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SURVEY ON MEASURES TO ADDRESS THE INTERFACE BETWEEN ANTITRUST AND FRANCHISING AGREEMENTS

prepared by the Secretariat

I. INTRODUCTION

This survey was prepared on the basis of the answers to the questionnaire on measures to address the interface between antitrust and franchising agreements (hereafter – the "Questionnaire"). The Questionnaire was prepared by the Secretariat in the framework of the Thematic Project on Intellectual Property and Competition Policy, as revised and approved at the Fourth Session of the Committee on Development and Intellectual Property, which was held in Geneva on November 16 to 20, 2009.[1]

By March 1, 2011, 29 (twenty nine)[2] Member States responded to the Questionnaire (hereafter – the "respondents"). The description and analysis of the answers received from the respondents (hereafter – the "Answers") are provided in this survey as follows.

II. DESCRIPTION AND ANALYSIS OF THE ANSWERS PROVIDED BY THE RESPONDENTS

A. National laws governing franchising agreements (ref. to Question 2)

BOX I – WHAT IS A "FRANCHISING AGREEMENT"?

DEFINITION AND CONTEXT.

A special type of vertical relationship between two firms usually referred to as the "franchisor" and "franchisee". The two firms generally establish a contractual relationship where the franchisor sells a proven product, trademark or business method and ancillary services to the individual franchisee in return for a stream of royalties and other payments. The contractual relationship may cover such matters as product prices, advertising, location, type of distribution outlets, geographic area, etc. Franchise agreements generally fall under the purview of competition laws, particularly those provisions dealing with vertical restraints (for further details see also Box III in this survey). Franchise agreements may facilitate entry of new firms and/or products and have efficiency enhancing benefits. However, franchising agreements in certain situations can restrict competition as well.

Sources:

OECD Glossary of Industrial Organisation Economics and Competition Law. Available at: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

Information by the European Franchise Federation (EFE). Available at: http://www.eff-franchise.com/spip.php?rubrique6.

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1 This survey is based on a document prepared by Dr. Kristina Janušauskaitė and reviewed by Mr. Giovanni Napolitano.

2 The respondents are: Algeria, Australia, Bulgaria, Chile, Cyprus, Czech Republic, Germany, Hungary, Ireland, Japan, Kyrgyzstan, Korea, Lebanon, Lithuania, Madagascar, Mexico, Moldova, Monaco, The Netherlands, Rwanda, Serbia, Slovakia, Sweden, Syria, Thailand, Trinidad and Tobago, Ukraine, United Kingdom and United States of America.

Under the national legislation of most respondents, franchising agreements are regulated under general contractual law. Hence, modalities of franchising agreements and (or) franchisees exempted or excluded from the law or code can be found in national contractual provisions which are part of national civil codes or other civil legislation, including the legislation on intellectual property (IP) rights. As far as voluntary codes are concerned, few respondents indicated a Code of Ethics[3] which was adopted or promoted by the national Associations on Franchising.

Table 1 contains references to the national legislation and (or) voluntary codes, as informed by respondents.

Table 1

No	Member State	National Law Governing Franchising Agreements	Voluntary Codes of Conduct/Practise Concerning Franchising
1	Algeria	Under the Government's preparation	-
2	Australia	Trade Practices (Industry Codes-Franchising) Regulations 1998, Trade Practices (Industry Codes-Oilcode Regulations 2006) (covers franchisees in the downstream petroleum sector), and the Trade Practices Act 1974	Trade Practices (Industry Codes-Franchising) Regulations 1998, Trade Practices (Industry Codes-Oilcode Regulations 2006) (covers franchisees in the downstream petroleum sector), and the Trade Practices Act 1974
3	Bulgaria	The Bulgarian Commerce Act, Law on Marks and Geographical Indication and Law on Industrial Designs (covers general statutory provisions on licensing agreements)	Code of Ethics of Bulgarian Franchise Association
4	Chile	-	-
5	Cyprus	Contractual law, IP law and European law	-
6	Czech Republic	No specific law	The Czech Franchise Association promotes the European Code of Franchising Ethics

[3] Available at: http://www.eff-franchise.com/spip.php?rubrique13.

7	Germany	No specific law	The European Code of Ethics fro Franchising adopted by the German Franchise Organisation “Deutscher Franchise Verband e.V.”
8	Hungary	Hungarian Civil Code (general contractual law)	The European Code of Ethics fro Franchising adopted by the Hungarian Franchise Association (HFA)
9	Ireland	No specific law	-
10	Japan	No specific law	-
11	Kyrgyzstan	Civil Code, Part II, Chapter 44 “Complex Entrepreneur Activity (Franchising)”	-
12	Korea	Fair Franchise Transaction Act (FFTA) and Enforcement Decree of FFTA	-
13	Lebanon	No specific law	-
14	Lithuania	Civil Code, Chapter XXXVII, Vol. 6	-
15	Madagascar	No information	-
16	Mexico	Industrial Property Law, Articles 2(VII), 136 to 142bis3, 213, 214; Regulations under the Industrial Property Law, Articles 10, 11, 12 and 65 (“franchising agreement” concept is limited to the licensing of use of the mark which transfers technical know-how)	-
17	Moldova	Civil Code (No. 117 of June 6, 2002), Chapter XXI “Franchising”; Law No. 1335-XIII on Franchising	-
18	Monaco	No specific law	-
19	The Netherlands	Civil Code (covered by general contractual law)	-
20	Rwanda	No specific law (general provisions on licensing of IP laws are applicable)	-
21	Serbia	No specific law (law of contracts and torts may be applied)	-

22	Syria	Law No8 (2007) on Trademarks and Geographical Indications, Drawings, Models and Illegal Completion; Trade and Industrial Property Protection Law No 47 (1946)	-
23	Slovakia	No specific information	-
24	Sweden	Act on the Information Duty of the Franchisor, No.484 of 01/10/2006	-
25	Thailand	Civil and Commercial Code (Book I on General Principles and Book II on Obligations) (general contractual law)	-
26	Trinidad and Tobago	General contractual law	-
27	UK	No specific law	-
28	Ukraine	Economy Code of Ukraine – Chapter 36 “Use in Entrepreneurial Activity of the Rights of Other Economic Subjects (Commercial Concession)”, Articles 366-376; Civil Code of Ukraine – Chapter 76 “Commercial Concession”(Articles 1115-1129)	-
29	United States of America	Federal and State franchise registration and disclosure laws; State franchise relationship laws; Federal and State business opportunity laws	Code of Ethics (IFA – The International Franchise Association)

B. National antitrust law (ref. to Question 3)

Respondents listed national laws dealing with anti-competitive practices in their respective jurisdictions, except Lebanon, Monaco, Slovakia, and Trinidad and Tobago. Most respondents indicated that national antitrust statutes governed franchising agreements to the extent they covered anti-competitive practices related to vertical agreements in general.

European Union Member States referred to Article 101 of the Treaty on the Functioning of the European Union (hereafter – the “EC Treaty”) which covers franchising agreements, and in particular to Part 3 of Article 101.

BOX II – *ARTICLE 101 OF THE EC TREATY*

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings 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 internal market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

   (b) limit or control production, markets, technical development, or investment;

   (c) share markets or sources of supply;

   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   (i) any agreement or category of agreements between undertakings;

   (ii) any decision or category of decisions by associations of undertakings; and

   (iii) any concerted practice or category of concerted practices;

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Source:

Consolidated Version of the Treaty on the Functioning of the European Union. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.

Franchising agreements that contain anticompetitive provisions or have anticompetitive effects may be exempted pursuant to the EU Commission “Block Exemption Regulation” at the European level (hereinafter – the “EU Block

Exemption Regulation" or the "BER") and its accompanying Commission Notice containing Guidelines on vertical restraints.

BOX III – BLOCK EXEMPTION REGULATION (BER), VERTICAL AGREEMENTS, VERTICAL RESTRAINTS & GUIDELINES ON VERTICAL RESTRAINTS (EU Competition Law)

BER*:* Regulations, issued by the Commission or by the Council pursuant to Article 101(3) of the EC Treaty specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) EC Treaty. When an agreement fulfils the conditions set out in a block exemption regulation, individual notification of that agreement is not necessary: the agreement is automatically valid and enforceable. Block exemption regulations exist, for instance, for vertical agreements, R&D agreements, specialization agreements, technology transfer agreements and car distribution agreements. There are currently two BERs: on technology transfer agreements (Reg (EC) 772/2004) and on research and development agreements (Reg (EC) 2659/2000).

Vertical Agreement*:* Agreement or concerted practice entered into between two or undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Vertical Restraint: Refers to certain types of practices by manufacturers or suppliers relating to the resale of their products. The usual practices adopted in this regard are resale price maintenance (see also Box VII in this Survey), exclusive dealing and exclusive territory or geographic market restrictions. Under exclusive dealing and/or exclusive territory, a single distributor is the only one who obtains the rights from a manufacturer to market the product. A significant debate exists in the economic literature as to whether this confers monopoly power on the distributor. Usually, the distributor's market power is limited by inter-brand competition. The manufacturer's purpose is normally to provide incentives to the distributor to promote the product and provide better service to customers.

Guidelines on Vertical Restraints: Interpretative text adopted by the Commission in order to facilitate the application of competition rules and to provide for transparency and legal certainty with regard to the Commission's administrative practice. These texts are sometimes also referred to as guidelines and are published in the Official Journal of the European Communities.

Sources:
Commission Regulation (EU) No 330/2010 of 20 April 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L 142, 23.4.2010. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF.
European Commission Guidelines on Vertical Restraints (2010/C 130/01). OJ C 130/1, May 19, 2010. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF.
Glossary of Competition Terms (© European Commission). Available at: http://www.concurrences.com/article.php3?id_article=12252&lang=en**.**

OECD Glossary of Industrial Organisation Economics and Competition Law. Available at: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

Table 2 provides for detailed references to national antitrust statutes. Table 2 also indicates whether antitrust statutes govern franchising agreements and to what extent.

Table 2

No	Member State	National Antitrust Law	Governs Franchising Agreements (Yes/No)[4]
1	Algeria	Ordinance on Competition (No 03-03 of July 19, 2003)	No (no explanation added)
2	Australia	Trade Practices Act 1974	Yes. The Act regulates behaviour relevant to relationship between franchisor and franchisee: Unfair practices, including misleading conduct (Part V of the Act); Unconscionable conduct (Part IVA of the Act); Anti-competitive practices (Part IV of the Act).
3	Bulgaria	The Bulgarian Law on Protection of Competition	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
4	Chile	Competition Law	Yes. Franchising agreements can be considered as vertical agreements.
5	Cyprus	Block exemption regulation of 1998 regarding franchising agreements (replaced by the 2000 block exemption regulation on vertical restraints (Reg. 365/2000)	Yes. The law covers general anti-competitive practices (franchising agreements are not specifically mentioned).
6	Czech Republic	Act on Protection of Competition No. 143/2001	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.

[4] The comments provided by the respondents in their Answers are likewise added.

7	Germany	Act Against Restraints of Competition	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
8	Hungary	Hungarian Competition Act	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
9	Ireland	Competition Act (2002)	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
10	Japan	Act of Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54, April 14, 1947)	Yes. Franchising agreements can be assessed if they do no contain “unfair trade practices”.
11	Kyrgyzstan	Law on “Setting Limits for Monopolistic Activity, Development and protection of Competition”	Yes. Note: anticompetitive conditions in franchising agreements can be assessed under the Civil Code.
12	Korea	Fair Franchise Transaction Act (FFTA), Arts. 12-13	-
13	Lebanon	No information	-
14	Lithuania	Law on Competition	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
15	Madagascar	Law No. 2005-020 of October 17, 2005 on Competition, Arts. 13 to 27	Yes. No specific explanation
16	Mexico	Federal Law on Economic Competition (June 22, 1993)	No
17	Moldova	Law on the Protection of Competition (No. 1103-XIV of June 30, 2000), Chapter I	Yes. Anticompetitive agreements can also cover franchising agreements (Art. 7 of the Law on the Protection of Competition)

18	Monaco	No information	-
19	The Netherlands	Competition Law	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be assessed under the EU Block Exemption Regulation.
20	Rwanda	Competition and Consumer Protection Law	No
21	Serbia	Law of Contracts and Torts	Yes. General provisions of this law can be applied.
22	Syria	The Syrian Competition and Antimonopoly Law No. 7 (2008)	Yes. General anti-trust provisions are applied.
23	Slovakia	No information	-
24	Sweden	Swedish Competition Act, No.579 of 01/11/2008, chapter 2, Articles 1 and 2	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be also assessed under the EU Block Exemption Regulation.
25	Thailand	Trade Competition Act (B.E. 2542 (1999)	Yes. Franchising agreements are considered as one category of business governed by the Trade Competition Act.
26	Trinidad and Tobago	No information	-
27	UK	Competition Act 1998	Yes. Franchising agreements as vertical agreements (containing anti-competitive provisions) can be also assessed under the EU Block Exemption Regulation. UK Competition Act applies when there is no cross-border element.
28	Ukraine	Civil Code, Article 1122(2); Economy Code, Article 372(2)	Yes. Anticompetitive effect of franchising agreements can be assessed under the mentioned Codes.
29	United States of America	Federal Antitrust Laws : Sections 1 and 2 of the Sherman Act; Sections 3 and 7 of the Clayton Act; Section 5 of the Federal Trade Commission Act	Yes. *Note:* In addition twenty one States have laws or regulations that govern the post-sale relationship between franchisee and franchisor. Such franchise relationship laws typically govern when, and under what circumstances, a franchisor may terminate an extant franchise agreement or refuse to renew a franchise. Some also address other aspects such as fair dealing; discriminatory treatment; market protection; franchise transfers; and the minimum advance notice of franchise termination.

C. Consideration if national statutory provision and (or) code of conduct/practice proscribe any conduct of the franchisor based on "market power" (ref. to Question 4)

BOX IV – MARKET POWER AND MARKET SHARE

Market Power. The ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition. The exercise of market power leads to reduced output and loss of economic welfare. Although a precise economic definition of market power can be put forward, the actual measurement of market power is not straightforward. One approach is the Lerner Index, i.e., the extent to which price exceeds marginal cost. However, since marginal cost is not easy to measure empirically, an alternative is to substitute average variable cost. Another approach is to measure the price elasticity of demand facing an individual firm since it is related to the firm's price-cost (profit) margin and its ability to increase price. However, this measure is also difficult to compute. The actual or potential exercise of market power is used to determine whether or not substantial lessening of competition exists or is likely to occur.

Market Share. Measure of the relative size of a firm in an industry or market in terms of the proportion of total output or sales or capacity it accounts for. In addition to profits, one of the frequently cited business objectives of firms is to increase market share. Market share, profits and economies of scale are often positively correlated in market economies. High levels of market share may bestow market power on firms.

Example: Market Definition and Market Share Calculation under the EU Competition Law. Under BER, the market share of both the supplier and the buyer are decisive to determine if the block exemption applies. In order for the block exemption to apply, the market share of the supplier on the market where it sells the contract products to the buyer, and the market share of the buyer on the market where it purchases the contract products, must each be 30 % *or less*. For agreements between small and medium-sized undertakings it is in general not necessary to calculate market shares (*de minimis rule*, see also Box VI in this Survey). In order to calculate an undertaking's market share, it is necessary to determine the relevant market where that undertaking sells and purchases, respectively, the contract products. Accordingly, the relevant product market and the relevant geographic market must be defined.

Source:

OECD Glossary of Industrial Organisation Economics and Competition Law. Available at: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

For more information on the market share definition and market share calculation under the EU Competition Law, see European Commission Guidelines on Vertical Restraints (2010/C 130/01). OJ C 130/1, May 19, 2010. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF.

1. Table 3 summarizes the responses to the question concerning "market power" and "market share."

Table 3

No	Member State	National Provisions and/or Code/Practice Proscribe the Franchisor's Conduct Based on "Market Power"	There Are Market Share Restrictions that Exempt/Govern Franchising Agreements	There is Definition of or Guidance for Determining if the Franchisor Has "Market Power"
1	Algeria	YES	NO	YES
2	Australia	YES (it is mentioned that bargaining positions of parties could be considered to determine a party's unconscionable conduct)	NO	NO
3	Bulgaria	YES	YES (de minimis rule)	YES
4	Chile	NO	NO	NO
5	Cyprus	YES	YES	NO
6	Czech Republic	NO	YES (de minimis rule)	NO
7	Germany	YES	YES	NO
8	Hungary	YES	YES	NO
9	Ireland	YES	YES	YES[5]
10	Japan	NO	NO	NO
11	Kyrgyzstan	YES	YES	YES[6]
12	Korea	NO	NO	NO
13	Lebanon	-	-	-

[5] The note made in Ireland's Answer: Market power is determined taking into consideration a number of factors including market shares of the undertakings involved, market shares of competitors, entry barriers, buyer power etc. With respect to market power or dominance in relation to section 5 of the Competition Act 2002 (Abuse of dominance) the Competition Authority follows the European Commission's Guidance, and in the most part considers dominance to be unlikely if the undertakings market share is below 40%.

[6] The note made in Kyrgyzstan's Answer: General definition of market power (dominant position): an exclusive position of economic entities in the market of certain goods, giving him the opportunity to have a decisive effect on competition, impede market access to other economic entities. The dominant position of the entity is recognized, if its share in the relevant product market a particular product exceeds 35 percent or the limit established annually by the state antimonopoly body of the Kyrgyz Republic (Law of the Kyrgyzstan "On setting limits for monopolistic activity, development and protection of competition").

14	Lithuania	YES	YES (de minimis rule)	YES
15	Madagascar	YES	NO	YES
16	Mexico	NO	NO	NO
17	Moldova	YES	NO	NO
18	Monaco	NO	NO	NO
19	The Netherlands	NO	YES	NO
20	Rwanda	NO	NO	NO
21	Serbia	YES	YES	YES (ref. to the definition of “dominant position”)
22	Syria	YES	YES	YES (ref. to the definition of “dominant position”)
23	Slovakia	NO	NO	NO
24	Sweden	YES	YES	YES
25	Thailand	YES	NO	NO
26	Trinidad and Tobago	NO	NO	NO
27	UK	YES	YES	YES
28	Ukraine	NO	NO	NO
29	United States of America	NO	NO	NO

1.1. EU Member States (Bulgaria, Cyprus, Germany, Hungary, Lithuania, Ireland, UK, and Sweden) noted that Article 102 of the EC Treaty prohibits abuses of dominant position having a Community effect, provided it is established that a franchisor, as an undertaking, holds a dominant position and its conduct may be considered to be an abuse within the meaning of that provision. For example, it would be generally unlawful for a franchisor that holds a dominant position to discriminate unduly between franchisees. In the UK, the prohibitions against abuse of dominance are principles-based and are applied *ex post*. While certain forms of behaviour by a dominant firm are likely to be found to be abusive, strictly speaking no forms of conduct are prescribed.

BOX V – ARTICLE 102 OF THE EC TREATY (Abuse of a Dominant Position))

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Source:

Consolidated Version of the Treaty on the Functioning of the European Union. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF.

1.2. Moldova informed that certain agreements that lead or may lead to restraining competition concluded between economic agents in the following situations are prohibited: (i) competitors who jointly hold more then 35 percent on the market of a certain kind of merchandise, (ii) non-competitors, one of which holds a dominant market position and the other is its supplier or buyer, (iii) non-competitors which are not between them either competitors or suppliers, but all or at least one of them hold a dominant position on the market of a certain kind of merchandise.

1.3. Further, most EU Member States cited the EU Block Exemption Regulation, which exempts vertical agreements (including franchising agreements) where the parties' market shares do not exceed 30% on the relevant markets. The benefit of this exemption is automatic for all agreements which satisfy the criteria set out in the block exemption. Importantly, the benefit will be lost if the agreement contains one so-called “hardcore restriction,” as defined in Article 4 of the BER. “Hardcore restrictions” include, in particular, resale price maintenance provisions and restrictions preventing retailers responding to unsolicited orders from customers outside the territory in which they operate. However, where neither party's market share exceeds 15%, EU and some of Respondents’ competition law will generally not apply at all to vertical agreements, because such agreements are considered not to be capable of a significant impact on competition. Some countries mentioned that practice as a “*de minimis*” rule. But such an agreement will be considered capable of distorting competition if it contains certain serious restrictions (similar to those listed as “hardcore restrictions” in the BER).

BOX VI – WHAT IS *DE MINIMIS RULE?*

Communication from the Commission clarifying under what conditions the impact of an agreement or practice on competition within the common market can in its view be considered to be non-appreciable, namely where the aggregate market share of the undertakings involved remains below certain thresholds. In addition, agreements between small and medium-sized enterprises are said to be rarely capable of significantly affecting trade between Member States or competition within the common market, they will in any event not normally be of sufficient Community interest to justify intervention. In short, agreements or practices falling under the "*de minimis*" notice are considered to be of minor Community importance and are not examined by the Commission under EC competition law. Certain cases may, however, be examined by national competition authorities.

Sources:
Glossary of Competition Terms (© European Commission). Available at: http://www.concurrences.com/article.php3?id_article=12252&lang=en.

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis). OJ C 368, 22.12.2001.

1.4. Regarding the determination of “market share”, some EU Members noted that the European Commission Guidelines also provides guidance on the concepts of dominance and market power.

1.5. The United States replied that there was no Federal statutory provision defining market power in franchising contexts. US Courts have defined market power as the ability to raise prices above those that would be charged in a competitive market.[7] Although enhancement of market power by sellers often elevates the prices charged to customers, enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers. Such non-price effects may include reduced product quality, reduced product variety, reduced service, or diminished innovation. These effects may coexist with price effects, or can arise in their absence.[8] In the context of Sherman Act Section 2 monopolization cases, the US courts generally look for monopoly power, defined as “the ability ‘(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.”[9]

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7 See *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 89 note 38 (1984).

8 See more in U.S. Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES §1 (issued August 19, 2010). Available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

9 See *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999).

D Consideration of specific clauses/individual restraints (ref. to Question 5)

1. References to specific restraining clauses in franchising agreements are summarized in Tables 4.1 and 4.2.

Table 4.1

No	Member State	Specific Clauses/Individual Restraints in Franchising Agreements[10]		
		Are there any clauses that, where included in a franchising agreement, are deemed to be *per se* illegal?	Does your law allow franchisors to impose re-sale prices on their franchisees (see also Box below)?	Does the law prevent the demarcation of territories in which franchisees are allowed to operate?
1	Algeria	NO	NO	-
2	Australia	YES	NO	NO
3	Bulgaria	YES	NO	YES
4	Chile	NO	-	NO
5	Cyprus	YES	NO	YES
6	Czech Republic	Note: not in a sense as per se illegality is understood under US antitrust law.	YES, except for fixed or minimum resale prices.	YES
7	Germany	YES	NO	YES
8	Hungary	NO	NO	YES
9	Ireland	YES	YES	YES (in case of passive sales) NO (in case of active sales)
10	Japan	NO	NO	NO
11	Kyrgyzstan	YES	NO	NO
12	Korea	YES	NO	YES
13	Lebanon	-	-	-
14	Lithuania	Note: Not in a sense as per se illegality is understood under US antitrust law.	YES	NO
15	Madagascar	NO	NO	NO
16	Mexico	NO	NO	NO

[10] This Table also contains comments made by some of the respondents in their Answers.

17	Moldova	YES	NO	NO
18	Monaco	YES	NO	NO
19	The Netherlands	NO	NO	NO
20	Rwanda	NO	NO	NO
21	Serbia	YES	NO	YES
22	Syria	YES	NO	YES
23	Slovakia	NO	NO	NO
24	Sweden	NO	NO	YES
25	Thailand	NO	NO	YES
26	Trinidad and Tobago	NO	YES	-
27	UK	NO	It will be determined under BER and national competition laws.	YES
28	Ukraine	YES	NO	NO
29	United States of America	YES	YES	NO

BOX VII – *RESALE PRICE MAINTENANCE (RPM)*

A supplier specifying the minimum (or maximum) price at which the product must be re-sold to customers. From a competition policy viewpoint, specifying the minimum price is of concern. It has been argued that through price maintenance, a supplier can exercise some control over the product market. This form of vertical price fixing may prevent the margin from retail and wholesale prices from being reduced by competition. However, an alternative argument is that the supplier may wish to protect the reputation or image of the product and prevent it from being used by retailers as a *loss leader* to attract customers. Also, by maintaining profit margins through RPM, the retailer may be provided with incentives to spend greater outlays on service, invest in inventories, advertise and engage in other efforts to expand product demand to the mutual benefit of both the supplier and the retailer.

RPM may also be used to prevent *free riding* by retailers on the efforts of other competing retailers who instead of offering lower prices expend time, money and effort promoting and explaining the technical complexities or attributes of the product. For example, one retailer may not reduce price but explain and demonstrate to customers the use of a complex product such as a computer. The customer may after acquiring this information choose to buy the computer from a retailer that sells it at a lower price and does not explain or demonstrate its uses. In many countries, RPM is *per se illegal* with few exceptions or exempt products. Many economists now advocate adopting a less stringent approach in competition law towards RPM and other *vertical restraints*.

Source:

OECD Glossary of Industrial Organisation Economics and Competition Law. Available at: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

1.1. EU Member States referred to the BER regarding *per se* illegal clauses in franchising agreements, territorial exclusivity, exclusive dealing, tying, etc. Some of them, such as the Czech Republic, Lithuania, and the UK stated that neither the EU nor their national laws recognize the concept of *per se* illegality as it is understood under the US antitrust law. They mentioned that clauses in a franchising agreement cannot be deemed *per se* illegal when they are in breach of the national provisions stated in the national laws. Certain provisions, even if they appear being illegal, such as retail price maintenance, exclusivity, etc., should be interpreted in view of the Competition Laws, i.e., the agreements should be scrutinized in search of a purpose to limit competition or to restrict competition. That also should be read together with exemptions under the EC Treaty and the EU Block Exemption Regulation, already mentioned.

1.2. Some examples of *per se* illegal clauses have been provided: price fixing; restriction of active sales into the exclusive territory or to an exclusive customer group; restriction of sales to end users by a buyer operating at the wholesale level of trade; restriction of sales to unauthorized distributors by the members of a selective distribution system, and restriction of the buyer's ability to sell components, supplied for the purposes of incorporation; restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade; restriction of cross-supplies between distributors within a selective distribution system; and restriction agreed between a supplier of components and a buyer who incorporates those components (Cyprus, Czech Republic, Germany, Hungary, and Ireland). Other countries, like Kyrgyzstan, Moldova, and Ukraine, provided similar samples of clauses under their national laws.

1.3. In the United States franchising agreements are typically entered into between parties who are at different levels of the supply chain. Such parties are therefore typically not direct competitors, but rather have a vertical relationship. Vertical restrictions are not per se illegal in the U.S. but, rather, analyzed under a *rule of reason*[11].

OX VIII – "RULE OF REASON"

A legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. Some market restrictions which *prima facie* give rise to competition issues may on further examination be found to have valid efficiency enhancing benefits. For example, a manufacturer may restrict supply of a product in different geographic markets only to existing retailers so that they earn higher profits and have an incentive to advertise the product and provide better service to customers. This may have the effect of expanding the demand for the manufacturer's product more than the increase in quantity demanded at a lower price. The opposite of the rule of reason approach is to declare certain business practices *per se illegal,* that is, always illegal. Price fixing agreements and resale price maintenance in many jurisdictions are per se illegal.

11 See *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

Source:

OECD Glossary of Industrial Organisation Economics and Competition Law. Available at: http://www.oecd.org/dataoecd/8/61/2376087.pdf.

U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property §3.4 (1995). Available at: http://www.justice.gov/atr/public/guidelines/0558.htm

On the other hand, franchising may raise horizontal restraint issues if competitors at the same market level enter into an agreement (e.g. joint action of franchisees). Contrary to vertical restraints, certain categories of horizontal restraints are deemed *per se* illegal because they almost invariably harm competition. For example, a restraint among competitors that fixes prices is deemed *per se* unlawful.

Agreements to allocate bids among competitors are deemed a form of price fixing and are *per se* illegal. Agreements among actual or potential competitors to divide territories or allocate customers are also deemed *per se* illegal to the extent they are considered to have the same anticompetitive effects as price-fixing agreements, such as when the restraint is not ancillary to a legitimate economic integration, *e.g.* a joint venture. However, courts have generally scrutinized market and customer allocations under a *rule of reason* analysis where the allocations are ancillary to a procompetitive integration of the parties' economic activities. Group boycotts as joint activity among certain competitors aimed at excluding other competitors from the market are also generally considered per se illegal, except if their efficiency–enhancing features counterbalance their harmful effects. On the other hand, the *per se* rule is almost always applied when the boycott arrangement in effect is a form of price-fixing. As confirmed by the U.S. Supreme Court,[12] vertical prices restraints are evaluated under a *rule of reason* analysis. Thus, as a matter of Federal law, both minimum and maximum resale price restraints are allowed, unless they unreasonably restrain trade. However, some States still ban resale price maintenance as a matter of State law.[13]

1.4. Some respondents mentioned a number of exceptions or defenses the franchisor may raise allowing the demarcation of territories, such as: efficiency gains, fair share for consumers, indispensability of the restrictions, no elimination of competition (Cyprus). The others such as Czech Republic, Germany, and Ireland, in addition, referred to the EU Block Exemption Regulation, Article 4(b).

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12 See *Leegin Creative Leather Products v. PSKS Inc.*, 551 U.S. 877 (2007).

13 See, *e.g.* the recent settlement of the *People v. Bioelements* case in California. Press release available at: http://ag.ca.gov/newsalerts/print_release.php?id=2028.

Table 4.2

No	Member State	Specific Clauses/Individual Restraints in Franchising Agreements[14]			
		Does the law/code of conduct/practice proscribe any type of exclusive dealing as having anti-competitive effects?	Does the law specify the elements of a per se unlawful tie-in arrangement or, alternatively, provide guidelines for determining as to when a franchisee may be lawfully compelled by a franchisor to buy products tied to the original product?	Does the law allow the inclusion of non-competition clauses?	Does the law allow the franchisor to prohibit a franchisee to maintain an independent website?
1	Algeria	-	-	-	NO
2	Australia	YES	YES	YES	YES
3	Bulgaria	YES	NO	YES	YES
4	Chile	-	NO	YES	NO
5	Cyprus	YES	NO	YES	NO
6	Czech Republic	YES	NO	YES	YES
7	Germany	General provisions under German and EU law may be applicable	General provisions under German and EU law may be applicable	YES	General provisions under German and EU law may be applicable
8	Hungary	YES	(tying provided as an example of restricting competition)	YES	NO
9	Ireland	YES	NO (note: anti-competitive tying is prohibited)	YES	NO
10	Japan	YES	YES	NO	NO
11	Kyrgyzstan	YES	NO	YES	(not regulated under law, but condition may be integrated in a franchising agreement)
12	Korea	YES	NO	YES	NO
13	Lebanon	-	-	-	-

[14] This Table also contains comments made by some of the respondents in their Answers.

14	Lithuania	YES	YES	YES	NO
15	Madagascar	NO	YES	YES	-
16	Mexico	NO	NO	NO	NO
17	Moldova	NO	NO	YES	NO
18	Monaco	NO	NO	-	NO
19	The Netherlands	YES	NO	YES	NO
20	Rwanda	NO	NO	-	-
21	Serbia	YES	NO	YES	YES
22	Syria	YES	YES	YES	NO
23	Slovakia	NO	NO	YES	NO
24	Sweden	YES	YES	YES	YES
25	Thailand	YES	NO	YES	-
26	Trinidad and Tobago	-	-	YES (subject to the agreement between the parties)	NO
27	UK	NO	YES	YES	YES
28	Ukraine	YES	NO	YES	NO
29	United States of America	NO	YES	YES (but may not be enforceable under competition law when state policies disfavor such provisions)	YES

1.4. Some respondents stated that exclusive dealing arrangements were exempt if the market share of the supplier and buyer are less than 30%. Any exclusive dealing arrangement between undertakings about that market share threshold would need to be assessed; whether the exclusive dealing has anti-competitive effects will depend on the circumstance of the case. Ireland specifically mentioned that its Competition Authority uses the European Commission's Guidelines on Vertical Restraints as a framework for analysis. The Guidelines also provide examples of when exclusive dealing is likely to be anti-competitive. The Guidelines state that while the guidelines are applicable to franchising it should be noted that "the more important the transfer of know-how, the more likely it is that the restraints create efficiencies and /or are indispensable to protect the know-how and that the vertical restraints fulfill the conditions of Article 101(3)"

1.5. As a general rule a tying arrangement is *per se* unlawful under US antitrust laws only if the following four elements are met: (1) the tying and tied products are separate products; (2) the seller has appreciable economic power in the tying product market; (3) the purchase of the tying product is conditioned on the additional purchase of the tied product; 4) a substantial

volume of interstate commerce in the tied product market is affected[15]. If one or more of these criteria cannot be satisfied, a plaintiff may still seek to prove that a tying arrangement is unlawful under the *rule of reason*, under which he must demonstrate an anticompetitive effect in the tied product market. In addition, even where all these criteria have been met, some lower courts have declined to find ties *per se* unlawful in the absence of some kind of showing of anticompetitive effect. The US Supreme Court noted[16] that many tying arrangements are "fully consistent with a free, competitive market" and that they may be precompetitive.

Moreover, the US Supreme Court has never recognized financial interest as an element of a tying violation. Some courts have been reluctant to find unlawful tying unless the firm selling the tying products also has a direct financial interest in the sale of the tied product. At the same time other courts in the US declined to adopt this requirement. It is well settled that a franchisor may require its franchisees to purchase from an approved supplier in which the franchisor has no financial interest.[17] As regards a sufficient financial interest of the franchisor, the US case law in this area sets the standard as the tying product's seller receiving a "direct economic benefit" from sales of the tied product.

Reflecting modern economic analysis, US courts generally are reluctant to find a specific trademark to constitute a separate "tying" product for antitrust purposes. As noted, a "tying product" must be separate from the "tied" product and the seller must possess market power in it.[18] In a 2006 decision, the US Supreme Court rejected the use of market power presumptions based on intellectual property rights in tying cases[19]. However, previous case law recognized that a franchisor's trademark may serve as a tying product for purposes of antitrust analysis, where the tying is not justified by the need to maintain quality control[20].

The United States law provides exceptions and justifications that can be validly raised by a franchisor for tying of products, such as the rationale of being essential elements of a 'unified/single package. Courts have accepted various justifications for tie-in arrangements: (1) Tie-ins can aid a firm in gaining entry into a market impervious to conventional entry methods and, in this manner, increase efficiency; (2) Tie-ins can also be used to maintain producers' reputation, by ensuring that buyers of the tying products purchase the appropriate input, product, or spare parts to make the tying product function property. Therefore, courts have acknowledged that tie-ins to maintain a product's quality may be justifiable; (3) Sales of the tied product may be used to meter the intensity of the use of the tying product, allowing the seller to legitimately extract higher revenues from

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15 See Eastman Kodak Co*. v. Image Tech. Servs.,* 504 U.S. 451, 461-62 (1992).

16 See *Illinois Tool Works v. Independent Ink,* 547 U.S. 28 (2006) at 45 and 36.

17 See *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Kentucky Fried Chicken Corp.* at 377-381.

18 See ABA Section of Antitrust Law, Antitrust Law Developments (6th ed. 2007) at 1555.

19 See *Illinois Tool Works v. Independent Ink, Inc.,* supra, 547 U.S. 28, 43-46.

20 See *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971).

those who place a higher value on use of the tying product, as evidenced by their more intensive use thereof; (4) a tie-in to protect trade secrets is justifiable.[21]

Under certain circumstances, US courts have dismissed claims of illegal tying arrangement based on other arguments, *e.g.*, that franchises necessarily involve "bundled" and related products.[22] In addition, courts tend to use a *rule of reason* approach in "technological tying" where the tying and tied products are electronic ones[23]. This type of tying has so far been rare in franchising contexts.

E. Public policy considerations and enforcement (ref. to Questions 6 and 7)

1. The Answers to these Questions are summarized in Table 5.

Table 5

No	Member State	Would the authorities allow certain anti-competitive practices in the context of franchising agreements for the sake of social considerations?		Have the national authorities ever scrutinized actual cases of the interface between anti-trust and franchising agreements?	
		YES	NO	YES	NO
1	Algeria		✓		✓
2	Australia	✓		✓ (no sample case provided)	
3	Bulgaria	✓			✓
4	Chile	-	-	✓	
5	Cyprus		✓		✓
6	Czech Republic		✓		✓
7	Germany	✓		✓	
8	Hungary		✓	✓	
9	Ireland		✓		✓
10	Japan		✓	✓	
11	Kyrgyzstan	-	-		✓

21 See *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1166 (S.D. Ind. 1985).

22 See *In Rick-Mick Enterprises v. Equilon Enterprises,* 532 F.3d 963 (9th Cir. 2008) and *Sheridan v. Marathon Petroleum Co.,* 530 F.3d 590 (7th Cir. 2008), the courts understood that the "franchise and the method of processing credit transactions are part of a single product (franchise)."

23 See *United States v. Microsoft Corp.* 253 F.3d 34 (D.C. Cir. 2001) (en banc).

12	Korea	✓		✓ (no elaboration of the case mentioned)	
13	Lebanon	-	-	-	-
14	Lithuania	-	-		✓
15	Madagascar	✓			✓
16	Mexico	✓			✓
17	Moldova	✓			✓
18	Monaco	-	-		✓
19	The Netherlands	✓		✓ (no example provided)	
20	Rwanda	✓		-	-
21	Serbia	✓		-	-
22	Syria	✓		✓ (the example is not elaborated)	
23	Slovakia		✓		✓
24	Sweden		✓	✓	
25	Thailand	✓			✓
26	Trinidad and Tobago	-	-	-	-
27	UK		✓	✓	
28	Ukraine	✓			✓
29	United States of America		✓	✓ (that arises mostly in private litigation)	

1.1. As already mentioned in this survey, EU Member States explained that certain anti-competitive practices in the context of franchising agreements can be allowed on the basis of Article 101(3) of the EC Treaty. Social considerations that can be a basis for allowing certain anti-competitive practices mentioned by some of the Respondents are encouragement of small and medium-sized enterprises, promotion of self-employment / entrepreneurship, job creation – hence, situations where some pro-competitive effects can be established. Other respondents additionally referred to technical and economic progress, fair share of benefits as relevant factors which allow some anti-competitive practices in the context of franchising agreements.

On the other hand, the UK answered that competition law did not take into account broader social objectives although, as outlined in the guidelines to the BER, it has been recognized that in the application of competition rules what might be termed ‘social considerations’ such as improving consumer choice and driving innovation and new business are enhanced. The UK Government consults with the Office of Fair Trading to ensure that legislation is consistent with competition law principles, recognising that competition law can and does facilitate competitive markets which benefit business and consumers alike.

1.2. Germany listed some samples in relation to anti-competitive practices regarding franchising agreements. The German Federal Supreme Court decided that, despite the existence of exclusive purchase obligations for a period of five years, an undertaking is not hindering its franchisees in an unfair manner, if it does not pass the complete purchasing advantages on to its franchisees. In this case, the exclusive purchase obligation was in accordance with § 20(1) ARC and Article 2 of the BER[24]. The Higher Regional Court of Düsseldorf decided that it can be objectively justified to offer better terms to franchisees than to undertakings outside the franchise system[25].

Japan summarized a recent case concerning the interface between antitrust and franchising agreements (*Cease and Desist Order against Seven-Eleven Japan Co., Ltd*.). Japan mentioned that a scheme where the amount equivalent to the costs of the disposed goods at the franchisee stores was entirely borne by the franchisees. Under the scheme, Seven-Eleven Japan Co., Ltd forced some franchisees, which practiced or intended to practice discount sales of daily goods among recommended goods to stop such Discount Sales. Given the above findings of the fact, the Japan Fair Trade Commission issued cease and desist orders on June 22, 2009 because such an act violated Article 19 of the Antimonopoly Act ("Abuse of a Dominant Bargaining Position").

The UK referred to the case *Pronuptia v. Schillgalis*, which was heard by the ECJ. In the mentioned case the ECJ stated that the transfer of intellectual property rights from the franchisor to the franchisee differentiated a franchise system from other forms of selective distribution - the franchisee pays a fee for the use of the franchisor's intellectual property. It is also legitimate for the franchisor to impose conditions which protect its intellectual property. The ECJ held that restrictions in a franchise system which were necessary to protect the intellectual property of the franchisor fall outside the prohibition against anticompetitive agreements. Other restrictions may be exempt from the prohibition (provided they satisfy the usual criteria for exemption). Resale price maintenance is not justified simply by the fact that it is within a franchise system. The European Commission has applied these principles in a number of enforcement decisions[26].

Sweden mentioned that there were very few cases regarding franchising and antitrust. In one recent case, the Swedish Competition Authority investigated a practice of resale price maintenance regarding convenience stores operated on a franchise basis. The franchisor issued price recommendations that had the character of fixed resale prices since they in effect limited the franchisees freedom to determine their own prices. The

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24 See BGH, decision of October 11, 2008 – "DIY and hobby".

25 See OLG Düsseldorf, decision of February 27, 2008 – "horse races".

26 See Yves Rocher (OJ [1987] L 8/49, [1988] 4 CMLR 592); Computerland (OJ [1987] L 222/12, [1989] 4 CMLR 259); ServiceMaster (OJ [1988] L 332/38, [1989] 4 CMLR 581); Charles Jourdan (OJ [1989] L 35/31, [1989] 4 CMLR 591).

case was later closed since the franchisor made a commitment allowing the franchisees to set their own prices.

The United States explained that franchising agreements-related issues mostly arise in private rather than government antitrust litigation. The antitrust analysis is the same in both franchising and non-franchising contexts.

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