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Part I

INTRODUCTION

1

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A. Scope, Methodology, and Plan

1.01 This book analyses the European Union ('EU') competition rules applicable to vertical agreements which are within and outside the scope of Commission Regulation (EU) 330/2010 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 ('Regulation 330/2010')[1] and Commission Regulation (EU) No 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 ('Regulation 461/2010').[2]

1.02 The term 'vertical agreements' covers a wide range of supply and distribution agreements (exclusive and selective distribution, franchising, agency, etc). In a brochure specifically on vertical agreements, the European Commission ('Commission'), having emphasized the importance of that type of agreement given that almost all goods reach the final customer via a distribution channel, describes vertical agreements as:

> [a]greements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain. Distribution

[1] [2010] OJ L102/1.
[2] [2010] OJ L129/52.

agreements between manufacturers and wholesalers or retailers are typical examples of vertical agreements. However, an industrial supply agreement between a manufacturer of a component and a producer of a product using that component is also a vertical agreement.[3]

1.03 Business practice, in other words, is filled with vertical agreements, and sooner or later any practicing lawyer is likely to be asked to advise on the admissibility of certain restrictions of competition which are frequently included in such agreements. Regulation 330/2010, which is the umbrella block exemption regulation for vertical agreements, is likely to be the starting point for that analysis. Regulation 330/2010 applies if and when no other, more specific, block exemption regime applies. For motor vehicle distribution, such a specific block exemption exists in Regulation 461/2010.

1.04 Technology transfer agreements, which concern the licensing of technology, are also vertical agreements for which a specific block exemption regime has been created, namely Commission Regulation (EC) 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements ('Regulation 772/2004').[4] Technology transfer agreements and the block exemption regime of Regulation 772/2004 are dealt with only in passing in this book, as the focus is on distribution (rather than production) agreements. Technology transfer agreements are the subject of a number of separate specific studies.[5]

1.05 This book is divided into four parts. Part I addresses a number of general issues which are relevant to the EU competition law treatment of vertical restraints in general. Part II contains a detailed analysis of the scope and conditions for the application of the prohibition laid down in Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') and the exemption from that prohibition pursuant to Regulation 330/2010. Part III discusses the EU competition law analysis of vertical agreements which are not covered by, or do not comply with the conditions of, Regulation 330/2010. Finally, Part IV focuses on Regulation 461/2010.

1.06 The issues that are addressed in this Part I (**Chapter 1**) are (i) the implementation and the (public and private) enforcement of Article 101 TFEU before and after the entry into force of Council Regulation (EC) 1/2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003');[6] (ii) the historical background of Regulation 330/2010 and Regulation 461/2010; and (iii) the nature and legal and practical consequences of soft EU competition law (in the form of notices, guidelines, etc) as opposed to hard EU competition law (provisions of primary and secondary EU law).

1.07 Part II (**Chapters 2 to 8**) discusses the application of Regulation 330/2010 to vertical agreements. The various chapters of Part II cover the following topics:

- **Chapter 2** deals with the question of what agreements fall within the scope of the prohibition laid down in Article 101(1) TFEU. Agreements outside the scope of that prohibition do not require an exemption pursuant to Article 101(3) TFEU. They are as such compatible with EU competition law.

[3] European Commission, *Competition Policy in Europe. The competition rules for supply and distribution agreements* (OOPEC, 2002) 7.
[4] [2004] OJ L123/11.
[5] eg S Anderman and J Kallaugher, *Technology Transfer and the New EU Competition Rules* (OUP, 2006).
[6] [2003] OJ L1/1.

- **Chapter 3** deals with the question of what agreements fall within the scope of application of Regulation 330/2010.
- **Chapters 4 and 5** follow the structure of Regulation 330/2010 to discuss the hardcore restrictions (Chapter 4) and the excluded restrictions (conditions with which non-compete obligations must comply to be covered by the safe harbour of Regulation 330/2010) (Chapter 5).
- **Chapter 6** summarizes the discussion of Chapters 2 to 5. It takes a number of frequently used distribution formulas as a starting point and then checks the admissibility of certain vertical restraints used in the context of those formulas under Regulation 330/2010. The frequently used distribution formulas are:
  - exclusive and non-exclusive distribution;
  - selective distribution;
  - franchising;
  - agency; and
  - online distribution (which is a form of distribution linked to a distribution formula, rather than a distribution formula in itself).

For each one, the following vertical restraints are checked:

- territorial protection of the buyer against the supplier and against other buyers;
- territorial restrictions imposed on the buyer;
- customer allocation and the protection of the buyer against the supplier and against other buyers;
- customer restrictions imposed on the buyer;
- non-compete obligations and quantity forcing;
- exclusive supply; and
- exclusive purchasing.

The approach adopted in Chapter 6 results, so to speak, in a 'Regulation 330/2010 checklist' for each of the frequently used distribution formulas, including online distribution.

- **Chapter 7** addresses vertical agreements which are concluded for other purposes than the distribution of the contract products. It concerns supply and subcontracting agreements by means of which products are supplied to a buyer as input for the manufacturing of its own products. The emphasis is on subcontracting which, over the course of the years, has come to lie at the crossroads of various legal instruments. Both horizontal and vertical subcontracting is addressed.
- Finally, **Chapter 8** discusses the circumstances in which the safe harbour of Regulation 330/2010 can be disapplied or withdrawn.

1.08 Part III (**Chapter 9**) discusses the EU competition law assessment of vertical agreements which are not covered by, or do not comply with the conditions of, Regulation 330/2010. There is no presumption of illegality of a vertical agreement which is outside the scope of Regulation 330/2010. Whether or not an agreement which falls outside that scope is in fact illegal is influenced by the reason for it not being covered, that is, whether it exceeds the market share limits of Regulation 330/2010 or instead contains one or several severe infringements of the competition rules. Such an assessment outside Regulation 330/2010, a so-called 'self-assessment', is fact-driven and requires a case-by-case approach. To that end, Chapter 9 is an attempt at systemizing the guidance offered by the Commission

Notice—Guidelines on Vertical Restraints ('Vertical Guidelines')[7] for purposes of conducting such a self-assessment.

1.09 Finally, Part IV (**Chapter 10**) analyses the specific regime applicable to motor vehicle distribution.

B. Article 101 TFEU

(1) General

1.10 One of the EU's exclusive competences is to establish the competition rules necessary for the functioning of the internal market (Article 3(1)(b) TFEU). In light of that, the TFEU contains a chapter (Chapter I of Title VII) on competition, which in its turn contains a section on 'rules applying to undertakings' (Articles 101–106 TFEU). This section, in particular Articles 101 and 102, serves as the general legal background of any EU competition law handbook. This book deals first and foremost with restrictive practices between companies which may be within the scope of Article 101(1) TFEU and covered by the vertical block exemption regulations. It contains only passing references to Article 102 TFEU, regarding the abuse of dominant position. It does so where that is relevant for the discussion on restrictive practices in vertical relations.

1.11 Article 101 TFEU consists of three paragraphs:

- Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction, or distortion of competition;
- Article 101(2) TFEU contains one particular consequence of the infringement of that prohibition, which is automatic nullity; and
- Article 101(3) TFEU lists the cumulative conditions which must be fulfilled for the prohibition of Article 101(1) TFEU to be declared inapplicable.

1.12 Article 101 TFEU provides:

> 1. The following shall be prohibited as incompatible with the common 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 common 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;
>   (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.

[7] [2010] OJ C130/1.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings,
   - any decision or category of decisions by associations of undertakings,
   - 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.

1.13 Article 101(3) TFEU thus contains four cumulative conditions for the prohibition of Article 101(1) TFEU to be inapplicable. Those conditions, of which two are positive and two are negative, are the following:

- The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress.
- Consumers must receive a fair share of the resulting benefits.
- The agreement must not impose restrictions which are not indispensable to the attainment of those objectives.
- The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

The four conditions are discussed at length in the Commission Notice—Guidelines on the application of Article 81(3) of the Treaty ('Article 81(3) Guidelines').[8]

(2) Relation between Articles 101 and 102 TFEU[9]

1.14 Article 102 TFEU concerns the abuse of a dominant position. As opposed to Article 101 TFEU, Article 102 TFEU applies to a company's (or several companies') unilateral conduct, on condition that that company or those companies hold a dominant position (single or collective dominance). Article 102 TFEU does not prohibit the creation of dominance; it only prohibits the abuse thereof.

1.15 Articles 101 and 102 TFEU operate independently from one another. Case law shows that the application of Article 101 TFEU cannot prevent the application of Article 102 TFEU and vice versa, so that Articles 101 and 102 TFEU can be applied simultaneously to the same agreement or conduct.[10] According to new language in the Vertical Guidelines (that is, language that cannot be found in the 2000 version of the Commission Notice—Guidelines on vertical restraints ('2000 Vertical Guidelines')[11]) the possible simultaneous application of Articles 101 and 102 TFEU to an agreement is particularly relevant in the context of

[8] [2004] OJ C101/97, para 38 *et seq*.

[9] eg J Faull and A Nikpay, *The EC Law of Competition* (2nd edn, OUP, 2007) paras 4.411–4.425; DG Goyder, *EC Competition Law* (OUP, 2003) Chapter 16; P Roth and V Rose (eds), *Bellamy and Child. European Community Law of Competition* (6th edn, OUP, 2008) paras 10.006–10.008.

[10] See in particular the case law on the abuse of collective dominance: eg Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission (Italian Flat Glass)* [1992] ECR II-1403; Case C-393/92 *Almelo* [1994] ECR I-1477; Joined Cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA & Dafra Lines A/S v Commission* [2000] ECR I-1365.

[11] [2000] OJ C291/1.

the fourth condition of Article 101(3) TFEU. That condition states that an agreement may not afford the parties the possibility of eliminating competition in respect of a substantial number of the products concerned. Because Articles 101 and 102 TFEU both pursue the aim of maintaining effective competition in the market, the consistency of their application requires that an agreement cannot be exempted on the basis of Article 101(3) TFEU if that agreement constitutes an abuse of a dominant position.[12]

C. Implementation of Article 101 TFEU

1.16 Article 103 TFEU empowers the Council to implement Articles 101 and 102 TFEU. Presently, the implementation of Articles 101 and 102 TFEU is governed by Regulation 1/2003, which has applied since 1 May 2004, and embraces a directly applicable exception system. Article 1(2) of Regulation 1/2003 provides:

> Agreements, decisions and concerted practices caught by Article [101(1)] of the Treaty which satisfy the conditions of Article [101(3)] of the Treaty shall not be prohibited, no prior decision to that effect being required.

1.17 Regulation 1/2003 forms part of the so-called 'modernization package', which also consists of a regulation laying down rules concerning the initiation of proceedings by the Commission, as well as the handling of complaints and the hearing of the parties concerned,[13] and of six general notices. Two of those notices address substantive EU competition law.[14] They are directly relevant to our topic, namely:

- Commission Notice—Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ('Guidelines on the effect on trade concept'),[15] discussed in Chapter 2; and
- the Article 81(3) Guidelines,[16] which are relevant for the EU competition law assessment of vertical agreements outside Regulation 330/2010 (see Chapter 9).

1.18 The main features of the implementation of Article 101 TFEU by Regulation 1/2003 are the abolition of the notification requirement (paragraph 1.20) and the abandonment of the exemption monopoly (referred to as the 'decentralised application of EU competition law') (paragraphs 1.21–1.24). We also recall the importance of the effect on trade concept (paragraphs 1.25–1.28), as well as the rules which Regulation 1/2003 contains about the relationship between EU and national competition law (paragraphs 1.29–1.39), and the uniform application of EU competition law by the Commission and the national authorities (paragraph 1.40). Finally, it is useful to recall the continued relevance of block exemption regulations in a directly applicable exception system (paragraph 1.41–1.42).

[12] Vertical Guidelines, para 127.

[13] Commission Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18.

[14] The other four notices of the modernization package are notices which deal mainly with various procedural aspects of EU competition law enforcement within the framework of Reg 1/2003: (i) Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43; (ii) Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54; (iii) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/65; and (iv) Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [2004] OJ C101/78.

[15] [2004] OJ C101/81.

[16] See n 8 above.

In accordance with Article 44 of Regulation 1/2003, the Commission evaluated the functioning of Regulation 1/2003 five years from the date of its application. Following a public consultation of the stakeholders, the Commission published a Report on the functioning of Regulation 1/2003,[17] accompanied by its Staff Working Paper,[18] in April 2009. Where relevant, references to the Report on the functioning of Regulation 1/2003 are included hereafter. **1.19**

(1) No notification

The directly applicable exception system of Regulation 1/2003 frees parties from the requirement to notify their agreements to the Commission so as to benefit from the exemption of Article 101(3) TFEU. The abolition of the notification requirement has, as a minimum, two immediate consequences. First, with the freedom of no longer having to notify agreements to the Commission comes the responsibility for companies to self-assess their agreements. That is particularly the case for those agreements or clauses in agreements which raise competition concerns, such as territorial or customer restrictions and non-compete obligations. Second, in the absence of notification, it is only at a time when companies are confronted with questions from a competition authority or when a contracting party questions the enforceability of certain contractual provisions in court that they will learn whether or not they have correctly performed their self-assessment.[19] Companies can (and very often will) opt for legal certainty and, where possible, draft their agreements so that they qualify for the safe harbour created by a block exemption regulation. Block exemption regulations therefore remain a very useful instrument of EU competition law policy under the regime of Regulation 1/2003. **1.20**

(2) Decentralized application of EU competition law

The modernization of EU competition law enforcement not only increased the responsibility of companies, but also that of the national competition authorities ('NCAs') and national courts. **1.21**

Decentralized application by NCAs

Together with the Commission, the NCAs form the European Competition Network ('ECN'). The principles of the close cooperation between the Commission and the NCAs in the context of the ECN are laid down in Articles 11 to 14 of Regulation 1/2003, and they are further developed in the Commission Notice on cooperation within the Network of Competition Authorities. The close cooperation between the Commission and the NCAs essentially concerns the allocation of cases,[20] and the exchange of information,[21] including the exchange and use of confidential information in the ECN.[22] Materially speaking, it also **1.22**

[17] European Commission, *Communication from the Commission to the European Parliament and the Council—Report on the functioning of Regulation 1/2003*, 29 April 2009, available at the DG COMP website. ('Report on the functioning of Regulation 1/2003').

[18] European Commission, *Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council—Report on the functioning of Regulation 1/2003*, 29 April 2009, available at the DG COMP website ('2009 Commission Staff Working Paper on Regulation 1/2003').

[19] If the company wants to rely on Art 101(3) TFEU, it carries the burden of proof. In that respect, Reg 1/2003, Art 2 provides that '[t]he undertaking or association of undertakings claiming the benefit of Article [101(3) TFEU] shall bear the burden of proving that the conditions of that paragraph are fulfilled.'

[20] Commission Notice on cooperation within the Network of Competition Authorities, paras 5–15.

[21] Reg 1/2003, Art 11 and Commission Notice on cooperation within the Network of Competition Authorities, paras 16–19.

[22] Reg 1/2003, Art 12 and Commission Notice on cooperation within the Network of Competition Authorities, paras 26–28.

concerns the rules applying to the parallel application of EU and national competition law, as well as to the successive application of EU competition law by the NCAs and the Commission or vice versa.

1.23 In the 2009 Commission Staff Working Paper on Regulation 1/2003 (paragraph 184), the Commission gives an overall positive evaluation of the decentralized application by the NCA:

> Since the entry into force of Regulation 1/2003, the enforcement of EC competition rules has vastly increased. The results of enforcement actions within the ECN are impressive. More than 1000 cases have been pursued over the last five years on the basis of the Community competition rules. Within this time period the Commission has been informed of more than 300 envisaged decisions submitted by the national competition authorities pursuant to Article 11(4) of Regulation 1/2003. These figures compared to the situation before the entry into force of Regulation 1/2003 clearly demonstrate a significant increase of enforcement activities in the EU since 2004.

Decentralized application by national courts[23]

1.24 National courts may be called upon to apply Articles 101 and 102 TFEU in litigation between private parties (contractual litigation, action for damages).[24] The cooperation between the national courts and the Commission in the context of such lawsuits is foreseen in Article 15 of Regulation 1/2003 and further developed in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC.[25] The cooperation between the Commission and the national courts is reciprocal: on the one hand, the Commission serves as *amicus curiae*; and, on the other hand, the national courts facilitate the Commission's role to enforce EU competition law:

- In relation to the Commission being an *amicus curiae*, Article 15(1) of Regulation 1/2003 provides that the national courts may ask the Commission to transmit information in its possession or its opinion on questions about the application of EU competition law.[26] On its own initiative, the Commission may submit written observations to a national court in cases where the coherent application of Articles 101 or 102 TFEU so requires. The Commission may also make oral observations if the national court so permits (Article 15(3)).[27] Since the entry into force of Regulation 1/2003, the *amicus curiae* instrument has scarcely been used by the Commission.[28]
- In relation to the national court's facilitation of the Commission's role in enforcing EU competition law, Regulation 1/2003 provides for the transmission of judgments applying Articles 101 or 102 TFEU to the Commission (Article 15(2)), as well as the transmission of documents necessary for the assessment of a case in which the Commission would like to submit its observations (Article 15(3)).[29] Articles 20(6) and 20(8) of Regulation 1/2003 furthermore highlight the role of national courts in the context of an investigation by the

[23] A comprehensive overview of the impact of Reg 1/2003 on the judiciary can be found in K Lenaerts and D Gerard, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline' (2004) 3 World Competition 313.

[24] On the private enforcement of Arts 101 and 102 TFEU, see paras 1.66–77 below.

[25] [2004] OJ C101/54.

[26] In the Notice on the cooperation between the Commission and the courts, the Commission stated that it 'will endeavour to provide the national court with the requested opinion within four months from the date it receives the request' (para 28). The duty to transmit information and the request for an opinion are further dealt with in the Notice, respectively, paras 21–6 and 27–30.

[27] Notice on the cooperation between the Commission and the courts, paras 31–5.

[28] For examples of *amicus curiae* cases, see the 2009 Commission Staff Working Paper on Regulation 1/2003, paras 284–9.

[29] Notice on the cooperation between the Commission and the courts, para 36.

Commission.[30] Materially speaking, the cooperation between the Commission and the national courts also concerns the rules relating to the parallel application of EU and national competition law, as well as to the application of EU competition law by the national courts and the Commission and vice versa.

(3) Importance of the effect on trade concept

1.25 The effect on trade concept is a jurisdictional criterion. The first question that an NCA or national court must address when applying national competition law is whether or not the agreement or conduct may appreciably affect trade between the Member States. If not, EU competition law does not enter into play, and the NCA or national court may decide the case exclusively on the basis of national competition law. Conversely, if there is an appreciable effect on trade between the Member States, Article 3(1) of Regulation 1/2003 requires the NCA or national court also to apply Articles 101 and 102 TFEU:

> Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.[31]

1.26 The obligation to apply EU competition law is aimed at ensuring that the EU rules are applied to all cases within their scope. There is no obligation to apply national competition law in parallel: in cases within the scope of EU competition law, Member States have a choice to prescribe whether or not national competition law will also apply.[32] Inversely, Member States may voluntarily provide for the application of EU competition law rules even in the absence of an appreciable effect on inter-State trade (for instance, they may choose to apply EU block exemption regulations to cases without appreciable effect on inter-State trade).[33]

1.27 Logically, there has been a revival of the effect on trade concept. Traditionally, the concept had little practical relevance, given that it was interpreted very broadly and therefore was considered as being easily fulfilled. Nowadays, under the regime of Regulation 1/2003, the analysis has become more than a mere formality. According to the Commission:

> [t]he obligation to apply the [EU] competition rules to cases capable of affecting trade has been broadly followed, making a single legal standard a reality on a very large scale. Given the central importance of the rule in Article 3(1) for ensuring a level playing field, the question merits the continued close attention of all enforcers.[34]

[30] Notice on the cooperation between the Commission and the courts, paras 38–41.

[31] Originally, the Commission wanted EU competition law to apply to the exclusion of national competition law in the case of an appreciable effect on inter-State trade. In its proposal of what would later become Reg 1/2003 (COM(2000)582 final [2000] OJ C3653/284), Art 3 read: 'Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article [101 TFEU] or the abuse of a dominant position within the meaning of Article [102 TFEU] may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws'.

[32] eg Italy and Luxembourg exclusively apply EU competition law to cases falling within the scope of the latter (2009 Commission Staff Working Paper on Regulation 1/2003, paras 152–3). Most Member States, however, rely on a double (an EU and a national) legal basis in cases of concurrence. The most obvious advantage of parallel application is that, if the existence of an effect on inter-State trade is successfully challenged, the NCA still has a national legal basis for competition law enforcement.

[33] That is the case for instance in Belgium, pursuant to Article 5(2) of the Belgian Competition Act.

[34] 2009 Commission Staff Working Paper on Regulation 1/2003, para 151.

1.28 In this book, the effect on trade concept is discussed in more detail as one of the steps which must be considered when determining the application of the prohibition laid down in Article 101(1) TFEU (see Chapter 2, paragraphs 2.16–2.64 below).

(4) Relationship between EU and national competition law

Convergence rule

1.29 When a national authority investigates a restrictive practice within the meaning of Article 101(1) TFEU which may affect trade between the Member States, and must apply EU and national competition law in parallel, then Regulation 1/2003 imposes restrictions on the way in which the national authority can apply national competition law.[35]

1.30 Those restrictions are stated in the convergence rule of Article 3(2) of Regulation 1/2003, which reads:

> The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1)] of the Treaty, or which fulfil the conditions of Article [101(3)] of the Treaty or which are covered by a Regulation for the application of Article [101(3)] of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

According to the Commission, the convergence rule essentially aims at creating a level playing field by 'providing for a single standard of assessment which allows undertakings to design EU-wide business strategies without having to check them against all the relevant national sets of competition rules'.[36] It is considered to be one of the major successes of Regulation 1/2003.[37]

1.31 In line with the wording of Article 3(2) of Regulation 1/2003, a distinction must be made between, on the one hand, restrictive practices within the meaning of Article 101(1) TFEU (agreements, decisions by associations of undertakings, or concerted practices), and, on the other, unilateral behaviour.

Convergence and Article 101 TFEU

1.32 With regard to the parallel application of Article 101 TFEU and national competition law, there is total convergence: an NCA or national court may not prohibit, on the basis of national competition law, a restrictive practice which is not prohibited by Article 101 TFEU. The reason why the restrictive practice is not prohibited is irrelevant: it may be because there is no (appreciable) restriction of competition in the sense of Article 101(1) TFEU (for instance, because the practice qualifies for de minimis treatment)[38] or because the restrictive

[35] Reg 1/2003, Art 3(3) clarifies that the restrictions do not apply when the national authorities apply national merger control laws, nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Arts 101 and 102 TFEU. As regards the latter, Reg 1/2003, recital 9 refers to acts of unfair trade practice. According to Reg 1/2003, recital 8, in fine, Reg 1/2003 also 'does not apply to national laws which impose criminal sanctions on national persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced'. On that recital, WPJ Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) paras 153–57. For some insights on the interpretation of the principle of '*ne bis in idem*' in the context of parallel application, see the 2009 Commission Staff Working Paper on Regulation 1/2003, paras 154–55.

[36] 2009 Commission Staff Working Paper on Regulation 1/2003, para 141.

[37] 2009 Commission Staff Working Paper on Regulation 1/2003, para 142.

[38] For a survey of the reasons why a restrictive practice may not be covered by Art 101(1) TFEU, see Ch 2, paras 2.04–15 below.

practice fulfils the conditions of Article 101(3) TFEU on the basis of an individual exemption or a block exemption regulation (for instance, Regulation 330/2010 or Regulation 461/2010). In all those cases, the national authority may not prohibit the practice on the basis of national competition law.

1.33 The opposite is also true. National authorities may not authorize a restrictive practice under national competition law if it is prohibited under Article 101 TFEU. That is not mentioned in Article 3(2) of Regulation 1/2003, but it is a straightforward application of the general principle of the primacy of EU law.[39]

Convergence and unilateral conduct (including Article 102 TFEU)

1.34 **Concept 'unilateral conduct'** Pursuant to Article 3(2), in fine, of Regulation 1/2003, Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

1.35 Obviously the concept of 'unilateral conduct' is linked to behaviour which is caught by Article 102 TFEU. However, it transpires from the 2009 Commission Staff Working Paper on Regulation 1/2003 (paragraphs 160 to 179) that the concept has to be linked more generally to behaviour outside the scope of Article 101 TFEU and relating to national rules about economic dependence or to the prohibition of the resale below cost or at loss. In other words, its scope has to be linked to that of Article 101 rather than to that of Article 102 TFEU. That approach is in line with the system of convergence under Regulation 1/2003: Article 101 TFEU does not apply to genuinely unilateral conduct of undertakings. Therefore the rule of total convergence in case of the parallel application of Article 101 TFEU and national competition law is not endangered if a national authority applies stricter national laws to such genuinely unilateral conduct.

1.36 If a dominant undertaking imposes a non-compete obligation in a supply or distribution agreement within the scope of Article 101 TFEU, a national authority no longer has the power to prohibit that non-compete obligation on the basis of its powers to apply stricter national laws to unilateral conduct. The agreement concerned is an agreement within the scope of Article 101 TFEU and so there must be total convergence in the relationship between the national competition law and Article 101 TFEU. That the non-compete obligation is applied by a dominant player and is not prohibited under Article 102 TFEU is irrelevant in that context. Indeed, it is not because a practice is not prohibited under Article 102 TFEU that it must be considered as unilateral conduct in the sense of Article 3(2) of Regulation 1/2003, which continues to be subject to the application of stricter national laws.

1.37 In respect of the application of stricter national laws to unilateral conduct, it is also important to note that Article 3(2) of Regulation 1/2003 does not distinguish between dominant or non-dominant undertakings. The possibility for a national authority to apply stricter national laws therefore applies to unilateral conduct by dominant as well as by non-dominant undertakings.

1.38 **Dominant undertakings** In respect of dominant undertakings, recital 8 of Regulation 1/2003 says that stricter national laws 'may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings'. Therefore,

[39] 2009 Commission Staff Working Paper on Regulation 1/2003, para 156, in fine: 'The rule in Article 3(2) is to be seen in the context of the principle of primacy of [EU] law. It flows from that principle that national competition law cannot authorize an agreement or practice, which is prohibited by Articles [101] and/or [102 TFEU].'

as regards unilateral conduct, national competition law may be more strict than Article 102 TFEU. If unilateral behaviour amounts to an abuse in the sense of Article 102 TFEU, a national authority must respect the general principle of primacy of EU law and cannot allow the conduct purely on the basis of national law. Conversely, if the conduct is not abusive in the sense of Article 102 TFEU, the national authority may apply stricter national laws.

1.39 **Non-dominant undertakings** Aside from dominant undertakings, non-dominant undertakings may also pursue unilateral conduct. By definition, that conduct (for instance, their refusal to sell) is outside the scope of Article 102 TFEU. Given that such unilateral conduct is equally outside the scope of Article 101 TFEU, Article 3(2) of Regulation 1/2003 allows a national authority to apply stricter national law.

(5) Uniform application of EU competition law

1.40 Specifically in order to assure the uniform application of EU competition law, Regulation 1/2003 contains the following provisions:

- *Article 11(4), as read in conjunction with Article 11(6)*. Pursuant to Article 11(4) of Regulation 330/2010, an NCA must communicate certain draft decisions to the Commission no later than 30 days before their adoption. The draft decisions are decisions that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation. If necessary, the Commission has the power, pursuant to Article 11(6) of Regulation 1/2003, to relieve the NCA of its competence to apply Articles 101 and 102 TFEU by initiating proceedings itself. In the Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities,[40] the Commission lists as one of the situations in which it will use its power according to Article 11(6) a situation in which 'network members envisage a decision which is obviously in conflict with consolidated case-law'.[41] Articles 11(4) and 11(6) of Regulation 1/2003 are addressed in the 2009 Commission Staff Working Paper on Regulation 1/2003, paragraphs 252 to 264, from which it transpires that the NCAs have generally taken the Commission's observations to heart and that there has therefore been no need to apply the mechanism of Article 11(6) with a view to correct the approach taken by an NCA in an envisaged decision.
- *Article 15(2)*. Member States shall forward to the Commission a copy of any written judgment of the national courts on the application of Articles 101 or 102 TFEU without delay after the full written judgment has been notified to the parties. That will enable the Commission 'to become aware in a timely fashion of cases for which it might be appropriate to submit observations where one of the parties lodges an appeal against the judgement'.[42]
- *Article 16.* This provision, which is self-explanatory, guarantees the uniform application of EU competition law in the case of the successive application of EU competition law, first by the Commission and afterwards by the national authorities:

  1. When national courts rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the

[40] Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities, Council document 15435/02 ADD 1, 10 December 2002, available at <http://register.consilium.europa.eu/pdf/en/02/st15/st15435-ad01.en02.pdf>.

[41] Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities, Council document 15435/02 ADD 1, 10 December 2002, para 21.

[42] Notice on the cooperation between the Commission and the courts, para 37.

Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article [267] of the Treaty.[43]

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.[44]

- Regulation 1/2003 does not contain language regarding the application of EU competition law by the Commission after an NCA has already ruled on a restrictive practice under Article 101 TFEU or the unilateral practice under Article 102 TFEU. In that respect, reference can be made to the Commission Notice on cooperation within the Network of Competition Authorities (paragraph 57). It reads that the Commission will normally not—to the extent that Community interest is not at stake—adopt a decision which is in conflict with a decision of an NCA after proper information pursuant to both Article 11(3) and (4) of Regulation 1/2003 has taken place and the Commission has not made use of Article 11(6) of Regulation 1/2003. So if an NCA notified a draft decision bringing an infringement to an end in a given Member State, the Commission, which may be investigating the same practice or abuse in other Member States, will normally decide in line with the NCA's decision.

(6) Relevance of block exemption regulations

1.41 Regulation 1/2003 changed the rationale of block exemption regulations, but not their legal nature or consequences. Block exemption regulations were, and still are, directly applicable general legislative acts which create a rebuttable presumption that certain categories of agreements fulfil the conditions of Article 101(3) TFEU.[45] Because Regulation 1/2003 abolished the notification requirement, their rationale nevertheless has changed. They no longer serve to reduce the number of notifications to the Commission but instead have become the most important tools for companies and their advisors to perform an assessment under Article 101(3) TFEU.

1.42 This had already been emphasized by the Commission in its White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty ('1999 White Paper on Modernisation'),[46] where it stated:

> In a directly applicable exception system, the legislative framework is of primary importance. The application of the rules must be sufficiently reliable and consistent to allow business to assess whether their restrictive practices are lawful. The Commission would keep the sole right to propose legislative texts . . . to ensure consistency and uniformity in the application of the competition rules. Block exemptions are the first of these legislative texts.[47]

[43] Art 267 TFEU is the preliminary rulings procedure whereby national courts can (and in some circumstances must) seek guidance on the validity and interpretation of EU law from the Court of Justice of the European Union ('Court').

[44] Art 16(2) must be read in light of Art 11(6) by means of which the Commission can relieve an NCA of its competence to apply Arts 101 and 102 TFEU.

[45] 2009 Commission Staff Working Paper on Regulation 1/2003, para 25: 'Regulation 1/2003 did not change the instrument of block exemption regulations which confers legality under Article [101(3) TFEU] on agreements that fulfil the requirements set out in the relevant Commission regulation . . . To the extent that an agreement fulfils the requirements of a block exemption regulation, no individual assessment under Article [101(3) TFEU] is warranted.'

[46] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (Commission Programme no 99/027)*, approved on 28 April 1999, available at <http://ec.europa.eu/off/white/index_en.htm>.

[47] 1999 White Paper on Modernisation, paras 84–5.

That principle has been incorporated into the convergence rule of Article 3(2) of Regulation 1/2003: if an agreement within the scope of Article 101(1) TFEU is covered by, and complies with the conditions of, a block exemption regulation, it benefits from Article 101(3) TFEU and can also no longer be challenged on the basis of national competition law.[48]

D. Regulations 330/2010 and 461/2010

(1) Introduction

1.43 This section briefly outlines the background of the two block exemption regulations which are discussed in detail in this book, namely Regulations 330/2010 and 461/2010. The latter regulation is the successor of Commission Regulation 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector ('Regulation 1400/2002'),[49] which replaced Commission Regulation (EC) No 1475/95 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements ('Regulation 1475/95'),[50] which, in its turn, replaced the first motor vehicle block exemption regulation, Commission Regulation (EEC) 123/85 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements ('Regulation 123/85').[51] For its part, Regulation 330/2010 replaces Commission Regulation (EC) 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ('Regulation 2790/99'),[52] which in its turn had replaced three existing block exemption regulations applicable, respectively, to exclusive distribution, exclusive purchasing, and franchising agreements.[53]

(2) Background to Regulation 330/2010

Regulation 2790/99

1.44 As indicated above, Regulation 330/2010 replaced Regulation 2790/1999. The coming into being of Regulation 2790/99 must be seen against the background of the Green Paper on

[48] In that respect, block exemption regulations are a mechanism to save on enforcement costs. As WPJ Wils puts it: 'for any category of agreements (i) which are very frequently concluded in business practice, (ii) for which a full individual assessment would in the overwhelming majority of cases lead to the conclusion that the conditions of Article [101(3)] are fulfilled, and (iii) which can be sufficiently clearly defined, the cost saving, including the reduction of risk, at the level of self-assessment by the undertakings when concluding these agreements as well as at the level of ex post litigation is likely to outweigh the cost of adopting the block exemption regulation', WPJ Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) para 72.

[49] [2002] OJ L203/30.

[50] [1995] OJ L145/25.

[51] [1985] OJ L15/16.

[52] [1999] OJ L336/21.

[53] Commission Regulation (EEC) 1983/83 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements [1983] OJ L173/1; Commission Regulation (EEC) 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements [1983] OJ L173/5; and Commission Regulation (EEC) 4087/88 on the application of Article 85(3) of the Treaty to categories of franchise agreements [1988] OJ L359/46 ('Regulation 4087/88').

Vertical Restraints in EC Competition Policy.[54] In that Green Paper, the Commission identified a number of shortcomings in its then existing policy on vertical restraints:

- The existing block exemption regulations were comprised of rather strict form-based requirements (every restriction of competition that was not expressly allowed was prohibited) and hence were considered to be too legalistic and to operate as a straightjacket.
- The existing block exemption regulations did not contain any market share limit. Accordingly, they were form-based instead of effects-based, and companies which had significant market power could benefit from them. The sanction of withdrawal of the benefit of block exemption was not considered as a real deterrent because it only worked with effect in the future.
- The existing block exemption regulations only covered vertical agreements on the resale of final goods and not of intermediate goods or, aside from Regulation 4087/88 (franchising), services. Therefore, a significant percentage of all vertical agreements were outside of the existing block exemption regulations, even when the parties involved did not have any market power.[55]

1.45 Regulation 2790/99 addressed those shortcomings and innovated in several respects:

- It was an umbrella block exemption regulation. As opposed to its predecessors, it applied to a wide array of vertical agreements at every stage of the production and distribution chain, and also to both agreements on goods and on services.
- It introduced a market share limit for suppliers and, in the case of exclusive supply obligations, for the buyers.
- It moved away from the traditional straightjacket approach and adopted a blacklist approach: except for expressly stated exceptions, everything was allowed which was not expressly prohibited. A blacklist approach reverses the traditional straightjacket logic that everything is prohibited if it is not expressly allowed. Nevertheless, given that the straightjacket approach remains applicable to territorial and customer restrictions, the change in approach was substantially less spectacular than it appeared at face value.
- It was accompanied by explanatory guidelines on the Commission's policy on vertical restraints in and outside the scope of Regulation 2790/99.

1.46 In addition, the adoption of Regulation 2790/99 required extensive revision of two Council regulations:

(i) the enabling regulation for the Commission to adopt block exemption regulations, ie Regulation (EEC) 19/65 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices;[56] and

[54] European Commission, *Green Paper on Vertical Restraints in EC Competition Policy*, 22 January 1997, available at <http://europa.eu/documents/comm/green_papers/pdf/com96_721_en.pdf>.

[55] Those shortcomings are listed in European Commission, *Communication from the Commission on the application of the Community competition rules to vertical restraints (Follow-up on the Green Paper on Vertical Restraints*) [1998] OJ C365/3.

[56] [1965] OJ Spec Ed 36/533: Reg 19/65 had to be revised because (i) it excluded the adoption of a block exemption regulation covering vertical agreements between more than two undertakings, and also selective distribution agreements, agreements concerning services, and agreements concerning the supply or purchase, or both, of goods or services intended for processing or incorporation; and because (ii) it required block exemption regulations to list the clauses which must be contained in the vertical agreements. The revision took place by means of Council Regulation (EC) 1215/1999 of 10 June 1999 amending Regulation 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices [1999] OJ L148/1.

(ii) Regulation (EEC) 17/62 First Regulation implementing Articles 85 and 86 of the Treaty ('Regulation 17/62'),[57] which in the meantime has been repealed by Regulation 1/2003 (Article 43).

Regulation 330/2010

1.47 Regulation 2790/99 expired on 31 May 2010.[58] In anticipation thereof, the Commission launched a public consultation on 28 July 2008 with the release of a draft new block exemption regulation and draft new vertical guidelines. During the public consultation, the Commission received more than 150 submissions. Subsequently, Regulation 330/2010 was adopted on 20 April 2010. It entered into force on 1 June 2010 and is set to expire on 31 May 2022.[59] The Vertical Guidelines were published on 19 May 2010.

1.48 Because of the generally positive assessment of the functioning of Regulation 2790/99, whose approach had meantime been copied in other block exemption regulations adopted by the Commission, Regulation 330/2010 is an upgrade of Regulation 2790/99 rather than an entirely new set of rules.

1.49 From an overall view, the regime of Regulation 330/2010 contains two major developments compared to the regime of Regulation 2790/99. Those developments correspond to two major market trends since the entry into force of Regulation 2790/99: that is, the increase of the market power of large distributors, and the exponential increase of sales over the internet:[60]

- Regulation 330/2010 contains a double market share threshold: the market share held by the supplier and the buyer must not exceed 30 per cent for an agreement between them to benefit from the block exemption under Regulation 330/2010. The double market share threshold is discussed in more detail in Chapter 3.
- The guidelines accompanying Regulation 330/2010 contain more guidance on the Commission's competition law assessment of internet sales. Online distribution is discussed in more detail in Chapter 7.

As always, the devil is in the detail. Throughout Regulation 330/2010 and the Vertical Guidelines, there are a number of changes and clarifications that have a demonstrable impact on the block exemption treatment of vertical agreements. A good example is the fact that location clauses now benefit from the block exemption, irrespective of the chosen distribution formula (Article 4(b) Regulation 330/2010). In addition to having submitted written observations in the framework of the public consultation in the run-up to Regulation 330/2010, we had the opportunity to discuss our experience with Regulation 2790/99 with the Directorate General of Competition ('DG COMP') team responsible for drafting its successor. Many of the views expressed in this book on particular points of the competition law regime applicable to vertical agreements are a result of those exchanges of views.

[57] [1962] OJ 13/204.
[58] Reg 2790/1999, Art 13.
[59] Reg 330/2010, Art 10.
[60] Noted in the article by the DG COMP officials responsible for the revision of Regulation 2790/99, M Brenning-Louko, A Gurin, L Peeperkorn and K Viertiö, 'Vertical Agreements: New Competition Rules for the Next Decade' (2010) 2 Competition Policy Newsletter 2.

(3) Background to Regulation 461/2010

1.50 From the outset, the motor vehicle sector has been governed by a specific competition law regime.[61] The foundations of that regime were laid in the Commission's 1974 *BMW* decision.[62] That decision was designed as a landmark case,[63] and 'it was hoped that manufacturers would adapt their distribution systems accordingly'.[64] The most significant feature of the *BMW* decision was that it endorsed a combination of exclusive and selective distribution. For decades it has been this combination that has distinguished motor vehicle distribution from the distribution of other products.[65]

1.51 *BMW* did not produce the desired effect of bringing motor vehicle distribution agreements into line, as many manufacturers continued to submit notifications with the aim of obtaining an individual exemption for the types of agreement that were specifically used by them.[66] It was against that background that the Commission decided to adopt a sector-specific block exemption. Regulation 123/85 remained in force from 1 July 1985 until 30 June 1995 and essentially codified the principal holdings found in the *BMW* decision.

1.52 Regulation 123/85 was succeeded by Regulation 1475/95,[67] which remained in force until 30 September 2002. Regulation 1475/95 did not differ substantially from its predecessor, and the concept of combined exclusive and selective distribution was kept intact. The main changes included the requirement that dealers had to be allowed to handle multiple brands (albeit that strict conditions could be imposed by the supplier),[68] and also that there should be mandatory access to certain technical information by independent repairers so as to increase their ability to compete in the after-sales market with the authorized network.[69] In order to facilitate the use of Regulation 1475/95, the Commission issued a so-called Explanatory Brochure.[70]

1.53 The preparation of the following block exemption, Regulation 1400/2002, was, in contrast, an elaborate exercise. The first step was the publication of the Evaluation Report in November 2000, which was provided for in Article 11(3) of Regulation 1475/95. The overall tone of the Evaluation Report was fairly pessimistic and clearly set the scene for a major reform. The suggestion that a radical change was called for was strengthened by a series of cases brought

[61] For an interesting comparison between the position in the US and the EU, D Gerard, '"Regulated Competition" in the Automobile Distribution Sector: A Comparative Analysis of the Car Distribution System in the US and the EU' (2003) 10 ECLR 518.

[62] *Bayerische Motoren Werke AG* [1975] OJ L29/1.

[63] European Commission, *IVth Report on Competition Policy*, 1974, para 86.

[64] European Commission, *Report on the Evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements*, 15 November 2000, COM(2000)743 final, 149, para 28 ('Evaluation Report').

[65] This feature has also been cited as the main problem that has caused the single market for cars not to function properly: E Van Ginderachter, 'Concurrence: Les nouvelles règles applicables au secteur automobile' (2002) JTDE 233, 235; and L Idot, 'Le nouveau règlement d'exemption relatif à la distribution automobile' (2002) 50 JCP–La Semaine Juridique Entreprises et Affaires 2000, 2002.

[66] A Hermel, 'La distribution automobile: les problèmes actuels, les réponses à venir' (2002) 59 Petites Affiches 6; and K Stöver, 'Les règlements d'exemption catégorielle relatifs à la distribution des voitures et aux stations-service', Speech delivered at the University of Liège, 4 June 1986, unpublished.

[67] Commission Regulation (EC) 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [1995] OJ L145/25.

[68] Reg 1475/95, Art 3(3).

[69] Reg 1475/95, Art 6(12).

[70] European Commission, *Explanatory brochure for Regulation (EC) No 1475/35* ('Explanatory Brochure'). The document is available at the DG COMP website.

by the Commission against leading car producers. These cases[71] concerned serious infringements of the competition rules (unjustified restrictions on lawful cross-border trade and resale price maintenance) and, given their timing, clearly served to underscore the deficiencies of the existing regime.

1.54 Guidance on the manner in which DG COMP proposed to apply Regulation 1400/2002 could be found in an Explanatory Brochure,[72] issued immediately before the entry into force of the Regulation. In order to address the many questions that were triggered by the application of the new approach, DG COMP subsequently issued an additional document entitled 'Frequently Asked Questions'.[73]

1.55 The Commission evaluated Regulation 1400/2002 and issued an evaluation report with its main findings.[74] Particularly with respect to motor vehicle distribution, the Commission's evaluation was very critical of the block exemption regime contained in Regulation 1400/2002. A fairly extensive preparatory process culminated in the adoption of Regulation 461/2010 and a set of so-called Supplementary Guidelines.[75]

1.56 The new regime triggers a radical change compared to past practice. As of 2013 it places motor vehicle distribution under the block exemption regime of Regulation 330/2010. As regards the after-market (repair and maintenance, distribution of spare parts), the Commission keeps all options open. Due to its interpretation of the market share limit of 30 per cent, the vast majority of agreements concerning the after-market may not be able to benefit from a block exemption and may require a self-assessment.

1.57 The adoption of Regulation 461/2010 is the provisional end point of the turbulent block exemption history of motor vehicle distribution. There are very few, if any, areas of EU competition law where the Commission has made so many radical shifts of policy in a period of about 25 years. Take, for example, the link between sales and servicing. Originally mandatory to benefit from the block exemption regime, the Commission subsequently made a U-turn and blacklisted the same link.

E. Enforcement of Article 101 TFEU

1.58 Thus far, we have outlined the general principles applicable to the implementation of Article 101 TFEU under Regulation 1/2003. We also indicated the continued relevance of block exemption regulations and briefly set out the precedents and the coming into being of Regulations 330/2010 and 461/2010. This section adds another dimension, namely the public

[71] *Volkswagen I* [1998] OJ L124/60; *Opel* [2001] OJ L59/1; *Volkswagen II* [2001] OJ L262/14; and *DaimlerChrysler* [2002] OJ L257/1.

[72] See *European Commission, Explanatory brochure for Commission Regulation (EC) No 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concentrated practices in the motor vehicle sector*. The document is available at the DG COMP website.

[73] DG COMP has specified that the Frequently Asked Questions are intended to complement and not to replace the Explanatory Brochure (Frequently Asked Questions, opening paragraph). The Frequently Asked Questions are available at the DG COMP website.

[74] European Commission, *Evaluation Report on Block Exemption Regulation 1400/2002*, May 2008, available at the DG COMP website.

[75] Commission notice—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 [2010] OJ C138/16 ('Supplementary Guidelines').

and private enforcement in cases of the infringement of Article 101 TFEU. In this respect, an overall distinction must be made between the public enforcement of Article 101 TFEU (that is, its enforcement by the Commission and the NCAs) and its private enforcement (that is, its enforcement by private parties in private litigation in court or arbitration).

(1) Public enforcement

1.59 The principle of public enforcement which underpins Regulation 1/2003 is that the Commission and the NCAs together form a network of public authorities which apply the EU competition rules in close cooperation.[76] It is clear that in order to achieve this the NCAs must be competent to apply Article 101 TFEU. Before Regulation 1/2003 came into force, that was not always the case (about half of the NCAs were able only to apply national competition law). Regulation 1/2003 explicitly requires that the Member States must designate and empower authorities to apply Article 101 TFEU.[77]

1.60 The Commission and the NCAs can uncover infringements during *ex officio* investigations or as a consequence of complaints. Given that any person showing a legitimate interest can lodge a complaint, private parties play an important role in the public enforcement of competition law. The modernization package[78] contains a special notice on complaints: the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty. One of the express purposes of the directly applicable exception system established by Regulation 1/2003 was to liberate sufficient resources for ex officio investigations into serious infringements of competition (that is, hard core cartels such as horizontal price fixing or market sharing).[79]

1.61 In addition to *ex officio* investigations and complaints, a third way of uncovering cartels is to provide for the immunity or the reduction of fines for those companies that are involved in a cartel but denounce it to the competition authorities. At the EU level, that type of leniency is governed by the Commission Notice on immunity from fines and reduction of fines in cartel cases ('Leniency Notice').[80] Whilst the Leniency Notice has generally been a success, given that it only applies to horizontal cartels between competitors[81] it is of little relevance in the context of the discussion of this book and will not be discussed at any length.

1.62 The powers which Regulation 1/2003 gives to the Commission and to the NCAs for the public prosecution of infringements of Article 101 TFEU are as follows.

[76] Reg 1/2003, recital 15.
[77] Reg 1/2003, recital 35 and Art 35.
[78] See para 1.17 above.
[79] 'The Commission will in future concentrate on pro-actively investigating serious infringements, following complaints or on its own initiative', C Gauer, D Dalheimer, L Kjolbye and E De Smijter 'Regulation 1/2003: a modernised application of EC competition rules' (2003) 1 EC Competition Policy Newsletter 3.
[80] [2006] OJ C 298/1.
[81] Leniency Notice, para 1: 'This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.' In some Member States, such as Poland, the legal position is different and leniency also applies to vertical practices which are restrictive of competition.

Public enforcement by NCAs

1.63 According to Article 5 of Regulation 1/2003, the NCAs have the power, acting on their own initiative or on a complaint, to take the following decisions:

- requiring that an infringement be brought to an end;
- ordering interim measures;
- accepting commitments; and
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Public enforcement by the Commission

1.64 The Commission can adopt the same decisions as the NCAs:

- finding and termination of an infringement (Article 7);
- interim measures (Article 8);
- commitments (Article 9); and
- fines, with a maximum of 10 per cent of a company's total turnover in the preceding business year (Article 23), as well as periodic penalty payments (Article 24).

1.65 Exceptionally,[82] where the EU's public interest so requires, the Commission can also, acting on its own initiative, adopt a 'finding of non-applicability' in accordance with Article 10 of Regulation 1/2003. A finding of non-applicability is a Commission decision in which the Commission finds that the prohibition of Article 101 TFEU is not applicable, either because the conditions of Article 101(1) TFEU are not fulfilled, or because the conditions of Article 101(3) TFEU are satisfied. The Commission has exclusive powers to adopt a finding of non-applicability which is binding on the NCAs and on the national courts.[83]

(2) **Private enforcement**

1.66 As a result of Regulation 1/2003, which abolished the notification system and the Commission's exclusive power to apply Article 101(3) TFEU, important obstacles to the private enforcement of Article 101 TFEU before national courts were removed. Under the regime of Regulation 17/62, a notification of the agreement to the Commission would block the private enforcement of Article 101 TFEU, and any doubt on the applicability of Article 101(3) TFEU would force national courts to suspend proceedings.[84]

1.67 Private enforcement of competition law rules via litigation before the national courts is generally considered to have a number of advantages when compared to public enforcement.

[82] Reg 1/2003, para 14. The Commission has yet to adopt a decision under Art 10 of Reg 1/2003. In that regard, the 2009 Commission Staff Working Paper on Regulation 1/2003 emphasizes the exceptional character of such a decision in the sense that it is confined to clarifying the law and ensuring its consistent application throughout the EU, ie to correct the approach of NCAs or to send a signal to the ECN about how to approach a certain case.

[83] 2009 Commission Staff Working Paper on Regulation 1/2003, para 112.

[84] 2009 Commission Staff Working Paper on Regulation 1/2003, para 12. Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, paras 26–7 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

The Commission Notice on the handling of complaints by the Commission lists the following advantages:

- National courts may award damages for loss suffered as a result of an infringement of Article [101 TFEU].
- National courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article [101 TFEU].
- It is for the national courts to apply the civil sanction of nullity of Article [101(2)] in contractual relationships between individuals. They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article [101(2)], with particular regard to all the other matters covered by the agreement.
- National courts are usually better placed than the Commission to adopt interim measures.
- Before national courts, it is possible to combine a claim under Community competition law with other claims under national law.
- Courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Commission.

Direct effect of Article 101 TFEU

1.68 A prerequisite for the private enforcement of Article 101(1) TFEU is that it must have direct effect so that it can be applied by the national courts. That direct effect was recognized by the Court of Justice of the European Union ('Court') a long time ago, in the 1974 *BRT v SABAM* case: 'As the prohibitions of Articles [101(1)] and [102] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.'[85]

Consequences of infringement of Article 101(1) (and 102) TFEU according to Article 101(2) TFEU

1.69 According to Article 101(2) TFEU, any agreement or decision which is prohibited by Article 101(1) TFEU and which cannot be exempted on the basis of Article 101(3) TFEU is automatically void. There is no further provision in the TFEU concerning the consequences of the infringement of Articles 101 and 102 TFEU.

Consequences of infringement of Article 101(1) TFEU according to national law

1.70 It appears from the case law of the Court that the consequences of the infringement of Article 101 TFEU are, by and large, a matter of national law:[86]

> 11. In its judgment of 25 November 1971 in Case 22/71 (Béguelin Import Company and others v S.A.G.L. Import Export and others (1971) ECR 949), the Court ruled that an agreement falling under the prohibition imposed by Article [101(1)] of the Treaty is void and that, since the nullity is absolute, the agreement has no effect as between the contracting parties. It also follows from previous judgments of the Court, and in particular from the judgment of 30 June 1966 in Case 56/65 (Société Technique Minière v. Machinenbau Ulm (1966) ECR 235), that the automatic nullity decreed by Article [101(2)] applies only to those contractual provisions

[85] Case 127/73 *BRT v SABAM* [1974] ECR 51, para 16. See also Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, paras 26–7 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para 39.

[86] Case 319/82 *Kerpen & Kerpen* [1983] ECR 4173. See also Case 10/86 *VAG France SA* [1986] ECR 4071, paras 14–15; Case C-230/96 *Cabour* [1998] ECR I-2055, para 51; Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service v Commission* [1999] ECR II-93, para 50.

> which are incompatible with Article [101(1)]. The consequences of such nullity for other parts of the agreement are not a matter for Community law . . .
>
> 12. The . . . automatic nullity decreed by Article [101(2)] of the Treaty applies only to those contractual provisions which are incompatible with Article [101(1)]. The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for Community law. Those consequences are to be determined by the national court according to its own law.

Private enforcement as a 'shield' and a 'sword'

1.71 In terms of the consequences of the automatic nullity of restrictive practices incompatible with Article 101 TFEU, which are thus governed by national law, a distinction is often made between the use of Article 101 TFEU as a shield or as a sword.[87]

1.72 **Private enforcement as a 'shield'** Article 101(1) TFEU is used as a shield when its infringement is invoked before a national court as a defence in order to defeat a contractual obligation (eg a non-compete obligation or a territorial or customer restriction imposed on a distributor) or to counter a claim for damages.[88]

1.73 Regulation 1/2003 improves the conditions for such use as a shield. Following Regulation 1/2003, national courts indeed have the power to apply Article 101 TFEU in its entirety.[89] That implies that national proceedings no longer need to be suspended to await the outcome of the Commission's decision on the applicability of Article 101(3) TFEU to the agreement in dispute.

1.74 Failure of an agreement to comply with the provisions of a block exemption regulation, in casu Regulation 330/2010, leads either to the loss of the block exemption for the entire agreement[90] or for the obligation concerned.[91] If that loss cannot be remedied by means of a self-assessment under Article 101(3) TFEU, the sanction of Article 101(2) TFEU applies. That sanction of nullity may have a tremendous impact on the parties to a supply or distribution agreement. The restrictions of competition which they contain are often crucial to their existence. If they have not been drafted in accordance with applicable competition law, the parties (or at the very least one of them) may be stuck with a binding deal but with unenforceable pricing provisions, non-compete obligations, etc. As stated above, the consequences of the nullity provided for by Article 101(2) TFEU are, by and large, a matter of national law.

[87] The distinction has been made by FG Jacobs and T Diesenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective', in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing, 2003) 189–90; also J Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) CMLRev 570–1.

[88] Other examples are given in P Roth and V Rose (eds), *Bellamy and Child. European Community Law of Competition* (6th edn, OUP, 2008) para 14.098. For practical applications, F Randolph and A Robertson, 'The First Claims for Damages in the Competition Appeal Tribunal' (2005) 7 ECLR 365.

[89] Reg 1/2003, Art 6 ('National courts shall have the power to apply Articles [101 and 102] of the Treaty').

[90] In case of a hardcore infringement of Reg 330/2010, Art 4; see also Vertical Guidelines, para 70 and Chapter 4 of this book.

[91] In case of the infringement of the obligations contained in Reg 330/2010, Art 5; see also Vertical Guidelines, para 71 and Chapter 5 of this book.

Private enforcement as a 'sword' Article 101 TFEU is used as a sword principally when it is invoked in support of an action for damages before the national courts. That possibility is foreseen by Regulation 1/2003 (recital 7), reading as follows: **1.75**

> National courts have an essential part to play in applying the [EU] competition rules. When deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements.

In *Courage v Crehan*, the Court also recognized the existence of a Community right to damages between private parties when it stated that '[t]he full effectiveness of Article [101 TFEU], in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[92]

In the context of a distribution agreement, there are many examples of situations where damages may become an issue: when a distributor wants to claim damages for the infringement by the supplier of an exclusive supply obligation, or, inversely, when a supplier believes that a distributor infringes its exclusive purchasing obligations; alleged breach of a non-compete obligation; alleged supply of an unauthorized reseller by a member of a selective distribution network; hampering export; direct or indirect resale price maintenance. **1.76**

Mainly due to the absence of national rules providing for effective redress, private enforcement of Article 101 TFEU has not been a success in the EU, to say the least. A 2004 study commissioned by DG COMP on the conditions for claims for damages in cases of infringement of EU competition rules concluded that there was an underdevelopment of actions for damages for breach of EU competition law, and that there exists an astonishing diversity of approaches taken by the Member States. Specifically, it identified only 12 successful damages awards for breach of EU competition law since the entry into force of Regulation 17/62 in 1962.[93] In light of that poor result, the Commission set out to raise awareness of the obstacles faced by those seeking damages for competition law infringements. That campaign led to the 2005 Green Paper on Damages Actions for Breach of the EC antitrust rules and the 2008 White Paper on Damages Actions for Breach of the EC antitrust rules.[94] During that period, the Commission saw itself supported by the Court's 2006 judgment in *Manfredi*.[95] In 2009, it proposed the adoption of a Council directive on rules governing actions for damages for infringements of Articles 101 and 102 TFEU. In line with the above, the objective of the proposed directive was to ensure, through the introduction of a set of rules designed to address the most important obstacles currently standing in the way of effective reparation, that all **1.77**

[92] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para 26, as confirmed by Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para 60 and by Case C-421/05 *City Motors Group* [2007] ECR I-653, para 33. On *Courage v Crehan*, eg A Anastasia, 'Individual Tort Liability for Infringements of Community Law' (2002) LIEI 177; A Jones and D Beard, 'Co-contractor, Damages and Article 81: The ECJ finally speaks' (2002) 5 ECLR 246; AP Komninos, 'New Prospects for Private Enforcement of EC Competition Law: Courage v Crehan and the Community Right to Damages' (2002) CMLRev 447; O Odudu and J Edelman, 'Compensatory damages for breach of Article 81' (2002) ELRev 327; T Tridimas, 'Liability for breach of Community law: growing up or mellowing down?' (2001) CMLRev 301; W Van Gerven, 'Of Rights, Remedies and Procedures' (2000) CMLRev 501; and W Van Gerven, '*Crehan* and the Way Ahead' (2006) European Business Law Review 269.

[93] The study is available at the DG COMP website.

[94] An overview of the Commission's initiatives relating to private enforcement of Articles 101 and 102 TFEU through actions for damages is available at the DG COMP website.

[95] Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619; see eg E De Smijter and D O'Sullivan, 'The Manfredi judgment of the ECJ and how it relates to the Commission's initiatives on EC antitrust damages actions' (2006) 3 Competition Policy Newsletter 23.

victims would be in a position to obtain full compensation of the damage caused by an infringement of the EU competition rules. Due to intense lobbying by the industry and some Member States, the adoption of such a directive has been postponed.

F. Hard v Soft EU Competition Law

(1) General

1.78 A final issue that needs to be addressed in this introductory chapter concerns the relation between so-called hard and soft EU competition law. In this context, 'hard law' stands for the rules of primary and secondary EU competition law (Articles 101 and 102 TFEU, the block exemption regulations) while 'soft law' stands for a variety of 'quasi-legal measures'[96] or 'rules of conduct which, in principle have no legally binding force but which nevertheless may have practical effects'.[97] The use of soft law as a means of developing Community policy is expressly recognized in Article 288 TFEU in the form of non-binding 'recommendations' and 'opinions'. Apart from those recommendations and opinions, soft law has taken on a variety of different forms, including resolutions, green papers, white papers, notices, guidelines, 'frameworks' (eg in the field of State aid), codes of conduct, and inter-institutional agreements.

1.79 Any competition law practitioner will acknowledge that advising on competition law frequently involves references to soft law instruments. For vertical restraints, reference can be made to the Vertical Guidelines (Regulation 330/2010), the Explanatory Brochure and the Frequently Asked Questions (Regulation 1400/2002), or the Supplementary Guidelines (Regulation 461/2010). For present purposes, we will first address the legal nature of the Vertical Guidelines (paragraphs 1.80–1.82), as well as their legal and practical consequences (paragraphs 1.83–1.91). Subsequently, we transpose the findings in regard of the Vertical Guidelines to soft law applicable to motor vehicle distribution and servicing (paragraph 1.92).

(2) Legal nature of the Vertical Guidelines

1.80 According to the Commission, the Vertical Guidelines set out the principles for the assessment of vertical agreements under Article 101 TFEU.[98] While the Vertical Guidelines are without prejudice to the possible parallel application of Article 102 TFEU to vertical agreements,[99] they do not provide the reader with any specific guidance on the said application.[100] As to Article 101 TFEU, the Commission's objective with the Vertical Guidelines is to help companies make their own EU competition law assessment of their vertical agreements.[101] The Commission rules out a mechanical application of the Vertical Guidelines: it considers that

[96] H Cosma and R Whish, 'Soft law in the Field of EU Competition Policy' (2003) European Business Law Review 25, 53.

[97] F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin, *The Construction of Europe. Essays in Honour of Emile Noël* (Kluwer, 1994) 197. In line with its increased use, studies on EU soft law have been on the rise. An extensive list of references to such studies can be found in D Trubek, P Cottrell and M Nance, '"Soft Law", "Hard Law" and European Integration: Towards a Theory of Hybridity', available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855447>.

[98] Vertical Guidelines, para 1.

[99] Vertical Guidelines, para 1.

[100] On the application of Art 102 TFEU to vertical agreements, Vertical Guidelines, paras 1 and 127. The only exception to the rule that the Vertical Guidelines do not deal with Art 102 TFEU is para 215 relating to tying.

[101] Vertical Guidelines, para 3.

each case must be evaluated in the light of its own facts and that the Vertical Guidelines must be applied with due consideration for the specific circumstances of each case.[102]

1.81 While the Commission's objective can be endorsed, in reality matters are more complex. The reason is that the Vertical Guidelines on several occasions add extra conditions for the block exemption to apply or interpret Regulation 330/2010 in a way that is hard to reconcile with its express wording. One of the most telling examples concerns one of the Regulation's blacklisted clauses. Pursuant to Article 4(b), first indent, of Regulation 330/2010, an active sales restriction can be imposed with regard to territories or customers which are exclusively reserved to the supplier or exclusively allocated by the supplier to another dealer. The Vertical Guidelines (paragraph 51) add that the exclusive dealer must be protected against active sales in his territory 'by all the other buyers of the supplier within the Union'. If a supplier omits to impose the latter condition in its distribution agreements, that means, at least according to the Vertical Guidelines, that those agreements contain a hardcore restriction and, consequently, that the benefit of the block exemption would be lost for the agreements in their entirety.[103] Similarly, the discussion on internet sales as being a form of passive sales, whose infringement is a hardcore restriction in the sense of Article 4(b) of Regulation 330/2010, is found exclusively in the Vertical Guidelines. The question about the legal nature of the Vertical Guidelines is therefore not merely theoretical, but is directly relevant for the practitioner.

1.82 The answer to the question of the legal nature can be short. It clearly follows from the case law of the Court that instruments of soft law, such as the Vertical Guidelines, are not legally binding as such. Whilst they may clarify the terms of Regulation 330/2010 and indicate the Commission's approach, they cannot alter the scope of Regulation 330/2010 as a matter of law.[104] Legally speaking, the provisions of Regulation 330/2010 prevail over any conflicting statement in the Vertical Guidelines.

(3) The consequences of the Vertical Guidelines

1.83 The fact that the Vertical Guidelines cannot alter the scope of Regulation 330/2010 does not mean that they are by definition void of any legal, let alone any practical, consequences. To briefly consider those effects, a distinction must be made between their effects for the Commission, on the one hand, and their effects for third parties, on the other.

Effects for the Commission

1.84 The Vertical Guidelines frame the margin of discretion which the Commission enjoys in the context of its vertical restraints policy. They are meant to enhance the degree of legal certainty and to result in a more uniform application of the rules.[105] In line with the case law of the Court, the Commission is bound by the Vertical Guidelines on the basis of the principle of legitimate

[102] Vertical Guidelines, para 3.

[103] That example has been developed for the regime of Reg 2790/1999 in F Wijckmans and F Tuytschaever, 'Active Sales Restrictions Revisited' (2004) 2 ECLR 104.

[104] For instance, in C-226/94 *Grand Garage Albigeois et al* [1996] ECR I-651, para 21; and Case C-309/94 *Nissan France et al* [1996] ECR I-677, para 22, the Court ruled in regard of the Commission Notice of 4 December 1991 entitled 'Clarification of the activities of motor vehicle intermediaries' ([1991] OJ C329/20), that 'its purpose is merely to clarify certain terms used in the regulation and it cannot therefore alter the scope of the regulation'. Reference is also made to the case law cited in V Korah and D O'Sullivan, *Distribution Agreements Under the EC Competition Rules* (Hart Publishing, 2002) 127 and to F Dethmers and P Posthuma De Boer, 'Ten Years On: Vertical Agreements under Article 81' (2009) ECLR 9, 425.

[105] In general, H Cosma and R Whish, 'Soft law in the Field of EU Competition Policy' (2003) European Business Law Review 25, 50.

expectations (*patere legem quam ipse fecisti*).[106] Should that not be the case, the Commission would be entitled to breach the legitimate expectations of those who rely on the Vertical Guidelines to assess whether or not their vertical agreements may enjoy the block exemption contained in Regulation 330/2010. That goes against the fact that the principle of legitimate expectations is a general principle of EU law.[107]

Effects for third parties

1.85 In order to appreciate the legal effects of the Vertical Guidelines for third parties, a distinction must be made between the EU courts, the national courts, the NCAs and national courts, and finally the individual market players.

1.86 **EU courts** In respect of the EU courts, the Vertical Guidelines state the following:

> These Guidelines are without prejudice to the case-law of the General Court and the Court of Justice of the European Union concerning the application of Article 101 TFEU to vertical agreements.[108]

1.87 The Vertical Guidelines therefore only have interpretative force for the EU courts: the General Court and the Court may interpret EU law on the basis of certain declarations from the institutions, as long as the content of those declarations is publicly available.[109] However, the EU courts are not bound by the Vertical Guidelines and may allow their own views to prevail over those of the Commission. A Court judgment is binding upon the Commission.

1.88 **NCAs and national courts** In respect of the legal effect of the soft law of the Vertical Guidelines for national authorities (NCAs and national courts), there is a discrepancy between the law and daily practice. As far as daily practice is concerned, any competition law practitioner will be familiar with the situation where the national authorities consider guidelines issued by the Commission as being more or less black-letter law. In spite of that, legally speaking, the Vertical Guidelines are not in themselves legally binding on the national authorities. In addition, Article 4(3) of the Treaty on the European Union ('TEU')[110] (the 'loyalty clause') cannot be invoked against the national authorities (because the Commission issued the Vertical Guidelines autonomously).[111] Notwithstanding that, account must be taken of what the Commission stated back in 1999, in its White Paper on Modernisation:

> [Guidelines] might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in

[106] eg Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, para 55.

[107] eg K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell, 2005) 714, para 17-069 with references; V Korah and D O'Sullivan, *Distribution Agreements Under the EC Competition Rules* (Hart Publishing, 2002) 125. See also Joined Cases C-189/02P, C-202/02P, C-205/02P to C-208/02P and C-213/02P *Dansk Rorindustri* [2005] ECR I-5425, paras 209–11, with reference to Case C-171/00P *Libéros v Commission* [2002] ECR I-451, para 35.

[108] Vertical Guidelines, para 4. Similar statements can be found in other Commission notices, eg Article 81(3) Guidelines, para 7 and the Guidelines on the effect on trade concept, para 5. On the judicial review of Art 101 TFEU, D Bailey, 'Scope of Judicial Review under Article 81 EC' (2004) CMLRev 1327.

[109] See eg Case C-429/85 *Commission v Italy* [1988] ECR 843, para 9; Case C-292/89 *Antonissen* [1991] ECR I-745, para 18; Case C-25/94 *Commission v Council* [1996] ECR I-1469, para 38; Case C-329/95 *Länsratten I Stockholms Län* [1997] ECR I-2675, para 23; C-402/03 *Skov and Bilka* [2006] ECR I-199, para 42; and Case T-236/07 *Germany v Commission* [2010] ECR, not yet reported.

[110] [2010] OJ C83/1.

[111] Binding force for decisions *sui generis* exists only when there exists a formal agreement between the Commission and all of the Member States, eg European Commission, *Competition Law in the EC—Volume IIB. Explanation of rules applicable to state aid* (OOPEC, 1997) 15.

> individual cases the Commission would confirm the approach they set out. Provided those individual decisions were upheld by the Court of Justice, then, notices and guidelines would come to form part of the rules that must be applied by national authorities.[112]

1.89 That statement requires some refinement. The precise legal position is as follows:

- Both for NCAs and national courts, the direct legal effects of a Commission decision are governed by Article 16 of Regulation 1/2003: both may no longer, on the basis of national competition law, arrive at a different conclusion than the Commission for the agreements, decisions or practices 'which are already the subject of a Commission decision'. The application of the Vertical Guidelines in a Commission decision, therefore, does not entail direct legal effects for agreements, decisions, or practices which are not the subject of the decision concerned.
- For NCAs, the legal effects of a Commission decision which applies the Vertical Guidelines may extend beyond its factual context by means of the Commission's use of Article 11(6) of Regulation 1/2003 (ie the initiation of a procedure which relieves the NCAs of their competence to apply Article 101 TFEU). That may occur in particular if the Commission's viewpoint has been supported by the EU courts. In that respect, the Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities is relevant. It confirms that the type of situations which justify the Commission's initiation of a procedure (and the corresponding impossibility for an NCA to apply Article 101 TFEU to a given case) includes situations in which an NCA may want to go against 'previous decisions':

  > Network members envisage a decision which is obviously in conflict with consolidated case-law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick.[113]

- In view of the principle of the separation of powers, there is no counterpart to Article 11(6) of Regulation 1/2003 for national courts. If a national court is confronted with a case which is similar to a case in which the Commission has already applied the Vertical Guidelines to a specific situation, and the national court has questions on that application, it may want to take advantage of the Commission's role as *amicus curiae* and seek its opinion. In addition, and in accordance with Article 267 TFEU, it can always refer one or several preliminary questions to the Court.

1.90 **Market players** Market players are first and foremost bound by the wording of Regulation 330/2010. Where a supplier's distribution policy is questioned on a matter where the Vertical Guidelines deviate from Regulation 330/2010, the supplier, in its turn, is entitled to question the Vertical Guidelines. In other cases, the supplier may want to show that, in spite of its apparent infringement of the Vertical Guidelines, in reality, it complies with the conditions to enjoy a safe harbour under Regulation 330/2010.

1.91 The practical consequences of the Vertical Guidelines for the market players, however, are undeniable. A lawyer advising a client on the legality of its vertical agreements simply cannot ignore the Commission's views on the application of the block exemption regulation, as expressed in the Vertical Guidelines, especially because the NCAs and national courts give

[112] 1999 White Paper on modernisation, para 86.

[113] Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities, Council document 15435/02 ADD 1, 10 December 2002, para 21.

particular attention to those views. As a consequence, when confronted with an inconsistency between the Vertical Guidelines and Regulation 330/2010, it is always advisable to contact DG COMP.

(4) The legal and practical effects of the Explanatory Brochure, the Frequently Asked Questions (Regulation 1400/2002), and the Supplementary Guidelines (Regulation 461/2010)

1.92 The above observations in respect of the Vertical Guidelines are equally applicable to the Explanatory Brochure, the Frequently Asked Questions, and the Supplementary Guidelines which accompany the motor vehicle block exemption regulation. The most essential points are the following:

- The Commission expressly states that the Explanatory Brochure is not legally binding.[114] At the time of the publication of the Explanatory Brochure, a member of the so-called Block Exemption Regulation Team of DG COMP expressed it as follows:

  > Although the Brochure is intended as a legally non-binding guide to the Regulation, experience shows indeed that this kind of information tools are instrumental in clarifying each party's responsibilities, hence contributing to avoiding or quickly resolving disputes.[115]

- Whilst the Explanatory Brochure and the Frequently Asked Questions do not bind the Community Courts, the NCAs, the national courts (save from the effects identified above), or the sector (eg producers, dealers, independent traders), the same is not true for the Commission. For the reasons, and under the conditions set out above (see paragraph 1.89 above), the Commission is bound by its interpretation of Regulation 1400/2002 as laid down in the Explanatory Brochure and the Frequently Asked Questions.
- Both the Explanatory Brochure and the Frequently Asked Questions provide interpretations and clarifications of provisions of Regulation 1400/2002 which are not necessarily covered by the wording of the block exemption regulation. To the extent that such interpretations and clarifications go beyond the parameters set forth in the Regulation, they are invalid as a matter of law. Indeed, non-binding guidelines are not the correct legal instrument to broaden the scope of restrictions or conditions that are contained in a Commission regulation.
- In relation to Regulation 461/201, there are the Supplementary Guidelines. The legal status of those guidelines is identical in all respects to that of the Vertical Guidelines.
- The Explanatory Brochure and the Frequently Asked Questions remain valid until 1 June 2013 in respect of motor vehicle distribution, but not for after-market agreements. As of that date (for motor vehicle distribution) and since 1 June 2010 (for after-market agreements), the soft law governing the motor vehicle sector encompasses both the Vertical Guidelines and the Supplementary Guidelines.

[114] Explanatory Brochure, 9; and P Arhel, '104 questions/réponses sur le nouveau règlement automobile (la brochure explicative)' (2002) 237 Petites Affiches 7.

[115] M Martinez Lopez, 'New explanatory Brochure on Commission Block Exemption Regulation No 1400/2002 on the motor vehicle sector: bringing competition rules closer to consumers and market operators' (2003) 1 Competition Policy Newsletter 59.