

restraints examined in this Paper fit within either the first or second categories, RPM explicitly falls within the third. Yet, because of the notification requirement of s. 6 of the AML, international contracts incorporating all such IP rights will be vetted to ensure that their implementation poses no anti-competitive threat to the domestic market, while their domestic counterparts escape such automatic examination. This observation remains true throughout the entire range of Japanese competition law enforcement.

This part of the Paper must also be prefaced with a caveat with regard to the discussion of U.S. law. Constitutional antitrust jurisdiction in the U.S. has been exercised at both the federal and state levels of government. Considerations related to the length of this Paper, however, preclude analysis of state antitrust law; only federal law will be considered. Therefore, it must be noted that one of the fundamental characteristics of each type of practice discussed under U.S. federal law is that it must affect interstate commerce. There are different tests that may be applied in order to determine whether the particular fact situation before the court is appropriately tried under federal or state law. While consideration of this issue is also beyond the scope of this Paper, the examination of U.S. law that follows is nonetheless implicitly set within this framework.

Finally, it should be noted that in all three countries there is a range of exemptions from the application of national competition law. The specific "shape" of these exemptions can take on a rich variety of forms, from a narrowly-stated defence for a particular violation to an outright sectoral carveout. This wide variety poses certain difficulties when trying to present the information in a somewhat cohesive, if not readily digestible, form. Nonetheless, the attempt has been made to set the material out in tabular format in Annex I.

#### 4.1 Resale Price Maintenance (RPM)

In our discussion of the economics of vertical restraints, the provision of RPM frequently emerged as a candidate in private vertical arrangements. Are there enough offsetting harmful social effects of RPM? Why has RPM been treated as *per se* illegal in most countries? Three major private incentives for RPM stand out: a manufacturer cartel that sells very similar products; a cartel among retailers which carry similar products; and a single manufacturer which uses RPM to corner the market for its product on the basis of quality and service.

First, the usual explanation of the *per se* illegality of RPM is that it is assumed to facilitate horizontal price fixing and, thus, can be used as a cartel-facilitating instrument. Cartels often break down as members chisel on cartel price. RPM can be used to provide the cartel some stability by allowing price-fixing at the retail level. The test of a manufacturer cartel, facilitated by RPM, is whether the prices for all products in the relevant market are