



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL IV - COMPETITION

Brussels, February 1996

## **Survey of the Member State National Laws Governing Vertical Distribution Agreements**

Compiled by

Laraine L. Laudati  
European University Institute  
Florence, Italy

and a group of trainees at DG IV



---

## Table of Contents

	<i>Page</i>
<b>Introduction and summary of findings</b>	5
<b>I. THE NATIONAL LAWS APPLICABLE TO VERTICAL AGREEMENTS</b>	11
<b>Existing Law</b>	11
Member States with laws whose structure is similar to that of Article 85	11
<i>General description</i>	11
<i>Block exemptions</i>	11
Member States with laws whose structure is not similar to that of Article 85	12
<i>General description</i>	12
<i>Block Exemptions</i>	13
Third Countries	13
<b>Expected Modifications</b>	14
Member States with laws whose structure is similar to that of Article 85	14
Member States with laws whose structure is not similar to that of Article 85	14
Third Countries	15
<b>Number of Cases Per Year</b>	15
Member States with laws whose structure is similar to that of Article 85	15
Member States with laws whose structure is not similar to that of Article 85	15
Third Countries	16
<b>II. POLICY GOALS UNDERLYING VERTICAL RESTRAINTS LAWS</b>	17
<b>Member States with laws whose structure is similar to that of Article 85</b>	17
<b>Member States with laws whose structure is not similar to that of Article 85</b>	17
<b>Third Countries</b>	18
<b>III. TYPES OF VERTICAL RESTRAINTS UNDER NATIONAL LAW</b>	19
<b>Member States with laws whose structure is similar to that of Article 85</b>	19
Restrains in general	19
Resale price maintenance	19
<b>Member States with laws whose structure is not similar to that of Article 85</b>	19
Restrains in general	19
Resale Price Maintenance	20
<b>Third Countries</b>	21
Restrains in general	21
Resale Price Maintenance	21

---

<b>IV. CRITERIA FOR DECIDING WHETHER VERTICAL RESTRAINTS ARE UNLAWFUL</b>	22
<b>Member States with laws whose structure is similar to that of Article 85</b>	22
Criteria	22
De minimis rules	23
Sectoral studies	23
<b>Member States with laws whose structure is not similar to that of Article 85</b>	23
Criteria	23
De minimis rules	24
Sectoral studies	24
<b>Third Countries</b>	25

## **TABLES**

<b>I. NATIONAL LAWS GOVERNING VERTICAL AGREEMENTS</b>	27
<b>II. POLICY GOALS OF LAWS APPLICABLE TO VERTICAL RESTRAINTS</b>	41
<b>III. TYPES OF VERTICAL RESTRAINTS COVERED BY NATIONAL LAWS</b>	45
<b>IV. CRITERIA FOR DECIDING WHETHER VIOLATION EXISTS</b>	61

## *Appendixes*

<b>I. STAGIAIRES WHO COMPILED SURVEY RESPONSES</b>	70
<b>II. MEMBER STATE AND THIRD COUNTRY SURVEY QUESTIONNAIRE</b>	71
<b>III. MEMBER STATE LAWS APPLICABLE TO VERTICAL AGREEMENTS</b>	73

# SURVEY OF THE MEMBER STATE NATIONAL LAWS GOVERNING VERTICAL DISTRIBUTION AGREEMENTS

## Introduction and summary of findings

This report summarizes the findings of a survey of the national competition laws of the Member States and several third countries (Canada, Norway, USA) governing vertical distribution agreements. The survey was made in preparation for the "Green Paper on Vertical Restraints in EU Competition Policy", a chapter of which summarizes the findings herein reported. The purpose of this survey was to provide the basis for comparison of Community law and policy with Member State and third country law and policy as they apply to vertical restraints. It demonstrates that considerable diversity in the arrangements for handling vertical agreements is employed in the Member States and third countries studied. However, certain major aspects in which these systems are consistent in differing from the Community system can be identified. First, they hold that economic analysis should be employed in the first instance to determine whether an arrangement is prohibited. This is true of at least some of the Member States with systems based on the Community system (most notably France and Italy), some of the Member states with systems which differ from the Community system (most notably, Germany and the UK) and third countries (both the US and Canada). Moreover, since none of these jurisdictions is concerned with market integration, they do not provide for protection of parallel imports, as the Community system does.<sup>1</sup>

The research for this study was done in the summer of 1995 by a group of trainees at DG IV,<sup>2</sup> who gathered responses to a questionnaire,<sup>3</sup> relying on national competition laws,<sup>4</sup> annual reports, secondary sources, and telephone interviews with national authorities. Their findings were subsequently reviewed by officials of each of the national authorities<sup>5</sup>. However, the conclusions in this report are the responsibility of the author, and have not been endorsed or approved by the Member State authorities.

The Community system is regarded to be based on the "prohibition principle," under which all arrangements which meet the criteria of Art. 85(1) are prohibited and, under Art. 85(2),

---

<sup>1</sup> Under the Community system, exclusive distribution agreements containing bans on passive sales by the distributor outside its allotted territory are not exemptible. This protects the market integration goal and maintains the freedom of parties to a distribution agreement to respond to third party traders who engage in parallel trade, thereby contributing to the elimination of significant price differences between the Member States.

<sup>2</sup> Appendix 1 contains a list of the names of the stagiaires who did the research for each Member State.

<sup>3</sup> Appendix 2 contains the questionnaire used for the survey.

<sup>4</sup> The portions of the national laws applicable to vertical agreements is set forth in the second column of Table 1.

<sup>5</sup> The findings for Canada and the United States were not reviewed by their national authorities.

---

deemed automatically void; they may be eligible for exemption under Art. 85(3) if they meet specified criteria. Thus, arrangements are ultimately unlawful only if they are prohibited and do not qualify for exemption. Economic analysis is generally made only to determine whether the arrangement qualifies for exemption, but not to determine whether the arrangement is prohibited. In contrast, the systems of some Member States and third countries are based on the "abuse control principle," under which arrangements are generally considered to be lawful unless they constitute an abuse. Economic analysis would be done to determine whether an abuse is present.

As explained below, some of the Member States which have national laws structured in the same way as the Community's do not believe it is accurate to characterize their systems as based on the prohibition principle as opposed to the abuse control principle, due to the manner in which they apply the law. In particular, they undertake economic analysis in order to determine whether the arrangement is prohibited, rather than considering such analysis only at the exemption stage, as the Community does.

#### Member States with laws whose structure is similar to that of Article 85

The survey results show that the laws of 9 Member States (Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Spain and Sweden) follow the general approach of the Community, with national laws which resemble Article 85 with its two-part structure, containing a general prohibition and an exemption provision. Thus, they follow the Community's classification scheme for vertical restraints, including both territorial and non-territorial restraints, and they apply similar criteria to analyze whether a violation<sup>6</sup> exists (e.g., market position of parties, foreclosure effect, effects on intrabrand and interbrand competition). In cases which have been decided to date by national courts or authorities under these laws, the influence of Community law is often apparent.

Resale Price Maintenance (RPM) is per se prohibited in France, Greece, Portugal, Spain, and Sweden, although they allow recommended prices. In Italy, RPM is not per se illegal, but is analyzed on a case-by-case basis. In Luxembourg, both RPM and price recommendations are prohibited.

Block exemptions have been adopted by 3 of the Member States with laws similar to Article 85 (Ireland, Spain and Sweden). In all instances, national block exemptions correspond, to a greater or lesser extent, to Community block exemptions.

Only two of these Member States (Spain and Sweden) have adopted a de minimis rule. France and Italy have indicated that they do not have such a rule because they prefer to carry out a full analysis of the market and the market position of the parties. However, the Court of Appeal in France has held that agreements involving less than 10% of the relevant market are outside the scope of the law.

---

<sup>6</sup> *In this study, the term "violation" shall be used to mean the following: with respect to the Community and Member States whose laws have a two-part structure, with a general prohibition and an exemption provision, a violation shall imply that the arrangement is prohibited and not exemptible; with respect to other systems which do not employ a two-part structure, that the arrangement is contrary to the law.*

---

An important distinction was made by several Member States which have laws similar to Article 85 between their application of national law governing restrictive agreements and the Commission's application of Article 85(1): they indicated that unlike the Commission, they apply economic analysis in order to determine whether a violation has occurred. For instance, the **Italian** authority carries out a rule of reason<sup>7</sup> analysis both to determine whether a restriction exists and whether an exemption should be granted, relying heavily on economic analysis, especially the economic impact of the agreement in the relevant market. Market access, market position of the parties, duration of the agreement, and cumulative effect of the network of distribution systems are considered. The Italian authority stated in its comments: [W]hat is to be considered a restriction of competition under Article 85 of the Treaty as well as under the corresponding national provisions is in no way a self-evident issue.

Under a traditional, legalistic approach one may consider Article 85 to prohibit some clauses in vertical agreements. Nevertheless, an increasingly shared view is that Article 85(1) should be interpreted as prohibiting vertical agreements only in so far as they have an economic impact restricting competition on the market. Notably, in many judgments the European Court of Justice has held that the restrictive nature of a vertical agreement within the meaning of Article 85(1) can be considered only by reference to its economic and legal context. On an economic appraisal, there is ample support for the view that an examination of the potentially restrictive nature (in terms of competition) of a vertical agreement should not be confined to its formal aspects.

In **France**, the lawfulness of distribution agreements is assessed with reference to the clauses in the contracts and the way in which they are applied in the economic context in which the distribution system operates. This method is utilized irrespective of whether the exclusivity clauses are in an isolated contract or a network of contracts.

The French authority believes that its interpretation differs from the Commission's, because under French practice exclusivity in sales or purchasing does not in itself restrict competition. Thus, it takes a favourable view of distribution systems, believing that they contribute to economic efficiency and generally comply with Article 85(1) or the national law equivalent, except where they are accompanied by clauses which may be injurious to competition. The authority decides whether a restriction exists on the basis of an economic analysis, taking account of the increased competition that, more often than not, is generated by this type of system. Foreclosure and the cumulative effect of a network of agreements constitute principal criteria for assessing whether a restriction of competition is present. The French authority views the presence of a degree of permanent competition as a justification for not finding a restriction, which it contrasts with the Commission's approach, which considers it as a condition for granting an exemption.

If, after this initial assessment, the French competition authority concludes that an appreciable restriction of competition is present, it considers whether an exemption is justified. Its analysis is more strict than the Commission's at this point. The authority explained:

---

<sup>7</sup> *The Bundeskartellamt, in its comments on this study, objected to use of the term "rule of reason" being made in the study on grounds that this use was not consistent with the term's meaning in Germany and the US. It stated that "according to US antitrust law the 'rule of reason' allows within the scope of the prohibitory provision to weigh the advantages and disadvantages of a competition restriction and in the case of prevailing disadvantages to deny the fact of violation of the prohibition." Here, the term is used to signify that a variety of factors are balanced in order to determine ultimately whether a violation exists - that is, whether the arrangement falls within the prohibition and is not exemptible in the EU system.*

---

[R]ecent exchanges among Member State authorities, notably that held in Brussels last spring, [at the European Competition Forum<sup>8</sup>] showed that several countries [with laws similar to Article 85] consider that vertical agreements may have, in certain cases, a favorable effect on competition.

It is only when vertical agreements have a potentially anticompetitive object or effect that they are prohibited under the 1986 competition law, unless they do not result in a sufficient economic benefit. The provision on abuse of dominant position is based on the same conditions.

Member States with laws whose structure is not similar to that of Article 85

The laws applicable to restrictions of competition in the remaining 6 Member States (Austria, Denmark, Finland, Germany, the Netherlands and the UK) do not resemble Community law. A violation is generally based on the finding of some type of abuse:

- in **Austria**, not economically justified;
- in **Denmark**, where a "dominant influence" may be exerted;
- in **Finland**, the agreement affects price formation, decreases efficiency, prevents or complicates the practising of trade by another party, or is incompatible with a binding international agreement in a manner incompatible with sound and effective competition;
- in **Germany**, the restraints have an adverse effect on competition (for exclusive distribution agreements, exclusive purchasing agreements, and selective distribution systems), or the restraints exceed the scope of licensed rights (for license agreements);
- in the **Netherlands**, the restraints are contrary to the general interest;
- in the **UK**, contrary to the public interest.

The classification scheme for violations varies considerably among these countries, but all of them have per se rules against RPM. Austria is the only country in this group which has adopted block exemptions, which are similar to Community block exemptions.

Five of these countries (all but Finland) are currently considering reforms of national competition law which may bring them more into line with Community law.

The **German** authority takes the view that a restrictive organization of distribution does not as a rule endanger workable competition, but can do so when combined with a degree of market power. Thus, under German law, exclusive distribution agreements and exclusive

---

<sup>8</sup> On 3 and 4 April, 1995, the Commission organised the First European Competition Forum at the Palais du Congrès in Brussels. More than 260 participants who were competition authorities and judges from 35 countries, including all 15 Member States, were present. The proceedings of the Forum will be published in 1996 jointly by John Wiley & Sons, Ltd. and the Office for Official Publications of the European Communities. A summary of the proceedings was published in Vol. 1, No. 5 of DG IV's Competition Policy Newsletter. L. Laudati, "The First European Competition Forum: Vertical restraints" (Summer 1995), p. 7.

---



purchasing agreements are permissible in principle but subject to supervision by the competition authorities in order to prevent abuse.

In the **UK**, exclusive distribution and exclusive purchasing agreements are not covered by the law dealing with agreements, but rather by the law which allows the authorities to investigate on a case-by-case basis if a market share threshold of 25% is reached either by one firm or a group of firms through a network of vertical arrangements. A rule of reason analysis is followed, which involves a balancing of the effect that vertical restraints have on competitive rivalry at both manufacturing and retailing level against the benefits arising from efficiency gains. In making this analysis, two main structural conditions are considered relevant:

- market imperfections upstream or downstream, giving rise to significant individual or collective market power in the short to medium term;
- widespread use of vertical restraints in a given product market, affecting a significant proportion of total market sales, with no history of significant entry.

Efficiency gains are considered by UK authorities as least likely to be strong when the product is simple or non-technical, inexpensive, subject to repeat purchases, sold in convenience outlets, and when consumer information is widely available, strong branding is present, the product is mature, entry barriers in retailing are high, and economies of scale in retailing are substantial. RPM is illegal, but allowed if the Restrictive Practices Court rules that failure to apply minimum RPM would cause a net detriment to the public. Several in-depth studies have been carried out recently which involve issues of vertical restraints in the beer, petrol, carbonated drinks, cars and ice cream sectors.

### Third Countries

#### United States

The goal of US antitrust law is to promote consumer welfare; it has no goal to promote market integration. Vertical restraints are mainly governed by Section 1 of the Sherman Act,<sup>9</sup> which provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal.

In 1977, the Supreme Court ruled in *GTE Sylvania*<sup>10</sup> that non-price vertical restraints are to be subjected to analysis under the rule of reason, recognizing that such restraints may "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products". In the absence of market power by the manufacturer, distribution arrangements which contain non-price vertical restraints are generally considered to be legal because they promote efficient delivery and a stable supply of goods and services for the consumer, and to increase interbrand competition by enhancing the ability of manufacturers within an industry to compete for customers. Moreover, the anticompetitive risks of such restraints is generally believed to be low, as the manufacturer's interest is in

---

<sup>9</sup> *In certain circumstances, Section 2 of the Sherman Act and Section 3 of the Clayton Act may be applicable to vertical restraints.*

<sup>10</sup> *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977).

---

developing effective distribution in order to maximize sales to consumers, and thus it has every incentive to encourage intrabrand competition among distributors in order to keep prices low.

Rule of reason analysis involves identification of the relevant market, establishing the defendant's market power as well as a multitude of other factors used to analyze whether the restraint adversely affects competition in the inter-brand market, and the justifications establishing a legitimate objective and the necessity of the restraint to achieve that objective. The defendant has the burden of establishing justifications to rebut the plaintiff's claim, but the ultimate burden rests with the plaintiff to convince the court that the restraint, on balance, has an anticompetitive effect. Whether there are less restrictive alternatives to the restraint in question in order to achieve the legitimate objective must also be considered.

US courts tend to be more cautious about the anticompetitive effects of interbrand restraints, and may demand a thorough market analysis including inquiry into "both the extent of the foreclosure and the buyer's and seller's business justifications."<sup>11</sup> The degree to which competing manufacturers are deprived of outlets for their products, or distributors are prohibited from using alternative suppliers, is a threshold factor in analysis of such restraints.

There is no de minimis rule in the US. RPM is per se illegal under US law. Retail price suggestions, however, do not fall within the per se prohibition.

### Canada

Exclusive dealing and tying arrangements which are likely to have exclusionary effects on the market because they are engaged in by a major supplier of a product or widespread in a market, with the result that competition is likely to be lessened substantially, may be prohibited by the Competition Tribunal. A "market restriction" is defined as a requirement imposed by the supplier on the customer, requiring that a customer supply any product only in a defined market. If such a restriction is likely substantially to lessen competition in relation to the product, such as when it is engaged in by a major supplier of a product or because it is widespread in relation to the product, it may be prohibited by the Tribunal. Finally, a supplier may be ordered by the Tribunal to sell to a given customer who may be substantially affected in his business due to his inability to obtain adequate supplies, provided he is willing and able to meet usual trade terms. Restrictions on interbrand competition are viewed more strictly than restrictions on intrabrand competition. No de minimis rule applies, but authorities place low priority on cases of low economic impact.

---

<sup>11</sup> *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236-37 (1st Cir. 1983).

---

## I. THE NATIONAL LAWS APPLICABLE TO VERTICAL AGREEMENTS

This section provides basic information about the national laws governing vertical restraints. The foundation for this section is the information set forth in Table 1. Most importantly, this section discusses the extent to which the structure and application of national law is similar to that of the Community in this area. It also describes recent revisions which have been made to national law, and expected future revisions. Finally, it provides data, where available, as to the number of vertical restraints cases handled by national authorities.

### Existing Law

#### *Member States with laws whose structure is similar to that of Article 85*

##### *General description*

The laws of 9 Member States (Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Spain and Sweden) have national laws whose structure is similar to that of the Community.

**Belgian** law is nearly identical to Community law, and parliamentary debates refer explicitly to EU practice and jurisprudence as the basic source to guide decisionmaking by the Belgian authority. The **Irish** competition law adopts the same framework as Articles 85 and 86; Irish courts have stated that EC precedent is persuasive although not strictly binding; and the Irish authority has followed EC reasoning in many cases.

As discussed in the introductory summary above, the interpretation of the law in Italy and France differs from that in the Community. **In France**, enforcement officials and judges apply both national law and Art. 85 simultaneously. **Italian** law substantially resembles Art. 85, although it specifies that the prevention, restriction or distortion of competition must be "appreciable" in order to fall within the prohibition. Moreover, notwithstanding its resemblance to Art. 85, **Luxembourg** law is based on the abuse control principle. **Portuguese** law, which substantially resembles Art. 85, does not hold prohibited agreements automatically void, as does Art. 85, because this is deemed overly harsh.

In Portugal, Spain and Sweden, Community jurisprudence with respect to Art. 85 is generally followed when interpreting national law.

##### *Block exemptions*

Of these nine countries, 3 (Ireland, Spain and Sweden) have adopted block exemptions which apply to vertical distribution. In **Ireland**, block exemptions have been adopted for exclusive distribution agreements, petrol, and franchises, all of which are based on Community block exemptions. The Irish authority has also issued a category license for cylinder LPG dealers which covers exclusive purchase of LPG by dealers for resale. Moreover, a notice declares that restricted user, exclusive user and permitted user clauses in shopping center leases are not prohibited. In **Spain**, block exemptions have been adopted by Royal Decree, which make explicit reference to Community block exemptions 1983/83, 1984/83, 2349/84, 123/85, 4087/88, 556/89, 417/85, and 418/85. The **Swedish** government has established nine block

---

exemptions, eight of which correspond to Community block exemptions. The ninth relates to retailing chains, which has no counterpart under Community law. The Swedish block exemptions have been adapted to take account of special conditions existing on the Swedish market, including introduction of market share ceilings and turnover thresholds.

Five other Member States (Belgium, France, Greece, Italy and Portugal) have not adopted block exemptions. In **France**, Community block exemptions are used as guiding principles. In **Greece**, national courts directly apply Art. 85, including block exemptions, and use them as a guide in national law decisions. **Luxembourg** feels no urgency to adopt Community block exemptions, but it is possible that national courts would use them as guidelines in taking their decisions. In Portugal, the competition authority also follows Community block exemptions as a guide.

### *Member States with laws whose structure is not similar to that of Article 85*

#### *General description*

The national laws of 6 Member States (Austria, Denmark, Finland, Germany, the Netherlands and the UK) have national laws whose structure is not similar to that of the Community.

- In **Austria**, vertical sales agreements are generally allowed; they must be notified to the Kartellgericht (the cartel court) and can be prohibited upon request of a group of experts if they are not economically justified.
  - In **Denmark**, vertical agreements through which a "dominant influence" may be exerted must be notified, and the Competition Council can institute negotiations with the undertakings and order them to terminate the decisions or agreements if other measures fail to end the negative consequences of the anticompetitive practices.
  - In **Finland**, vertical restraints are deemed to be unlawful if, in a manner incompatible with sound and effective competition, they affect price formation, decrease efficiency, prevent or complicate the practising of trade by another party, or are incompatible with a binding international agreement. Moreover, the use of exclusive sales rights or exclusive purchasing agreements by an undertaking or an association of undertakings enjoying a dominant market position is prohibited.
  - In **Germany**, there is no general prohibition against vertical restraints. Rather, vertical agreements other than RPM are subject to abuse control. The German authority takes the view that a restrictive organization of distribution does not as a rule endanger workable competition, but can do so when combined with a degree of market power. Thus, under German law, exclusive distribution agreements and exclusive purchasing agreements are permissible in principle but subject to supervision by the competition authorities with a view to preventing abuse; license agreements are invalid if they contain restraints exceeding the scope of the licensed rights.
  - In the **Netherlands**, all agreements between enterprises are valid unless they are prohibited by a general rule which declares certain types of agreements contrary to the general interest
-

or are prohibited by a decision of the Minister of Economic Affairs who declares the specific agreement contrary to the general interest.

- In the **UK**, the treatment of an agreement containing vertical restraints depends on whether it is registrable under the Restrictive Trade Practices Act 1976, which, in turn, depends on a complex set of formal legal criteria unrelated to the economic effect of the restraint. If it is registrable, and deemed substantially anticompetitive, then the Restrictive Practices Court must decide whether it is in the public interest to allow it to continue. A rule of reason analysis is followed, which involves a balancing of the effect that vertical restraints have on competitive rivalry at both the manufacturing and retailing level against the benefits arising from efficiency gains. In making such analysis, two main structural conditions are considered relevant: market imperfections upstream or downstream, giving rise to significant individual or collective market power in the short to medium term; and widespread use of vertical restraints in a given product market, affecting a significant proportion of total market sales, with no history of significant entry. Efficiency gains are considered by UK authorities as least likely to be strong when the product is simple or non-technical, inexpensive, subject to repeat purchases, sold in convenience outlets, consumer information is widely available, strong branding is present, the product is mature, entry barriers in retailing are high, and economies of scale in retailing are substantial. If an agreement is not registrable, the authorities may nonetheless investigate it and order its discontinuance if found to be against the public interest.

### *Block Exemptions*

Of these countries, only Austria has incorporated Community block exemptions into national law, including those applicable to exclusive distribution, exclusive purchase, franchises and the automobile sector.

### *Third Countries*

In the **US**, vertical restraints are mainly governed by Section 1 of the Sherman Act,<sup>12</sup> which provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal. In 1977, the Supreme Court ruled in *Continental TV v. GTE Sylvania* that non-price vertical restraints are to be subject to analysis under the rule of reason, recognizing that such restraints may "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Absent market power of the manufacturer, distribution arrangements which contain non-price vertical restraints are generally viewed to be legal because they promote efficient delivery and a stable supply of goods and services for the consumer, and increase interbrand competition by enhancing the ability of manufacturers within an industry to compete for customers. Moreover, the anticompetitive risks of such restraints is generally believed to be low, as the manufacturer's interest is to develop effective distribution in order to maximize sales to consumers. Thus, the manufacturer has every

---

<sup>12</sup> *In certain circumstances, Section 2 of the Sherman Act and Section 3 of the Clayton Act may be applicable to vertical restraints.*

---

incentive to encourage intrabrand competition among distributors in order to keep prices low. No de minimis rule exists in the US.

In **Canada**, civil provisions govern refusals to deal, selective distribution, exclusive dealing, tied selling, and market restrictions (the equivalent of exclusive distribution); criminal provisions address govern conspiracy, price discrimination and RPM. No de minimis rule applies, but authorities place low priority on cases of low economic impact. Exclusive dealing and tying arrangements which are likely to have exclusionary effects on the market because engaged in by a major supplier of a product or widespread in a market, with the result that competition is likely to be lessened substantially, can be prohibited by the Competition Tribunal. A market restriction, defined as a requirement imposed by the supplier on the customer that the customer supply a product only in a geographically defined area, which is likely to substantially lessen competition in relation to the product, such as when it is engaged in by a major supplier of a product or because it is widespread in relation to the product, may be prohibited by the tribunal. A supplier may be ordered by the Tribunal to accept a given customer who may be substantially affected in his business due to his inability to obtain adequate supplies, provided he is willing and able to meet usual trade terms. Restrictions on interbrand competition are viewed more strictly than restrictions on intrabrand competition.

In **Norway**, the competition act, which entered into force on 1 January 1994, is based on the abuse control principle. Thus, vertical restraints are legal unless the Authority, upon individual scrutiny, intervenes with respect to the restraints in question.

### **Expected Modifications**

#### *Member States with laws whose structure is similar to that of Article 85*

Four of these Member States (Belgium, France, Ireland, and Sweden) are considering modifications to their national competition law which would affect the treatment of vertical agreements. **Belgian** authorities expect the law to be modified to limit the number of mergers falling within its control. Since they currently devote most of their resources to merger control, such a modification would allow them to begin to look into vertical restraints cases, which is expected to result in an increase in the number of notifications and the adoption of block exemptions. In **Ireland**, a bill currently before parliament would give the national authorities powers to enforce the law which it currently does not have, and would allow the grant of negative clearances. In **Sweden**, the block exemption on motor vehicles is being reviewed to determine whether modifications are needed in response to the adoption of the new Community block exemption in this area.

#### *Member States with laws whose structure is not similar to that of Article 85*

Five of these Member States (Austria, Denmark, Germany, the Netherlands, and the United Kingdom) are considering harmonization of national competition law with Community law. In Austria, a general revision of the national competition law is expected, which would harmonize it with Community law. However, discussions are still underway at a political level. In **Germany**, no concrete proposal for amendment to the law yet exists, but interested parties have clearly indicated that the abuse control principle would be preserved with respect

---

to vertical restraints. In the **Netherlands**, a draft bill was adopted by the government in July 1995 and sent to the State Council for advice. It is expected to be presented to the parliament in 1996. It would harmonize Dutch law with Community law and transform the current abuse control system into a prohibition system. In the **UK**, the Government proposed revision of the law relating to anticompetitive agreements in 1989, which would provide for a general prohibition, subject to block or individual exemptions. Legislation to implement these changes will be introduced, according to the OFT, "when the legislative timetable permits."

### *Third Countries*

**Canada** is considering modifications to its current competition rules. However, the proposed modifications have not yet been made public.

### **Number of Cases Per Year**

#### *Member States with laws whose structure is similar to that of Article 85*

In **Belgium**, until now, the authority has initiated no proceedings with respect to vertical restraints due to resource limitations. In **France**, 9 vertical restraints cases (including 3 related to general sales conditions, 3 related to selective distribution, 1 franchise agreement, and 2 other vertical agreements) were dealt with by the Authority in 1994. In **Greece**, 3 vertical restraints cases (including 2 related to exclusive distribution and one franchise agreement) were dealt with by the authority in 1994. In **Ireland**, no data exists because the authority has no power to initiate cases. However, it has received a substantial number of notifications from the time the law took effect in 1991 through 1994: 54 pertaining to exclusive purchase agreements, 196 pertaining to exclusive distribution agreements, and 26 pertaining to franchise agreements. In **Italy**, the authority issued decisions with respect to 13 vertical agreements in 1993 and 11 in 1994, but it initiated proceedings in 6 cases in 1993 and 4 in 1994. In Portugal, approximately 6 vertical restraints cases were initiated during 1994. In Luxembourg, no data is available. In Spain, on average, the authority "instructs" approximately 15 cases per year involving vertical restraints. In Sweden, no data is available.

#### *Member States with laws whose structure is not similar to that of Article 85*

In **Austria**, although the authority received 805 notifications of vertical restraints in 1994, none resulted in any action. The Austrian Cartel Court has not yet decided any cases. In **Denmark**, on average, the authority has taken measures against anticompetitive practices in 6-7 cases per year involving vertical restraints. In **Finland**, the authority received 69 requests to initiate procedures concerning vertical restraints in 1994; 32 decisions concerning vertical restraints were issued simultaneously; in 13, the company modified or abolished the restriction which was deemed to have harmful effects; in 19, the restriction was deemed acceptable. The authority initiated approximately 3-5 cases per year on its own initiative. In **Germany**, no reliable statistics exist respecting vertical restrictions. However, it appears that approximately 25 cases are brought per year. In the **Netherlands**, it appears that 3-5 decisions are reported each year, but no definitive data is available. Finally, in the **UK**, no data is available.

---

*Third Countries*

In the **US**, enforcement of vertical price fixing cases decreased during the 1980's. However, the Clinton Administration recently filed a complaint in federal court alleging RPM. This is the second RPM case to be filed in the last 10 years. The Department of Justice has indicated that it will vigorously pursue other similar cases. The states have also brought cases for violations involving vertical restraints.

In **Norway**, in 1994, the Authority ordered companies presumed to have committed infringements to obey the prohibitions of the Act in the future in 176 cases and granted 106 exemptions, 8 involving RPM during 1994.

---



## II. POLICY GOALS UNDERLYING VERTICAL RESTRAINTS LAWS

The policy goals underlying existing national laws governing vertical restraints is set forth in Table 2.

### Member States with laws whose structure is similar to that of Article 85

Of the 9 Member States with vertical restraints laws which resemble the Community's, two (Belgium and Greece) state that they have an explicit policy objective to be in harmony with Community law; Ireland states that its policy objectives are similar to the Community's.

**Spain** has articulated a policy objective specifically applicable to vertical restraints: to obtain efficient and diversified means of distribution with a positive effect on the market and the end user.

General objectives of competition law were set forth by several Member States.

- In **France**, the rules applicable to vertical restraints have the objectives of punishing anticompetitive practices, to put to an end restrictive practices or to redress damages caused by restrictive practices.
- In **Greece**, competition law is designed to protect the competitive process for the benefit of the consumer and the national economy.
- In **Italy**, competition law is designed to protect and guarantee the right of free enterprise, promoting the competitive process to the benefit of consumers.
- In **Portugal**, competition law has as its aims "the unhindered development of supply and demand and market access, a balance in the relations between economic undertakings, the encouragement of the general objectives of economic and social development, an increase in the competitiveness of business undertakings, and the protection of the interests of the consumer."
- The purpose of the **Swedish** Competition Act is to eliminate and counteract obstacles to effective competition in production and trade in goods, services and other products.
- **Luxembourg's** policy objective with respect to its competition law of 1970 was designed to fill a gap left by a number of national regulations and international treaties.

### Member States with laws whose structure is not similar to that of Article 85

Of the Member States with vertical restraints law which do not resemble the Community's, several have announced policy objectives of their laws applicable to vertical restraints.

- **Denmark's** objective is to promote competition and thus strengthen the efficiency of production, distribution, service, etc. through measures securing free market entry.
-

- The **Finnish** law announces no explicit policy goals for vertical restraints, but the general goal of the competition law applies to vertical restraints: the protection of sound and effective economic competition from harmful restrictive practices, with special attention to the interest of consumers and the protection of the freedom of entrepreneurs to operate without unjustified barriers and restrictions.
- Provisions governing exclusive dealing arrangements in **Germany** are designed to protect the interests of the parties who would be restrained, potential entrants, and competition. Germany also has set forth a specific policy objective related to the law applicable to RPM and recommended prices: protection of competitive freedom of action of the contracting parties and protection of all market participants who would be affected by the lack of freedom of action of the contracting parties. Indirectly, a goal also exists to protect competition as an institution.
- In the **Netherlands**, a goal is to ensure that intrabrand competition is not prevented through the foreclosure effect; the prohibition of RPM is designed to ensure that consumers receive the benefits that flow from efficient distribution systems, such as lower prices or the availability of choice.
- UK law is designed to promote the "public interest."

### **Third Countries**

The goal of **US** antitrust law is to promote consumer welfare; it has no goal to promote market integration.

**Canadian** competition law seeks to strengthen the role of market forces, thereby encouraging maximum efficiency in the use of economic resources. Competition is regarded as a vehicle to the achievement of economic efficiency. The principle objectives of the law are efficiency, adaptability and international competitiveness.

In **Norway**, the policy objective is to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition.

---

### III. TYPES OF VERTICAL RESTRAINTS UNDER NATIONAL LAW

The types of vertical restraints covered by national law (exclusive distribution, exclusive purchase, selective distribution, franchises, customer and use restrictions; territorial and non-territorial) are presented in Table 3. The footnotes of Table 3 contain summaries of many decisions of the national authorities and national courts for each Member State and third country. Reference is made to some of this information in the discussion which follows.

#### **Member States with laws whose structure is similar to that of Article 85**

##### *Restraints in general*

The Member States whose laws applicable to vertical restraints are structured like the Community's generally recognize the same types of vertical restraints as does the Community, including both territorial restraints (exclusive distribution, exclusive purchase, and franchises) and non-territorial restraints (exclusive distribution, exclusive purchase, selective distribution, franchises, customer and use restrictions, and resale price maintenance).

A substantial body of decisions on cases falling within the various categories exists in several of these Member States (Greece, Ireland, Portugal, and Sweden), a lesser number in Italy. The influence of Community law on national law is often apparent in the decisions of national courts or authorities. For example, in establishing a block exemption (known as a "category license" in Ireland) for certain exclusive purchase agreements, the **Irish** authority made explicit reference to Community block exemption 1984/83, and Commission decisions on exclusive purchase agreements.

##### *Resale price maintenance*

Resale Price Maintenance (RPM) is per se prohibited in France, Greece, Portugal, Spain, and Sweden, although they allow recommended prices. In **Italy**, RPM is not per se illegal, but is analyzed on a case-by case basis. In **Luxembourg**, RPM, price recommendations, and refusals to deal used as a sanction for non-compliance or unwillingness to comply with an RPM scheme are prohibited per se, but a general exception exists for books, newspapers and tobacco products. A temporary exemption may be granted by the Minister for a determined product or service to facilitate its launching on the market, such as novelty or exclusivity for a patent.

#### **Member States with laws whose structure is not similar to that of Article 85**

##### *Restraints in general*

For this group of Member States, there is considerable variation in the types of vertical restraints which have been recognized.

- In **Austria**, the law is not well developed in this area. It provides that vertical restraints are agreements between a supplier and one or more undertakings which remain

economically independent but are restricted to compete freely with respect to the purchase or distribution of goods, or the use or provision of services.

- Under the **Danish** system, the aim and effect of the restriction, rather than its formal denomination or structure, is the focus of the law through a general clause governing restrictive practices. All types of vertical restraints are covered, although the law is not yet well developed.
- In **Finland**, the practice has been to recognize the same types of vertical restraints as are recognized in the Community.
- In the **Netherlands**, the categorization scheme for the prohibitory measures is based on the type of restriction of competition, such as market sharing (assigning quotas, dividing/sharing capacity, geographical, sharing distributors and/or consumers), rather than the type of agreement.
- In the **UK**, vertical restraints are examined on a case-by-case basis. No UK law refers directly to the classifications used in Community law or in the economic analysis of vertical restraints, but in practice, authorities consider these elements in reviewing particular cases.

### ***Resale Price Maintenance***

All of these countries (Austria, Denmark, Finland, Germany, the Netherlands and the UK) have per se rules against RPM.

- In **Austria**, RPM is excluded from the rules applicable to vertical sales agreements; RPM agreements are regarded as cartels and prohibited as such.
  - In **Denmark**, RPM is prohibited; few exemptions have been granted, and they concern only books, newspapers and magazines.
  - In **Finland**, the setting of either a maximum or a minimum price is banned. An exemption may be granted with respect to RPM if it promotes the production or distribution of goods or technical or economic development and if the benefit primarily accrues to the clients or the consumers. Printing a recommended resale price on the package does not violate Finnish law.
  - In **Germany**, agreements are void to the extent that they restrain the freedom of a party to establish prices or business terms and conditions in contracts which they might enter with third parties regarding the goods supplied, or other goods or services, regardless of whether the restraints affect market conditions. This covers both legal and economic restraints. Non-binding price recommendations are allowed. Certain sectors are exempt from this provision, including publications and certain agricultural products.
  - In the **Netherlands**, RPM is prohibited, but exemptions are possible.
-

- In the **UK**, RPM is prohibited. However, the Restrictive Practices Court may exempt certain classes of goods from the prohibition, where the public detriment outweighs the procompetitive effects of the prohibition. Exemptions have been granted in the case of books and certain medicines.

## **Third Countries**

### *Restraints in general*

Under **US** law, the major categorization is interbrand restraints and intrabrand restraints. Intrabrand restraints include both price restraints, which are per se illegal, and non-price restraints, which are subject to the rule of reason. Non-price restraints may take various forms, such as territorial restrictions and customer restrictions. Interbrand restraints include exclusive purchase/dealing arrangements and tying arrangements. A tying arrangement occurs when the supply of one product (the tying product) is made contingent upon the purchase of another product (the tied product). Exclusive purchase/dealing arrangements are subject to the rule of reason; tying arrangements are subject to a presumption of illegality upon plaintiff's proof of five elements: (1) the tied and tying products are separate items; (2) the supply of the tying product is made contingent on the purchase of the tied product; (3) the supplier has sufficient market power in the tying product market to actually restrain competition in the tied product market; (4) the tie results in the anticompetitive effect of foreclosing the market to alternative suppliers of the tied product; and (5) a substantial amount of competition in the tied product market is affected by the tying arrangement.

### *Resale Price Maintenance*

RPM is per se illegal under **US** law. Retail price suggestions, however, do not fall within the per se prohibition. In **Canada**, RPM is governed by criminal provisions.

---

#### IV. CRITERIA FOR DECIDING WHETHER VERTICAL RESTRAINTS ARE UNLAWFUL

The criteria used by the national authorities to decide whether a vertical restraint is unlawful is presented in Table 4. In systems similar to the Community's, these criteria are used to determine, first, whether an arrangement is prohibited and, second, whether it is exemptible. In systems which differ from the Community's, these criteria are generally used to determine whether an abuse has been committed. The footnotes to the table contain examples of decisions by the national authorities and courts applying these criteria. Reference is made to some of this information in the discussion which follows. This section also discusses whether sectoral studies are undertaken by the authority.

##### Member States with laws whose structure is similar to that of Article 85

###### *Criteria*

In general, these Member States apply similar criteria to those applied by the EU in deciding cases. The **Belgian** parliament intends that EU decisions will be a basic source to aid interpretation of Belgian law. However, as stated above, no cases have yet been decided in Belgium in the area of vertical restraints. In **France**, the competition authority distinguishes between anticompetitive practices (i.e., agreements which have as their object or effect the restriction of competition in a market, and the abuse of a dominant position or a state of economic dependence) and restrictive practices (i.e., abusive discriminations, where a party to an agreement receives unjustified discriminatory conditions regarding prices, delays in payment, sales or purchase conditions, and which affect competitive conditions; abusive refusals to deal, where a seller refuses to sell in response to a normal demand by a buyer, and the refusal is not justified by a law or regulation, or by the need to further economic progress; or RPM). **Greece** follows a legalistic approach similar to the EU approach. In **Italy**, the authority carries out a rule of reason analysis to determine whether an exemption is warranted. It emphasizes economic analysis in application of national law, especially economic impact of the agreement in the relevant market, considering the market position of the parties, in order to determine whether there is a restriction and to determine whether an exemption should be granted.

Some of these Member States have taken account of the foreclosure effect in their analysis.

Nature and quality of the product has been considered by French, Greek and Spanish authorities in selective distribution cases. In **Italy**, nature and quality of the product may be taken into account insofar as relevant to the economic evaluation of the impact of the agreement on competition and the conditions of supply in the market.

Some of these countries also have analyzed the effect on interbrand vs. intrabrand competition, including France, Greece, Portugal and Spain. In **France**, the authority considers that even if the effect of a selective distribution agreement is to limit the number of distributors (and thus the level of intrabrand competition), it can promote interbrand competition. In **Spain**, effect on intrabrand competition is always considered, especially when the level of interbrand competition in the relevant market is insufficient or similar networks exist for all substitute brands.

---

### *De minimis rules*

A de minimis rule has been adopted by Spain, and not by the eight other Member States in this group (Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal and Spain). Under **Swedish** law, agreements of minor importance are those in which the joint market share of the parties does not exceed 10% of the relevant market within Sweden, and the annual turnover of each of the parties does not exceed 200 million SEK (ECU 22,65 million). However, if only very small companies are involved, with annual turnover not exceeding 10 million SEK (ECU 1,132 million), then the aggregate market share can be up to 15%.

The Member States which do not employ a de minimis rule have varying reasons for this. In **Belgium**, the law only applies to restrictions occurring in a substantial part of the Belgian market. Community practice will guide future decisions as to what constitutes substantial. Moreover, Belgian competition law provides that it does not affect SME's. In **Greece**, although the law does not contain a de minimis provision, the Greek authority has power to issue a de minimis rule. Until the time of this study, the authority has considered de minimis as a guiding principle. The **Irish** authority has stated that it does not intend to follow the example of the Commission and Court of Justice with respect to agreements of minor importance, because "given the size and distribution of the population in Ireland, it is possible that a number of relatively small undertakings could, by acting together, prevent, restrict or distort competition in a part of the State. The exclusion of small undertakings from the provisions of the Act could deny consumers in parts of the State the protection against anti-competitive activities which the Act provides." No de minimis rule is used in **France** and Italy, as the authority in both of these Member States prefers to carry out a full analysis of the market and the market position of the parties. In France, although the law does not provide a de minimis rule, the Court of Appeal has held that agreements involving less than 10% of the relevant market are outside the scope of the law.

### *Sectoral studies*

Greece has undertaken sectoral studies in several sectors, including cosmetics, beverage, beer and snack foods. The **Spanish** Tribunal de Defensa de la Competencia (TDC) has studied the lack of legal regularization in some sectors, noting that they have not adopted to the new competition legislation.

## **Member States with laws whose structure is not similar to that of Article 85**

### *Criteria*

These Member States follow various approaches to analyze vertical restraints. In **Austria**, an "economic justification" test, which takes account of economic benefits for the parties and for the national economy, is applied to determine whether a vertical restraint constitutes an abuse. In **Germany**, market controlling enterprises which restrict market access or intrabrand competition are subject to abuse control. Under **Netherlands** law, in cases where the abuse control system governs, a violation exists if the Minister declares that the agreement or its application is contrary to the general interest; he may thereafter declare it to be non-binding. Observance of agreements which have been declared non-binding is prohibited. In cases

---

where prohibition rules for vertical agreements have been created (collective and individual RPM and market sharing) the legal form of the agreement is decisive for determining whether an infraction has occurred. (Waivers of vertical agreements like exclusive distribution and franchising agreements which have the effect of marketsharing are covered by the prohibition on market sharing.) The rule of reason is not applicable in those cases. In the **UK**, all vertical restraints are subject to a rule of reason analysis, except price restraints, which are per se illegal, but are allowed if failure to apply minimum resale prices would harm the public interest.

Some of these countries consider the foreclosure effect. In **Finland**, the rule of reason analysis of vertical restraints includes the analysis of the foreclosure effect and market position of the parties; the nature of the product and interbrand/intrabrand competition are considered as well. In **Germany**, the foreclosure effect is an essential criterion in the appreciation of vertical restrictions. In the **UK**, the main structural conditions of product markets where vertical restraints may be harmful are considered, including market imperfections upstream or downstream giving rise to individual or collective market power, and, markets in which vertical restraints are prevalent and there is no history of significant entry.

### *De minimis rules*

A de minimis test is used in the Netherlands but not in three of the other abuse control Member States (Denmark, Finland and Germany). No de minimis rule exists in **Denmark**, but in practice, minor cases are not pursued. However, under a draft act currently being considered, a de minimis rule would be established, such that agreements between undertakings having a turnover of less than DKK 1 billion (ECU 137,5 million) or a market share less than 10% would be exempt. **Finnish** law does not include a de minimis rule. If a restriction of competition is not compatible with sound and effective competition, due, for example, to the small market share of an undertaking or an association of undertakings, the restriction will not be addressed. In **Germany**, there is no de minimis rule, but the Bundeskartellamt may intervene when a significant part of the market is involved. In the **Netherlands**, a de minimis test applies to the prohibition on market sharing, which provides that restrictive agreements which bind no more than eight enterprises are not covered by the prohibition provided that their combined turnover is no more than NLG 5 million (ECU 2,376 million) in the case of goods, or NLG 1 million (ECU 0,475 million) in the case of services. No de minimis test is used with respect to the prohibition on collective and individual RPM. In the **UK**, vertical restraints are evaluated if at least 25% of the market is held by one firm or a network of firms.

### *Sectoral studies*

Sectoral studies have been conducted by some of these Member States. In **Finland**, an analysis of the effects of a restraint is usually preceded by a sectoral study, where information about the characteristics of the relevant businesses are gathered. These studies usually are published as part of a decision. Sectors which have been studied include banking, spectacles, and insurance. In the **Netherlands**, two sectoral studies were initiated from 1991-1995, one with respect to RPM in the consumer and household appliance sectors, the other with respect

---



to maintenance agreements for photocopy machines. In the **UK**, the MMC has conducted studies of the beer and petrol sectors.

### **Third Countries**

In the **US**, absent market power by the manufacturer, distribution arrangements which contain non-price vertical restraints are generally viewed to be legal because they promote efficient delivery and a stable supply of goods and services for the consumer, and increase interbrand competition by enhancing the ability of manufacturers within an industry to compete for customers. Moreover, the anticompetitive risks of such restraints is generally believed to be low, as the manufacturer's interest is to develop effective distribution in order to maximize sales to consumers. Thus, the manufacturer has every incentive to encourage intrabrand competition among distributors in order to keep prices low.

Under the rule of reason, a number of factors are analyzed, including definition of the relevant market, defendant's market power, adverse effects on competition in the inter-brand market, and legitimate objectives and the necessity of the restraint to achieve those objectives. The defendant has the burden to establish justifications to rebut the plaintiff's claim, but the ultimate burden rests with the plaintiff to convince the court that the restraint, on balance, has an anticompetitive effect. Whether less restrictive alternatives to the restraint in question can be found to achieve the legitimate objective must also be considered. No de minimis rule exists.

The Justice Department takes the position that non-price vertical restraints generally are not harmful to competition. However, US courts tend to be slightly more cautious about the anticompetitive effects of intrabrand restraints, and may demand a thorough market analysis including inquiry into "both the extent of the foreclosure and the buyer's and seller's business justifications."<sup>13</sup> Courts generally will analyze the degree to which competing manufacturers are deprived of outlets for their products, or distributors are prohibited from using alternative suppliers.

In **Norway**, a rule of reason approach is followed when considering whether an intervention should be made against a restraint which is not per se illegal. The Authority must determine whether interbrand or intrabrand competition is affected by the restraint, and whether barriers to entry are created which foreclose the market. Norway does not have a de minimis rule.

---

<sup>13</sup> *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236-37 (1st Cir. 1983).

---



**TABLE I : NATIONAL LAWS GOVERNING VERTICAL AGREEMENTS**

<i>European Union/ Member State/Third Country</i>	Citation to National Law (1A) <sup>1</sup>	Modeled after Art. 85 (1B, 4B) <sup>1</sup>	Have recently revised (7) <sup>1</sup>	Considering Future Revisions (7) <sup>1</sup>	Number of Cases per Year (6) <sup>1</sup>
<i>Austria</i>	Kartellgesetzn ovelle 1993, BGBL 693/93, Sec. 30a-30e	no <sup>2</sup>	no	yes <sup>3</sup>	0 <sup>4</sup>
<i>Belgium</i>	Law of 5.8.1991 concerning the protection of competition, Ch. 2, Sec. 1.	yes <sup>5</sup>	no	yes <sup>6</sup>	0 <sup>7</sup>
<i>Denmark</i>	Danish Competition Act, Statute No. 370 of 7 June 1989, Secs. 5, 7-9, 11-13, 14.	no <sup>8</sup>	no	yes <sup>9</sup>	6-7 <sup>10</sup>
<i>Finland</i>	Finnish Competition Act, Secs. 4 (RPM), 6, 9 (other).	no <sup>11</sup>	yes <sup>12</sup>	no	3-5 <sup>13</sup>
<i>France</i>	Ordonnance n°86-1243 of 1.12.86, Arts 7-10, 34-36 and Art 1382 of the Civil Code <sup>14</sup>	yes <sup>15</sup>	yes <sup>16</sup>	yes <sup>17</sup>	9 <sup>18</sup>
<i>Germany</i>	Gesetz gegen Wettbewerbsb eschränkunge n (GWB), Secs. 15-22, 25, 26, 38, 38a, 99, 100, 102, 102a, 103.	no <sup>19</sup>	no	yes <sup>20</sup>	>30 <sup>21</sup>

<i>Greece</i>	Law on the Control of Monopolies and Oligopolies and the Protection of Free Competition, Law 703/77, as amended by Laws 1934/91, 2000/91, and 2296/95), Art. 1.	yes <sup>22</sup>	yes <sup>23</sup>	no	3 <sup>24</sup>
<i>Ireland</i>	Irish Competition Act 1991, Sec. 4	yes <sup>25</sup>	yes <sup>26</sup>	yes <sup>27</sup>	no data <sup>28</sup>
<i>Italy</i>	Law No. 287/90, Secs. 2, 4.	yes <sup>29</sup>	no	no	4-6 <sup>30</sup>
<i>Luxembourg</i>	Law of June 17, 1970, Arts. 1, 2; Decree of December 9, 1965	yes <sup>31</sup>	no	no	no data <sup>32</sup>
<i>Netherlands</i>	Dutch Economic Competition Act, Arts. 9, 10, 19b and 23.	no <sup>33</sup>	yes <sup>34</sup>	yes <sup>35</sup>	3-5 <sup>36</sup>
<i>Portugal</i>	Decree-Law No. 371/93, 1 Jan. 1994, Art. 2, Sec. I.	yes <sup>37</sup>	yes <sup>38</sup>	no	6 <sup>39</sup>
<i>Spain</i>	Law No. 16 of 17 July 1989, Art. 1; Royal Decree No. 157/92 of 21 February 1992.	yes <sup>40</sup>	yes <sup>41</sup>	no	15 <sup>42</sup>
<i>Sweden</i>	Swedish Competition Act 1993, Arts. 6, 7, 8, 9, 17.	yes <sup>43</sup>	yes <sup>44</sup>	yes <sup>45</sup>	no data <sup>46</sup>

<i>United Kingdom</i>	Fair Trading Act 1973, Restrictive Trade Practices Act 1976, Resale Prices Act 1976, Competition Act 1980 <sup>47</sup>	no <sup>48</sup>	no	yes <sup>49</sup>	no data
<i>Canada</i>	Competition Act, Secs. 45, 50, 51, 61, 75, 77, 79	no <sup>50</sup>	no	yes	no data
<i>Norway</i>	Norwegian Competition Act, Secs. 3-1, 3-2.	no <sup>51</sup>	yes <sup>52</sup>	no	no data <sup>53</sup>
<i>USA</i>	Sherman Act, Secs. 1, 2; Clayton Act, Sec. 3	no <sup>54</sup>	yes <sup>55</sup>	no	? <sup>56</sup>

#### FOOTNOTES TO TABLE I

1. The numbers contained in parentheses refer to the questionnaire (Appendix 2) to which the information in the column corresponds.

##### **Austria**

2. Austrian competition law is based on the abuse control principle. Vertical restraints are generally allowed under Austrian law, and are subject only to a notification requirement. The Federal Ministry of Justice may exempt categories of vertical restraints. (Sec. 30e). Community block exemptions for exclusive distribution (No. 1983/83), exclusive purchase (1984/83), franchises (No. 4087/88) and the automobile sector (No. 123/85) have been incorporated in Austrian national law.
3. A general revision of Austrian competition law, which would harmonize it with Community law, is expected. However, discussions are still being held on a political level.
4. 805 notifications of vertical restraints were deposited with the Cartel Court in 1994, none of which resulted in any action. The Austrian Cartel Court has not yet decided any case pertaining to vertical sales agreements.

##### **Belgium**

5. Belgian competition law is almost identical to Community law. Legislative history indicates that the parliament referred explicitly to EU practice and jurisprudence as the basic source to guide decisionmaking by the Belgian authority. (Pasinomie, 5.8.91, p. 3685) However, no block exemptions currently exist.

6. Belgian antitrust authorities expect the law to be modified to limit the number of mergers falling within its control. Since Belgian authorities currently devote most of their resources to mergers, such a modification would allow them to begin to look into vertical restraints cases, which is expected to result in an increase in the number of notifications of vertical restraints. The adoption of block exemptions would probably follow.
7. Until now, Belgian authorities have not initiated any proceedings against vertical restraints.

### **Denmark**

8. Danish competition law is based on abuse control and the "transparency" principle, under which competition and efficiency in production and distribution are to be furthered through the greatest possible transparency concerning the factors of competition. The Danish Competition Council is to achieve such "transparency" by publishing its reports on investigations which include, among other things, data on pricing.

Sec. 5 provides that agreements and decisions by which a "dominant influence" is exerted or may be exerted on a certain market shall be subject to notification; Secs. 7-9 contain rules on how to obtain transparency in certain markets; and Secs. 11-13 contain measures for the Council to take against "anticompetitive practices," and provides that the Council can order the undertakings to terminate the decisions or agreements if other measures fail to end the anticompetitive effects. The terms "dominant influence" and "anticompetitive practices" are general terms, both of which encompass vertical restraints, which do not have any parallel under Community law.

9. The Minister for Business and Industry has appointed a law committee in 1993 to investigate the possibility of harmonizing Danish competition law with Arts. 85 and 86, and to report before 1996. An extract from the Report of the Committee on the Competition Act states:

The Committee considered the advantages and disadvantages of a change in the Danish approach to domestic competition legislation, basing its assessment on socio-economic conditions in Denmark, Community competition law, and competition legislation in the Member States of the EU and in Norway. The Committee's deliberations have resulted in the formulation of a draft parliamentary bill.

The main intention of the draft bill is to bring Danish competition law more closely into line with Community competition law while taking into consideration the Danish industrial structure with few large and many small businesses, and the Danish tradition of competition law. In this connection, one objective was to produce a draft bill that would not hamper businesses by imposing unnecessary administrative burdens.

The Committee's draft bill proposes to prohibit restrictive trade agreements, decisions by associations of undertakings (industrial/commercial organisations) and concerted practices between enterprises that jointly -- on a group basis and globally -- have a turnover of DKK 1,000 million or more and a share of 10 per cent or more of the Danish market for the goods or services concerned. Other restrictive trade agreements will be covered by a provision for reactive intervention in any specific case of harmful restraint of competition.

---

10. These are average annual figures, and include only cases where the Competition Council took measures against negative consequences of anticompetitive practices according to Secs. 11-14 of the Danish Competition Law.

### **Finland**

11. Finnish competition law applied to vertical restraints is based substantially on the abuse control principle. Art. 9 of the Finnish law provides that a competition restriction will be deemed to have harmful effects if it, in a manner incompatible with sound and effective competition: affects price formation; decreases or is likely to decrease efficiency within the economic sector; prevents or complicates the practising of trade by another party; or is incompatible with a binding international agreement. However, certain aspects of the law are based on prohibition. The use of exclusive sales rights or exclusive purchasing agreements by an undertaking or an association of undertakings enjoying a dominant position is prohibited. Finnish Competition Act, Art. 4, which prohibits RPM, is largely similar to Art. 85(1). Finnish Competition Act, Art. 19, resembles Art. 85(3). Art. 19 provides the following grounds for granting an exemption: the promotion of production, distribution, technical or economic development where the benefit primarily accrues to the clients or the consumers. Art. 18 resembles Art. 85(2) in providing that a condition in an agreement shall not be applied or implemented if it is prohibited under Articles 4-7 or under an obligation or injunction issued by the Competition Council or the Office of Free Competition.
12. The present Finnish Act on Competition Restrictions was introduced on 27 May 1992 (n° 480/92). With respect to vertical restraints, the law now includes an expansion of the prohibition on RPM to the extent that setting a maximum price is now banned (the ban had previously been limited to minimum price). In 1992, the fining system was also modified, and a possibility of issuing interlocutory injunctions, a prohibition of cartels and the abuse of a dominant market position were added.
13. In 1994, the Finnish Office of Free Competition received 69 requests to initiate procedures concerning vertical restraints. Thirty-two decisions concerning vertical restraints were issued simultaneously. In thirteen cases, the company modified or abolished the restriction which was deemed to have harmful effects. In nineteen cases, the restriction was deemed to be acceptable as such. The Office of Free Competition commences, on its own initiative, approximately 3-5 cases per year.

### **France**

14. In France, three sets of provisions are applicable to vertical restraints. Ord. No. 86-1243 of 1.12.86, Arts. 7 and 10, part III, concerning anticompetitive practices under the supervision of the Conseil de la Concurrence; Arts. 34 and 36, part IV, of the same Ordonnance, concerning restrictive practices (Art. 34 deals with discrimination and Art. 36 deals with refusal to supply); and Art. 1382 of the Civil Code, concerning unfair practices under the control of the Civil or Commercial Tribunal.
15. Art. 7 of the French law corresponds to Art. 85(1), Art. 8 to Art. 86 and Art. 10 to Article 85(3). Article 7 applies to general conditions of sale and purchase, and to all practices, contractual or non-contractual, which have the object or effect of restricting competition. The abuse of economic dependence between commercial partners is prohibited. (Art. 8-2). Article 9 renders null and void all undertakings, agreements and contractual clauses prohibited by Articles 7 and 8.
-

The French authority believes that its interpretation differs from the Commission's, because under French practice exclusivity in sales or purchasing does not in itself restrict competition. Thus, it takes a favourable view of distribution systems, believing that they contribute to economic efficiency and generally comply with Article 85(1) or the national law equivalent, except where they are accompanied by clauses which may be injurious to competition. French law does not include a notification requirement because vertical restraints are considered a priori lawful.

It is only when vertical restraints have an anticompetitive object or effect that they are prohibited under national law. The authority decides whether a restriction exists based on economic analysis, taking account of the increased competition that, more often than not, is generated by this type of system.

Only after its initial assessment, where it concludes that an appreciable restriction of competition is present, does it consider whether an exemption is justified. At this point, its analysis is stricter than the Commission's.

The competition authorities and courts apply both national and Community competition law with respect to verticals, and utilize community block exemptions as guiding principles. They also grant individual exemptions under national law. (Art. 10).

French law also covers discrimination and abusive refusals to deal. (Arts. 36-1 and 36-2).

16. The law of 29.12.1992 extended the scope of procedural rules of the 1986 ordonnance concerning the application of EU competition rules. Also, the penalties imposed for certain practices under Title IV of the Ordonnance of 1.12.86 have recently been strengthened, and a new RPM exemption provision added.
17. French policymakers are considering rules to protect competitors.
18. The figures are for cases in 1994 dealt with by the Conseil de la Concurrence. They include 3 cases related to general sales conditions, 3 to selective distribution, 1 franchise agreement and 2 to other vertical agreements. No statistics are available for the commercial and civil tribunal.  
Moreover, 35 judgments were made on the basis of Article 36 and 8 on the basis of Article 34.

### **Germany**

19. German law does not create a general prohibition of all vertical restraints. Rather, only contracts on RPM and conditions of trade, and efforts to circumvent these rules are per se forbidden (Secs. 15, 38 par. 1, no. 10-12, 25). However, the book sector is exempt. (Secs. 16, 17, 20, 21, 38 par. 2 no. 1 and 3, 38a, 99, 100, 102, 102a, 103).
  20. Germany is currently considering harmonization of its competition law with EU competition law. However, the Ministry of Economic Affairs, the Bundeskartellamt, and the business community all agree that the abuse control principle should be preserved with respect to vertical restraints.
  21. In Germany, no reliable statistics exist regarding vertical cases, since provisions addressing other forms of abusive conduct may also have vertical elements. However, reliable data is available only with respect to Secs. 15-21. Regarding cases under Secs. 15-17 brought by both the Bundeskartellamt and the authorities of the Lander, the yearly average number of cases brought for the period from 1991-1994 was 10, under sec. 18, 10 cases; and under sec. 20, 5 cases. Formal penalties or prohibition
-



orders were imposed in few cases; most were resolved by the undertakings agreeing to eliminate the objectionable provisions following negotiations with the authorities.

### Greece

22. Sec. 1(1) of the Greek competition act corresponds to Art. 85(1). No block exemptions have been adopted, but Greek courts apply Art. 85 directly, including the block exemptions, and use them as guidelines in national law decisions.
23. Until 1991, both the basic rule and the indicative examples under Greek law corresponded to Art. 85. In 1991, more indicative examples were added (paras. (f) through (j)). Subpara. (f) referred to the establishment of uniform terms of sale of goods and services aimed at imposing uniform prices. Subpara. (g) referred to the exclusive sale and purchase (exclusive supply contracts) between the members of an undertaking or association of undertakings. Subpara. (j) prohibited the impediment of the free circulation of goods. These amendments were an attempt to clarify the law. They also broadened its scope to other kinds of corporate behavior, outside the ambit of competition law.  
In 1995, a new law was enacted, which deleted subparas. (f) through (j) because they were criticized as not functioning well and as not suitable. Sec. 1(1) again became a direct translation of Art. 85. (Law 2296/95)
24. In 1994, the Greek Competition Authority dealt with three cases involving vertical restraints, two of which related to exclusive distribution and one related to a franchise agreement.

### Ireland

25. Sec. 4(1) of the Irish law is essentially the same as Art. 85. Although there is no explicit requirement in the Act to follow Community competition law principles, the Irish courts have stated that they will regard EU precedent as very persuasive although not strictly binding. The authority has, in practice, adopted the reasoning of the EU in a number of circumstances, but has not made any general statement as to the extent to which it adopts all EU principles.  
The Category License for Exclusive Distribution Agreements, (Stationery Office, Dublin, 1993, reprinted in Competition Authority Annual Report, 1993, Annex 2), is based on EC block exemption 1983/83 for exclusive distribution arrangements. Similarly, the Category License covering the supply of motor fuel (Competition Authority Annual Report, 1993, Annex 7), granted on 1 July 1993, is based on EC block exemption 1984/83, particularly Title III which covers service station agreements and the explanatory note to the Regulation. The Category License for Franchise Agreements, (The Stationery Office, Dublin, 1994), largely follows the reasoning of the Commission in its block exemption 4087/88. It adopts definitions and principles used by the Court of Justice in *Pronuptia de Paris GmbH v. Schillgalis*, [1986] ECR 353. The Authority has also issued a category license for cylinder LPG dealers on 28.10.94, which covers exclusive purchase of LPG by dealers for resale.  
A Notice in respect of Shopping Centre Leases (Competition Authority Annual Report, 1993, Annex 3) was published on 10 September 1993. It states that while a restricted user clause tends to prevent the operation of a similar outlet in the shopping centre, such clauses (as well as exclusive user and permitted user clauses) do not offend Sec. 4(1) because they have neither the object nor effect of interfering with competition. (Competition Authority Annual Report, 1993 (supra, Annex III.) This "object or effect" test is based on Art. 85.

26. The current law was enacted in 1991. Prior to 1991, vertical restraints were not covered by Irish competition law.
27. A bill placed before the Irish parliament (Oireachtas) in 1994 proposes to amend the competition law. It proposes the following changes: categories of agreements may receive "negative clearance" by means of a "certificate" (corresponding to a negative clearance under Art. 85) as well as by "license" (corresponding to an exemption under Art. 85(3)) (Sec. 3); under Sec. 6, the Authority would have a right of action in the Courts in respect of an agreement, decision or concerted practice which is prohibited under Secs. 4 and 5 of the Act (Sec. 5); a "Director of Competition Enforcement" could be appointed whose duty it would be to investigate any alleged infringement of Secs. 4 and 5, and make recommendations to the Authority as regards the institution of proceedings (Sec. 7).
28. The Irish authority currently has no power to initiate cases. Rather, it may decide whether to grant a license or certification upon receipt of a notification. No figures are available as to the number of decisions rendered annually by the authority. However, the breakdown of notifications is as follows, from the effective date of the act in 1991 through 31.12.94: exclusive purchase agreements (motor fuels), 54 notifications, 50 of which were cleared under the category license, and 4 were cleared as amended; exclusive distribution agreements, 239 notifications were addressed under the Exclusive Distribution Category License (EDCL), of which 167 were cleared, 29 were cleared as amended, 42 were withdrawn following the grant of the EDCL, and 1 was refused; franchising agreements, 26 notifications, 9 of which were amended, 3 of which were cleared under the category license, and 13 are still under consideration.

### Italy

29. Italian law substantially resembles Art. 85, although it specifies that the prevention, restriction or distortion of competition must be appreciable in order to fall within the prohibition. Art. 2 of the Italian law is modelled on Art. 85 (1). It covers "resolutions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities" Art. 2.2 of the Italian law provides a non-exhaustive list of examples of practices which may appreciably restrict competition: directly or indirectly fixing purchase or selling prices, or any other contractual conditions; limiting or restricting production, market outlets or market access, investment, technical development or technological progress; sharing markets or sources of supply; applying objectively dissimilar conditions to equivalent transactions in commercial relations with other contracting parties for the same services, thereby placing them at an unjustified competitive disadvantage; making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.
- Art. 4 provides exceptions to the general prohibition of Art. 2, and is modeled on Article 85(3). It provides that the Authority can authorize, for a limited period, the forbidden agreements when they "have the effect of improving the conditions of supply in the market, leading to substantial benefits for consumers. Such improvements shall be identified also taking into account the need to guarantee the undertakings the necessary level of international competitiveness and shall be related, in particular, to increases of production, improvements in the quality of production or distribution, or technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes of this subsection, and may not permit competition to be eliminated in a substantial part of the market."
-

No block exemptions have been adopted because, among other things, it is not clear whether the law gives the Authority the power to do so.

30. In total, the Authority pronounced on 13 vertical agreements of all types in 1993 and 11 in 1994. However, the Authority initiated proceedings in 6 of those cases in 1993 and 4 in 1994.

### **Luxembourg**

31. Art. 1.1 and 2.2 of the Luxembourg competition Law of June 17, 1970, contain virtually the same provisions as Art. 85(1) and (3). However, whereas Art. 85(2) declares prohibited agreements to be automatically void, the law of 1970 requires express prior decision to that effect by the Minister of Economy who is vested with jurisdiction over enforcement.  
The Luxembourg authority perceives no urgency to adopt Community block exemptions. However, national courts may use them as guidelines for taking national decisions.
32. Only one case involving the law of 1970 is reported by the Ministère de L'économie over the last five years. The procedure was abandoned as a result of an informal agreement. It is not possible to know whether this involved vertical restraints.

### **Netherlands**

33. Currently, Dutch competition law is based on the abuse control system, under which any binding private agreement between enterprises affecting competition is valid unless prohibited by a general rule which declares them contrary to the general interest, or by a decision of the Minister of Economic Affairs who declares the specific agreement contrary to the general interest. All such agreements must be notified for registration to the Minister of Economic Affairs within one month of coming into effect. (Arts. 1, 2).  
Certain agreements are prohibited under Arts. 9e, including collective and individual vertical RPM. Exemptions for collective RPM are possible under art. 9g. Vertical marketsharing agreements are prohibited under a Decree which is based on Art. 10 (the Market Sharing Agreements Decree). Exemptions from this prohibition are possible under Art. 12.
34. The last revision of the Dutch Economic Competition Act with regard to vertical agreements occurred by Act of 15 November 1989. This revision introduced Articles 9e to 9g, discussed in preceding note. P. Behrens, *The application of EC competition rules in the national courts*, vol. 2, pp. 139 et seq. (1994). In June 1994, the prohibition on market sharing agreements (horizontal and vertical) took effect.
35. Revisions to the Dutch competition law are expected in 1997, according to the Ministry of Economic Affairs. The new act is expected to be based on EC competition rules and will transform the current abuse control system into a prohibition system. Exemptions will be possible under the criteria of Art. 85(3). Negative clearances may be possible under the new system.
36. No definite figures were provided by the Ministry. However, it appears that 3-5 decisions are reported each year.
-

## Portugal

37. Decreto-Lei no. 371/93, Art. 2 mainly reproduces Art. 85(1) and (3). In general, decisions of the national authority follow the decisions of the Commission and the Community courts. However, the Community system, which considers an agreement which violates Art. 85(1) to be void unless exempted under Art. 85(3), is considered overly severe and thus not strictly followed. Comments to "The Commission's Communication Project Concerning the Application of Art. 85 and 86 of the EC Treaty by National Courts," Lisbon, 24 June 1992, Conselho da Concorrência, Annual Report 1992. Community jurisprudence is often cited in decisions of the national authority.
38. Decreto-Lei No. 371/93 entered into force on 1 January 1994. It replaces Decreto-Lei no. 422/83, the original competition law which dates from 1983. The earlier law was modeled on Art. 85, but also provided that a refusal, "directly or indirectly, without justification, [of] the purchase or sale of goods and the supply of services, mainly due to the character of the seller or buyer," constituted a restriction of competition. Otherwise violative exclusive or selective distribution agreements could be justified if they contributed to the improvement of distribution, reserving to the users of the goods in question an equitable part of the benefits resulting therefrom. (Art. 15, DL no. 422/83)  
Art. 2 of the new act changed the wording slightly of the former Art. 13, adding in Art. 2.1(a) a specific prohibition against price fixing.
39. Approximately 6 cases were initiated during 1994.

## Spain

40. Art. 1 of Spanish competition Law No. 16/1989 is modelled on Art. 85(1) and 85(2) of the EC Treaty, with minor differences. Art. 3 and 4 of the Spanish law contain all requirements for individual authorizations of agreements, decisions, recommendations and prohibited practices. Art. 3 is, in general, modelled on Art. 85(3). However, Art. 3.2 adds an individual exemption when the general economic situation and the public interest so justify. Art. 5 provides that the Government may create block exemptions by Royal Decree.  
Royal Decree No. 157/1992 of 21 February 1992 implements Law No. 16/89 with respect to block exemptions, individual authorizations and the competition register. It provides for the exemption of agreements between enterprises that affect only the domestic market, and fall within the categories and satisfy the conditions laid down in Commission block exemptions No. 1983/83, 1984/83, 2349/84, 123/85, 4087/88, 556/89, 417/85, and 418/85. It also establishes the procedure for the individual exemption of agreements, decisions, recommendations and prohibited practices under Art. 3.  
Before Royal Decree No. 157/1992 took force, only an individual exemption was possible with respect to vertical agreements that affected only the domestic market. The Tribunal for the Defense of Competition (TDC) may decide cases only by formal resolutions. Comfort letters are not used.  
The national courts and national authority take into account the jurisprudence of the Court of Justice and the Court of First Instance in making decisions, and mainly follow it, with necessary adjustments for the national market.
41. In 1992, Community block exemptions were incorporated in national law. See preceding note.

42. This figure represents the average number of files that the Spanish SDC investigates per year.

### **Sweden**

43. The jurisprudence of the European Court of Justice and Court of First Instance has guided the Swedish authority in its decisions under national law.
44. The current law came into force on 1 July 1993.
45. The block exemption for motor vehicles is being reviewed at present.
46. No statistics are available regarding the number of cases involving vertical restraints initiated by the Swedish authority.

### **United Kingdom**

47. Sections 6, 7, 9, 10 and 11 of the Fair Trading Act of 1973 (FTA); Sections 5, 6, 9(3) and (4), 10, 11, 20, 43 and Schedule 3 of the Restrictive Trade Practices Act of 1976 (RTPA); Section 9 of the Resale Prices Act 1976 (RPA); and Section 2 of the Competition Act of 1980. The common law doctrine on restraint of trade is also relevant.
48. In the UK, no law refers directly to the concepts used in Community law or in the economic analysis of vertical restraints. Rather, the treatment of an agreement containing vertical restraints depends on whether it is registrable under the RTPA, which in turn depends on a complex set of formal legal criteria unrelated to the economic effect of the restraint. If an agreement is registrable, a copy must be provided to the Director General of Fair Trading, who must decide if it is substantially anticompetitive, it must be placed before the Restrictive Practices Court. The Court decides whether it is in the "public interest" to allow the agreement to continue. If an agreement is not registrable, the authorities may nonetheless investigate and order its discontinuance if it is found to be against the public interest. Thus, registrability is not crucial to whether action can be taken, nor is an agreement prohibited simply because it is registrable.
- Vertical restraints which are not contained in agreements subject to the RTPA, but which meet certain market share and turnover levels, may still be subject to scrutiny. The Director General of Fair Trading (DGFT) may be able to require the Monopolies and Mergers Commission (MMC) to examine the behavior of the parties involved under the FTA or the Competition Act 1980. If the MMC finds the restraint to be against the public interest, it may recommend that the parties be required to modify or discontinue it. The Secretary of State for Trade and Industry may implement such recommendations. The MMC has found vertical restraints to be damaging to competition and consumers' interests in some markets (e.g. beer, bicycles, newspaper distribution and motor cars) but not in others (e.g., fine fragrances, ice cream and petrol distribution).
- Collective RPM on goods is prohibited. Individual RPM on goods is also prohibited, but the Restrictive Practices Court may exempt certain classes of goods from the prohibition where the resulting public detriment outweighs the procompetitive effects of prohibition. Exemptions have been granted in the case of books and certain medicines.
-

49. A number of proposals for reform have been made in recent years, but none have been adopted and no legislative changes are currently envisaged. In 1989, the government issued a White Paper proposing reform of the law recommending creation of a general prohibition of anti-competitive agreements subject to provisions for block or individual exemptions. Legislation to implement this proposal will be introduced, according to the OFT, "when the legislative timetable permits."

### **Canada**

50. The Canadian law contains both civil (Secs. 75, 77, 79) and criminal (Secs. 45, 50, 51, 61) provisions applicable to vertical restraints. The civil provisions address refusals to deal and selective distribution, exclusive dealing, tied selling, "market restrictions" (exclusive distribution); the criminal provisions address conspiracy, price discrimination, and RPM.

### **Norway**

51. The Norwegian competition act, which entered into force on 1 January 1994, is based on the abuse control principle. Thus, vertical restraints are legal unless the Authority, upon individual scrutiny, intervenes with respect to the restraints in question. The Norwegian act does, however, impose a per se ban on specified categories of agreements, listed in Sec. 3-1 to 3-4 (collaboration and influencing prices, markups, and discounts, collaboration and influence on tenders, collaboration, using influence to achieve market sharing, and associated undertakings encouraging these restraints). No demonstration of market power need be made with respect to per se restraints. The Norwegian Supreme Court has confirmed the per se nature of these prohibitions, noting that they are prohibited irrespective of their actual effects on competition. The provisions of the law are as follows:  
Sec. 3-1 prohibits agreements between two or more enterprises which will influence competition, fix or influence prices, profits or rebates, except for cash rebates. The prohibition applies to vertical agreements.  
Sec. 3-2 prohibits RPM.  
Sec. 3-3 prohibits agreements between enterprises concerning market sharing of areas, customers, quotas, specialization volume limitations, and vertical market sharing.  
Secs. 3-5 to 3-8 provide certain exceptions to the prohibitions, all of which apply to vertical restraints.  
Sec. 3-7 excepts certain license agreements.  
Sec. 3-9 provides for individual exemptions from the prohibitions, provided certain conditions are fulfilled.  
Sec. 3-10 provides that the Authority may intervene against otherwise legal restrictive practices (terms of business, agreements and action) if they have the purpose or effect of restricting competition. For this provision to apply, market power must be established.  
Finally, the Authority has issued guidelines regarding its exemption policy.
52. The Norwegian Competition Act entered into force on 1 January 1994. It did not involve any major revisions to the provisions applicable to vertical restraints.
53. The statistics kept by the Norwegian authority do not distinguish between horizontal and vertical restraints. However, the following statistics were available for 1994: 175 cases where the Authority impressed on parties who were presumed to have committed infringements to obey the prohibitions of the Act in the future; 106 exemptions granted, 8 of which involved RPM, 9 of which were dismissals of
-

applications for exemptions, and 3 of which were voluntary withdrawals of restraints; the authority initiated 34 cases and intervened in 6, four of which concerned refusals to deal, 1 exclusive purchasing, and 6 voluntary amendments of the restraints in accordance with the instructions of the Authority, 2 of which amendments concerned exclusive purchasing.

### United States

54. In the US, vertical restraints are mainly governed by Section 1 of the Sherman Act, which provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal. In 1977, the Supreme Court ruled in *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977), that non-price vertical restraints are to be subject to analysis under the rule of reason, recognizing that such restraints may "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Absent market power of the manufacturer, distribution arrangements which contain non-price vertical restraints are generally viewed to be legal because they promote efficient delivery and a stable supply of goods and services for the consumer, and increase interbrand competition by enhancing the ability of manufacturers within an industry to compete for customers. Moreover, the anticompetitive risks of such restraints is generally believed to be low, as the manufacturer's interest is to develop effective distribution in order to maximize sales to consumers. Thus, the manufacturer has every incentive to encourage intrabrand competition among distributors in order to keep prices low. In certain circumstances, Section 2 of the Sherman Act and Section 3 of the Clayton Act may be applicable to vertical restraints.
  55. In 1993, the Clinton Administration rescinded the Department of Justice 1985 Vertical Restraints Guidelines. These guidelines were strongly criticized by many parties, including Congress; they were not adopted by the FTC; and they were largely ignored by the federal judiciary. In its decision to rescind these guidelines, the Clinton Administration specifically mentioned the policy of the guidelines to subject vertical price fixing (which the Supreme Court has held to be illegal per se) to the rule of reason if the restraint is merely "ancillary" to non-price restraints. Rebecca P. Dick, Chief, Civil Task Force, Antitrust Division, U.S. Department of Justice, *Antitrust Enforcement and Vertical Restraints*, speech before the ABA Section of Antitrust Law and the Corporate Bar Association of Westchester and Fairfield, New York, 4 November 1994.
  56. Enforcement of vertical price fixing decreased during the 1980's. However, the Clinton Administration recently filed a complaint in federal court alleging RPM. This is the second RPM case to be filed in the last 10 years. The Department of Justice has indicated that it will vigorously pursue other similar cases. Speech of Rebecca P. Dick, supra note 55, at 3-4.
-





TABLE II:

**POLICY GOALS OF LAWS APPLICABLE TO VERTICAL RESTRAINTS**

<i>European Union/ Member State/ Third Country</i>	
<i>Austria</i>	The Austrian cartel law states: "In order not to be declared incompatible with national cartel law, vertical agreements must be economically justified. Assessing this economic justification, the justifiable interests of the binding enterprises, the bound enterprises, as well as the consumers must be taken into consideration; the freedom of choice must not be unreasonably restricted, and market access for other competitors must not be unreasonably impeded."
<i>Belgium</i>	No specific policy objectives are mentioned with respect to vertical agreements. With respect to the competition laws in general, the objectives are to follow the competition laws of the European Union.
<i>Denmark</i>	The objective is to promote competition and strengthen the efficiency of production, distribution, service etc. through measures securing free market entry.
<i>Finland</i>	No specific policy objectives are included in the law with respect to any type of restraints. The general goal of the law also applies to vertical restraints: the protection of sound and effective economic competition from harmful restrictive practices. Special attention shall be paid to the interest of the consumers and to the protection of the freedom of entrepreneurs to operate without unjustified barriers and restrictions.
<i>France</i>	In France, the rules of the 1986 Ordonnance applicable to vertical relations have as their objectives, on the one hand, to punish anticompetitive practices, and, on the other hand, to guarantee fairness in commercial relations and to end restrictive practices, or to assure the redress of damages caused by restrictive practices.
<i>Germany</i>	The policy objectives behind Sec. 15's general prohibition on RPM are protection of competitive freedom of action of the contracting parties and protection of all market participants who would be affected by the lack of freedom of action of the contracting parties. Indirectly, a goal also exists to protect competition as an institution. Similarly, provisions controlling exclusive dealing agreements are designed to protect the interests of the parties who would be restrained, potential entrants, and competition. However, non-price vertical restraints are subject only to abuse control since restrictions on intrabrand competition generally enhance interbrand competition, except where the latter is already affected by powerful market positions.
<i>Greece</i>	Two basic objectives of Greek competition law in general are the protection of the competitive process for the benefit of the consumer and the national economy, and the harmonization of Greek law with Community law.

<i>Ireland</i>	There is no statement of policy regarding vertical restraints. However, with regard to competition law in general, the goals are similar to those of Community competition law.
<i>Italy</i>	No specific policy objectives are mentioned in the Italian competition law with respect to vertical agreements. The basic objective of the competition law in general is to protect and guarantee the right of free enterprise, thereby promoting the competitive process to the benefit of consumers. (Sec. 1.1)
<i>Luxembourg</i>	The law of 1970 was designed to fill a gap left by a number of national regulations and international treaties (such as the Havana Charter, the Paris Treaty of 1965 which instituted the European Coal and Steel Community and Arts. 85 and 86 of the Treaty of Rome.) The Decree of 1965 was designed to release parties from the authority of their suppliers as to the prices which they could set, thereby rendering competition possible.
<i>Netherlands</i>	Dutch authorities assume that individual vertical agreements often form part of broader vertical cooperation agreements, which proliferate in the Netherlands at present. They believe it becomes more important to ensure that intrabrand competition is not prevented completely, and that these agreements can have horizontal effects by foreclosing distribution systems. The present system assumes that RPM prevents consumers from profiting from benefits that flow from an efficient distribution system, such as lower prices or the availability of the choice between higher prices combined with better service and lower prices with a lower level of service. It further assumes that if producers compete for the favour of the reseller rather than that of the consumer, higher prices will result. Thus, RPM diminishes the incentive for efficient distribution and results in higher prices. Moreover, collective RPM has the effect of preventing interbrand competition.
<i>Portugal</i>	The competition law sets forth its general policy goals: "This Act aims to integrate within a legal framework for competition policy the development of an open economy involved in the developing process of internationalisation and the drive for competition which will contribute to: the unhindered development of supply and demand and market access, a balance in the relations between economic undertakings, the encouragement of the general objectives of economic and social development, an increase in the competitiveness of business undertakings, and the protection of the interests of the consumer."
<i>Spain</i>	The policy objectives of the laws applicable to vertical restraints are to obtain efficient and diversified means of distribution with a positive effect on the market and the end user.
<i>Sweden</i>	No specific policy objectives are mentioned with respect to vertical restraints. The purpose of the Swedish Competition Act is to eliminate and counteract obstacles to effective competition in the field of production of and trade in goods, services and other products. (Sec. 1)
<i>United Kingdom</i>	In performing its case-by-case analysis of vertical agreements, UK authorities seek to promote the "public interest."
<i>Canada</i>	Canadian competition law seeks to strengthen the role of market forces thereby encouraging maximum efficiency in the use of economic resources. Competition is regarded as a vehicle to the achievement of economic efficiency. The principle objectives of the law are efficiency, adaptability and international competitiveness.

---

<i>Norway</i>	The policy objective is to achieve efficient utilisation of society's resources by providing the necessary conditions for effective competition. Competition Act, Sec. 1-1.
<i>US</i>	US antitrust law is focused primarily on protecting competition and thereby enhancing efficiency and consumer welfare.

---



**TABLE III:  
TYPES OF VERTICAL RESTRAINTS COVERED BY NATIONAL  
LAWS**

<i>European Union/ Member State/ Third Country</i>	Territorial Restrictions				Non-Territorial Restrictions					
	Exclusive Distribution (3Ai) <sup>1</sup>	Exclusive Purchase (3Aii) <sup>1</sup>	Franchises (3Aiii) <sup>1</sup>	Selective Distribution (3Aiv) <sup>1</sup>	Exclusive Distribution	Exclusive Purchase (3Bi) <sup>1</sup>	Franchises (3Bii) <sup>1</sup>	Selective Distribution (3Biii) <sup>1</sup>	Customer and Use Restriction (3Biv) <sup>1</sup>	Resale Price Maintenance (3Bv) <sup>1</sup>
<i>Austria</i>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>	yes <sup>2</sup>
<i>Belgium</i>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>
<i>Denmark</i>	yes <sup>4, 5</sup>	yes <sup>4</sup>	yes <sup>4, 6</sup>	yes <sup>4, 7</sup>	yes <sup>4, 5</sup>	yes <sup>4</sup>	yes <sup>4, 6</sup>	yes <sup>4</sup>	yes <sup>4</sup>	yes <sup>4, 5, 8</sup>
<i>Finland</i>	yes <sup>9, 10</sup>	yes <sup>9</sup>	yes <sup>9</sup>	yes <sup>9</sup>	yes <sup>9</sup>	yes <sup>9, 11</sup>	yes <sup>9</sup>	yes <sup>9, 12</sup>	yes <sup>9, 13</sup>	yes <sup>9, 14</sup>
<i>France</i>	yes <sup>15</sup>	yes <sup>16</sup>	yes	yes	yes <sup>17</sup>	yes	yes <sup>18</sup>	yes <sup>19</sup>	yes	yes <sup>20</sup>
<i>Germany</i>	yes <sup>21</sup>	yes <sup>21</sup>	yes <sup>22</sup>	yes <sup>23</sup>	yes	yes	yes <sup>22</sup>	yes <sup>23</sup>	yes	yes <sup>24</sup>
<i>Greece</i>	yes <sup>25</sup>	yes <sup>26</sup>	yes <sup>27</sup>	yes <sup>25, 28</sup>	---	---	yes <sup>27</sup>	yes <sup>28, 29</sup>	yes	yes <sup>25, 30</sup>
<i>Ireland</i>	yes <sup>31</sup>	n/a	yes <sup>32</sup>	yes <sup>33</sup>	yes <sup>31</sup>	yes <sup>34</sup>	yes <sup>32</sup>	n/a <sup>33</sup>	n/a <sup>35</sup>	yes <sup>36</sup>
<i>Italy</i>	yes <sup>37, 38</sup>	yes <sup>37</sup>	yes <sup>37</sup>	yes <sup>37</sup>	yes <sup>37, 38</sup>	yes <sup>37</sup>	yes <sup>37</sup>	yes <sup>37</sup>	yes <sup>37</sup>	yes <sup>37, 39</sup>
<i>Luxembourg</i>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	n/a <sup>40</sup>	yes <sup>41</sup>
<i>Netherlands</i>	yes <sup>42</sup>	yes <sup>42, 43</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>	yes <sup>42</sup>
<i>Portugal</i>	yes <sup>44, 45</sup>	yes <sup>44, 46</sup>	yes <sup>44, 47</sup>	yes <sup>44, 48</sup>	yes <sup>44, 45</sup>	yes <sup>44, 46</sup>	yes <sup>44, 47</sup>	yes <sup>44, 48</sup>	yes <sup>44, 45</sup>	yes <sup>44, 45</sup>
<i>Spain</i>	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
<i>Sweden</i>	yes <sup>49</sup>	yes <sup>50</sup>	yes <sup>51</sup>	yes <sup>52</sup>	yes <sup>49</sup>	yes <sup>50</sup>	yes <sup>51</sup>	yes <sup>52</sup>	yes <sup>53</sup>	yes <sup>54</sup>
<i>United Kingdom</i>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>55</sup>	yes <sup>56</sup>
<b>Third Country</b>										
<i>Canada</i>	yes <sup>57</sup>	yes <sup>58</sup>	yes <sup>57</sup>	yes <sup>59</sup>	yes <sup>57</sup>	yes <sup>59</sup>	yes <sup>57</sup>	yes <sup>59</sup>	yes <sup>57</sup>	yes <sup>60</sup>
<i>Norway</i>	yes <sup>61</sup>	yes <sup>61</sup>	no <sup>62</sup>	yes <sup>61</sup>	yes <sup>61</sup>		no <sup>62</sup>	yes <sup>61</sup>	yes <sup>61</sup>	yes <sup>63</sup>
<i>USA</i>	yes <sup>64</sup>	yes <sup>64</sup>	yes <sup>64, 65</sup>	yes <sup>64</sup>	yes <sup>64</sup>	yes <sup>64</sup>	yes <sup>64, 65</sup>	yes <sup>64</sup>	yes <sup>64</sup>	yes <sup>66</sup>

### FOOTNOTES TO TABLE III

- The numbers contained in parentheses refer to the questionnaire (Appendix 2) to which the information in the column corresponds.

#### **Austria**

- Vertical sales agreements are broadly defined in the Austrian Kartellgesetz, and would include agreements in all classifications listed. The Austrian cartel court has not yet decided any cases pertaining to vertical sales agreements.

## Belgium

3. Until now, Belgian authorities have not decided any cases pertaining to vertical restraints. However, it is anticipated that the Community system will be followed in the future, and that block exemptions will be adopted.

## Denmark

4. Under the Danish system of abuse control, the effect of the restriction, rather than its formal denomination or structure, is the focus of the law. All categories of vertical restraints are covered. Koktvedgaard, Textbook on competition law (Laerebog i Konkurrenceret) 1994, at p. 127.
  5. If an exclusive distribution agreement has a negative effect on competition, the Council can order it to be terminated or changed pursuant to Secs. 11, 12. The Council may order undertakings to make deliveries to specified customers. The Danish Competition Council considered an exclusive distribution/purchase agreement between the Danish Publishers Association and the Danish Bookshopkeepers Association, under which the publishers can only deliver books to members of the latter, and they can only purchase books from the former. The agreement included a system of resale price maintenance. The Council approved both arrangements on "cultural grounds," to preserve a book sector consisting of well qualified bookshop keepers with a broad knowledge of Danish literature. This is one of the two exemptions granted for an RPM scheme, the other covering magazines and newspapers. Documentation Series from the Council, 1990.122 and 1991.22.
  6. Franchise agreements are a recent phenomenon in the Danish market. The Competition Council considered twelve franchise agreements of real estate agents, creating a vertical sales system between the main real estate agent (franchisor) and a real estate agent-member of the chain (franchisee), which contained a provision to fix prices. The Council concluded that the provision fixing prices could distort competition, but decided not to challenge the provision at that time. Instead, it would observe the development of the market as to whether other chains adopt similar provisions, which together could create a distortion of competition. Documentation series from the Council 1994-1, p. 46.
  7. In Denmark, the Council emphasizes that selective distribution systems should be based on objective, non-discriminatory criteria.
  8. Sec. 14 of the Danish Competition Law provides that enterprises or associations of enterprises may not agree, decide, stipulate or otherwise require that subsequent resellers shall observe minimum prices or profits, unless the Council has approved the agreement, etc. in question. Such approval shall be justified by important considerations. Only two exemptions have been granted, as noted above. In the tobacco industry, the Council revoked an exemption which it had earlier granted to enforce binding prices of tobacco, and this decision was affirmed by the Competition Appeals Tribunal, which dismissed the appeal in June 1991. However, the Danish Parliament passed a bill which continues the right to enforce binding resale prices of tobacco, except cigars. The reasons were to protect small retailers. See *Hummel Sport Danmark A/S*, OECD Doc. 1994 II iv; *Whirlpool Danmark*, Documentation series 1994-3, p. 274; *Smith & Co.*, Documentation Series 1993-1, p. 65; *Schulstad Gruppen A/S*, Documentation series 1993-1, p. 66; *Sadolin Malervarer og Dyrup & Co.*, Documentation series 1990-3, p. 187.
-

---

## Finland

9. Finnish law does not provide any categorization of vertical restraints, but in practice, the categorization follows that of the Community.
10. In *Nokia Data Oy*; dn:o 105/61/91, 19.2.1993, the Finnish Office of Free Competition found that a computer supplier and its retailers had entered an agreement which, while containing a clause prohibiting retailers from selling their products outside a given geographic region, did not provide absolute protection and did allow passive sales outside the given region. Thus, the clause was held not to constitute a restriction of competition.
11. In *Kesko Oy's* terms of trade regarding the grocery trade, dno 444/61/92, 6.7.1993, the Finnish Competition Office ruled that agreements between a supplier and its retailers constituted violations which contained a "purchase obligation", requiring the retailer to buy most of its products from the supplier, provided the latter's prices were competitive. They also contained a loyalty rebate given to the retailer if it increased its purchases each year. When preparing its decision, the Office considered the high market share of the supplier in the grocery trade (40%), the structure of the market and that the purchasing loyalty created by the system would be of long standing. Kesko Oy modified the relevant agreements and terms of trade.  
The above-mentioned principles were also adhered to in the following decisions: *Spar Oy's terms of trade regarding the grocery trade*, 39/61/91, 14.12.1993; *Kesko Oy's terms of trade in the footwear trade*, 294/61/93, 27.12.1994; *S-Group's terms of trade regarding the grocery trade*, 242/61/94, 5.4.1995. See also decision 154/61/94, 28.9.1994 (exclusive purchasing agreements in the market of stainless pipelines).
12. The selective distribution system of Abloy Oy, a lock manufacturer, was considered to have anti-competitive effects. The company modified the criteria on how to select the retailers as well as the relevant agreement and terms of trade. 115/61/91, 23.7.1993.
13. In *Nokia Data Oy*; dn:o 105/61/91, 19.2.1993, the Finnish Office of Free Competition found that an agreement between a computer supplier and its retailers contained a clause which, in preventing certain retailers from selling computers to schools because other retailers had an exclusive right for the schools, constituted a harmful restrictive practice.
14. Under Art. 4 of the Finnish Competition Act, resale price maintenance is explicitly prohibited. In one case, the Office of Free Competition held that printing the recommended resale price on the package did not constitute resale price maintenance because it did not require that the printed price be charged. *Leiras Oy*; dn:o 327/61/92, 26.1.1993. The Finnish Franchising Entrepreneurs' Association applied for an exemption regarding RPM. They requested that franchisors could provide franchisees with binding resale prices. The application was rejected as the anticompetitive effects of the RPM agreements were considered to outweigh the procompetitive effects. 253/67/93, 24.9.1993.

## France

15. Previously considered anticompetitive per se, exclusive distribution is now analysed according to the rule of reason and is accepted as long as some competition in the market remains. In particular, an exclusive arrangement should not remove the
-

possibility for a dealer to react to an unsolicited request from someone outside his territory.

In the field of products and materials for physiotherapists, the Conseil de la Concurrence held that an exclusive distribution agreement was not covered by Art. 7, provided a degree of competition remained in the relevant market. Decision 91-D-22. In a case involving distribution of gardening materials, exclusive distribution agreements were prohibited which contained absolute territorial protection provisions. Decision No. 94-D-27.

16. In a case involving the petrol sector, supplying only retailers who would accept exclusive purchase agreements was condemned, because it exceeded what was necessary to protect the integrity of the product. Decision No. 92-D-1992.
17. In the field of materials and films for industrial graphics arts, the Conseil de la Concurrence prohibited an exclusive distribution agreement containing RPM provisions held to restrain competition. Decision No. 93-D-50, 23.11.1993.
18. In the hairdresser field, the Conseil de la Concurrence upheld that the obligation imposed by the franchisor to use only those products which it or a designated third party manufactured on the ground that this was necessary to carry out the franchisor's know-how. Decisions 94.D.31; 94.D.32.
19. In the field of dental material and supply, the Conseil de la Concurrence prohibited a selective distribution agreement where the selection criteria were based on acceptance of commercial policy and not on objective criteria. Decision No. 93-D-49, 16.11.1993.
20. In the market for ski boots, the Conseil de la Concurrence imposed sanctions against a supplier for practices related to discount practices for resellers and imposing "suggested" resale prices by threat of refusal to sell and non-renewal of distribution contract. (Decision 91-D-03, 15.01.1991).
21. **Germany**

Agreements falling within GWB Sec. 18 (use restrictions, exclusive dealing agreements, restrictions on distribution, and tying agreements) may be prohibited if they have an adverse effect on competition, which occurs when 1) a significant number of enterprises in relation to competition in the market are similarly bound and unfairly restricted in their freedom to compete; 2) other enterprises are unduly restrained from entering the market; or 3) competition in the market for these or other goods or commercial services is substantially impaired through the scope of such restraints.

"Significant" implies that an important part of the market is involved. What matters is the significance of the restraints on the market, rather than the number of restrained enterprises. A bound market share of 40-50% is generally sufficient, but market share is not the only criterion.

"Unduly restrained" requires an extensive balancing of the interests of all undertakings involved, thereby taking into account the main objective of the GWB to preserve the freedom of competition. Arts. 85 and 86 of the EC Treaty must be considered, because the Bundeskartellamt may not forbid restraints which are allowed under Community law.

The Bundeskartellamt may declare agreements with Sec. 18 to be invalid.

Sec. 18 does not apply to certain vertical restrictions of competition in the areas of agriculture (Sec. 100) and energy (Sec. 103).

---



According to the majority opinion in the legal community, GWB Sec. 26(2) can also be applied to restrictive agreements within the meaning of GWB Sec. 18 nr. 1-4. Accordingly, the Bundeskartellamt often evaluates exclusivity rules in distribution systems in light of GWB Sec. 26(2) if the undertaking imposing the binding provisions has relative market power (GWB Sec. 26(2), second sentence), or a dominant position in the relevant market. Moreover, the Bundeskartellamt is also able to proceed against exclusive and tying practices of dominant undertakings pursuant to GWB Sec. 22(4). Whereas Secs. 18 and 22(4) authorize only competition enforcement officials to intervene, the character of Sec. 26(2) as an immediate prohibition enables affected undertakings to file a private action in civil court.

22. GWB Secs. 15 and 18 are applicable to franchise agreements, but franchise agreements only rarely satisfy the requirements for taking action pursuant to GWB Sec. 18(1) a-c. Under the abuse control principle, a violation may occur only when a franchisor has a dominant position in the market, or binds other undertakings in a market where similar binding agreements already exist. In the former case, agreements are likely to be governed by GWB Sec. 26(2). Price recommendations by the franchisor are only allowed with brand articles (GWB Sec. 38a). Otherwise, the prohibition of price recommendations in GWB Sec. 3(1) nr. 11 and 12 applies.
  23. The German legislator assumes that a restrictive distribution system will endanger the functioning of the market only if market power is present. Accordingly, selective distribution systems are evaluated in light of GWB Sec. 26(2). Pursuant to this provision, firms subject to GWB Sec. 26(2) are free to structure their distribution systems provided, however, that they do not treat undertakings engaged in similar business activities differentially without justification. The antitrust authority can declare such agreements void pursuant to GWB Sec. 18.
  24. Section 15 of the GWB provides that agreements between enterprises relating to goods or commercial services are null and void to the extent that they restrain the freedom of a party in establishing prices or business terms and conditions in contracts which it might enter with third parties regarding the goods supplied, or other goods or commercial services, regardless of whether the restraints affect market conditions. Both legal restraints (which are provisions in the contract binding the restrained party to observe certain terms and conditions in the contracts it enters into with third parties, which may be enforced in court proceedings ) and economic restraints (which are economic disadvantages such that any reasonable entrepreneur would prefer to renounce his contractual freedom rather than suffer such disadvantages, such as withdrawal of a discount, refusal to deliver, withdrawal of the right to rescind the contract) are subject to Sec. 15. Moreover, Sec. 15 prohibits such restraints imposed on either party to an agreement. Thus, most favoured buyer clauses (i.e., restraints on a supplier not to sell to other customers at more favourable prices) are equally subject to Sec. 15 as RPM clauses. *Garant*, Federal Supreme Court, WuW/E BGH 1787, 27.1.1981.  
Agreements with agents acting in the name and on behalf of their principals are not subject to Sec. 15. *Shell-Tankstelle*, Federal Supreme Court, WuW/E BGH 877, 1967. However, in order to qualify, the economic risk related to the goods sold by the agent in the name and on the account of his principal must in fact be born by the principal and not the agent. *Telefunken*, Kammergericht, WuW/E OLG 2819, 5 Aug. 1982.  
Recommendations having the purpose of circumventing the prohibition of imposing binding prices are forbidden. (GWB Sec. 38(1) nr. 10-12). All forms of vertical recommended prices are forbidden, with certain legal exceptions, such as non-binding recommended prices for branded goods. An enterprise is permitted to make non-
-

binding price recommendations for its branded goods to the retail trade or end consumers, provided such goods are in price competition with similar goods of other manufacturers, that they are specifically designated as non-binding and state a specific price, that there is no economic or other pressure applied to ensure compliance, and that the recommendations are made in the expectation that the recommended price corresponds to the actual price. (Sec. 38a). The GWB contains exemptions from the ban on price recommendations in favor of SME's and for special branches of business (transport(Sec. 99) and banking and insurance (Sec. 102)).

The GWB provides for branch-specific and special defined exemptions from the prohibition against imposition of binding prices. Those exemptions relate to the areas of published materials (Secs. 16, 17), producers' associations (Sec. 100 par. 2 and 3), banking and insurance (Sec. 102), societies exercising intellectual property rights (Sec. 102a) and public utilities (sec. 103). Moreover, Secs. 20(2) and 21, exempt subject-matter restrictions imposed on licensees and those acquiring rights in know-how contracts otherwise prohibited pursuant to Sec. 15.

### Greece

25. An exclusive distribution agreement combined with a selective distribution network, which incorporated non-export, non-import and price fixing clauses, was held to constitute a restriction of competition. Guy Laroche, CPC Resolution No.1 (1980) ECLR 58.

An exclusive agreement between a foreign firm and a Greek importer which allowed the latter to re-export the product, and not prohibiting parallel imports, was not violative. Parfumes Guy Laroche, CPC Resolution No. 19 (1982) ECLR 156.

Where the exclusive distributor in Greece of certain brand spectacle frames wished to appoint an exclusive dealer in Rhodes, the authority held that Rhodes was a separate market, that the only imports to Rhodes were through the Greek distributor in question, and supplies directly to local opticians in Rhodes from the rest of Greece were not commercially attractive. Accordingly, the authority concluded that an exclusive distributorship with one of the local opticians would have placed the others at a competitive disadvantage. CC Advisory Opinion 63 (spectacles)(1988) ECLR 315.

The Authority has applied directly Reg. 1983/83 to clear an exclusive distribution agreement. Tiza/Pec, CC Advisory Opinion 34 and Ministerial Decision (1986) ECLR 129.

26. Customers with whom exclusive supply agreements had been entered received special reductions on prices or on net annual turnover. The authority held this scheme violative, as it placed non-exclusive customers at a competitive disadvantage, and excluded competitors from access to the market. Tasty Food, Competition Commission 1985 (OECD).

In the petroleum sector, the Minister of Commerce has recommended that firms should adapt their contracts to the provisions of Reg. 1984/83. Association of Greek Benzin Sellers, CC Advisory Opinion 56 (1987) ECLR 37.

27. A franchise agreement for disposable baby slips containing the following clauses was held violative by the authority: to sell only those products supplied by the franchisor or by suppliers nominated by the franchisor; to buy only from the franchisor even if the same goods were offered from other sources at lower prices; and to sell at prices set by the franchisor. Moreover, the franchisor could not agree to abstain from appointing new franchisees at a distance less than 1.000 metres from existing franchisees. In this case, the distributor was the main customer of the manufacturer, distributing 30% of the latter's product. The agreement gave preferential treatment to this distributor as

compared to others in the network. The authority imposed fines of DRS 2.2 million. Pigi/Avlon, CC Advisory Opinion 50 (1987) ECLR 113.

28. A selective distribution system involving corrugated asbestos-cement sheets and related products was at issue in CC advisory Opinion 63, Hellenit-Asbestos (1988) ECLR 315. New dealers were to be selected on the basis of their solvency, storing capacity, promotional activities, etc. The authority held that this constituted a selective distribution system, and thereby was allowed if the selection criteria were objective and reasonable, even if the supplier was dominant, and even if the product was not high-technology, as long as other factors justified the system such as the need to guarantee solvency. However, the authority eliminated the clauses which prohibited the exclusive dealers from selling and storing competing products, and which provided territorial protection to dealers in areas with less than 10.000 inhabitants.

A negative clearance was denied by the authorities in CC Advisory Opinion 75 (Toyota)(1989) ECLR 166. There, the following clauses in a vehicle distribution servicing agreement were held violative: to sell exclusively Toyota products; not to seek customers outside the contract territory; not to make exports to non-EEC countries, or to undertakings outside the distribution network of Toyota in EEC countries; not to assign the right to sell Toyota products to third parties.

The Greek authority made 11 decisions regarding selective distribution systems in the cosmetics industry. In 6 of those cases, negative clearances were granted. They contained the following clauses: the reseller and his staff should be professional in the market for cosmetics and perfumes; the quality of the shop premises should coincide with the international prestige and status of the products involved; the surface covered by the selling points should not be disproportionate with the total number of products for sale under the various brand names; storage conditions should guarantee the highest standards of preservation; products could be resold only to participants in the selective distribution network and having as their trading territory EU countries; the reseller should provide the best possible presentation of the products, periodically employing the best shop windows; and the reseller should use the advertising material supplied by the firm for the presentation of its products on his premises. However, the following clauses were found to restrict competition: allocation of predetermined space of the premises, windows, etc. for the sale and promotion of the products; contribution of the reseller to the advertising expenses of the products; upkeep and communication to the importer lists of clients; power of the supplier to amend the terms and conditions that shops must fulfil, and the obligation of the reseller to comply with the amendments; and the obligation of the supplier to give an extra 10% discount to those resellers satisfying all terms. CC Advisory Opinion 65 and 69-74 (1989) ECLR 167.

The authority rejected a complaint in the cosmetics industry involving new products and allergy-sensitive products, holding that although certain practices could restrict competition, the market shares of the products involved were too small (4.5-5.5%) to influence competition. Con dica, Tonifarm, Lavifarm (1990) OECD.

29. The authority cleared a standard form agreement for selective distribution in the perfume sector, which was designed to ensure that the resellers would be able to preserve the quality and prestige of the products concerned. If the terms are based on objective and quality criteria, justified by the nature of the product and applied in a non-discriminatory manner, they will be cleared. CC Advisory Opinion No. 3 and Ministerial Decision (Christian Dior)(1983) ECLR 279.

A clause in a distribution agreement in the cosmetics industry required the retailer to keep at all times a stock equal to two thirds of sales of each category of products in question. The Minister held that the clause violated the act because it "exceeds the necessary limits for the operation of a selective distribution system." Re Lancaster,

Paco Rabanne and Clarins, CC Advisory Opinion 35 and 36 and Ministerial Decisions (1986) ECLR 129.

Clauses which prohibited the distributor from making "special offers" without the prior written approval of the supplier, and which prevented the distributor from altering the original packaging of the products, were allowed in a selective distribution system for perfume products. Re Guy Laroche, Courreges and Lancome, CC Advisory Opinion 37 and Ministerial Decision (1986) ECLR 130.

Major fines of Drs 4.000.000 were imposed on two distributors for ignoring the terms of their notified selective distribution system and instead accepting new orders based on subjective and qualitative criteria, demanding unreasonably large orders, delivering "recommended" price lists which were in reality obligatory, granting subjective turnover discounts, and penalising the complainant by cutting supplies immediately after it started discounting the products in question. I&A Patistas, CC Advisory Opinion 57 and Ministerial Decision (1988) ECLR 36.

30. The authority granted a negative clearance for an exclusive import agreement which contained a clause fixing price margins (minimum and maximum price per product). The authority reasoned that the clause restricted the marketing of perfume and other products of high quality where patent, know-how and trade mark licensing was involved. The price clause was deemed to preserve the prestige of these products. The authority referred explicitly to the Commission's comfort letters to *Dior* and *Lancome*. However, it is noteworthy that those comfort letters were issued after all direct and indirect RPM restrictions had been removed. *Parfumes Guy Laroche*, CPC Resolution No 19 (1982) ECLR 156.

A Greek publisher and bookseller filed an action against a discount retail bookseller for selling the former's titles at prices below its price lists. The publisher argued that this violated competition law because it threatened the viability of the publisher's business, including its own retail shops. The court held that the discount seller was a cost saving company passing part of its benefits to the consumer, and that it had been selling at a discount for more than 17 years while the publisher's bookshops continued in operation. In fact, some of them matched the discount seller's discount policies. Thus, the court concluded that the discounter had neither the intention nor the potential to drive its competitors out of the market. *Papadimas v. Protoporia*, CFI 7227/1991 (1991) 5 ECLR R-168.

### **Ireland**

31. A block exemption (called a "category license" in Ireland) exists for exclusive distribution agreements, and for motor fuels. Both pertain to territorial restraints, specifically in the context of contract territory. A large number of individual decisions also address territorial restraints. (The Stationery Office, Dublin, 1993, reprinted in Competition Authority Annual Report, 1993, Annex 2).
32. A category license exists in Ireland for franchise arrangements. (The Stationery Office, Dublin, 1994).
33. No cases have been decided thus far by the Irish authority with respect to selective distribution agreements.
34. A series of exclusive purchase agreements between a supplier of motor fuel and a series of filling station operators were held by the Irish Authority to violate Art. 4(1), but satisfied the requirements for a license (corresponding to an exemption under Art. 85(3)). The license was granted because the advantages of the distribution system,
-

with concomitant benefits to consumers, outweighed the restrictions on competition. Both inter and intra brand competition would result, and no territorial restrictions were involved. (*Esso Solus and Related Agreements*, Case no. CA/11/91E, CA/12/91E, CA/13/91E and CA/14/91E, Competition Authority Decision of 25 June 1992.)

An exclusive purchase agreement was held not to violate Art. 4(1) which imposed an obligation not to deal in competing goods without the supplier's consent (which would not be unreasonably withheld). The Authority concluded that this requirement did not result in a restriction of competition because it did not prevent resellers from obtaining supplies of the branded products in question from a source other than the supplier, nor did it prevent suppliers of competing products from gaining access to the grocery market in Ireland. (*Johnson Bros. Ltd./Campbell Grocery Products Ltd.*, Case no. CA/290/92E, Competition Authority Decision of 28 October 1994.)

The Authority prohibited certain notified exclusive purchase agreements between suppliers and dealers of cylinder LPG as anticompetitive because they were of too great a duration, they included RPM provisions, and they included products ancillary to the main contract. A category license was granted for similar agreements, on condition that they be of no more than two years duration, that they contain no RPM clauses, and that no products other than cylinder LPG be part of the agreements. In making its competitive assessment, the authority considered EEC Reg. 1984/83 as regards exclusive purchase arrangements, and cited the Commission's decision in the *Scholler and Langnese* cases as being "of considerable relevance." (*Cylinder LPG Category License*, Competition Authority Decision No. 364 of 28 Oct. 1994, The Stationery Office, Dublin, 1994).

A certificate was granted with respect to an exclusive purchase agreement between a British manufacturer of prepared grocery products and an Irish distributor. Case no. CA/290/92E, Competition Authority Decision of 28 October 1994.

35. In notifications under the EDCL, the Irish authority has permitted restrictions on customers where, for example, the distributor is restricted from dealing with specified large customers, with whom the manufacturer wishes to deal directly. Use restrictions were also addressed in the Authority's decisions of 10.4.95, Blugaz/bulk customers, where a restriction preventing bulk customers using the LPG purchased in gas-powered cars was considered.
36. The Irish Authority has decided in one case that RPM is prohibited in agreements relating to the supply of cylinder liquid petroleum gas (LPG). Competition Authority Decision No. 364 of 28 October 1994, The Stationery Office, Dublin, 1994.  
An arrangement whereby a supplier of motor fuel oil informed the retail filling-station operators which it supplied of the prices at its own retail outlets was held to be anti-competitive because it could have the effect of eliminating uncertainty about competitors' behavior. *Esso Solus*, Case no. CA/11/91E, CA/12/91E, CA/13/91E, and CA/14/91E, Competition Authority Decision of 25 June 1992.

### Italy

37. Section 2 of the Italian Competition Act prohibits all types of agreements, including vertical agreements, which have as their object or effect appreciable prevention, restriction or distortion of competition, without any reference to their formal denomination or structure. The restrictive nature of a vertical agreement within the meaning of Section 2 is evaluated case by case, by reference to its economic and legal context.

38. On the basis of the analysis of their economic context, some exclusive distribution agreements were held not to constitute appreciable restrictions of competition. (*Vevey Europe-Res Pharma*, deliberation of 26.2.92, in Bulletin 4/92, rif. 17; *Contal-Talat*, deliberations of 13.1.92, in Bulletin 1/92, rif.33; *Sodilat-Putignano*, deliberation of 5.2.92, in Bulletin 3/92, rif. 34; *Alleanza Assicurazioni-Ambroveneto*, deliberation of 24.11.93, in Bulletin 36/93, rif. 67).
39. Art. 2 of the Italian Act was held inapplicable to interprofessional agreements regulated by law fixing minimum prices for the sale of agricultural products. (*Biraghi*, deliberation of 11.3.92, in Bulletin 5/92, rif. 131.)

### **Luxembourg**

40. The Luxembourg authority and courts have not decided any vertical restraints cases.
41. The Regulation of 9 December 1965 establishes a per se rule against RPM as well as refusals to deal which serve as a sanction for non-compliance or unwillingness to comply with a price set under an RPM scheme. The law forbids both recommended and imposed prices. A general exception exists for books, newspapers and tobacco products. A temporary exemption may be granted by the Minister for a determined product or service to facilitate its launching on the market, such as novelty or exclusivity attached to a patent.

### **Netherlands**

42. The Economic Competition Act is applicable to all vertical restrictions. All types of vertical restrictions can be declared contrary to the general interest by the Minister of Economic Affairs. Dutch law prohibits certain categories of vertical restrictions, including collective and individual RPM. Exclusive distribution and franchising agreements can also be prohibited when they have the intention or effect of market sharing.
43. The case of Grolsch (beerbrewer) involves exclusive distribution agreements between Grolsch and 35 wholesalers of beer. These agreements contained clauses which provided absolute territorial protection. Negotiations to remove these clauses were ongoing as of the time this report was being prepared.

### **Portugal**

44. The Portuguese competition authority has stated that it follows the categorisation stipulated under Community law.
45. In *Unicer*, No. 1/85, Conselho da Concorrência, 1984/1985 Annual Report, the authority allowed an exclusive distribution system, but required the elimination of certain clauses in the contract concerning price fixing and prohibiting distributors from selling competing products. These clauses were considered restrictive of competition under Art. 13a, c, and e. This case was decided before the 1985 law took force, but the law was nonetheless applied.
- In *Centralcer*, Conselho da Concorrência, Annual Report 1986, the authority allowed an exclusive distribution system in the beer supply sector, but required the elimination of certain practices and clauses relating to price fixing and a requirement that distributors not sell competing products.
-

See *Sociedade da água do Luso and Central de Cervejas*, Conselho da Concorrência, Annual Report 1987.

In *Berger*, Conselho da Concorrência, Annual Report 1988, the authority held violative an exclusive distribution system which incorporated absolute territorial protection, RPM, and non-objective selection criteria. A fine of 500.000 excudos was imposed.

In *Dan Cake*, No. 4/91, exclusive distributions were held to violate Art. 13, and a fine was imposed. These agreements established exclusive territories and defined conditions of sale, not taking into account objective criteria when setting transaction conditions and not permitting the distributors to sell competing products.

46. Clauses containing exclusive purchase agreements and RPM were held to restrict competition. *Wasteels Expresso*, Conselho da Concorrência, Annual Report 1987. The authority decided that an exclusive purchase agreement in the butane gas cylinder sector met the requirements of EC block exemption 1984/83 in *BP* (Annual Report 1993, Case 4/93).
47. The authority granted an exemption regarding a franchise agreement in *Temtudo Franchising, Lda*, (Annual Report 1993.) A more lenient approach was taken by the Portuguese authority in analyzing this case than is followed in the Community, as transfer of know-how and technology was not deemed essential, and RPM and a clause prohibiting sales of competing products were allowed.
48. In 1985, the Portuguese Competition authority dealt with the first cases concerning selective distribution. It stated that the selection of dealers must be based on qualitative, non-discriminatory, proportionate and open criteria. Selective distribution networks were deemed unlikely to have serious anticompetitive effects in sectors with strong competition, since competitors would not be foreclosed from the market. However, when the producer or seller has strong market power or a dominant position, anticompetitive effects are possible.
- In 1985, the authority adjudged selective distribution systems in the dermatopharmaceutical industry violative and not qualified for exemption because the requirements eliminated some types of retailers, creating artificial barriers to entry, limiting competition in different markets, and leading to price fixing. *Phar, Vichy, Ferraz Lynce* (3/85, 4/85, and 5/85, respectively), Conselho da Concorrência, Report 1986.
- The authority granted an exemption with respect to a selective distribution system in the perfume sector in *Polimaia*, Annual Report 1993, Case 3/92. However, the authority ordered *Polimaia* to bring its agreements into conformance with EC requirements as set forth in Commission decisions in the *Yves Saint Laurent* and *Givenchy* cases.
- An exemption was denied in *Parfums & Beaute*, (Annual Report 1993, Case 9/92), and the authority ordered the inclusion of a seller in its distribution network.

## Sweden

49. In Sweden, an exemption was granted with respect to an exclusive distribution scheme where the following conditions were imposed: the products covered were specified; the supplier could choose distribution channels for products not covered; and the agreements were limited to one year. Case 971/93, 29 June 1994.
- The Swedish authority held that three conditions constituted a restriction of competition in a newspaper distribution agreement: the distributor agreed to provide an

- undetermined number of newspapers for an unlimited period of time; an RPM provision; and an exclusivity provision. Case 1794/93, 26 May 1994.  
See also cases 983/93, 991/93, 1356/93, 1413/93, 1455/93, 649/94, 650/94, 651/94, 652/94, 740/94, 1807/93, 737/94, 570/94, 571/94, 1207/93, 1060/94, 206/94, 499/94, 1592/93, 1243/93, 778/94, 1034/93, 874/93.
50. An exclusive purchase agreement which included a requirement that when providing repair service, the retailer was obliged to use the manufacturer's original spare parts, was held to constitute a restriction of competition, likely to restrict both inter and intrabrand competition. The Authority found that such agreements could impede new entry. Case 991/93, 17 February 1994.  
See 896/93, 1469/93, 152/94, 874/93, 605/94, 1451/93, 206/94, 1027/94, and 1218/94.
51. An agreement between a franchise chain and its franchisees in the Swedish market for office utensils contained a provision regarding an exclusive right for the franchisee to work within a specified geographic area. Since market sharing is deemed to be a restriction of competition, a negative clearance was not granted. However, the exclusive right was considered to be necessary to achieve the positive effects of the agreement, enabling the franchisees to concentrate their efforts in the area that had been assigned to them. Accordingly, the Competition Authority exempted the agreement. Case 232/95; see also Cases 747/93, 1438/93, 9/94, 319/94, 1116/94, 1339/94, and 25/95.
52. A health foods supplier concluded selective distribution agreements with most health foods wholesalers in Sweden according to which the wholesalers were bound to sell only to authorized retailers. The Competition Authority did not consider health foods to be products that justify a selective distribution system under Community caselaw. Accordingly, the Authority found the agreement to be anti-competitive and to constitute an appreciable restriction of competition. The supplier was ordered to terminate the agreement and the obligation was combined with a fine of SEK 500.000 (ECU 56.622). Case 94/95; see also Cases 824/93, 539/93, 641/93, 781/93, 1042/93, 1070/93, 1129/93, 1187/93, 1592/93, 327/94, 379/94, 458/94, 499/94, 514/94, 576/94, 778/94, 840/94, 1298/94, and 155/95.
53. See cases 110/94, 1376/93, 1350/93, and 1522/94.
54. In case 1807/93, a series of exclusive purchase agreements were at issue. A price list was provided from the manufacturer through the distributor directly to the consumer. The Swedish authority held that it was unclear whether these prices were only recommended prices. No exemption was granted because the existence of the price list together with an obligation that the distributors use the prices in the price list as the basis for negotiations with their customers constituted an excessive restriction of the freedom of the distributors to set their own prices. See also cases 1116/93, 786/93, 1413/93, 1455/93, 1794/93, 1812/93 and 1320/94.

### United Kingdom

55. Agreements containing restrictions within each of these classifications may or may not be registrable under the RTPA, which exempts from its scope certain forms of exclusive distribution and exclusive purchase agreements. Moreover, the RTPA does not cover agreements where restrictions are accepted by only one party, which will be the case with many forms of franchise and selective distribution agreements.
-



56. In the UK, RPM agreements for goods are void under the Resale Prices Act of 1976, except where the Restrictive Practices Court has granted an order exempting a particular class of goods from the scope of the act. This has been done in the case of books and certain medicines.

### Canada

57. "Market restriction" is defined as any practice whereby a supplier, as a condition of supplying a product, requires the distributor to sell the product only in a defined market. They cover distributorships, agencies, franchise agreements, non-competition clauses, and others.  
If a market restriction is engaged in by a major supplier or is widespread in relation to a product, and thereby is likely to substantially lessen competition in relation to the product, the Competition Tribunal may prohibit such market restriction. (Sec. 77(3)).
58. The Competition Tribunal may, on application of the Director, prohibit one or more suppliers from continuing to engage in "exclusive dealing" or "tied selling."  
Exclusive dealing means any practice whereby a supplier of a product, as a condition of supplying, requires that the customer deal only or primarily in products supplied or designated by the supplier, or refrain from dealing in a specified class or kind of product, except as supplied by the supplier.  
Tied selling is any practice whereby a supplier, as a condition of supplying the product to a customer, requires that customer to acquire another product from the supplier or his nominee or to refrain from using or distributing, in conjunction with the supplied product, another product not of a brand or manufacturer designated by the supplier or his nominee. (Sec. 77(1).)  
These practices are not per se illegal. Rather, if the Tribunal finds that they are engaged in by a major supplier of a product or are widespread in a market, are likely to impede entry or expansion of sales of a product in the market, or to have other exclusionary effect in the market, with the result that competition is or is likely to be substantially lessened, it may prohibit them. (Sec. 77(2)).
59. Sec. 75 addresses refusals to deal. It provides that the Competition Tribunal may, on the application of the Director of Investigation and Research and subject to certain conditions (including that the party to whom supply has been refused is "substantially affected" in his business due to his inability to obtain adequate supplies) order a supplier to accept a given customer.  
Suppliers are permitted to implement criteria for selection of purchasers which set out clearly the conditions that, in accordance with the needs of the business, the supplier considers are essential for a purchaser to meet and continue to meet as long as the purchaser carries the supplier's products. Those criteria may include the nature of the purchaser's business, the quality of other products supplied by the purchaser, the location of the purchaser's business, the purchaser's level of sales, the purchaser's service capabilities and facilities, the training and coverage of the purchaser's staff, and other factors. These criteria must be lawful, realistic, objective and workable. [CCL 6-9].
60. It is a criminal offense to attempt to discourage an unrelated business from price cutting or to influence a business to raise prices, by agreement, threat, promise, or other means. The law prohibits the refusal to supply or other discrimination against a price cutter. (Sec. 61(1)).  
The law establishes a rebuttable presumption that an unqualified suggestion by a supplier of a resale price is proof of an attempt to influence the price. A successful
-

defense requires that the supplier prove that in making the suggestion, it was made clear to the purchaser that he was under no obligation to accept the suggestion and would not suffer in his business relations if the suggestion was not accepted. (Sec. 61(3)).

### **Norway**

61. The Norwegian act provides that the Authority may intervene against vertical restraints which restrict competition contrary to the Act. The Authority has issued guidelines concerning its intervention policy, which state that under certain circumstances the following practices may be detrimental to competition and economic efficiency: exclusive distribution, customer and use restrictions, selective distribution, and exclusive purchase.  
The Norwegian act creates an exception for individual suppliers from the general prohibition against market sharing for exclusive distribution arrangements. Sec. 3-3.
62. Franchise agreements are not considered to be vertical restraints by the Norwegian authority. However, they may contain prohibited vertical restraints, such as those specified in the preceding note.
63. RPM is prohibited under the Norwegian Act.

### **United States**

64. The categorization of vertical restraints under US law differs from that under Community law. Under US law, the major division is between inter brand restraints and intra brand restraints.  
Intrabrand restraints include both price restraints, which are per se illegal, and non-price restraints, which are subject to the rule of reason. Non-price restraints may take various forms: territorial restrictions (including restrictions on area of responsibility of the distributor, imposing a quota on the distributor, specifying the location from which the distributor may operate, imposing "pass-over" arrangements, under which a distributor who makes a sale in another distributor's territory makes a payment to the second distributor, imposing royalty or differential pricing, under which a distributor who makes a sale in another distributor's territory must either charge a higher price to his customer or pay the manufacturer a royalty, imposing an absolute, air-tight territorial restriction) and customer restrictions (including a reservation by the manufacturer of a customer to himself, authorized distribution schemes [which resemble selective distribution]).  
Interbrand restraints include exclusive purchase/dealing arrangements and tying arrangements. A tying arrangement occurs when the supply of one product (the tying product) is made contingent upon the purchase of another product (the tied product). Exclusive purchase/dealing arrangements are subject to the rule of reason; tying arrangements are subject to a presumption of illegality upon plaintiff's proof of five elements: (1) the tied and tying products are separate items; (2) the supply of the tying product is made contingent on the purchase of the tied product; (3) the supplier has sufficient market power in the tying product market to actually restrain competition in the tied product market; (4) the tie results in the anticompetitive effect of foreclosing the market to alternative suppliers of the tied product; and (5) a substantial amount of competition in the tied product market is affected by the tying arrangement.
  65. Under US law, provisions of franchising agreements constituting territorial restraints, exclusive dealing, tying, etc. are examined under the appropriate tests often developed
-

in cases outside the franchising context. *Spray-Rite Service Corp. v. Monsanto*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984).

66. The setting of both price floors (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)) and price ceilings (*Albrecht v. Herald Co.*, 390 U.S. 145 (1968)) is per se illegal in the US.

Price suggestions are lawful, but when they go beyond either mere suggestions of preferred resale prices they may be viewed as an "agreement" to fix prices in violation of the Sherman Act. Thus, insistence that the distributor "stay competitive" or "meet competition" are merely vague suggestions from the manufacturer and do not constitute an agreement to fix prices. *Chisholm Bros. Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137 (9th Cir. 1974). Sending price lists to distributors is also deemed lawful. *Mesirow v. Pepperidge Farm*, 703 F.2d 339 (9th Cir. 1983); *Morrison v. Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979). Where distributors maintain discretion to accept or reject recommended prices, it is not deemed an agreement to fix prices. *Winn v. Ebna Hibel Corp.*, 858 F.2d 1517; *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964). A factual finding of frequent departure from any recommended price will generally immunize price suggestions from classification as an agreement. *Belfiore v. New York Times Co.*, 826 F.2d 177, 181 (2d Cir. 1987). General compliance with price suggestions, however, is not sufficient to establish an "agreement" to fix prices, absent positive evidence of a "meeting of the minds" between manufacturer and distributor. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 and n. 9 (1984).

However, courts have held that where manufacturers have demanded and received assurance from distributors that recommended prices will be followed, this constitutes a vertical price fixing agreement in violation of the Sherman Act. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Moreover, forcing compliance with suggested prices by exploiting leverage over the distributor amounts to vertical price fixing. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Actual coercion into following resale price schemes is a clear violation of the Sherman Act. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985).

---



**TABLE IV: CRITERIA FOR DECIDING WHETHER VIOLATION EXISTS**

<i>European Union/ Member State/Third Country</i>	Rule of Reason (5A) <sup>1</sup>	Rule of Reason Criteria			De Minimis (5B) <sup>1</sup>	Interbrand v. Intra-brand (5C) <sup>1</sup>	Sectoral Studies (5D) <sup>1</sup>
		Foreclosure Effect (5A1) <sup>1</sup>	Nature and Quantity of Product (5A2) <sup>1</sup>	Market Position of Parties (5A3) <sup>1</sup>			
<i>Austria</i>	yes <sup>2</sup>	yes	yes	yes	no	yes	no
<i>Belgium</i>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	n/a <sup>3</sup>	no <sup>4</sup>	n/a <sup>3</sup>	no
<i>Denmark</i>	yes <sup>5</sup>	yes <sup>5</sup>	yes <sup>5</sup>	yes <sup>5</sup>	no <sup>6</sup>	yes <sup>5</sup>	yes <sup>5</sup>
<i>Finland</i>	yes	yes <sup>7</sup>	yes	yes <sup>8</sup>	no <sup>9</sup>	yes	yes <sup>10</sup>
<i>France</i>	yes <sup>11</sup>	yes <sup>12</sup>	yes <sup>13</sup>	yes <sup>14</sup>	no <sup>15</sup>	yes <sup>16</sup>	no
<i>Germany</i>	no <sup>17</sup>	yes	yes <sup>18</sup>	yes <sup>19</sup>	no <sup>20</sup>	yes <sup>21</sup>	no <sup>22</sup>
<i>Greece</i>	no <sup>23</sup>	yes	yes <sup>24</sup>	yes	yes <sup>25</sup>	yes <sup>26</sup>	yes <sup>27</sup>
<i>Ireland</i>	yes <sup>28</sup>	yes <sup>29</sup>	yes <sup>30</sup>	yes <sup>31</sup>	no <sup>32</sup>	yes <sup>33</sup>	no
<i>Italy</i>	yes <sup>34</sup>	yes <sup>35</sup>	yes <sup>36</sup>	yes <sup>37</sup>	no <sup>38</sup>	yes	no <sup>39</sup>
<i>Luxembourg</i>	n/a	n/a	n/a	n/a	no	n/a	no
<i>Netherlands</i>	yes <sup>40</sup>	no	no	no	no	yes	yes <sup>41</sup>
<i>Portugal</i>	no <sup>42</sup>	yes	yes	yes <sup>43</sup>	no	yes <sup>44</sup>	yes
<i>Spain</i>	yes	yes <sup>45</sup>	yes <sup>46</sup>	yes <sup>47</sup>	yes <sup>48</sup>	yes <sup>49</sup>	yes <sup>50</sup>
<i>Sweden</i>	yes	yes	yes	yes	yes <sup>51</sup>	yes <sup>52</sup>	no
<i>United Kingdom</i>	yes <sup>53</sup>	yes <sup>54</sup>	yes <sup>55</sup>	yes <sup>56</sup>	yes	yes <sup>57</sup>	yes <sup>58</sup>
<i>Canada</i>					no	yes <sup>59</sup>	no
<i>Norway</i>	yes <sup>60</sup>	yes <sup>61</sup>	yes	yes <sup>61</sup>	no <sup>62</sup>	yes <sup>61</sup>	no <sup>63</sup>
<i>USA</i>	yes <sup>64</sup>	yes <sup>65</sup>	yes	yes	no <sup>66</sup>	yes	

**FOOTNOTES TO TABLE IV**

- The numbers contained in parentheses refer to the questionnaire (Appendix 2) to which the information in the column corresponds.

**Austria**

- In Austria, vertical restraints are allowed unless anticompetitive, which is determined under an "economic justification" test, under which economic benefits to the parties and to the national economy are considered.

### Belgium

3. The intention of the Belgian government, expressed in the Parliamentary work, is that EU practice and jurisprudence will be a basic source for interpretation of the law by the Belgian authority. However, no cases have been decided to date in the area of vertical restraints.
4. No de minimis rule has been explicitly adopted in Belgium. However, Art. 2 limits its coverage to restrictions occurring in a substantial part of the Belgian market. The law provides no indication of what constitutes a "substantial part" of the market, Community practice will guide future decisions.  
Art. 5 presumes that the antitrust provisions of the law do not affect small and medium size enterprises as defined by Art. 12 & 2 of the Belgian accounting law (17.7.75). However, this does not constitute a de minimis rule, as it concerns the size of the enterprise rather than the market position of the parties.

### Denmark

5. In Denmark, a broad array of information is considered in the evaluation of vertical restraints; a rule of reason analysis, the main structural conditions of the market and the market behavior is included in the analysis. The foreclosure effect is also considered.
6. Currently, there is no de minimis rule, although the Danish competition Council states that minor cases are not pursued.

### Finland

7. For the Office of Free Competition, the foreclosure effect is one of the central issues considered in the evaluation of vertical restraints. The foreclosure effect may appear at different levels of the distribution channel.
8. See, e.g., *Kesko Oy's terms of trade*, dno 444/61/92, 6.7.1993 (wherein the loyalty rebate system was modified due to the firm market position of the supplier).
9. Finnish competition law does not include a de minimis rule. If a restriction of competition is not incompatible with sound and effective competition, such as when the market share of the undertaking or association of undertakings is small, the restriction will not be addressed.
10. An analysis of the effects of a restraint is usually preceded by a sectoral study, where the characteristics of the relevant businesses are gathered. However, the studies are seldom published as separate reports but form part of the decision. Studies of other authorities, research organizations etc. are also used. The studies published by the Office of Free Competition include: Competition in the Finnish Banking Sector in the 1980s (Publications of the Office of Free Competition 4/1992); Competition and Pricing in the Spectacle Market, 5/1992; Regulation and Competition in the Insurance Sector (6/1992); About Competition and Entry Barriers of Foreign Banks in Finland (11/1992).

### France

11. In France, the competition authority distinguishes between anticompetitive practices (i.e., agreements which have as their object or effect the restriction of competition in
-

a market, and the abuse of a dominant position or a state of economic dependence) and restrictive practices (i.e., abusive discriminations, where a party to an agreement receives unjustified discriminatory conditions regarding prices, delays in payment, sales or purchase conditions, and which affect competitive conditions; abusive refusals to deal, where a seller refuses to sell in response to a normal demand by a buyer, and the refusal is not justified by a law or regulation, or by the need to further economic progress; or RPM).

12. Analysis of foreclosure effect has been applied to vertical restraints and constitutes a principal criterion for assessing whether a restriction of competition is present. See Decisions No. 94-D-05 of 18.1.1994, No. 94-D-37 of 21.6.1994 (motor vehicles); No. 94-D-40 of 28.6.1994 (ski insurance).
13. The nature of product has been taken into account in assessment of selective distribution systems in France (e.g., the distribution of ski boots did not require the technical trained staff and special sales conditions, due to the lack of technical sophistication of the product. Decision 91-D-03, 15.1.1991). This criterion is not currently present in the decisions.
14. In certain circumstances, the market position of the parties may be taken into account in the assessment of an infringement of Art. 7 of the Ordonnance of 1986. See, e.g., Decision No. 94-D-55, of 18.10.1994; Decision No. 94-D-60, 13.12.1994.
15. There is no de minimis rule in France. The competition authorities prefer to make a complete analysis of the market, and the market power of each party. In all cases, the examination of the object or effect of the practice on the competition is the basis of the decisions of the competition authorities in France. A case by case analysis is made.

In one case, the Court of Appeal concluded that the practices of an enterprise which held 10% of the market fell outside the scope of Article 7.

16. The Conseil de la Concurrence considers that even if the effect of a selective distribution agreement is to limit the number of distributors (and thus the level of intrabrand competition), it can promote interbrand competition.

## **Germany**

17. The Bundeskartellamt does not utilize a "rule of reason" with respect to vertical agreements in order to determine whether a violation exists. However, it does consider the various criteria listed to decide whether a vertical restriction is inequitable.
18. The nature and quality of the product is especially important in Germany in assessing selective distribution systems. Generally, distribution systems with selective criteria relating to quality are permissible if their standards are justified and appropriate, and the distribution system reaches complete coverage.  
A producer of high-technology products is allowed to impose high standards for qualification of personnel, for the equipment of sales offices and for the insurance of fast and reliable technical service. (Bundesgerichtshof, 16.12.1986, in "Wirtschaft und Wettbewerb" (WuW), WuW/E BGH pp. 2351, 2357 ("Belieferungswürdige Verkaufsstätten II)).  
The exclusion of mail order businesses in favor of businesses of specialized dealers on grounds of the need for product assistance is justified only for technically complex

and dangerous products which require intensive personal customer assistance not substitutable by written customer information. (Bundesgerichtshof, 8.3.1983, in WuW/E BGH pp. 1995, 1998 ("Modellbauartikel III"); Oberlandesgericht Hamburg, 10.3.1988, in WuW OLG pp. 4195, 4198 ("Marklin"); Kammergericht, 4.2.1985, in WuW OLG pp. 3501, 3505 ("Marklin")).

19. Sec. 22(4) states that market controlling enterprises, which restrict market access or intrabrand competition, are subject to abuse control. [explain].
20. In Germany, the market position of the undertakings concerned plays an important role in the evaluation of vertical restraints. GWB sections 22(4) and 26(2) require a finding of dominance or relative market power; Sec. 18, however, imposes a lower threshold for taking action.
21. The Bundeskartellamt in general believes that restrictions on intrabrand competition caused by vertical restraints are outweighed by improvements in interbrand competition; and that the advantages of vertical agreements outweigh the disadvantages as long as interbrand competition is functioning actively.
22. The rights of the Bundeskartellamt to request information are limited to that which is related to a specific case; it has no right to conduct sectoral inquiries. (GWB Sec. 46).

### Greece

23. Greece follows a legalistic approach similar to the Commission's in analyzing cases under Art. 85.
24. Nature and quality of the product are considered by Greek authorities in selective distribution cases. Such agreements are allowed where the basis of the restrictions is objective qualitative criteria applied uniformly and without discrimination. See Working Group on cosmetics sector, 1985 OECD; *Cosmetics*, Administrative Court of Appeals, 1985 OECD; *Guy Laroche, Courreges and Lancome*, supra; *I&A Patistas*, CC Advisory Opinion 57 and Ministerial Decision (1987) ECLR; *Perfume Distribution*, CC 104-107 (1992) 2 ECLR.
25. Greek competition law does not provide a de minimis rule. However, the de minimis rule can be utilized through Art. 8a.2.i of the Greek Competition law, which provides that the Minister of Commerce, after obtaining the opinion of the Competition Committee, can issue a decision establishing certain categories of agreements, decisions and certified practices not covered by Art. 1, para. 1. However, such decision has not been issued as of the time of this study.  
The de minimis rule has been considered as a guiding principle, using no established criteria, in decisions of the Greek Authority. Eg. CC Advisory Opinion No. 5 and Ministerial Decision (bathing suits)(1985) ECLR; *Tiza/Pec*, supra; *Re Lancaster, Paco Rabanne and Clarins*, supra; *Rothmans Int/Georgiadis*, CC Advisory Opinion 57 and Ministerial Decision (1986) ECLR; *Record Companies*, 1989 OECDI; *Cosmetics*, CC Advisory Opinion 102 (1991) 5 ECLR; *Perfume Distribution*, supra; *Swatch Watches*, Committee for the Protection of Competition 31/1 (1993) 1 ECLR.
26. The competitive effects of a selective distribution which promoted interbrand competition but limited intrabrand competition by limiting the number of distributors was analyzed by the Greek Competition Committee in several cases. (Cacheral II, 48/84;



Lancaster I, 35/86; Paco Rabanne-Clarins I, 36/86; Charles of the Ritz, 42/86; Christian Dior, 49/86; ΦΗΜΗ, 60/88).

27. For instance, as the result of complaints of refusals to deal in the cosmetics sector, a major sectoral study was undertaken. Sectoral studies also have been undertaken in the beverage, beer, and snack food sectors.

### Ireland

28. See, e.g., *Esso Solus and Related Agreements*, Case no. CA/11/91E, CA/12/91E, CA/13/91E, and CA/14/91E, Competition Authority Decision of 25 June 1992.
29. See, e.g., *Johnson Bros. Ltd./Campbell Grocery Products Ltd.*, Case no. CA/290/92E, Competition Authority Decision of 28 October 1994, para. 9 (exclusive purchase agreement held lawful, inter alia, because it did not prevent the suppliers of competing products from gaining access to the grocery market in Ireland); *Cylinder LPG Category License decision*, Competition Authority Decision No. 364 of 28 Oct. 1994, The Stationery Office, Dublin, 1994.
30. See *Esso Solus and Related Agreements*, Case no. CA/11/91E, CA/12/91E, CA/13/91E, and CA/14/91E, Competition Authority Decision of 25 June 1992, para. 2.31; *Cylinder LPG Category License decision*, Competition Authority Decision No. 364 of 28 Oct. 1994, The Stationery Office, Dublin, 1994, para. 4.
31. *Esso Solus and Related Agreements*, Case no. CA/11/91E, CA/12/91E, CA/13/91E, and CA/14/91E, Competition Authority Decision of 25 June 1992, paras. 2.31, 2.32, 2.34; *Cylinder LPG Category License decision*, Competition Authority Decision No. 364 of 28 Oct. 1994, The Stationery Office, Dublin, 1994, paras. 5-14.
32. In Nallen/O'Toole (Belmullet), the authority stated that it does not intend to follow the example of the Commission and the Court of Justice with respect to agreements of minor importance. It stated:  
"given the size and distribution of population in Ireland, it is possible that a number of relatively small undertakings could, by acting together, prevent, restrict or distort competition in a part of the State. The exclusion of small undertakings from the provisions of the Act could deny consumers in parts of the State the protection against anti-competitive activities which the Act provides."
33. *Esso Solus and Related Agreements*, Case no. CA/11/91E, CA/12/91E, CA/13/91E, and CA/14/91E, Competition Authority Decision of 25 June 1992, para. 2.31.

### Italy

34. The Italian authority emphasizes economic analysis in application of Art. 2 of the national law, especially with respect to the economic impact of the agreement in the relevant market, in order to determine whether there is a restriction of competition. It carries out a rule of reason analysis using the criteria set forth in Art. 4 to determine whether agreements prohibited under Art. 2 may be given an exemption.
35. The foreclosure effect was analyzed in *INA/Banca di Roma*.
-

36. The nature and quantity of the product may be taken into account insofar as they are relevant to the economic evaluation of the impact of the agreement on competition (Art. 2) and on the conditions of supply in the market (Art. 4).
37. See, e.g., *Ina-Banca di Roma*, deliberation of 13.10.93, in Bulletin 30/93; *San Paolo-La Fondiaria-Milano Assicurazioni*, deliberation of 11.2.94, in Bulletin 6-7/94.
38. The Authority carries out a full analysis of the market, and the market position of the parties, rather than applying a de minimis rule.
39. In 1994, the Authority concluded a general fact-finding survey of the cinema industry, in which the vertical links between companies operating at different stages of the production process were analysed.

### **Netherlands**

40. Under Netherlands law, the rule of reason is applicable only to those cases in which prohibition rules have been created. In the vertical area, these are collective and individual RPM. (e.g., Art. 4 of the Decision on marketsharing). In contrast, in those cases where the abuse control system governs, a violation exists if the agreement or its application is contrary to the general interest. Thus, the legal form of the agreement is decisive for determining whether an infraction has occurred. If the Minister decides that an agreement violates the competition rules, he/she can declare it non-binding. Observance of agreements which have been declared non-binding is prohibited.
41. In the period from 1991-1995, the Dutch competition Authority initiated two sectoral studies, one with respect to individual vertical RPM in consumer goods and household appliance sectors, the other with respect to maintenance agreements for photocopy machines, focusing on the freedom to purchase toner from other suppliers. Neither study was completed as of the time of this report.

### **Portugal**

42. Vertical restraints in Portugal may be authorized if they satisfy the conditions of a positive economic balance, following the model of Art. 85(3).
43. The Portuguese authority takes into account the dimension and structure of the parties involved, and the commercial strategy and objectives of the producer/seller/distributor.
44. E.g., in *Phar, Vichy, and Ferraz Lynce* (3/85, 4/85 and 5/85, Conselho da Concorrência, Report 1986), the effects on intrabrand competition (which would be limited due to the closeness of pharmacies and easy access of consumers to pharmacies) were balanced against the effects on interbrand competition (which would not be limited).

### **Spain**

45. The Spanish authority always considers foreclosure effect on sources of supply. E.g., *Land-Rover* (19.04.90) and *Novia Data* (28.05.90).
-

46. This criterion is almost always considered in selective distribution cases by the Spanish authority. E.g. Omega (9.7.90).
47. See, e.g., Toshiba (21.3.91).
48. Art. 3.2 (d) of Law 16/1989 provides that an individual exemption may be obtained when the general economic situation and the public interest justify it if, due to its minor importance, the potential restriction of competition is not significant. The Tribunal for the Defense of Competition (TDC), when interpreting this article, held that the Commission Communication of 3 September 1986 is not automatically applicable to the national market and that it is not desirable to establish general exemptions based on quantitative criteria within the national market because they could leave certain geographic markets without defense. The TDC noted that the Commission Communication is not binding. (Case No. 18/90, 31 January 1990.)
49. Effect on intrabrand competition is always considered, especially when the level of interbrand competition in the relevant market is insufficient or similar networks exist for all substitute brands.
50. The TDC has made several studies which have found that some sectors have not completely adapted to the new competition legislation.

### **Sweden**

51. Under Swedish law, agreements of minor importance are those in which the joint market share of the parties does not exceed 10% of the relevant market within Sweden, and the annual turnover of each of the parties does not exceed 200 million SEK (ECU 22,65 million). However, if only very small companies are involved, with annual turnover not exceeding 10 million SEK (ECU 1,132 million), then the aggregate market share can be up to 15%.
52. See case 1085/93, 206/94, 1518/94, 499/94.

### **United Kingdom**

53. All vertical restraints in the UK are subject to a rules of reason analysis, except RPM which is per se illegal.  
None of the criteria mentioned in this table are relevant to determining whether an agreement is registrable under the RTPA. However, these criteria are relevant to the determination of what action should be taken with respect to such agreement as part of a general public interest and competition assessment.
  54. The main structural conditions of product markets where vertical restraints may be harmful are considered. These include
    - (i) market imperfections at the upstream or downstream level giving rise to significant individual or collective market power, at least in the short to medium term, and
    - (ii) where vertical restraints are prevalent or widespread within a given product market, i.e. where many or most producers employ similar vertical restraints, which therefore affect a significant proportion of total market sales and there is no history of significant entry. That may provide prima facie evidence of collective power, which is taken into account in the rule of reason assessment.
-

55. Nature and quantity of the product are not formal factors which must be considered. For instance, under the RPTA, the exemption provisions relate solely to goods under the contract and do not take account of the nature or quantity of the goods. However, the MMC, in examining the economic context of certain practices, has taken account of the perishability of newspapers. Newspapers and Periodicals (Cmnd 7214 (1978)); see "A Report on the Supply in the United Kingdom for Retail Sale of Fine Fragrances," (Monopolies and Mergers Commission, published November 1993, CM 2380).
56. Under the FTA vertical restraints are evaluated on a case by case basis if at least 25 % of the market is held by one firm or by a network of firms.
57. Effects on intra v. inter-brand competition are analyzed in the course of the rule of reason assessment.
58. The MMC report on *The Supply of Beer* (1989) found that a complex monopoly existed which was operating against the public interest as a result of the brewers' exclusive purchasing systems. In *The Supply of Petrol* (1965) the MMC accepted that exclusive purchasing agreements with retail outlets were justifiable but recommended that their duration be limited to five years. Certain undertakings negotiated with petrol suppliers following this report are still in place.

### **Canada**

59. Restrictions on interbrand competition are viewed much more strictly than restrictions on intrabrand competition.

### **Norway**

60. A rule of reason approach is followed when considering whether an intervention should be made against restraints which are not illegal per se.
61. The Norwegian Competition Authority may intervene with respect to a vertical restraint which is not per se illegal if the parties involved possess market power in one or more of the affected markets, and thus interbrand competition will be affected. If interbrand competition is not restricted, the Authority may intervene with respect to vertical restraints that create barriers to entry (market foreclosure). The authority may also intervene in vertical restraints cases where intrabrand competition is affected, such as exclusive or selective distribution cases.
62. Although there is no de minimis rule, the Authority may grant an exemption from the prohibitions of the Act if the restraints on competition have little significance for competition. (Sec. 3-9)
63. In several cases, the Authority has detected infringements of the Act through sectoral studies.

### **United States**

64. In the US, all non-price vertical restraints are subject to analysis under the rule of reason, recognizing that such restraints may "promote inter-brand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977). Thus, the fact that "a manufacturer intended to eliminate intra-brand competition, did so through territorial
-

limitations, and terminated the [distributor] who had invaded another's territory at discount prices would not impair market competition in the absence of other factors." Phillip E. Areeda, *Antitrust Law*, Vol. VIII, at 487 (1989). Rather, once a particular form of non-price vertical restraint is identified and established by the plaintiff: (1) the plaintiff must identify the relevant market; (2) the plaintiff must identify the defendant's market power and a multitude of other factors must be analysed to determine whether the restraint adversely affects competition in the inter-brand market; and (3) any manufacturer justifications establishing a legitimate objective and the necessity of the restraint to achieve that objective must be considered before determining whether, on balance, the restraint is reasonable in the context of the larger inter-brand market. Whether less restrictive alternatives are available to address the defendant's legitimate objectives is also considered, and is plaintiff's burden to establish. In short, this inquiry is used to determine "a restraint's anticompetitive potential versus its reasonable necessity to achieve a legitimate business function." *Id.* at 548.

The burden is generally considered to fall to the defendant manufacturer to establish justifications in order to rebut the plaintiff's claims, but ultimately to the plaintiff to convince the court that the restraint, on balance, has an anticompetitive effect. See *O.S.C. Corp. v. Apple Computer*, 792 F.2d 1464, 1469 (9th Cir. 1986); *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 575 (5th Cir. 1982).

Legitimate objectives are those which share with and promote the policies underlying US antitrust law, primarily including consumer welfare and promotion of the competitive process. Areeda, p. 490. Objectives which have been deemed legitimate include minimizing distribution costs; avoiding consumer confusion; assuring efficient delivery; maximizing market coverage; avoid free riding; protect product quality; maintain product goodwill; ensure adequate inventories; and encourage intensive local promotional strategies.

65. Foreclosure effect is particularly relevant in the context of inter-brand restraints such as exclusive dealing, exclusive purchase or tying. The degree to which competing manufacturers are deprived of outlets for their products, or distributors are prohibited from using alternative suppliers, is a threshold factor in analysis of such restraints. B. Hawk, *The Treatment of Non-Territorial Vertical Restraints under EU and US Competition Law*, paper presented to DG IV, 8 December 1994, at 51-52.
  66. No de minimis rule exists under US antitrust law.
-

**APPENDIX I:****STAGIAIRES WHO COMPILED SURVEY RESPONSES**

Austria	Gerlinde Berger, Andrea Ertl <sup>14</sup>
Belgium	François Dubreucq
Denmark	Jacob Federspiel, Catrin Hanson
Finland	Eva Jaakonmaki, Marjo Ojala
France	Yannick Scaramozzino
Germany	Barbara Halberfellner
Greece	Joanna Christoforou, Geoffrey Taylor
Ireland	Eoin O'Shea, Jemima Stratford
Italy	Caterina Bortolini, Sandra Cascone
Luxembourg	Laurence Duretz, Olivier Leurquin
Netherlands	Rein Wesseling
Portugal	Natalia Basterrechea, Noemi Borge
Spain	Natalia Basterrechea, Noemi Borge
Sweden	Haike Degenkolbe, Niklas Kavius
UK	Kevin Coates, Michelle Dyson
Australia	Lucy Fraser, Annabel Hart
Canada	Trudy Feaster, Natalie McNelis
Norway	Eric Gallstad, Rikke Skipper Pedersen
USA	Todd Friedbacher

---

<sup>14</sup>*Austrian national expert on secondment to DG IV.*

---

**APPENDIX II:****MEMBER STATE AND THIRD COUNTRY SURVEY QUESTIONNAIRE**

1. A. What section of the national competition law applies to vertical restraints?  
Please attach a copy of the relevant provisions.
  - B. Is it modelled on Art. 85? If not, how does it differ?
  2. What are the policy objectives of the laws applicable to vertical restraints?
  3. Types of vertical restraints covered: Under Community law, vertical restraints fall within the following categories. Is the categorization the same in your Member State/third country? If not, how are vertical restraints categorized?
    - A. Territorial restrictions
      - i. Exclusive distribution
      - ii. Exclusive purchase
      - iii. Franchises
      - iv. Selective distribution
    - B. Non-territorial restrictions
      - i. Exclusive purchase
      - ii. Franchises
      - iii. Selective distribution
      - iv. Customer and use restrictions
      - v. Resale price maintenance
  4. A. With respect to each type of restriction listed in response to question 3, have any cases been decided by the national authority or national courts? If so, please provide name and volume reference for major precedents, and briefly set forth their holdings.
  - B. Do the decisions of the national authority and national courts regarding vertical restraints follow the jurisprudence of the Court of Justice and Court of First Instance in interpreting Art. 85?
  5. How is it decided whether a violation exists?
    - A. Is a rule of reason approach followed?
      1. Is the foreclosure effect considered?
      2. Is nature and quantity of the product covered by the contract considered?
      3. Is the market position of the parties considered?
    - B. Is there a De Minimis rule?
    - C. Are the effects on interbrand v. intrabrand competition analyzed?
-

- D. Have any sectoral or other studies been done by the national authority which have resulted in the finding of a violation?
  
  - 6. How many cases involving vertical restraints does the national authority initiate each year?
  
  - 7. Are national authorities considering any revisions of the laws applicable to vertical restraints or their application? Have they recently made any such revisions?
-



**APPENDIX III:****MEMBER STATE LAWS APPLICABLE TO VERTICAL AGREEMENTS<sup>15</sup>****AUSTRIA****Katellgesetznovelle 1993, BGBl 693/93****Vertical restraints**

## §30a

- (1) Vertical restraints are agreements between a supplier with one or more enterprises remaining economically independent through which these enterprises are restricted in the purchase or distribution of goods or in the use or provision of services.
- (2) Resale price maintenance does not fall under the application of vertical restraints.

**Duty to notify**

## §30b

Vertical restraints have to be notified to the Cartel Court before implementation. An example of the clauses stipulated with the members has to be attached to this notification.

**Interdiction**

## §30c

- (1) The Cartel Court has to prohibit vertical restraints upon application, if
  1. The vertical restraint is against a statutory prohibition or against public morals;
  2. The vertical restraint is not economically justified. This is the case when the vertical restraint is not in accordance with the international treaties listed under §7 (1). When examining the economic justification of vertical restraints, the interests of the supplier, the tied enterprises and the final consumers have to be taken into account to the same extent. In addition, the freedom to take economic decisions of the tied enterprises has not to be restricted more than necessarily and market access must not be made to difficult for other competitors.
- (2) The following parties are entitled to file an application
  1. The Parties of the contract (§44)

---

<sup>15</sup>*Translations to English are unofficial*

2. Associations which represent economic interests of enterprises in the case these interests are affected by vertical restraints.
3. Each entrepreneur whose legal or economic interests are affected by vertical restraints.

### Legal consequences of the prohibition

#### §30d

- (1) The (also partial) execution of vertical restraints is forbidden, as far as the Cartel Court has by ultimate decision or by interim injunction prohibited the implementation of vertical restraints.
- (2) Vertical restraints are invalid, as far as their execution is prohibited.

### Block exemptions

#### §30e

- (1) The Federal Minister for Justice may - after having heard the social partners - decide by ordinance that particular groups of vertical restraints are not subject to prohibition according to §30c.
- (2) As far as an ordinance according to paragraph 1 contains special provisions on credit institutes, insurance companies or pension funds, it has to be proclaimed in agreement with the Federal Minister for Financial Affairs or Federal Minister for Economic Affairs.

## **BELGIUM**

### Law of August 5, 1991, concerning the protection of competition

#### Article 2

#### Ententes

§ 1 **Sont interdits**, tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser de manière sensible la concurrence sur le marché belge concerné ou dans une partie substantielle de celui-ci et notamment ceux qui consistent à :

- a) fixer de façon directe ou indirecte les prix d'achat ou de vente ou d'autres conditions de transaction;
  - b) limiter ou contrôler la production, les débouchés, le développement technique ou les investissements;
  - c) répartir les marchés ou les sources d'approvisionnement;
  - d) appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence.
-

- e) subordonner la conclusion de contrats à l'acceptation par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

### **Nullité**

§2 Les accords ou décisions interdits en vertu du présent article sont nuls de plein droit.

### **Exemptions**

- §3 Toutefois, les dispositions du §1 du présent article peuvent être déclarées inapplicables:
- à tout accord ou catégorie d'accords entre entreprises .
  - à toute décision ou catégorie de décisions d'associations d'entreprises, etc.
  - à toute pratique concertée ou catégorie de pratiques concertées.
- qui contribuent à améliorer la production ou la distribution ou à promouvoir le progrès technique ou économique ou qui permettent aux petites et moyennes entreprises d'affermir leur position concurrentielle sur le marché concerné ou sur le marché international, tout en réservant aux utilisateurs une partie équitable du profit qui en résulte et sans toutefois :
- a) imposer aux entreprises intéressées des restrictions qui ne sont pas indispensables pour atteindre ces objectifs;
  - b) donner à ces entreprises la possibilité, pour une partie substantielle des produits en cause, d'éliminer la concurrence.

## **DENMARK**

### **Part 3 : Transparency**

- 5.(1) Agreements and decisions, by which a dominant influence is exerted or may be exerted on a certain market, shall be subject to notification to the Competition Council within 14 days of the conclusion of the agreement or decision concerned.
- (2) Changes in matters relating to any notification made shall likewise be notified within 14 days.
- (3) Agreements and decisions under subsection (1) shall not be valid unless notified within the time limit prescribed.
- (4) The Competition Council lays down rules on the notification procedure.
7. Where the competition is not sufficiently workable, or where, for other particular reasons, it is necessary to observe the competitive conditions or create transparency of price conditions, the Competition Council may :
- 1) for a period of up to 2 years at a time order an enterprise or association etc. within a specified time limit to currently submit specified types of information about prices, profits, discounts, bonuses, business conditions, financial and organizational relations, etc.,
  - 2) lay down rules on invoicing and other documentation of the price calculation,
  - 3) lay down rules on marking or display of price and quantity.

- 8.(1) The Competition Council shall undertake investigations and may publish reports on such investigations suitable for promoting transparency regarding competitive conditions, cf, however, section 10(4).
  - (2) Enterprises or associations etc. comprised by an investigation shall be informed of the report before it is published.
  - (3) Comments, if any, made by the enterprise or association etc., shall on request be published in connection with the report, provided that such comments are submitted to the Council within 30 days of receipt of the report.
9. If it is considered suitable in order to promote competition, and thus strengthen efficiency, the Competition Council may publish information about prices, discounts, bonuses etc.(cf.,however, section 10(4)).

#### **Part 4**

##### **Measures against harmful effects of Anti-competitive practices**

11. If the Competition Council finds that an anti-competitive practice is exerted on a certain market, which entails or may entail harmful effects on competition, and accordingly on the efficiency of production and distribution of goods or services etc., or restraints of the freedom of trade, cf. section 1, the Council can attempt to terminate the harmful effects through negotiation.
  12. (1) If such harmful effects as referred to in section 11 cannot be terminated through negotiation, the Council issues an order which may imply total or partial termination of agreements, decisions, stipulations and business conditions.  
(2) If the harmful effects cannot be terminated by order issued in pursuance of subsection (1), the Council may order one or more of the enterprises concerned to sell to specified buyers on the terms usually applied by the enterprise to similar sales. The enterprise is, however, always entitled to demand payment in cash or adequate security.
  13. (1) If an anti-competitive practice as referred to in section 11 entails that a price or profit, whether as to level and duration, clearly exceeds what would be obtainable on a market with workable competition, and if such effect cannot be terminated in any other way, the Council decides for a term not exceeding 1 year at a time, for specified goods and services etc., enterprises or associations etc., that :
    - 1) given prices or profits must not be exceeded, or
    - 2) specified calculation rules shall be observed in connection with the calculation of prices and profits.  
(2) Assessment of a price or profits shall be based on the conditions of such enterprises which are operated with appropriate technical and commercial efficiency. When stipulating the price of a product or service, etc., the enterprise shall be able to meet the necessary costs and to obtain a profit reflecting the risk involved in manufacturing and sale of the product or service etc.  
(3) When stipulating maximum prices or profits, the Competition Council may deviate from the principles laid down in subsection (2), if justified by weighty reasons, including considerations for production sectors with intensive research and development.
  14. (1) Enterprises or associations etc. are not allowed to agree, decide, stipulate, or otherwise to make it a condition that subsequent resellers shall observe
-

- minimum prices or profits, unless the Competition Council has approved the agreement etc. in question. Such approval shall be justified by weighty reasons.
- (2) If recommended prices are indicated for resale, it shall appear that the price is only recommended.

**Part 6 :****Penalty provisions, other powers.**

21. (1) Having obtained a court order, representatives of the Competition Council may, on due proof of identity :
- 1) on the spot obtain and make copy of any information which is of importance for the performance of supervision according to this Act, including accounts, accounting records, ledgers, other business records and electronic data, and
  - 2) gain access to the premises and vehicles of an enterprise or association etc.
- (2) The Police shall give assistance in that respect. Having consulted the Minister of Industry, the Minister of Justice may lay down rules on such assistance.

**FINLAND****Act on Restrictions on Competition (Laki Kilpailunrajoituksesta ), No. 480/92, 27 May, 1992****Chapter 2****Restriction on competition**

## Section 4

It shall be prohibited in carrying out an economic activity to require that when goods are put up for sale or rental in Finland, the next sales level shall not exceed or undercut certain price or consideration or a specific criterion for the determining thereof.

## Section 5

It shall be prohibited in carrying out an economic activity to apply an agreement or any other concerted practice under which competitive bidding for the sale or purchase of a good or for the rendering of a service requires

- (1) that a person shall refrain from making a tender,
- (2) that a person shall tender higher or lower than another person, or
- (3) that the price tendered or an advance or credit term to be applied shall otherwise be based on collusion among the tenderers.

What was said in the first paragraph shall not apply to an agreement or any other arrangement binding tenderers to tender collectively when the tenderers have joined together in order to make a joint tender for a joint performance.

## Section 6

Undertakings or associations of undertakings operating on the same level of production or distribution shall not, whether by virtue of an agreement, a decision or any similar procedure,

- (1) fix or recommend prices or rentals to be charged or paid within an economic activity.
- (2) restrict production, share out markets or share out sources of supply unless it be indispensable to do so with a view to arrangements which contribute to the efficiency of production or distribution or make for technical or economic development and which mainly benefit the customers or consumers.

#### Section 8

A pecuniary penalty (penalty for infringement of competition ) shall be imposed on an undertaking or an association of undertakings which infringes provisions of any of Sections 4 to 7 unless the infringement must be deemed to be insignificant or unless imposition of a penalty must otherwise be deemed unjustifiable from the point of view of the safeguarding of competition.

In determining the amount of the penalty, account shall be taken of the nature and coverage of the restriction on competition as well as its duration. the amount of the penalty shall be between 5,000 and 4,000,000 marks. Where the restriction on competition and the circumstances of the case so warrant, the above maximum may be exceeded. The maximum penalty shall not, however, exceed 10 per cent of the previous year's total turnover of each of the undertakings or associations of undertakings that have participated in the restrictive practice.

The penalty shall be ordered by the Competition Council upon proposal of the Office of Free Competition. The penalty shall be ordered payable to State.

The Competition Council may order the undertaking or association of undertakings to terminate an activity that infringes any of Sections 4 to 7.

#### Section 9

A restriction on competition shall be deemed to have harmful effects where, in way incompatible with sound and effective economic competition, it

- (1) affects price formation,
- (2) decreases or is apt to decrease efficiency within economic activities,
- (3) prevents or hampers the economic activity of someone else, or,
- (4) is incompatible with an international treaty binding on Finland.

#### Section 19

At the request of an undertaking or association of undertakings, the Office of Free Competition may order that provisions of Sections 4 to 6 shall not apply to a restriction on competition if the restriction contributes to efficiency of production or distribution of goods or to technical or economic development and if the benefit therefrom mainly accrues to the customers or consumers.

If the Office deems that the preconditions for an exemption do not exist, the case shall, where the applicant so requests, be referred to the Competition Council for decision.

If the terms of an exemption are infringed or if the circumstances have essentially changed after the granting of the exemption, the Competition Council may, on the proposal of the Office of Free Competition, withdraw the exemption. Prior to the proposal to that effect, the holder of the exemption shall be heard.

---

**FRANCE****Ordonnance relative à la Liberté des Prix et de la Concurrence (No. 86 - 1243 du 1er décembre 1986, J.O.R.F. 9 décembre)****Titre III  
Des Pratiques Anticoncurrentielles**

## Article 7

Sont prohibées; lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes expresses ou tacites ou coalitions, notamment lorsqu'elles tendent à :

1. Limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises;
2. Faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;
3. Limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique;
4. Répartir les marchés ou les sources d'approvisionnement

## Article 8

Est prohibée, dans les mêmes conditions, l'exploitation abusive par une entreprise ou un groupe d'entreprises :

1. D'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci;
2. De l'état de dépendance économique dans lequel se trouve, à son égard, une entreprise cliente ou fournisseur qui ne dispose pas de solution équivalente.

Ces abus peuvent notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées.

## Article 9

Est nul tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles 7 et 8.

## Article 10

Ne sont pas soumises aux dispositions des articles 7 et 8 les pratiques :

1. Qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application;
  2. Dont les auteurs peuvent justifier qu'elles ont pour effet d'assurer un progrès économique et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence pour une partie substantielle des produits en cause. Ces pratiques ne doivent imposer des restrictions à la concurrence que dans la mesure où elles sont indispensables pour atteindre cet objectif de progrès.
-

Certaines catégories d'accords, notamment lorsqu'ils ont pour objet d'améliorer la gestion des entreprises moyennes ou petites, peuvent être reconnues comme satisfaisant à ces conditions par décret pris après avis conforme du Conseil de la concurrence.

#### **Titre IV**

### **De la Transparence et des pratiques restrictives**

#### Article 34

Est puni d'une amende de 5000 à 100 000 F le fait par toute personne d'imposer, directement ou indirectement, un caractère minimal au prix de revente d'un produit ou d'un bien, au prix d'une prestation de services ou à une marge commerciale.

#### Article 36

Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou artisan :

1. De pratiquer, à l'égard d'un partenaire économique, ou d'obtenir de lui des prix, des délais de paiement, des conditions de vente ou des modalités de vente ou d'achat discriminatoires et non justifiés par des contreparties réelles en créant, de ce fait, pour ce partenaire, un désavantage ou un avantage dans la concurrence;
2. De refuser de satisfaire aux demandes des acheteurs de produits ou aux demandes de prestations de service, lorsque ces demandes ne présentent aucun caractère anormal, qu'elles sont faites de bonne foi et que le refus n'est pas justifié par les dispositions de l'article 10;  
(Loi n 92-1442 du 31 décembre 1992.) "La demande d'un acheteur est présumée présenter un caractère anormal au sens de l'alinéa précédent lorsqu'il est établi que cet acheteur procède à l'une ou l'autre des pratiques déloyales visées par les articles 32 à 37 du présent titre".
3. De subordonner la vente d'un produit ou la prestation d'un service soit à l'achat concomitant d'autres produits, soit à l'achat d'une quantité imposée, soit à la prestation d'un autre service.

L'action est introduite devant la juridiction civile ou commerciale compétente par toute personne justifiant d'un intérêt, par le parquet, par le ministre chargé de l'économie ou par le président du Conseil de la concurrence, lorsque ce dernier constate, à l'occasion des affaires qui relèvent de sa compétence, une pratique mentionnée au présent article.

Le président de la juridiction saisie peut, en référé, enjoindre la cessation des agissements en cause ou ordonner toute autre mesure provisoire.

---



**Code Civil**  
**Chapitre II Des délits et des quasi-délits.**

Article 1382

Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.

**GERMANY**<sup>16</sup>**Gesetz Gegen Wettbewerbsbeschränkungen (GWB)****Part two**  
**Other Agreements****§15 - Invalidity of Vertical Restraints**

Agreements between enterprises regarding goods or commercial services which relate to markets within the territory in which this Act applies shall be null and void, insofar as such agreements restrain the freedom of a party thereto in establishing prices or business terms in contracts which it concludes with third parties regarding the goods supplied, other goods or commercial services.

**§ 16 Resale Price Maintenance for Publications**

§ 15 shall not apply insofar as a publisher, by legal or economic means, binds the purchasers of his publications to maintain specific resale prices or to impose the same obligation on their purchasers down to the resale to the ultimate consumer.

**§ 17 Abuse control**

(1) The Cartel Authority may, on its own initiative, and should, on application of a purchaser who is bound by an agreement pursuant to §16, declare the resale price maintenance agreement to be ineffective, either with immediate effect or as of a future date determined by it, and prohibit the implementation of a new resale price maintenance agreement of similar kind, if it finds that

1. The resale price maintenance agreement is administered abusively; or
2. The resale price maintenance agreement or its connection with other restraints of competition is likely, in a manner not justified by the situation of the economy as a whole, to increase the prices of the goods subject to price maintenance or to prevent a decrease of the prices or to restrict their production or sale.

(2) The Cartel Authority should call upon the enterprise maintaining resale prices to cease and desist from the abuse objected to before it issues an order pursuant to subsection (1).

**§ 18 Use Restrictions; Exclusive Dealing; Distribution Restrictions; Tying Agreements**

---

<sup>16</sup> *The Bundeskartellamt has cautioned that all provisions of the GWB should be reviewed in order to "gain a complete overview of the dealing and vertical restrictions of competition in Germany".*

---

- (1) The Cartel Authority may declare agreements between enterprises regarding goods or commercial services to be ineffective, either with immediate effect or as of a future date determined by it, and prohibit the implementation of new obligations of similar kind, insofar as such agreements
1. restrain a party to the agreement in the use of the supplied goods, other goods or commercial services; or
  2. restrain a party to the agreement in the purchase from or the sale to third parties of other goods or commercial services; or
  3. restrain a party to the agreement in the resale of the supplied goods to third parties; or
  4. obligate a party to the agreement to purchase goods or commercial services which are, by their nature or in commercial practice, nonrelated, and further insofar as
    - a) enterprises in a number significant in relation to competition in the market are thereby bound in the same manner and inequitably restrained in their freedom to compete ; or
    - b) other enterprises are thereby inequitably restrained in entering the market; or
    - c) the competition in the market for these or other goods or commercial services is substantially impaired through the scope of such restraints.
- (2) A restraint is deemed not to be inequitable within the meaning of subsection (1) lit. b) if it is insignificant in relation to supply and demand opportunities which continue to exist for other enterprises.

#### § 19 - Partial Invalidity

- (1) If the Cartel Authority declares a resale price maintenance agreement or a restraint as designated in § 18 to be ineffective, the validity of the other contractual arrangements connected therewith shall be determined by general provisions of law, unless otherwise provided in subsection (2).
- (2) <sup>1</sup>On application of a party to the agreement and simultaneously with the order as designated in subsection (1), the Cartel Authority may further order that the ineffectiveness so declared shall not affect the validity of the other contractual arrangements. <sup>2</sup>The order may be issued only insofar as required to prevent undue hardship for a party to the agreement and no predominating interests of another party to the agreement are opposed thereto.
- (3) <sup>1</sup>If arrangements provide that, in the event of a declaration of ineffectiveness referred to in subsection (1), the beneficiary of such resale price maintenance agreement or restraint shall have a right to rescind or terminate or to change the terms of the agreement to the disadvantage of the other party, in particular to increase the counterperformance of the other party, then rights arising from such arrangements may be exercised only insofar as the Cartel Authority has, on application, granted permission therefor. <sup>2</sup>This permission shall be granted, insofar as the exercise of these rights will not inequitably restrain the freedom of economic action of the other party. <sup>3</sup>The permission may be subjected to restrictions, time limitations, conditions and duties.
-

## **GREECE**

### **Act 703 of September 26th, 1977 on the Control of Monopolies and Oligopolies and Protection of the Free Competition (as amended by Acts 1934/91, 2000/91, and 2296/95).**

#### **Chapter I - Subject matter of the act**

##### Article 1 - Prohibited Cartels

1. The following shall be prohibited: all agreements between undertakings, all decisions by associations of undertakings and concerted practices of whatsoever kind, which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which:
  - a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - b) limit or control production, markets, technical development or investment;
  - c) share markets or sources of supply;
  - d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby impeding competition in particular by refusing without valid justification to sell, purchase or conclude any other transaction;
  - e) make 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.
2. Any agreements or decision prohibited, pursuant to the preceding paragraph, shall be absolutely null and void, except where otherwise provided by the present Act.
3. Agreements, decisions and concerted practices or categories thereof, falling within the provisions of paragraph 1 of the present Article may be declared valid, wholly or in part, by a decision of the Competition Committee, if they cumulatively fulfil the following conditions:
  - a) they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
  - b) they do not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of the aforementioned objectives;
  - c) they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market in question.

##### Article 8a - Authorities of the Competition Committee

1. The Competition Committee is the competent authority for the observance of the provisions of the present Act.
  2. In particular, the Competition Committee has the following authorities :
    - a. decides whether the prohibited agreements, decisions and concerted practices of the kind described in Article 1(1) of the present Act are valid according to the provisions of Article 1(3);
    - b. certifies that there is no infringement of the provisions of Articles 1(1), 2 and 2a, according to the specific provisions of Article 11 of the present Act;
-

- c. prohibits, according to the specific provisions of Articles 4c and 4d of the present Act, the realisation of a concentration notified according to Article 4b of the present Act, if the concentration can significantly restrict competition. In case where the concentration has been put into effect in breach of the provisions or decisions, the Committee may take measures pursuant to the provision of Article 4d(4) of the present Act;
- d. it may grant a derogation from the obligation regarding the suspension of a concentration, according to the specific provisions of Article 4e(1) to (3) of the present Act;
- e. threatens and imposes the fines, penalty payments and the sanctions, as provided for in Articles 4a(4), 4b(4), 4e(1) and (4), 9(1) and (2), 21(2), 25(2) and 26(6) of the present Act;
- f. takes provisional measures under the circumstances referred to in Article 9(4) of the present Act;
- g. keeps the Provisional and Definite Registers of Cartels and registers the notifications and decisions, according to the specific provisions of Article 19 of the present Act;
- h. expresses its concurrent opinion for the issuance of Ministerial decisions exempting categories of agreements according to Article 1(3) of the present Act;
- i. expresses its concurrent opinion for the issuance of Ministerial decisions determining agreements, decisions and concerted practices or categories thereof that do not fall within the provisions of Article 1(1) of the present Act;
- j. expresses its concurrent opinion for the issuance of the Competition Committee's Rules of Procedure;
- k. expresses its concurrent opinion for the appointment of the Director of its Secretariat;
- l. delivers its opinion for the issuance of Ministerial decisions pursuant to Articles 5 and 6 of the present Act;
- m. delivers its opinion with respect to competition matters and proposals amending the present Act according to what is provided in Article 8d of the present Act;
- n. collects, studies and evaluates under its obligation for professional secrecy, all the necessary for the attainment of its tasks, information and documents obtained pursuant to what is particularly provided in Articles 25 and 26 of the present Act.

## IRELAND

### **Irish Competition Act of 1991, Statute No. 24 of 1991, as commenced by the Competition Act 1991 (Commencement) Order 1991, SI 249 of 1991**

#### **Part II Rules of Competition**

Anti-competitive agreements, decisions and concerted practices.

- 4(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

- 
- (b) limit or control production, markets, technical development or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
  - (e) make 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.
- (2) The Competition Authority established by this Act ("the Authority") may in accordance with section 8 grant a licence for the purposes of this section in the case of
- (a) any agreement or category of agreements,
  - (b) any decision or category of decisions,
  - (c) any concerted practice or category of concerted practices,
- which in the opinion of the Authority, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not
- (i) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives;
  - (ii) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.
- (3) (a) A licence under subsection (2) shall, while it is in force, and in accordance with its terms, permit the doing of acts which would otherwise be prohibited and void under subsection (1).
- (b) Where a licence under subsection (2) covers a category of agreements, decisions or concerted practices, any agreements, decisions or concerted practices (as the case may be) within that category which comply with the terms of the licence need to be notified under section 7 to benefit from the licence while it is in force.
- (4) The Authority may certify that in its opinion, on the basis of the facts in its possession, an agreement, decision or concerted practice notified under section 7 does not offend against subsection (1).
- (5) Before granting a licence or issuing a certificate under this section, the Authority may invite any Minister of the Government concerned with the matter to offer such observations as he may wish to make.
- (6) On granting a licence or issuing a certificate under this section, the Authority shall forthwith give notice in the prescribed manner to every body to which it relates stating the terms and the date thereof and the reasons therefor and cause the notice to be published in *Iris Oifigiúil* and cause notice of the grant of the licence or issue of the certificate, as the case may be, to be published in one daily newspaper published in the State.
- (7) The prohibition in subsection (1) shall not prevent the Court, in exercising any jurisdiction conferred on it by this Act concerning an agreement, decision or concerted practice which contravenes that prohibition and which creates or, but for this Act, would have created legal relations between the parties thereto, from applying, where appropriate, any relevant rules of law as to the severance of those terms of that agreement, decision or concerted practice which contravene that prohibition from those which do not.
-

- (8) In respect of an agreement, decision or concerted practice such as is referred to in subsection (7) a court of competent jurisdiction may make such order as to recovery, restitution or otherwise between the parties to such agreement, decision or concerted practice as may in all the circumstances seem just, having regard in particular to any consideration or benefit given or received by such parties on foot thereof.

## **ITALY**

### **Rules on protection of competition and the market - Law n 287 of 10 October 1990**

#### Article 2 - Agreements restricting freedom of competition

1. The following shall be regarded as agreements: accords and/or concerted practices between undertakings, and any decisions, even if adopted pursuant to their Articles or Bylaws, taken by consortia, associations of undertakings and other similar entities.
2. Agreements are prohibited between undertakings which have as their object or effect appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it, including those that:
  - a) directly or indirectly fix purchase or selling prices or other contractual conditions;
  - b) limit or restrict production, market outlets or market access, investment, technical development or technological progress;
  - c) share markets or sources of supply;
  - d) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage;
  - e) make 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.
3. Prohibited agreements are null and void.

#### Article 4 - Exemption from the prohibition of agreements restricting competition

1. The Authority may authorize, for a limited period, agreements or categories of agreements prohibited under section 2 which have the effect of improving the conditions of supply in the market, leading to substantial benefits to consumers. Such improvements shall be identified also taking into account the need to guarantee the undertakings the necessary level of international competitiveness and shall be related, in particular, with increases of production, improvements in the quality of production or distribution, or with technical and technological progress. The exemption may not permit restrictions that are not strictly necessary for the purposes of this subsection, and may not permit competition to be eliminated in a substantial part of the market.
  2. The Authority may subsequently, after giving notice, revoke the exemption referred to in subsection (1) in cases where the party concerned abuses it, or when any of the conditions on which the exemption was based no longer obtain.
  3. Requests for exemption shall be submitted to the Authority, which shall avail itself of the powers of investigation referred to in section 14 and decide within a period from 120 days of the date on which the application is filed.
-

**LUXEMBOURG****17 juin 1970 - Loi concernant les pratiques commerciales restrictives**Article 1<sup>er</sup>

Sont passibles des sanctions prévues par la présente loi :

- 1) tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui ont pour objet et pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur le marché et qui sont de nature à porter atteinte à l'intérêt général;
- 2) Les activités d'une ou de plusieurs entreprises qui exploitent de façon abusive une position dominante sur le marché et qui portent atteinte à l'intérêt général;

## Article 2

Ne sont pas visés par l'article 1<sup>er</sup> les accords entre entreprises, les décisions d'associations d'entreprises et les pratiques concertées :

- 1) qui résultent de l'application d'un texte législatif ou réglementaire;
- 2) dont les auteurs sont en mesure de justifier qu'ils contribuent à améliorer la production ou la distribution des produits ou à promouvoir le progrès technique ou économique, tout en respectant les intérêts des utilisateurs.

**Réglementation des prix imposés et du refus de vente**Article 1<sup>er</sup>

Il est interdit à toute personne qui est professionnellement en situation de produire ou de vendre des marchandises ou de prêter des services, de procéder à une fixation verticale de prix, par quelque moyen que ce soit ayant pour objet d'imposer individuellement ou collectivement des prix minima de vente de marchandises ou des prix minima de prestations de services, de même que de maintenir de pareils prix imposés.

Il est de même interdit d'imposer le caractère de prix minima aux prix conseillés, aux prix indicatifs, aux prix ou marges bénéficiaires maxima fixés par l'office des prix ou au prix maxima au consommateur qui sont obligatoirement indiqués sur l'emballage des marchandises.

## Article 2

L'article 1<sup>er</sup>, alinéa 1<sup>er</sup> n'est pas applicable à la vente de livres, de journaux et d'autres produits de la presse.

Des dérogations pourront être accordées par le ministre de l'économie nationale pour un produit ou un service déterminé, notamment en fonction de la nouveauté d'un produit ou d'un service, de l'exclusivité attachée à un brevet d'invention ou d'une campagne publicitaire de lancement.

Ces dérogations seront limitées dans le temps.

---

### Article 3

La décision motivée, à prendre sous la forme d'un arrêté ministériel, sera notifiée au demandeur d'une dérogation et pourra être publiée au Mémorial.

### Article 4

Il est interdit aux personnes visées à l'article 1<sup>er</sup> du présent règlement de refuser, dans le but de déjouer l'interdiction formulée dans le même article 1<sup>er</sup>, de satisfaire dans la mesure de leurs disponibilités et dans les conditions conformes aux usages commerciaux, aux demandes d'acheteurs de marchandises ou aux demandes de prestations de service, lorsque ces demandes ne présentent aucun caractère anormal et qu'elles émanent de demandeurs de bonne foi.

Il est également interdit aux personnes prédésignées, de pratiquer habituellement, pour le motif ci-dessus énoncé, des conditions discriminatoires de vente non justifiées par les usages commerciaux.

## **PORTUGAL**

### **Law No. 422/83, 3 December, 1983**

#### **Section II : Prohibited practices**

### Article 2

#### **Agreements, concerted practices and decisions by associations of undertakings**

1. All agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, which have as their object or effect the prevention, distortion or restriction of competition in the national market or a part thereof are prohibited, in particular those which :
    - (a) directly or indirectly fix purchase or selling prices or interfere with setting of prices by the free market, leading to prices which are artificially high or low;
    - (b) directly or indirectly fix other trading conditions at the same or different stages of the economic process;
    - (c) limit or control production, distribution, technical development or investment;
    - (d) share markets or sources of supply;
    - (e) apply, whether systematically or occasionally, dissimilar conditions, in respect of prices or otherwise, to equivalent transactions;
    - (f) directly or indirectly refuse to purchase or sell goods or to pay for services;
    - (g) make 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.
  2. Any agreements or decisions prohibited under this Article are void unless they are considered justified under the provisions of Article 5.
-



**SPAIN****Law No. 16/89, 17 July, 1989****Título I****De la libre competencia****Capítulo I****De los acuerdos y prácticas restrictivas o abusivas****Sección primera : De las conductas prohibidas y de las autorizadas.**

## Artículo 1 - Conductas prohibidas

1. Se prohíbe todo acuerdo, decisión o recomendación colectiva, o práctica concertada o conscientemente paralela, que tenga por objeto, produzca o pueda producir el efecto de impedir, restringir, o falsear la competencia en todo o en parte del mercado nacional y, en particular, los que consistan en :
  - (a) La fijación, de forma directa o indirecta, de precios o de otras condiciones comerciales o de servicio.
  - (b) La limitación o el control de la producción, la distribución, el desarrollo técnico o las inversiones.
  - (c) El reparto del mercado o de las fuentes de aprovisionamiento.
  - (d) La aplicación, en las relaciones comerciales o de servicio, de condiciones desiguales para prestaciones equivalentes que coloquen a unos competidores en situación desventajosa frente a otros.
  - (e) La subordinación de la celebración de contratos a la aceptación de prestaciones suplementarias que, por su naturaleza o con arreglo a los usos de comercio, no guarden relación con el objeto de tales contratos.
2. Son nulos de pleno derecho los acuerdos, decisiones y recomendaciones que estando prohibidos en virtud de lo dispuesto en el número 1, no estén amparados por las exenciones previstas en la presente Ley.

## Artículo 2 - Conductas autorizadas por Ley

1. Las prohibiciones del artículo 1 no se aplicarán a los acuerdos, decisiones, recomendaciones y prácticas que resulten de la aplicación de una ley o de las disposiciones reglamentarias que se dicten en la aplicación de una Ley.
2. El Tribunal de Defensa de la Competencia podrá formular propuesta motivada al Gobierno, a través del Ministro de Economía y Hacienda, de modificación o supresión de las situaciones de restricción de la competencia establecidas de acuerdo con las normas legales.

## Artículo 3 - Supuestos de autorización

1. Se podrán autorizar los acuerdos, decisiones, recomendaciones y prácticas a que se refiere el artículo 1, o categorías de los mismos, que contribuyan a mejorar la producción o la comercialización de bienes y servicios, o a promover el progreso técnico o económico, siempre que :
-

- (a) Permitan a los consumidores o usuarios participar de forma adecuada de sus ventajas.
  - (b) No impongan a las empresas interesadas restricciones que no sean indispensables para la consecución de aquellos objetivos, y
  - (c) No consientan a las empresas partícipes la posibilidad de eliminar la competencia respecto de una parte sustancial de los productos o servicios contemplados.
2. Asimismo se podrán autorizar, siempre y en la medida en que se encuentren justificados por la situación económica general y el interés público, los acuerdos, decisiones, recomendaciones y prácticas a que se refiere el artículo 1, o categorías de los mismos, que :
- a) Tengan por objeto defender o promover la exportaciones, en cuanto sean compatibles con las obligaciones que resulten de los Convenios internacionales ratificados por España, o
  - b) Tengan por objeto la adecuación de la oferta a la demanda cuando se manifieste en el mercado una tendencia sostenida de disminución de ésta, o cuando el exceso de capacidad productiva sea claramente antieconómico, o
  - c) Produzcan una elevación suficientemente importante del nivel social y económico de zonas o sectores deprimidos, o
  - (d) Atendiendo a su escasa importancia, no sean capaces de afectar de manera significativa a la competencia.

Artículo 8 - Corresponsabilidad de las empresas controladoras que ejercen influencia dominante

A los efectos de la aplicación de esta Ley, se entiende que las conductas de una empresa previstas en la misma, son también imputables a la empresa que la controla, cuando el comportamiento económico de aquélla es determinado por ésta.

See also Royal Decree 157/92 (21.2.92) regarding exemptions by category.

### Apéndice III

#### Member state laws applicable to vertical agreements

En la parte correspondiente a España, falta citar el Real Decreto 157/92, de 21 de febrero por el que se desarrolla la Ley 16/1989 de 17 de julio, en materia de exenciones por categorías, autorización singular y registro de defensa de la competencia.

## **SWEDEN**

### **Competition Law, SFS 1993:20**

#### Section 6

- (1) Without prejudice to decisions taken pursuant to section 8 or 15 or to section 13 or 17, agreements between undertakings shall be prohibited if they have as their object or effect the prevention, restriction or distortion of competition in the Swedish market to an appreciable extent.
- (2) This shall apply, in particular, to agreements which :
  - 1. directly or indirectly fix purchase or selling prices or any other trading conditions.

2. limit or control production, markets, technical development, or investment;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
5. make 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 NETHERLANDS**

### **Wet Economische Mededinging of 28 June, 1956 (Stbl. 1958, 413) (WEM)**

#### **Vertical price maintenance**

##### Article 9e

1. Provisions in restrictive agreements that serve to restrict the freedom of entrepreneurs to determine prices when offering, selling or delivering goods that are supplied to them, or that commit entrepreneurs to similarly restrict the freedoms of their customers in relation to such goods, are invalidated in as far as :
  - (a) The party from which such goods originate is required to impose or enforce the stipulations in question in respect of third parties, or the stipulations in question are imposed or enforced by one or more parties other than those from which the goods originate, or
  - (b) The stipulations in question relate to goods designated by General Administrative Order
2. Measures decreed pursuant to Clause 1b of this Article shall expire five years after the date on which they take effect, unless withdrawn earlier.
3. Our Ministers shall consult the Commission before recommending the approval, amendment or withdrawal of a measure as referred to in Clause 1b of this Article.
4. A request for the advice of the Commission shall be announced without delay in The Netherlands State Gazette. Such announcements shall also state the term within which interested parties can contact the Commission in writing.

##### Annotation

By decree of 11 December 1991 (Statute Book 1991,713), pursuant to Article 9, Clause 1, first sentence and Item b, individual vertical price maintenance is invalidated as of 1 January 1992 for the following goods :

##### Article 9f

1. Article 9 shall not apply in as far as provisions in restrictive agreements :
    - a. Relate to a market outside The Netherlands;
    - b. Are imposed by one or more entrepreneurs on one or more other entrepreneurs affiliated to those entrepreneurs in a group.
-

2. Article 9, Clause b, shall not apply in as far as provisions in restrictive agreements provide that buyers of goods must fix the prices at which they offer, sell or deliver such goods at least at a defined amount , providing that this amount does not exceed the purchase price paid or payable by those buyers for the goods in question, including the direct costs relating to the transportation of those goods to the point of sale plus the value added tax due.

#### Article 9g

1. Our Ministers may, in response to an application to that effect, stipulate that Article 9, Clause 1a shall not apply to a restrictive agreement for a period that they shall determine, if, in their view, this is required in the general interest.
  2. Our Ministers may, in response to an application to that effect, extend the term referred to in Clause 1 of this Article by periods that they shall determine, providing that applications to that effect are submitted at least three months prior to the expiry of a current period, if, in their view, this is required in the general interest .
  3. Our Ministers shall announce the submission of applications pursuant to Clause 2 of this Article in The Netherlands State Gazette without delay. If such an application is submitted, the restrictive agreement in question shall not be subject to Article 9, Clause 1a, until a decision has been made on the application. Further, if the application is rejected, Article 9, Clause 1a shall not apply within two months of relevant decision is announced.
  4. Decisions decreed pursuant to Clauses 1 or 2 of this Article may contain restrictions and conditions .
  5. Such decisions must be amended or withdrawn. A decision to amend or withdraw a decision, other than in accordance with an application from one or more of the parties involved in the restrictive agreement in question, or , in cases involving a competition agreement contracted by a legal person, an application from that legal person, shall not take effect within two months of the publication date of The Netherlands State Gazette in which the relevant decision is announced.
  6. If applications submitted pursuant to Clauses 1 and 2 of this Article are subject to Clause 5, Clause 13 shall apply likewise.
  7. If our Ministers are contemplating rejection of an application within the meaning of Clause 2 of this Article, or an amendment or withdrawal pursuant to Clause 5, and in their view, there are strong grounds for an immediate provision, they may suspend some or all of the stipulations of the competition agreement to be affected by such rejection, amendment or withdrawal.
  8. Suspension shall not be effected until the Commission has been asked to advise on the application of Clauses 2 and 5 of this Article.
  9. Unless lifted at an earlier date, suspensions shall expire three months after such advice is presented. They shall in any event expire within one year of taking effect.
-

10. Coordinated actual conduct that entails a restriction of competition as a result of a restrictive agreement, or a part thereof, which has been suspended pursuant to Clause 7 of this Article, is prohibited.
11. Decisions decreed pursuant to Clauses 1, 2, 5 or 7 of this Article, as well decisions lifting suspension, shall be announced in The Netherlands State Gazette.

(Authorization for general invalidation)

#### Article 10

1. By General Administrative Order, provisions in restrictive agreements of a nature or purport described in that Order may be invalidated if, in Our view, the general interest so requires.
2. Measures decreed pursuant to Clause 1 of this Article shall include a statement of the grounds on which they are based.
3. Such measures shall not take effect within two months of the publication date of the State Gazette in which they are announced.
4. Unless withdrawn at an earlier date, they shall expire five years after taking effect, subject to later legislation stipulating otherwise.

Annotation :

The following measures are currently in effect :

- Decree of 4 February 1993, invalidating provisions on horizontal price maintenance in restrictive arrangements (Horizontal Price Maintenance Decree, Statute Book 1993, 80; effective as of 1 July 1993);
- Decree of 19 January 1994, invalidating provisions relating to tendering in restrictive agreements (Tendering Agreements Decree, Statute Book 1994, 55, effective as of 1 June 1994);
- Decree of 19 January 1994, invalidating provisions on market sharing in restrictive agreements (Market Sharing Agreements Decree, Statute Book 1994, 56; effective as of 1 June 1994);

#### **Statute Book of the Kingdom of The Netherlands - Volume 1994**

56

Decree of 19 January 1994, invalidating provisions on market sharing in restrictive agreements (Market Sharing Agreements Decree)

We Beatrix, by the grace of God, Queen of The Netherlands, Princess of Oranje-Nassau, etc. etc. etc.

On the recommendation of the State Secretary of Economic Affairs of 4 June 1993, N 93040744 WJA/W;

In view of Articles 10 and 12 of the Economic Competition Act;

---

In view of the recommendations of the Economic Competition Commission;

Having heard the Council of State (advisory report of 10 December 1993, N W10.93.0344);

In view of the further report of the State Secretary of Economic Affairs of 11 January 1994, N 94001620 WJA/W;

Have approved and understood :

#### Article 1

Provisions in restrictive agreements, restricting the freedom of two or more owners of businesses or professional practitioners, with equivalent or similar functions in the economy, to :

- a. Determine the volume of goods that they produce, supply or purchase or of services that they provide or purchase,
- b. determine the utilization of their production capacity or the level of their investment in production capacity,
- c. determine their location, sales area or sources of supply, or
- d. select their customers or suppliers, or to accept orders for the supply of goods or the provision of services, and which serve to establish, or maintain, or result in a sharing of the market between those business owners or professional practitioners, are invalid.

#### Article 2

Provisions in restrictive agreements, restricting the freedom of an owner of a business or a professional practitioners to :

- a. Determine the volume of goods that they produce, supply or purchase, or of services that they provide or purchase,
- b. determine the utilization of their production capacity or the level of their investment in production capacity,
- c. determine their location, sales area or sources of supply, or
- d. select their customers or suppliers, or to accept orders for the supply of goods or provision of services, if two or more of these restrictive agreements commit two or more business owners or professional practitioners to the same natural or legal person in respect of the performance of an equivalent or similar function in the economy, and the said competition agreements serve to establish, or maintain, or result in a sharing of the market between those business owners or professional practitioners, are invalid.

#### Article 3

1. Articles 1 and 2 shall not apply to provisions in restrictive agreements :

- a. which are exempt from the prohibition contained in Article 85, Clause 1 of the founding treaty of the European Communities, pursuant to :
    - 1 ) The second sentence of Article 2, Clause 1 of EEC regulation N 26/62, dated 4 April, 1962, as issued by the Council of the European Communities, concerning the application of certain rules relating to competition in agriculture (PbEG L 993);
-

- 2 ) EEC Regulation N 1983/83, dated 22 June 1983, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of sole trader agreements (PbEG L 173);,
  - 3 ) EEC Regulation N 2349/84, dated 23 July 1984, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of patent licensing agreements (PbEG L 219);
  - 4 ) EEC Regulation N 123/85, dated 12 December 1984, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of sales and customer service agreements for motor vehicles (PbEG 1985, L 15);
  - 5 ) EEC Regulation N 417/85, dated 19 December 1984, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of specialisation agreements (PbEG 1985, L 53);
  - 6 ) EEC Regulation N 418/85, dated 19 December 1984, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of research and developments agreements (PbEG 1985, 53);
  - 7 ) EEC Regulation N 4087/88, dated 30 November 1988, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of franchise agreements (PbEG L 359);
  - 8 ) EEC Regulation N 556/89, dated 30 November 1988, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the Treaty to groups of know-how licensing agreements (PbEG 1989 L 61);
  - 9 ) EEC Regulation 1017/68, dated 19 July 1968, as issued by the Council of the European Communities, concerning the application of competition rules in the field of road, rail and inland waterways transportation (PbEG 1989 L 175);
  - 10 ) EEC Regulation N 4056/86, dated 22 December 1986, as issued by the Council of the European Communities, determining the application of Articles 85 and 86 of the Ocean-going Shipping Treaty (PbEG L 378);
  - 11 ) EEC Regulation N 3975/93, dated 14 December 1987, as issued by the Council of the European Communities, determining the application of competition rules to companies in the commercial aviation sector (Pb EG L 378);
  - 12 ) EEC Regulation N 3652/93, dated 22 December 1993, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the EEC Treaty to certain groups of agreements between businesses relating to automated reservation systems for airline services (PbEG L 333);
  - 13 ) EEC Regulation N 1617/93, dated 25 June 1993, as issued by the Council of the European Communities, concerning the application of Article 85, Clause 3 of the EEC Treaty to certain groups of agreements, decisions and coordinated actions
-

- relating to the joint planning and coordination of schedules, joint operations, consultation on fares and freight charges for scheduled flights and the allocation of landing and take-off times at airports (PbEG L 333);
- b. Which cannot detrimentally affect trade between European Community Member States, or which do not noticeably obstruct, restrict or distort competition within the Common Market, but which, if that were the case, would be exempt pursuant to one of the Regulations listed in Clause 1a of this Article;
  - c. or which dispensation has been granted pursuant to Article 85, Clause 3 of the founding treaty of the European Communities, or which are subject to an Order granted pursuant to Article 2, Clause 2 of EEC Regulation N 26/62, dated 4 April 1962, as issued by the Council of the European Communities, concerning the application of certain rules relating to competition in agriculture (PbEG L 993);
  - d. Which solely involve owners of businesses affiliated in a group or professional practitioners operating as partners in a firm;
  - e. As described in Article 3 of the Tendering Agreements Decree;
  - f. Which relate to the production and distribution of electricity or natural gas.
2. Articles 1 and 2 shall not apply in as far as the provisions in restrictive agreements to which they refer;
- a. Relate solely to a market outside The Netherlands;
  - b. Are subject to approval, or can be invalidated, prohibited or overturned by a government authority in accordance with the stipulations of, or pursuant to any Act other than the Economic Competition Act, or have arisen on the basis of any statutory requirements.

#### Article 4

1. Article 1 shall not apply to provisions in restrictive agreements, if no more than eight owners of businesses or professional practitioners are party to the restrictive agreement in question, providing that :
    - 1 ) If the agreement solely involves business owners or professional practitioners whose activities focus on the supply of goods, their combined turnover in the preceding calendar year did not exceed five million Dutch guilders;
    - 2 ) In other cases, the combined turnover of these business owners or professional practitioners in the preceding calendar year did not exceed one million Dutch guilders.
  2. Article 2 shall not apply to provisions in restrictive agreements if the system of restrictive agreements as described in that Article commits no more than eight business owners or professional practitioners, providing that :
    - 1 ) If an agreement solely involves business owners or professional practitioners whose activities focus on the supply of goods, their combined turnover in the preceding calendar year did not exceed five million Dutch guilders.
    - 2 ) In other cases, the combined turnover of these business owners or professional practitioners in the preceding calendar year did not exceed one million Dutch guilders.
-



## Article 5

Article 3, Clause 1b and f, and Article 4 shall apply only in as far as the relevant stipulations are not prohibited pursuant to Article 85, Clause 1 of the founding treaty of the European Communities.

## Article 6

Our Ministers may, in response to an application to that effect, stipulate that Articles 1 and 2 shall not apply to a proposed restrictive agreement submitted in draft form in that application, if, in their view, this is required in the general interest.

## Article 7

An amendment of a Regulation, within the meaning of Article 3, Clause 1a, shall take effect in respect of the application of that Clause as from the date on which the relevant amendment takes effect, but no earlier than the date two months after the date of the European Community Publications Journal in which the amendment of that Regulation is announced.

Issued on the third day of February 1994  
The Minister of Justice  
E.M.H. Hirsch Ballin

The recommendations of the Council of State were made available for public inspection at the Ministry of Economic Affairs. The recommendations and the accompanying documents made available for inspection shall be included in the supplement to The Netherlands State Gazette of 8 March 1994, N 47.

## **UNITED KINGDOM**

The following laws all contain provisions relevant to vertical restraints : Fair Trading Act 1973, parts I, IV, and XII and schedule 8; the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the Competition Act 1980.

### **Restrictive Trade Practices Act 1976 - Chapter 34**

#### 5. The European Communities

- (1) This Act applies to an agreement notwithstanding that it is or may be void by reason of any directly applicable Community provision, or is expressly authorised by or under any such provision; but this subsection is subject to subsection (2) and section 34 below.
- (2) The Court
  - (a) may decline or postpone the exercise of its jurisdiction under sections 1 and 2 above, or
  - (b) may, notwithstanding subsection (2) of section 4 above exercise its jurisdiction under that section, if and in so far as it appears to the Court right so to do having regard to the operation of any directly applicable Community provision or to the purpose and effect of any authorisation or exemption granted in relation to such a provision.

## Part II Goods

### 6. Restrictive agreements as to goods

- (1) This Act applies to agreements (whenever made) between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture, whether with or without other parties, being agreements under which restrictions are accepted by two or more parties in respect of any of the following matters :
  - (a) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;
  - (b) the prices to be recommended or suggested as the prices to be charged or quoted in respect of the resale of goods supplied;
  - (c) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;
  - (d) the quantities or descriptions of goods to be produced, supplied or acquired;
  - (e) the processes of manufacture to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied; or
  - (f) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied.
- (2) For the purposes of subsection (1) above it is immaterial
  - (a) whether any restrictions accepted by parties to an agreement relate to the same or different matters specified in that subsection, or have the same or different effect in relation to any matter so specified, and
  - (b) whether the parties accepting any restrictions carry on the same class or different classes of business.
- (3) For the purposes of this Part of this Act an agreement which
  - (a) confers privileges or benefits only upon such parties as comply with conditions as to any such matters as are described in subsection (1)(a) to (f) above; or
  - (b) imposes obligations upon parties who do not comply with such conditions;shall be treated as an agreement under which restrictions are accepted by each of the parties in respect of those matters.
- (4) Without prejudice to subsection (3) above, an obligation on the part of any party to an agreement to make payments calculated by reference
  - (a) to the quantity of goods produced or supplied by him, or to which any process of manufacture is applied by him; or
  - (b) to the quantity of materials acquired or used by him for the purpose of or in the production of any goods or the application of any such process to goods.

being payments calculated, or calculated at an increased rate, in respect of quantities of goods or materials exceeding any quantity specified in or ascertained in accordance with the

---

agreement, shall be treated for the purposes of this Act as a restriction in respect of the quantities of those goods to be produced or supplied, or to which that process is to be applied.

This subsection does not apply to any obligation on the part of any person to make payments to a trade association of which he is a member, if the payments are to consist only of bona fide subscriptions for membership of the association.

#### 9. Provisions to be disregarded under Part II

- (3) In determining whether an agreement for the supply of goods or for the application of any process of manufacture to goods is an agreement to which this Act applies by virtue of this Part, no account shall be taken of any term which relates exclusively to the goods supplied, or to which the process is applied, in pursuance of the agreement.
- (4) Where any such restrictions as are described in section 6(1) above are accepted or any such information provisions as are described in section 7(1) above are made as between two or more persons by whom, or two or more persons to or for whom, goods are to be supplied, or the process applied, in pursuance of the agreement, subsection (3) above shall not apply to those restrictions or to those information provisions unless accepted or made in pursuance of a previous agreement
  - (a) in respect of which particulars have been registered under this Act; or
  - (b) which exempt from registration by virtue of an order under section 29 (agreements important to the national economy) or section 30 (agreements holding down prices) below.

#### 10. Presumption under Part II as to the public interest

- (1) For the purposes of any proceedings before the Court under Part I of this Act, a restriction accepted or information provision made in pursuance of an agreement to which this Act applies by virtue of this Part shall be deemed to be contrary to the public interest unless the Court is satisfied of any one or more of the following circumstances
  - (a) that the restriction or information provision is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury (whether to persons or to premises) in connection with the consumption, installation or use of those goods;
  - (b) that the removal of the restriction or information provision would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction or information provision itself or of any arrangements or operations resulting therefrom;
  - (c) that the restriction or information provision is reasonably necessary to counteract measures taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons party thereto are engaged;
  - (d) that the restriction or information provision is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the

- agreement and not carrying on such a trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods;
- (e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;
  - (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction or information provision would be likely to cause a reduction in the volume of earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry;
  - (g) that the restriction or information provision is reasonably required for purposes connected with the maintenance of any other restriction accepted or information provision made by the parties, whether under the same agreement or under any other agreement between them, being a restriction or information provision which is found by the Court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the Court; or
  - (h) that the restriction or information provision does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so;

and is further satisfied (in any such case) that the restriction or information provision is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction or the information provision.

(2) In this section

- (a) "purchasers", "consumers" and "users" include persons purchasing, consuming or using for the purpose or in the course of trade or business or for public purposes; and
- (b) references to any one person include references to any two or more persons being interconnected bodies corporate or individuals carrying on business in partnership with each other.

## 20. Interpretation of Part III

In this Part of this Act

- "business" includes a professional practice;
  - "the relevant provisions" has the meaning given by section 14 (6) above;
-

- "scale" (where the reference is to the scale on which any services are, or are to be, made available, supplied or obtained) means scale measured in terms of money or money's worth or in any other manner;
- "services"
  - (a) does not include the application to goods of any process of manufacture or any services rendered to an employer under a contract of employment (that is, a contract of service or of apprenticeship, whether it is express or implied, and, if it is express, whether it is oral or in writing), but with those exceptions,
  - (b) includes engagements (whether professional or other) which for gain or reward are undertaken and performed for any matter other than the production or supply of goods,
    - [and
  - (c) includes arrangements for the use by public service vehicles (within the meaning of the Public Passenger Vehicles Act 1981) of a parking place which is used as a point at which passengers on services provided by means of such vehicles may be taken up or set down].

and any reference to the supply of services or to supplying, obtaining or offering services or to making services available shall be construed accordingly.

#### 43. Interpretation and construction

##### (1) In this Act

"agreements" includes any agreement or arrangement, whether or not it is or is intended to be enforceable (apart from any provision of this Act) by legal proceedings, and references in this Act to restrictions accepted or information provisions made under an agreement shall be construed accordingly;

"the Court" means the Restrictive Practices Court;

"designated services" has the meaning given by section 13(1) above ;

"the Director" means the Director General of Fair Trading appointed under the Fair Trading Act 1973;

"goods" includes ships and aircraft, minerals, substances and animals (including fish), and references to the production of goods include references to the getting of minerals and the taking of such animals;

"information provision" includes a provision for or in relation to the furnishing of information;

"interconnected bodies corporate" means bodies corporate which are members of the same group, and for the purposes of third definition "group" means a body corporate and all other bodies corporate which are its subsidiaries

(a) within the meaning of [section 736 of the Companies Act 1985 (or for companies in Northern Ireland), [Article 4 of the Companies (Northern Ireland) Order 1986]; or

(b) in the case of an industrial and provident society, within the meaning of section 15 of the Friendly and Industrial and Provident Societies Act 1968 (or for industrial and provident societies in Northern Ireland, section 47 of the Industrial and Provident Societies Act (Northern Ireland) 1969):

"price" includes a charge of any description;

"restriction" includes a negative obligation, whether express or implied and whether absolute or not;

"services supply association" means such an association as is described in section 16 (1) above;

"supply" includes supply by way of lease of hire, and "acquire" shall be construed accordingly;

"trade association" means a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members, or of persons represented by its members.

- (2) For the purposes of
- (a) sections 6 to 9 above, and Schedule 3 to this Act except for paragraph 5(4) to (8) of that Schedule;
  - (b) Part III of this Act except as is provided by section 19(2) above;
- any two or more interconnected bodies corporate, or any two or more individuals carrying on business in partnership with each other, shall be treated as a single person.
- (3) This Act applies to the construction or carrying out of buildings, structures and other works by contractors, as it applies to the supply of goods, and for the purposes of this Act any buildings, structures or other works so constructed or carried out shall be deemed to be delivered at the place where they are constructed or carried out.
- (4) For the purposes of this Act a person shall not be deemed to carry on a business within the United Kingdom by reason only of the fact that he is represented for the purposes of that business by an agent within the United Kingdom.
- (5) Any reference in this Act to any other enactment is a reference to that enactment as amended, or extended or applied by or under any other enactment, including this Act.

#### Schedule 3 - Excepted agreements

##### Exclusive dealing

2. This Act does not apply to an agreement for the supply of goods between two persons, neither of whom is a trade association, being an agreement to which no other person is party and under which no such restriction as are described in section 6(1) above are accepted or no such information provisions as are described in section 7(1) above are made other than restrictions accepted or provision made for the furnishing of information
- (a) by the party supplying the goods, in respect of the supply of goods of the same description to other persons; or
  - (b) by the party acquiring the goods, in respect of the sale, or acquisition for the sale, of other goods of the same description.

##### 6. Monopoly situation in relation to supply of goods

- (1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of goods of any description in the following cases, that is to say, if

- (a) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by one and the same person, or are supplied to one and the same person, or
  - (b) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members if they are the same group interconnected bodies corporate, or are supplied to members of one and the same group of interconnected bodies corporate, or
  - (c) at least one-quarter of all the goods of that description which are supplied in the United Kingdom are supplied by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or are supplied to members of one and the same group consisting of two or more such persons, or
  - (d) one or more agreement are in operation, the result of collective result of which is that goods of that description are not supplied in the United Kingdom at all.
- (2) The two or more persons referred to in subsection (1)(c) of this section, in relation to goods of any description, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affair as in any way to prevent, restrict or distort competition is between persons interested as producers or suppliers or between persons interested as customers of producers or suppliers.

#### 7. Monopoly situation in relation to supply of services

- (1) For the purposes of this Act a monopoly situation shall be taken to exist in relation to the supply of services of any description in the following cases, that is to say, if
- (a) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by one and the same person, or supply for one and the same person, or
  - (b) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group of interconnected bodies corporate, or supply for members of one and the same group of interconnected bodies corporate, or
  - (c) the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by members of one and the same group consisting of two or more such persons as are mentioned in subsection (2) of this section, or supply for members of one and the same group consisting of two or more such persons, or
  - (d) one or more agreements are in operation, the result or collective result of which is that services of that description are not supplied in the United Kingdom at all.
- (2) The two or more persons referred to in subsection (1)(c) of this section, in relation to services of any description, are any two or more persons (not being a group of interconnected bodies corporate) who whether voluntarily or not, and whether by agreement or not, so conduct their respective affairs as in any way to prevent, restrict or distort competition in connection with the supply of services of that description, whether or not they themselves are affected by the competition, and whether the competition is between persons interested as persons by whom, or as persons for whom, services are supplied.
-

- (3) In the application of this section for the purposes of a monopoly reference, the Commission, or the person or persons making the reference, may, to such extent as the Commission, or that person or those persons, think appropriate in the circumstance, treat services as supplied in the United Kingdom if the person supplying the services
- (a) has place of business in the United Kingdom, or
  - (b) controls the relevant activities from the United Kingdom, or
  - (c) being a body corporate, is incorporated under the law of Great Britain or of Northern Ireland,
- and may do so whether or not those services would otherwise be regarded as supplied in the United Kingdom.

#### 9. Monopoly situation limited to part of United Kingdom

- (1) For the purposes of a monopoly reference, other than a reference relating to exports of goods from the United Kingdom, the person or persons making the reference may, if it appears to him or them to be appropriate in the circumstances to do so, determine that consideration shall be limited to a part of the United Kingdom.
- (2) Where such a determination is made, then for the purposes of that monopoly reference the provisions of sections 6 and 7 of this Act, or such of those provisions as are applicable for those purposes, shall have effect as if, wherever those provisions refer to the United Kingdom, they referred to that part of the United Kingdom to which, in accordance with the determination, consideration is to be limited.
- (3) The preceding provisions of this section shall have effect subject to subsection (4) of section 50 of this Act in cases to which that subsection applies.

#### 10. Supplementary provisions relating to ss 6 to 9

- (1) In the application of any of the provisions of sections 6 to 9 of this Act for the purposes of a monopoly reference, those provisions shall have effect subject to the following provisions of this section.
- (2) No account shall for those purposes be taken of any provisions of an agreement in so far as they are provisions by virtue of which it is an agreement to which [the Act of 1976] applies.
- (3) In relation to goods or services of any description which are the subject or different forms of supply
- (a) references in paragraphs (a) to (d) of subsection (1), and in subsection (2) of section 6 or in section 8(3) of this Act to the supply of goods, or
  - (b) references in paragraphs (a) to (d) of subsection (1), and in the subsection (2), of section 7 of this Act to the supply of services.

shall for those purposes be construed in whichever of the following ways the Commission, or the person or persons making the monopoly reference, think appropriate in all the circumstances, that is to say, as references to any of those forms of supply taken separately, to all those forms of supply taken together, or to any of those forms of supply taken in groups.

---



- (4) For the purposes of subsection (3) of this section the Commission, or the person of persons making the monopoly reference in question, may treat goods or services as being the subject of different forms of supply whenever the transactions in question differ as to their nature, their parties, their terms or their surrounding circumstances, and the difference is one which, in the opinion of the Commission, or the person or persons making the reference, ought for the purposes of that subsection to be treated as a material difference.
- (5) For the purposes of a monopoly reference made by the Director, subsection (3) and (4) of this section shall have effect subject to section 50(3) and (4) of this Act.
- (6) In determining, for the purposes of a monopoly reference, whether the proportion of one-quarter mentioned in any provision of section 6, section 7 or section 8 of this Act is fulfilled with respect to goods or services of any description, the Commission, or the person or persons making the reference, shall apply such criterion (whether it be value or cost or price or quantity or capacity or number of workers employed or some other criterion, of whatever nature) or such combination of criteria as may appear to them or him to be most suitable in all the circumstances.
- (7) The criteria for determining when goods or services can be treated, for the purposes of a monopoly reference, as goods or services of a separate description shall be such as the person or persons making the reference may think most suitable in the circumstances.
- (8) In construing the provisions of section 7(3) and section 9 of this Act and the provisions of subsections (1) to (7) of this section, the purposes of a monopoly reference shall be taken to include the purpose of enabling the Director, or the Secretary of State or any other Minister, to determine in any particular circumstances
  - (a) whether a monopoly reference could be made under Part IV of this Act, and
  - (b) if so, whether in those circumstances such a reference could be made by the Director and references in those provisions to the persons or persons making a monopoly reference shall be construed accordingly.

#### 11. Meaning of "complex monopoly situation"

- (1) In this Act "complex monopoly situation" means circumstances in which, in accordance with the preceding provisions of this Act, a monopoly situation if for the purposes of this Act to be taken to exist in relation to the supply of goods or services of any description, or in relation to exports of goods of any description from the United Kingdom, by reason that the condition specified in paragraph (c) or in paragraph (d) of section 6(1) or of section 7(1) of this Act or section 8 of this Act are fulfilled.
- (2) Any reference in the preceding subsection to paragraph (c) or paragraph (d) of section 6(1) or of section 7(1) of this Act shall be construed as including a reference to that paragraph as modified by section 9(2) of this Act.

### **Resale Prices Act 1976, Chapter 53**

#### **Part II**

#### **Individual Minimum Resale Price Maintenance**

##### Prohibition of individual resale price maintenance

---

## 9. Minimum resale prices maintained by contract or agreement

- (1) Any term or condition
  - (a) of a contract for the sale of goods by a supplier to a dealer, or
  - (b) of any agreement between a supplier and a dealer relating to such a sale,

is void in so far as its purports to establish or provide for the establishment of minimum prices to be charged on the resale of the goods in the United Kingdom.

- (2) It is unlawful for a supplier of goods (or for an association or person acting on behalf of such suppliers)
  - (a) to include in a contract for sale or agreement relating to the sale of goods a term or condition which is void by virtue of this section ;
  - (b) to require, as a condition of supplying goods to a dealer, the inclusion in a contract or agreement of any such term or condition, or the giving of any undertaking to the like effect;
  - (c) to notify to dealers, or otherwise publish on or in relation to any goods, a price stated or calculated to be understood as the minimum price which may be charged on the resale of the goods in the United Kingdom.

Paragraph (a) does not affect the enforceability of a contract of sale or other agreement, except in respect of the term or condition which is void by virtue of this section.

Paragraph (c) is not to be construed as preventing a supplier (or an association or person acting on behalf of a supplier) from notifying to dealers or otherwise publishing prices recommended as appropriate for the resale of goods or to be supplied by the supplier.

## **Competition Act 1980 - Chapter 21**

### **Control of anti-competitive practices**

#### 2. Anti-competitive practices

- (1) The provisions of sections 3 to 10 below have effect with a view to the control of anti-competitive practices, and for the purposes of this Act a person engages in an anti-competitive practice if, in the course of business, that person pursues a course of conduct which, of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in the United Kingdom or any part of it or the supply or securing of services in the United Kingdom or any part of it.
  - (2) To the extent that a course of conduct is required or envisaged by a material provision of, or a material recommendation in, an agreement which is registered or subject to registration under the Restrictive Trade Practices Act 1976, that course of conduct shall not be regarded as constituting an anti-competitive practice for the purposes of this Act; and for the purposes of this subsection
-

- 
- (a) a provision of an agreement is a material provision if, by virtue of the existence of the provision (taken alone or together with the other provisions) the agreement is one to which that Act applies; and
  - (b) a recommendation is a material recommendation in an agreement if it is one to which a term implied into the agreement by any provision of section 8 or section 16 of that Act (terms implied into trade association agreements and services supply association agreements) applies.
- (3) For the purposes of this Act, a course of conduct does not constitute an anti-competitive practice if it is excluded for those purposes by an order made by the Secretary of State; and any such order may limit the exclusion conferred by it by reference to a particular class of persons or to particular circumstances.
- (4) Without prejudice to the generality of subsection (3) above, an order under that subsection may exclude the conduct of any person by reference to the size of his business, whether expressed by reference to turnover, as defined in the order, or to his share of a market, as so defined, or in any other manner.
- (5) For the purpose only of enabling the Director General of Fair Trading (in this Act referred to as "Director") to establish whether any person's course is excluded by virtue of any such provision of an order under subsection (3) above as is referred to in subsection (4) above, the order may provide for the application, with appropriate modifications, of any provisions of sections 44 and 46 of the Fair Trading Act 1973 (power of Director to require information).
- (6) For the purposes of this section any two persons are to be treated as associated
- (a) if one is a body corporate of which the other directly or indirectly has control either alone or with other members of a group of interconnected bodies corporate of which he is a member, or
  - (b) if both are bodies corporate of which one and the same person or group of persons directly or indirectly has control;
- and for the purposes of this subsection a person or group of persons able directly or indirectly to control or materially to influence the policy of a body corporate, but without having a controlling interest in that body corporate, may be treated as having control of it.
- (7) In this section "the supply or securing of services" includes providing a place or securing that a place is provided other than on a highway, or in Scotland a public right of way, for the parking of a motor vehicle (within the meaning of [the Road Traffic Act 1988]).
- (8) For the purposes of this Act any question whether, by pursuing any course of conduct in connection with the acquisition of goods or the securing of services by it, a local authority is engaging in an anti-competitive practice shall be determined as if the words "in the course of business" were omitted from subsection (1) above; and in this subsection "local authority" means
- (a) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly.
  - (b) (applies to Scotland), and
-

- (c) in Northern Ireland, a district council established under the Local Government Act (Northern Ireland) 1972

Notes :

- Commencement : 12 August 1980 (SI 1980/978)

-The words in square brackets in sub-s (7) were substituted by the Road Traffic (Consequential Provisions) Act 1988, s 4, Sch 3, para 9

- Functions of the Director General of Fair Trading : the functions under this section and ss 3-10 and 16 of this Act, so far as relating to courses of conduct which have or are intended to have or are likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of telecommunication apparatus, the supply or securing of telecommunication services, the generation, transmission or supply of electricity, the supply of water or securing a supply of water or with the provision or securing of sewerage services, are exercisable concurrently with, respectively, the Director General of Telecommunications, the Director General of Electricity Supply and the Director General of Water Services (end the references in these sections, ss 3-10, 16 and 19 of this Act, to the Director, are to be construed accordingly) : see the Telecommunications Act 1984, s 50(3), the Electricity Act 1989, s 43 and the Water Industry Act 1991, s 31.

See further, the New Roads and Street Works Act 1991, s 10.

Order : Anti-Competitive Practices (Exclusions) Order 1980, SI 1980/979 and the amending SI 1984/1919.

---