REVIEW OF THE EU VERTICAL AND HORIZONTAL BLOCK EXEMPTION REGULATIONS AND GUIDELINES – WHERE WE ARE AT AND WHAT LIES AHEAD

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Abstract: *This article outlines the new vertical and horizontal block exemptions and their guidelines. It is worth noting that this reform is part of an ongoing wider reform of the EU competition law framework to adapt EU policy and its enforcement to the digital age and sustainability concerns.*

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Key-Words: horizontal agreements, vertical agreements, e-commerce, information exchange, transfer of technology, sustainability.

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1. INTRODUCTION

Since 2019[1], the European Union ("EU") has been reviewing its competition law legal framework and guidelines to accommodate the digital economy, which is characterised by network effects, mobility of intangible and business functions, reliance on data, and multisided markets[2].

One wonders, however, if the constant references that the European Commission ("EC") makes to the digital economy are not a little naive and already outdated. Once used to describe how traditional brick-and-mortar economic activities (production, distribution, trade) are being transformed by the omnipresent use of the internet, digitalisation now spans all economic sectors, so much so that the digital economy overlaps with the societal economy as a whole.

The EC has identified several priorities that have to be achieved by 2024 and that will affect the competition law reform: (a) reaching net zero/climate neutrality; (b) adjusting to the digital age; (c) creating a more attractive environment for investment, the job market and future generations; (d) strengthening the EU's reach in the world; (e) promoting the European way of life; and (f) strengthening the EU's democracy[3].

These objectives seem somewhat optimistic when current data show that a gap in productive investment of 1.5 to 2 percentage points of Gross Domestic Product ("GDP") has opened between Europe and the United States and corporate spending on research and development is also low in the EU compared to international competitors – 1.5% of GDP in the EU in 2020 vs. 2.6% in the United States and Japan[4]. The EU even looks to be unlikely to meet its Green Deal objectives as reports show lingering fossil fuel subsidies and plans to continue to use coal[5].

In any case, even though unexpected external factors such as the COVID-19 pandemic and the Ukraine war had an impact on the EC's priorities, a purposely "once-in-a-generation" reshaping of most aspects of antitrust policy and enforcement is still underway, including regulation for the digital sector

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1 https://www.consilium.europa.eu/en/policies/a-digital-future-for-europe/timeline-digital-europe/.

2 See, for example, the OECD 2018 Market Studies Guide for Competition Authorities, www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm.

3 Von der Leyen, 2019.

4 https://www.eib.org/en/publications/online/all/investment-report-2022-2023.

5 8th EAP – indicator-based progress – 2023 (europa.eu).

in the form of the Digital Markets Act[6] and the Foreign Subsidies Regulation, even if there are doubts as to whether this "reshaping" is truly something that should be treated as a competition issue, with some arguing that the antitrust ecosystem is becoming increasingly tainted with industrial policy and exclusively political measures[7].

Other rather ambitious reforms proposed by the EC include a changed approach to market definition, new merger control filing forms, revised guidance on abuse of a dominant position, plus a wide-ranging consultation on the rules governing antitrust enforcement, in particular Regulation 1/2003, December 16 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[8], which will certainly warrant our attention in the near future[9].

Other rather ambitious reforms proposed by the EC include a changed approach to market definition, new merger control filing forms, revised guidance on abuse of the dominant position, plus a wide-ranging consultation on the rules governing antitrust enforcement, in particular Regulation 1/2003, which will certainly deserve our attention in the near future[10].

The reform of the vertical and horizontal block exemptions and guidelines was also part of the ongoing reform, even though, as we will see, the changes brought about were, on the whole, underwhelming.

This article reviews the regulations and guidelines, which are very important in terms of getting undertakings to self-assess their conduct, enhancing legal certainty in an uncertain market, strengthening leniency programmes because the self-assessments will enable undertakings to better detect potential infringements, and promoting a more uniform implementation of competition law across the 27 Member States that, further to applying the EU competition framework, also have national provisions that mirror the EU rules[11].

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6 http://data.europa.eu/eli/reg/2022/1925/oj. About this Act: Geradin & Bania, 2024; Moreno Belloso, 2023.

7 http://data.europa.eu/eli/reg/2022/2560/oj. About this Regulation: Bungenberg, 2024; Wolski, 2022; Moreno Belloso, 2022; Moreno Belloso & Petit, 2023.

8 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R0001.

9 http://data.europa.eu/eli/reg/2003/1/oj.

10 http://data.europa.eu/eli/reg/2003/1/oj.

11 "*The main findings of the evaluation study support that the R&D BER and Chapter 3 of the Horizontal Guidelines provide an adequate degree of legal certainty. In particular, stakeholders (mainly SMEs) identified as key strengths of the R&D BER that it facilitates self-assessment, encourages a consistent application of EU competi-*

The EC's evaluation of Vertical Block Exemption and of Regulation 330/2010 triggered a consultation process that started on 23 October 2020[12]. According to the EC, given the expanding digital landscape and increased economic activity on virtual platforms, as well as developments in decision practice and case law, the current regulations and the 2010 guidelines had to be re-examined[13].

The EC has also evaluated the two Horizontal Block Exemption Regulations on research and development agreements (Regulation 1217/2010 of 14 December 2010[14]) and on specialisation agreements (Regulation 1218/1010 of 14 December 2010[15]), together with the 2011 Horizontal Guidelines (approved in December 2010, and published on 14 January 2011), again stressing that they need to be adapted to keep abreast of the increasingly technological world and new sustainability goals[16].

This article provides context and explains the main aspects of this review.

2. BRIEF CONTEXT OF THE REFORM OF THE EU VERTICAL AND HORIZONTAL FRAMEWORK

In the early years of EU competition law, particularly during the 1960s and 1970s, the EC and the courts prioritised removing vertical restrictions to promote market integration and dismantle private barriers to trade between EU Member States under the current Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits restrictive agreements and concerted practices that affect EU trade[17].

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tion rules and reduces the need for external legal support", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 47.

12 Commission Evaluation of Vertical Agreements Block Exemption Regulation 330/2010. The EC's evaluation identified a range of problems that manifested [themselves] with the change in the market paradigm (Blewett & Kennis, 2023: 2): "[...] *lack clarity in the rules defining agency agreements*"; difficulties in "[...] *applying rules that are no longer adapted to the current business environment*"; gaps in the "[...] *rules, for example, a lack of guidance on how to assess retail parity clauses or restrictions on the use of price comparison websites*"; and scope for "[...] *diverging interpretations of the rules by national competition authorities and national courts*".

13 Mckinsey & Company, 2022: 1, and Blewett & Kennis, 2023: 2.

14 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010R1217.

15 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010R1218.

16 On this, Schwab, 2017.

17 "*The Commission often failed to recognise the potential pro-competitive effects of vertical restraints on inter-brand competition. The Commission's approach should be viewed in the economic context in which EU*

While vertical block exemptions and guidelines have been in place since 1985, the evolution towards a self-assessment approach, which replaced the *ex ante* authorisation mechanism in place until the 1980s, considerably strengthened the block exemptions and related guidelines. The Block Exemption Regulation[18], applicable to vertical agreements, and the Vertical Guidelines of 25 May 2000[19], significantly changed how vertical agreements were treated[20].

The mentioned Block Exemption Regulation 2790/1999 was replaced by Regulation 330/2010[21] and the 2000 Vertical Guidelines were replaced by the 2010 Vertical Guidelines[22], which included guidance for online sales and clear thresholds for buyer power[23].

On 23 October 2020, the EC published impact assessment reports reviewing Regulation 330/2010 and the 2010 Vertical Guidelines "[...] *exploring a possible revision of the rules in the areas of dual distribution, active sales restrictions, indirect measures restricting online sales and parity (most-favoured nation) obligations* [...]"[24]. On 9 July 2021, the EC published a proposal to revise the 2010 Vertical Guidelines and Regulation 330/2010, opening it up to public consultation and gathering responses between 9 July and 17 September 2021. On 10 May 2022, the EC adopted Regulation 2022/720 ("2022 VBER")[25]

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competition law developed during the 1960s and 1970s, when national markets were very much partitioned. While the primary objective of the Commission in this field has been to protect competition, the objective of market integration and the dismantling of private barriers to trade between EU member states has also played a significant role in shaping the EU competition", Blewett & Kennis, 2023: 1.

18 Commission Regulation (EC) No 2790/1999, OJ 1999 L 336/21. Dabbah, 2006: 134-151 and Goyder & Albors-Llorens, 2009: 221-229.

19 Commission Guidelines on Vertical Restraints, OJ 2000 C 291/1.

20 Bellis, 2011: 25. *"Vertical agreements may produce positive effects, including lower prices, the promotion of non-price competition and improved quality of services. Simple contractual arrangements between a supplier and a buyer which determine only the price and the quantity of a transaction can often lead to sub-optimal levels of investments and sales, as they do not take into account externalities arising from the complementary nature of the activities of the supplier and its distributors. These externalities fall into two categories: vertical externalities and horizontal externalities"*, Communication from the Commission, Commission Notice, Guidelines on Vertical Restraints, 2022/C 248/01, C(2022) 3006.

21 Commission Regulation (EU) 330/2010, OJ 2010 L 102/1.

22 Commission Guidelines on Vertical Restraints, OJ 2010/C 130/01.

23 Gorjão-Henriques & Sousa Ferro, 2010: 126, and Bellis, 2011: 27. The 2000 Guidelines already made some references to online sales (paragraphs 51-53) and the 2010 Guidelines only expand on what was said in 2000.

24 Blewett & Kennis, 2023: 2.

25 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720.

to replace Regulation 330/2010 (which expired on 31 May 2022), and the new Vertical Guidelines, which entered into force on 1 June 2022 ("2022 Guidelines")[26].

Broadly speaking, the 2022 Guidelines and the 2022 VBER have maintained the same basic structure, substance and principles as the previous guidelines and, in this regard, are/were/have been rather disappointing for a "once in a generation" reform of antitrust rules[27]. In the wake of the responses to the public consultation carried out to draft the 2022 Guidelines and 2022 VBER, the EC stated that the purpose was to adapt the safe harbour to the digital age[28]; to reduce false negatives and eliminate false positives under the vertical exemption framework[29]; to provide stakeholders with clear, transparent, simple and up-to-date rules so that they can adjust their conduct to Article 101 TFEU[30]; and to adapt the vertical framework to a new market reality that relies heavily on the internet[31].

However, central issues in the legal and economic debate in the past few years, such as resale price maintenance ("RPM") (including minimum advertised price policies), were left unchanged, and the EC did not seize the chance during its 2022 VBER evaluation to align EU laws on RPM with those of the US. This would have given businesses greater flexibility and allowed them to use new technologies in distribution more extensively.

This is particularly unfortunate because the evaluation did bring to light important issues, including the need for additional clarification regarding recommended or maximum resale prices, and the conditions for exempting RPM under Article 101(3) TFEU owing to the efficiencies achieved.

Horizontal agreements/cooperation had been governed by Regulation 2658/2000 of 29 November 2000 on specialisation agreements and Regulation 2659/2000 of 29 November 2000 on research and development agreements, and the Horizontal Guidelines were adopted at the end

26 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG.

27 Heinisch & Hofmann, 2022: 144-159.

28 Mckinsey & Company, 2022:1 and Blewett & Kennis, 2023:2.

29 Explanatory Note on the new VBER and Vertical Guidelines, p. 1.

30 Explanatory Note on the new VBER and Vertical Guidelines, p. 1.

31 Varona & Hernández, 2022: 490.

of 2000[32, 33]. The Horizontal Guidelines replaced and expanded the 1968 Notice on agreements, decisions and concerted practices in the field of horizontal cooperation[34], and the 1993 Notice on the assessment of joint ventures under Article 81[35].

These guidelines, when read in conjunction with the 2004 Guidelines on the application of Article 81(3), recognised that horizontal agreements may have a positive economic impact[36]. This perspective, shaped by globalisation and technological developments, assumed that companies may benefit from collaborating in terms of sharing risks and expenses, and innovating[37]. This approach was expected to help to level the playing field, allowing smaller companies to compete with larger, more established ones. Without collaboration, the market could become dominated by only the largest and most well-resourced companies, possessing large amounts of capital, labour and know-how[38].

The 2011 Horizontal Guidelines "[...] *emphasise the importance of economic analysis focusing on the identification of the parties' market power and other*

32 Guidelines on Horizontal Agreements, OJ [2001] C 372, [2001] 4 CMLR 819.

33 The 2001 Horizontal Guidelines addressed topics such as a) the classification of undertakings as potential competitors; (b) the analysis of horizontal agreements under Article 81(1); (c) the absence of restrictive effect where the parties did not have a market share of more than 10% or where one of the parties has an insignificant market share; (d) criteria for assessing agreements between undertakings; (d) analysis of the specific aspects of R&D agreements; (e) sustainability agreements; (f) purchasing agreements; (g) commercialisation agreements. We closely follow the [the approach taken in Ritter & Braun, 2004: 225-226 and Whish, 2009: 574.

34 Notice of 1968 on agreements, decisions and concerted practices in the field of horizontal co-operation, OJ [1968] C 75/3.

35 1993 Notice on the assessment of joint ventures under Article 81, OJ [1993] C 43/2.

36 Along the same lines, Moura e Silva (2020: 753).

37 "*Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster*", Paragraph 2 of Commission Notice "Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011/C 11/01.

38 On the reasonable need for firms to cooperate to reduce risks, see Jones & Sufrin, 2016: 715. In particular, we are thinking about the *Vacuum Interrupters Decision* (COMP/27.442, (1977) OJ L48/32), where the Commission considered that Associated Electrical Industries Ltd and Reyrolle Parsons Ltd could separately research, produce and commercialise the product, but that both companies had not done so because the risk was too high for each to bear alone. In addition, and as a sign of change in the EC's policy, in the *Optical Fibres Decision* ([1986] OJ L236/30) it considers that there is no restriction of competition, given that neither party had the individual capacity to develop and market the product, and the agreement benefited as well from the exceptional exemption of Article 101(3) TFEU.

elements linked to market structure (paragraphs 5 and 39 to 53). Provided that the cooperation genuinely aims at integrating the economic activities of the parties and is likely to bring relevant efficiencies, horizontal collaboration agreements tend to be analysed from the perspective of their effects on competition"[39]. The EC also adopted Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to specific categories of research and development agreements, and Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements. The 2010 Horizontal Block Exemption Regulations and 2011 Horizontal Guidelines were set to expire on 30 June 2023.

As such, in 2022, the EC had three options: let the term of the Horizontal Block Exemption Regulations and Guidelines lapse, renew them or revise the legal framework applicable to horizontal cooperation.

The EC went with the third option[40] and the new documents entered into force after they were published in the Official Journal of the European Union. The EC published the Research and Development Block Exemption Regulation 2023/1066 ("R&D BER")[41] and the Specialisation Agreement Block Exemption Regulation 2023/1067 ("Specialisation BER", and together with the R&D BER, "2023 HBERs")[42] on 21 July 2023, and the new Horizontal Guidelines ("2023 Guidelines") on 1 June 2023[43]. According to the EC, they are intended to guide undertakings in determining whether horizontal agreements are lawful under competition law[44]; promote the cohesion of the internal market; guide the environmental and digital transition and beneficial economic cooperation between undertakings[45]; and simplify administrative

39 Moura e Silva, 2020: 782 (our translation).

40 For a comparison of the 2011 Guidelines and the 2001 Guidelines, Morais, 2011: 223-271.

41 http://data.europa.eu/eli/reg/2023/1066/oj.

42 http://data.europa.eu/eli/reg/2023/1067/oj.

43 Annex to the Communication from the Commission, Approval of the Content of a Draft for a Communication from the Commission on Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 523.

44 Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD (2021)103 final of 6 May 2021, p. 13.

45 "*The evaluation showed that the* [...] *Horizontal Guidelines make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy. They promote competition and offer legal certainty to companies in the conception and implementation of their horizontal cooperation agreements*", Paragraph 5 of the Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.

supervision by the EC, the national competition authorities and national courts.

Once again, it seems that the new horizontal framework introduces no major changes and reflects the EC's tendency to undertake overcomplicated analyses that create uncertainty, something that is evident from the long list of requirements to be met for a soft safe harbour for sustainability agreements and the complete lack of a safe harbour for the very challenging matter of information exchanges.

3. MAIN CHANGES INTRODUCED BY THE 2022 VBER AND 2022 GUIDELINES

3.1 Non-compete clauses

Non-compete clauses, also known as "single branding", may limit the margin within which buyers may use or resell competing goods and services.[46] These clauses require the buyer to buy over 80% of its total demand for a given product from one provider[47].

The Portuguese Competition Authority (*Autoridade da Concorrência*) ("PCA") considered a non-compete clause in its *Nestlé* decision (PRC/2004/31). After examining the contracts between Nestlé and other companies operating in the "HORECA channel" (hotels, restaurants and cafeterias), the PCA concluded that Nestlé engaged in anti-competitive behaviour because the non-compete clauses it imposed on its clients in coffee supply contracts amounted to exclusivity clauses. According to the PCA, these non-compete obligations limited competition in the market for coffee consumption. The contracts specified a minimum quantity of coffee that clients had to purchase and contained additional provisions to extend the contract if the client was unable to meet the minimum purchase requirements during the five-year exclusive purchasing period[48].

46 "*Non-compete obligations* [...] *are arrangements that cause the buyer to purchase more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year from the supplier or from another undertaking designated by the supplier. This means that the buyer is prevented from purchasing competing goods or services or that such purchases are limited to less than 20 % of its total purchases*", 2022 Guidelines, paragraph 247.

47 Heinisch & Hofmann, 2022: 157.

48 Brice, 2008.

The 2022 VBER and 2022 Guidelines state that "[...] *non-compete obligations exceeding a duration of five years are excluded from the block exemption*", but the real innovation is that it included the possibility of tacitly extending a non-compete clause beyond the five years in the 2022 VBER safe harbour[49]. Unlike the 2010 Guidelines and Regulation 330/2010, under which non-compete clauses could not be tacitly extended, the 2022 Guidelines do, provided that the distributor is not excessively penalised for terminating or renegotiating (e.g. by having to compensate the supplier)[50, 51].

3.2 Parity clauses

Parity clauses, or "Most Favoured Nation Clauses" ("MFNs"), "Most Favoured Customer Clauses" or "Across Platforms Parity Agreements", as they are most commonly known, are often used in the digital environment "[...] *to ensure that business users do not offer their products or services at lower prices or under better terms on other platforms or their own websites*"[52]. These clauses enable the platform to demand, for example, that suppliers refrain from presenting lower prices or better conditions on intermediary sales channels or on their direct sales channels.

Parity clauses can be wide if they hinder suppliers from offering better terms on alternative sales channels in all their sales channels, or narrow if they prevent suppliers from offering better terms on their own websites but allow them to offer better conditions on other sales channels or rival platforms[53, 54].

49 2022 Guidelines, paragraphs 247 and 248.

50 Varona & Hernández, 2022: 491 and Heinisch & Hofmann, 2022: 157-158.

51 "*A significant number of stakeholders across all categories and sectors expressed broad support for the changes made in order to exempt tacitly renewable non-compete clauses beyond 5 years (while nevertheless proposing minor clarifications, such as additional guidance on what constitutes a reasonable period of time and/or reasonable cost and resolving apparent contradictions with some paragraphs of the Vertical Guidelines). A few stakeholders, however, disagreed with this change. Stakeholders representing the Horeca sector argued in particular that non-compete clauses exceeding 3 years should be excluded from the VBER. They further argued that the exception set out in Article 5(2) of the VBER, allowing indefinite non-compete clauses where the contract goods or services are sold by the buyer from premises and land owned or leased by the supplier, should be removed, as this would allow hospitality entrepreneurs to better compete with breweries and drink suppliers*", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 12.

52 Heinisch & Hofmann, 2022: 156-157.

53 Santos Goncalves, 2019.

54 "*The feedback on the proposals of the draft revised rules relating to parity obligations was mixed. Stakeholders from almost all stakeholder categories welcomed the proposal to exclude across-platform retail parity*

Debate surrounding these types of clauses has been rife, particularly in the hotel sector. In 2015, the German Competition Authority (*Bundeskartellamt*) ("GCA"), along with several other EU competition authorities, prohibited wide parity clauses that prevented hotels from reducing room prices on competing booking platforms. In contrast to the more permissive approach adopted by other competition authorities in Europe to narrow parity clauses[55], the GCA disallowed narrow MFNs[56] that prevent a hotel from offering cheaper room rates on its own booking platform. Although the Dusseldorf Higher Regional Court annulled the PCA's order in 2019, stating that the narrow application of best-price clauses ought to be classified as a material ancillary agreement to an agency contract and therefore not covered by Article 101(1) TFEU, Germany's Federal Court of Justice (*Bundesgerichtshof*) confirmed that the narrow parity clauses applied by online platforms violated competition law.

Also relevant to this point is the 2012 *Apple Books* case, in which the EC investigated Apple and various international ebook publishers in relation to retail price parity clauses and other pricing clauses that Apple introduced in its iBookstore contracts, after transitioning from a wholesale to an agency model. Although the EC expressed concern that these arrangements were part of a strategy to increase ebook prices, the case was resolved through commitments: Apple agreed not to enter into or enforce any retail price MFN clauses in agreements with ebook retailers or publishers for five years[57]. Concerns about Apple's conduct extended beyond the EU: in 2013 the US Department of Justice looked into five prominent e-book publishers, one of which was Apple, and concluded that they employed parity clauses as a

obligations (often referred to as 'wide retail parity obligations') from the VBER. In particular, among the stakeholders that submitted comments, this proposal was supported by all the distributors and their associations, by half of the stakeholders from the e-commerce sector, as well as by a significant share of business associations that represent both suppliers and distributors and by law firms and their associations. Some of these stakeholders characterised the proposed approach as 'middle-of-the-road' or contrasted it favourably to the UK competition authority's proposal to treat across-platform retail parity obligations as hardcore", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 4.

55 "*In the UK, the view of the Competition and Market Authority (CMA) to date has been that narrow MFNs do not have an appreciable effect on competition and are likely to be necessary to ensure the benefits that online platforms offer to consumers*", https://www.osborneclarke.com/insights/latest-ruling-on-booking-coms-best-price-clauses-is-narrow-the-new-wide.

56 https://www.osborneclarke.com/insights/latest-ruling-on-booking-coms-best-price-clauses-is-narrow--the-new-wide.

57 Chappatte & O'Connel, 2022.

means to establish a coordinated arrangement aimed at raising prices and harming consumers[58, 59].

Although narrow retail parity obligations will continue to benefit from the safe harbour created by 2022 VBER if they meet the applicable general conditions, the 2022 Guidelines suggest that if these obligations are used to cover a significant proportion of users and there is no evidence of efficiencies, the block exemption is likely to be withdrawn[60]. In fact, the exemption has been narrowed, because retail parity obligations between competing platforms (APPAs) are no longer covered by the exemption (Article 5(1)*(d)* VBER).

In contrast to the EC's more flexible approach, Article 9 of the Portuguese Competition Law ("LDC") suggests that both wide and narrow parity clauses are prohibited under Portuguese law.

Despite objections from the PCA (explained below), the Portuguese text introduces a new subparagraph (Article 9(1)*(f)* LDC) that seems to imply that price parity clauses limit competition within the scope of the supply of accommodation, goods or services in hotels or local accommodation establishments[61].

In fact, the PCA issued an opinion[62] stating that Draft Decree 1120/XXII/2021 (which resulted in Decree-Law 108/2021) should not include that subparagraph, suggesting that the extent to which parity clauses affect competition should be assessed on a case-by-case basis, as is customary in most economic sectors and activities[63].

This asymmetry is undesirable as it may result in different rules being applied to the same type of behaviour, which could furthermore lead to a

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58 *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013). "*After a bench trial, the district 13 court concluded that Apple violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., by orchestrating a conspiracy among five major publishing companies to raise the retail prices of digital books, known as 'ebooks'. The court then issued an injunctive order, which, inter alia, prevents Apple from signing agreements with those five publishers that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications*", Case 13-3741, Document 373-1, 06/30/2015, 1543162, p. 2 (https://www.justice.gov/atr/case-document/file/624326/download). Apple appealed before the 2nd United States Circuit Court of Appeals, which upheld the previous judgment. Apple then unsuccessfully appealed that decision before the Supreme Court of Justice of the United States.

59 Explained in: https://www.oxera.com/wp-content/uploads/2018/07/Most-favoured-Nation-clauses_1-1.pdf-1.pdf.

60 About Portuguese law bans on MFNs on booking platforms: Connor, 2022.

61 Oliveira e Costa & Marques de Azevedo, 2021: 1.

62 https://www.concorrencia.pt/sites/default/files/processos/epr/Parecer%20Decreto-Lei%20n.%C2%BA%20108-2021.pdf.

63 Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 10.

compartmentalisation of the internal market, since the PCA applies both the LDC and Article 101 of the TFEU[64, 65].

3.3 Dual pricing and dual distribution

Dual pricing and dual distribution practices have become more common, particularly after the COVID-19 pandemic, mainly because ecommerce has grown significantly[66]. They play a significant role in the market economy since most transactions among suppliers, distributors and consumers are agreed to on digital platforms.

According to a study conducted by McKinsey & Company, during the pandemic ecommerce as a share of total retail sales grew (compared to pre-pandemic years) more than 3 times in the US, more than 4 times in the United Kingdom, and 1.6 times in China. Online purchases accounted for nearly 20% of total global sales in 2021, and almost a quarter of all global sales are expected to be made online by 2025[67].

Furthermore, following a study by the International Trade Administration, global B2C ecommerce revenue is expected to exceed EUR 5 billion by 2027, growing at a steady average annual rate of 14.4%[68].

On top of that, according to an annual survey on the use of Information and Communication Technologies in households and by individuals, in the EU 91% of individuals aged 16 to 74 have used the internet, of which 75% purchased or ordered goods or services for private use. And the percentage of e-shoppers has increased from 55% in 2012 to 75% in 2022[69].

Dual pricing occurs when the same product is displayed at different prices depending on where (online or offline) it is purchased[70]. Given that dual

64 "*It therefore seems necessary to take into account the possible incompatibility between the Draft Decree and Article 3 of Regulation (EU) No 1/2003, insofar as the provisions of the Draft Decree could lead to the prohibition of parity clauses that may be justifiable, and therefore lawful, within the meaning of Article 101(3) of the TFEU*", Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 13.

65 Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 12.

66 Heinisch & Hofmann, 2022: 145 and Ridruejo & Schliephake, 2022.

67 https://www.mckinsey.com/~/media/mckinsey/featured%20insights/mckinsey%20explainers/what%20is%20e%20commerce/what-is-e-commerce_final.pdf.

68 https://www.trade.gov/ecommerce-sales-size-forecast.

69 https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230228-2.

70 2022 Guidelines, paragraph 209.

pricing and dual distribution systems are increasingly common and there is a real risk of distributors and suppliers exchanging information[71], the 2022 Guidelines understand that this practice may be justified, provided that the price difference is reasonable and related to the discrepancy between the costs and investments required for online and offline channels[72]. They may fall under the Article 2(1) exemption of the 2022 VBER because they incentivise and reward investments in online or offline channels. Previously, this type of agreement was considered a "hardcore" restriction[73].

Although dual pricing limiting retailers' access to the internet is still clearly prohibited, the truth is that the EC appears to be suggesting that dual pricing will be analysed with a significant degree of flexibility[74] (this "[...] *will enable them to, for instance, determine ex post an aggregate annual discount based on the mix of online/offline sales made throughout the year instead of ex ante applying a different discount to each individual purchase*"[75]).

Dual distribution occurs when a supplier sells goods or services to independent distributors and directly to consumers[76]. Thus, it is clear that there may be a certain degree of intra-group competition between suppliers when they sell directly to consumers and the independent distributors themselves who sell the products or goods of those suppliers.

While vertical agreements between competitors are seemingly excluded from the block exemption, dual distribution agreements are covered by the vertical agreements safe harbour as long as they do not fall foul of the limits set out in the 2022 Guidelines that apply to online intermediation service providers (e.g. ecommerce marketplaces, app stores, price comparison tools and social media services) that also sell goods or services that compete

71 Ridruejo & Schliephake, 2022.

72 2022 Guidelines, paragraph 209.

73 Commission Guidelines on Vertical Restraints, OJ 2010/C 130/01, paragraph 62.

74 2022 Guidelines, paragraph 209.

75 Varona & Hernández, 2022: 491.

76 "*On the one hand, the review of the old VBER showed that, in view of the increase in the use of dual distribution, the old VBER may exempt vertical agreements where horizontal concerns are no longer negligible, in particular as regards information exchange between suppliers and distributors, and as regards so-called hybrid platforms. On the other hand, that review indicated that extending the dual distribution exemption to wholesalers and importers is appropriate. This extension is reflected in Article 2(4) of the new VBER*", Explanatory Note on the new VBER and Vertical Guidelines, p. 2.

with the companies to which they provide intermediation services, which are excluded from the safe harbour benefit[77, 78, 79].

For instance, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*)("ICA"), in case 1842, *Amazon/Apple*, imposed a EUR 68.7 million fine on Amazon and a EUR 134.5 million fine on Apple for breaching Article 101 TFEU through Apple's distribution activity on Amazon's online marketplace[80]. In Italy, Apple used a dual distribution approach, selling its products directly to consumers and through resellers. These channels consist of an open distribution system, which is used for most of its products, and a selective distribution system, specifically for Beats Wireless products. Under the open distribution system, Apple had established distribution agreements with designated official resellers, providing them with discounts to encourage them to promote and sell Apple products[81].

The ICA ruled that online intermediation service providers with a hybrid function are not eligible to benefit from Regulation 330/2010[82], and the restrictions related to the conditions for providing online intermediation services to third parties are not covered by Regulation 330/2010. In fact, and to support this claim, "[...] *the ICA referred to both the Commission's proposed new draft of the VBER and to its draft Vertical Guidelines to support its conclusion that: (i) providers of online intermediation services with a hybrid function (i.e., that both provide intermediation services and sell goods/services in competition with the undertakings to which they provide such services) cannot benefit from the dual distribution*

77 Czapracka, Harjula, Kuhn & Citron, 2022.

78 Explanatory Note on the new VBER and Vertical Guidelines, p. 2 and Czapracka, Harjula, Kuhn & Citron, 2022.

79 "*All categories of stakeholders were critical of the threshold introduced in Article 2(4) of the draft revised VBER, which limits the current safe harbour for dual distribution to instances where the parties' aggregated market share in the retail market does not exceed 10%. Some stakeholders argued that this threshold should, as a minimum, be replaced by a higher market share threshold (20%) or by an alternative threshold (relating to the share of direct sales of the manufacturer in relation to its entire sales). In addition, many stakeholders indicated that it is difficult and costly (especially for SMEs) to calculate market shares at retail level, notably where local markets and/or different products are concerned. They also pointed to inconsistencies with Article 3 of the VBER, where the relevant market share threshold for the buyer concerns the purchasing market and not the retail market*", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 3.

80 The fines imposed by the ICA were subsequently reviewed and lowered to EUR 58.6 million (Apple) and EUR 114.7 million (Amazon).

81 Kmiecik & Gordley, 2021: 15.

82 Heinisch & Hofmann, 2022: 146.

exceptions; and (ii) the VBER does not apply to restrictions relating to the conditions for the provision of online intermediation services to third parties"[83].

3.4 E-commerce

Article 4*(e)* of the 2022 VBER is an innovative rule that reflects the case law of the European Court of Justice[84] regarding measures designed to prohibit distributors or their consumers from using the internet to sell or resell goods or services; these are considered a "hardcore" restriction under the 2022 Guidelines and the 2022 VBER[85].

For example, on 27 June 2006, the French Competition *Authority* (*Autorité de la Concurrence*) ("FCA") initiated an investigation into potential anti-competitive practices in the cosmetics and personal hygiene distribution sector. Following a thorough investigation, the FCA closed the case against ten of the 11 companies involved (Decision 07-D-07, 8 March 2006).

Although *Pierre Fabre Dermo-Cosmétique* argued that its refusal to sell its products on the internet was justified, the FCA nevertheless considered that such an absolute and general ban on internet sales was anti-competitive (we note that the members of Pierre Fabre's selective distribution system could only sell its cosmetics and personal hygiene products in physical stores and in the presence of a trained pharmacist).

As a result, Pierre Fabre was fined on 24 December 2008, a decision it appealed to the Paris Court of Appeal (*Cour d'appel de Paris*), which in turn requested a preliminary ruling on the matter from the European Court of Justice ("ECJ"). Specifically, the national court asked the ECJ if a general and absolute prohibition on the selling of contract goods to end users over the internet, imposed on authorised distributors in the context of a selective distribution network, constituted a "hardcore" restriction of competition by object for the purposes of Article 101(1) of the TFEU.

The ECJ held that a complete and unconditional prohibition on online sales within a selective distribution network constitutes a breach of Article 101(1) TFEU by object, as it significantly curtails the ability of authorised distributors to sell contractual products to consumers outside their designated

83 Kmiecik & Gordley, 2021: 16.

84 *Pierre Fabre Dermo-Cosmétique SAS v. President de L'Autorite de la Concurrence*, [2011] C-439/09, EU:C:2011:649, and *Coty Germany GmbH v Parfümerie Akzente GmbH*, [2018] C-230/16, EU:C:2017:941.

85 For example, vertical agreements aimed at significantly reducing the aggregate volume of online sales of contract products, 2022 Guidelines, paragraph 203. Moreno-Tapia, López Ridruejo & Sement, 2023.

territory or area of activity. The ECJ determined that this limitation could not be justified on the basis of safety or public health concerns. It also found that maintaining a prestigious image could not be considered a legitimate objective that would warrant restricting competition. It also concluded that the measures in question could not benefit from Regulation 330/2010, as a general ban on using the internet limits both active and passive sales within the meaning of Article 4*(c)* Regulation 330/2010[86].

More recently, the FCA fined Rolex France (jointly with Rolex Holding SA, the Hans Wilsdorf Foundation and Rolex SA) more than EUR 90 million[87]. The selective distribution agreements between Rolex and its retailers prohibited Rolex's network of authorised retailers from selling Rolex watches in response to email requests or on the internet. Rolex claimed that the ban on online sales was intended to protect its image and combat counterfeiting and off-network sales[88]. While acknowledging the legitimacy of these objectives, the FCA found that imposing an online sales ban was not a reasonable and proportionate measure. Therefore, the FCA sanctioned Rolex for an anticompetitive agreement.

However, there are important nuances in the 2022 VBER, as it allows certain restrictions on online sales or restrictions on online advertising that are not intended to prevent the overall use of online advertising platforms[89]. Paragraph 210 of the 2022 Guidelines clarifies that online advertising restrictions can benefit from the exemption provided by Article 2(1) 2022 VBER, provided that they do not have the object of preventing the buyer from using an entire advertising channel. In addition, paragraph 208 of the 2022 Guidelines says that online sales restrictions generally do not have such an object when the buyer remains free to operate his own online store and to advertise online, because in reality the buyer is not prevented from making effective use of the internet to sell goods or services.

Finally, the 2022 VBER and 2022 Guidelines adopt a more flexible approach to dual pricing and equivalence. In fact, the EC dismissed the equivalence approach so the criteria imposed by suppliers in relation to online stores will not

86 Paragraph written closely following Mavroghenis & Kolotourou, 2022.

87 https://www.concurrences.com/IMG/pdf/decision_rolex.pdf?119260/a9b7d48a09fcd29f2090f2e-00334d04248574ebb6b6da997e396be300cf6caf1.

88 https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/lautorite-de-la-concurrence--sanctionne-rolex-dune-amende-de-91-600-000-euros.

89 Urlus & Sutherland, 2022: 7–8.

have to be equivalent to the criteria they impose on physical shops[90] because the online sales market has already developed into a mature and strong channel that "[...] *no longer requires special protection relative to offline sales channels*"[91].

3.5 Selective distribution

A selective distribution system is a distribution framework where the supplier agrees to sell goods or services, directly or indirectly, only to selected distributors that meet specific criteria[92], and where these distributors agree not to sell such goods or services to unauthorised distributors within the territory reserved for selective distribution[93].

Well-known companies with strict quality standards, such as L'Oréal[94], Adidas[95], Guess[96], BMW[97], Chanel[98] and Omega[99], have employed selective distribution systems over the years.

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90 2022 Guidelines, paragraph 208.

91 Explanatory Note on the new VBER and Vertical Guidelines, p. 4.

92 "*The criteria used by the supplier to select distributors may be qualitative or quantitative, or both. Quantitative criteria limit the number of distributors directly by, for instance, imposing a fixed number of distributors. Qualitative criteria limit the number of distributors indirectly, by imposing conditions that cannot be met by all distributors, for instance, relating to the product range to be sold, the training of sales personnel, the service to be provided at the point of sale or the advertising and presentation of the products. Qualitative criteria may refer to the achievement of sustainability objectives, such as climate change, protection of the environment or limiting the use of natural resources. For example, suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means, such as cargo bike instead of by motor vehicle*", 2022 Guidelines, paragraph 144.

93 2022 Guidelines, paragraph 143, Wagner-Von Papp, 2018, and Blewett & Kennis, 2023: 28.

94 *NV L'Oréal and SA L'Oréal ("L'Oréal") v. PVBA De Nieuwe AMCK ("De nieuwe AMCK")*, [1980] 31/80. The *L'Oreal* case, decided in the 1980s, concerns a selective distribution system. The agreement in question included a clause that restricted the distribution of cosmetic products to situations in which an authorised Kérastase hairdresser was present. L'Oreal argued that this requirement was essential to guarantee the appropriate distribution and use of the products. Honório, 2019: 26-27.

95 *Adidas*, *Bundeskartellamt*, 27 June 2017, B3-137/12. Adidas, one of the world's largest sports article manufacturers, implemented a selective distribution system that limits the sale of its products to authorised retailers for final customer purchase. In April 2012, Adidas updated its guidelines for online sales, known as ecommerce conditions, which took effect on 1 January 2013. These conditions included a restriction on the sale of Adidas products through open marketplaces on the internet, among other measures. *Bundeskartellamt*, 27 June 2017, B3-137/12, Case Summary.

96 Commission Decision 17 December 2018, AT.40428, Guess, C(2018) 8455.

97 *Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH*, [1995] C-70/93, ECLI:EU:C:1995:344.

98 Chanel (OJ1994 C334/11), mentioned in Gauberti, 2016: 40.

99 *Omega* (OJ1970 L242/22), mentioned in Gauberti, 2016: 40. "*In Omega* [...] *the European Commission accepted a restriction on the number of dealers because Omega was only physically capable of manufacturing*

Purely qualitative selective distribution systems are not considered to restrict competition if they meet the criteria the ECJ set in the *Metro* judgment. As such, this type of selective distribution system does not require an individual exemption or to qualify for the exemption provided by the 2022 VBER if the nature of the goods or services requires a selective distribution system (this is the case, for instance, of high-quality, high-technology or luxury products); if distributors are chosen on the basis of objective qualitative criteria applied uniformly and not in a discriminatory manner; and if the criteria are not beyond what is necessary.

Even if these conditions are not met, selective distribution agreements can benefit from the exemption under the 2022 VBER if the market shares of the supplier and the buyer do not exceed 30% in their respective markets and the agreement does not contain any "hardcore" restrictions. Also, in addition to the usual examples of qualitative selective distribution criteria that relate to the product range, the training of staff or point-of-sale services, the 2022 Guidelines allow access to the distribution network to be made conditional on achieving sustainability objectives (such as climate change, environmental protection or using natural resources).

While the basic principles of selective distribution have not changed, the 2022 VBER, as in the case of exclusive distribution systems, allows suppliers to restrict buyers of authorised distributors from selling to unauthorised distributors, which was expressly prohibited under Regulation 330/2010.

The 2022 Guidelines also allow suppliers to require distributors to have one or more physical stores or showrooms as a condition to becoming members of their selective distribution system. Suppliers may also impose quality requirements for online sales that are different from those imposed on physical stores, require distributors to make an (absolute) minimum number of sales in physical stores and, in line with the case law of the Court of Justice of the European Union ("CJEU")[100], the 2022 Guidelines expressly provide that distributors may be prohibited from selling products on marketplaces as long as they are allowed to use other online channels and even search engine advertising channels.

a relatively small quantity of its luxury watches and there was only limited demand for such watches", Gauberti, 2016: 40.

100 *Coty Germany GmbH v Parfümerie Akzente GmbH*, [2018] C-230/16, EU:C:2017:941.

4. MAIN CHANGES INTRODUCED BY THE 2023 HBERS AND 2023 GUIDELINES

4.1 R&D agreements

The R&D BER, which focuses on protecting competition in innovation, introduced a number of important changes, albeit not all those discussed during the public consultation phase[101].

Firstly, when two or more of the parties are competing undertakings within the meaning of Article 1(1)(15), Article 101(1) TFEU will not apply to R&D agreements for the duration of the research and development if, at the time the agreement is entered into: *(a)* the combined market share of the parties to the R&D agreements (joint R&D of contract products or contract technologies, or joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement falling under point Article 1(1)*(a)* R&D BER between the same parties) does not exceed 25% on the relevant product and technology markets; *(b)* the combined market share of the financing party and all the parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies does not exceed 25% on the relevant product and technology markets (this exemption only applies to paid-for R&D of contract products or contract technologies, or joint exploitation of the results of R&D of contract products or contract technologies carried out in accordance with a prior agreement falling under Article 1(1)*(b)* R&D BER between the same parties).

Secondly, Articles 10 and 11 R&D BER allow the EC and national competition authorities to withdraw exemptions in concrete cases, in the wake of Article 29 Regulation 1/2003.

Thirdly, market shares will be calculated based on data relating to the preceding calendar year. If the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share will be calculated as an average of the parties' market shares for the three preceding calendar years (Article 7(3) R&D BER)[102].

Fourthly, the EC states that, in general, the benefits of R&D agreements outweigh the harmful effects on competition only until a certain market

101 On the complex relationship between innovation and competition: Oliveira Pais, 2011.

102 Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines, paragraph 10.

power threshold is exceeded. Consequently, the R&D BER exemption may only apply to agreements between competing undertakings provided their combined market share does not exceed 25%. Furthermore, the R&D BER simplifies the grace period to two consecutive calendar years (in all cases) following the year in which the threshold was first exceeded (Article 6(5) R&D BER)[103, 104].

Lastly, if the R&D agreement includes any of the excluded restrictions referred to in Article 9(1), Article 101(1) TFEU will not apply to the remaining part of the R&D agreement, provided that the excluded restrictions can be separated from that remaining part and that the other conditions of the R&D BER are met.

4.2 Specialisation agreements

The Specialisation BER harbour certain types of agreements between undertakings that specialise in the production of different goods or services because they can result in efficiency gains for businesses involved and consumers, as it enables them to concentrate on their core competencies and cut costs[105].

In today's climate, particularly in the aftermath of a pandemic, these types of exemptions are extremely important as increasingly more companies look for ways to compete more effectively. Specialisation agreements can enable undertakings to achieve economies of scale, develop new products and services more quickly, and improve their quality and efficiency[106]. Of all the changes made to this type of block exemption, we would note the following.

Firstly, the new Specialisation BER extends the definition of unilateral specialisation agreements to include specialisation agreements entered into by more than two parties active on the same product market ("*Such benefits can arise first from agreements whereby one or more parties fully or partly give up the manufacture of certain goods or the preparation of certain services in favour of another party or parties*", recital 8). This change is likely to be "[...] *important for small and medium-sized enterprises* [...], *as their size may necessitate cooperation with more than one party*"[107].

103 Ovecka & Holinde, 2023b.

104 Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines, paragraph 10.

105 https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014.

106 McKinsey & Company, 2021.

107 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 4.

Secondly, it simplifies the grace period that applies if the market shares of the parties to the agreement exceed the exemption threshold. If the market shares referred to in Article 3 are initially not more than 20% but subsequently rise above that in one or more of the relevant markets, the exemption established in Article 2 will continue to apply for two consecutive calendar years following the year in which the 20% threshold was first exceeded.

Thirdly, market shares will be calculated on the basis of data relating to the preceding calendar year or, where the preceding calendar year is not representative of the parties' position in the relevant market(s), they will be calculated as an average of the parties' market shares over the previous three calendar years (Article 4*(b)* Specialisation BER, and paragraph 205 of the 2023 Guidelines).

Fourthly, the Specialisation BER clarifies how the market share threshold is calculated in the case of agreements concerning intermediate products. When the specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of downstream products, which they also sell, the Article 2 exemption will only apply if both of the following conditions are fulfilled: *(a)* the parties' combined market share does not exceed 20% on the relevant market(s) to which the specialisation products belong (Article 3*(a)* Specialisation BER); and *(b)* the parties' combined market share does not exceed 20% on the relevant market(s) to which the downstream products belong (Article 3*(b)* Specialisation BER)[108].

Lastly, the new Specialisation BER empowers the EC and the national competition authorities to withdraw the exemption in specific cases, in line with Article 29 Regulation 1/2003.

4.3 Joint ventures and their parent companies

The 2023 Guidelines cover when Article 101 TFEU applies to joint ventures and their parent companies, in line with the CJEU's case law[109]. In particular, they reflect the *LG Electronics* case, in which the ECJ held that a joint venture

108 Skotki, 2023.

109 It considers that parent companies and their joint ventures form a single economic unit, and that the EC should therefore refrain from applying Article 101 TFEU to agreements and concerted practices between parent companies and joint ventures, provided that they occur in the relevant market where the joint venture is present and for periods during which the parent companies exercise decisive influence over them. In this regard, see *LG Electonics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P, EU:C:2017:679, *The Goldman Sachs Group Inc. v. Commission*, C-595/18 P, EU:C:2021:73, *Viho,* C-73/95 P, EU:C:1996:405.

and its parent company may constitute the same entity in some markets, but in some specific cases they may also be considered separate entities, for example, when they operate in different markets or the parent company does not exercise decisive influence over the joint venture.

In the draft of the 2011 Guidelines, the EC stated that "*Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU Competition Law*"[110]. By contrast, paragraph 11 of the final version of the 2011 Guidelines did not follow the line of reasoning of previous proposals, stating that: "*Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings*"[111]. Paragraph 12 of the 2023 Guidelines states that the "[...] *Commission will, in general, not apply Article 101 to agreements or concerted practices between parent companies and their joint venture to the extent that they concern conduct that occurs in relevant market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture*"[112], but, generally, the EC must apply Article 101 to the categories of agreements listed in paragraph 12[113].

Therefore, using "*generally*" to the detriment of the peremptory "*does not apply*" denotes an attempt, in our view, to give some sense and flexibility to the contradiction, for example, between the *Gosme/Martell-DMP* case[114], in which the joint venture and the parent company were considered separate

110 Draft Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 11.

111 For a comparison of the two versions: Bretz, 2023.

112 "*The new proposed guidance does not state that Article 101(1) 'does not apply to' agreements between a joint venture and its parents but solely specifies in paragraph 13 that 'the Commission will typically not apply' Article 101(1) to such agreements. This wording [...] suggests that the Commission does not exclude the possibility that Article 101(1) may apply. Indeed, rather than stating that agreements and concerted practices between a joint venture and its parents cannot be challenged, the Commission only signals that it would not challenge them if they concern activities in the markets where the joint venture is active*", Meyring & Venot, 2022.

113 "*(a) agreements between parent companies to create a joint venture; (b) agreements between parent companies to modify the scope of their joint venture; (c) agreements between parent companies and their joint venture concerning products or geographies in which the joint venture is not active; and (d) agreements between parent companies not involving their joint venture, even if the agreement concerns products or geographies in which the joint venture is active*", Horizontal Guidelines 2023, paragraph 12.

114 Commission Decision 15 May 1991, *Gosme/Martell-DMP*, 91/335/EEC (Official Journal L 185, 11/07/1991 P. 0023 – 0030).

entities, and the *El du Pont de Nemours and Company* case[115], in which the joint venture and the parent company were considered entities of the same group as regards liability[116]. The 2023 Guidelines thus appear to introduce an element of discretion to the application of competition rules[117].

Finally, a coordination joint venture may also be justified if it aims to achieve a sustainable goal, once again reinforcing the principle of sustainable development and alignment with the policies of the United Nations and the European Green Deal[118].

4.4 Sharing of telecommunications infrastructure

Mobile network telecom operators often cooperate to maximise the success (and profits) of the network they build[119]. They share the use of portions of telecoms platforms (for example, antennas or power supplies), operating and maintenance costs, and development costs[120]. This enables them to reduce production costs and, by extension, the final price they charge consumers, as well as provide a better service[121].

While some sharing arrangements can be legal, even if they result in higher prices or reduced supply, the EC acknowledges that they may be a restriction by object if they are used as a tool in operating a cartel[122], or a restriction by effect if they reduce consumer choice, service quality and development[123].

This therefore requires a careful case-by-case analysis[124] taking into account the following elements[125]: *(a)* the type and depth of sharing; *(b)* the scope of the shared services and technologies; *(c)* the purpose of the sharing; *(d)* the duration and structure of the cooperation; *(e)* the geographic market; *(f)* the relevant market's characteristics and structure; *(g)* the number of

115 *El du Pont de Nemours and Company*, [2013] C-172/12 P, ECLI:EU:C:2013:601.

116 In this regard, Bretz, 2023.

117 Meyring & Venot, 2022.

118 Horizontal Guidelines 2023, paragraphs 3 and 516.

119 Escudero & Tuit, 2022: 3.

120 Batchelor & Kafetzopoulos, 2023.

121 Horizontal Guidelines 2023, paragraph 260.

122 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 4.

123 *Network sharing – Czech Republic*, AT.40305, 11 July 2022.

124 *02 (Germany) v. Commission*, T-328/03, EU:T:2006:116, paragraphs 65–71.

125 Horizontal Guidelines 2023, paragraph 264.

sharing agreements in the relevant market; and *(h)* the number and identity of the network operators involved.

4.5 Joint purchasing agreements

The line between a buyer cartel[126] and a joint purchasing agreement[127] is sometimes blurred, and the expert report that the EC requested identifies the omission of criteria to distinguish one from the other (the "[...] *Horizontal Guidelines of 2011 say nothing about what is meant by joint purchasing and how it is distinguishable from a buyer cartel*")[128]. As such, the EC has found itself in need of further guidance on drawing the line between one and the other[129].

In order to distinguish these situations from one another, the EC states that a joint purchasing agreement will not, in principle, be a buyer cartel if: *(a)* the "[...] *joint purchasing arrangement makes it clear to suppliers that the negotiations are conducted on behalf of its members and that the members will be bound by the agreed terms and conditions for their individual purchases, or that the*

126 On the concept of restriction by object: *Allianz Hungária*, C-32/11, EU:C:2013:160, paragraph 45; *Erauw-Jacquery*, P-27/87, ECLI:EU:C:1988:183, paragraph 13; *Binon c. Messageries de la presse,* C-243/83, ECLI:EU:C:1985:284, paragraph 45; Moura e Silva, 2020: 633; Jones & Sufrin, 2014: 203-232. Considering the buyer cartel as restrictive of competition by object: *Campine,* T-240/17, EU:T:2019:778 paragraph 297; *Alliance One v Commission,* T-24/05, EU:T:2010:453; *Deltafina v Commission,* T-29/05, EU:T:2010:355.

127 On the concept of constraint by effect: Jones & Sufrin, 2014: 232–242. On the interconnection between joint purchasing agreements and sustainability agreements: "*A difficult issue of particular importance is whether the pursuit of sustainability objectives by a joint purchasing agreement may influence its characterisation as being restrictive of competition by object or effect. We consider that, in principle, certain joint purchasing arrangements can make a positive contribution to sustainability objectives. Certain agreements between competing purchasers might be regarded as restrictions of competition by object as they amount to a group boycott. We have suggested that a distinction should be made between 'horizontal boycotts' that harm competitors at the same level of the market as the perpetrators of the boycott, on the one hand, and 'vertical purchasing restraints' where purchasers agree not to deal with a supplier or suppliers at a different level of the market, on the other. An example of a vertical purchasing restraint would be what we describe as a sustainable products purchasing agreement, for example where a group of competing purchasers agree to purchase timber only from sustainable sources. We consider such an agreement should not be considered to be restrictive of competition by object, but should instead be analysed on an effects basis*", Whish & Bailey, 2022.

128 Whish & Bailey, 2022: 67. Along the same lines, several "[...] *law firms and associations of competition lawyers and economists consider that legal certainty is lacking due to a perceived difficulty to distinguish between joint purchasing and buying cartels as both involve an agreement on purchase prices. In this regard they point at recent Commission decisions covering buying cartels and the need to clarify the factors that influence the distinction between legitimate purchasing arrangements and by object buying cartels*", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

129 Pree, Gornall, Rijke & The, 2022 and Heinisch & Gerber, 2023.

joint purchasing arrangement purchases on behalf of its members"[130]; and *(b)* the "[...] *members of the joint purchasing arrangement have defined the form, scope and functioning of their cooperation in a written agreement, so that its compliance with Article 101 can be verified ex post and checked against the actual operation of the joint purchasing arrangement*"[131]. But it is important to draw attention to the fact that simply because it is not secret does not rule out the possibility of an agreement being classed as a true buyer cartel. As the 2023 Guidelines acknowledge[132], there are various examples of the EC imposing sanctions on buyer cartels that did not initially operate in secret (*French Beef* decision[133]).

According to the 2023 Guidelines, as the 2001 Guidelines[134] and the 2011 Guidelines[135] did before them, a joint purchasing agreement "[...] *involves the pooling of purchasing activities and can be carried out in various ways, including through a jointly controlled company, through a company in which undertakings hold non-controlling stakes, through a cooperative, by a contractual arrangement or by looser forms of cooperation, for example where a representative negotiates or concludes purchases on behalf of several undertakings* [...]"[136]. Therefore, no distinction is made based on the possible forms of cooperation, i.e. a joint venture can carry out a joint purchasing agreement.

In addition to the fact that this type of agreement may have vertical or horizontal aspects, or both, with the 2022 Guidelines applying to the former and the 2023 Guidelines to the latter, joint purchasing agreements, although capable of harming competition, may also have beneficial effects for it[137].

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130 Horizontal Guidelines 2023, paragraph 282. "*This does not require the joint purchasing arrangement to disclose the identity of its members, in particular where they are small- or medium-sized undertakings and/or account for only a limited share of the joint arrangement's purchases from a supplier. However, it is not the responsibility of suppliers to take steps to find out about the existence of a joint purchasing arrangement* [...]", Horizontal Guidelines 2023, paragraph 282, (a).

131 Horizontal Guidelines 2023, paragraph 282, (b).

132 Van Bael & Bellis, 2023a: 2.

133 Commission Decision 2003/600/EC of 2 April 2003, *French Beef*, OJ L 209, 19.8.2003.

134 Van Bael & Bellis, 2010: 472.

135 Paragraph 195 of the Commission Notice "Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011/C 11/01.

136 Horizontal Guidelines 2023, paragraph 273.

137 "*Joint purchasing arrangements may involve both horizontal and vertical agreements. In such cases, a two-step analysis is necessary. First, the horizontal agreement(s) between the competing undertakings engaging in joint purchasing or the decisions adopted by the association of purchasing undertakings must be assessed according to the principles set out in these Guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, it is necessary to carry out a fur-*

Companies that enter into these agreements are typically small or medium-sized and seek to obtain higher discounts to compete with larger companies. As a result, the positive effects on competition are twofold: it increases competitiveness and reduces prices, which can benefit consumers by giving them greater purchasing power[138] ("*Joint purchasing arrangements generally aim to create a degree of buying power vis-à-vis suppliers, which individual members of the joint purchasing arrangement might not attain if they acted independently. The buying power of a joint purchasing arrangement can lead to lower prices, more variety or better quality products for consumers*"[139]). To go so far as to absolutely restrict these arrangements would potentially be anti-competitive in itself, as it would likely smother the initiative of small and medium-sized entrepreneurs[140] and leave control of the market in the hands of the collective giants, who would be the only ones able to offer quality at attractive prices[141].

4.6 Bidding consortia

For the first time, the 2023 Guidelines address the issue of bidding consortia and dedicate a specific chapter to it (chapter 5.4). A bidding consortium occurs when two or more parties cooperate in a public or private tender to submit a bid[142], with the main concern surrounding them being the possibility that they may result in a bid-rigging cartel (one of the most serious competition law offences).

The alleged cartel case involving two Portuguese undertakings, Aeronorte and Helisul, comes to mind as an interesting decision regarding bidding consortia. The PCA began an investigation after learning from media reports that the National Fire Brigade and Civil Protection Services had cancelled an international public tender for aerial services to fight forest fires owing to suspicions of collusion between competitors. The tender was for the acquisition of six heavy lift helicopters and related services, including piloting,

ther assessment of any vertical agreements between the joint purchasing arrangement and its individual members and between the joint purchasing arrangement and suppliers. Such vertical agreements must be assessed using the VBER and Vertical Guidelines. Vertical agreements that are not covered by the VBER are not presumed to be illegal but require an individual assessment under Article 101", 2023 Guidelines, paragraph 276.

138 Whish, 2009: 593.

139 2023 Guidelines, paragraph 275.

140 On the link between free competition and restrictions imposed by competition law: Masso, 2020: 189–204.

141 On the advantages of horizontal agreements for efficiency and economic integration: Moura e Silva, 2020: 753; Jones & Sufrin, 2016: 715; Brodley, 1982: 1521.

142 2023 Guidelines, paragraph 347, and Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 5.

crewing and maintenance. The PCA's investigation concluded that the two companies in question had made a single bid to artificially reduce competition[143], a conclusion that Lisbon's Court of Commerce later rejected[144]. The court stressed that while the defendants did not provide evidence to support their inability to submit individual tenders, it could not conclude that they were capable of doing so, as the burden of proving this rested with the prosecution and it had failed to do so[145].

In the EC's view, a bidding consortium agreement "[...] *allows the parties to participate in projects that they would not be able to undertake individually*"[146], so that, for there to be an infringement, it must be verified at the individual bid level whether there is a real and effective possibility[147] that the parties "*would be able to*" compete individually, and not just hypothetically[148]. This is justified by the simple fact that if they could carry out the proposed project individually, then they would be competitors; if they cannot, then they would not be competitors and there would be no restriction of competition[149].

143 https://www.concorrencia.pt/pt/artigos/adc-aplica-coima-empresas-por-cartel-em-concurso-publico--para-o-fornecimento-de-meios.

144 Decision available at: https://www.concorrencia.pt/sites/default/files/processos/contencioso/TCL-2008-05-21-IDF_2007_86-PRC_2005_20.pdf.

145 One of the companies even requested clarification of the tender. Furthermore, it is important to mention that the tender was open to both national and foreign companies. It is certain that the defendants, by presenting themselves as a consortium, removed competition between themselves. However, it would be premature to conclude that they prevented, distorted or significantly restricted competition based solely on this. Furthermore, there is no evidence (or even an allegation) that the consortium's participation caused all other technically capable companies to refrain from submitting bids. Moreover, there is no conclusive evidence to suggest that the defendants had any intention of restricting or monopolising sources of supply or reducing the number of competitors for the relevant products or services by submitting a single bid, Decision of the Lisbon's Court of Commerce, 21 May 2008, Case 48/08.7TYLSB.

146 2023 Guidelines, paragraph 352.

147 *Generics (UK) Ltd and Others v. Competition and Markets Authority*, C-307/18, EU:C:2020:52.

148 "*The assessment of whether the parties are capable of competing in a tender procedure individually, and are thus competitors, depends firstly on the requirements included in the tender rules. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: it is necessary to assess whether each party is realistically capable of completing the contract on its own, taking into account the specific circumstances of the case, such as the size and capabilities of the undertaking, the level of financial risk induced by the project as well as the level of the investments required for the project, and the present and future capacity of the undertaking assessed in light of the contractual requirements*", 2023 Guidelines, paragraph 353.

149 Batchelor & Kafetzopoulos, 2023.

But even if the agreement fulfils the requirements of Article 101(1) TFEU, it may still be justified under Article 101(3) TFEU if[150] *(a)* the efficiency gains of a joint bid through a bidding consortium agreement are more easily passed on to consumers and the tendering authority; *(b)* the joint bid allows the parties to submit an offer that is more competitive than the offers they could have submitted individually; and *(c)* awarding the contract does not eliminate competition and other effective competitors take part in the tender procedure.

4.7 Information exchange[151]

An information exchange may be considered a restriction by object (so there is no need to assess the detrimental effects on the market since the conduct is considered sufficiently harmful per se) if the exchange concerns commercially sensitive information and is capable of establishing certainty as to strategic behaviour of undertakings on the market[152]. It may also be considered a restriction by effect in view of[153] *(a)* the nature of the information exchanged (e.g. price and investment information[154]); *(b)* the characteristics of the exchange; and *(c)* the market's characteristics(e.g. degree of concentration and market share stability)[155].

While information exchange agreements, can, in some cases, facilitate collusion and potentially foreclose the market, the 2023 Guidelines[156] recognise that exchanges of information can potentially have beneficial effects on competition[157], as they can directly benefit consumers by, for example, reducing

150 2023 Guidelines, paragraphs 358–359.

151 "*For the purposes of this Chapter, information exchange includes the exchange of (i) raw, unorganised digital content that may need processing in order to make it useful (raw data); (ii) pre-processed data, that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information of any form, as well as (iv) any other type of information, including non-digital information*", 2023 Guidelines, paragraph 367.

152 *Infineon Technologies v. Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 100, *Dole Food and Dole Fresh Fruit Europe v. Commission*, C-286/13 P, EU:C:2015:184, paragraph 122 and 2023 Guidelines, paragraph 413.

153 *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

154 Moura e Silva, 2020: 708.

155 This was also the case in the 2011 Horizontal Guidelines, paragraphs 77–85.

156 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023 2–3.

157 2023 Guidelines, paragraph 372.

prices and thereby improving their welfare[158]. "*The access to reliable market information can enable undertakings to effectively plan and forecast their production and commercial activities as well as to invest in new production powers or in R&D, which can, on their part, lead to better quality, more innovations and lower prices of the offered goods and services*"[159].

Compared to the 2011 Guidelines[160], most stakeholders considered that the 2023 Guidelines were flawed by default[161] because they provided few coordinates for undertakings and others to assess with a relative degree of certainty whether they were involved in a horizontal cooperation agreement and there was no fixed market share or safe harbour[162]. As such, and according to those stakeholders, the Guidelines failed to fulfil one of its main goals: to provide stakeholders with simpler, clearer and up-to-date rules and guidance that can help businesses to self-assess the compliance of their conduct with competition law.

The 2023 Guidelines also lack a safe harbour and a fixed market share and the matter remains unclear[163]. Furthermore, despite the EC's efforts to fill the gaps in the 2011 Guidelines, the 2023 HBERs and 2023 Guidelines, in our view, have one shortcoming regarding the marginal treatment of information exchanges in merger settings, even though the 2023 Guidelines briefly mention this situation in paragraph 371 ("*Information may also be*

158 Bulgarian Commission on Protection of Competition & United Nations Conference on Trade and Development, 2013: paragraph 8.

159 Bulgarian Commission on Protection of Competition & United Nations Conference on Trade and Development, 2013: paragraph 7.

160 In the 2011 Guidelines, "[...] *the EU Commission affirms that the exchange of business information between competitors may have a pro-competitive effect and may lead to substantial gains in efficiency. Information exchange may have pro-competitive effects in particular, if it allows companies to collect market data in order to become more efficient and more capable to satisfy customer requests*", CMS, 2011: 2.

161 "*Respondents consider that the chapter contains too little guidance to allow for self-assessment of horizontal cooperation agreements. They consider that there are many pro-competitive forms of information exchange that are currently not addressed in the chapter. Horizontal cooperation mentioned in this regard cover information exchange in mergers and acquisitions projects or the initial stages of horizontal cooperation, in restructuring scenarios, for the purposes of the compilation of industry statistics, in the context of eco-systems and in areas where interoperability is needed. Respondents from the banking, automotive, insurance and agricultural sectors feel that their sectors would benefit from individual guidance. Other respondents requested individual guidance on information exchange in carbon emissions trading, trade associations and joint purchasing cooperation*", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

162 Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

163 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 3.

exchanged in the context of an acquisition process. In such cases, depending on the circumstances, the exchange may be subject to the rules of the Merger Regulation. Any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control remains subject to Article 101. This assessment must be made throughout the acquisition process, as what is directly related to and necessary for the implementation of the acquisition may depend on which stage the acquisition process is at")[164,165].

We believe that the 2023 Guidelines perpetuate a considerable state of uncertainty as to what, if any, information competitors can share, and what are the conditions for that exchange. While they acknowledge that each case must be assessed in light of the specific elements of the framework under discussion, they do not provide clear guidance on assessing the exchange of current and recent information[166].

4.8 Sustainability agreements[167]

Unlike the 2011 Guidelines[168], but similar to the Guidelines published in 2001[169], the 2023 Guidelines seem to present (in chapter 9) specific, albeit residual, coordinates[170] concerning sustainability agreements ("[...] *the term* [...] *refers to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the forms of cooperation*"[171])[172].

164 Heinisch & Gerber, 2023: 9.

165 Ovecka & Holinde, 2023a: 2.

166 With the same concerns, Van Bael & Bellis, 2023b: 1-2.

167 On the link between competition law and sustainability: Holmes, Middelschulte & Snoep, 2021: 3-15.

168 They did not ignore these agreements altogether. Although there was no specific reference to them, they could be included in other chapters, as was the case with the chapter on R&D agreements, Jones & Sufrin, 2014: 739.

169 On the provisions of the 2001 Guidelines on environmental agreements, see Van Bael & Bellis, 2010: 510-524.

170 In this sense, Little, Berg, Pradille & Aubry, 2022: 403 and Annex to the Communication from the Commission, Approval of the Content of a Draft for a Communication from the Commission on Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 523.

171 2023 Guidelines, paragraph 521.

172 "*Some stakeholders suggested that specific guidance should be provided in the Vertical Guidelines in relation to sustainability objectives. They asked, in particular, for reassurance in the Vertical Guidelines about the use of sustainability criteria for the establishment of a selective distribution network. In addition, several stakeholders requested guidance on the assessment of sustainability objectives under Article 101(3) of the Treaty*",

Environmental concerns have garnered increasing weight in the EC's agenda to the point of being considered fundamental, so the resurgence of a chapter dedicated to sustainability agreements is understandable[173, 174]. In fact, in our view, the EU treaties enshrine sustainable development policies as a key principle of the European integration process (Article 3 TEU[175])[176], as the 2023 Guidelines do in terms of the UN's 2030 Sustainable Development Goals[177], which all the Member States adopted in 2015 ("*By adding a new chapter to its guidelines, the Commission acknowledges the increased importance of sustainability agreements and the need for guidance* [...]"[178]). Indeed, it would probably not make sense to seek to promote sustainability on the one hand, and condemn those who follow practices that reduce negative externalities on the other, provided they do not serve to hide agreements with anti-competitive purposes (greenwashing)[179].

It may be advisable to consider a broader definition[180] of sustainability agreements[181] since their object can be the protection[182] of the environment, biodiversity, public health, labour conditions, animal welfare, human rights;

Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 15.

173 "[...] *Horizontal Guidelines are not fully adapted to the economic and societal developments of the last ten years, such as* [...] *the pursuit of sustainability goal*", Paragraph 6 of the Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.

174 For an in-depth look at the problem of sustainability in competition law, Holmes, 2020: 354–405.

175 Treaty on European Union.

176 In our view, the concern with sustainable development was already latent in the former Article 2 of the Treaty of Paris: "*The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States*".

177 Goal 1: no poverty; Goal 2: zero hunger; Goal 3: good health and well-being; Goal 4: quality education; Goal 5: gender equality; Goal 6: clean water and sanitation; Goal 7: affordable and clean energy; Goal 8: decent work and economic growth; Goal 9: industry, innovation and infrastructure; Goal 10: reduced inequalities; Goal 11: sustainable cities and communities; Goal 12: responsible consumption and production; Goal 13: climate action; Goal 14: life below water; Goal 15: life on land; Goal 16: peace, justice and strong institutions; Goal 17: partnerships for the goals.

178 Little, Berg, Pradille & Aubry, 2022: 403.

179 Whish, 2009: 598.

180 Holmes, 2020: 354–405, Comba, 2022: 1–10.

181 This is a much broader definition than the one in the 2001 Horizontal Guidelines, Little, Berg, Pradille & Aubry, 2022: 403 and Comba 2022: 1.

182 2023 Guidelines, paragraph 517, and Comba, 2022: 1.

energy efficiency[183]; quality of life; building lasting and resilient infrastructure; fair trade; available food (i.e. avoiding food waste); food health; and natural resources.

In comparison, the UK's Competition and Markets Authority ("CMA") published draft guidance that, despite following the wider definition of sustainability agreements in the 2023 Guidelines, identifies climate change agreements as a specific subclass of environmental sustainability agreements. Giving more favourable treatment to this subset under the exemption in the Competition Act 1998 enables the UK to meet its climate change targets under both domestic and international law (an example of the use of the framework i*s* the agreed shift, by delivery companies, to use electric vehicles[184]).

In our view, competition law could play a role in combating unsustainable development ("*Given that competition law is an intellectual construct, and climate change is real, one should assume that competition law will be adaptable*"[185])[186]. Heavy is the head that wears the crown because the line between sustainable benefit and benefit in terms of competition may lead to a conflict of values. For example, if two companies enter into a sustainable agreement that is extremely beneficial for the environment but increases the price of a particular product, is that allowed under competition law? The answer is not clear to us, nor does it seem to have been to the EC, as it issued the 2023 Guidelines precisely to help frame the competition rules to cover these hypotheses[187].

Firstly, a sustainable agreement may fall outside the scope of Article 101(1) TFEU if the agreement is compatible with the internal market, for example, because it *(a)* benefits consumers[188] of a particular product on the relevant market[189]; *(b)* only aims to ensure that companies, suppliers and distributors comply with requirements or prohibitions in binding international treaties;

183 Whish, 2009: 598.

184 https://www.algoodbody.com/insights-publications/sustainability-agreements-and-competition-law.

185 Dirk Buschle, Deputy Director, Legal Counsel, Energy Community Secretariat Vienna, Concurrences, "Energy Community Forum", 25 January 2021.

186 Malinauskaite & Erdem, 2023: 1-24.

187 Comba, 2022: 2.

188 For some insightful critical comments regarding the concept of the "consumer welfare standard", Coutinho, 2023: 1-5 and Van Bael & Bellis, 2010: 76-80.

189 2023 Guidelines, paragraph 528.

(c) only concerns companies' internal conduct and not their external economic activity[190]; *(d)* aims to create a database with information on suppliers that follow sustainable rules[191]; or *(e)* aims to organise a campaign promoting environmental impacts and other negative externalities.

Secondly, the exemption from Article 101(3) TFEU may be granted to an agreement that is covered by Article 101(1) TFEU if it complies with the following cumulative conditions[192]: *(a)* it contributes to promoting the production or distribution of goods or to economic and technological progress[193]; *(b)* it is indispensable; *(c)* its benefits outweigh its harm[194]; *(d)* consumer benefits are connected with consuming or using the products it covers; *(e)* there is evidence of how the benefits will manifest and an estimate of their impact; *(f)* it does not promote the elimination of competition, and the market remains competitive to some degree[195].

By contrast, in 2023 the Netherlands Authority for Consumers and Markets (*Autoriteit Consument & Markt*) ("ACM") published a policy rule outlining its approach to sustainability agreements (*Beleidsregel Toezicht ACM op duurzaamheidsafspraken*)[196] to replace its initial two draft guidance documents in this area. This new rule is less complicated and burdensome than the conditions specified in the 2023 Guidelines[197]. Even though the ACM has stated that it will follow the EC's 2023 Guidelines, it has taken the

190 2023 Guidelines, paragraph 529 and Little, Berg, Pradille & Aubry, 2022: 404.

191 2023 Guidelines, paragraph 530 and Little, Berg, Pradille & Aubry, 2022: 404.

192 Little, Berg, Pradille & Aubry, 2022: 404–405, Van Bael & Bellis, 2023a: 6 and 2023 Guidelines, paragraphs 556–596.

193 This was also stated in the 2001 Horizontal Guidelines, paragraph 186.

194 Also, *Asnef-Equifaz*, C-238/05, EU:C:2006:734, paragraph 72. This was already the case in the 2001 Horizontal Guidelines, paragraph 193.

195 "[...] *the elimination of competition for a limited period of time, where this has no impact on the development of competition after that period elapses, is not an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce to the market a sustainable substitute for the product, with the aim of raising consumer awareness about the characteristics of the new product, will, in general, fulfil the last condition of Article 101(3)*", 2023 Guidelines, paragraph 596.

196 https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf.

197 "[...] *the EC approach set out in the draft does not take as liberal approach to exemption on sustainability grounds as the Dutch approach, and there has been limited appetite and engagement by companies to date for approaching the European Commission for informal guidance on sustainability initiatives*", MacLennan & Citron, 2022.

liberty of going further than the EC in certain aspects. For instance, due to the urgent need to prevent harm to the environment and the role that undertakings can play in this area, the ACM considers it inappropriate to conduct further investigations into an environmental damage agreement "[…] *if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages* […]"[198]. Furthermore, according to the ACM, agreements that only seek to ensure compliance with sufficiently defined requirements or prohibitions established by legally binding international treaties, agreements or conventions on environmental, social and corporate governance issues or by national law do not fall within the scope of Article 101(1) TFEU[199].

Overall, we believe that the final version of the 2023 Guidelines does not significantly move away from the EC's stance outlined in the draft.[200] Although those who expected a more radical "green" approach to EU competition law may feel a little let down[201], the 2023 Guidelines represent a positive change as they provide reasonably useful guidance for undertakings on the interplay between sustainability projects and the limits of EU competition law ("*Although* […] *the Commission may not have been as ambitious as it could have been in relation to the fair share criterion for application of the Art. 101(3) exemption*"[202]).

5. FINAL THOUGHTS

Having assessed the new legal framework and guidelines applicable to vertical and horizontal agreements, we are still uncertain whether this is a proper reform or nothing more than a series of changes so everything remains the same.

The EC continues to produce rather long documents, with complex sets of examples and instructions that, ironically, can be difficult to interpret.

198 Kuipers, Beetstra & Van Roosmalen, 2023.

199 Kuipers, Beetstra & Van Roosmalen, 2023.

200 Gassler, 2023.

201 "*The EC's open-door policy creates scope to seek further informal comfort. But, concerned about floodgates opening, the EC has not bowed to pressure to flex the existing rules further (as advocated by the more liberal approach of Dutch and UK competition regulators)*", Ford, Mangiaracina & Cochrane, 2023.

202 Wright & Byrne, 2023: 3.

Also, proposing the economic balance test set out in Article 101(3) TFEU as a plan B for an array of situations in which the impact on competition should be assessed *ad hoc*, as most competition practitioners can attest, is, in our view, far from realistic, as this provision, like equivalent national provisions, are rarely used in practice.

Rather than recognising the digital economy for what it is, an all-pervading phenomenon, the EC clearly still considers it a separate reality and treats it as such. In our view, it is key that the EC acknowledges that ecommerce, price algorithms and artificial intelligence are not confined to a particular industry.

With regard to vertical agreements, the 2022 Guidelines and 2022 VBER have maintained the structure and essence of their previous versions. Some of the VBER's provisions have been clarified and adjusted, such as those on non-compete clauses, parity clauses, dual pricing and dual distribution, ecommerce and selective distribution. The 2023 Vertical Guidelines have clarified small important issues, such as the broadening of the concept of active sales: in addition to the means referred to in the 2010 Guidelines (letters, visits, emails and calls), the Guidelines list various examples of active selling related to targeted advertising and promotion online, but they still avoid critical issues such as resale price maintenance, even within a franchise system.

Nonetheless, it seems that suppliers now enjoy greater flexibility to combine various distribution models and "[…] *wish to oblige their distributors to pass-on sales restrictions to their customers*"[203]. The anticipated surge in enforcement cases at both EU and national levels is likely to offer greater guidance and, hopefully, enhance legal certainty[204].

Regarding the 2023 Horizontal Guidelines and 2023 HBERs, they apply to a variety of agreements, such as joint ventures and their parent companies, purchase agreements and standardisation agreements, sharing of telecommunications infrastructure, production and commercialisation agreements, joint purchasing agreements, bidding consortia, information exchange, sustainability agreements and R&D agreements.

In our opinion, while the EC has made commendable efforts to address the gaps in the 2011 Guidelines, the 2023 HBERs and 2023 Guidelines may still have some limitations with regard to information exchanges. This issue

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203 Heinisch & Hofmann, 2022: 159.

204 Heinisch & Hofmann, 2022: 159.

is of particular concern in a context where information is readily available. For example, parties engaging in M&A would have benefitted from more detailed guidance, in particular in relation to information exchange in the period between signing and closing where parties remain independent, but a significant amount of information often needs to be exchanged in order to be prepared for Day 1 as a combined company[205].

Moreover, in relation to sustainability agreements, the 2023 Guidelines and 2023 HBERs appear to offer companies the opportunity to create inventive collaborative initiatives in the sustainability field, notwithstanding the complex framework for such cooperation. Chapter 9 encourages undertakings to seek informal advice on initiatives that require greater case expertise but stops short of adopting the approach of some authorities who have confirmed that they will not impose fines or take enforcement action in relation to sustainability agreements in certain circumstances[206].

BIBLIOGRAPHY

Batchelor, Bill & Kafetzopoulos, Andreas

2023 *New EU Competitors Cooperation Framework: Stricter on Information Exchange. Broader on Joint Sustainability Agreements*, Skadden, available at https://www.skadden.com/insights/publications/2023/06/new-eu-competitors-cooperation-framework [Consulted on 26/07/2023]

Bellis, Jean-François

2011 "The New EU Rules on Vertical Restraints", in *Revista de Concorrência e Regulação*, n.º 5, pp. 25-46

Blewett, Richard & Kennis, Maarten

2023 *EU Vertical Agreements*, Thomson Reuters Practical Law, 06 June 2023, available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/06/eu_vertical_agreements_June_2023.pdf [Consulted on 25/07/2023]

Bretz, Oliver

2023 *And now? The new Horizontal Guidelines and Joint Ventures*, Euclid Law, 29 June 2023, available at https://euclid-law.eu/what-now-the-new-horizontal-guidelines-and-joint-ventures/ [Consulted on 14/07/2023]

205 Czapracka, Harjula, Kuhn & Citron, 2023: 13.

206 As such, Czapracka, Harjula, Kuhn & Citron, 2023: 12.

BRICE, Miriam

2008 *The Portuguese Competition Authority Accepts Commitments of a Leading Food Company in Relation to Vertical Restraints (Nestlé)*, e-Competitions May 2008, Article 26655, available at https://www.concurrences.com/fr/bulletin/special-issues/anticompetitive-object-effect/ententes-3317/the-portuguese-competition-authority-accepts-commitments-of-a-leading-food [Consulted on 04/12/2023]

BRODLEY, Joseph

1982 "Joint Ventures and Antitrust Policy", in *Harvard Law Review*, vol. 95

BUNGENBERG, Marc

2024 *Foreign Subsidies Regulation: A Commentary*, Germany: Bloomsbury Academic

CHAPPATTE, Philippe & O'CONNELL, Kerry

2022 *E-Commerce: Most Favoured Nation Clauses*, Global Competition Review, available at https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/e-commerce-most-favoured-nation-clauses [Consulted on 06/01/2024]

CMS

2011 *Information Exchange between Competitors*, Newsletter Competition, spring 2011, CMS, available at https://cms.law/en/media/local/cms-vep/files/publications/publications/information-exchange-between-competitors [Consulted on 26/07/2023]

COMBA, María Campo

2022 "EU Competition Law and Sustainability", in *Erasmus Law Review*, Eleven International Publishing, n.º 2

CONNOR, Charley

2022 *Portuguese Law Bans MFNs on Booking Platforms*, Global Competition Review, available at https://globalcompetitionreview.com/article/portuguese-law-bans-mfns-booking-platforms [Consulted on 05/12/2023]

COSTA, Guilherme Oliveira e & AZEVEDO, Francisco Marques de

2021 *Olhar para a Floresta, mas focar-se apenas na Árvore: as opções legislativas do Decreto-Lei n.º 108/2021*, Sérvulo Publications, 15 December, available at https://www.servulo.com/en/knowledge/Olhar-para-a-Floresta-mas-focar-se-apenas-na-Arvore-as-opces-legislativas-do-Decreto-Lei-n-1082021/7753/ [Consulted on 09/01/2024]

COUTINHO, João Paulo

2023 "Servizio Elettrico Nazionale – Between the "consumer welfare" standard and a unitary theory of abuse: nothing new in the west?", in *OADC,*

Centro de Estudos e Investigação em Direito, Universidade Católica Portuguesa, coordination by Sofia Oliveira Pais, available at https://fd.porto.ucp.pt/pt-pt/asset/12251/file, [Consulted on 19/07/2023]

Czapracka, Katarzyna; Harjula, Marika; Kuhn, Tilman & Citron, Peter

2023 *The New EU Horizontal Cooperation Antitrust Rules*, White & Case, available at https://www.whitecase.com/insight-alert/new-eu-horizontal-cooperation-antitrust-rules [Consulted on 07/12/2023]

Czapracka, Katarzyna; Kuhn, Tilman; Sakellariou-Witt, Strati & Citron, Peter

2022 *New EU Competition Rules for Distribution Agreements, Kluwer Competition Law Blog*, available at https://competitionlawblog.kluwercompetitionlaw.com/2022/05/30/new-eu-competition-rules-for-distribution-agreements/ [Consulted on 08/01/2024]

Dabbah, Maher

2006 *EC and UK Competition Law – Commentary, Cases and Materials*, reprinted, Cambridge: Cambridge University Press

Escudero, Alberto & Tuit, Michael

2022 *New rules on agreements between competitors*, PwC, available at https://periscopiofiscalylegal.pwc.es/wp-content/uploads/2022/06/2.-New-rules-on-agreements-between-competitors-DEFINITIVO.pdf [Consulted on 18/07/2023]

Ford, Jonathan; Mangiaracina, Annamaria & Cochrane, Emma

2023 *Baby steps – European Commission opens the door for positive engagement on sustainability agreements but more can be done*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2023/july/baby-steps_european-commission-opens-the-door-for-positive-engagement-on-sustainability-agreements [Consulted on 09/01/2024]

Gassler, Martin

2023 *The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022*, Kluwer Competition Law Blog, available at https://competitionlawblog.kluwercompetitionlaw.com/2023/06/07/the-new-sustainability-chapter-in-the-horizontal-guidelines-changes-in-the-final-version-compared-to-the-draft-version-of-march-2022/ [Consulted on 07/12/2023]

Gauberti, Annabelle

2016 Why Selective Distribution makes sense for Luxury and Premium Businesses, in *World Trademark Review*, February/March, available at https://crefovi.com/Selective%20distribution.pdf [Consulted on 08/01/2024]

Geradin, Damien & Bania, Konstantina

2024 *The Digital Markets Act: A Guide to the Regulation of Big Tech in the EU*, Germany: Bloomsbury Academic

Goncalves, Santos

2019 *Price Parity Clauses and Online Platforms: Is There a New Way Forward*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/april/three-undertakings-two-or-just-one [Consulted on 04/12/2023]

Gorjão-Henriques, Miguel & Sousa Ferro, Miguel

2010 "The Latest Reform of EU Competition Law on Vertical Restraints", in *Revista de Concorrência e Regulação*, year 1, n.º 4, pp. 111-138

Goyder, Joana & Albors-Llorens, Albertina

2009 *Goyder's EC Competition Law*, 5th edition, New York: Oxford University Press

Greber, David

2003 *Law and Competition in Twentieth Century Europe*, reprinted, Oxford: Clarendon Press

Heinisch, Oliver & Hofmann, Michael

2022 "European Union: updated rules on vertical agreements", in *Law Business Review: Europe, Middle East and Africa Antitrust Review*, available at https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-updated-rules-vertical-agreements [Consulted on 21/07/2023]

2023 *European Union: New EC Draft HBERs and UK Draft Horizontal Guidelines Shape Horizontal Agreements*, Global Competition Review, available at https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2024/article/european-union-new-ec-draft-hbers-and-uk-draft-horizontal-guidelines-shape-horizontal-agreements [Consulted on 05/12/2023]

Holmes, Simon

2020 "Climate change, sustainability, and competition law", in *Journal of Antitrust Enforcement*, 2020, vol. 8, pp. 354-405

Holmes, Simon; Middelschulte, Dirk & Snoep, Martijn
2021 *How sustainability can be taken into account in every area of competition law*, USA: Concurrences

Honório, Mariana Lima
2019 *Os Sistemas de Distribuição Seletiva: As Proibições de Venda em Plataformas de Comércio Online*, Master's Thesis, Nova School of Law

Inderst, Roman & Thomas, Stefan
2022 "Sustainability Agreements in the European Commission's Draft Horizontal Guidelines", in *Journal of European Competition Law & Practice*, vol. 13, issue 8, December 2022, pp. 571-577

Jones, Alison & Sufrin, Brenda
2014 *EU Competition Law – Text, Cases, and Materials*, 5th edition, United Kingdom: Oxford University Press
2016 *EU Competition Law – Text, Cases, and Materials*, 6th edition, United Kingdom: Oxford University Press

Kmiecik, Andrzej & Gordley, Catherine
2021 "Italian Competition Authority condemns Amazon and Apple for discriminatorily limiting access to Amazon Marketplace", in *VBB on Competition Law*, volume 21, n.º 11, available at https://www.vbb.com/media/Insights_Newsletters/VBB_on_Competition_Law_Volume_2021_No._11.pdf [Consulted on 08/01/2024]

Krueger, Birgit & Mühle, Jan
2017 "The EU's Vertical Restraints Rules and E-commerce – A case for continuity, modification or disruption?", in *Competition Law & Policy Debate*, vol. 3, issue 2, May 2017

Kuipers, Pauline; Beetstra, Tialda & Van Roosmalen, Joost
2023 *Sustainability and Competition: From Hot Topic to Business As Usual?*, Kluwer Competition Law Blog, available at https://competitionlawblog.kluwercompetitionlaw.com/2023/10/13/sustainability-and-competition-from-hot-topic-to-business-as-usual/ [Consulted on 05/09/2023]

Le Strat, Ariane & King, Saskia
2022 *The impact of the new VBER and VABEO rules for franchises*, Bird & Bird Insights, 17 November, available at https://www.twobirds.com/en/insights/2022/uk/the-impact-of-the-new-vber-and-vabeo-rules-for-franchises [Consulted on 11/01/2024]

Leucht, Brigitte & Marquis, Mel
2013 "American Influences on EEC Competition Law: Two Paths, How Much Dependence?", in Patel, Kiran Klaus & Schweitzer, Heike (ed.), *The*

Historical Foundations of EU Competition Law, Oxford: Oxford University Press

Little, David; Berg, Werner; Pradille, Clément & Aubry, Axelle
2022 "The European Commission's Draft Guidelines on Sustainability Agreements – a legal analysis and practical implications", in *European Competition Law Review*, vol. 43, issue 9

Louveaux, Bertrand; Jeffs, Claire; Lyle-Smythe, Anna & Yeung, Natalie
2023 *Competition & Regulatory Newsletter: European Commission Adopts New Horizontal Block Exemption Regulations and Guidelines*, Slaughter and May Newsletters, available at https://my.slaughterandmay.com/insights/newsletters/european-commission-adopts-new-horizontal-block-exemption-regulations-and-guidelines [Consulted on 19/09/2023]

Maclennan, Jacquelyn & Citron, Peter
2022 *Recent Guidance on Sustainability Cooperation from the Dutch Competition Authority*, White & Case, available at https://www.whitecase.com/insight-alert/recent-guidance-sustainability-cooperation-dutch-competition-authority [Consulted on 07/12/2023]

Malinauskaite, Jurgita & Erdem, Faith
2023 "Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities", in *Journal of Common Market Studies*, pp. 1-24, available at https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.13458#pane-pcw-references [Consulted on 19/07/2023]

Masso, Fabiano Del
2020 "A Livre Concorrência como Princípio da Teoria Jurídica do Mercado", in Pais, Sofia Oliveira & Bagnoli, Vicente (coord.), *Temas Atuais de Direito da Concorrência – Economia Digital, Direitos Fundamentais e Outros Desafios*, Porto: Universidade Católica Editora

Mavroghenis, Stephen & Kolotourou, Christina
2022 *European Union: Restrictions of Online Sales*, Global Competition Review, available at https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/european-union-restrictions-of-online-sales [Consulted on 07/01/2024]

Mckinsey & Company
2021 *The New Digital Edge: Rethinking Strategy for the Postpandemic Era*, Mckinsey Digital, available at https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/the%20new%20digital%20edge%20rethinking%20strategy%20for%20

the%20postpandemic%20era/the-new-digital-edge-rethinking-strategy-for-the-postpandemic-era.pdf [Consulted on 26/07/2023]

Meyring, Bernd & Venot, Erik

2022 *Three undertakings, two or just one? Another attempt to increase certainty for agreements between parents and joint ventures*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/april/three-undertakings-two-or-just-one [Consulted on 16/07/2023]

Morais, Luís

2009 *Os Conceitos de Objecto e Efeito Restritivos da Concorrência e a Prescrição de Infracções de Concorrência*, Coimbra: Almedina

2011 "The New EU Framework of Horizontal Cooperation Agreements", in *Revista de Concorrência e Regulação*, n.º 6

Moreno Belloso, Natalia

2022 *The EU Digital Markets Act (DMA): A Summary*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109299 [Consulted on 18/09/2023]

Moreno Belloso, Natalia & Petit, Nicolas

2023 *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411743 [Consulted on 18/09/2023]

Moreno-Tapia, Irene; Ridruejo, López & Sement, Floriane

2023 *Implications of the New Vertical Block Exemption Regulation for E-Commerce* Operators, Cuatrecasas Competition and EU Law Blog, available at https://www.cuatrecasas.com/en/global/art/implications-of-the-new-vertical-block-exemption-regulation-for-e-commerce-operators [Consulted on 19/09/2023]

Moura e Silva, Miguel

2010 *O Abuso de Posição Dominante na Nova Economia*, Coimbra: Almedina

2020 *Direito da Concorrência*, reimpressão, Lisboa: AAFDL Editora

Ovecka, Matej & Holinde, Sabine

2023a *The New Horizontal Guidelines: Information Exchange*, Norton Rose Fulbright, Antitrust and Competition, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiwhv-oifiCAxXHbKQEHdzMB9kQFnoECBUQAQ&url=https%3A%2F%2Fwww.nortonrosefulbright.com%2Fen%2Fknowledge%2Fpublications%2F7debe299%2Fthe-new-horizontal-guidelines-information-exchange&us-

g=AOvVaw3O5AdFj7Gpp1HxDOQhteC6&opi=89978449 [Consulted on 05/12/2023]

2023b *The New Block Exemption Regulation and Horizontal Guidelines on Research & Development Agreements*, Norton Rose Fulbright, Antitrust and Competition, https://www.nortonrosefulbright.com/en/knowledge/publications/84128fb7/the-new-block-exemption-regulation-and-horizontal-guidelines-on-research-development-agreements [Consulted on 06/12/2023]

Pais, Sofia Oliveira

2011 *Entre Inovação e Concorrência – Em Defesa de um Modelo Europeu*, Porto: Universidade Católica Editora

Papp, Wagner-von

2018 *Selective Distribution*, Dictionary of Competition Law, Concurrences, Article 12220, available at https://www.concurrences.com/en/dictionary/selective-distribution [Consulted on 04/12/2023]

Pérez, Ramírez & Scheur, Sebastian Van de

2013 "The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge", in Patel, Kiran Klaus & Schweitzer, Heike (ed.), *The Historical Foundations of EU Competition Law*, Oxford: Oxford University Press

Pree, Jolling de; Gornall, Helen; Rijke, Bart de & The, Stephanie

2022 *Commission Drafts Revised Horizontal Rules on Cooperation Between Competitors*, De Brauw Blackstone Westbroek, available at https://www.debrauw.com/articles/commission-drafts-revised-horizontal-rules-on-cooperation-between-competitors#experts [Consulted on 22/07/2023]

Ridruejo, María López & Schliephake, Claudia Valdés

2022 *Review of Vertical Restraints regarding Dual Distribution Systems*, Cuatrecasas Competition and EU Law Blog, available at https://www.cuatrecasas.com/en/spain/competition-eu-law/art/eu-review-of-vertical-restraints-regarding-dual-distribution-systems [Consulted on 27/07/2023]

Ritter, Lennart & Braun, David

2004 *European Competition Law: A Practitioner's Guide*, 3rd edition, Netherlands: Kluwer Law International

Rohrssen, Benedikt

2023 *VBER 2022: EU Competition Law for Vertical Agreements – Digital, Dual and Exclusive Distribution Plus Franchising*, Springer

Schrijvershof, Diederik & Van de Hel, Martijn
2016 *Franchise and the Cartel Prohibition*, available at https://www.lexology.com/library/detail.aspx?g=15b0c9b8-db3a-455b-be3b-6dbc79d4de7b [Consulted on 19/09/2023]

Skotki, Lara
2023 *New Block Exemption Regulation on Specialisation Agreements*, available at https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/new-block-exemption-regulation [Consulted on 13/09/2023]

Tamke, Maren; Bär-Bouyssière, Bertold; Karagulova-Glantz, Anara & Přerovský, Adam
2023 *How to play nice with your competitors – new horizontal EU rules*, Dentons, available at https://www.dentons.com/en/insights/articles/2023/june/16/how-to-play-nice-with-your-competitors-new-horizontal-eu-rules [Consulted on 25/07/2023]

Uría Menéndez
2022 *New Vertical Block Exemption Regulation and new Vertical Guidelines*, Uría Menéndez, Client Briefing, 25 May 2022, available at https://www.uria.com/en/publicaciones/newsletter/1533-competition-law#:~:-text=The%20new%20Vertical%20Block%20Exemption,to%20the%20new%20digital%20era [Consulted on 20/07/2023]

Urlus, Hans & Sutherland, Chazz
2022 *The New VBER and Vertical Guidelines Explained: Key Takeaways*, GreenbergTraurig, available at https://www.gtlaw.com/en/insights/2022/6/the-new-vber-and-vertical-guidelines-explained-key-takeaways [Consulted on 18/09/2023]

Van Bael & Bellis
2023a *The New Horizontal Guidelines – What's new for purchasing agreements?*, Van Bael & Bellis, June 2023, available at https://www.vbb.com/media/Insights_Articles/28-6-23_Joint_Purchasing.pdf [Consulted on 25/07/2023]
2023b *The New Horizontal Guidelines – Staking out New Boundaries on Information Exchange*, Van Bael & Bellis, June 2023, available at https://www.vbb.com/media/Insights_Articles/29-6-23_Guidelines_information_exchange.pdf [Consulted on 04/12/2023]

Van Bael, Ivo & Bellis, Jean-François
2010 *Competition Law of the European Community*, 5th edition, Netherlands: Kluwer Law International

VARONA, Edurne Navarro & HÉRNANDEZ, Alberto Pérez
2022 "New Vertical Block Exemption Regulation and Vertical Guidelines", in *European Competition Law Review*, vol. 43, issue 11
WHISH, Richard
2009 *Competition Law*, 6th edition, Oxford: Oxford University Press
WOLSKI, Justyna Smela.
2022 *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, Belgium: College of Europe
WRIGHT, Lisa & BYRNE, Helen
2023 *European Commission Clarifies Sustainability Rules in Revised Horizontal Guidelines*, Slaughter and May, available at https://my.slaughterandmay.com/insights/client-publications/european-commission-clarifies-sustainability-rules-in-revised-horizontal-guidelines [Consulted on 07/12/2023]

Official Documents

AUTORIDADE DA CONCORRÊNCIA DE PORTUGAL
2021 *Opinion of the Competition Authority on Draft Decree No 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses*, available at https://www.concorrencia.pt/sites/default/files/processos/epr/Parecer%20Decreto-Lei%20n.%C2%BA%20108-2021.pdf [Consulted on 10/01/2024]
AUTORITÉ DE LA CONCURRENCE
2023 *L'Autorité de la concurrence sanctionne Rolex d'une amende de 91 600 000 euros pour avoir interdit à ses distributeurs agréés de vendre en ligne ses montres*, Press Release, December 19th 2023, available at https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-sanctionne-rolex-dune-amende-de-91-600-000-euros [Consulted on 07/01/2024]
BULGARIAN COMMISSION ON PROTECTION OF COMPETITION & UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
2013 *Guidelines on Information Exchange Between Competitors, Sofia Competition Forum*, available at https://unctad.org/system/files/non-official document/ccpb_SCF_InfoSharing_en.pdf [Consulted on 26/07/2023]
BUNDESKARTELLAMT
2014 *Adidas Abandons Ban on Sales via Online Marketplaces*, Case Summary, 19 August 2017, *Bundeskartellamt*, B3-137/12, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/

Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2 [Consulted on 10/01/2024]

EUROPEAN COMMISSION

2019 *Commission Evaluation of Vertical Agreements Block Exemption Regulation 330/2010.*

2021 *Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations*, SWD(2021)103 final of 6 May 2021

2022 *Explanatory Note on the new VBER and Vertical Guidelines*, at

2023 *Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.*

Leyen, Ursula Von der

2019 *A Union that Strives for More – My Agenda for Europe*, Political Guidelines for the Next European Commission 2019-2024, available at https://www.europarl.europa.eu/resources/library/media/20190716RES57231/20190716RES57231.pdf [Consulted on 25/07/2023]

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

2022 *OECD Handbook on Competition Policy in the Digital Age*, available at https://www.oecd.org/daf/competition-policy-in-the-digital-age/ [Consulted on 13/09/2023]

Whish, Richard & Bailey, David

2022 *Horizontal Guidelines on purchasing agreements: delineation between by object and by effect restrictions – final report*, available at https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf [Consulted on 24/07/2023]