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Review of application and implementation of the Set

Model Law on Competition (2010) – 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:

(i) 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;

(ii) 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 as 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 which 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 which 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 designee.

III. Authorization or exemption

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

COMMENTARIES ON CHAPTER IV AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATIONS

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

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

(i) 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;

(ii) 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 as 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 anti-competitive.

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 anti-competitive; nor is the acquisition of dominance through competition on the merits. However, the exercise or abuse of a dominant position may lead to (i) reduced output and increased prices; (ii) reduced quality and variety of services/products; or (iii) limitation of innovation, which would be considered as anti-competitive.

3. Competition laws handle the question of whether a company is to be considered as 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 price or reduce output will be frustrated 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.

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.

Box 4/1

Barriers to entry in competition law and policy

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

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

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

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

9. To some jurisdictions, the concept of dominance refers not only to the situation where an enterprise acts unilaterally, but also to the situation in which two or more enterprises acting together have market power or have the incentive to act in lock step and together they have market power (collective dominance). This refers to highly concentrated markets, where two or more enterprises control a large share of the market, creating and enjoying conditions through which they can dominate or operate in the market very much in the same manner as would a monopolist. This criterion was adopted by the European Commission and the Court

of First Instance of the European Communities[1] in the Vetro Piano in Italia Judgment,[2] which was soon followed by the Nestlé Perrier merger case.[3] The cumulative effect of use of a particular practice, such as tying agreements, may well result in an abuse of a dominant position.

Alternative approaches in existing legislation – Finding of a dominant position

Region / Country	
Africa	
Zambia	In Zambia, under section 7 (2) of the Competition and Fair Trading Act 1994, abuse of dominant power is expressed as acts or behaviour that limit access to markets or otherwise unduly restrain competition, or have or are likely to have adverse effects on trade or the economy in general. Generally, an enterprise is considered to be dominant if it has a level of market power that allows it to behave independently of competitive pressures (e.g. pricing and distribution strategies). An important but not conclusive factor in determining dominance is the share of the market of the undertaking. An undertaking is unlikely to be dominant if its market share is less than 40 per cent – although this rule will largely depend on the circumstances of the case.
Asia/Pacific	
China	According to Article 17 (2) of the Anti-Monopoly Law of the People's Republic of China, a dominant market position is defined as a market position held by business operators that have the ability to control the price or quantity of commodities or other trading conditions in the relevant market or bloc or to affect the entry of other business operators into the relevant market. Furthermore, six main factors to determine a dominant market position of a business operator are provided by Article 18: (i) the market share of the business operator and its competitive status in the relevant market; (ii) the ability of the business operator to control the sales market or the raw material supply market; (iii) the financial and technological conditions of the business operator; (iv) the extent of reliance on the business operator by other business operators in the transactions; (v) the degree of difficulty for other business operators to enter the relevant market; and (vi) other factors relevant to the determination of the dominant market position of the business operator. Article 19 (1) prescribes a rebuttable presumption of dominance when an enterprise meets any one of the following

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

Region / Country	
	conditions: (i) the market share of one enterprise accounts for half or more of the relevant market; (ii) the joint market share of two enterprises accounts for two thirds or more of the relevant market; or (iii) the joint market share of three enterprises accounts for three quarters or more of the relevant market. However, under the condition prescribed in Article 19 (1) (ii) and (iii), if any of the enterprises has a market share of less than one tenth, that enterprise shall not be considered to have a dominant market position. In addition, an enterprise that has been presumed to have a dominant market position shall not be considered as having a dominant market position if the enterprise can provide evidence to the contrary.
India	The Indian Competition Act 2002 defines “dominant position” as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. The Competition Commission of India, when inquiring whether an enterprise enjoys a dominant position or not, has due regard to all or any of these factors.
Mongolia	According to Article 3 (1) of the Law of Mongolia on Prohibiting Unfair Competition, dominance exists when a single entity acting alone or a group of economic entities acting together account constantly for over 50 per cent of supply to the market of a certain good or similar goods, products, or works carried out and services provided.
Europe (non-EU)	
Russian Federation	According to Article 5 (1) of the Russian Federation’s Federal Law on Protection of Competition of 2006, a dominant position is defined as a situation where an economic entity or several economic entities (i) have a decisive impact on the general conditions in the relevant market; or (ii) have an opportunity to remove other economic entities from this market; or (iii) can impede access to this market for the other economic entities. Article 5 (2) contains a refutable presumption of dominance if a company holds a market share exceeding 50 per cent. A company with a market share between 35 and 50 per cent may be considered as dominant, based on an economic assessment taking into account factors such as the stability of the company’s market share over time, respective market shares of the company’s competitors, and the ability of other companies to access the relevant market. Companies with a market share of less than 35 per cent may not be found dominant unless the law provides otherwise, e.g. in the case of collective dominance or in electricity markets where en electricity generation company holding a market share of 20 per cent or less may not be found dominant.

Region / Country	
Europe (EU)	
European Union	Article 102 of the Treaty on the Functioning of the European Union (TFEU) 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 which 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.[4] The Guidance on the European Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) 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: – 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), – constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry), – constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power). It is emphasized that market shares provide a useful first indication of the market structure and of the relative importance of the various undertakings active in the market. However, the European Commission will interpret market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated.
Poland	According to Article 4 (10) of the Polish Act of 16 February 2007 on Competition and Consumer Protection, a firm is presumed to hold a dominant position when its market share exceeds 40 per cent.
Czech Republic	Article 10 (1) of the Czech Consolidated Act on the Protection of Competition, 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)n, unless proven otherwise, an undertaking or undertakings in joint dominance shall be deemed not to be in a dominant position if its/their

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

Region / Country	
	share of the relevant market achieved during the period examined does not exceed 40 per cent.
Estonia	In Estonia, dominance requires that an undertaking be able to operate to an appreciable extent independently of competitors, suppliers and buyers. Dominance is presumed if an undertaking or several undertakings hold a market share of more than 40 per cent in the relevant market. Undertakings with special or exclusive rights, or in control of essential facilities, are also considered as dominant; see § 13 of the Estonian Competition Act.
Lithuania	Under the Lithuanian law on competition, a 40 per cent market share establishes a presumption of dominance. In addition, the law provides for a presumption of joint dominance when the three largest firms in a market have a collective market share of 70 per cent. Market share thresholds for the presumption of dominance are lower for retail markets; see Article 3 (11).
Germany	According to the German Act Against Restraints of Competition, 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: (i) has no competitors or is not exposed to any substantial competition; or (ii) has a paramount market position in relation to its competitors. For this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its 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 this Act, and its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings. Two or more undertakings are dominant insofar as no substantial competition exists between them with respect to certain kinds of goods or commercial services and they jointly satisfy the conditions set out above. An undertaking is presumed to be dominant if it has a market share of at least one third. A number of undertakings is presumed to be dominant if it: (i) consists of three or fewer undertakings reaching a combined market share of 50 per cent; or (ii) 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 number of undertakings has no paramount market position in relation to the remaining competitors.
Spain	The 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 competitors, its customers and consumers,

Region / Country	
	thereby being able to adjust pricing or any other characteristics of the product or service to its own advantage.
Latin America	
Brazil	Law 8,884 of 1994 presumes that a firm has a dominant position when a company or group of companies controls 20 per cent of the relevant market. This percentage is subject to change by the Administrative Council for Economic Defense (CADE) for specific sectors of the economy (Article 20, Paragraph 3).
Colombia	Decree 2153 of 1992 defines a dominant position as the "possibility of determining, directly or indirectly, the conditions of a market". Dominant position is determined on a case-by-case basis. The law provides no thresholds.
North America	
Canada	According to Subsection 79(1) of the Canadian Competition Act, for sanctioning the abuse of a dominant position, the Tribunal must firstly find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Canadian Competition Bureau's Updated Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) explain that substantial or complete control is understood to be synonymous with market power.
United States	In the United States, monopoly power is not defined by statute, but courts have traditionally defined it as being "the power to control market prices or exclude competition". *United States v. E.I. du Pont de Nemours & Co*., 351 U.S. 377, 391 (1956). Market share is not the only factor considered in determining whether monopoly power exists.

II. *Acts or behaviour considered as abusive*

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

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

12. It is not possible to provide an exhaustive list of acts that may constitute abuse of dominance. As such, "abuse of dominance" is a concept that encompasses all those acts that fit within the definition provided in the paragraph above. Nonetheless, in order to guide enforcement practice, some competition laws provide non-exclusive lists of acts that are considered abusive and are prohibited. These behaviours may include a whole range of strategies by firms aimed at raising barriers to entry into a market. Chapter 4 (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 Chapter 4 (2) does not necessarily reflect their frequency or their seriousness in terms of anti-competitive impact. It should also be highlighted that acts such as "resale price maintenance" and "parallel imports" are currently classified as vertical restraints and not as acts that constitute abuse of dominance as such. Although the acts listed are likely to be anti-competitive, this is not necessarily the case. The competition authority must undertake the analysis on a case-by-case basis to determine the effect of each practice.

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

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

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

15. The measure of cost in order to consider that predatory pricing exists varies among jurisdictions. Most jurisdictions agree that predatory pricing exists when products are being priced below average variable cost. However, debate exists on whether pricing below average total cost constitutes predatory pricing or not. In order to find that an abuse of dominance by predatory pricing exists, some jurisdictions require that the defendant have a reasonable prospect or "dangerous probability" of recouping the money it lost on below-cost pricing. Without recoupment, the practice of reducing prices may actually enhance consumer welfare.[5] Other jurisdictions consider that a reasonable prospect or dangerous probability of recoupment is not necessary for a finding of predatory pricing.[6] The defendant's act of selling beyond a measure of cost will suffice.

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

17. Predatory behaviour is not limited to pricing. Other means, such as acquisition of goods or services in order to suspend the activities of a competitor, may be considered as 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 Trade Practices Act 1974 (TPA). General prohibition in subsection 46(1) TPA: Under subsection 46(1) TPA, a corporation that has a substantial degree of power in a market must not take advantage of that power in that or any other market for one of three proscribed purposes. If the 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, subsection 46(1AAA) provides that the corporation may contravene subsection 46(1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services. That is, the general prohibition in subsection 46(1) does not require recoupment to be

[5] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, Supreme Court of the United States, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed2d 168 (1993).
[6] *Tetra Pak International SA v. Commission* case T-83/91, [1994] ECR II-755. CFI aff'd Case C-333/94P [1996] ECR I-5951, Court of Justice of the European Union.

Region / Country	
	established. The prohibition in subsection 46(1AA) TPA: Under this provision, 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 one of three proscribed purposes. This prohibition differs from the general prohibition in subsection 46(1) in two key respects: (i) the provision is attracted if the corporation has a “substantial share” of the market rather than a “substantial degree of power”, and (ii) there is no requirement that the corporation “take advantage” of its market share.
China	An example of regulations on predatory pricing appears in the People’s Republic of China Law for Countering Unfair Competition of 2 September 1993. Its Article 11 states that an operator (i.e. enterprises or individuals) may not sell its goods at a price that is below cost in order to exclude its competitors from the market. The law also lists a number of cases in which low pricing practices are not to be considered as unfair, e.g. selling fresh goods, seasonal lowering of prices, changing the line of production or closing the business.
Mongolia	Article 4 (3) of the Law of Mongolia on Prohibiting Unfair Competition forbids a dominant enterprise to sell its own goods at a price lower than the cost, with the intention of impeding the entry of other economic entities into the market or driving them from the market.
Europe (EU)	
European Union	According to Article 102 TFEU, directly or indirectly imposing unfair purchase or selling prices constitutes a case of abuse of a dominant position. The Guidance on the European Commission’s enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings explains how the European Commission assesses price-based exclusionary conduct, including predatory pricing. The European Commission will generally intervene when evidence shows that a dominant undertaking is engaging in predatory conduct by deliberately incurring losses or foregoing profits in the short term, to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.
Hungary	Article 21 (h) of the Hungarian Competition Act (2005)

Region / Country	
	prohibits the setting of extremely low prices which are not based on greater efficiency in comparison with those of competitors and are likely to drive out competitors from the relevant market or to hinder their market entry.
Latin America	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from unreasonably selling products below cost (article 20 and article 21, XVIII).
Colombia	Decree 2153 of 1992 provides that when there is a dominant position, predatory pricing will be considered abusive. The law explicitly provides that reducing prices below cost for the purpose of eliminating various competitors or preventing their entry or expansion will qualify as abuse when there is dominance.
North America	
United States	In the United States, the Supreme Court has held that two elements must be present in order to establish predatory pricing. First, the prices complained of must be "below an appropriate measure of cost", and second, the competitor charging low prices must have a "dangerous probability" of recouping its investment in below-cost prices. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. (1993). See also: *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 117 (1986). The United States Supreme Court has stated that it is important to distinguish between pro-competitive price-cutting and anti-competitive predatory pricing because "cutting prices in order to increase business often is the very essence of competition". *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

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

18. Although rarely anti-competitive, 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 is the reason why discrimination is seldom anti-competitive in an economic sense. However, price differentiation may be found to be discriminatory if there is no objective commercial justification for it. For instance, so-called loyalty discounts may lack an objective commercial justification, whereas volume discounts may be justified by economies of scale. However, it needs to be emphasized that different prices may result from the dominant company meeting the market, for instance because

negotiations took place in different market situations, or one customer simply bargained harder. Therefore, the competition authority needs to carefully assess the competitive impact of price differentiation on a case-by-case basis.

19. "Loyalty discounts" are price discrimination strategies whereby a seller gives buyers a discount if they acquire a substantial percentage of their overall purchases of the relevant product from the seller over a defined reference period. These discounts may be efficient and enhance consumer welfare by reducing prices. However, in certain circumstances they can also cause anti-competitive 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 anti-competitive exclusionary practice. The anti-competitive effect may be related to predatory behaviour at the margin ("predation analogy") or to the leveraging of assured sales to foreclose rivals from contestable markets ("bundling analogy").[7]

20. Price discrimination also covers the situation where a firm charges the same price despite incurring different costs to supply to each customer. Examples of the latter type of price discrimination may include "delivered pricing", i.e. 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 (whereby the seller charges transportation fees from that point irrespective of the actual point of shipment and the related costs).

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

Alternative approaches in existing legislation – Price discrimination

Region / Country	
Peru	In Peru, although the legislation considers discriminatory pricing as 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 (Article 10.2 (b) of the Legislative Decree 1034 approving the Law on Repression of Anti-Competitive Conduct).
Colombia	Decree 2153 of 1992 provides that when there is a dominant position, the following acts will be considered abusive: Imposing discriminatory provisions for equivalent transactions that place one consumer or supplier at a disadvantage vis-à-vis 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 the 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

[7] Padilla, A. Jorge. "The Law and Economics of Loyalty Rebates"

Region / Country	
	reducing or eliminating competition in the market;
Australia	According to the former Section 49, subsection 1 of the Australian Trade Practices Act 1974, the prohibition of discrimination was not limited to price-based discriminations, but referred also to credits, provision of services, and payment for services provided in respect of the goods. It was also pointed out that differential terms and conditions should not be considered unlawful if they were related to cost differences. More generally, preventing firms from offering lower prices to some customers could well result in discouraging firms from cutting prices to anyone. Since Section 49 of the Australian Trade Practices Act 1974 was repealed in 1995, conduct that would have been considered prohibited under that provision is instead addressed by Section 45, if it results in a substantial lessening of competition, or by Section 46 if it is the result of the misuse of market power by a corporation.

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

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

23. In this context, it also needs to 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 anti-competitive vertical agreements.

Alternative approaches in existing legislation – Resale Price Maintenance

Region / Country	
Latin America	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from "imposing on distributors, retailers and representatives of a certain product or service retail prices, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties" (article 20 and article 21, XI).

Region / Country	
Europe (EU)	
European Union	EU competition law does not qualify RPM as a specific type of abuse of dominance, but as an anti-competitive feature of vertical agreements. According to Article 4 (a) of the block exemption for certain categories of vertical agreements of 2010, RPM constitutes a hardcore restriction that excludes the application of the block exemption to the vertical agreement in question. It is defined as a restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
Sweden	In Sweden, an economic approach has been chosen concerning resale price maintenance. The setting of minimum prices with an appreciable effect on competition is covered by the prohibition against anti-competitive cooperation as laid down in the Swedish Competition Act. However, setting maximum prices is not generally prohibited.
North America	
Canada	Formerly, Canadian competition law sanctioned resale price maintenance criminally. However, in 2009, this criminal 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”; see Section 76 of the Canadian Competition Act. Note that 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	In the United States, the Supreme Court has held that minimum resale price maintenance is *per se* illegal under Section 1 of the Sherman Act, but there must be an actual agreement requiring the distributor to adhere to specific prices. See *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988). Because maximum resale price maintenance may lead to low prices, the Supreme Court recently ruled that maximum resale price maintenance is not *per se* an offence. The court instead applied the rule of reason analysis to the conduct in that case, pursuant to

Region / Country	
	which the agreement had to be analysed to determine if it was in fact anti-competitive. See: *Leegin Creative Leather Products Inc. v. PSKS Inc. dba Kay's Kloset*, 551 U.S. 877 (2007).

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

24. Parallel imports are the most common form of restrictions referred to in Chapter IV (II) (d) of the Model Law on Competition. Also called "grey-market" imports by those seeking to discredit them, they can be described as goods produced under protection of an intellectual property right (e.g. trademark, patent or copyright), which are placed into circulation in one market by the intellectual property right-holder, or with his consent, and then imported into a second market without the authorization of the owner of the local intellectual property right (IPR). 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-quoted provision of the Model Law on Competition.[8]

25. The ability of a right-holder to exclude parallel imports legally from a particular market depends on the importing nation's intellectual property and competition laws. An intellectual property regime of national exhaustion awards the right to prevent parallel imports, while one of international exhaustion makes such imports legal. Under national exhaustion, exclusive distribution rights end upon first sale within a country, but this will have no effect on the existence of exclusive distribution rights in another country, giving local IPR owners in that other country the right to exclude parallel imports from the country of first sale. Under international exhaustion, distribution rights are exhausted upon first sale anywhere in the world, and parallel imports cannot be excluded.[9] Finally, under a regime of regional exhaustion, exclusive distribution rights are exhausted upon the first sale of the protected goods within a given region, enabling parallel importation within the region, but not from

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

[9] See: Maskus K (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.

outside the region. In this context, it needs to be noted that all of these regimes are in line with the minimum standard[10] provided under the TRIPS agreement.[11]

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

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

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

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

Region / Country	
Japan	Japan has taken measures in several cases against unfair prevention of parallel imports of branded porcelain tableware, pianos, ice cream and automobiles.
European Union	According to the principle of EU-wide exhaustion, IPR holders are not allowed to restrict parallel imports within the EU. This is constant jurisdiction of the Court of Justice of the European Union, since its landmark decision Deutsche Grammophon/Metro:[12] "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."
New Zealand	Parallel imports are legal when the conditions set by Section 12 (5A) of the Copyright Act 1994 No. 143 are met. The respective provision reads as follows: "An object that a person imports or proposes to import into New Zealand is not an infringing copy under subsection (3)(b)

[10] See Article 6, TRIPS agreement.
[11] Agreement on Trade-Related Aspects of Intellectual Property Rights.
[12] Court of Justice of the European Union, 78/70 [1971] E.C.R. 487.

	if— (a) it was made by or with the consent of the owner of the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made; or (b) where no person owned the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made, any of the following applies: (i) the copyright protection (or other equivalent intellectual property right protection) formerly afforded to the work in question in that country has expired: (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 to secure the copyright (or other equivalent intellectual property right) in the work in that country: (iii) the object is a copy in 3 dimensions of an artistic work that has been industrially applied in that country in the manner specified in section 75(4): (iv) the object was made in that country by or with the consent of the owner of the copyright in the work in New Zealand."

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

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

29. As a general rule, firms have freedom of contract and therefore enjoy the ability to refuse to deal with other undertakings. Jurisdictions recognize that an obligation to deal might lead to less investment and innovation. In some circumstances, however, refusals to deal may be used as a mean 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 indispensible for its competitors to do business and which cannot be duplicated at commercially sensible cost. In these cases, the negative effects of the exclusion of competitors cannot be outweighed by promotion of investment and innovation.

30. However, it needs to be kept in mind that refusals to deal are not in and of themselves anti-competitive, 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, image etc. of the manufacturer's product. This is also the case when an enterprise announces in advance the circumstances under which it will refuse to sell.

Alternative approaches in existing legislation – Refusal to deal

Region / Country	
Brazil	Law 8.884 of 1994 forbids an enterprise with a dominant position from "denying the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies" (article 20 and article 21, XIII).
United States	"The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct 2847, 86 L.Ed.2d 467 (1985)). Under certain circumstances, a refusal to cooperate with rivals can constitute anti-competitive conduct that violates [Section 2]. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anti-competitive conduct by a single firm. (…) We have never recognized such a doctrine [essential facilities] (…) and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purposes. .[13]

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

[…]

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

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

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

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

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

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

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

[...]

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

35. Arrangements between a supplier and its distributor often involve the allocation of a specific territory (territorial allocations) or specific type of customer (customer allocations), i.e. where and with whom the distributor can deal. For example, the distributor might be restricted to sales of the product in question in bulk from the wholesalers, or to only selling directly to retail outlets. The purpose of such restrictions is usually to minimize 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.

36. Territorial allocations can take the form of designation of a certain territory to the distributor by the supplier, the understanding being that the distributor will not sell to customers outside that territory, nor to customers who may, in turn, sell the products in another area of the country.

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

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

designated territory for fear of price competition in areas where prices are set at the highest level.

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

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

[...]

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

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

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

Alternative approaches in existing legislation – “Tying and bundling”

Region / Country	
Latin America	
Brazil	Law 8,884 of 1994 forbids an enterprise with a dominant position from “conditioning the sale of a product on acquisition of another or on contracting of a service, or conditioning performance of a service on the contracting of another or on purchase of a product”(article 20 and article 21, XXIII).
North America	
United States	The United States Supreme Court had defined tying arrangements as: “an agreement by a party to sell one product

Region / Country	
	but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[14] Tying arrangements have been found unlawful where sellers exploit their market power over one product to force unwilling buyers into acquiring another.[15] Liability for tying under section 1 of the Sherman Act exists where (i) two separate products are involved; (ii) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (iii) the arrangement affects a substantial volume of interstate commerce; and (iv) the defendant has "market power" in the tying product market.[16]

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

[15] See: *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 V.S.2, 12(1984); *Northern Pacific Railway Co. v. United States,* 356 US1, 6(1958); *Times-Picayune Publishing Co. v. United States,* 345 US 594, 605 (1953).

[16] *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 US.2 (1984); *Eastman Kodak Co. v. Image Technical Services Inc.*, 504 US. 451, 461-62 (1992).

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 for article 6, before being put into effect, if all relevant facts are truthfully disclosed to competent authorities, if the affected parties have an opportunity to be heard, and if it is then determined that the proposed conduct, as altered or regulated if necessary, will be consistent with the objectives of the law.

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

43. Not all countries that modelled their competition laws on the basis of EU 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 3 and 5.

44. Note that traditionally, authorizations and exemptions only relate to anti-competitive 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.