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I. INTRODUCTION

Competition law futurology can be risky. But perhaps not so risky, if we are talking about EU competition law and policy. While competition policy is utterly connected with economic policy and the latter may inevitably change in a given jurisdiction further to political, social, and ideological shifts, the fact that EU competition policy is not national but supranational makes predictions slightly less adventurous. The European Union will remain a dynamic supranational entity, thus being sheltered from political paradigm shifts which are more likely to affect—at least in a dramatic way—specific Member States than a Union of twenty-seven or thirty-something states. At the same time, EU competition law and policy has been blessed with the existence of strong institutions at the center, which determine, enforce, and adjudicate the applicable rules.

In the last years, EU competition law enforcement has known profound changes both in substance and in procedure. These changes are described as "the modernization" of EU competition law. The great drive for modernization started in 1996 with the publication of the Green Paper on vertical restraints,[2] which brought into European antitrust enforcement a more economic approach. This more economic approach was not limited to vertical agreements but was introduced across the board in Article 101 TFEU. The new generation of block exemption regulations and the adoption of guidelines for specific categories of agreements, as well as in the context of the general framework of Article 101 TFEU, were a success. These developments were then followed by an equally brave—albeit a bit more painful—wave of modernization in Article 102 TFEU. Recently, the Commission adopted a new Block Exemption Regulation and Guidelines for vertical restraints and the same will happen before Christmas for horizontal agreements.

Does this all mean the "end of history" in the modernization of EU competition law? Not really. I offer below some predictions and suggestions as to how modernization might evolve in the next fifteen years.[3]

II. MODERNIZATION AND ARTICLE 101 TFEU

With regard to Article 101, the most obvious development will be the occasional revisiting of guidelines and block exemption regulations by the Commission, as the latter is bound periodically to do. There is no dramatic surprise on this front. By 2014, the Commission is bound

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[2] Green Paper on Vertical Restraints in EU Competition Policy, COM(96) 721, January 1997.

[3] The present article only deals with substantive and not with procedural law.

to publish a new Block Exemption Regulation and Guidelines for technology transfer agreements and again in 2022 the rules on vertical and horizontal agreements will be revisited.

But if the Commission wanted to carry modernization and the new economic approach even more forward, it might do some soul searching about its persistence in continuing to adopt block exemption regulations. Indeed, the compatibility of such regulations with the post-2004 legal exception system has been criticized severely, at least in the academic community.

In the new system of enforcement, block exemption regulations are an anomaly. They no longer contain the formalism of the 1980s and 1990s but their very nature is hard to reconcile with the unitary norm system of Article 101 TFEU. Under a full-fledged economic analysis, it would make better sense to use guidelines (soft law) rather than regulations (hard law), which apply only below certain market share thresholds and cannot benefit agreements containing certain black-listed clauses. Although such conditions, in their substance, are based on sound economic reasoning, the procedural and analytical framework is problematic because (a) it leads to a certain "proceduralization," which does not fit particularly well with the new economic approach and (b) it creates an exception to the system of legal exception introduced in 2004.

First, failure to comply with the conditions of a block exemption regulation has severe legal consequences for an agreement. The agreement is no longer protected by the non-rebuttable presumption of legality of the regulation concerned and the parties are disadvantaged by having to argue their case under an individual analysis of the four cumulative conditions of Article 101(3) TFEU, where they clearly bear the burden of proof. In boundary cases, this is unsatisfactory. For example, if in a vertical agreement the market share of the supplier is 29 percent, the agreement is considered lawful and it is not open to parties in a civil litigation to disprove this fact. If, however, the supplier's market share is 32 percent, he is in the unenviable position to have to prove that the agreement is beneficial under Article 101(3) TFEU. The difference of treatment is striking.[4] Conversely, an agreement that formally satisfies the conditions of a block exemption regulation but, due to particular circumstances, is detrimental to consumer welfare, is impossible to be challenged, unless the rather extraordinary procedure of withdrawal of the benefit of the regulation is followed. For example, a vertical agreement where the supplier's market share is below 30 percent but the purchaser's market share is very high was almost impossible to challenge under the previously applicable Regulation 2790/1999. This particular problem has now been remedied in the new Regulation 330/2010 but highlights the above inherent weakness of the "proceduralization" of enforcement.

Second, block exemption regulations are the only area where courts are not on a par with competition authorities. The benefit of the block exemption may exceptionally be withdrawn by a competition authority in an individual case if the conditions of Article 101(3) TFEU are not fulfilled, but courts have no power in that respect. The latter only have the power to decide whether or not the agreement is covered by the block exemption regulation. In other words, in the context of litigation, the fact that an agreement falls under a block exemption functions as a non-rebuttable presumption that it is lawful under Article 101(3) TFEU, for as long as the block exemption benefit has not been withdrawn in the context of public enforcement.[5] This is again

[4] At the same time, failure to comply with the conditions of a block exemption regulation is still seen by some courts in the EU (mistakenly) as a presumption of illegality.

[5] *See* Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C 101/97, ¶ 35: "[T]he application of Article [101(3)] to categories of agreements by way of block

the exception to the post-2004 rule, that Article 101 TFEU is an integral norm that can be applied by the same competition authority or court.

Of course, there is undoubtedly a question of legal certainty. Undertakings and their advisors are rather fond of block exemption regulations, because they provide legal certainty. However, this is not a powerful argument. A certain degree of legal uncertainty is inherent in any rule-of-reason or economic approach. Perfect legal certainty exists only in *per se* rules of prohibition or permission. This is not, however, how EU competition law has been developing in the last fifteen years and, in the end, it was the business world itself that has consistently argued in favor of the more economic approach. The attraction of block exemption regulations may also be explained by certain last-minute nostalgia for the notification and authorization system shortly before its demise in 2004. Suddenly, the same undertakings that had severely criticized the *ancient régime* stood in awe before the unknown world of self-assessment and new economic approach.

While, block exemption regulations may, at that time, have been perceived as an excusable deviation, at least for a transitory period, their continued existence makes no sense. Besides, if they were to cease to exist, they would in effect be substituted by safe harbors in the various guidelines, which should be almost as good. Indeed, the nature of safe harbor rules in a soft law instrument, such as the guidelines, is much more attuned to the modern system of self-assessment and to the new economic approach. The generalized use of guidelines, as well as the use by the Commission of other dormant enforcement tools, such as the adoption of inapplicability decisions pursuant to Article 10 of Regulation 1/2003 and the issuing of guidance letters in appropriate cases, is likely to be the future for the Commission.

III. MODERNIZATION AND ARTICLE 102 TFEU

As far as Article 102 is concerned, the challenge for the Commission in the next fifteen years will be to put in effect the new economic approach espoused in the Guidance Paper.[6] Voices that criticize the Commission (or rather DG-COMP) for embarking on an approach of conflict with existing case law on Article 102 TFEU, are simply misplaced. While there is no doubt that the EU Courts are the only organs that can interpret Article 102 TFEU, it is equally true that it is not and should not be the business of the Courts to set competition policy in Europe. Competition policy is determined only by the Commission through the cases it decides to bring—or not to bring. This is certainly not an affront to the Luxembourg Courts. The latter can always review the decisions taken by the Commission, including decisions rejecting complaints in Article 102 TFEU cases, but within specific limits. Very recently, the General Court reiterated this fundamental state of the case law in the following terms:

> [I]t follows from settled case-law that, although as a general rule the [Union] judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have

exemption regulation is based on the presumption that restrictive agreements falling within their scope fulfill each of the four conditions laid down in Article [101(3)]." *See also* Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ [2004] C 101/65, ¶ 51: "Agreements that fulfill the conditions of a block exemption Regulation are deemed to satisfy the conditions of Article [101(3)]."

[6] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.

> been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's.[7]

The Commission has already employed its new approach in recent cases brought or not brought[8] and this is bound to continue in the future. In this context, we are also likely to see cases where the Commission will adopt decisions pursuant to Article 10 of Regulation 1/2003 because of the existence of a valid efficiency defense. It might also be reasonable to expect guidance letters in deserving situations where a dominant company is unclear whether its future conduct might infringe Article 102 TFEU. These would all be signs of maturity.

A remaining question is exploitative abuses. The Commission has not published any guidelines on their treatment and some commentators suggest that it should. I would, however, caution against a "modernization" of something that is almost non-existent. So far as the Commission's decisional practice and case law in this area is not very developed, the Commission might stay away from producing guidelines and rather make its policy known through enforcement.

IV. CONCLUSION

While the real revolution in EU competition policy took place at the turn of the millennium, the advent of "modernization" and of the corresponding new economic approach is likely to continue in the years to come. This does not mean the supremacy of any given economic current. The Treaty rules on competition are generally phrased and thus open to accommodate future developments of economic thinking, as, indeed, should be the case. I consider appropriate to close this short article on futurology with a wish that in the next fifteen years DG-COMP continues to be at the forefront of innovative work of high quality in setting and enforcing competition policy in Europe.

[7] Case T-321/05, AstraZeneca AB and AstraZeneca plc v. Commission, Judgment of July 1, 2010, not yet reported, ¶ 32.

[8] *See e.g.* Damien Neven & Miguel de la Mano, *Economics at DG Competition, 2009–2010*, 37(4) REV. INDUS. ORG. (forthcoming 2010).