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Model Law on Competition (2015) Revised chapter IV*

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Model Law on Competition (2010): Chapter IV

Acts or behaviour constituting an abuse of a dominant position of market power

I. Prohibition of acts or behaviour involving an abuse, or acquisition and abuse, of a dominant position of market power

A prohibition on acts or behaviour involving an abuse or acquisition and abuse of a dominant position of market power:

(a) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

(b) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

II. Acts or behaviour considered abusive:

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises that overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

(d) Restrictions on the importation of goods that have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;

(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his/her designee.

III. Authorization or exemption

Acts, practices or transactions not absolutely prohibited by the law may be authorized or exempted if they are notified, as described in article 7, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if the affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

Commentaries on chapter IV and alternative approaches in existing legislations

I. Prohibition of acts or behaviour involving an abuse of a dominant position of market power

A prohibition on acts or behaviour involving an abuse of a dominant position of market power:

(a) Where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control a relevant market for a particular good or service, or groups of goods or services;

(b) Where the acts or behaviour of a dominant enterprise limit access to a relevant market or otherwise unduly restrain competition, having or being likely to have adverse effects on trade or economic development.

Introduction

1. Abuse of dominance is one of the most controversial issues in competition law. The question of when to consider a company dominant, as well as the spectrum of acts that might constitute abuse of dominance, varies from country to country, and may depend on the goals of each competition regime (consumer welfare, efficiency, protecting the competitive process) and on the inclusion or exclusion of other values – such as fairness – in the competition analysis. This chapter outlines general criteria for identifying the existence of dominance. It also provides a non-exclusive list of acts that may be considered anticompetitive.

2. Dominance means significant market power. From an economic perspective, dominance is the ability of a firm (or a group of firms acting jointly) to raise and profitably maintain prices above the level that would prevail under competition for a significant period of time. The mere possession of a dominant position is not considered to be anticompetitive, neither is the acquisition of dominance through competition on the merits. However, the exercise or abuse of a dominant position may lead to (a) reduced output and increased prices; (b) reduced quality and variety of services/products; or (c) limitation of innovation, which would be considered anticompetitive.

3. Competition laws handle very differently the question of whether a company is to be considered dominant. A number of competition laws do not provide for a concrete definition of dominance, but rely on the competition authority's economic judgment. On a case-by-case basis, the competition authority will have to assess several factors that influence the determination of dominance. High market share is one indicator in favour of a finding that an enterprise is dominant in a relevant market. Nonetheless, in many jurisdictions, the sole possession of high market share is insufficient for a finding of dominance, given that some markets are characterized by a high level of competition, despite having relatively few players. Other market indicators, such as barriers to entry, and actual and potential competitors, durability of high market share, buyer power, economies of scale and scope, access to upstream markets and vertical integration, market maturity/vitality, access to important inputs, and the financial resources of the firm and its competitors should, among other things, be taken into consideration.

4. Other jurisdictions provide shortcuts to proof of dominance by using safe harbours based on market share thresholds as a starting point for determining dominance. If an

enterprise does not possess a minimum level of market share, it will not be considered dominant. If it does, the competition authority will analyse other factors, as mentioned above, to determine whether the enterprise is dominant.

5. Yet other jurisdictions presume that an enterprise is dominant past a given market share threshold. They put the burden of proving the lack of market power on the defendant once it has been shown that the firm has the requisite market share. If the defendant does not overcome this burden, it will be considered dominant.

6. The use of market share thresholds – either to establish a prima facie case and thus shift the burden of proof or to rule out dominance – enhances the efficiency of the enforcement of the competition authority and gives entrepreneurs legal certainty. Nonetheless, market share thresholds pose the risk of underemphasizing or overemphasizing market share in certain cases, leading to overenforcement or underenforcement. Therefore, it is not advisable for a competition law to stipulate irrefutably that a company is dominant when it reaches certain market share thresholds.

7. Entry and import competition are further factors to consider when determining whether an enterprise is dominant. If entry of one or more undertakings into a market is easy, any attempt by an incumbent to raise prices or reduce output will be hindered by the new entrants. Ease of entry is determined by the height of barriers to entry. For a specific analysis of barriers to entry, see box 4.1. Import competition can be considered as a particular form of entry, when foreign companies start selling competing products on the domestic market. Thus, imports can constitute an important source of competition and need to be taken into account in the assessment of dominance.

Box 4.1. Barriers to entry in competition law and policy

Barriers to entry to a market refer to factors that may prevent or deter the entry of new firms into a market even when incumbent firms are earning excess profits. Barriers to entry can vary widely according to the level of maturity or the level of development of a market. Different categories of barriers to entry can be distinguished.

Structural barriers to entry arise from basic industry characteristics such as technology, cost and demand. There is some debate over what factors constitute relevant structural barriers. The widest definition suggests that barriers to entry arise from product differentiation, absolute cost advantages of incumbents and economies of scale. Product differentiation creates advantages for incumbents because entrants must overcome the accumulated brand loyalty of existing products. Absolute cost advantages imply that the entrant will enter with higher unit costs at every rate of output, perhaps because of inferior technology. Scale economies restrict the number of firms that can operate at minimum costs in a market of a given size. A narrower definition of structural barriers to entry has been given by George Stigler and proponents of the Chicago school of antitrust analysis. They suggest that barriers to entry arise only when an entrant must incur costs which incumbents do not bear. Therefore, this definition excludes scale economies and advertising expenses as barriers because these are costs that incumbents have had to sustain in order to attain their position in the market. Other economists also emphasize the importance of sunk costs as a barrier to entry. Since such costs must be incurred by entrants, but have already been borne by incumbents, a barrier to entry is created. In addition, sunk costs reduce the ability to exit, and thus impose extra risks on potential entrants.

Strategic barriers to entry refer to the behaviour of incumbents. In particular, incumbents may act so as to heighten structural barriers to entry or may threaten to retaliate against entrants if they do enter. Such threats must, however, be credible in the sense that incumbents must have an incentive to carry them out if entry does occur. Strategic entry deterrence often involves some kind of pre-emptive behaviour by incumbents. One example is the pre-emption of facilities by which an incumbent overinvests in capacity in order to threaten a price war if entry actually occurs. Tying up necessary infrastructure, such as transport or port facilities, can constitute a strategic barrier to entry, too.

Legal barriers to entry can arise from the provisions of national legal systems. Examples of legal barriers to entry include tariffs and quotas, intellectual property and trademark regulations, exclusive rights contributed by law to certain companies/statutory monopoly power, as well as further administrative obstacles to market entry.

8. Regardless of the definition of dominance adopted by a competition law, the assessment of whether a company is dominant or not strongly depends on the definition of the relevant market. As a rule of thumb, the narrower the relevant market is defined, the higher the likelihood that a single player enjoys significant market power in this market. The definition of the relevant market is dealt with in more details in the commentaries on chapter II of the Model Law on Competition.

9. To some jurisdictions, the concept of dominance refers not only to the situation where an enterprise acts unilaterally, but also to the situation in which two or more enterprises acting together have market power or have the incentive to act in lock step and together they have market power (collective dominance). This refers to highly concentrated markets, where two or more enterprises control a large share of the market, creating and enjoying conditions through which they can dominate or operate in the market very much in the same manner as would a monopolist. This criterion was adopted by the European Commission and the Court of First Instance of the European Communities[1] in the Vetro Piano in Italia judgement,[2] which was soon followed by the Nestlé Perrier merger case.[3] The cumulative effect of use of a particular practice, such as tying agreements, may well result in an abuse of a dominant position.

Alternative approaches in existing legislation: Finding of a dominant position

Region/country	
Africa	
South Africa	The Competition Act, 1998 (No. 89), article 7, establishes that a firm is dominant in a market under the following conditions: (a) it has at least 45 per cent of that market; (b) it has at least 35 per cent, but less than 45 per cent of that market, unless it can show that it does not have market power; or (c) it has less than 35 per cent of that market, but has market power. Under article 8 of the Act it is prohibited for a dominant firm to do the following: (a) Charge an excessive price to the detriment of consumers;

[1] Now General Court of the European Union.
[2] Comment transmitted by the European Union Commission, Vetro Piano in Italia judgement of 10 March 1992.
[3] Information provided by the European Commission, Nestlé Perrier decision of 22 July 1992.

Region/country	
	(b) Refuse to give a competitor access to an essential facility when it is economically feasible to do so; (c) Engage in an exclusionary act, other than an act listed in paragraph (d), if the anticompetitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; (d) Engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect of its act: (i) Requiring or inducing a supplier or customer not to deal with a competitor; (ii) Refusing to supply scarce goods to a competitor when supplying those goods is economically feasible; (iii) Selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract or forcing a buyer to accept a condition unrelated to the object of a contract; (iv) Selling goods or services below their marginal or average variable cost; (v) Buying up a scarce supply of intermediate goods or resources required by a competitor.
Zambia	Competition and Consumer Protection Act of 2010 (No. 24), part III, article 15, indicates that “a dominant position exists in relation to the supply of goods or services if (a) thirty per cent or more of those goods or services are supplied or acquired by one enterprise; or (b) sixty per cent or more of those goods or services are supplied or acquired by not more than three enterprises”. Article 16 establishes the prohibition of abuse of dominant position stating that “an enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general”. For purposes of this part, “abuse of a dominant position” includes the following: (a) Imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions; (b) Limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition; (c) Applying dissimilar conditions to equivalent transactions with other trading parties; (d) Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage have no connection with the subject matter of the contracts;

Region/country	
	(e) Denying any person access to an essential facility; (f) Charging an excessive price to the detriment of consumers; or (g) Selling goods below their marginal or variable cost.
Asia-Pacific	
China	According to article 17 of the Anti-Monopoly Law of China, a dominant market position is defined as a market position held by a business operator that has the ability to control the price or quantity of commodities or other trading conditions in the relevant market or to hinder or affect the entry of other business operators into the relevant market. Furthermore, six main factors to determine a dominant market position of a business operator are provided under article 18: (a) The market share of the business operator and its competitive status in the relevant market; (b) The ability of the business operator to control the sales market or the raw material supply market; (c) The financial and technological conditions of the business operator; (d) The extent of reliance on the business operator by other business operators in the transactions; (e) The degree of difficulty for other business operators to enter the relevant market; (f) Other factors relevant to the determination of the dominant market position of the business operator. Article 19 (1) prescribes a rebuttable presumption of dominance when an enterprise meets any of the following conditions: (a) The market share of one business operator accounts for half or more of the relevant market; (b) The joint market share of two business operators accounts for two thirds or more of the relevant market; (c) The joint market share of three business operators accounts for three fourths or more of the relevant market. However, under the conditions set out in article 19, if any of the business operators has a market share of less than one tenth, that enterprise shall not be considered to have a dominant market position. In addition, a business operator that has been presumed to have a dominant market position shall not be considered to have a dominant market position if the operator can provide evidence to the contrary.

Region/country	
India	The Indian Competition Act, 2002 defines dominant position under article 4 as a "position of strength, enjoyed by an enterprise, in the relevant market, in India", which enables it to "operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour". The Competition Commission of India, when inquiring whether an enterprise enjoys a dominant position or not, has due regard to all or any of these factors. The same article states that no enterprise or group shall abuse its dominant position. There shall be an abuse of dominant position if an enterprise directly or indirectly, imposes unfair or discriminatory conditions on the purchase or sale of goods or services or unfair or discriminatory prices, including predatory prices, on the purchase or sale of goods or services.
Mongolia	According to the Law of Mongolia on Competition 2010, a business entity shall be considered to have a dominant position where it solely or jointly with other entities or its related entity, operates on the market with a certain product and maintains one third or more of its production and sale (article 5.2). Additionally, under article 5.3, a business entity that does not satisfy the requirement specified in article 5.2, but is capable of limiting the conditions for other business entities to enter the market or forcing them out of the market shall be considered to have a dominant position, depending on the scope of the product, geographic boundary of the market, market concentration and market power.
Europe (European Union)	
Czech Republic	Article 10 (1) of the Consolidated Act on the Protection of Competition (2001) states that "one or more undertakings jointly (joint dominance) shall be deemed to have a dominant position in the relevant market if their market power enables them to behave independently, to a significant extent, of other undertakings or consumers". According to article 10 (3), unless proven otherwise, an undertaking or undertakings in joint dominance shall be deemed not to be in a dominant position if its/their share of the relevant market achieved during the period examined does not exceed 40 per cent.
Estonia	In Estonia, dominance requires that an undertaking be able to operate to an appreciable extent independently of competitors, suppliers and buyers. Dominance is presumed if an undertaking or several undertakings hold a market share of more than 40 per cent of the turnover in the market. Undertakings with special or exclusive rights, or in control of essential facilities, are also considered as dominant; see paragraph 13 of the Competition Act of 2001.
European Union	Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position without providing a definition of dominant position. In their decisional practice, the European institutions have defined dominance as a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained in a relevant market by affording it the power to behave to an appreciable extent

Region/country	
	independently of its competitors, its customers and ultimately, of consumers.[4] The guidance on the European Commission's enforcement priorities in applying article 82 of the Treaty Establishing the European Community (now article 102 of the Treaty on the Functioning of the European Union) to abusive exclusionary conduct by dominant undertakings sets out the criteria to be taken into account by the European Commission when assessing dominance, in particular: (a) Constraints imposed by the existing supplies from, and the position in the market of, actual competitors (the market position of the dominant undertaking and its competitors); (b) Constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry); (c) Constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power). It is emphasized that market shares provide a useful first indication of the market structure and of the relative importance of the various undertakings active in the market. However, the European Commission will interpret market shares in the light of relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated.
Germany	According to the Act against Restraints of Competition, paragraph 19, an undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services in the relevant product and geographic market, it has no competitors or is not exposed to any substantial competition, or it has a paramount market position in relation to its competitors. For this purpose, account shall be taken in particular of its market share, financial power, access to supplies or markets, links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of the Act, and its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings. Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions set out above. An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings are presumed to be dominant if (a) they consist of three or fewer undertakings reaching a combined market share of 50 per cent or (b) they consist of five or fewer undertakings

[4] See Court of Justice of the European Union case 27/76, *United Brands Company and United Brands Continental BV v. Commission of the European Communities* (1978), European Court Reports (ECR) 207, para. 65; Court of Justice of the European Union case 85/76 *Hoffmann-La Roche and Company v. Commission of the European Communities* (1979), ECR 461, para. 38.

Region/country	
	reaching a combined market share of two thirds, unless the undertakings demonstrate that the conditions of competition may be expected to maintain substantial competition between them, or that the number of undertakings have no paramount market position in relation to the remaining competitors.
Lithuania	Under the Law on Competition 1999, last amended in 2012, a dominant position shall mean the position of one or more economic entities in a relevant market directly facing no competition or enabling to exert a unilateral decisive influence in a relevant market by effectively restricting competition. A 40 per cent market share establishes a presumption of dominance. In addition, the law provides for a presumption of joint dominance when the three largest firms in a market have a collective market share of 70 per cent. Market share thresholds for the presumption of dominance are lower for retail markets: 30 per cent for individual economic entities and 55 per cent for joint dominance for three or fewer economic entities together (article 3 (2)).
Poland	According to article 4 (10) of the Act of 16 February 2007 on Competition and Consumer Protection, a dominant position shall mean an undertaking with a market position that allows it to prevent effective competition in a relevant market, thus enabling it to act to a significant degree independently from its competitors, contracting parties and consumers. It is assumed that an undertaking holds a dominant position if its market share exceeds 40 per cent.
Spain	Spanish competition law does not provide for a definition of dominance. According to the decisional practice of the Spanish competition authority, a company is considered dominant when it is able to behave to an appreciable extent independently of its suppliers, clients or competitors, thereby being able to adjust pricing or any other characteristics of the product or service to its own advantage.
Europe (non-European Union)	
Russian Federation	Article 5 (1) of the Federal Law on Protection of Competition of 2006, as amended in 2011, defines a dominant position as the position of one or more economic units in the market of a certain commodity making it possible for such unit(s) to exert a critical influence upon the general conditions of a commodity’s circulation in the appropriate commodity market and/or to remove other economic units from this commodity market and/or to impede access to this commodity market of other economic units. Article 5 (1) contains a rebuttable presumption of dominance if a company holds a market share exceeding 50 per cent. According to article 5(2), an economic unit whose share in the market of a certain market does not exceed 35 per cent may not be deemed dominant, except for the instances specified by parts 3, 6 and 6.1 of the same article. Pursuant to paragraph 6.1 of article 5(2), an economic agent whose market share is less than 35 per cent shall be deemed dominant if all of the following conditions are met: (a) The economic agent can unilaterally fix the price level

Region/country	
	of a commodity and exert a decisive influence on the general conditions of the commodity's sale in the appropriate commodity market; (b) Admittance to an appropriate commodity market of new competitors is impeded, in particular as a result of economic, technological, administrative or other restrictions; (c) The commodity sold or acquired by an economic agent cannot be replaced by another commodity in consumption, in particular when consumed for industrial purposes; (d) Alteration of a commodity's price does not cause a reduction in demand for the commodity corresponding to such alteration.
Latin America	
Brazil	Law No. 12.529 of 30 November 2011, article 36, paragraph 2, states that a dominant position is assumed when a company or group of companies is able to unilaterally or jointly change market conditions or when it controls 20 per cent or more of the relevant market, provided that such percentage may be modified by the Brazilian competition authority for specific sectors of the economy.
Colombia	Decree 2153, article 45 (1992) defines a dominant position as the "possibility of determining, directly or indirectly, the conditions of a market". A dominant position is determined on a case-by-case basis. The law provides no thresholds.
Costa Rica	Article 15 of Law No. 7472 states that in order to determine whether an economic agent has "substantial power" in the relevant market, the following factors must be considered: (a) Its participation in that market and its possibility to fix prices unilaterally or to restrict, in a substantial way, the supply in the relevant market, and that the other economic agents cannot currently or in the future, counteract that power; (b) The existence of entry barriers and the elements that, foreseeably, may alter both those barriers and the supply of the other competitors; (c) The existence and power of its competitors; (d) The possibilities of the economic agent and its competitors to access the sources of input; (e) Its recent behaviour.
Nicaragua	Law No. 601 on the Promotion of Competition, article 21, states that in order to determine whether an economic agent has a position of dominance in the relevant market the following factors, among others, should be considered: (a) The existence of barriers for entry to the market of goods or services, whether economic and/or legal and the elements that

Region/country	
	foreseeably may alter both of these barriers, and other competitors' supply;
	(b) The possibilities of access of the economic agent and its competitors to the source of inputs;
	(c) Recent behaviour with respect to supply and demand in the relevant market;
	(d) The possibility of substitution or competition between brands, products or patents in the relevant market;
	(e) The economic, financial or technological power of the competing economic agents that participate in the transaction.
North America	
Canada	According to subsection 79 (1) of the Competition Act, to sanction the abuse of a dominant position, the Tribunal must first find that "(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business; (b) that person or those persons have engaged in or are engaging in a practice of anticompetitive acts, and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market".
	The updated enforcement guidelines on the abuse of dominance provisions of the Canadian Competition Bureau (sections 78 and 79 of the Competition Act) explain that substantial or complete control is understood to be synonymous with market power.
United States of America	In the United States, monopoly power is not defined by statute, but courts have traditionally defined it as being "the power to control market prices or exclude competition" (*United States v. E.I. du Pont de Nemours and Company*, 351 U.S. 377, 391 (1956)). Market share is not the only factor considered in determining whether monopoly power exists.

II. Acts or behaviour considered abusive

10. As previously mentioned, enjoying a dominant position/substantial market power is not prohibited by competition law, which means that the mere possession of a dominant position is not anticompetitive in itself and a dominant undertaking is entitled to compete on its merits. The prohibition on abusing a dominant position applies when a dominant undertaking uses its market power in a way that distorts competition.

11. In general, a firm abuses its dominance when it performs acts that increase its economic power and are not responsive to consumers and/or the market. Acts that serve as roadblocks to competitors and do not have offsetting advantages to consumers are examples of abuse of dominance. Some jurisdictions expand this definition of abuse of dominance to protect smaller rivals from unfair exclusions by more efficient dominant firms.

12. It is not possible to provide an exhaustive list of acts that may constitute abuse of dominance. As such, abuse of dominance is a concept that encompasses all those acts that fit within the definition provided in the paragraph above. Nonetheless, in order to guide enforcement practice, some competition laws provide non-exclusive lists of acts that are considered abusive and are prohibited. These types of behaviour may include a whole range of strategies by firms aimed at raising barriers to entry into a market. Chapter IV (2) of the Model Law on Competition lists some examples of acts of abuse by a dominant company, which are commented on below. It should be noted that the order of the examples listed in that chapter does not necessarily reflect their frequency or their seriousness in terms of anticompetitive impact. Further, acts such as resale price maintenance and parallel imports are currently classified as vertical restraints, not as acts that constitute abuse of dominance as such. Although the acts listed are likely to be anticompetitive, this is not necessarily the case. The competition authority must undertake the analysis on a case-by-case basis to determine the effect of each practice.

13. The analytical framework that competition authorities use to assess whether certain acts of dominant undertakings constitute such an abuse of their market power has evolved over time. Today, more and more competition authorities base their decision on whether a certain practice by a dominant undertaking is to be considered abusive on a sound economic assessment (the so-called effects-based approach). Traditionally, a number of competition law regimes have pursued a form-based approach, according to which the competition authority assesses whether the behaviour under scrutiny corresponds to one of the legal examples for abusive behaviour without proceeding to a comprehensive economic assessment.

(a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;

14. One of the most common forms of predatory behaviour is predatory pricing, which generally refers to the act by which a company prices its products below a measure of cost. Some jurisdictions only require engagement by a company in strategic low pricing to eliminate its rivals, regardless of whether the price is below cost or not. Enterprises may engage in such behaviour to drive competing enterprises out of business with the intention of maintaining or strengthening a dominant position. The greater the diversification of the activities of the enterprise in terms of products and markets, and the greater its financial resources, the greater its ability is to engage in predatory behaviour.

15. The measure of cost used to determine the existence of predatory pricing varies among jurisdictions. Most jurisdictions agree that predatory pricing exists when products are being priced below average variable cost. However, there is debate as to whether pricing below average total cost constitutes predatory pricing or not. In order to determine whether abuse of dominance by predatory pricing exists, some jurisdictions require that the defendant have a reasonable prospect or dangerous probability of recouping the money it lost on below-cost pricing. Without recoupment, the practice of reducing prices may actually enhance consumer welfare.[5] Other jurisdictions consider that a reasonable prospect

5 *Brooke Group Ltd. v. Brown and Williamson Tobacco Corporation*, Supreme Court of the United States, 509 U.S. 209, 113 S. Ct. 2578, 125 L.Ed2d 168 (1993).

or dangerous probability of recoupment is not necessary to determine predatory pricing.[6] The defendant's act of selling beyond a measure of cost will suffice.

16. As low pricing usually involves benefits to consumers, jurisdictions may be reluctant to condemn pricing as predatory. Depending on the structure of its markets, jurisdictions must balance the benefits and detriments of such practices. Developing jurisdictions tend to be less reluctant to condemn predatory pricing, as their markets may be more concentrated, and as barriers to entry are high, the elimination of a smaller rival may be more problematic. On the other hand, consumers and small businesses in developing countries may derive more benefits from lower prices, leading to agencies being reluctant to intervene. Accordingly, a balance needs to be performed on a case-by-case basis.

17. Predatory behaviour is not limited to pricing. Other means, such as acquisition of goods or services in order to suspend the activities of a competitor, may be considered predatory behaviour. Also, the refusal by an enterprise in a dominant position to supply a material essential for the production activities of a customer who is in a position to engage in competitive activities may, under certain circumstances, be considered predatory.

Alternative approaches in existing legislation: Predatory behaviour

Region/country	
Asia-Pacific	
Australia	Predatory pricing is covered by two provisions of the Competition and Consumer Act 2010 under section 46: (1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1), which defines misuse of market power, even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services. (1AA) states as follows: A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of: (a) Eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or (b) Preventing the entry of a person into that or any other market; or (c) Deterring or preventing a person from engaging in competitive conduct in that or any other market.
China	Article 17 of the Anti-Monopoly Law of China of 30 August 2007 prohibits a dominant business operator from selling products at prices below cost without any justifiable cause.

[6] *Tetra Pak International SA v. Commission,* case T-83/91 (1994)ECR II-755, CFI aff'd Case C-333/94 P (1996) ECR I-5951, Court of Justice of the European Union.

Region/country	
Mongolia	Article 7.1.4 of the Law of Mongolia on Competition 2010 prohibits a dominant business entity from selling products at a price below the actual costs with the purpose of preventing other business entities from entering the market and forcing them out of the market.
Europe (European Union)	
European Union	According to article 102 of the Treaty on the Functioning of the European Union, directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions constitutes a case of abuse of a dominant position. The guidance on the European Commission's enforcement priorities in applying article 82 of the Treaty Establishing the European Community (now article 102 of the Treaty on the Functioning of the European Union) to abusive exclusionary conduct by dominant undertakings explains how the European Commission assesses price-based exclusionary conduct, including predatory pricing. The Commission will generally intervene when there is evidence that a dominant undertaking is engaging in predatory conduct by deliberately incurring losses or foregoing profits in the short term, to foreclose or be likely to foreclose, one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.
Hungary	Article 21 (h) of the Competition Act LVII of 1996, last amended in 2010, prohibits the setting of extremely low prices that are not based on greater efficiency in comparison with that of competitors and are likely to drive out competitors from the relevant market or to hinder their market entry.
Latin America	
Brazil	Article 36, paragraph 3, subsection XV of Law No. 12.529 of 30 November 2011 forbids an enterprise with a dominant position from selling goods or services at unreasonably low cost prices.
Colombia	Decree 2153 of 1992 provides that when there is a dominant position, predatory pricing will be considered abusive. Article 50 clearly states that reducing prices below cost for the purpose of eliminating various competitors or preventing their entry or expansion will qualify as abuse when there is dominance.
North America	
United States	The Supreme Court of the United States has held that two elements must be present in order to establish predatory pricing. First, the prices that are the object of a complaint must be "below an appropriate measure of cost"; second, the competitor charging low prices must have a "dangerous probability" of recouping its investment in below-cost prices (*Brooke Group Ltd. v. Brown and Williamson Tobacco Corporation*, 509 U.S. (1993). See also *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 117 (1986)). According to the Supreme Court, it is important to distinguish between pro-competitive price cutting and anticompetitive predatory pricing because "cutting prices in order to increase business often is the very essence of competition" (*Matsushita Electric Industrial Company v. Zenith Radio Corporation*, 475 U.S. 574, 594 (1986)).

(b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises that overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

18. Although rarely anticompetitive, price discrimination – the conduct whereby a firm sells a product or service at different prices, regardless of identical costs of supplying the goods – may be a strategy to unfairly exclude competitors from the market. Charging lower prices to consumers may be a sign of competition, which explains why discrimination is seldom anticompetitive in an economic sense. However, price differentiation may be found to be discriminatory if there is no objective commercial justification for it. For instance, so-called loyalty discounts may lack an objective commercial justification, whereas volume discounts may be justified by economies of scale. However, it needs to be emphasized that different prices may result from the dominant company meeting the market, for instance because negotiations took place in different market situations, or one customer simply bargained harder. Therefore, the competition authority needs to carefully assess the competitive impact of price differentiation on a case-by-case basis.

19. Loyalty discounts are price discrimination strategies whereby a seller gives buyers a discount if they acquire a substantial percentage of their overall purchases of the relevant product from the seller over a defined reference period. These discounts may be efficient and enhance consumer welfare by reducing prices. However, in certain circumstances they can also cause anticompetitive harm when exercised by firms with market power. The link between the conditions to qualify for the discount and the reward of a lower price may result in an anticompetitive exclusionary practice. The anticompetitive effect may be related to predatory behaviour at the margin ("predation analogy") or to the leveraging of assured sales to foreclose rivals from contestable markets ("bundling analogy").[7]

20. Price discrimination also covers the situation where a firm charges the same price despite incurring different costs to supply to each customer. Examples of the latter type of price discrimination may include delivered pricing, that is to say, selling at a uniform price irrespective of location, whatever the transportation costs to the seller, and base-point selling, where one area has been designated as the base point (the seller charges transportation fees from that point irrespective of the actual point of shipment and the related costs).

21. The proscription of discrimination also includes terms and conditions in the supply or purchase of goods or services. For example, the extension of differentiated credit facilities or ancillary services in the supply of goods and services can also be discriminatory.

[7] R O'Donoghue and AJ Padilla, 2013, *The Law and Economics of Article 102 TFEU* [Treaty on the Functioning of the European Union], Hart Publishing, Oxford, United Kingdom of Great Britain and Northern Ireland.

Alternative approaches in existing legislation: Price discrimination

Region/country	
Australia	Price discrimination was prohibited under section 49 of the Trade Practices Act 1974. However, this prohibition was repealed by the Competition Policy Reform Act 1995. Under the current Competition and Consumer Act 2010, there is no outright prohibition of price discrimination. Nevertheless, price discrimination in appropriate circumstances may violate section 46 of the Act, which prohibits the misuse of market power.
Colombia	Decree 2153 of 1992, article 50, considers the following acts that are discriminatory in nature to be abusive, provided that a business entity enjoys a dominant position: imposing discriminatory provisions for equivalent transactions that place one consumer or supplier at a disadvantage over another consumer or supplier under analogous conditions; selling or providing services in any part of the country at a price different from that offered in another part of the country when the intent or effect is to reduce or eliminate competition in that part of the country, and the price does not correspond to the cost structure of the transaction; sales to one buyer under conditions different from those offered to another buyer with the intent of reducing or eliminating competition in the market.
Peru	Although the legislation considers discriminatory pricing to be an example of abusive behaviour, discounts and bonuses that correspond to generally accepted commercial practices that are given because of special circumstances such as anticipated payment, quantity, volume etc., when granted in similar conditions to all consumers, do not constitute a case of abuse of dominant position (Legislative Decree 1034 approving the Law on Repression of Anticompetitive Conduct, article 10.2 (b)).
South Africa	The Competition Act, 1998 (No. 89), article 9, establishes the following prohibitions regarding price discrimination by a dominant firm: An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, under the following conditions: (a) It is likely to have the effect of substantially preventing or lessening competition; (b) It relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and (c) It involves discriminating between those purchasers in terms of the following: (i) The price charged for the goods or services; (ii) Any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) The provision of services in respect of the goods or services; (iv) Payment for services provided in respect of the goods or services.

Region/country	
	However, conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) is not prohibited price discrimination if the dominant firm establishes that the differential treatment: (a) Makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers; (b) Is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; (c) Is in response to changing conditions affecting the market for the goods or services concerned, including the following: (i) Any action in response to the actual or imminent deterioration of perishable goods; (ii) Any action in response to the obsolescence of goods; (iii) A sale pursuant to a liquidation or sequestration procedure; (iv) A sale in good faith in discontinuance of business in the goods or services concerned.

(c) Fixing the prices at which goods sold can be resold, including those imported and exported;

22. Fixing the resale price of goods, usually by the manufacturer or by the wholesaler, is generally termed resale price maintenance. In a number of competition laws, it is considered illegal per se, while other competition law regimes apply the rule of reason to resale price maintenance, given that it may also be pro-competitive. For example, it may be a way to promote investment in services and promotional efforts on the part of retailers, thereby controlling free riders. Nonetheless, resale price maintenance may also facilitate cartels by assisting cartel members in identifying price-cutting manufacturers.

23. In this context, it should be emphasized that a number of competition laws do not classify retail price maintenance as a specific type of abuse of a dominant position, but as a particular case of anticompetitive vertical agreements.

Alternative approaches in existing legislation: Resale price maintenance

Region/country	
Africa	
South Africa	According to the Competition Act, 1998 (No. 89), section 5(2), the practice of minimum resale price maintenance is prohibited. However, section 5(3) provides that a supplier or producer may recommend a minimum resale price to the reseller of a good or service, provided that: (a) The supplier or producer makes it clear to the reseller that the recommendation is not binding; (b) If the product has its price stated on it, the words "recommended price" appear next to the stated price.
Asia	
China	According to the Anti-Monopoly Law of China, article 14, any of the following agreements among business operators and their trading parties are prohibited: fixing the price of commodities for resale to a third party, restricting the minimum price of commodities for resale to a third party or other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.
Europe (European Union)	In competition law in the European Union, resale price maintenance does not qualify as a specific type of abuse of dominance, but as an anticompetitive feature of vertical agreements. According to article 4 (a) of the block exemption for certain categories of vertical agreements of 2010, resale price maintenance constitutes a hard-core restriction that excludes the application of the block exemption to the vertical agreement in question. It is defined as a restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
Sweden	In Sweden, an economic approach has been chosen to resale price maintenance. The setting of minimum prices with an appreciable effect on competition is covered by the prohibition against anticompetitive cooperation as laid down in the Competition Act of 2008. In particular, chapter 2, article 7, of the Act establishes that "any abuse by one or more undertakings of a dominant position on the market shall be prohibited". Such abuse may consist in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. However, setting maximum prices is not generally prohibited.
Latin America	
Brazil	According to Brazilian Competition Law No.12.529 of 30 November 2011, section IX, article 36, the act of imposing on the trade of goods or services to distributors, retailers and representatives, "any resale prices, discounts, payment terms, minimum or maximum quantities, profit margin or any other market conditions related to their

Region/country	
	business with third parties" shall establish a violation of the economic order if such practice has an objective of effect of limiting competition, controlling the relevant market, arbitrarily increasing profits and exercising a dominant position abusively, as set forth in the caput of the same article.
North America	
Canada	Formerly, Canadian competition law criminally sanctioned resale price maintenance. However, in 2009, this prohibition was replaced by a civilly enforceable provision that enables the Canadian Competition Tribunal to prohibit the practice only if it has an "adverse effect on competition" (Competition Act, section 76). The provision does not only apply to companies holding a dominant position, but also to any person who "(a) is engaged in the business of producing or supplying a product; (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or (c) has the exclusive rights and privileges conferred by a patent, trademark, copyright, registered industrial design or registered integrated circuit topography".
United States	The Supreme Court of the United States has held that minimum resale price maintenance is illegal per se under section 1 of the Sherman Act, but there must be an actual agreement requiring the distributor to adhere to specific prices (see *Business Electronics Corporation v. Sharp Electronics Corporation*, 485 U.S. 717, 720, 724 (1988)). Because maximum resale price maintenance may lead to low prices, the Supreme Court recently ruled that maximum resale price maintenance is not an offence per se. The Court instead applied the rule-of-reason analysis to the conduct in that case, pursuant to which the agreement had to be analysed to determine if it was in fact anticompetitive (See *Leegin Creative Leather Products Inc. v. PSKS Inc. dba Kay's Kloset*, 551 U.S. 877 (2007)).

(d) Restrictions on the importation of goods that have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence, and where the purpose of such restrictions is to maintain artificially high prices;

24. Parallel imports are the most common form of restrictions referred to in chapter IV (II) (d) of the Model Law on Competition. Also called grey-market imports by those seeking to discredit them, they can be described as goods produced under protection of an intellectual property right such as a trademark, patent or copyright, which are placed into circulation in one market by the intellectual property right holder, or with his or her consent, and then imported into a second market without the authorization of the owner of the local intellectual property right. This owner is typically a licensed local dealer who may seek to prevent parallel imports in order to avoid intra-brand competition. Using different trademarks for the same product in different countries, thereby seeking to disguise

international exhaustion and prevent imports from one another, is another example of practices captured by the above-mentioned provision of the Model Law.[8]

25. The ability of a right-holder to exclude parallel imports legally from a particular market depends on the importing nation's intellectual property and competition laws. An intellectual property regime of national exhaustion awards the right to prevent parallel imports, while one of international exhaustion makes such imports legal. Under national exhaustion, exclusive distribution rights end upon first sale within a country, but this will have no effect on the existence of exclusive distribution rights in another country, giving local intellectual property right owners in that country or in another one the right to exclude parallel imports from the country of first sale. Under international exhaustion, distribution rights are exhausted upon first sale anywhere in the world, and parallel imports cannot be excluded.[9] Finally, under a regime of regional exhaustion, exclusive distribution rights are exhausted upon the first sale of the protected goods within a given region, enabling parallel importation within the region, but not from outside the region. In this context, it needs to be noted that all of these regimes are in line with the minimum standard set in article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, also known as the TRIPS Agreement.

26. Proponents of the prohibition of parallel imports argue that a local intellectual property right holder who acts as a retailer with an exclusive territory is more willing to invest in customer service or pre-sales advice, for example, in the knowledge that no near rival can freeride on his or her efforts. In the proponents' view, these incentives would justify the ban on parallel imports.

27. Opponents of the prohibition of parallel imports are more concerned with the prohibition's negative impact on intra-brand competition. In particular, regional jurisdictions that aim at market integration, such as the European Union, therefore allow parallel imports within their common market. From this perspective, parallel imports represent an important means to ensure a balance between the protection of exclusive rights and the free flow of goods.

28. In summary, the legislative approach to parallel imports varies, depending on which of the two views above is favoured. However, it should be noted that in jurisdictions that allow parallel imports, attempts to undermine these are usually not qualified as a specific type of abusive behaviour by a dominant undertaking, but may constitute an anticompetitive vertical restraint.

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[8] Such practice was at the basis of Court of Justice decision 3/78 (1978) ECR 1823. In legal action brought by Centrafarm BV against American Home Products Corporation (AHP), Centrafarm claimed that, as a parallel importer, it was entitled to sell certain drugs originating from AHP under the trade name "Seresta" in the Netherlands without authorization by AHP. The latter offered these drugs for sale in the United Kingdom under the name "Serenid D". AHP claimed an infringement of its intellectual property rights, whereas Centrafarm argued that both drugs were identical and thus AHP's intellectual property rights were exhausted upon release of the drug onto the United Kingdom market. The Court ruled that the exercise of an intellectual property right can constitute a disguised restriction on trade in the common market, if it is established that a practice of using different marks for the same product, or preventing the use of a trademark name on repackaged goods, was adopted in order to achieve partition of markets and to maintain artificially high prices.

[9] See K Maskus, 2001, Parallel imports in pharmaceuticals: Implications on competition and prices in developing countries, available at http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf, accessed 19 May 2015.

Alternative approaches in existing legislation: Restrictions on the importation of goods

Region/country	
Costa Rica	The intellectual property regime of Costa Rica provides for the possibility of parallel imports by applying the concept of international exhaustion, as long as it does not "unjustifiably affect the normal working of the patent or result in unreasonable prejudice to the legitimate interests of the owner or his [/her] licensee" (article 16.2 of Law No. 6867 on Patents, Industrial Designs and Utility Models, as last amended in 2008).
European Union	According to the principle of European Union-wide exhaustion, intellectual property right holders are not allowed to restrict parallel imports within the European Union. This is constant jurisdiction of the Court of Justice of the European Union, since its landmark decision Deutsche Grammophon/Metro:[10] It is in conflict with the rules providing for the free movement of products within the common market for the holder of a legally recognized exclusive right of distribution to prohibit the sale on the national territory of products placed by him or with his consent on the market of another Member State on the grounds that such distribution did not occur within the national territory. Such prohibition, which could legitimize the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite markets into a single market.
Japan	Japan has taken measures in several cases against unfair prevention of parallel imports of branded porcelain tableware, pianos, ice cream and automobiles.
New Zealand	Parallel imports are legal when the conditions set by section 12 (5A) of Copyright Act 1994 No. 143 are met. The respective provision reads as follows: An object that a person imports, or proposes to import into New Zealand is not an infringing copy under subsection (3)(b) if : (a) It was made by or with the consent of the owner of the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made; or (b) Where no person owned the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made, any of the following applies: (i) The copyright protection (or other equivalent intellectual property right protection) formerly afforded to the work in question in that country has expired;

[10] Court of Justice of the European Union, 78/70 (1971) ECR 487.

Region/country	
	(ii) The person otherwise entitled to be the owner of the copyright (or other equivalent intellectual property right) in the work in question in that country has failed to take some step legally available to them [sic] to secure the copyright (or other equivalent intellectual property right) in the work in that country; (iii) The object is a copy in 3 dimensions of an artistic work that has been industrially applied in that country in the manner specified in section 75(4); (iv) The object was made in that country by or with the consent of the owner of the copyright in the work in New Zealand.
South Africa	According to section 56 (2) (e) of the Patents Act 1978 (No. 57), as amended in 2002, a compulsory licence can be granted if the demand for a patent-protected product is being met by importation, and the price charged by the patentee or his/her licensee or agent for the patented product is excessive in relation to the price charged therefor in countries where the patented article is manufactured by or under licence from the patentee or his/her predecessor or successor in title.
Zimbabwe	Section 24A of the Patents Act stipulates that parallel importation is allowed "if the cost of importing such product is less than the cost of purchasing from the patentee".[11]

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

(i) Partial or complete refusal to deal on an enterprise's customary commercial terms;

29. As a general rule, firms have freedom of contract and therefore enjoy the ability to refuse to deal with other undertakings. Jurisdictions recognize that an obligation to deal might lead to less investment and innovation. In some circumstances, however, refusals to deal may be used as a means to exclude competitors or to grant a competitive advantage to another enterprise. This is especially likely to occur when an essential facility is owned by a dominant undertaking, i.e. where this undertaking owns facilities that are indispensable for its competitors to do business and that cannot be duplicated at a commercially sensible cost. In these cases, the negative effects of the exclusion of competitors cannot be outweighed by the promotion of investment and innovation.

30. However, it should be kept in mind that refusals to deal are not in and of themselves anticompetitive, and are part and parcel of competitive markets. Firms should generally be free to choose to deal, and also give preferential treatment, to traditional buyers, related

[11] World Intellectual Property Organization, Exceptions and Limitations to Patent Rights: Exhaustion of Patent Rights, 6 October 2014 (SCP/21/7), available at http://www.wipo.int/edocs/mdocs/scp/en/scp_21/scp_21_7.pdf, accessed 19 May 2015.

enterprises, dealers that make timely payments for the goods they buy, or who will maintain the quality and image of the manufacturer's product, for example. This is also the case when an enterprise announces in advance the circumstances under which it will refuse to sell.

Alternative approaches in existing legislation: Refusal to deal

Region/country	
Brazil	Law No. 12.529 of 2011, section XI, article 36, states that it is a violation of economic order to refuse the sale of goods or provision of services for payment terms within normal business practice and custom.
China	Article 17(3) of the Anti-Monopoly Law of the People's Republic of China establishes that a business operator with a dominant market position shall not abuse its dominant market position by refusing to trade with a trading party without any justifiable cause.
European Union	The guidance on the European Commission's enforcement priorities in applying article 82 of the Treaty Establishing the European Community (now article 102 of the Treaty on the Functioning of the European Union) to abusive exclusionary conduct by dominant undertakings establishes that the Commission will consider refusal to supply or margin squeeze practices as an enforcement priority if three circumstances are present: the refusal relates to a product or service that is objectively necessary to be able to compete effectively in a downstream market, the refusal is likely to lead to the elimination of effective competition in the downstream market and the refusal is likely to lead to consumer harm.
South Africa	Article 8(b) of the Competition Act, 1998 (No. 89) indicates that it is prohibited for a dominant firm to refuse to give a competitor access to an essential facility when it is economically feasible to do so. In addition, under article 8(d)(ii), is it is prohibited for a dominant firm to refuse to supply scare goods to a competitor when supplying those goods is economically feasible, unless the firm concerned can show technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect of this act.
United States	The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified (*Aspen Skiing Company. v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 601, 105 S. Ct 2847, 86 L.Ed.2d 467 (1985)). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct that violates [section 2]. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. (...)

Region/country	
	We have never recognized such a doctrine [essential facilities] (...) and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purposes.[12]

(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:

[…]

(ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;

31. The above-mentioned behaviour is frequently an aspect of exclusive dealing arrangements and can be described as a commercial practice whereby an enterprise receives the exclusive rights, frequently within a designated territory, to buy, sell or resell another enterprise's goods or services. As a condition for such exclusive rights, the seller frequently requires the buyer not to deal in, or manufacture, competing goods.

32. Under such arrangements, the distributor relinquishes part of his or her commercial freedom in exchange for protection from sales of the specific product in question by competitors. The terms of the agreement normally reflect the relative bargaining position of the parties involved.

33. The results of such restrictions are similar to those achieved through vertical integration within an economic entity, the distributive outlet being controlled by the supplier, but in the former instance, without bringing the distributor under common ownership.

34. It should be noted that a large number of competition laws do not only deal with exclusive distribution agreements under the prohibition on abusing a dominant position, but within the context of anticompetitive vertical agreements.

[12] Concerning unilateral refusals to deal, see *United States v. Colgate and Company*, Supreme Court of the United States, 1919, 250 U.S. 300, 39 S. Ct. 465, 53 1.Ed. 992, 7 A.L. R. 443. Also: *Eastman Kodak v. Image Technical Services Inc.*, 504 U.S. 451 (1992) (holding that a monopolistic right to refuse to deal with a competitor is not absolute, the jury should be permitted to decide if the defendant's proffered reasons were pretextual).

> *(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:*
>
> *[…]*
>
> *(iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;*

35. Arrangements between a supplier and its distributor often involve the allocation of a specific territory (territorial allocations) or specific type of customer (customer allocations), i.e. where and with whom the distributor can deal. For example, the distributor might be restricted to sales of the product in question in bulk from the wholesalers, or to only selling directly to retail outlets. The purpose of such restrictions is usually to minimize intrabrand competition by blocking parallel trade by third parties. The effects of such restrictions are manifested in prices and conditions of sale, particularly in the absence of strong interbrand competition in the market. Nevertheless, restrictions on intrabrand competition may be benign or pro-competitive if the market concerned has significant competition between brands.

36. Territorial allocations can take the form of designation of a certain territory to the distributor by the supplier, the understanding being that the distributor will not sell to customers outside that territory or to customers who may, in turn, sell the products in another area of the country.

37. Customer allocations are related to cases in which the supplier requires the buyer to sell only to a particular class of customer, for example only to retailers. Reasons for such a requirement are the desire of the manufacturer to maintain or promote product image or quality, or that the supplier may wish to retain for itself bulk sales to large purchasers, such as sales of vehicles to fleet users, or sales to the Government. Customer allocations may also be designed to restrict final sales to certain outlets, for example approved retailers meeting certain conditions. Such restrictions can be designed to withhold supplies from discount retailers or independent retailers for the purpose of maintaining resale prices and limiting sales and service outlets.

38. Territorial and customer allocation arrangements serve to enforce exclusive dealing arrangements that enable suppliers, when in a dominant position in respect of the supply of the product in question, to insulate particular markets one from another and thereby engage in differential pricing according to the level that each market can bear. Moreover, selective distribution systems are frequently designed to prevent resale through export outside the designated territory for fear of price competition in areas where prices are set at the highest level.

39. In this context, it should be noted, once more, that a large number of competition law regimes deal with exclusive and selective distribution systems not only under abuse of dominance provisions, but under provisions that prohibit anticompetitive vertical agreements.

> *(e) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:*
>
> *[…]*
>
> *(iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his/her designee*.

40. Such behaviour is generally referred to as "tying and bundling". Bundling involves offering two or more products together, for example, goods A and B. Pure bundling implies that products are only sold together (for example, A + B). Mixed bundling involves selling both the products together (A + B) and separately (A, B), in which case the first is offered for a discounted price – bundled discounting. Tying is a similar practice, whereby the product requested is only offered together with the tied product, which is also available separately (A + B, B). The tied product may be totally unrelated to the product requested or may be a product in a similar line. Tying arrangements are often imposed in order to promote the sale of slower-moving products, and in particular those subject to greater competition from substitute products. By virtue of the dominant position of the supplier in respect of the requested product, it is able to impose as a condition for its sale the acceptance of the other products.

41. Tying and bundling may harm competition by leading to anticompetitive foreclosure and contributing to the maintenance or strengthening of market power. Most jurisdictions understand that the competition agency must show the anticompetitive effects of tying and bundling arrangements, whereas the dominant company has the burden to prove that its conduct is justified by efficiencies.

Alternative approaches in existing legislation: Tying and bundling

Region/country	
Africa	
South Africa	The Competition Act, 1998 (No. 89), article 8(d)(iii), indicates that it is prohibited for a dominant firm to sell goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract.
Asia	
China	Article 17(5) of the Anti-Monopoly Law of China states that a business operator with a dominant market position shall not abuse its dominant market position to conduct acts such as tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause.
Europe	
European Union	The Treaty on the Functioning of the European Union, section (d), article 102, prohibits any abuse consisting in making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The guidance on the European Commission’s enforcement priorities in applying article 82 of the Treaty Establishing the European Community (now article 102 of the Treaty on the Functioning of the European Union) to abusive exclusionary conduct by dominant undertakings in sections 47–50 establishes that the Commission will normally take action under article 102 of the Treaty on the Functioning of the European Union where an undertaking is dominant in the tying market and where, in addition, the following conditions are fulfilled: the tying and tied products are distinct products, and the tying practice is likely to lead to anticompetitive foreclosure.
Latin America	
Brazil	Law No.12529 of 2011, section XVIII, article 36, states as a violation of economic order to condition the sale of goods on the acquisition or use of another good or service, or to condition the provision of a service on the acquisition or use of another good or service.
North America	
United States	The Supreme Court of the United States has defined tying arrangements as follows: “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he [/she] will not purchase that product from any other supplier.”[13] Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring

[13] *Northern Pacific Railway Company v. United States*, 356 U.S. 1,5–6,78 S. Ct. 514, 518, 2 L.Ed.ed 545 (1958).

Region/country	
	another.[14] Liability for tying under section 1 of the Sherman Act exists under the following conditions: (a) Two separate products are involved; (b) The defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (c) The arrangement affects a substantial volume of interstate commerce; (d) The defendant has “market power” in the tying product market.[15] The Supreme Court of the United States explained in Jefferson Parish, 466 U.S., at 12, 104 S. Ct. 1551: “[o]ur cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” Over the years, however, the Court’s strong disapproval of tying arrangements has substantially diminished. In its more recent opinions, the Court, rather than relying on assumptions, has required a showing of market power in the tying product.[16] In *Jefferson Parish Hospital District. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L.Ed.2d 2 (1984), the Supreme Court repeated the well-settled proposition that “if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power.” (Id., at 16, 104 S. Ct. 1551). This presumption of market power, applicable in the antitrust context when a seller conditions its sale of a patented product (the tying product) on the purchase of a second product (the tied product), has its foundation in the judicially created patent misuse doctrine (See *United States v. Loew’s Inc.*, 371 U.S. 38, 46, 83 S. Ct. 97, 9 L.Ed.2d 11 (1962)). In 1988, Congress substantially undermined that foundation, amending the Patent Act to eliminate the market power presumption in patent misuse cases (See 102 Stat. 4676, codified at 35 U.S.C. paragraph 271(d)). The question presented to the Court in *Illinois Tool Works Inc. v. Independent. Ink, Inc.* was whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. The Court concluded that the mere fact that a tying product is patented does not support such a presumption.[17]

[14] See *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 6 (1958); *Times-Picayune Publishing Company v. United States,* 345 U.S. 594, 605 (1953).

[15] *Eastman Kodak Company v. Image Technical Services Inc.*, 504 U.S. 451, 461–62 (1992).

[16] See *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 34–35, 126 S. Ct. 1281, 1286, 164 L. Ed. 2d 26 (2006).

[17] *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 31, 126 S. Ct. 1281, 1284, 164 L. Ed. 2d 26 (2006).

III. Authorization or exemption

Acts, practices or transactions not absolutely prohibited by the law may be authorized if they are notified, as described in possible elements in article 7, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if the affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

42. In some competition law regimes, the competition authority can authorize behaviour that is not anticompetitive per se when possible efficiency gains outweigh the anticompetitive impact. European competition law followed this approach with respect to anticompetitive agreements and concerted practices until 2004. That is to say, the European Commission was not only empowered to adopt block exemptions that clarify conditions under which certain categories of contracts are not to be considered as anticompetitive, but it also authorized certain contracts and concerted practices individually upon a respective application by the companies concerned. The latter possibility was abandoned in 2004, and it now incumbent on the individual companies to assess whether their behaviour complies with the competition law requirements.

43. Not all countries that modelled their competition laws on European Union competition law have uniformly adopted the shift towards the self-assessment of firms. For instance, a number of African competition law systems still empower the competition authority to grant individual exemptions of agreements and concerted practices. For further information on this question, reference is made to the commentaries on chapters III and V.

44. Traditionally, authorizations and exemptions only relate to anticompetitive agreements and concerted practices. However, it is not excluded that certain competition law systems also provide for this possibility in relation to the abuse of a dominant position.

45. For example, the Fair Competition Act 2002 of Barbados, section 16(4), indicates that an enterprise will not be considered to have abused its dominant position if the Commission is satisfied that:

(a) Its behaviour is exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress, and consumers are allowed a share of the resulting benefit;

(b) The effect or likely effect of its behaviour in the market is the result of its superior competitive performance;

(c) The enterprise is enforcing a right under an existing copyright, patent, registered design or trademark, except where the Fair Competition Commission is satisfied that the exercise of those rights:

(i) Has the effect of lessening competition substantially in a market;

(ii) Impedes the transfer and dissemination of technology. In France, article L.420-4 of the French Commercial Code provides for exemptions from offences of abusing a dominant position and abusing an economically dependent undertaking. Such exemptions apply to business practice or behaviour, which has the effect of ensuring economic progress, including the creation or retention of jobs, and which allows consumers a fair share of the resulting benefit, without giving businesses concerned the possibility of eliminating competition in a substantial part of the products’ market. These practices may include organizing, for agricultural products, in the same brand or trade name, volumes and quality of production as well as trade policy.