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**Eighth United Nations Conference to Review  
All Aspects of the Set of Multilaterally Agreed  
Equitable Principles and Rules for the Control  
of Restrictive Business Practices**

Geneva, 19–23 October 2020

Item 16 of the provisional agenda

**Other business**

**Model Law on Competition (2020),  
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

*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 the question of whether a company is to be considered dominant very differently. 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 as 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 also constitute a strategic barrier to entry.

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<sup>1</sup> in the *Vetro Piano in Italia* judgement,<sup>2</sup> which was soon followed by the Nestlé Perrier merger case.<sup>3</sup> 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

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#### **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 (as amended in 2018) it is prohibited for a dominant firm to do the following:

- (a) Charge an excessive price to the detriment of consumers or customers;
- (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 or services to a competitor when supplying those goods or services 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;

<sup>1</sup> Now General Court of the European Union.

<sup>2</sup> Comment transmitted by the European Union Commission, *Vetro Piano in Italia* judgement of 10 March 1992.

<sup>3</sup> Information provided by the European Commission, Nestlé Perrier decision of 22 July 1992.

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(iv) Selling goods or services at predatory prices;

(v) Buying up a scarce supply of intermediate goods or resources required by a competitor;

(vi) Engaging in a margin squeeze.

## 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;
- (e) Denying any person access to an essential facility;
- (f) Charging an excessive price to the detriment of consumers;
- (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 an economic undertaking 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 undertakings into the relevant market.

Furthermore, six main factors to determine a dominant market position of a undertaking are provided under article 18:

- (a) The market share of the undertaking and its competitive status in the relevant market;
- (b) The ability of the undertaking to control the sales market or the raw material supply market;
- (c) The financial and technological conditions of the undertaking;
- (d) The extent of reliance on the undertaking by other undertakings in the transactions;
- (e) The degree of difficulty for other undertakings to enter the relevant market;

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(f) Other factors relevant to the determination of the dominant market position of the undertaking.

Article 19 (1) prescribes a rebuttable presumption of dominance when an enterprise meets any of the following conditions:

(a) The market share of one undertaking accounts for half or more of the relevant market;

(b) The joint market share of two undertakings accounts for two thirds or more of the relevant market;

(c) The joint market share of three undertakings accounts for three fourths or more of the relevant market.

However, under the conditions set out in article 19, if any of the undertakings has a market share of less than one tenth, that enterprise shall not be considered to have a dominant market position. In addition, an undertaking 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.

**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”. Following the Competition (Amendment) Act of 2007, the provisions of India on abuse of dominant position apply equally to groups of firms. A “group” for this purpose means “two or more enterprises which, directly or indirectly, are in a position to – (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise”.<sup>4</sup>

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, article 5.2, 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. 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)****Czechia**

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

<sup>4</sup> Act No. 39 of 2007, The Competition (Amendment) Act (24 September 2007), available at <https://www.wipo.int/edocs/lexdocs/laws/en/in/in111en.pdf>.

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	<p>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.</p>
Estonia	<p>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.</p>
European Union	<p>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 independently of its competitors, its customers and ultimately, of consumers.<sup>4</sup> 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:</p> <ul style="list-style-type: none"> <li>(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);</li> <li>(b) Constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry);</li> <li>(c) Constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power).</li> </ul> <p>The Commission emphasizes 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.</p>
Germany	<p>According to the Act against Restraints of Competition, § 18, 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. When assessing market dominance, account shall be taken in particular of an undertaking's 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 40 per cent. A group of undertakings is presumed to be dominant if (a) it consists of three or fewer undertakings reaching a</p>



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	combined market share of 50 per cent or (b) it consists of five or fewer undertakings 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 group of undertakings has no paramount market position in relation to the remaining competitors.
Lithuania	Under article 3 (2) of the Law on Competition 1999, last amended in 2012, a dominant position shall mean the position of one or more undertakings in a relevant market directly facing no competition or able 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, when 70 per cent or more of a relevant market is held by three or fewer undertakings, the law presumes that each enjoys a dominant position. 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. <sup>5</sup>
Poland	According to article 4 (10) of the Act of 16 February 2007 on Competition and Consumer Protection, a dominant position is that market position which allows an undertaking 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 in the relevant market 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	<p>Article 5 (1) of the Federal Law on Protection of Competition of 2006, as amended in 2015, defines a dominant position as that position which makes it possible for one or more economic entities to have a decisive impact on the general conditions of a commodity's circulation in the relevant market and/or to remove other economic units from this commodity market and/or to impede access to this commodity market of other economic entities. Article 5 (1) contains a rebuttable presumption of dominance if an entity holds a market share exceeding 50 per cent, unless that entity is a financial organization.</p> <p>According to article 5 (2), an economic entity whose share in the relevant market does not exceed 35 per cent may not be deemed dominant, unless that firm exists in a highly concentrated market wherein respective shares are stable over a long period of time, entry is infrequent, and price elasticity of demand for the relevant commodity is low (article 5 (3)), or Federal Law otherwise provides for a finding of dominance (article 6). This provision was abrogated in 2015.<sup>6</sup></p>
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<sup>5</sup> See Lithuania, Law on Competition VIII-1099, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mf0v>.

<sup>6</sup> Russian Federation, Federal Law on Protection of Competition (July 8, 2006) (as amended in 2015), available at [en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20\(a%20amended%20in%202015\).pdf](http://en.fas.gov.ru/upload/documents/Federal%20Law%20On%20Protection%20of%20Competition%20(a%20amended%20in%202015).pdf).

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**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	<p>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:</p> <ul style="list-style-type: none"> <li>(a) Its market share and ability to unilaterally fix prices or substantially restrict output in a relevant market, and the inability of other economic agents, currently or in the future, to counteract that power;</li> <li>(b) The existence of entry barriers and elements that, foreseeably, may alter both those barriers and the supply of the other competitors;</li> <li>(c) The existence and power of its competitors;</li> <li>(d) The possibilities of the economic agent and its competitors to access the sources of input;</li> <li>(e) Its recent conduct.<sup>7</sup></li> </ul>
Nicaragua	<p>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:</p> <ul style="list-style-type: none"> <li>(a) The existence of barriers for entry to the market of goods or services, whether economic and/or legal, and the elements that foreseeably may alter both of these barriers and other competitors’ supply;</li> <li>(b) The possibilities of access of the economic agent and its competitors to the source of inputs;</li> <li>(c) Recent behaviour with respect to supply and demand in the relevant market;</li> <li>(d) The possibility of substitution or competition between brands, products or patents in the relevant market;</li> <li>(e) The economic, financial or technological power of the competing economic agents that participate in the transaction.</li> </ul>

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<sup>7</sup> Organization for Economic Cooperation and Development and Inter-American Development Bank, 2014, Competition Law and Policy in Costa Rica: A Peer Review, available at <https://www.oecd.org/daf/competition/CostaRica-PeerReview2014en.pdf>.

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## 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 a substantial degree of market power. The Bureau generally defines a relevant market, along both product and geographic dimensions, then considers such evidence as market shares of the relevant person(s) and barriers to entry.

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 Supreme Court, *United States v. E.I. du Pont de Nemours and Company*, 351 US377, 391 (1956)). Since *du Pont*, however, lower courts have split over whether monopoly power “requires proof of both power to control prices and power to exclude competition” (United States Court of Appeals for the Third Circuit, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 201 (3d Cir. 1992), cert. denied, 507 US921 (1993)), or whether proof of either element is sufficient for a finding of monopoly power. The United States Supreme Court has made it clear that proof of actual exercise of that power is unnecessary – proof of a firm’s potential to raise prices or exclude competition is sufficient (*United States v. Griffith*, 334 US100, 107 (1948)).

In the Sherman Act, paragraph 2 case, the United States antitrust agencies and private plaintiffs must first define a relevant market before proving that a firm has monopoly power (United States Supreme Court, *Spectrum Sports, Inc., v. McQuillan*, 506 US447, 453 (1993)). According to guidance from the United States Department of Justice, an antitrust market is defined along two dimensions: (a) the product market contains all products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products would find it profitable to impose a “small but significant and non-transitory” increase in price; and (b) the geographic market is the area outside of which geography limits some customers’ willingness or ability to substitute otherwise similar products, or some suppliers’ willingness or ability to serve customers. Transportation costs, language barriers, regulation, taxation, custom and familiarity, reputation and service availability, among other things, are all relevant when defining an appropriate geographic market.

Once a relevant antitrust market is defined, plaintiffs in the United States may show that a defendant possesses monopoly power by presenting: (a) circumstantial evidence based on market share, considered in the context of the market’s structure (market concentration and barriers to entry); and (b) direct evidence of the use of monopoly power to raise prices, reduce output or exclude actual and potential competitors.

The United States Supreme Court has affirmed that monopoly power may be inferred from a defendant firm’s market share (*United States v. Grinnell Corp.*, 384 U.S. 563 (1966)); while the exact market share required for an inference of monopoly power has not been articulated, the United States Supreme Court has not accepted a market share of less than 75 per cent, by itself, as enough to establish monopoly power. Courts in the United States also look to the structure of the market – even a 100 per cent market share may not be sufficient evidence of monopoly power if new or fringe firms may easily enter or expand within

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the market (see United States Court of Appeals for the Ninth Circuit, *United States v. Syfy*, 903 F.2d 659 (9th Cir. 1990).

Courts in the United States will also observe evidence that a competitor actually has the ability to control market prices or exclude competition (see United States Court of Appeals for the District of Columbia Circuit, *United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001). This type of evidence is not generally conclusive, as ability to control price may only be temporary, a competitor may have valid reasons for restricting its output or quality. Typically, plaintiffs in the United States present direct evidence of monopoly power alongside circumstantial evidence based on market share and structure.

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<p><i>II. Acts or behaviour considered abusive</i></p>
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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 conduct by a dominant undertaking harms the competitive process, and, therefore, may be expected to harm consumers.

11. In general, an undertaking abuses its dominance when the effects of its conduct are to damage the abilities of actual or potential rivals to compete, and such conduct would not be successful for an undertaking in a non-dominant position. Actions that serve as roadblocks to competitors and do not have offsetting advantages to consumers are examples of abuse of dominance. When assessing conduct by dominant undertakings, it is important to consider whether the conduct at issue is competition on the merits – i.e. conduct that simply reduces the dominant undertaking's costs or makes it better able to serve customers and, therefore, harms competitors. However, some jurisdictions expand the definition of abuse of dominance to protect smaller, less efficient rivals from exclusion 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. This type 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 the seriousness of their 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. Lastly, depending upon the jurisdiction in which they occur, different abusive acts will receive stronger or weaker presumptions of anticompetitive effect, based on relevant case law, statutory provisions and underlying economic assumptions.

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). Legal authorities draw upon economic theory, empirical evidence, experience and anticipated error costs when determining whether the anticompetitive effects of conduct by a dominant undertaking warrant that conduct's

condemnation. 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.

14. In most jurisdictions, it is at least possible for anticompetitive conduct by a dominant undertaking to avoid condemnation on the grounds that it promotes efficiency. Once anticompetitive effects are demonstrated, however, the burden to raise and prove pro-competitive justifications lies with the dominant undertaking. Conduct which is somewhat pro-competitive must generally be the least competitively adverse choice available to the dominant undertaking and will often be tailored to addressing some specific preference of or problem faced by the dominant undertaking's customers.

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

15. One of the most common forms of predatory behaviour is predatory pricing, which generally refers to the charging of low prices by a dominant undertaking in the short-run, when those low prices risk an increase in prices over the long run. While most jurisdictions require that a dominant undertaking charge prices below some relevant measure of costs, others only require engagement by a company in strategic low pricing to eliminate its rivals. Predatory pricing may be an attempt 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 undertaking in terms of products and markets, and the greater its financial resources, the greater its ability is to engage in predatory behaviour.

16. As low pricing usually involves benefits to consumers and consumers are typically only harmed if and when the dominant enterprise later charges supra-competitive prices, jurisdictions may be reluctant to condemn pricing as predatory. Depending on the structure of their markets, jurisdictions must balance the benefits and detriments of aggressively low pricing. Developing jurisdictions tend to be less reluctant to condemn predatory pricing, as their markets may be more concentrated, and as barriers to entry tend to be 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. Assessing whether a certain pricing strategy should be deemed "predatory" is inherently challenging, as prices must be deemed "too low" relevant to an appropriate benchmark. The benchmark chosen by nearly every legal regime is some measure of the dominant undertaking's cost – a few jurisdictions instead measure prices against some normal or usual value. Choosing against which of the dominant undertaking's costs to measure presents another challenge; average variable cost (total variable cost divided by units produced) is the most commonly used measure, but enforcement plaintiffs and enforcement agencies do not present the same cost measure in every case. Price-cost tests employing average total cost (total cost divided by units produced) are also common and frequently used in addition to average variable-cost tests.

18. Generally, price-cost tests are useful for their ability to indicate two things. First, price-cost tests tell whether a dominant undertaking is willing to sacrifice its profits over the short-run. Such behaviour only makes sense if it enhances, or the dominant undertaking believes that it will enhance, its economic power, to the detriment of competition. Second, price-cost tests may tell whether conduct by a dominant undertaking impedes competition by even an equally efficient competitor. The idea of the equally efficient competitor underscores the idea of some that price cuts which harm competitors should not be the object of legal scrutiny, so long as only less-efficient competitors are harmed. Some jurisdictions, however, are concerned with competitors that are "not yet as efficient" or "reasonably efficient;" reliance on the idea of the equally efficient competitor would result in under-enforcement in those jurisdictions willing to give up the short-term consumer benefits of lower prices in the hope that less efficient firms will become equally efficient in the future.

19. 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 (see *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 509 US209 (1993)). Other jurisdictions consider that a reasonable prospect or dangerous probability of recoupment is not necessary for a pricing strategy to be deemed predatory. The dominant firm's pricing at a level below a measure of cost is sufficient.

20. Predatory behaviour is not limited to pricing. Other means, such as over-investment in capacity to foreclose competition or the acquisition of inputs to raise a competitor's costs, 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 undertaking from selling products at prices below cost without any justifiable cause, as well as from selling at unfairly high prices or buying at unfairly low prices. Article 17 also forbids dominant undertakings from refusing to trade with counterparties without any legitimate reasons.

**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** 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

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*Region/country*

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	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.
Germany	The Act Against Restraints on Competition, paragraph 19, of Germany provides more general prohibitions of conduct by dominant undertakings that could be categorized as predatory behaviour. First, an undertaking with a dominant position may not directly or indirectly impede another undertaking in an unfair manner, or treat another undertaking differently from others, without any objective justification. It is also prohibited for an undertaking to demand less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification. Based on the statutory language, it is unclear whether downward pricing pressure from competing firms in one market, and not another, would constitute an objective justification for price differences.
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.
Poland	Article 9 of the Act on Competition and Consumer Protection (2007) of Poland specifically enumerates seven possible ways in which an undertaking(s) may abuse its (their) dominant position, including through the direct or indirect imposition of unfair prices, including excessive or predatory pricing, long time limits for payment or other trading conditions. <sup>8</sup>
Russian Federation	<p>Article 7 of the Federal Law on Protection of Competition (as amended in 2015) of the Russian Federation prohibits the pricing of goods at monopolistically low levels. Monopolistically low prices are those below the sum of the necessary production and distributions costs of the goods and profit, and are below the prices formed under competitive conditions in a market with a comparable composition of buyers and sellers, conditions of circulation and entry, and government regulation (including taxation and customs- and tariffs regulation), if such a market exists in the Russian Federation or abroad, including the price fixed:</p> <ol style="list-style-type: none"> <li>1. By the reduction of an earlier fixed price of the goods, provided the following conditions are met in their totality: <ol style="list-style-type: none"> <li>(a) That expenses necessary for production and distribution of the product have remained the same or that their change does not match the change in price;</li> <li>(b) That the composition of buyers and sellers in the market has remained unchanged or that changes were insignificant;</li> <li>(c) That conditions of product circulation in the market, including those caused by government regulation, have remained the same or that changes were disproportionate to the change in price;</li> </ol> </li> <li>2. By the maintenance of or failure to increase earlier fixed prices, provided that the following conditions are met in their totality:</li> </ol>

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<sup>8</sup> Poland, Act on Competition and Consumer Protection (16 February 2007), available at [http://www.polishlaw.com.pl/pdf/act12b\\_new.pdf](http://www.polishlaw.com.pl/pdf/act12b_new.pdf).

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 Region/country
 

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- (a) That expenses necessary for production and distribution of the product increased considerably;
- (b) That the composition of buyers or sellers in the market has brought about a possibility to increase the price of the product;
- (c) That conditions of circulation in the market, including those caused by government regulation, have brought about a possibility to increase the price of the product.

**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 prices unreasonably below cost. In reference to recent litigation involving drug maker Genzyme, the Administrative Council for Economic Defence of Brazil stated that the purpose of antitrust law is to establish a competitive and balanced market that supplied products to consumers at the lowest price. It will therefore find predatory pricing infringements only if there is no pro-competitive logic to a company's conduct. Plaintiffs in Genzyme litigation presented no evidence that Genzyme priced below its own average variable cost, nor that Genzyme had a rationale to engage in predatory pricing.

## 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.

## Peru

Article 10 of the Peruvian Competition Act defines abuse of a dominant position as that which happens when an economic agent who holds a dominant position within a relevant market uses such position to restrict competition inappropriately, in a way that would not have been possible without the agent's dominant position. The competition authority of Peru, the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (Indecopi), must demonstrate that suspect conduct has, or has the potential to generate, anticompetitive effects that would negatively affect consumer welfare, with an emphasis on efficiency rather than the protection of less efficient firms.<sup>9</sup>

**North America**

## Canada

Article 78 of the Competition Act of Canada provides a definition of "anti-competitive act", which is prohibited under article 79 for a firm with a dominant position. Subsection 78 (i) brings within the Act's prohibition "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor". The article's definition is non-exclusive but enumerates multiple forms of predatory behaviour by a dominant firm.

The Competition Bureau of Canada provides guidance on abuse of dominance, which states that "[p]redatory acts involve a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to eliminate, discipline, or deter entry or expansion of a competitor". An appropriate measure of the suspect firm's cost is not provided.

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<sup>9</sup> Organization for Economic Cooperation and Development, 2018, OECD-IDA Peer Reviews of Competition Law and Policy: Peru, available at <https://www.oecd.org/daf/competition/PERU-Peer-Reviews-of-Competition-Law-and-Policy-2018.pdf>.



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 Region/country
 

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## 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*,

509US (1993); see also *Cargill Inc. v. Monfort of Colorado Inc.*, 479 US104, 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 US574, 594 (1986)). The same requirements were extended to the concept of predatory bidding when the Supreme Court held that *Weyerhaeuser*, a sawmill operator, could only be liable under paragraph 2 of the Sherman Act if the plaintiff could show that *Weyerhaeuser* suffered (or expected to suffer) a short-term loss as a result of its higher bidding for alder log inputs, and that it had a dangerous probability of recouping that loss through higher pricing in the output market (*Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1078 (2007)).

The Department of Justice of the United States emphasizes that “alongside the broad consensus that predatory pricing can be anticompetitive, there is general recognition that... ‘antitrust would be acting foolishly if it forbade price cuts any time a firm knew that its cuts would impose hardship on any competitor or even force its exit from the market’”. The Department of Justice thus recognizes the dual requirements from *Brooke Group* as bringing needed rigor and order to predatory-pricing law, by concluding that there is no reliable way to distinguish between above-cost predatory pricing and legitimate discounting. It therefore believes that above-cost pricing should remain legal per se, regardless of a firm’s monopoly status. The Department of Justice also believes that pricing above average total cost should be per se legal, and that pricing below average total cost may be economically rational. The Department of Justice’s guidance recognizes the growing consensus that average avoidable cost is the best measure to evaluate predation claims, as it focuses on the costs that were incurred when predatory pricing was pursued. According to the Department, average avoidable cost reflects a negative cash flow on incremental sales and may therefore reflect an effort to exclude. When average avoidable cost is difficult to assess, the Department of Justice believes that average variable cost is generally the next best alternative (see *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, chapter 4, Price predation, available at <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4>).

*(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;*

21. 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.

22. 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”).<sup>10</sup>

23. 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).

24. 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.

#### **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.

<sup>10</sup> O’Donoghue R and Padilla AJ, 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.

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*Region/country*

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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)).<sup>11</sup>

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.

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.

The United States competition authorities recognize that price discrimination is generally lawful, as reflective of different costs of dealing with different customers or a seller's attempt to meet a competitor's price. However, price discrimination may be illegal under the Robinson–Patman Act if the following conditions are met:

1. The product at issue must be a commodity and must have been purchased, rather than leased.
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<sup>11</sup> Peru, Legislative Decree No. 1034 approving the Repression of Anticompetitive Conducts Law (24 June 2008), available at <https://www.apeccp.org.tw/htdocs/doc/Peru/Competition/Legislative%20Decree%201034.pdf>.

Region/country

2. The commodities must be of “like grade and quality”.
3. It must be that the discriminatory pricing strategy is likely to injure competition.
4. The sales must normally be in interstate commerce, i.e. across State lines.

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

25. 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.

26. Resale price maintenance can also be achieved through indirect means, e.g. by fixed distribution margins, fixed discount levels or other conduct, such as threats, warnings and sanctions.

27. 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), unchanged by the Competition Amendment Act of 2018, the practice of minimum resale price maintenance (RPM) 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.

In cases where a vertical restraint involves a firm (or firms) considered dominant, as defined in paragraph 7 of the Act, the restrictions on abuses may also apply, but these are dealt with in the separate section relating to abuse of dominance.

*Region/country*

Common Market for Eastern and Southern Africa	The Competition Commission of the Common Market for Eastern and Southern Africa (COMESA) classifies RPM as vertical arrangements that harm consumers because businesses subject to RPM restrictions are unable to respond effectively to consumer demands and to compete effectively against competitors and are therefore prohibited under the COMESA Competition Regulations. The COMESA Competition Commission investigated restrictive vertical distribution practices engaged in by Coca-Cola and its distributors. Following the investigation, the parties agreed to eliminate the price-maintenance clause from their distribution contracts (COMESA Competition Commission, Staff Paper No. 2018/12RR/08, Coca-Cola, 6 December 2018). The decision has been criticized as lacking significant detail in analysing the alleged RPM and mentioning the relevant legal standard under the COMESA regulations for evaluating RPM. <sup>12</sup>
<b>Asia</b>	
China	According to the Anti-Monopoly Law of China, article 14, any of the following agreements among undertakings 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. Article 15 of the Anti-Monopoly Law, however, provides a list of circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition of article 14. Articles 17–19 of the Anti-Monopoly Law may also be relevant to the assessment of vertical restraints when a party has a dominant position in a relevant market.  The Supreme People’s Court of China recently decided a case involving RPM and found that the Chinese competition authorities do not bear the burden to prove the anti-competitive effects of companies’ RPM practices.
India	Under the Competition Act, introduced in 2002, RPM agreements, specifically mentioned as one of the species of vertical agreements, are to be judged under the rule of reason (section 3(4)). The Act appears to deal with fixed RPM rather than maximum and minimum RPM. In section 4(2) (a) (ii) of the Act, unilateral resale price-fixing is listed as an abuse practice under the legal framework of abuse of dominance. <sup>13</sup> In a recent case, the Indian Competition Authority held that RPM involving monitoring of maximum permissible discount level through discount control mechanism and levy of penalty for non-compliance amounts to unreasonable imposition of vertical restraints in violation of section 3(4) of the Act (Competition Commission of India, Case No. 17/2017, Honda Motorcycle and Scooter, Decision, 14 March 2018). <sup>14</sup>
Japan	Under the Competition Law of Japan, RPM is prohibited as unjustly restricting another party’s selling price of goods under paragraph 12 of the “Designation of Unfair Trade Practices” (Fair Trade Commission Public Notice No. 15, 1982). <sup>15</sup> The Japan Fair Trade Commission stated in its guidelines on distribution systems and business practices that RPM are

<sup>12</sup> COMESA, 2019, COMESA guidelines on restrictive business practices, available at [https://www.comesacompetition.org/wp-content/uploads/2019/08/Final-Guidelines-on-RBP\\_May-2019.pdf](https://www.comesacompetition.org/wp-content/uploads/2019/08/Final-Guidelines-on-RBP_May-2019.pdf); see also <https://www.comesacompetition.org/?p=2090>.

<sup>13</sup> India, 2002, The Competition Act 2002, available at [https://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf).

<sup>14</sup> India, Competition Commission of India, Case No. 17 of 2017 – Honda Motorcycle and Scooter India Private Ltd. (see <https://www.cci.gov.in/sites/default/files/Case%20No.17%20of%202017.pdf>).

<sup>15</sup> Japan, Fair Trade Commission, 1982, Designation of Unfair Trade Practices, Public Notice No. 15 of 18 June 1982 (see [https://www.jftc.go.jp/en/legislation\\_gls/unfairtradepractices.html](https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html)).

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 Region/country
 

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regarded as “in principle illegal as an unfair trade practice”.<sup>16</sup> The provision, however, allows for RPMs on “justifiable grounds”. This term has been restrictively interpreted by the Supreme Court and is not satisfied “[s]imply because it is a necessary or rational in business management for an entrepreneur to impose the restrictive term” (lawsuit brought by Meiji Shoji Co., Ltd. seeking to overturn a Japan Fair Trade Commission Decision, Supreme Court Decision on 11 July 1975).<sup>17</sup>

## Turkey

Under Turkish Competition Law, minimum and fixed RPM is definitely prohibited by the Communiqué on Vertical Agreements if vertical agreements are to benefit from this block exemption. In its decision practice, the Turkish Competition Authority found it sufficient in earlier cases to consider the objective or the effect of the RPM agreements to prohibit RPM (Dogus Automotive/Volkswagen; WB Company; Efes). In more recent cases, the Competition Authority took also into consideration the structure of the market to a great extent such as inter-brand vs. intra-brand competition or the consumer benefit (Kütas Tekanne, Vira).

**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. RPM 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.

Under regulation 330/2010, the basic principles governing vertical price fixing can be described as, on the one hand, a hard-core restriction for the imposition of fixed or minimum RPM, and on the other hand, providing automatic exemption within the parameters of the block exemption for the imposition of maximum resale prices or the issuance of price recommendations (article 4(a) of the block exemption for certain categories of vertical agreements). RPM that amounts to a hard-core restriction involves the rebuttable presumption that the conditions of article 101(3) of the Treaty on the Functioning of the European Union are not met. Nonetheless, the European Commission’s Vertical Guidelines themselves provide examples of cases where vertical price fixing practices may meet the four cumulative conditions of article 101(3) of the Treaty on the Functioning of the European Union and, therefore, gives rise to some tension in view of the relation between RPM and article 101 (3) of the Treaty.

## Sweden

Under the Swedish Competition Act, chapter 2, sections 1 and 2, and chapter 2, section 7, correspond to articles 101(1) and 101(3) of the Treaty on the Functioning of the European Union as well as article 102 of the Treaty on the Functioning of the European Union and include vertical agreements. Swedish competition law is expressly guided by European Union competition law, as stated in the preparatory work of the Competition Act. However, the Act does not generally prohibit RPM and no explicit definition of vertical restraints is

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<sup>16</sup> Japan, Fair Trade Commission, 2017, Guidelines concerning distribution systems and Business Practices under the Antimonopoly Act (English translation; see [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/DistributionSystemsAndBusinessPractices.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/DistributionSystemsAndBusinessPractices.pdf)).

<sup>17</sup> See Organization for Economic Cooperation and Development, 2008, Round table on resale price maintenance, Note by Japan, DAF/COMP/WD(2008)56, available at [https://www.jftc.go.jp/en/int\\_relations/oced\\_files/RESALEPRICEMAINTENANCE.pdf](https://www.jftc.go.jp/en/int_relations/oced_files/RESALEPRICEMAINTENANCE.pdf).

*Region/country*

contained. Any agreement or concerted practice among undertakings active at different levels of trade that restricts competition is liable to be covered.

Germany Under German competition law, there is a general ban of RPM. RPM falls under the definition of agreements pursuant to paragraph 1 of the Acts against Restraint of Competition. However, paragraph 2 of the Acts against Restraint of Competition allows for an exemption in case of an efficiency justification for the benefit of the consumer. Paragraph 30 of the Acts against Restraint of Competition further provides for an exemption from the general RPM prohibition for books, newspapers and magazines. For a definition of RPM, the old version of paragraph 14 of the Acts against Restraint of Competition stated that RPMs are “agreements between undertakings which [...] restrict a party in its freedom to determine prices [...] in agreements which it concludes with third parties on the goods supplied, on other goods, or on commercial services”.

Poland Under the Competition and Consumer Protection Act of Poland, RPM is prohibited but exemptible if it contributes to technical or economic progress and the consumer receives a fair share of the benefits generated by the agreement.<sup>18</sup> The treatment of RPM under competition law is, however, a debated issue and the debate on the merits of RPM is looked closely at by the Polish competition authority (Office of Competition and Consumer Protection).<sup>19</sup>

**Latin America**

Brazil The Brazilian Competition Law No.12.529 of 30 November 2011, article 36, provides a framework for assessment of vertical restraints, here meaning all anticompetitive conduct other than mergers. Article 36(3) provides a non-exhaustive list of acts that may constitute anticompetitive practices. Among them are potentially anticompetitive vertical agreements, including RPM practices. According to annex I of the Administrative Council for Economic Defence (CADE) Resolution No. 20/99, vertical restraints such as RPM generally require the existence of market power in the market of origin (presumed when the company controls 20 per cent or more of a relevant market). Annex I also states that such practices shall be assessed under the rule of reason as the authority is required to balance pro-competitive and anticompetitive effects. However, in a recent RPM case, the Brazilian competition authority seemed to have departed from the rule of reason approach towards RPM by deeming an RPM practice illegal unless the defendants are able to prove efficiencies. An infringement was found regardless of the duration of the practice or whether the distributors followed the minimum resale prices (SKF, Administrative Proceeding 08012.001271/2001-44).

Mexico According to Article 10, Index II of the Mexican Federal Law of Economic Competition, RPM, like all other vertical restraints, is a monopolistic practice subject to the rule of reason and is defined as “set[ing] the prices or other conditions that a distributor or supplier has to abide by when commercializing or distributing goods or providing services”.<sup>20</sup>

<sup>18</sup> Act of 16 February 2007 on Competition and Consumer Protection.

<sup>19</sup> Organization for Economic Cooperation and Development, 2008, Round table on resale price maintenance, Note by Poland, DAF/COMP/WD(2008)59, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2008\)59&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2008)59&docLanguage=En).

<sup>20</sup> Organization for Economic Cooperation and Development, 2004, Competition Law and Policy in Mexico: An OECD Peer Review, available at <https://www.oecd.org/mexico/31430869.pdf>.

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**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 United States Supreme Court initially ruled that both maximum and minimum RPM practices are illegal per se under section 1 of the Sherman Act (Albrecht, Dr. Miles) if there is an actual agreement requiring the distributor to adhere to specific prices (see <i>Business Electronics Corporation v. Sharp Electronics Corporation</i> , 485 US717, 720, 724 (1988)). However, in 2007 the Supreme Court abandoned per se illegality for RPM practices and turned to a rule of reason analysis (see <i>Leegin Creative Leather Products Inc. v. PSKS Inc. dba Kay’s Kloset</i> , 551 U.S. 877 (2007)). The Supreme Court found that the per se rule is inappropriate, as it found no support for the conclusion that RPM always or almost always tends to restrict competition or decrease output, or that RPM is manifestly anticompetitive. The Leegin decision offers three factors to consider in RPM cases. First, the number of manufacturers using RPM. Second, whether RPM was initiated by manufacturers or retailers and, finally, whether the manufacturer or retailer involved have market power.

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*(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;*

28. 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.<sup>21</sup>

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<sup>21</sup> 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, Centrafarm claimed that, as a parallel importer, it was entitled to sell certain drugs originating from American Home Products Corporation under the trade name “Seresta” in the Netherlands without authorization by American



29. 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.<sup>22</sup> 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.

30. 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.

31. 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.

32. 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.

33. In light of increasing digitalization and electronic commerce, the issues surrounding restrictions on parallel trade<sup>23</sup> carry over into the digital economy where similar restrictions such as geo-blocking (practices of online traders to restrict cross-border sales on the basis of consumers' nationality or place of residence or establishment) create barriers to cross-border consumers of digital content. Consequently, the European Union adopted the European Union geo-blocking regulation on 27 February 2018, which prohibits unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment (Regulation (EU) 2018/302).

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Home Products Corporation. The latter offered these drugs for sale in the United Kingdom under the name "Serenid D". American Home Products Corporation claimed an infringement of its intellectual property rights, whereas Centrafarm argued that both drugs were identical and thus American Home Products Corporation'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.

<sup>22</sup> 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](http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/ssa_maskus_pi.pdf), accessed 19 May 2015.

<sup>23</sup> Restrictions on parallel imports can take place when the supplier of a product using an exclusive distribution system (physical or online) wants to strengthen the protection of its exclusive distributors. In these cases, competition is restricted when a consumer/customer wants to buy a product online but the sale is refused because of discriminatory requirements regarding nationality or place of residence or establishment, which have a negative competition impact in cross-border online sales without any justification.

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

### Region/country

Costa Rica	<p>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). In 2013, there was some tension between the Competition Authority in Costa Rica and the Ministry of Health, which had limited parallel medication imports and conditioned them on the patent holder’s consent. It justified these measures on grounds of guaranteeing good quality products, as well as preventing commercialization by third parties without the consent of the patent holder. The Costa Rican Competition Authority, however, found that these limitations would violate the applicable regulations that explicitly allow for parallel imports and limit entry barriers for new competitors and, therefore, limit competition in the market.<sup>24</sup></p>
European Union	<p>The definition of parallel imports under European Competition Law involves trade in products which takes place outside the official system set up by a particular firm. 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 <i>Deutsche Grammophon/Metro</i>:<sup>25</sup></p> <p style="padding-left: 40px;">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.</p> <p>Restricting parallel imports can violate article 101 or article 102 of the Treaty on the Functioning of the European Union if the relevant firm is considered to be dominant. European Courts have further ruled that any agreement to limit parallel trade is a “by object” abuse, even if consumer harm is not demonstrated (<i>GlaxoSmithKline C-501/06 P, C-513/06 P, C-519/06 P</i>).</p>
Switzerland	<p>The limitation of parallel imports can be considered unlawful territorial restraints under article 5(4) of the Swiss Cartel Act.<sup>26</sup> In the decision <i>Gaba International AG, Gebro Pharma GmbH</i>, 19 December 2013, the Swiss court found that the restriction of passive sales constitutes an unlawful restraint irrespective of the effects on competition in Switzerland and regardless of proof of a certain level of intensity of effects on competition.<sup>27</sup></p>

<sup>24</sup> Organization for Economic Cooperation and Development, 2014, *Competition Law and Policy in Costa Rica: A Peer Review*, available at <https://www.oecd.org/daf/competition/CostaRica-PeerReview2014en.pdf>.

<sup>25</sup> Court of Justice of the European Union, 78/70 (1971) ECR 487.

<sup>26</sup> Switzerland, Federal Act on Cartels and other Restraints of Competition (6 October 1995, status as of 1 December 2014), available at <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html>.

<sup>27</sup> Concurrences, 2013, *The Swiss Federal Administrative Court upholds fines imposed by the Competition Authority to a toothpaste manufacturer and licensor and its distributor and licensee for prohibiting parallel imports from Austria to Switzerland (Gaba International)*, 19 December, available

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*Region/country*


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Japan	Intellectual property law of Japan neither precludes nor sanctions parallel imports. Under its antimonopoly law, however, obstruction of parallel imports is per se illegal, not subject to the rule of reason. <sup>28</sup> Japan has taken measures in several cases against unfair prevention of parallel imports of branded porcelain tableware, pianos, ice cream and automobiles.
New Zealand	<p>The Copyright Amendment Act 1998 legalizes parallel importing in New Zealand under certain circumstances.<sup>29</sup> Prior to 1998, the Copyright Act 1994 prohibited the parallel importation into New Zealand of all goods protected by copyright, other than those imported for domestic uses. Parallel imports of non-infringing copies are legal when the conditions set by section 12 (5A) of Copyright Act 1994 No. 143 are met. The respective provision reads as follows:</p> <p style="padding-left: 40px;">An object that a person imports, or proposes to import into New Zealand is not an infringing copy under subsection (3)(b) if</p> <p style="padding-left: 40px;">(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</p> <p style="padding-left: 40px;">(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:</p> <p style="padding-left: 80px;">(i) The copyright protection (or other equivalent intellectual property right protection) formerly afforded to the work in question in that country has expired;</p> <p style="padding-left: 80px;">(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;</p> <p style="padding-left: 80px;">(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);</p> <p style="padding-left: 80px;">(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.</p>

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at <https://www.concurrences.com/en/bulletin/news-issues/december-2013/The-Swiss-Federal-Administrative-64200>.

<sup>28</sup> Japan, Fair Trade Commission, 2017, revision, Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act, available at [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/DistributionSystemsAndBusinessPractices.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/DistributionSystemsAndBusinessPractices.pdf).

<sup>29</sup> New Zealand, Copyright Amendment Act 1998 (see <http://www.legislation.govt.nz/act/public/1998/0020/latest/DLM426040.html>).

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*Region/country*

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South Africa	Section 34 (2) (d) of the Trade Marks Act allows parallel importation and states that a registered trade mark is not infringed by “the importation into or the distribution, sale or offering for sale in the Republic, of goods to which the trade mark has been applied by or with the consent of the proprietor thereof.” 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	Unauthorized parallel imports are generally allowed entry into 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”. <sup>30</sup>

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*(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;*

34. 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.

35. 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 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**

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*Region/country*

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Brazil	Refusals to deal as well as the denial of access to essential facilities are deemed a potential antitrust infringement, pursuant to article 36, paragraph 3, V and XI of Law No. 12, 529/2011. In order to amount to an antitrust infringement, access to the facility must be considered essential for entrance into the market and its replication must be either impossible or not reasonably feasible. In a recent investigation against Thyssenkrupp, the Brazilian competition authority (CADE) found that there were sufficient alternative suppliers and the alleged conduct did not amount to an antitrust infringement. Other investigations into refusal to deal conduct concerns the
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<sup>30</sup> World Intellectual Property Organization, 2014, Exceptions and limitations to patent rights: Exhaustion of patent rights (SCP/21/7), available at [http://www.wipo.int/edocs/mdocs/scp/en/scp\\_21/scp\\_21\\_7.pdf](http://www.wipo.int/edocs/mdocs/scp/en/scp_21/scp_21_7.pdf).

<i>Region/country</i>	
	financial sector such as the provision of credit card services (against large financial institutions in Brazil) and other payment processing companies.
China	Article 17(3) of the Anti-Monopoly Law of China establishes that an undertaking with a dominant market position shall not abuse its dominant market position by refusing to trade with a trading party without any justifiable cause. Article 4 of the State Administration for Industry and Commerce’s Dominance Provisions and article 13 of the National Development and Reform Commission’s Anti-Price Monopoly Provisions provide detailed examples of refusal to deal.
European Union	<p>In its guidance on the European Commission’s enforcement priorities in applying article 82 of the European Commission Treaty (now article 102 of the Treaty on the Functioning of the European Union 2009/C 45/02) to abusive exclusionary conduct by dominant undertakings, ), the European Commission considers refusal to supply as a potential abuse of dominance practice. According to the guidance, refusal to supply covers refusal to supply products to customers, refusal to license intellectual property rights or refusal to grant access to an essential facility or a network. The Commission considers these 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.</p> <p>In a recent judgement by the European General Court (Slovak Telekom, a.s., v. European Commission, Case T-851/14, 13 December 2018) it was decided that, in order to find a refusal to deal, the finding of indispensable access for potential competitors to carry on their business is not required because the underlying regulatory framework in any event clearly acknowledged the need for access.</p>
South Africa	<p>Article 8(b) of the Competition Act, 1998 (No. 89) prohibits the refusal of access to an “essential facility” by a dominant firm when it is economically feasible to provide access. According to section 1 (vi) of the Competition Act, an “essential facility” is an infrastructure or resource without which a competitor cannot reasonably provide goods or services to its customers.</p> <p>In addition, under article 8(d)(ii), is it is prohibited for a dominant firm to refuse to supply scarce 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. As to the actual anticompetitive effect of the abusive conduct, it was found in Nationwide Airlines (Pty) Ltd, Comair Ltd vs. South African Airways (Pty) Ltd that, for an abuse to arise, it does not require evidence of actual harm to consumers and that evidence of substantial or significant exclusion, such as foreclosure of the market to competition, is sufficient.</p>
United States	United States competition law does not explicitly prohibit refusal to deal practices and the United States Supreme Court has never expressly adopted an “essential facilities” doctrine. Within the limitations set in <i>Aspen Skiing</i> , the termination of an existing business relationship may violate paragraph 2 of the Sherman Act as short-term profits are sacrificed in order to eliminate a competitor from the market in the long run. <i>Aspen Skiing Co v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585, 601 (1985). In 2004, the Supreme Court emphasized that this category is on the outer boundaries of paragraph 2 and reaffirmed the general rule that businesses can refuse to deal with their competitors ( <i>Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP</i> ).
India	Section 4 of the Indian Competition Act, 2002, provides a list of practices, which, when carried out by a dominant enterprise or group, would constitute an abuse of dominance, and any behaviour by a dominant firm which falls within the scope of such conduct is likely to be prohibited, including limitation or restriction of the

## Region/country

production of goods or provision of services and indulging in practice or practices resulting in denial of market access, in any manner.<sup>31</sup> The Indian Competition Commission, on the other hand, states in its guidance on competition law in India that businesses generally have the right to use their discretion in choosing whom to do business with. However, if this choice is made through a conspiracy with another competitor, business or individual, they will likely be in contravention of the law.<sup>32</sup> In a recent case, the Indian Competition Commission decided to investigate constructive and outright refusal to deal by Sony and Star India in the television broadcasting business and considered market power to be necessary for the assessment (Competition Commission of India, Case No. 30/2017, Noida Software Technology Park/ Star India / Sony Pictures Network India, 27 July 2018).<sup>33</sup>

*(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;*

36. 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.

37. 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.

38. 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.

39. 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.

### Alternative approaches in existing legislation: Exclusive Dealing

## Region/country

European Union In its guidance on article 102 of the Treaty on the Functioning of the European Union, the European Commission uses the term "exclusive dealing" to cover explicit as well as indirect exclusive purchasing obligations and conditional rebates. It further extends the concept of exclusive dealing to exclusive supply with the main competitive concern of customer foreclosure. Under European Union law, exclusive dealing may be an abuse of dominance under article 102 of the Treaty on the Functioning of the European Union but may also be illegal in the absence of dominance as an anticompetitive agreement under article 101 of the Treaty on the

<sup>31</sup> India, The Competition Act 2002, available at [https://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf).

<sup>32</sup> Global Compliance News, n/d, Antitrust and competition in India, available at <https://globalcompliancencnews.com/antitrust-and-competition/antitrust-and-competition-in-india/>.

<sup>33</sup> Competition Commission of India, Case No. 30/2017, Noida Software Technology Park/Star India/Sony Pictures Network India, 27 July 2018, available at <https://www.cci.gov.in/sites/default/files/Case%20No.%2030%20of%202017.pdf>.

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 Region/country
 

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	Functioning of the European Union. The European Court of Justice has found that there is a presumption of unlawfulness of exclusive dealing where the supplier has a market share of 50 per cent. On the other hand, the Vertical Restraints Block Exemption provides a safe harbour where both parties' relevant market shares do not exceed 30 per cent and the exclusivity is for no more than five years.
United States	United States courts generally regard exclusive dealing as vertical agreements and therefore subject to a rule of reason analysis ( <i>Standard Stations v. United States</i> , 1949). In its landmark opinion in <i>Continental TV v. GTE Sylvania</i> , the Supreme Court specifically noted that the market impact of vertical non-price intra-brand restriction was complex, due to a simultaneous reduction of intra-brand competition on the one hand and an increase of inter-brand competition on the other. <sup>34</sup>
China	Article 17 of the Chinese Anti-Monopoly Law sets out a non-exhaustive list of the types of behaviour that absent a justification, would be considered abusive and therefore prohibited. By the end of 2018, although no investigations have been initiated against stand-alone non-price vertical agreements, investigations on abuse of dominance have been related to vertical arrangements, among them exclusive dealing. In the automobile industry, currently two types of exclusive dealings regarding spare parts initiated by automobile manufacturers holding dominant positions in the aftermarkets of their branded automobiles are being monitored by the Chinese Competition Authority, including exclusive purchasing obligations imposed on authorized network members (i.e. restrictions on buying from alternative sources) and exclusive supply obligations imposed on parts suppliers by restricting such suppliers from selling private brands directly to the aftermarket.
Chile	Under Chilean competition law, exclusive dealing is a vertical restraint covered by the general principle of article 3 of the Decree Law N°211/1973, that any act or contract that prevents, restrains or hinders free competition or tends to produce such effects may be subject to sanctions. Moreover, exclusive vertical agreements can constitute instruments of abusive dominance as any contractual provision can be construed as "abusive" if it is aimed at raising unjustified entry barriers to create or strengthen a dominant position. Accordingly, the Chilean competition authority found that exclusive dealing clauses, subscribed by dominant undertakings that generate entry barriers will be deemed anticompetitive ( <i>FNE v. CCU</i> ).
Republic of Korea	The Korea Fair Trade Commission enforces Korean Competition Law under the Monopoly Regulation and the Fair Trade Act, including the abuse of dominance. In this context, the Korea Fair Trade Commission has investigated for instance, Google Play, inquiring whether Google has engaged in exclusive dealing with game developers.

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(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;*

40. Arrangements between a supplier and its distributor often involve the allocation of a specific territory (territorial allocations) or specific type of customer (customer allocations),

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<sup>34</sup> Concerning unilateral refusals to deal, see *United States v. Colgate and Company*, Supreme Court of the United States, 1919, 250 US300, 39 S. Ct. 465, 53 1.Ed. 992, 7 A.L. R. 443. Also, *Eastman Kodak v. Image Technical Services Inc.*, 504 US451 (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).

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 intra-brand 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 inter-brand competition in the market. Nevertheless, restrictions on intra-brand competition may be benign or pro-competitive if the market concerned has significant competition between brands.

41. 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.

42. 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.

43. 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.

44. 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.

**Alternative approaches in existing legislation: Territorial and customer allocation**

*Region/country*

European Union	Territorial or customer allocations are generally not permitted according to Article 4 (b) of the European Commission’s vertical agreements block exemption regulations and the Vertical Guidelines. The Vertical Guidelines provide, however, for certain exceptions (“white list”), such as selective distribution systems.
Japan	Under the Japanese Fair Trade Commission Public Notice “Designation of Unfair Trade Practices”, trade between businesses is prohibited if it is based on conditions which unjustly restrict any trade between the parties. This general provision covers unjustifiable restrictions other than RPM or exclusive dealing, such as territory or customer restrictions. In its guidelines concerning distribution systems and business practices under the Antimonopoly Act, the Fair Trade Commission further provided criteria for the legality of territory or customer allocations.

(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.*



45. 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.

46. 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.

47. When certain economic conditions hold, tying could theoretically enable a firm that is dominant in one market to leverage its market power into another market, diminishing or eliminating competition in the second market and foreclosing entry by new firms.

48. Against the backdrop of digitization, the concepts of tying and bundling have been modified, as they were originally developed for the combined sale of two products and are now applied to cases in the digital economy and involve practices such as software integration or prioritized display in searching online rankings.

#### **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. In order to find an unlawful tying, an anticompetitive effect must be shown in that there is evidence of actual harm to consumer welfare or its results in substantial foreclosure of the market to rivals (*Competition Commission v South African Airways (Pty) Ltd. 18/CR/Mar01*) and no showing of technological, efficiency or other pro-competitive gains which outweigh the anticompetitive effect of that conduct.

#### **Asia**

China      Article 17(5) of the Anti-Monopoly Law of China states that an undertaking 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.

India      Under Indian competition law, tying constitutes a vertical agreement that is subject to a rule of reason analysis. The practice is specifically listed and may be prohibited under the Competition Act depending on their actual or likely effect on conditions of competition. For the assessment of these likely effects the Indian Competition Authority considers the factors listed in section 19 (3) of the Competition Act.<sup>35</sup> These factors include, for example, the elimination of existing competitors out of the market, foreclosure and higher market entry barriers.

<sup>35</sup> India, The Competition Act 2002, available at [https://www.cci.gov.in/sites/default/files/cci\\_pdf/competitionact2012.pdf](https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf).

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*Region/country*


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**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 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. In 2018, the European Commission fined Google after a three-year investigation, inter alia, for engaging in illegal tying and bundling practices. Google's conduct included illegal tying of its search and browser applications (European Commission, Case AT.40099 – Google Android, 18 July 2018).

**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.

Argentina Section 3 of the Argentinian Antitrust Law provides a non-exhaustive list of practices, that, if they satisfy the requirements set out in section 1 of the Antitrust Law, constitute illegal practices. According to section 3 (f) and (g), these include conditions that tie the sale of goods to the purchase of other goods or to the use of a service, and conditions that tie the provision of a service to the use of another service or the purchase of goods, as well as conditions that tie a purchase or sale to an undertaking not to use, purchase, sell or supply goods or services produced, processed, distributed or commercially exploited by third parties.<sup>36</sup>

**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" (Northern Pacific Railway Company v. United States, 356 US 1, 5–6 (1958)).

Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another.<sup>37</sup> 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;
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<sup>36</sup> Argentina, National Commission for the Defence of Competition, 2018, Draft guidelines for the analysis of cases of the abuse of dominance, available at [https://www.argentina.gob.ar/sites/default/files/traduccion\\_ingles\\_lineamientos\\_abuso\\_posicion\\_dominante.pdf](https://www.argentina.gob.ar/sites/default/files/traduccion_ingles_lineamientos_abuso_posicion_dominante.pdf).

<sup>37</sup> See Northern Pacific Railway Company v. United States, 356 US1, 6 (1958); Times-Picayune Publishing Company v. United States, 345 US594, 605 (1953).

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Region/country

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- (c) The arrangement affects a substantial volume of interstate commerce;  
 (d) The defendant has “market power” in the tying product market.<sup>38</sup>

The Supreme Court of the United States explained in *Jefferson Parish, 466US*, 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.<sup>39</sup>

In *Jefferson Parish* the Supreme Court also 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”. 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 US38, 46 (1962)).

In the *Microsoft* case, the United States Court of Appeals for the District of Columbia Circuit announced a new and permissive liability rule that repudiated the Supreme Court’s dominant rule of per se illegality for tying due to the court’s concern for the dynamic effects that a per se rule would have on innovation (*United States v. Microsoft Corp.*, 253 F.3d 34, 48 (D.C. Cir. 2001)).

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*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.*

49. 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.

50. 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.

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<sup>38</sup> *Eastman Kodak Company v. Image Technical Services Inc.*, 504 US451, 461–62 (1992).

<sup>39</sup> See *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 US28, 34–35, 126 S. Ct. 1281, 1286, 164 L. Ed. 2d 26 (2006).

51. 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.

52. 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.

53. 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.

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