# THE LATEST REFORM OF EU COMPETITION LAW ON VERTICAL RESTRAINTS

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ABSTRACT: *This paper looks at the changes brought to EU Competition Law, in what concerns vertical restraints on competition, by Commission Regulation (EU) 330/2010 and Commission Regulation (EU) 461/2010. It sets this reform against its historical background and discusses some of the main outstanding legal issues.*

SUMMARY: 1. Introduction. 2. Background. 3. Latest reform. 3.1. General block exemption for vertical agreements. 3.2. Block exemption for vertical agreements in the motor vehicle sector. 4. Conclusion.

## 1. INTRODUCTION

When one considers agreements or concerted practices with the object or effect of restricting competition, prohibited by Article 101 (1), of the Treaty on the Functioning of the European Union ("TFEU"[3]), one immediately tends to think of relations between competitors – generally, two or more undertakings active in the same market acting in such a way as to concertedly restrict competition on that market.

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3 Former articles 85 EEC/EC and 81 EC. Generally speaking, references to institutions and Treaty rules will be made using the Treaty of Lisbon wording. So, for instance, references will be made to article 101 TFEU (even when referring to case law under the former EEC or EC Treaty), to the General Court (even when addressing Court of First Instance decisions prior to December 1, 2009), or to the EU (even if, prior to December 1st, 2009, competition was a European Communities – EC, ESCC or EAEC - policy).

However, it has been made clear by the European Court of Justice (ECJ), since the mid 1960s, that EU[4] Competition Law applies to agreements or concerted practices between undertakings operating at different levels of the economic process, i.e. at different stages of the production or distribution chain (e.g. between a manufacturer and its retail or wholesale distributors, or between a supplier of raw material and a manufacturer of products based on that raw material).

It is important to keep in mind that a functional approach has been retained, allowing for two undertakings to be simultaneously competitors (horizontal agreements) and non-competitors (vertical agreements), depending on the market and circumstances in question. This has been made clear in EU Law's definition of "vertical agreement": "an agreement or concerted practice entered into between two or more undertakings each of which operates, *for the purposes of the agreement or the concerted practice*, 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"[5] (emphasis added).

Vertical restraints of competition have been, from the outset, a particularly sensitive area of EU Competition Law. To this day, it remains a widely disputed subject whether public control over vertical restraints of competition is necessary or justified, especially since the Chicago School gained influence[6].

It should be clear that EU competition law provisions on vertical restraints usually refer to vertical agreements (or concerted practices) between two undertakings, and so exclude from the relevant regime both vertical integration (business relations within the same undertaking, or single economic unit) and issues resulting from mergers of undertakings operating at different levels of the production or distribution chain (subject to merger control rules). These two types of issues are therefore also excluded from our analysis.

4 At the time, EEC Competition Law, of course.

5 Commission Regulation (EU) 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 102/1, 23/04/2010), article 1(1)(a).

6 The same may be said, in our view, regarding the traditional assessment of intrabrand restrictions on competition, also under a particular focus of scepticism by economists. Regarding the Sherman Act evolution and the Chicago School, see, in Portuguese and *inter alia*, Gorjão-Henriques, 1998: 73-94; Nogueira Serens, 2007: 414-434; Moura e Silva, 2008: 266-278.



Additionally, the present paper will focus exclusively on the EU Competition Law reform of vertical restraints. It should be noted, however, that the EU reform in question is also relevant whenever Portuguese Competition Law is being exclusively applied to agreements or concerted practices whose effects are felt in Portugal. This is so because, under article 5 (3) of Law 18/2003, of 11 June ("Portuguese Competition Act"), "[p]ractices prohibited by Article 4 [equivalent to article 101 (1) (2) TFEU] are considered justified when, though not affecting trade between Member States, they satisfy the remaining application requirements of a Community regulation adopted under Article 81(3) of the Treaty establishing the European Community [now, 101(3) TFUE]". In other words, EU block exemptions for vertical agreements are also applicable to agreements whose effects are felt in Portugal, but which do not affect trade between Member States and are, therefore, not subject to EU Competition Law[7].

## 2. BACKGROUND

Article 101 TFEU makes no explicit reference to vertical or horizontal agreements. It simply prohibits "all" agreements and concerted practices "which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Very early on, however, the European Court of Justice, backing the interpretation put forward by the European Commission, clarified that article 85 EEC (now article 101

7 Other Member States also try to introduce, even indirectly, the block exemption regulations. For instance, in Spain, through article 1(4) of Ley 15/2007, the legislator has declared that the national prohibition of restrictive agreements is inapplicable to agreements, etc., covered by EU block exemption regulations, even if there is no effect on trade – see, the annotations to article 1 of the New Spanish Competition Act by Begoña Barrantes (pp. 12, 37-39) and Carlos Vérgez (pp. 75-115), in Odriozola and Irissarry, 2008. In Germany, article 2 (2) of the Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition, GWB) in the version of 15 July 2005 (Bundesgesetzblatt I 2005, p. 2114), last amended by Article 8 of the Act of 17 March 2009 (BGBl. I 251, p. 550), states that "Bei der Anwendung von Absatz 1 gelten die Verordnungen des Rates oder der Kommission der Europäischen Gemeinschaft über die Anwendung von Artikel 81 Abs. 3 des Vertrages zur Gründung der Europäischen Gemeinschaft auf bestimmte Gruppen von Vereinbarungen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen (Gruppenfreistellungsverordnungen) entsprechend. *Dies gilt auch, soweit die dort genannten Vereinbarungen, Beschlüsse und Verhaltensweisen nicht geeignet sind, den Handel zwischen den Mitgliedstaaten der Europäischen Gemeinschaft zu beeinträchtigen*" (emphasis added). In Italy, article 1(1) of Legge 287/1990 stated that "Le disposizioni della presente legge in attuazione dell'articolo 41 della Costituzione a tutela e garanzia del diritto di iniziativa economica, si applicano alle intese, (...) di imprese che non ricadono nell'ambito di applicazione degli articoli (...) 85 e/o 86 del Trattato istitutivo della Comunità economica europea (CEE), dei regolamenti della CEE o di atti comunitari con efficacia normativa equiparata", thus consacrating a sort of "single barrier". This provision remains in force. In the UK, finally, the same option was made under article 10 of the Competition Act 1998.

TFEU) applies both to horizontal and vertical agreements, in the famous *obiter dictum*: "Neither the wording of article 85 [101] nor that of article 86 [102] gives any ground for holding that distinct areas of application are to be assigned to each of the two articles according to the level in the economy at which the contracting parties operate. Article 85 [101] refers in a general way to all agreements which distort competition within the common market and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the treaty does not make any distinction"[8]. And in the *Italy vs. Council and Commission* case, the ECJ clarified that "for the competition mentioned in article [101 (1) TFEU] means not only any possible competition between the parties to the agreement, but also any possible competition between one of them and third parties. This must all the more be the case since the parties to such an agreement could attempt, by preventing or limiting the competition of third parties in the product, to set up or preserve to their gain an unjustified advantage detrimental to the consumer or user, contrary to the general objectives of article [101 TFEU]. Therefore even if it does not involve an abuse of a dominant position, an agreement between businesses operating at different levels may affect trade (...) and (...) thus fall under the prohibition in article" 101 TFEU.

Contrary to what might have been expected, given the economic theory on the limited competitive impact of vertical restraints, it turned out that, in the following years, vertical agreements were the main target of the European Commission's enforcement of Competition Law. Together with the system of mandatory notification of restrictive agreements, introduced by EEC Regulation 17/62[9], this led to a flood of notifications of vertical agreements to the European Commission (more than 30.000 in little over a year)[10], many with

8 ECJ Judgment of 13 July 1966, *Consten and Grundig* (56 and 58/64), ECR (1966) 429 (p. 339 of English Special Edition of ECR) and *Italy vs. Council and Commission*, case 32/65. This was less than a month after it had taken a more ambiguous stand on the same issue – ECJ Judgment of 30 June 1966, *LTM v. MBU* (56/65), ECR (1966) 235. Regarding this evolution, see Gorjão-Henriques, 1998: 171-178, where a comparative analysis of the solutions in several OECD member States was given and this case-law was analysed.

9 EEC Council Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 13/204, 21/02/1962).

10 See Gorjão-Henriques, 1998: 123; 36228, more exactly, according to Alexander: 1965: 324.



the exact same content. Furthermore, since article 101 (1) had direct effect[11], national authorities could invoke this provision and a lack of notification or authorisation by the European Commission to declare agreements null and void.

It was to tackle the practical difficulties raised by the system of mandatory notification that Regulation 19/65/EEC was adopted[12], authorizing the European Commission to adopt block exemptions for certain types of agreements and concerted practices, thereby eliminating the need for the notification of such agreements.

A succession of block exemptions, specifically aimed at vertical agreements, were adopted by the Commission, beginning with the exclusive dealing regulation in 1967[13], replaced and extended (to exclusive purchasing and franchise agreements) by three Regulations in the 1980s[14]. This framework was completed in 1996 by a Regulation on technology transfer agreements[15]. These block exemptions, by themselves, were insufficient to lighten the administrative burden placed upon the European Commission by the mandatory notification system, and were thus complemented, with the assistance of the ECJ, by other mechanisms, such as the *de minimis* doctrine[16]; the notion of *workable competition*[17]; the European Commission's

11 Since case 13/61, *Sociedade Kledingverkoopbedrijf de Geus en Uitdenbogerd vs. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn*, of 6th April 1962.

12 Council Regulation 19/65/EEC, of 2 March 1965, on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (OJ 36/533, 06/03/1965), as amended by Council Regulation (EC) 1215/1999, of 10 June 1999, (OJ L 148/1, of 15/06/1999).

13 Regulation 67/67/EEC of the Commission, of 22 March 1967, on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ 57/849, 25/03/1967).

14 Commission Regulation (EEC) 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (OJ L 173/1, 30/06/1983); Commission Regulation (EEC) 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements (OJ L 173/5, 30/06/1983); and Commission Regulation (EEC) 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements (OJ L 359/46, 28/12/1988).

15 Commission Regulation (EC) 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31/2, 09/02/1996) (expired in 2004).

16 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 368/13, 22/12/2001).

17 At least since the ECJ decision of October 25, 1977 in *Metro I* – case 26/76 (ECR, 1977, 1875, § 20): as the ECJ stated, "the requirement contained in articles 3 [revoked by the Lisbon Treaty] and [101 TFEU] (...) that competition shall not be distorted implies the existence on the market of workable competition, that

discretionary margin in taking action, in accordance with the criterion of community interest; the issuance of guidelines (a strategy which continues to this day, as each of the two new Regulations of 2010 was accompanied by guidelines[18]), general dispensation of notification[19]; negative clearances[20]; and so-called comfort letters[21].

Following the Green Paper in 1996[22], and its follow-up in 1998[23], a major reform was introduced in 1999. Although it still considered vertical restraints within vertical agreements as *per se* restrictive, "after much soul searching, the Commission (...) produced a single block exemption"[24], through Regulation (EC) 2790/1999[25], approving a generalized *a priori* justification under article 101 (3) TFEU. This was the first step in a succession of revisions of EU Competition Law that began with the issue of vertical restraints, precisely because it had become one the most often criticized aspects of EU competition policy[26]. This reform was characterized primarily by a desire for a more effects-based approach and the recognition of the greater degree of competitive concern arising from restrictions to *interbrand* competition, as opposed

is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors" – for further developments, see Gorjão-Henriques, 1998: 46-61; for a synthesis, see Bellamy & Child, 2008: 154-156.

18 Commission Notice - Guidelines on Vertical Restraints (OJ C 130/1, 19/05/2010); and Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ C138/16, of 28/05/2010).

19 Article 4(2) EEC Regulation 17/62.

20 Article 2 EEC Regulation 17/62.

21 On the legal force of such letters, see ECJ Judgment of 11 December 1980, *NV L'Oréal* (31/80), ECR (1980) 3775, para. 12.

22 Green Paper on Vertical Restraints in EC Competition Policy (COM/96/721 final), presented in January 22, 1997.

23 Communication from the Commission on the application of the Community competition rules to vertical restraints - Follow-up to the Green Paper on vertical restraints (COM/98/0544 final, OJ C 365, 26.11.1998, p. 3).

24 Korah, 2000: 245.

25 Commission Regulation (EC) 2790/1999, of 22 December 1999, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336/21, 29/12/1999).

26 For a contemporary view of the 1999 reform, see Boscheck, 2000.



to restrictions to *intrabrand* competition[27]. In this context, the European Commission generally recognized that vertical agreements tended to be beneficial to competition (as the ECJ conceded previously in *Pronuptia*[28]), to the extent that they favoured *interbrand* competition and widened consumers' margin of choice. Historically, it was argued that the European Commission's initial focus on *intrabrand* competition was motivated more by the objective of ensuring the integrity of the internal market (the so-called construction of a model of competition as an instrument rather than a condition to the European model[29]), than by solid economic theory.

The Regulation also tackled the complexities raised by the fact that many undertakings resorted, simultaneously, to distribution systems with other undertakings (vertical agreements) and to own distribution mechanisms and direct sales (vertical integration), thereby competing with their own distributors or resellers. The block exemption introduced by Regulation (EC) 2790/1999 applied not only to vertical restraints relating to the distribution or sales of final products, but also to vertical restraints relating to intermediate products and services[30]. This Regulation – as indeed its successor – covers many different options for the distribution and sale of goods and services, including exclusive or selective distribution and agency and franchising agreements. Regulation (EC) 2790/1999 expired on 31 May 2010 and was succeeded by Regulation (EU) 330/2010[31]. The innovations brought by this new Regulation will be analyzed in the following section.

In 1985, a separate block exemption was established for motor vehicle distribution and servicing agreements, essentially in reply to specific challenges and shortcomings identified in the single market, in what concerned trade in motor vehicles[32]. This Regulation was succeeded by Regulation (EC)

27 See Commission Notice - Guidelines on Vertical Restraints (OJ C 130/1, 19/05/2010), § 119.

28 Regarding franchising agreements – Judgment of the ECJ of 26 January 1986, *Pronuptia* (161/84), ECR (1986) 353.

29 Bonassies, 1983: 56; see also Gorjão-Henriques, 1998: 126-127.

30 For a description of the vertical restraints regime under Regulation (EC) 2790/1999, see Bellamy & Child, 2008: 408-537; Pietro, 2008: 111-206.

31 Commission Regulation (EU) 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 102/1, 23/04/2010).

32 Commission Regulation (EEC) 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 15/16, 18/01/1985).

1475/1995[33] and by Regulation (EC) 1400/2002[34] that, although initially set to expire on June 1st, 2010, will see some of its provisions still in force until 31 May 2013[35], under article 2 of the new Regulation adopted in 2010, which intends to reduce the differentiated treatment of vertical agreements in the motor vehicle trade[36].

It should not be forgotten that block exemption Regulations do not establish definitive safe-harbours for undertakings. Indeed, the European Commission "may, acting on its own initiative or on a complaint, withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article [101 (3)] of the Treaty"[37]. On this point, it should be noted that Regulation (EU) 330/2010 and Regulation (EU) 461/2010 both authorize the European Commission to adopt Regulations excluding from the protection of these block exemptions – and subject to specific more stringent rules[38] – vertical agreements including specific restrictions relating to markets "where parallel networks of similar vertical restraints cover more than 50% of a relevant market"[39]. National competition authorities may also withdraw the benefit of block exemptions in individual cases, in respect to their respective national territory[40].

33 Commission Regulation (EC) 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145/25, 29/06/1995).

34 Commission Regulation (EC) 1400/2002, of 31 July 2002, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203/30).

35 See articles 2 and 3 Regulation (EU) 461/2010. According to article 2, "[p]ursuant to Article 101 (3) of the Treaty, from 1 June 2010 until 31 May 2013, Article 101 (1) of the Treaty shall not apply to vertical agreements relating to the conditions under which the parties may purchase, sell or resell new motor vehicles, which fulfil the requirements for an exemption under Regulation (EC) 1400/2002 that relate specifically to vertical agreements for the purchase, sale or resale of **new** motor vehicles".

36 Commission Regulation (EU) 461/2010, of 27 May 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 in the motor vehicle sector (OJ L 129/52, 28/05/2010).

37 Article 29(1) of Council Regulation (EC) 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 04/01/2003).

38 §§23 and 24 Regulation (EU) 330/2010, for instance.

39 Article 6 Regulation (EU) 330/2010 and Article 6 of Regulation (EU) 461/2010.

40 Article 29 (2) Regulation (EC) 1/2003 and, for Portugal, article 5 (4) of the Portuguese Competition Act.



## 3. THE 2010 REFORM

### 3.1. General block exemption for vertical agreements

Like any block exemption, the general block exemption for vertical agreements defines a category of agreements which the European Commission regards as normally satisfying the conditions laid down in article 101 (3) of the TFEU, rendering article 101 (1), when called into play, inapplicable to that category of agreements. It should be kept in mind that the benefit of a block exemption presupposes the applicability of the interdiction contained in article 101 (1) of the TFEU, and that the *onus probandi* of the violation of that provision rests with the European Commission, while it is for undertakings to demonstrate that the conditions for the benefit of article 101 (3) of the TFEU, or for the benefit of the block exemption, are met.

Specifically[41], Regulation (EU) 330/2010 (which is subsidiary in nature, applying only, in principle, when no other block exemption is applicable[42]) exempts vertical agreements for the purchase, sale or resale of goods or services, entered into by:

(i) Non-competing undertakings; or

(ii) Competing undertakings, in cases of non-reciprocal vertical agreements between a manufacturer and a distributor of goods that compete only at the distribution level, or between a provider of services and a buyer which do not compete at the level of the services in question; or

(iii) An association of undertakings and its members or suppliers, "if all its members are retailers of goods and if no individual member of the association, [in the sense of a single economic unit], has a total turnover exceeding EUR 50 million";

and only, in all these cases, if a market share of 30% is not exceeded (on both the supplier's and buyer's sides).[43]

41 The last reforming regulations were the ones substituting Regulation (EC) 2658/2000 and Regulation 2659/2000: Commission Regulation (EU) 1217/2010 of 14 December 2010 on the application of Article 101 (3) TFEU to certain categories of research and development agreements; and Commission Regulation (EU) 1218/2010 of 14 December 2010 on the application of Article 101 (3) TFEU to certain categories of specialisation agreements (both published in OC, L 335, of 18.12.2010, pp. 36-42 e 43-47). These most recent regulations, although with relevant provisions, are not assessed in this paper.

42 Article 2 (5) Regulation (EU) 330/2010.

43 Articles 1 to 3 Regulation (EU) 330/2010. In what concerns market shares and turnover, see the details (including provisions regarding transitions from below-threshold figures to over-threshold figures) provided

The exemption encompasses ancillary provisions within vertical agreements on the assignment or use of intellectual property rights (but not, therefore, agreements whose main scope is the assignment or use of such rights), as long as they do not have the same object as the hardcore restrictions excluded by this Regulation[44].

On the other hand, any vertical agreements meeting the requirements of the Regulation, but containing certain types of "hardcore restrictions", are excluded from the scope of the block exemption. This is based on the idea that certain types of competitive restrictions are serious enough and always justify interdiction or at least be subject to individual assessment on the basis of article 101(3) of the TFEU, and thus the entire agreement may also be reviewed. The prohibited hardcore restrictions may be summarized as restrictions which, "directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their *object*" (emphasis added) the:

(i) imposition on buyers[45] of a fixed or minimum sale price;
(ii) restriction of the territory into which buyers may carry out sales, except:
   a. Restrictions of active sales that do not limit sales by the customers of the buyer (reselling);
   b. Restrictions of sales to end users by wholesalers;
   c. Restrictions of sales by members of a selective distribution system to unauthorized distributors within a reserved territory; and
   d. Restrictions of sales of components, supplied for incorporation, to customers would use them to manufacture competing products;
(iii) Restriction of active or passive sales to end users by retailers in a selective distribution system;
(iv) Restriction of cross-supplies between distributors in a selective distribution system; or

for in articles 7 and 8 Regulation (EU) 330/2010. The market share threshold is used as a means of excluding the applicability of the block exemption to undertakings which may hold a significant degree of market power. It is a choice subject to criticism, based on the well-known shortcomings of attempting to extrapolate market power exclusively from market share.

44 Article 2 (3) Regulation (EU) 330/2010.

45 For the purposes of this Regulation, the concept of "buyer" "includes an undertaking which, under an agreement falling within Article 101 (1) of the Treaty, sells goods or services on behalf of another undertaking" – article 1 (1) (h) Regulation (EU) 330/2010.



(v) Restriction of sales of components, supplied for incorporation, as spare parts to end users, repairers or other service providers.[46]

It should be noted that these hardcore restrictions are generally intimately associated to the objective of promoting the fulfilment of the internal market, combating the segmentation of territories and allowing consumers to look for the best prices and conditions in any Member State. In this sense, if the *object* of the agreement may be classified under any of the above mentioned categories, it is deemed contrary to the fulfilment of the internal market and, therefore, may be unwelcomed in the EU legal order.

Other restrictions were deemed less serious than "hardcore restrictions", and therefore not justifying the exclusion of the block exemption for the entirety of the agreement containing them but, immediately, only to the restriction itself[47]. Nonetheless, the benefit of the block exemption is also excluded, in short, for direct or indirect obligations:

(i) Not to compete for longer than 5 years[48];
(ii) On buyers, not to manufacture, purchase, sell or resell goods or services after the termination of the agreement[49]; or
(iii) On members of a selective distribution system, not to sell competing brands.

Compared to the depth of innovations that had been brought by Regulation (EC) 2790/1999[50], the 2010 reform is more modest and may be seen as a renewal of an expired block exemption, with a few improvements, including minor refinements at the level of terminology and structure. Indeed, it has been stated by Commission experts that the review process initiated in 2008, including the very extensive public consultation, confirmed "that the architecture put in place in 1999 had worked well and only needed some up-dating and clarification"[51]. In particular, some changes were justified exclusively by broader developments since the adoption of the 1999

46 Article 4 Regulation (EU) 330/2010.

47 Article 5 – except, of course, if the agreement would not be concluded by the parties without that provision.

48 See the exception provided for in article 5 (2) Regulation (EU) 330/2010.

49 See the exception provided for in article 5 (3) Regulation (EU) 330/2010.

50 For an analysis of the reforms introduced by Regulation (EC) 2790/1999, see, e.g.: Subiotto & Amato, 2001; Griffiths, 2000; Nazerali & Cowan, 2000; Gniechwitz, 2004.

51 Brenning-Louko, Gurin, Peeperkorn & Viertiö, 2010: 1.

Regulation. Specifically, it was no longer necessary to foresee the possibility of withdrawal of the exemption in individual cases, by the European Commission or by the competition authorities of Member States, as this has already been provided for, generally, in the Modernisation Regulation[52].

The most notable innovation is the introduction of the double market share cap[53], i.e. a new market share threshold for excluding the applicability of the block exemption, motivated by the desire to take into greater account the competitive relevance of buyer power. Regulation (EC) 2790/1999 only excluded vertical agreements from its scope on the basis of the buyer's market share (over 30%) in the case of agreements containing exclusive supply obligations[54], arguably so as to avoid the foreclosure of the market on which the buyer purchases the contract goods or services.

Under the new Regulation, the block exemption shall no longer apply to vertical agreements when the buyer holds a market share of 30%, or more, on the "relevant market on which it purchases the contract goods or services"[55], regardless of the nature of the competitive restrictions in that contract, even though the economic justification for the extension of this exclusion to non-exclusive supply or distribution agreements is questionable (less obvious presence of a potential foreclosure effect)[56]. This change is said to reflect the "increased recognition and evidence that vertical restraints need not generally be supplier-led: also buyers can have market power that may be used to impose anticompetitive vertical restraints"[57]. It was becoming hard not to tackle practices of large retailers that were obviously restrictive

52 Article 29 Regulation (EC) 1/2003.

53 Van Bael & Bellis, 2010: 185 (highlighting this change on the basis of the draft vertical agreements block exemption and not directly on Regulation (EU) 330/2010).

54 Article 3 (2) Regulation (EC) 2790/1999.

55 Article 3 (1) Regulation (EU) 330/2010. It should be noted that this was not the original proposal in the draft Regulation submitted to public consultation. Originally, it was considered better to assess the buyer's market power on the downstream market, where the contract goods or services are sold. This proved, however, to be too complicated an analysis, as it would often require looking into a multitude of downstream markets, frequently local in scope and, therefore, was not viable in practice. It was also considered that, generally, the buyer's market power on the upstream market where it purchases the contract goods or services could be used as an indicator for its market power on the downstream markets. Still, it has been said that "[m]any stakeholders still consider that this dual market share cap place a heavy burden on companies and may result in excluding many vertical agreements from the scope of the safe harbour" (Coumes & Wilson, 2010: 440).

56 Stefano, 2010: 488.

57 Brenning-Louko, Gurin, Peeperkorn & Viertiö, 2010: 2.



of competition, made possible by their significant buyer power and their frequent condition of mandatory trading partners[58]. It has namely been pointed out that the previous block exemption covered agreements with monopolist distributors, which was considered inadequate by the European Commission[59]. According to this institution, "this change is beneficial for small and medium-sized enterprises (SME's), whether manufacturers or retailers, which could otherwise be excluded from the distribution market"[60].

The definition of "competing undertaking"[61], as well as the method for calculating market shares[62], have also been revised to take this shift into account, respectively by eliminating the reference to suppliers and by adding a reference to buyers.

Furthermore, a new provision is introduced to specifically clarify which market shares should be considered, for the purposes of applying the restriction to the scope of the block exemption, in the cases of "multi-party agreements" where the same undertaking finds itself simultaneously in the position of buyer and supplier: "For the purposes of paragraph 1, where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier in order for the exemption provided for in Article 2 to apply"[63].

The use of a market share criterion as a means of determining the scope of a block exemption creates a significant difficulty. Although *"plus commode"*[64], too often it must be recognized that defining the relevant market is an ambiguous exercise that cannot lead undertakings to definitive conclusions (even in the cases where there are resources, willingness and time to carry out the necessary economic assessments). The assessment of market shares on buyer

58 Coumes & Wilson, 2010: 439.

59 Fletcher, Fournier, Navarro, Neven, Prud'homme, Wahl & Wilson, 2010: 612.

60 European Commission, "Antitrust: Commission adopts revised competition rules for distribution of goods and services", Press Release IP/10/445, 20 April 2010.

61 Article 1 (1) (c) Regulation (EU) 330/2010.

62 Article 7 (a) Regulation (EU) 330/2010.

63 Article 3 (2) Regulation (EU) 330/2010.

64 Pietro, 2008: 179.

markets will frequently be even more complicated. Also, market shares evolve in time, and thus may require reassessments of the continued applicability of the block exemption. Thus, a large degree of uncertainty is introduced into a mechanism whose main purpose is to reduce legal uncertainty[65].

Previously, the block exemption encompassed (non-reciprocal) vertical agreements between competing undertakings, as long as the buyer had a "total annual turnover not exceeding EUR 100 million"[66]. This is no longer so under Regulation 330/2010 (apparently because "experience shows that, in certain markets, a €100 million company may be the main local or national producer and thus a major competitor"[67]), reducing the delimitation of its scope, from the buyer perspective, to the market share criterion.

Whereas before vertical agreements between competing undertakings could fall within the scope of the block exemption as long as the buyer did not compete on the relevant upstream contract goods or services market, this has now been restricted so that the block exemption applies exclusively, in scenarios of vertical agreements between competing undertakings, to cases where the buyer is only active at the distribution level (and thus does not compete with the supplier on any upstream product market). In other words, an agreement between a supplier of products X and Y and its distributor of product X is no longer covered by the block exemption if the distributor is also a supplier of product Y, even though product Y has no relation to the vertical agreement in question.

Another innovation was the clarification that the territorial restrictions considered hardcore – and thus justifying the exclusion from the scope of the exemption Regulation of any vertical agreement containing them – do not include restrictions on the place of establishment of the buyer[68]. In other words, suppliers are free to include in vertical agreements obligations for the buyer to have its establishment at a certain place, while still benefiting from the block exemption. While there may be legitimate reasons for a supplier to

65 In this sense, see Stefano, 2010: 487-488.

66 Article 2 (4) (a) Regulation (EC) 2790/1999.

67 Brenning-Louko, Gurin, Peeperkorn & Viertiö, 2010: 3.

68 Article 4 (b) Regulation (EU) 330/2010. Thus, it "can be agreed that the distributor will restrict its outlet(s) and warehouse(s) to a particular address, place or territory. This is designed to facilitate the parallel use of different types of distribution systems in the internal market by providing the possibility of protecting the investments of other than exclusive distributors" (Brenning-Louko, Gurin, Peeperkorn & Viertiö, 2010: 6).



wish to limit a buyer's freedom to move its place of business, the important thing is that clients may seek out that buyer's business, in person or remotely, regardless of their place of residence or corporate headquarters.

This ties into what has been presented, namely by the European Commission, as the greatest innovation of this reform – the clarification of the issue of online sales. Ironically, this innovation is not to be found in the Regulation (which makes no explicit reference to it), but rather in the new Guidelines on Vertical Restraints[69], which, even though they may, under certain circumstances, create legitimate expectations in undertakings as to the course of action to be followed by the European Commission, are not legally binding in nature. As was pointed out by one author, "[l]ike most safe harbours issues by enforcement authorities, the New Regulation's exemption is conservative, covering only those arrangements that are most obviously unlikely to raise competition concerns"[70]. Thus, undertakings will often find that the block exemption is not applicable and will have to carry out their own competitive assessment of vertical agreements, according to the new modernized and decentralized regime. The purpose of the Guidelines is precisely to help undertakings analyse restrictions included in vertical agreements, beyond the scope of the block exemption, and predict how the European Commission and national competition authorities will apply article 101 TFEU to such restrictions, an issue which became paramount after the abolition of the notification system by the Modernisation Regulation.

On the issue of the clarification of competitive restrictions to online sales in vertical agreements, the European Commission stated that "[t]he new rules also specifically, address the question of online sales. Once authorised, distributors must be free to sell on their websites as they do in their traditional shops and physical points of sale. For selective distribution, this means that manufacturers cannot limit the quantities sold over the Internet or charge higher prices for products to be sold online. The Guidelines further clarify the concepts of "active" and "passive" sales for exclusive distribution. Terminating transactions or re-routing consumers after they have entered their credit card details showing a foreign address will not be accepted. With the new rules

69 Commission Notice - Guidelines on Vertical Restraints (OJ C 130/1, 19/05/2010) (hereinafter "Guidelines on vertical restraints"). This document replaced the previous Commission notice - Guidelines on Vertical Restraints (OJ C 291/1, 13/10/2000) (hereinafter "2000 Guidelines on Vertical Restraints").

70 Stefano, 2010: 487.

in force, dealers will now have a clear basis and incentives to develop online activities to reach, and be reached, by customers throughout the EU and fully take advantage of the internal market"[71].

It should be noted that the previous Guidelines already mentioned online sales, although in far lesser detail[72]. The stress on the promotion of the internal market, as a policy objective specific to EU competition policy, in this new focus on the issue of online sales could not be more transparent.

The new clarifications relating to online sales[73] specify that maintaining websites, even with different language options (e.g. languages of territories other than those awarded to the distributor in question), and, as a rule, the advertising or promotion of that website or the use of newsletters or other means of maintaining customers informed upon their request, should be considered means of passive sales, and therefore should not be prohibited. Several examples are provided of vertical restraints that shall be considered "hardcore restrictions":

(i) Within exclusive distribution systems, the obligation for a distributor to prevent customers not assigned to it to view its website, to complete online transactions (e.g. based on location indicated by credit card information), or to re-route them to another website;
(ii) Limitation of (relative) proportion of online sales (but a minimum absolute amount of non-online sales may, in some cases, be required); and
(iii) Imposition of a higher price for online sales by distributors (dual pricing)[74].

Behaviours that actively target customer groups awarded to other exclusive distributors can legitimately be prohibited, such as unsolicited emails sent to such customers or banners or links placed in internet pages specifically targeted at such customers, or which appear in search engines to users that fall within such groups of customers. Essentially, the European Commission has sought to exclude any contractual terms which, directly or indirectly, make it

71 European Commission, "Antitrust: Commission adopts revised competition rules for distribution of goods and services", Press Release IP/10/445, 20 April 2010.

72 §§ 51-53 of the 2000 Guidelines on Vertical Restraints.

73 See, *maxime*, §§ 52-56 and 64 of the Guidelines on vertical restraints.

74 See further details in §52 of the Guidelines on vertical restraints.



harder for buyers to carry out online passive sales to customers, regardless of where they are located in the internal market.

Still, suppliers are free to impose quality standards for online sales, as long as they are justified and do not amount to an indirect mechanism for restricting online sales. Suppliers are also allowed to require that all distributors keep premises for non-online sales (named "brick and mortar shops"), meeting certain quality requirements. This being said, "imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shops, and which dissuade distributors from using the internet, is a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes"[75].

It should be noted that a case is pending before the ECJ which may confirm or invalidate some of the Commission's clarifications in relation to restrictions of online sales in the context of distribution agreements. In the pending *Pierre Fabre Dermo-Cosmétique* case, the ECJ has been asked if "a general and absolute ban on selling contract goods to end users via the Internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a 'hardcore' restriction of competition by object for the purposes of Article [101 (1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article [101 (3) TFEU]?"[76]

Other notable novelties in the Guidelines relate to the added attention to buyer power. Thus, new sections were added on "upfront access payments" (fees paid by suppliers to distributors at the beginning of a business relation, to ensure the products' access to the distributors' shelves, under certain conditions) and on "category management"[77] (wherein a manufacturer, generally a segment leader, provides the supplier with management services for the presentation and shelving of products within a certain segment

75 Brenning-Louko, Gurin, Peeperkorn & Viertiö, 2010: 7.

76 Case C-439/09 – Notice published in JO C 24, 30.1.2010, p. 27.

77 See sections VI-2-7 and 8 of the Guidelines on vertical restraints.

or category of products), both issues that had come to be tackled by the European Commission ever since 1999.

Resale price maintenance has been looked at in greater depth[78], with the European Commission "going to great lengths to show that it does accept that in some circumstances resale price maintenance might be procompetitive and that claims concerning the procompetitive nature of resale price maintenance in a given case will be heard and considered seriously"[79]. Therefore, according to the Guidelines, the following circumstances may mean that resale price maintenance clauses will be able to meet all the requisites of Article 101(3) of the TFEU:

(i) If they are introduced during an initial period following the introduction of a new product, in a market where distributors are subject to competitive pressure;
(ii) If used to organize a coordinated short term low price campaign (as a rule, 2 to 6 weeks); and
(iii) In cases where they make it possible for retailers to provide certain pre-sales services, in the case of complex products (to prevent free riding on pre-sales services investments by other retailers).

One aspect of the Guidelines that has been criticised[80], and will surely come to be discussed before the European Courts, is the idea that when a vertical agreement includes hardcore restrictions, such as resale price maintenance, "that agreement is presumed to restrict competition and thus to fall within Article 101 (1)", and that this also "gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101 (3)"[81]. If the Commission intended to suggest that this presumption existed generally, beyond a non-technical sense in the context of justifying the creation of a block exemption, it may find the idea will fit oddly with the Court's case-law on the *onus probandi* relating to the existence of a restriction of competition, under Article 101(1) of the Treaty, and to the fulfilment of the exemption conditions of Article 101(3) of the Treaty.

78 Guidelines on vertical restraints, § 223 *et ss.*

79 Fletcher, Fournier, Navarro, Neven, Prud'homme, Wahl & Wilson, 2010: 613, discussing the Commission's new approach to resale price maintenance is not in line with the Court's case-law, and the practical impact that this may have in the future case-law (see, e.g. pp. 652-655). In Portugal, see Calvete, 2010: 95.

80 Stefano, 2010: 488.

81 Guidelines on vertical restraints, § 223.



Finally, a reference to the period during which Regulation (EU) 330/2010 will be in force. The regulation will expire on 31 May 2022[82]. A transitional period was provided for, so that agreements in force on 31 May 2010 and exempted under Regulation (EC) 2790/1999 will continue to be exempted for one year, in order from them to be adapted, if need be, to the requirements of the new block exemption Regulation[83].

### 3.2. Block exemption for vertical agreements in the motor vehicle sector

As has already been noted above, there have been separate block exemptions put in place for the motor vehicle distribution and servicing agreements ever since 1985. For the purposes of these Regulations, a "motor vehicle" is "a self-propelled vehicle intended for use on public roads and having three or more road wheels"[84].

It is curious to note that this differentiated treatment of the motor vehicle markets in EU Law is not restricted to Competition Law. Internal market provisions have also dealt with motor vehicles in a distinct manner[85], *inter alia* with the consequence that European consumers are, as yet, not entirely free to choose the Member State in which they want to purchase their motor vehicles, since they will always be subject to the payment of taxes in their home State.

This does not mean, however, that the European Commission is more permissive with the motor vehicle sector when enforcing competition policy. Indeed, many would argue that the opposite is true. As was pointed out by Whish: "Over the years the Commission has had cause to examine a number of anti-competitive practices in the market for motor cars, in particular the partitioning of national markets to prevent sales of vehicles from low- to high-priced Member States, and has adopted numerous decisions finding

82 Article 10 Regulation (EU) 330/2010.

83 Article 9 Regulation (EU) 330/2010.

84 Article 1 (1) (g) Regulation (EU) 461/2010.

85 See, e.g.: Council Directive 2009/55/EC, of 25 May 2009, on tax exemptions applicable to the permanent introduction from a Member State of the personal property of individuals (OJ L 145/35, 10/06/2009); Council Directive (EEC) 83/182, of 28 March 1983, on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (JO L 105/59; 23/04/1983), last amended by Council Directive 2006/98/EC, of 20 November 2006; and Commission interpretative communication on procedures for the registration of motor vehicles originating in another Member State (JO C 68/15, 24/03/2007).

infringements both of Article [101 (1)] and, on a few occasions, of Article [102]"[86].

At least when it comes to block exemption Regulations, the Commission's approach has clearly been stricter, since, by contrast to the general regime, additional requirements are imposed in order for agreements in this sector to benefit from block exemption.

Until the entry into force of Regulation (EU) 461/2010, vertical agreements relating to the purchase, sale or resale of new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles were subject to a specific and single block exemption regime, set out in Regulation (EC) 1400/2002. From 1 June 2010 onwards, the block exemption regime in the motor vehicles sector shall be split as follows:

(i) Purchase, sale or resale of new motor vehicles:
   a. Until 31 May 2013: continues to be subject to the special regime foreseen in Regulation (EC) 1400/2002[87];
   b. After 1 June 2013: subject to the general regime of Regulation (EU) 330/2010 (partial end to the special regime for motor vehicles)[88].

(ii) Motor vehicles aftermarket (purchase, sale or resale of spare parts for motor vehicles, or provision of repair and maintenance services for motor vehicles): subject to the special regime foreseen in Regulation (EU) 461/2010 (valid until 31 May 2023[89]).

86 Whish, 2009: 663-664.

87 Article 2 Regulation (EU) 461/2010. It is not the purpose of the present paper to present the regime previously in force, under Regulation (EC) 1400/2002, and which will continue to be in force until 31 May 2013 for vertical agreements relating to the purchase, sale or resale of new motor vehicles. Descriptions and criticisms of this regime are available, e.g., in: Whish, 2009: 663-666; Marsden & Whelan, 2008; and Clark, 2002.

88 Article 3 Regulation (EU) 461/2010. The decision to bring the special regime to an end was, *inter alia*, based on the finding of falling prices, decreasing concentration levels and increased competition by Asian brands on the new motor vehicles markets in the EU (Zuehlke & Stefano, 2010: 94). In the words of the European Commission, "it appears that there are no significant competition shortcomings distinguishing the new motor vehicle distribution sector from other economic sectors and which could require the application of rules different from and stricter than those in the General Vertical Block Exemption Regulation" – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (OJ C138/16, of 28/05/2010) (hereinafter "Motor vehicles supplementary guidelines"), §12.

89 Article 8 Regulation (EU) 461/2010. Differently from the new vehicles market, the Commission concluded that competition "on the markets for repair and maintenance and for spare parts distribution is less intense, and there is a risk that consumers may be harmed by anti-competitive practices that push up repair costs" (European Commission, "Antitrust: Commission adopts revised competition rules for the motor vehicle sector: frequently asked questions", MEMO/10/217, 27 May 2010), thus justifying maintaining a stricter regime.



The new special block exemption regime for the motor vehicles aftermarket has been created as a supplement to the general block exemption[90]. This was due to the European Commission's conclusion that "the rules in Regulation (EU) No 330/2010 (...) are necessary but are not sufficient to ensure that the benefit of the block exemption is reserved only to those vertical agreements (...) for which it can be assumed with sufficient certainty that the conditions of Article 101 (3) of the Treaty are satisfied"[91]. In other words, the Commission considered that these agreements should meet stricter requirements in order to benefit from the block exemption.

This "add-on" approach has allowed Regulation (EU) 461/2010 to be far simpler and briefer than its predecessor. Thus, in order to be encompassed by the block exemption, vertical agreements in the motor vehicles aftermarket (as defined above) must: (a) "fulfil the requirements for an exemption under Regulation (EU) No 330/2010"; and (b) "not contain any of the hardcore clauses" listed in Regulation (EU) 461/2010[92], i.e. agreements which, "directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object":

(i) The restriction of sales of spare parts, by members of a selective distribution system, to independent retailers who repair motor vehicles (if independent repairers cannot access the brand's spare parts, they cannot offer the same quality services as authorised repairers);

(ii) The restriction of sales of spare parts, repair tools or diagnostic or other equipment, by a supplier of such items, to authorised or independent distributors or repairers or to end users (such clauses would limit the availability of these items in the aftermarkets from sources other than the motor vehicle manufacturers); or

(iii) The prohibition of the inclusion of a trade mark or logo on components used by manufacturers in the initial assembly of motor vehicles (this would decrease transparency, making it harder for the demand in

90 For a perspective of the European Commission on the characteristics and impact of this reform, see: Communication from the Commission - The Future Competition Law Framework applicable to the motor vehicle sector (COM/2009/0388 final).

91 Recital 14 Regulation (EU) 461/2010.

92 Article 4 Regulation (EU) 461/2010.

aftermarkets to go to the original source in order to purchase those components)[93].

The new Regulation has been accompanied by the adoption of revised Guidelines[94], which are aimed, *inter alia*, at assisting in the interpretation of the general block exemption regime for vertical agreements when applied to the new motor vehicles markets.

While some authors highlight that this reform, and in particular the submission, starting in 2013, of vertical agreements in the new motor vehicles markets to the general block exemption regime, is a positive move that should "entail a more efficient enforcement system for competition authorities and lower compliance costs for companies"[95], others criticise the European Commission for having been overly cautious in this reform, arguing that the partial extension of the lifetime of Regulation (EC) 1400/2002 is uncalled for and concluding that: "Until 2013, cynics will be justified in arguing that the 2010 «reform» of the exemption system for vertical agreements could be appropriately labeled «much ado about nothing»"[96].

At the very least, it can be said that it has become increasingly difficult for the European Commission to justify the preservation of a special regime for the exemption of vertical agreements in the motor vehicle sector, when all other sectors of the economy are subject to a single unified regime. It seems unlikely, in particular, that there are no other aftermarkets, except those relating to motor vehicles, as defined in this Regulation (and thus excluding, e.g., motorcycles), which justify the same type of supplementary requirements in order to benefit from a block exemption.

## 4. CONCLUSION

The latest reform of the EU block exemption Regulations for vertical agreements is best described as a renewal with some fine-tuning. Nonetheless, it raises issues which require reflection.

Companies operating in Portugal should keep in mind that these block exemption Regulations apply to their activities even when they are exclusively subject to Portuguese Competition Law.

93 Article 5 and Recitals 16-18 Regulation (EU) 461/2010.

94 Motor vehicles supplementary guidelines.

95 Zuehlke & Stefano, 2010: 97.

96 Colino, 2010: 224.



The main aspect of the reform of the general block exemption, concerning online sales, has not been included in the Regulation itself, but merely in the Guidelines, which means that those interpretations are yet to be tested and confirmed by the European Court of Justice, and indeed a judgment is pending which may soon shed some light on this issue.

Initially, block exemptions were created as a method of reducing the administrative burden on the European Commission created by the mandatory notification system under Regulation 17/62. With Regulation (EC) 1/2003 abolishing notifications and requiring undertakings to carry out their own assessment of the lawfulness of their agreements, inclusively under Article 101(3) of the TFEU, that role of block exemptions disappeared. This has led some authors to call for their abolition, arguing that they are: "relics from the past (...). Moreover, [they] run counter to the main goals of the modernisation process, as they generate obstacles for an effective enforcement of EU competition law and shade and blur the consistent enforcement of Article 101 TFEU as a whole. Therefore, overall, there seems to be no (proper) role for [block exemption Regulations] in the realm of Regulation 1/2003"[97].

Respectfully, we disagree with this approach. In a system where undertakings are called to make the extremely complex economic assessments required to apply Article 101 of the TFEU, which, more often than not, lead to debatable conclusions, block exemption Regulations serve to provide businesses with much craved legal certainty, the absence of which would unnecessarily hinder the development of commercial relations in the EU.

This, however, must be complemented with an analysis of the current block exemptions in light of their revised objective, post Regulation (EC) 1/2003. Firstly, block exemption Regulations really only apply to agreements that the European Commission can be sure, in principle, will restrict competition in a justified manner. In other words, they reflect a cautious approach that leaves outside a large number of agreements not prohibited by Article 101 TFEU or where there are significant doubts on whether the conditions of Article 101 (3) are met.

Additionally, several factors reduce the contribution of the block exemptions to legal certainty. The market share thresholds will often make market definition crucial for the conclusion on the applicability of the exemption,

97 Marcos & Graells, 2010: 200.

and market definitions are controversial and require significant expense in order to be economically justified in accordance with the case-law and guidelines. Buyer market shares – which must now always be assessed – will frequently be difficult to determine. Occasionally, it will not be clear whether contractual clauses will fall within the scope of the hardcore restrictions set out in the Regulations, and clarifications provided in the Guidelines do not necessarily coincide with the interpretation to be adopted by the European Court of Justice.

Furthermore, the European Commission (and, in the first case, also the National Competition Authorities) retain the right to withdraw the benefit of the block exemption in individual cases and to adopt Regulations restricting the scope of the block exemptions.

This means that, at the end of the day, block exemption Regulations, and in particular the two new Regulations on vertical agreements, do not perhaps fulfil their goals as effectively as possible. Indeed, they leave undertakings with a very significant margin for risk management. From the perspective of competition policy, they have the beneficial effect of incentivising companies to exclude from contracts, of their own initiative, some clauses which might – even if not necessarily – be considered restrictive of competition. Unfortunately, this creates a weighty limitation on trade. In the words of one author, it "is far from certain" that the new block exemption on vertical agreements provides companies with "a useful degree of legal certainty without chilling potentially pro-competitive behaviour"[98].

It is also far from clear why the motor vehicles sector has continued to be discriminated against, through the imposition of stricter requirements for the benefit of the block exemption.

The reality seems to be that, at the end of the day, undertakings will not so often find in the block exemption Regulations for vertical agreements the safe harbour that they expect and crave, and this may occasionally function as a stifle to trade. In any case, the application of the block exemption will still require expert legal advice and comprehensive self-assessment, which reduces the level of legal certainty inherent to block exemptions.

98 Stefano, 2010: 490.



## REFERENCES


Alexander, W.

1965 «L'application de l'article 85, paragraphe 3, CEE para voie de décisions individuelles et de règlements: une appréciation des mécanismes de exemption», *Revue Trimestrielle du Droit Européen*, pp. 323-335.

Bellamy, C., & Child, G.

2008 *European Community Law of Competition*, 6th ed., Oxford.

Bonassies, P.

1983 «Les fondements du droit communautaire de la concurrence: la théorie de la concurrence-moyen», in *Études dédiées à Alex Weill*, Paris: Dalloz, pp. 51-67.

Boscheck, R.

2000 "The EU Reform on vertical restraints – an economic perspective", *World Competition*, vol. 23, issue 4, pp. 3-49.

Brenning-Louko, M., Gurin, A., Peeperkorn, L., & Viertiö, K.

2010 "Vertical agreements: new competition rules for the next decade", *Competition Policy Newsletter*, vol. 2010-2, available at http://ec.europa.eu/competition/publications/cpn/2010_2_4.pdf.

Calvete, V.

2010 "Da ilicitude como uma das belas artes", in *Ars Ivdicandi – Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, Vol. IV, *Boletim da Faculdade de Direito da Universidade de Coimbra Stvdia Ivridica*, 101, *Ad Honorem – 5*, pp. 67-121.

Clark, J.

2002 "New rules for motor vehicle distribution and servicing", *Competition Policy Newsletter*, vol. 2002-3, available at http://ec.europa.eu/competition/publications/cpn/2002_3_3.pdf.

Colino, S. M.

2010 "Recent changes in the regulation of motor vehicle distribution in Europe – questioning the logic of sector-specific rules for the car industry", *The Competition Law Review*, vol. 6, issue 2, pp. 203-224.

Coumes, J.-M., & Wilson, K.

2010 "New rules on supply and distribution agreements: main changes of the new system", *European Competition Law Review*, vol. 31, pp. 439-441.

FLETCHER, A., FOURNIER, E. G., NAVARRO, E., NEVEN, D., PRUD'HOMME, T., WAHL, N. & WILSON, C.
2010 "Vertical restraints, RPM and Article 81 analysis", in Hawk, B. (ed.), *Annual proceedings of the Fordham Corporate law Institute – international Antitrust Law & Policy*, Juris Publishing, pp. 609-665.

GNIECHWITZ, C.
2004 "Commission Regulation (EC) No 2790/1999 - The European Commission's Block Exemption for Vertical Agreements", *Macquarie Business Law Journal*, available at http://www.austlii.edu.au/au/journals/MqBLJ/2004/4.html.

GORJÃO-HENRIQUES, M.
1998 *Da restrição da concorrência na Comunidade Europeia: a franquia de distribuição*, Coimbra: Almedina.
2010 *Direito da União – História, Direito, Cidadania, Mercado Interno e Concorrência*, 6th ed., Coimbra: Almedina.

GRIFFITHS, M.
2000 "A Glorification of *de minimis* – The Regulation on Vertical Agreements", *European Competition Law Review*, vol. 21, pp. 241-247.

KORAH, V.
2000 *An introductory guide to EC competition law and practice*, 7th ed., Hart Publishing.

LUGARD, P.
2001 *Vertical restraints under EC Competition Law*, Hart Publishing.

MARCOS, F., & SÁNCHEZ GRAELLS, A.
2010 "A missing step in the modernisation stairway of EU Competition Law – any role for block exemption regulations in the realm of Regulation 1/2003", *The Competition Law Review*, vol. 6, issue 2, pp. 183-201.

MARSDEN, P., & WHELAN, P.
2008 "Intervention and the internal market: contemporary European competition initiatives concerning distribution in the market for new cars", *European Competition Journal*, vol. 4, issue 2, pp. 485-540.

MOURA E SILVA, M.
2008 *Direito da Concorrência – uma introdução jurisprudencial*, Coimbra: Almedina.

NOGUEIRA SERENS, M. C.
2007 *A Monopolização da Concorrência e a (Re-)Emergência da Tutela da Marca*, Coimbra: Almedina.



NAZERALI, J., & COWAN, D.
2000 "Unlocking E.U. Distribution Rules – Has the European Commission Found the Right Keys?", *European Competition Law Review*, vol. 21, pp. 50-56.

ODRIOZOLA, M. (dir.), & IRISSARRY, B. (coord.)
2008 *Derecho Español de la Competencia – Comentarios la la Ley 15/2007, Real Decreto 261/2008 y Ley 1/2002*, Tomo I, Madrid: Bosch.

PIETRO, C.
2008 «Chapitre 2 – La nouvelle politique de la Commission européenne en matière de restrictions verticales», in *Le nouveau droit communautaire de la concurrence*, (François Brunet/Guy Canivet, Dir.), Paris: LGDJ, pp. 111-206.

STEFANO, G.
2010 "The new EU «Vertical Restraints Regulation»: navigating the vast sea beyond safe-harbours and hardcore restrictions", *European Competition Law Review*, vol. 31, pp. 439-441.

SUBIOTTO, R., & AMATO, F.
2001 "The Reform of the European Competition Policy Concerning Vertical Restraints" *Antitrust Law Journal*, vol. 69, pp. 147-193.

VAN BAEL, I., & BELLIS, J.-F.
2010 *Competition Law of the European Community*, Wolter Kluwer.

WHISH, R.
2009 *Competition Law*, 6th ed., Oxford, New York: Oxford University Press.

ZUEHLKE S. & STEFANO, G.
2010 "EC motor vehicle block exemption reform: are you ready for the new regime?", *European Competition Law Review*, vol. 31, pp. 93-97.

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