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from :	Mr Bernhard ZEPTER, Deputy-General of the European Commission
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to :	Mr Javier SOLANA, Secretary-General/High Representative
Subject :	Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 - Commission Staff Working Paper

Delegations will find attached Commission document SEC(2001) 871 neant.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 31.5.2001
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COMMISSION STAFF WORKING PAPER

Commission's proposal for a new Council Regulation implementing articles 81 and 82

ARTICLE 3

THE RELATIONSHIP BETWEEN EC LAW AND NATIONAL LAW

SUBMITTED TO

THE COUNCIL WORKING GROUP

This non-paper has been prepared by the services of the Commission (DG Competition) for discussion in the Council working group. It is designed to clarify certain issues related to the Commission's proposal for a new Regulation implementing Articles 81 and 82. This document has not been approved by nor is it intended to commit the Commission.

I. INTRODUCTION

1. Article 3 of the Commission's proposal for a new Council Regulation implementing Articles 81 and 82 of the Treaty provides as follows:

   "*Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws*".

2. The purpose of this staff paper is to explain and elaborate on the rationale for the proposal as well as its main constituent parts, including the affectation of trade criterion and the meaning of the term "*national competition laws*".

3. However, before addressing these issues, it must be emphasised that the function of Article 3 is to designate the law applicable to a particular case. It is not a rule of competence. Under the proposed Regulation the national competition authorities and the national courts acquire the power to apply Articles 81 and 82 in full, including the power for the national competition authorities to withdraw for their own territory the benefit of Community block exemption regulations in individual cases[2].

II. RATIO LEGIS OF ARTICLE 3: LEVEL PLAYING FIELD AND EFFECTIVE COOPERATION

4. The fathers of the EC Treaty did not regulate the relationship between EC competition law and national competition laws but decided to leave this issue for the Council. Article 83(2)(e) provides that:

   "*2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (e) to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this Article*".

5. In 1969 the Court of Justice was seized for the first time with a conflictual situation resulting from the parallel application of EC competition law and national competition law. Since the Council had not regulated the relationship between national competition law and Community competition law in Regulation 17/62, the Court of Justice had to accept the parallel application of Community and national competition law and could only establish a rule of conflict between these two laws. Indeed, in paragraph 9 of the judgement in *Walt Wilhelm* the Court of Justice held as follows: "*consequently, and as long as a regulation adopted pursuant to Article [83](2)(e) of the Treaty has not provided otherwise, national competition authorities may take action against an agreement in accordance with their national law, even when an examination from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform*

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2 See Article 29 of the Commission's proposal.

application of Community law or the effects of measures taken or to be taken to implement it."

6. At the time of *Walt Wilhelm* the Community had no fully integrated market and was only composed of 6 Member States of which only one Member State had an efficient national competition law. In the meantime the Community has evolved to a fully integrated market which resembles an internal market. In addition the Community has grown considerably in size. In 2003/2005 the Community will be composed of over 20 Member States which each have fully fledged national competition laws. This new situation, which is materially different from that of the initial period, makes it necessary to regulate the relationship between EC competition law and this great number of national competition laws. The internal market cannot properly function if interstate trade cases which do not violate the EC competition rules could be blocked by any stricter national competition law with the result that the strictest national competition law could govern the internal market.

7. Article 3 of the Commission's proposal for a new implementing Regulation is based on the rationale that agreements affecting trade between Member States should be subject to a single competition law test. A single barrier (as opposed to double or multiple barriers) promotes a level playing field for companies, operating in the internal market. It also strengthens the impact of EC competition law throughout the Community as a result of an increased application of this body of law and effective cooperation between all enforcement authorities and courts. Article 3 promotes effective enforcement through the application of the same rules by all enforcers that cooperate closely within a network of competition authorities.

A. LEVEL PLAYING FIELD: UNDISTORTED COMPETITION IN THE INTERNAL MARKET

a) Competition rules and the internal market

8. The current enforcement system of Regulation 17 was conceived at a time when the Community was composed of 6 Member States and when markets had yet to be substantially integrated. At present the Community has 15 Member States and is on the verge of substantial enlargement to a Community of 25 to 28 Member States. The internal market has been established in great many areas and business is globalising. These developments require a re-examination of the relationship between Community competition law and national competition law, the regulation of which is foreseen in Article 83(2)(e) of the Treaty.

9. When assessing the merits of Article 3 it is necessary to take account of the present stage of development of the Community and the fundamental objective of Articles 81 and 82, namely the protection of undistorted competition in the internal market. This aim follows from Article 3(1)(b) and (g) of the Treaty, according to which the fundamental objectives of the Community include the creation and maintenance of "*an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital*" and "*a system ensuring that competition in the internal market is not distorted*".

10. In a fully integrated Community market undistorted competition plays a fundamental role by ensuring equal conditions of competition within the internal

market. The internal market concept encompasses the creation of a single market, having the characteristics of a domestic market[3]. In such a market operators must face a level playing field, allowing them to compete on the merits and to capitalise on any competitive advantage that they may have. It lies at the heart of the Community that each operator should be allowed to compete on equal terms inside the internal market, unless the practices employed fall foul of the EC competition rules. The creation of an internal market with undistorted competition promotes economic efficiency and enhances the competitiveness of the European economy[4]. When the various factors of production and their output are allowed to move freely, economic operators can achieve, *inter alia*, economies of scale and scope in research and development, production and distribution, thereby promoting efficiencies for the European economy.

11. Differences in national competition law standards create an inherent risk of compartmentalisation and distortion of competition in the internal market. Stricter national standards in some Member States make it more difficult for firms, engaging in intra-Community trade, to pursue a coherent strategy in several Member States or the Community as a whole, for example, by employing a common distribution strategy. The prohibition of agreements or obligations to modify them significantly may force the undertakings concerned to change their commercial strategy on the market, which in turn can lead to a loss of economic welfare. The very aim of the EC competition rules is to promote economic welfare in the Community. Furthermore, it may become more difficult for companies operating in Member States with more stringent standards to respond to market developments by concluding cooperation agreements. If such opportunities are open to rivals that operate primarily in Member States with more lenient standards they can gain competitive advantages by being allowed to employ practices that are not allowed under stricter national laws. Article 3 eliminates these distortions of competition by creating a level playing field for all companies throughout the Community.

12. Competition law regulates directly the commercial behaviour of companies operating in the market. In the internal market other national legislations, which affect adversely the free circulation of goods and services, have been either harmonised or, following the *Cassis de Dijon* case law, benefit from mutual recognition. The internal market cannot function optimally and efficiently with different standards of competition law for the same type of transactions. Such a situation can only lead to a loss of efficiencies for the economy of the Community and runs counter to the fundamental aims of the Treaty i.e. a system of undistorted competition enhancing social welfare in the entire Community.

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3 See e.g. judgement of 9.2.1982, Case 270/80, Polydor, ECR 329, paragraph 16.

4 At the recent Lisbon summit the European Council emphasised their commitment to make the EU the world's most competitive economy by the year 2010.

13. Agreements and practices that fall to be considered under Articles 81 and 82 do so because they have cross-border effects and therefore have repercussions going beyond a single Member State. This fact is reflected by the affectation of trade criterion. Article 3 ensures that such agreements and practices are being assessed on the basis of Community law, which fully captures the cross-border perspective in its positive and negative aspects.

14. This can be illustrated by the following examples:

    (a) Two producers of machine tools established in two different Member States conclude a *specialisation agreement* whereby they each specialise in the production of certain products. They also accept an exclusive supply obligation concerning the products covered by the agreement. The parties jointly hold 10% of the relevant market. The competition authority in one Member State intervenes and prohibits the agreement on the basis of national competition law, whereas the other competition authority considers that the agreement does not appreciably restrict competition. The prohibition in the first Member State eliminates the entire agreement, leading to an immediate impact also in the second Member State.

    (b) Two suppliers of industrial goods, A and B, are located in the same Member State and compete on the Community market. They jointly have a market share of 22% on the Community market. A and B conclude an *agreement for the joint production* of certain ranges of products. The agreement is prohibited by the competition authority in their Member State. Two of their competitors on the Community market, C and D, are established in another Member State. C and D, which collectively have a market share of 25% conclude a agreement for the joint production of competing ranges of products. The agreement is cleared by the competition authority of their Member State. The difference in outcome has a direct impact on the competition between A,B,C and D on the European market.

    (c) Three European car manufacturers establish a *B2B reverse auction* for the world-wide purchase of components. The manufacturers are established in three different Member States. The system allows suppliers of components world-wide to participate in the auctions and place bids for the orders posted by each of the three European car manufacturers. If the arrangement is prohibited by a national competition authority under national law, the whole transaction is likely to fall. Even if not all participants are established in the Member State in question, the decision could be enforced against all participants to the extent that they own assets in the Member State in question.

    (d) A supplier of consumer electronics operates a *selective distribution system covering the entire Community*. Selection of distributors is based on qualitative criteria. The supplier in question accounts for some 20% of the market in each Member State. The distribution system is prohibited in one Member State on the basis of national competition law. Subsequently, discounters in a neighbouring Member State source the products from dealers in the Member State where selective distribution has been prohibited and undercut the authorised dealers in Member States where selective distribution is allowed. This destabilises the selective distribution system in those

Member States. Again the prohibition in one Member State has an impact in the other Member States.

e) Brewer X in one Member State concludes *an exclusive distribution agreement* for a premium lager brand with Brewer Y in another Member State. Brewer Y undertakes not to purchase competing premium lager brands for 5 years and to promote Brewer X's brand in various ways. Brewer Y has concluded a number of supply agreements with owners of on-trade premises, who have undertaken to buy beer exclusively from Brewer Y for 5 years. Brewer Y accounts for 15% of beer sales to on-trade premises in the Member State in question and has tied all its pubs. However, less than 30% of the entire on-trade market is tied. The competition authority in the Member State of Brewer Y prohibits the agreement, having a direct impact on the export activities of Brewer X.

(f) A supplier of a chemical in one Member State concludes *a long-term supply agreement* with a buyer in another Member State. The supplier undertakes to construct a storage facility at the production plant of the buyer, who undertakes to purchase the chemical exclusively from the supplier for 7 years. The market share of the supplier on the relevant market is 20%. The buyer accounts for 60% of demand in the buyer's Member State but only for 10% of demand in the relevant purchase market. A prohibition of the exclusivity in the buyer's Member State undermines the entire agreement and has a direct impact on the activities of the supplier located in another Member State.

15. In all these examples the intervention at national level has direct repercussions in other Member States, which would have been captured by the application of Community competition law. Article 3 in combination with enhanced cooperation between all enforcers within the network of competition authorities, which is one of the core elements of the Commission's proposal, ensures that due account is taken of the cross-border element of cases affecting trade between Member States.

b) The primacy rule

16. In 1969, the Court of Justice established in *Walt Wilhelm* that in the absence of regulation of the relationship between EC competition law and national competition laws by the Council pursuant to Article 83(2)(e) Community law and national laws can be applied in parallel subject to the principle of primacy of Community law. According to the primacy rule the application of national law must not prejudice the full and uniform application of the Community competition rules throughout the internal market. In other words, the principle of primacy establishes a conflict rule according to which Community law takes precedence over national law if the parallel application of these laws leads to a direct conflict between decisions. The rule of primacy is thus a rule of conflict relating to substance but is not a rule of jurisdictional delimitation between EC law and national law as foreseen in Article 83(2)(e).

17. The primacy rule established in *Walt Wilhelm* means that national law can neither exempt an agreement that is prohibited under Community law nor prohibit an agreement that is exempted under Article 81(3). The Court of Justice has not had occasion to decide on the applicability of the primacy rule to agreements and

practices that are not caught by Article 81(1) because they do not restrict competition within the meaning of that provision. The number of such cases will increase under a more economic approach to Article 81(1)[5].

18. In the case of more *lenient* national rules a conflict presupposes that such measures favour an agreement that violates Community law. In these cases the primacy rule ensures that prohibitions based on EC law have full effect. In the case of *stricter* national competition laws the present rule of primacy applies only if an agreement restricts competition within the meaning of Article 81(1) and is exempted under Article 81(3)[6]. As regards Block exemption regulations, the rule of primacy only works to the extent that an agreement violates Article 81(1). It does not eliminate stricter national laws in respect of non-restrictive agreements even if such agreements affect trade between Member States.

19. In the Commission's opinion the time has now come for the Community to replace the present system based on the primacy rule with a new system based on the application of the same rules to cases affecting trade between Member States. The current primacy rule is not sufficient to deal with all those distortions of competition in the internal market that can flow from the parallel application of Community competition law and 15, tomorrow 28, national competition laws. The more a market is integrated the more it requires one set of rules to avoid discrimination and obstacles to free trade and competition. A fully integrated market requires a system of competition based on equal obligations and equal chances. This is not ensured by a rule that applies only to restrictive agreements within the meaning of Article 81(1) but exposes all other (less restrictive) agreements to different standards. This creates distortions of competition between Member States and between those agreements, which benefit of Article 81(3) and other agreements which are in fact less restrictive.

20. The rule of primacy has also another unfortunate effect. To the extent that primacy does not apply to agreements that are not restrictive of competition within the meaning of Article 81(1), companies would have an incentive to argue that their agreements or practices are caught by Article 81(1) but fulfil the four conditions of Article 81(3). This is clearly an unattractive option, since it requires an admission that the agreement or practice is restrictive of competition. Article 3, on the other hand, ensures that EC competition law is applied from the outset to cases that affect trade between Member States and thus that all agreements and practices face a single competition law test, thereby benefiting from a level playing field.

21. The risk of discrimination and distortion of competition resulting from the application of stricter national competition laws is by no means hypothetical. Already in the past there have been cases in which parties have notified and asked for an exemption rather than negative clearance, given that only as regards the former it is established that the rule of primacy applies as defined in *Walt Wilhelm*[7].

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5 See e.g. judgement of 15.9.1998, Joined Cases T-374/94 a.o., European Night Services, ECR II-3141.

6 Due to the exclusive power of the Commission to apply Article 81(3), Commission action is required in the present system for the primacy rule to take effect in respect of agreements not covered by a block exemption regulation.

7 This was for example the case in Philips-Osram, OJ 1994 L 378, page 37, and in KSB/Goulds/Lowara/ITT, OJ 1990 L 19, page 25. The Commission services have often issued comfort letters of the exemption type. Such cases include, for example, Case 37.018

Article 3 eliminates the need under the primacy rule for companies to substantiate a conflict between the outcome under Community competition law and national competition law.

22. The power for the Commission under Article 10 of the proposed regulation to adopt non-infringement decisions in the Community public interest is no substitute for Article 3. These decisions are not meant to serve the purpose of ensuring a level playing field throughout the Community by a systematic adoption of non-infringement decisions. Such decisions are only intended to be adopted in exceptional cases in the Community public interest for the purposes of ensuring consistent application of Community competition law and for developing EC competition policy. They are not intended to protect efficient agreements against stricter national competition laws, which would reintroduce a *de facto* notification system and be contrary to the objective of releasing the enforcement potential of national competition authorities and courts.

c) Soft harmonisation

23. Most national competition laws have been modelled on the Community competition rules. In fact, only in a very limited number of Member States substantial differences remain at the level of the statutes. Significant *de facto* harmonisation has thus been achieved. A table of comparison is contained in the Annex to the present paper.

24. Whereas this development is certainly welcome and helpful, it does not exclude divergent application of these national rules. Competition rules are framework provisions where different policy aims and interpretations can lead to differences in outcome from Member State to Member State. Even where the statutes are the same there is no central judicial system, which would guarantee a uniform application of statutes which remain in the national spheres.

25. In the proposed Regulation substantial efforts have been made to ensure that the EC competition law will be applied in a coherent manner. Application of EC law is made subject to a number of mechanisms that aim at ensuring coherence. These mechanisms include cooperation and information sharing within the network of competition authorities; the power of the Commission to withdraw a case from a national competition authority; and the cooperation with the national courts, complementing the Article 234 reference procedure. These mechanisms do not apply to the application of the national competition laws.

26. Moreover, the said *de facto* harmonisation is by nature imperfect. The degree of approximation to the Community system differs from Member State to Member State. Agreements and practices affecting trade between Member States will therefore remain subject to potentially a significant number of different bodies of law and practice. Following enlargement the number of national laws will grow significantly. Without Article 3 there is a risk of renationalisation of Community

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Tamrock+Caterpillar concerning a joint venture for the production of hydraulic hammers, Case 35.977 Hoechst+BP concerning a mutual Supply Agreement concerning different grades of high-density polyethylene (HDPE) used for the production of pipes, Case 34.998 Toyota concerning a standard agreement for the distribution of commercial vehicles, Case 35.424 Polygram+EMI+BMG concerning a joint venture for the creation of an electronic ordering system, and Case 36.391 Siemens+Elscint concerning an R&D agreement in the field of computed tomography.

competition law: Member States can opt out of the control of a uniform system of competition by applying national competition laws to interstate trade cases. This would jeopardise the good functioning of the internal market to the detriment of the competitiveness of European industry.

27. A system of parallel application of national competition laws also involves a high compliance cost for companies. Before implementing an agreement companies must assess the compatibility of their transaction with Community law and the national competition laws of each Member State affected by the agreement. Further subsequent assessment is required each time the agreement is extended to another Member State. The European Council of Stockholm has called for a simplification of the legislative environment for business. The creation of one common standard of competition law for interstate trade cases is the most effective means of simplifying the regulatory environment for business. It will eliminate multiple standards of potentially 28 Member States.

28. These costs are not offset by any gain in terms of effective protection of competition, since Community law, as the common competition law, will apply to the transactions in question. In the field of competition law stricter is not necessarily better. In the case of non-hardcore agreements and practices a balance needs to be struck between repressing restrictive agreements and practices and promoting pro-competitive agreements and practices that increase the welfare of consumers.

B. EFFECTIVE COOPERATION BETWEEN ENFORCEMENT AUTHORITIES

29. Article 3 is also necessary to give the full intended effect to the network of competition authorities. It is a key feature of the reform that the national competition authorities apply EC competition law in close cooperation with each other and the Commission. Article 3 ensures that the national competition authorities actually do apply Articles 81 and 82 as intended by the reform. If the national competition authorities were to continue to apply national law to agreements and practices affecting trade between Member States a major objective of the reform would be lost, given that the network of competition authorities only covers cases dealt with on the basis of Community competition law.

30. The application of a single body of rules will increase the clarity of the law and increase its deterrent effect. The fact that the rules are enforced in close cooperation increases the likelihood of detecting infringements and uncovering their true scope. The members of the network will be able to exchange confidential information and discoveries in one Member State may generate awareness in other Member States concerning similar practices. The application of the same rules in the context of a network will also strengthen the position of each individual competition authority and enable it to better resist possible pressures to protect national champions.

31. The following sections highlight the most important aspects of the proposed enhanced cooperation between the competition authorities from the perspective of Article 3.

a) Case allocation

32. An important function of the network of competition authorities is to ensure an efficient allocation of cases[8]. The proposed Regulation contains provisions that aim at removing obstacles to an effective allocation and handling of cases. Article 12 on exchange of information and Article 21 on mutual assistance in respect of fact-finding aim at enabling the national competition authorities to deal effectively with cases affecting trade between Member States.

33. Article 13 empowers the national competition authorities to suspend a procedure or reject a complaint on grounds that another authority is dealing with or has dealt with the same agreement or practice. The purpose of this provision is to ensure that cases can be allocated to the best-placed authority and to avoid unnecessary duplication of work. The provision, however, only covers the application of Community competition law. Article 83 of the Treaty does not provide a legal base for extending this rule to the application of national competition law. In most national legal systems an authority that has received a complaint under national competition law must deal with the case in one way or another. In such event the *effet utile* of the system aiming at an efficient allocation of cases dealt with under EC competition law would be eliminated: reallocation of the case based on Community law while the proceedings based on national law must be continued implies parallel procedures and a high risk of inconsistent decisions.

b) Information and cooperation

34. According Article 11(3) national competition authorities must inform the Commission at an early stage of all cases involving the application of Articles 81 and 82. The information is accessible to the other national competition authorities via the envisaged network of competition authorities (the NCA Intranet).

35. The aim of this rule is not only to make it possible to reallocate cases between the members of the network. It also aims at promoting contacts and mutual communications and discussions between the members of the network with a view to sharing ideas and promoting a common competition culture and at increasing the effectiveness of market monitoring.

36. Such mutual exchanges provide the authorities with input on the conduct of market players in several Member States. This is particularly important in light of the current trend of globalisation, leading to more and more cases in which the same players interact in several or all Member States. The effectiveness of this instrument, however, presupposes that the national competition authorities apply Community competition law to cases affecting trade between Member States. Otherwise the collective monitoring becomes incomplete and ineffective.

c) Competition between ideas vs. competition between different systems in the Community

37. Article 3 does not eliminate intellectual "competition" between competition authorities. Discussion within the network of cases dealt with by the national competition authorities and the Commission and experience gained at national level

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8 See the separate staff paper on case allocation

will constitute an important input in the elaboration of the future competition policy of the network.

38. Community competition law is dynamic. Over time it has been adapted to meet the needs and challenges of any given moment. Initially, the main thrust was to promote market integration. More recently, the Commission has begun to look more to issues of market power and the impact of an agreement or practice on the market.

39. This dynamic process will continue, the aim being to ensure that the law is able to effectively address changing market conditions and protect competition for the benefit of consumers. In other words, the development of EC competition policy is an organic process where experience gained throughout the Community will shape the law. The proposed Regulation establishes the necessary framework for exploiting to the fullest the capabilities of each individual competition authority.

40. Moreover, Article 3 does not eliminate the application of national competition law. It remains applicable to all agreements and practices that do not affect trade between Member States. It is in this context that national competition laws can – without harming the internal market – function as a source of inspiration for further developments of EC competition law. In this way competition between national laws and Community competition law remains. The network provides an interface that allows for cross-fertilisation between the systems.

d) International cooperation

41. An increasing number of cases involve cooperation with competition authorities in third countries. In such event it is important to ensure that the Community interest is taken into account in cases that have repercussions in other Member States. Article 3 ensures that these cases become subject to the cooperation mechanisms of the network. This input is completely missing where a national competition authority applies national competition law.

42. In cases that involve several Member States coordination within the network is also essential to avoid the risk that third country authorities exploit differences in opinion between the competition authorities in the Community to promote their own interest.

e) The network and the powers of the Commission

43. Article 3 aims at promoting consistent application within the network of competition authorities and at preventing re-nationalisation of EC competition law. In the present system of parallel application the national competition authorities generally deal with cases affecting trade between Member States on the basis of national competition law. In the proposed system they will deal with such cases on the basis of Community competition law. Article 3 does not affect the quantity or quality of cases handled by the national competition authorities. It merely determines the applicable law.

44. The cooperation mechanisms contained in Article 11 of the proposal do not constitute cherry picking instruments whereby the Commission would pick and choose from the cases handled by the national competition authorities. Such action on the part of the Commission would be inconceivable in a network based on close cooperation between the competition authorities as stipulated in Article 11(1) of the

proposal. The very aim of the reform is to decentralise the application of EC competition law and associate the national competition authorities in its application to the widest extent possible. Article 3 is an essential instrument to that effect.

45. The information and consultation procedure contained in Article 11(4) pursues only the objective of a coherent application of Articles 81 and 82. The provision ensures that cases, which have implications for the internal market and other Member States, can be discussed before a decision is adopted.

46. Article 11(6), which provides that when the Commission opens a procedure the national competition authorities are relieved of their competence to apply Articles 81 and 82, also pursues the aim of coherent application. This provision ensures that there will be no parallel procedures at national level and Community level concerning the same case and that the Commission can play the role set out for it by the Treaty. It is essential to have a safeguard mechanism that allows the Commission to intervene to solve deadlocks concerning the allocation of cases and to prevent decisions that would run counter to the common competition policy of the network. As guardian of the Treaty the Commission has a special responsibility for ensuring that the rules of the Treaty are applied in substantially the same way throughout the Community. Article 11(6), which will only be used by the Commission to prevent substantial divergences, serves that aim. This power conferred by Article 11(6) is subject to the power of the Member States under Article 230 of the Treaty to challenge any Commission decision adopted following the application of Article 11(6).

47. All these mechanisms are indispensable to ensure coherence inside a system of decentralised application of EC competition law. Coherent application is essential both for the good functioning of the internal market and for the credibility of EC competition law inside the Community and internationally.

III. SUBSIDIARITY AND PROPORTIONALITY

48. The fundamental objectives of the Treaty include the creation of an internal market and a system ensuring that competition in this internal market is not distorted. Differences in competition law standards and their application from Member State to Member State create distortions in the internal market to the detriment of companies and the European economy. Action at Community level is required to eliminate such distortions. The Commission's proposal does so by creating an efficient enforcement system that promotes a level playing field throughout the internal market through the application of a single competition law standard to agreements and practices affecting trade between Member States.

49. The principle of subsidiarity is not designed to maintain the status quo. It is based on the efficiency of the intervention in terms of addressing an identified issue. By proposing to give up its monopoly over Article 81(3), the Commission provides for a more efficient application of EC competition law at national level. The present system of parallel application of Community law and national law is inefficient due to the distortions that it creates in the internal market and the compliance burden that it imposes on companies.

50. Moreover, the proposed Article 3 is fully in line with the principle of proportionality. Article 3 is limited to what is necessary in order to meet the

objectives of the reform. The scope of the rule is limited to national competition laws, defined as laws that cover the same types of agreements and practices as Articles 81 and 82, i.e. cases of parallel application[9].

51. There is no other solution which is as effective in terms of meeting the objectives of the reform, in particular the aim of ensuring coherence throughout the Community. An alternative based on the rule of primacy coupled with an intensive use by the Commission of Article 10 decisions would give rise to a number of problems. It would risk reintroducing a notification system and the scope for conflicts would be greater since the preventive mechanisms of the network would not apply. To the extent that the Commission intervened *ex post*, there would be conflicting formal decisions. The proposal aims at devising a system that avoids these conflicts rather than creating them. Finally, parallel application of national competition law makes it difficult to achieve effective allocation of cases within the network.

IV. THE SCOPE OF APPLICATION OF ARTICLE 3

A. THE DIFFERENCE BETWEEN ARTICLE 81 AND 82

a) Article 81

52. Undertakings normally face a choice between performing an activity themselves, performing it together with another undertaking or outsourcing the activity entirely to another undertaking. In the two last situations agreements in one form or another are necessary.

53. Article 81 acknowledges that such agreements[10] can create benefits for society by prohibiting only agreements that appreciably restrict or distort competition and by exempting even appreciably restrictive agreements in certain circumstances. In the terminology of the Treaty, agreements can contribute "*to improving the production or distribution of goods or to promoting technical and economic progress*". In some cases these benefits can be of such a magnitude that they outweigh an appreciable restriction of competition caused by the agreement, in which case it is covered by the exception rule of Article 81(3), provided that the three other conditions for its application are fulfilled. Article 81 thus has both a negative side and a positive side. The negative side is reflected by a strong prohibition rule and the positive side is reflected by the non-prohibition of agreements, which do not appreciably restrict competition, and by the exception rule of Article 81(3).

54. There is no inherent link between the restrictions of competition and the benefits in the sense that the restrictions must produce the benefits. Both elements are produced by the agreement. In some cases, however, restrictions are necessary for the proper functioning of the agreement. In the case, for example, of a research and development joint venture containing a non-compete obligation on the parties, the benefits flow from the joint research project and not the non-compete obligation.

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9 See section IV below.

10 In the present context this term incorporates concerted practices and decisions of associations of undertakings.

This obligation, however, may be necessary for the proper functioning of the joint venture and may thus either escape Article 81(1) or be covered by Article 81(3).

55. The positive side of Article 81 is not limited to agreements containing appreciable restrictions of competition. Agreements that do not restrict competition or do not restrict it appreciably can produce benefits similar to those produced by agreements caught by the prohibition of Article 81(1). In fact, a non-restrictive agreement that produces the benefits recognised under Article 81(3) is generally more beneficial from the point of view of economic welfare than a similar restrictive agreement. In the former case none of the benefits are limited by restrictive effects on competition. For example, an agreement providing for joint research and development and production between two firms that jointly hold 10% of the market may produce the same benefits as a similar agreement between two other firms in the same industry jointly holding 25% of the market. The former agreement is likely not to restrict competition under Article 81(1) whereas the latter agreement would be likely to restrict competition, but would be block exempted under the new draft R&D block exemption regulation[11].

56. The Court of Justice has expressly recognised the positive side of Article 81(1). It has, for example, held that selective distribution based on purely qualitative selection criteria is compatible with Article 81(1), since such systems are in the interest of consumers in as much as they address a need for particular services[12].

57. The paragraph 1 and paragraph 3 positive side of Article 81 is reflected in the proposed Article 3, which applies irrespective of the presence of restrictions of competition and thus covers both the positive and negative side of Article 81. It thus leads to the application of a single test for agreements and concerted practices affecting trade between Member States, to the exclusion of both more lenient and stricter national competition laws applicable to such agreements and practices.

b) Article 82

58. Article 82 prohibits the abuse of a dominant position within the common market or a substantial part thereof[13] in so far as it may affect trade between Member States.

59. Unlike Article 81, Article 82 is only concerned with dominant undertakings. When a firm has substantial market power it is likely to raise prices and reduce output in order to increase its profits, in which case consumers will suffer.

60. Given this difference, the need to exclude the application of stricter national laws to the behaviour of dominant undertakings is less compelling as long as such national laws do not impinge on pro-competitive or non-restrictive agreements. That is not the case for most Article 82 type practices since they constitute unilateral conduct that does not qualify as an agreement within the meaning of Article 81[14]. There may even be good reasons to apply more detailed national rules to such unilateral

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11 See Article 4(2) of Regulation No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ 2000 L 304, page 7.

12 See e.g. judgement of 25.10.1977, Case 26/76, Metro (I), ECR 1875. See also judgement of 28.1.1986, Case 161/84, Pronuptia, ECR page 353, concerning franchising, and of 12.12.1995.

13 See on the term "*or in a substantial part thereof*" section V.C. below.

14 The concept of agreement within the meaning of Article 81(1) is developed in section VI.B.a. below.

practices of dominant firms, thereby facilitating access to the market of a particular Member State. This is recognised in Article 3, which, as regards Article 82, covers "*the abuse of a dominant position within the meaning of Article 82*".

61. Article 3 does not exclude the application of stricter national competition laws to the unilateral behaviour of companies. On the other hand, to the extent that the abusive behaviour is based on an agreement within the meaning of Article 81, only Article 81 and 82 can apply if the case affects trade between Member States. In other words, as regards unilateral conduct Article 3 only excludes the application of national rules that are equivalent to those contained in Article 82. If it is alleged that a dominant firm has committed an abuse of the type covered by Article 82, for example discriminatory pricing, that Article must be applied. National law, on the other hand, remains applicable to the extent that it applies to the unilateral conduct of non-dominant firms or regulates the unilateral conduct of dominant firms in a stricter way than Article 82. In the field of unilateral conduct the main effect of Article 3 is thus to ensure that practices covered by Article 82 become subject to a common standard and to the cooperation mechanisms of the network of competition authorities.

B. WHAT CONSTITUTES NATIONAL COMPETITION LAWS?

62. Article 3 excludes the application of national competition laws to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 that may affect trade between Member States. It must therefore be considered what constitutes "*national competition laws*" for the purposes of Article 3. This concept must be interpreted in light of the objective of Article 3, which is to avoid parallel application of Community competition law and national competition laws to cases affecting trade between Member States. What matters is the substantive content of the national rule rather than the legal instrument of which it forms part.

a) Agreements between undertakings

63. Article 81 regulates agreements between undertakings in either a horizontal or vertical relationship. For there to be an agreement[15] within the meaning of Article 81(1) of the Treaty, as interpreted by the Community Courts, the undertakings must have expressed their joint intention to behave on the market in a certain way[16]. The Court of Justice has also held that the concept of concerted practice must be understood in light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy, which he intends to adopt on the market[17]. Article 81 thus

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15 In this section no specific mention is made of "*decisions of associations of undertakings*". It is only noted here that such decisions regulate the behaviour of undertakings and thus influence their commercial behaviour in the same way as agreements and concerted practices.

16 See e.g. judgement of 20.4.1999, Joined Cases T-305/94 and others, Limburgse Vinyl Maatschappij (PVC), ECR II-931, paragraph 715, *with references*.

17 See e.g. judgement of 6.7.1999, Case C-49/92 P, Anic Partecipazioni, ECR I-4125, paragraph 116, and of 16.12.1975, Joined Cases 40/73 to 48/73 and others, Suiker Unie, ECR page 1663, paragraph 173.

covers interaction between undertakings that has an influence on the commercial policy or conduct of at least one of the parties[18].

64. Article 81, on the other hand, does not regulate the unilateral conduct of firms on the market. For example, Article 81 does not regulate unilateral price discrimination, i.e. the application by a supplier of different prices to its customers[19]. Contracts of this nature merely reflect the terms and conditions of sale offered by a firm. It is not the result of a joint intention of the parties to the agreement to regulate or influence the commercial policy or conduct on the market of one or both parties. This implies with regard to Article 81 that Article 3, in so far as it covers agreements between undertakings within the meaning of Article 81(1), does not cover national laws that regulate the unilateral conduct of firms. In certain circumstances, however, seemingly unilateral conduct may be attributable to a commercial relationship between two or more parties[20].

65. Measures regulating the unilateral conduct of undertakings include national laws that regulate the behaviour of individual firms in a general way. They may prohibit certain types of advertising or marketing[21] or impose certain terms and conditions that aim to protect one of the parties to the contract, in particular consumers or weaker contractual parties, against an economically more powerful party. A Community law example of the latter can be found in Article 17 of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents according to which in the case of termination of the agreement the agent shall be entitled to an indemnity. Such measures also include rules that regulate the terms and conditions offered by buyers or suppliers to their trading partners such as laws imposing minimum purchase prices, rules that prohibit exploitation of a relationship of economic dependence, and rules that prohibit unilateral price discrimination. Rules of this nature do not constitute competition laws within the meaning of Article 3. Like other state measures, however, such provisions are subject to the free movement rules of the Treaty.

66. Most practices covered by Article 82 are also unilateral practices, thus falling outside the concept of agreement contained in Article 81. This is, for example, the case of price discrimination, excessive pricing, predatory pricing and refusals to supply, including supply only on terms and conditions that make the transaction economically unviable from the point of view of the buyer[22]. On the other hand, agreements within the meaning of Article 81 come into play when dominant firms engage in tying, grant target or loyalty rebates or conclude exclusivity contracts. Such practices regulate or influence the commercial conduct of the other party. The

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18 In paragraph 174 of the judgement in Suiker Unie cited in the previous note the Court held that Article 81 strictly precludes any contacts between operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

19 Article 81(1) requires that there is an agreement to discriminate, which is absent in the case in which a supplier simply applies different prices to different customers without committing himself by contract to do so or without engaging in a concerted practice to that effect.

20 See e.g. judgement of 6.7.2000, Case T-62/98, Volkswagen, paragraph 236, not yet reported, and of 17.9.1985, Joined Cases 25/84 and 26/84, Ford, ECR 2725.

21 An example would be a prohibition against passing off.

22 See in this respect judgement of 10.2.2000, Joined Cases C-147/97 and 148/97, Deutsche Post, ERC I-825, paragraphs 58-60.

other party thus has to or is given an incentive to purchase two separate products, reach certain targets or buy a product only from the dominant firm. Such agreements, which also fall to be considered under Article 81 whether entered into by dominant or non-dominant undertakings, are covered by Article 3.

67. Article 81 only applies to agreements and concerted practices between undertakings. National rules that regulate the behaviour of undertakings vis-à-vis the final consumers, which are not undertakings, are not covered by Article 81. This is, for example, the case of a prohibition on resale to consumers below the purchase price. To the extent that a statutory prohibition on resale below the purchase price applies to dealings between undertakings it regulates the unilateral conduct of firms.

68. The positive (non-infringement) side of Article 81(1) encompasses the situation where an agreement within the meaning of Article 81 does not restrict competition at all or where it restricts competition only to a non-appreciable extent. Article 3, as already stated, aims at preventing such agreements from being prohibited or modified on the basis of stricter national competition laws. Allowing the application of national competition laws to agreements, affecting trade between Member States, which do not appreciably restrict competition within the meaning of Article 81(1) would deprive the rule of its *effet utile*.

69. Excluding the application of stricter national rules to agreements capable of affecting trade between Member States is in no way detrimental to effective enforcement at national level.

70. The national competition authorities can intervene on the basis of national competition law against any agreement or practice that is not capable of appreciably affecting trade between Member States[23]. The new draft *de minimis* notice does not deal with the question of affectation of trade, except in point 12, last paragraph according to which agreements between small and medium sized undertakings, as defined in the Annex to Commission Recommendation 96/280/EC[24], are rarely capable of affecting trade between Member States.

71. As regards agreements that are capable of appreciably affecting trade between Member States national competition authorities are free to intervene against any agreement that appreciably restricts competition within the meaning of Article 81(1). The latter condition does not place any real constraint on the enforcement activities of the national competition authorities since appreciability as regards restrictions of competition is related to market position and not turnover. Moreover, the market share thresholds of 5%(10%[25]) for horizontal agreements and 10%(15%) for vertical agreements do not apply to hardcore restrictions such as price fixing or market sharing[26].

72. Assessment under Article 81 is by definition made within the confines of a relevant antitrust market. When the relevant market is wider that the territory of a Member State, the test of appreciability quite naturally presupposes that the restrictive effects

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23 It may, however, be appropriate to provide further guidance on the concept of appreciability in the context of affectation of trade, see section VI.a. below.

24 OJ 1996 L 107, page 4.

25 See paragraph 8 of the new draft *de minimis* notice.

26 See paragraph 12 of the draft notice.

are appreciable on the wider relevant market. For example, if the relevant geographic market comprises a small and a large Member State, the agreement is *de minimis*, if the parties to a horizontal cooperation agreement have less than 5%(10%) market share, even if they have a higher share of sales in the small Member State. The definition of a wider relevant geographic market means that companies operating in the small Member State are effectively constrained by their competitors in the large Member State. The 5%(10%) market share of the parties therefore correctly reflects the economic importance of the parties to the agreement. When the parties to an agreement have, in a properly defined market, less than 5%(10%) or 10%(15%) market share, as the case may be, and in the absence of hardcore restrictions, there is no need for intervention on the basis of national competition law that would justify the resulting distortion of a level playing field within the internal market. Indeed, the application of stricter national competition rules, for instance because appreciability is based only on sales on the national territory, would lead to the prohibition of innocuous agreements.

b) Unilateral conduct

73. As regards unilateral conduct, Article 3 is, as already indicated, to be interpreted as applying only to practices that constitute an abuse of a dominant position within the meaning of Article 82. It does not exclude the application of stricter national laws that regulate the unilateral behaviour of undertakings whether dominant or not. In the context of Article 3, the prohibition rule of Article 82, in so far as its applies to unilateral conduct, thus constitutes only a minimum standard that must be applied throughout the Community.

74. In certain economic sectors such as telecommunications, gas and electricity, liberalisation measures have been adopted to introduce competition in markets previously served by one or more incumbents holding exclusive or special rights. These liberalisation measures are in many cases based on Community directives implemented in national law. Such measures that mirror obligations under Community law cannot be considered national competition laws for the purposes of Article 3. Moreover, liberalisation measures, whether based on Community measures or not, generally regulate the unilateral conduct of (dominant) undertakings. They may, for example, regulate the terms and conditions for access to an essential facility controlled by a dominant firm or regulate the prices and other terms and conditions offered by a dominant firm. In such event the application of stricter national measures is not excluded by Article 3.

c) Article 86 and exclusive rights

75. Article 86(1) of the Treaty provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty. These rules include in particular Articles 81 and 82 and the rules on free movement of goods, services, persons and capital. Article 86 in conjunction with, in particular, Article 82 can lead to the finding that special or exclusive rights granted under national law must be abolished[27].

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[27] See e.g. judgement of 12.2.1998, Case C-163/96, Raso, ECR I-533, and of 13.12.1991, Case C-18/88, RTT v GB-Inno-BM, ECR I-5941.

76. The prohibition rule of Article 86(1) is subject to the exception rule of Article 86(2) according to which undertakings entrusted with the operation of services of a general economic interest are only subject to the rules of the Treaty, in particular the rules of competition, insofar as the application of these rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

77. The proposed Article 3 has no bearing on the competence of the Member States to grant special or exclusive rights. Laws granting such rights to particular undertakings cannot be considered "*national competition laws*" within the meaning of Article 3. In fact, by granting exclusive rights they restrict competition rather than protecting it. As is clear from Article 86(2), however, such measures may be justified. Moreover, to the extent that national rules, regulating the unilateral conduct of companies benefiting from such rights, are stricter than those flowing from Article 82, Article 3 does not prevent their continued application.

d) National rules on procedures and sanctions

78. The proposed Regulation does not purport to harmonise national procedures and sanctions. Each national competition authority applies Articles 81 and 82 on the basis of its national framework of procedures and sanctions. Article 3 covers only the application of Articles 81 and 82 but does not in any way affect the application of national procedural rules and sanctions.

79. Absent harmonisation, the application of Community law at national level takes place on the basis of national procedures and sanctions. The Court of Justice has held, however, that this rule is subject to certain fundamental principles of Community Law and therefore not unlimited. The two main requirements are the *principle of effectiveness* (or *effet utile*) and the *principle of equivalence*[28]. According to the principle of effectiveness national procedural rules must not render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. Under the principle of equivalence the rules concerning the enforcement of Community law must not be less favourable than those governing similar domestic actions, in the present case actions based on national competition law. The Commission's proposal has no bearing on the application of these fundamental principles. However, given that one of the principal aims of the reform is to promote the application of Articles 81 and 82 at national level, the respect of these principles clearly gains in importance.

e) National merger control

80. Article 22(1) of the Merger Regulation excludes the application of Regulation 17 to concentrations within the meaning of the Merger Regulation, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent. It follows that Regulation 17 remains applicable to non-Community dimension joint ventures with spill over effects and transactions that do not qualify as concentrations within the meaning of the Merger Regulation.

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[28] See e.g. judgement of 16.5.2000, Case C-78/98, Preston, not yet reported, and of 9.2.1999, Case C-343/96, Dilexport, ECR I-579.

81. Article 3 read in conjunction with Article 22(1) of the Merger Regulation could be taken to imply that it excludes the application of national merger control laws to transactions, which remain subject to Regulation 17 or the future new implementing regulation. However, the rationale of the proposal is to ensure a single competition law test in the antitrust field and not to impinge on the scope of application of national merger control laws. This fact could be clarified by inserting in Article 3 after "*national competition laws*" the words "*other than laws applicable to concentrations*".

V. THE AFFECTATION OF TRADE CRITERION

82. Article 81 applies to agreements, decisions and concerted practices "*which may affect trade between Member States*" and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 82 applies to any abuse by one or more undertakings of a dominant position within the common market or a substantial part thereof "*insofar as it may affect trade between Member States*". The affectation of trade criterion is employed in Article 3 to define the respective scope of application of Articles 81 and 82 and national competition laws as defined above. The present section deals with the concept of affectation of trade and the concept in Article 82 of a substantial part of the common market.

A. THE NATURE OF THE AFFECTATION OF TRADE CRITERION

83. According to the settled case law of the Court of Justice the affectation of trade criterion serves to define the boundary between the areas respectively covered by Community competition law and national competition law[29]. In other words, it is a jurisdictional criterion limiting the scope of application of Articles 81 and 82 to a particular category of agreements and practices that have a minimum level of cross-border effects and therefore fall to be dealt with under EC competition law.

84. The affectation of trade requirement is an autonomous criterion that must be assessed separately in each case. It is the agreement or practice as a whole that must be capable of affecting trade between Member States and not each individual restriction[30], and there is no inherent link between any restriction of competition and the affectation of trade requirement. Selective distribution agreements, for example, based on purely qualitative selection criteria justified by the nature of the products and thus not restrictive of competition within the meaning of Article 81(1), may nevertheless affect trade between Member States. In practice, however, the restrictions contained in an agreement will often lead to the conclusion that the agreement affects trade between Member States. For example, a distribution agreement, prohibiting exports, necessarily affects trade between Member States.

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29 See e.g. judgement of 13.7.1966, Joined Cases 56/64 and 58/64, Consten and Grundig, ECR 429, and of 6.3.1974, Joined Cases 6/73 and 7/73, Commercial Solvents, ECR page 223.

30 See judgement of 25.2.1986, Case 193/83, Windsurfing, ECR 611, paragraph 96.

B. THE SCOPE OF THE CONCEPT OF AFFECTATION OF TRADE

85. The criterion consists of two main elements, namely "*trade*" and "*affectation*" thereof.

86. The concept of "*trade*" encompasses not only trade in goods and services in the traditional sense but also other forms of economic activity, including establishment.

87. The concept of "*affectation*" implies according to settled case law that it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States[31]. In most cases the Community Courts have added language such as "*capable of hindering the attainment of the objectives of a single market between states*"[32]. In other judgements, however, this qualification is not used[33]. Indeed, in *Stichting Sigarettenindustrie*[34] the Court of Justice stated that "*it must be emphasised that the partitioning of the market is only one example of the effects on trade between Member States covered by Article 81(1) of the Treaty*".

88. For Articles 81(1) to apply, the flow or pattern of trade must be caused or be foreseeably likely to develop differently from what would have been the case in the absence of the agreement[35]. The concept of affectation of trade does not presuppose that trade is restricted or reduced[36]. What matters is whether trade flows are likely to have developed differently without the agreement. Moreover, it is not necessary that the agreement has an actual effect on trade, if it is capable thereof. Potential foreseeable effects must be considered, including foreseeable market developments[37].

a) Main categories of agreements

89. On the basis of the existing case law it is possible to establish categories of agreements and practices in respect of which the condition of an appreciable affectation of trade will generally be fulfilled. These categories cover the vast majority of cases that fall to be considered under Articles 81 and 82.

(i)Agreements concerning imports and exports

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31 In judgement of 31.1.1985, Case 123/83, BNIC v Clair, ECR page 391, paragraph 29, the Court held that even if there was no trade in an intermediate product covered by the agreement, the agreement would be capable of affecting trade, if the final product was exported. The case concerned price fixing by Cognac manufacturers in the form of a minimum price for the spirits used in the manufacture of cognac.

32 See e.g. judgement of 6.7.2000, Case T-62/98, Volkswagen, paragraph 179, and judgement of 21.1.1999, Joined Cases C-215/96 and 216/96, Bagnasco, ECR I-135, paragraph 47.

33 See e.g. judgement of 14.7.1981, Case 172/80, Züchner, ECR 2021, of 14.12.1983, Case 319/82, Kerpen & Kerpen, ECR 4173, and of 15.3.2000, Joined Cases T-25/95 a.o., Cimenteries, paragraph 3930.

34 See judgement of 10.12.1985, Joined Cases 240/82 ao., Stichting Sigarettenindustrie, ECR 3831, paragraph 48.

35 See in this respect judgement 29.10.1980, Joined Cases 209/78 a.o., Van Landewyck, ECR page 3125, paragraph 172, and of 2.7.1992, Case T-61/89, Dansk Pelsdyravler Forening, ECR II-1931, paragraph 143.

36 See e.g. judgement of 6.4.1995, Case T-141/89, Tréfileurope, ECR II-791.

37 See judgement of 25.10.1983, Case 107/82, AEG, ECR 3151, paragraph 60.

90. Agreements between undertakings in two or more Member States that concern imports and exports necessarily affect trade between Member States and therefore fall to be assessed under the EC competition rules. In *Kerpen & Kerpen*, for example, which concerned an agreement between a French producer and a German distributor covering more than 10% of exports of cement from France to Germany, the Court of Justice held that it was impossible to take the view that such an agreement could not appreciably affect trade between Member States[38].

91. Some agreements between undertakings in the same Member State fulfil also the jurisdictional criterion of Articles 81 and 82 because they concern imports[39] or exports. The Decision in *Milchförderungsfonds*[40], for example, concerned a scheme, established by German producers of dairy products, for the joint promotion of the products on export markets. The scheme was liable to increase exports from Germany, thereby affecting the patterns of trade compared to the situation without the agreement and distorting competition in other Member States[41].

92. This category also includes the large number of cases concerning restrictions on parallel trade and on resale to customers in other Member States[42]. It is immaterial whether the parties to the agreement are located in the same Member State or in different Member States.

(ii) Agreements and practices implemented in two or more Member States

93. Agreements that are implemented in two or more Member States are by their very nature liable to affect trade between Member States. Cartels covering two or more Member States harmonise the conditions of competition and affect the interpenetration of trade by cementing traditional trade patterns[43]. Joint ventures implemented in two or more Member States affect the commercial activities of the parties in those areas of the Community. Networks of selective distribution agreements implemented in two or more Member States limit trade to members of the network, thereby affecting the patterns of trade compared to the situation without the agreement[44].

(iii) Agreements and practices affecting the competitive structure

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38 Judgement of 14.12.1983, Case 319/82, Kerpen & Kerpen, ECR 4173, paragraph 8. See also judgement of 30.3.2000, Case T-513/93, CNSD, which concerned the fixing of tariffs applied by customs agents and where the service provided by the agents by their very nature concerned imports and exports, of 10.12.1985, Joined Cases 240/82 ao., Stichting Sigarettenindustrie, ECR 3831, paragraph 49, concerning an agreement between manufacturers and importers of cigarettes, and of 3.7.1985, Case 243/82, Binon, ECR 2015, concerning an agreement that covered the distribution of virtually all foreign newspapers in Belgium.

39 See in this respect judgement 29.10.1980, Joined Cases 209/78 a.o., Van Landewyck, ECR page 3125, paragraph 172.

40 See Commission Decision in Milchförderungsfonds, OJ 1985 L 35, page 35.

41 See also judgement of 21.2.1995, Case T-29/92, Vereniging van Samwerkende Prijsregelende Organisaties in de Bouwnijverheid, ECR II-289, paragraph 238.

42 See e.g. judgement of 6.7.2000, Case T-62/98, Volkswagen, and of 19.5.1999, Case T-175/95, BASF Coatings. For a horizontal agreement to prevent parallel trade see judgement of 8.11.1983, Joined Cases 96/82 and others, IAZ International, ECR 3369, paragraph 27.

43 See e.g. judgement of 6.4.1995, Case T-142/89, Usines Gustave Boël, ECR II-867, paragraph 102.

44 See in this respect judgement of 17.1.1984, Joined Cases 43/82 and 63/82, VBVB and VBBB, ECR 19, paragraph 9.

94. Agreements or practices that have an impact on the competitive structure within the Community affect trade between Member States within the meaning of Articles 81(1) and 82. It is not sufficient that the competitive structure within a single Member State is affected. The agreement or practice must have wider structural repercussions. This is in particular the case where supply or demand at European level is concentrated and the agreement or practice eliminates a significant source of competition in the Community[45].

(iv) Agreements and practices covering the whole of a single Member State

95. Agreements that cover an entire Member State may also affect trade between Member States within the meaning of Articles 81 and 82. This is particularly the case when such agreements hinder imports. The formula "*capable of hindering the attainment of the objectives of a single market between states*", which has been used by the Court of Justice, is particularly relevant in these cases and parallel trade cases.

96. In the case of cartels that cover the whole territory of a Member State, the undertakings involved must generally, in order for the cartel to remain stable, either take measures to restrict imports or ensure that suppliers from other Member States join the anti-competitive agreement. In both circumstances the normal patterns of trade are usually affected[46]. In the former case imports are foreclosed in a very direct way as the members of the cartel take active steps to block entry of products or producers from other Member States[47]. In the latter case, the effect on trade stems from the fact that the agreement prevents undertakings from other Member States from exploiting any competitive advantage that they have[48]. In some cases, however, the products or services covered by the agreement are by nature national and therefore not the subject of cross-border trade. This may, for example, be the case with certain retail banking services[49]. In these cases the prevention of imports does not form an inherent part of the agreement and trade will only be affected, if it is established that the agreement makes it difficult for undertakings from other Member States to establish themselves in the Member State in question.

97. In the case of undertakings holding a dominant position on the whole of the territory of a Member State, the abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case the patterns of trade are affected[50]. In *Michelin*[51], for example, the Court of Justice held

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45 See judgement of 21.2.1973, Case 6/72, Continental Can, ECR 215, of 6.3.1974, Joined Cases 6/73 and 7/73, Commercial Solvents, ECR 223, of 14.2.1978, Case 27/76, United Brands, ECR page 425 paragraphs 197 to 203, and of 13.2.1979, Case 85/76, Hoffmann-La Roche, ECR page 461.

46 See e.g. judgement of 11.7.1989, Case 246/86, Belasco, ECR 2117, paragraph 32-38.

47 See e.g. judgement of 26.11.1975, Case 73/74, Groupement des fabricants de papier peints de Belgique, ECR 1491, paragraph 28. In this case the producers had granted collective loyalty rebates, which made it difficult for suppliers from other Member States to penetrate the market.

48 See in this respect judgement of 27.1.1987, Case 45/85, Verband der Sachversicherer, ECR 405, paragraph 50, and of 28.5.1998, Case C-7/95 P, John Deere, ECR I-3111. See also judgement of 29.10.1980, Joined Cases 209/78 and others, Van Landewyck, ECR page 345, paragraph 172, where the Court stressed that the agreement in question reduced appreciably the incentive to sell imported products.

49 See judgement of 21.1.1999, Joined Cases C-215/96 and C-216/96, Bagnasco, ECR I-135, paragraph 47.

50 See e.g. judgement of 1.4.1993, Case T-65/89, BPB Industries and British Gypsum, ECR II-389.

that a system of loyalty rebates foreclosed competitors from other Member States and therefore affected trade within the meaning of Article 82. In *Rennet*[52] the Court similarly held that an abuse in the form of an exclusive purchasing obligation on customers foreclosed products from other Member States.

98. Distribution agreements confined to a single Member State may also in certain circumstances affect trade between Member States. This is particularly so when, often as a result of cumulative effects, they lead to foreclosure of supplies or suppliers from other Member States[53], or where they prevent or limit exports to buyers in other Member States[54].

b) The appreciability requirement

99. Agreements that have only an insignificant impact on trade between Member States fall outside the scope of Article 81(1) and Article 82. In other words, for Articles 81 and 82 to apply the affectation of trade must be "*appreciable*"[55], which implies that the agreement must be capable of affecting an appreciable volume of trade. This assessment is based on the position and importance of the parties on the market for the products concerned as indicated, for instance, by their market position and turnover in the products in question[56]. The issue of appreciability is further dealt with in section VI.a. below.

C. DOMINANCE IN A SUBSTANTIAL PART OF THE COMMUNITY

100. According to Article 82 the prohibition rule contained in this provision applies to any abuse of a dominant position within the common market "*or in a substantial part thereof*".

101. This term has been interpreted fairly extensively in the case law of the Court of Justice. According to the case law account must be had to the pattern and volume of production and consumption of the products in question as well as the habits and economic opportunities of sellers and buyers[57]. It is clear that the territory of a Member State constitutes a substantial part of the common market[58]. Regions and

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51 See judgement of 9.11.1983, Case 322/81, Nederlandse Banden Industrie Michelin, ECR page 3461

52 See judgement of 25.3.1981, Case 61/80, Coöperative Stremsel- en Kleurselfabriek, ECR 851, paragraph 15.

53 See e.g. judgement of 28.2.1991, Case C-234/89, Delimitis, ECR I-935 and of 15.12.1999, Case T-22/97, Kesko, ECR II-3775..

54 See e.g. judgement of 24.10.1995, Case C-70/93, Bayerische Motorenwerke, ECR I-3439, paragraph 20.

55 See e.g. judgement of 9.7.1969, Case 5/69, Völk v Vervaecke, ECR page 295, and of 25.11.1971, Case 22/71, Béguelin, ECR page 949, paragraph 16.

56 See e.g. judgement of 28.4.1998, Case C-306/96, Javico, ECR I-1983, paragraphs 16 and 17, of 1.2.1978, Case 17/77, Miller, ECR page 131, paragraphs 10 to 15, of 7.6.1983, Joined Cases 100/80 a.o., Musique Diffusion Française, ECR 1825, paragraphs 84 to 87, and of 14.7.1992, Case T-77/92, Parker Pen, ECR II-549, paragraph 46.

57 See judgement of 16.12.1975, Joined Cases 40/73 a.o., Suiker Unie, ECR page 1663, paragraph 443.

58 See judgement of 9.11.1983, Case 322/81, Michelin, ECR page 3461, paragraph 28, of 5.10.1994, Case C-323/93, Crespelle, ECR I-5077, paragraph 17, and of 26.11.1998, Case C-7/97, Bronner, ECR I-7817, paragraph 36.

even a port or an airport situated in a Member State may also do so, depending on their importance[59].

102. It is submitted that where the abuse of a dominant position is such as to appreciably affect trade between Member States, the dominant position will normally also be considered to cover a substantial part of the Community. In both cases the volume of commerce involved plays a central role.

103. In order to make clear, however, that national competition law remains applicable to the abusive conduct of firms that hold a dominant position in a market which does not constitute a substantial part of the Community, the following wording could be added to Article 3: "… or the abuse of a dominant position, *covering the common market or a substantial part thereof*, within the meaning of Article 82 …"

VI. OPTIONS FOR COMPLEMENTING ARTICLE 3

104. The concern has been expressed in relation to Article 3 that the affectation of trade criterion is not sufficiently precise to serve as a dividing line between the scope of application of EC competition law and national competition laws. The present section considers two options for increasing the operability of Article 3, while preserving its *ratio legis*.

a) Further clarification and quantification of the concept of affectation of trade

105. In the present system both national competition authorities and national courts have fairly limited experience in the application of Articles 81 and 82, including the affectation of trade criterion. In order to facilitate the application of Article 3 the Commission could issue a notice on the interpretation of the affectation of trade criterion drawing on the case law of the Community Courts and its own administrative practice.

106. Such a notice should contain two main elements, namely the qualitative elements relevant to the assessment of whether the agreement or practice is capable of affecting trade between Member States and a quantitative element relating to the condition of appreciability. It is necessary to maintain such a two-stage approach, given that the capacity of an agreement to affect trade between Member States is a function of the nature of the agreement or practice and the volume of trade generated by the parties.

107. The qualitative element covers the nature of the agreements and practices. The main categories are described in section V above and include agreements concerning imports and exports, agreements and practices implemented in several Member States, agreements or practices affecting the competitive structure in the Community and agreements or practices that foreclose undertakings from other Member States.

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[59] See e.g. judgement of 10.12.1991, Case C-179/90, Merci convenzionali porto di Genova, ECR I-5889, and of 17,7,1997, Case C-242/95, GT-Link, ECR I-4449.

108. The quantitative element must be capable of capturing the magnitude of trade. In the case law, the Community Courts have relied on the market position of the parties as reflected by their turnover or their share of sales.

b) Parallel application in the grey zone

109. It has been observed that the affectation of trade criterion would give rise to numerous legal challenges against decisions of the national competition authorities or national courts on grounds that the finding as regards affectation of trade between Member States is incorrect.

110. For the application of Community competition law the affectation of trade criterion has not caused substantial difficulties in the past. Only rarely have there been borderline cases giving rise to real doubt as to the fulfilment of the criterion. It has in the vast majority of cases been fairly straightforward to decide on the matter.

111. National competition authorities, however, are likely to face more challenges particularly if they apply stricter national laws. Moreover, there may be particular difficulties at the early stages of the procedure during which the national competition authorities are still in the process of collecting evidence. Once the fact-finding has been completed it will in the vast majority of cases be possible to make an informed and sound choice of legal base that can withstand judicial review.

112. From the point of view of effective enforcement it would be unfortunate, if national decisions were subject to annulment in cases where a *bona fide* assessment of the capacity of an agreement to appreciably affect trade between Member States were to be overruled. This would be particularly problematic if under national procedural law the choice of legal base must be made at the outset of the procedure. Such difficulties, however, can be overcome by incorporating into Article 3 a procedural rule, allowing for parallel application of national competition law and Community competition law in cases where it is unclear whether an agreement is capable of affecting trade between Member States.

ANNEX

COMPARISON OF MEMBER STATES' MAIN COMPETITION LAW PROVISIONS WITH ARTICLES 81 and 82 EC		
MS	**National prohibitions**	**National exceptions/exemptions**
ıll	No reference to "common market" or "affect trade between Member States"	
ვ	*All references are to Loi du 1er Juillet 1999 sur la protection de la concurrence économique, unless otherwise stated* Article 2 on restrictive agreements and Article 3 on abuse of a dominant position: identical to Articles 81 and 82 except a difference as regards *de minimis*: **de minimis** presumption applies to undertakings which do not exceed more than one of the following limits (qualifying undertakings are presumed not to be capable of appreciably affecting competition, unless the contrary is proved) (Art. 5): (i) average annual number of employees 50 (ii) annual turnover (net of VAT) BFR 200m (iii) total assets BFR 100m and not more than 100 employees (annual average).	Article 2(3) is identical to Art. 81(3) EC except: **SMEs**: special exemption for practices that enable SMEs to enhance their competitive position.

❩	*Gesetz gegen Wettbewerbsbeschränkungen ("GWB") (27 July 1957, as amended)* Section 1 on restrictive agreements contains a prohibition rule limited to agreements between competing undertakings. Section 19 on the abuse of a dominant position is equivalent to Article 82, except that there is a presumption of dominance in the following cases: 1/3 market share held by a single undertaking, 50% market share held by 2 or 3 undertakings or 2/3 market share held by 4 or 5 undertakings. In addition there are a number of special prohibition rules, including rules in Section 20 on: **economic dependence**: the discrimination/ unfair hindrance prohibition in s.20(1) applies to undertakings (which need not be dominant, but) on which SMEs depend in such a way that reasonable alternatives do not exist (s.20(2)) **preferential terms**: prohibition on dominant undertakings or undertakings on which others depend using their market position to obtain preferential terms (s.20(3)) **sales below cost price**: prohibition on 'undertakings with superior market power' using their market power to 'unfairly hinder' SMEs, in particular by making sales below cost price (s.20(4)) **refusing membership**: prohibition on refusing to admit an undertaking as a member of a trade or professional association (s.20(6))	The following are <u>automatically</u> excepted : **agriculture**: agreements between agricultural producers or their associations or federations (s.28) **insurance**: joint assumption of individual risk in the joint insurance or syndicate business of credit institutions (s.29) **copyright** collecting societies (s.30) **sports broadcasting**: central marketing of rights to television broadcasting of sports competitions (s.31) The following <u>may</u> be exempted from Section 1 after notification (Sections 2-7): **standards**: uniform application of standards, types, or general terms of business (s.2) **specialisation**, provided this does not lead to the creation or strengthening of dominance (s.3) **SMEs**: agreements or decisions which improve the competitiveness of SMEs and do not substantially impair competition (s.4(1)), including joint procurement of commercial services (s.4(2)) **satisfying demand**: increasing efficiency or productivity of the participating undertakings in technical, commercial or organisational respects, thereby improving the satisfaction of demand, provided this does not lead to creating or strengthening dominance (s.5(1)) **structural crisis cartels** (s.6) **81(3)EC**: categories broadly equivalent to Art. 81(3)EC (s.7) **public interest**: (exceptionally) the Federal Minister of Economics may exempt restraints necessary for prevailing reasons concerning the economy as a whole and the public interest (s.8(1)). The Minister may also grant an exemption in "especially serious individual cases" if there is an immediate danger to the existence of a majority of the undertakings in an economic sector, and other legislative measures cannot be taken (s.8(2)).

DK	*Consolidated Competition Act no. 687 of 12 July 2000* §6 on restrictive agreements and §11 on abuse of a dominant position: virtually identical to Articles 81 and 82. §7 contains the following *de minimis* rule: **de minimis**: the following are excepted as long as competition in the relevant economic sector is not restricted by the total effect of similar agreements, and subsequent resellers are not obliged or requested to observe minimum prices or profits, agreements between undertakings with: (i) an aggregate annual turnover less than DKK1 billion and an aggregated share of the relevant product or service market less than 10%, or (ii) an aggregate annual turnover less than DKK150 million	8 is identical to Article 81(3).
EL	*Act No 703 (26 Sept. 1977) on the control of monopolies and oligopolies and the protection of free competition (as amended)* Article 1 on restrictive agreements and Article 2 on abuse of a dominant position: virtually identical to Articles 81 and 82.	Article 7 is equivalent to Article 81(3) with the exception that it also covers the equivalent of Article 82. In addition the following special rules apply: **export** cartels: without prejudice to EL's international obligations, agreements with the exclusive aim of insuring, promoting or strengthening exports are excepted (Art.6) Although the competition rules do normally apply to the following undertakings and sectors, Ministers have power to exempt them: **public undertakings** or public utility undertakings of general importance to the national economy (Art.5(1)) **agriculture**: agricultural or livestock products, forestry or fisheries (Art.5(2)) **transport** (land, air and maritime), if necessitated by transport policy (Art.5(3))

ES	*Defence of Competition Law (Law no 16, 17 July 1989)* Article 1 on restrictive agreements and Article 6 on abuse of a dominant position: virtually identical to Articles 81 and 82.	The exception rule of Article 4 is equivalent to Article 81(3). In addition the following special rules apply: **law**: agreements, decisions, recommendations and practices that result from the application of a law or from regulations issued in application of a law (Art.2(1)) **public interest**: those which are "justified in the general economic situation or public interest" and: (a) **exports**: whose purpose is to defend or promote exports to the extent that they are compatible with Spain's obligations under international treaties, or (b) **satisfy demand**: whose purpose is to align offer and demand when a sustained trend of diminishing equilibrium in the market exists, or where excess productive capacity is clearly anti-economic, or (c) **depressed zones**: which would sufficiently increase the social or economic level of depressed zones or sectors.
F	*Code de Commerce* Articles L. 420-1 on restrictive agreements and L. 420-2 on abuse of a dominant position are similar to Articles 81 and 82. L. 420-2 includes, however, the concept of abuse of economic dependence, i.e. the abuse by an undertaking of a position of economic dependence in relation to a customer or supplier, which has no alternative. In addition the Code contains a number of special provisions including: Article L. 420-5 on abusively low prices Article L. 442-2 on resale blow purchase price Article L. 443-1 on the imposition of short payment terms, and Article L. 442-6 on attempts to obtain preferential conditions.	Article L. 420-4 contains derogation from Articles L. 420-1 and L. 420-2, which is broadly equivalent to Article 81(3). The principal difference is a specific mentioning of the creation or maintenance of employment and the fact that the exception rule extends to the equivalent of Article 82. In addition there exist special exceptions to the special prohibition rules contained in the Code such as that on the prohibition of resale below the purchase price.

IRE	*Competition Act 1991* Article 4 on restrictive agreements and 5 on abuse of a dominant position are identical to Articles 81 and 82.	The exception rule of Article 4(2) is identical to Article 81(3).
[	*Competition and Fair Trading Act (No. 287, 10th Oct. 1990)* Article 2 on restrictive agreements and Article 3 on abuse of a dominant position: virtually identical to Articles 81 and 82. <u>Scope of the Italian Act</u>: The Act applies only to agreements, abuse etc which are "outside the scope of": Arts. 65 and 66 ECSC, Arts. 81 and 82 EC, and EC Regulations or Community acts having equivalent statutory effect. (s.1(1))	The exception rule of Article 4 is virtually identical to Article 81(3).
L	*Loi concernant les pratiques commerciales restrictives* *(17 Juin 1970, as amended)* Articles 1(1) and (2) are different from Articles 81(1) and 82 in that restrictive agreements are not expressed as prohibited or void, but rather as 'liable to sanctions' and in that there is an additional cumulative criterion: 'activités… qui sont de nature à porter atteinte à l'intérêt général'.	The exception rule is equivalent to Article 81(3) but extends to Article 1(2) on the abuse of a dominant position.
NL	*Regulations on Economic Competition (Competition Act), Statute Book 1997, 242* Section 6 on restrictive agreements and section 24 on abuse of a dominant position replicate Articles 81 and 82 except for the omission of the examples of prohibited agreements and practices.	The exception rule of Section 6 replicates Article 81(3).

	In addition there is a *de minimis* provision in section 7 covering agreements involving no more than 8 undertakings and turnover limitations of 10m NLG if the agreement only involves undertakings which have as their core activities the supply of goods and 2m NLG in all other cases.	
Ö	*Federal Cartel Act of 19 October 1988 (last revision effective from 1st Jan. 2000)* According to Section 18 Cartels "by intent" are prohibited and may only be implemented if notified and approved by the Cartel Court. Cartels without intent, ("Wirkungskartelle") or with less than 5% market share on the national market or less than 25% on a local submarket, are excluded from the prohibition. Section 34 assumes a dominant position when the company has a market share of more than 30%. Other criteria include the financial power, buyer power, access to resources and oligopolistic market structures. On application a decision to terminate an abuse will be taken. The implementation of a cartel without approval by the Cartel Court, or the abuse of an identified dominant position is subject to criminal proceedings with fines of up to 360 daily rates (section 130), the abuse of a cartel is punishable by imprisonment up to 3 years (section 129).	The Ministry of Justice can according to section 17 exempt certain kinds of cartels or economic behaviour from the application of the cartel act. The regulations in force are a blueprint of the EC block exemptions. According to Section 23 the Cartel court can authorise cartels if economically justifiable. This can not be the case in cartels containing hard core restrictions. Furthermore there are exceptions for fixed resale prices for books and newspapers, co-operatives and for situations that are under direct supervision of the Ministry of Finance concerning certain financial institutions and the Ministry of Transport concerning some transport businesses as well as state monopoly businesses.
Þ	*Decree-law no 371/93 of 29 October 1993 on protection and promotion of competition* Article 2 on restrictive agreements and Article 3 on abuse of a dominant position replicate Articles 81(1) and 82 but includes additional examples of prohibited conduct: fixing prices 'leading to prices which are artificially high or low' (Art. 2(1)(a)) fixing other trading conditions 'at the same or different stages of the economic process' (Art. 2(1)(b)) applying dissimilar conditions 'whether systematically or occasionally'. There is no requirement that this must lead to placing other trading parties at a competitive disadvantage (Art. 2(1)(e)) …/… directly or indirectly refusing to purchase or sell goods or to pay for services (Art. 2(1)(f)) There is a presumption of dominance (under Article 3(2)) if an individual undertaking's share of the national market is at least 30%; if 2-3 undertakings jointly have 50%, or if 4-5 undertakings jointly have 65% (Art. 3(3)) Article 4 on the abuse of economic dependence prohibits the abuse by one or more	The exception rule of Article 5 is virtually identical to Article 81(3).

	undertakings of a position of economic dependence in relation to a supplier or buyer as the result of the absence of an equivalent alternative, whereby the behaviour of the undertaking takes any of the forms provided in Article 2.	
SUO	*Act on Competition Restrictions (480/1992)* Sections 6 prohibits specific horizontal agreements, including price fixing and market sharing. Section 7 on abuse of a dominant position is similar to Article 82. In addition there are specific prohibitions on RPM and on bid rigging. There is also a special rule on other restrictions of competition that decreases or is likely to decrease efficiency within the economy, or prevents or hinders the conducting of business by another.	There is a general exception rule broadly similar to Article 81(3) and a special rule applying to Article 6 prohibitions where limiting production or dividing markets or sources of supply is essential for an arrangement which will boost production or distribution or promote technical or economic development and as a result of which the benefit will primarily accrue to the customers or consumers.
SVE	*Competition Act, 14 January 1993 (1993:20)* Section 6 on restrictive agreements and section 19 on abuse of a dominant position replicate Articles 81(1) and 82.	An exemption rule in Section 8 is a replica of Article 81(3). Under Sections 18a to 18c there is a special exemption from major parts of the prohibition in Section 6 for cooperatives in the field of agriculture, horticulture and forestry. Section 17 provides for the issuing of Block Exemption Regulations. In a general BER for vertical agreements the Commission BE on verticals is in principle incorporated into Swedish law although with market share thresholds of 35% and 45%.

UK	*Competition Act 1998 (1998 Ch. 41)* *Fair Trading Act 1973 (1973 Ch. 41)* *all references are to the Competition Act 1998, unless otherwise stated* Section 2 on restrictive agreements and section 18 on abuse of a dominant position replicate Articles 81(1) and 82. There are additional provisions in the Fair Trading Act scale monopolies and complex monopolies. A market share threshold of 25% is applied.	There are a number of automatic exceptions including the following: **newspapers**: transfer of a newspaper or newspaper assets **public policy**: agreements or circumstances to which the Secretary of State is satisfied that the prohibition should not apply for exceptional and compelling reasons of public policy There are also some automatic exceptions from the prohibition contained in section 2 including: **vertical agreements except RPM** **land agreements** **securities markets**: EEA-regulated securities markets (Sch 3, s.3) **agriculture** **professional rules**