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A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?

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Block exemption regulations (BER) survived the modernisation of EU competition law. According to the Commission, they play a major role in the system instituted by Regulation 1/2003. Some authors consider that BER are conceptually hard to nest within the new system, but that they provide legal certainty. Others adopt a more critical approach and propose their axing. This paper adopts the latter approach. In view of the mixed messages that the Commission has been sending in the review of existing general and industry specific BER, this paper revisits the institution of BER, its justification and need in the decentralised system brought forward by Regulation 1/2003 and the more economic approach to EU competition law. After stating the initial justification for BER under the prior enforcement system, the paper stresses the difficulties for their fitness within the new paradigm, focusing on the distortions that they may generate for an effective and consistent enforcement of EU competition law. In order to complete the modernisation of EU competition law in a second wave (that is, as a consequence of the current revision of Regulation 1/2003), the paper recommends a clear-cut policy to abrogate all BER and to issue substitutive guidelines in exchange.

1. INTRODUCTION

The practical impact and effective consequences of the modernisation package of EU competition law remain subject to discussion. There is wide disagreement amongst authors as to the extent of the change of conceptual and systemic paradigm under Regulation 1/2003.¹ The disagreement seems particularly acute as regards the link between procedural and substantive aspects of the reform. In this paper, amongst the substantive aspects of the reform, we focus on block exemption regulations (hereinafter, BER).

Although the Commission has recently noted, in its review on the functioning of Regulation 1/2003,² that ‘Regulation 1/2003 did not change the instrument of block exemption regulations’;³ in our view, such an assessment is highly debatable. The

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¹ Council Regulation (EC) No 1/2003, of 16 December 2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1 (hereinafter, Regulation 1/2003).

² Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final.

³ Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, SEC(2009) 574 final (¶25). See also recital 10 of Regulation 1/2003; moreover, according to the Commission

Commission's position that all BER are aligned and consistent with the general philosophy underlying the modernisation or decentralisation of enforcement of Article 101(3) TFEU - i.e. with the 'shift from giving comfort to individual agreements to a system in which emphasis is on general guidance that can be helpful to numerous undertakings and other enforcers'⁴ - overlooks that the change in approach envisioned by Regulation 1/2003 should have left behind instruments not of an actual universal character and which impose specific behaviour rather than offering general guidance (i.e. instruments that *de iure* or *de facto* are binding for the undertakings and authorities concerned).⁵ From this perspective, the Commission's position that BER can coexist with other enforcement instruments in the modernised paradigm is hard to share in the case of general BER. In our opinion, that conclusion is even more difficult to reach for industry specific BER.⁶

From a different perspective, the parallel developments regarding the revision of industry specific BER (e.g. liner shipping companies,⁷ maritime transportation,⁸ insurance,⁹ and motor vehicles sector)¹⁰ are conducted on fragile grounds and their

Notice, Guidelines on the Application of Article 81(3) of the Treaty, OJ 2004, C101/97 (¶2): 'Regulation 1/2003 on the implementation of the competition rules laid down in Articles 81 and 82 does not affect the validity and legal nature of block exemption regulations. All existing block exemption regulations remain in force and agreements covered by block exemption regulations are legally valid and enforceable even if they are restrictive of competition within the meaning of Article 81(1). Such agreements can only be prohibited for the future and only upon formal withdrawal of the block exemption by the Commission or a national competition authority. Block exempted agreements cannot be held invalid by national courts in the context of private litigation' (footnotes omitted).

⁴ Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final (¶9) and Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003, SEC(2009) 574 final (¶43).

⁵ Indeed, '[t]he direct effect of article 81(3) will, of course, leave no place for individual exemption decisions or for block exemption regulations in the traditional sense', Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37(3) CMLRev 537, 566.

⁶ By referring to 'general BER' and 'industry specific BER', we distinguish between those regulations that exempt general practices or conduct no matter the sector in which they occur (e.g., vertical agreements, transfer technology agreements) and those that only cover a specific industry or economic sector (ad.ex. insurance, motor vehicle distribution).

⁷ Recently the Commission has complied with the Council's mandate to draft a new BER; see Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ 2009, L256/31.

⁸ Guidelines on the Application of Article 81 of the EC Treaty to Maritime Transport Services, OJ 2008, C245/2.

⁹ See Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Commission Regulation (EC) No 358/2003 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, COM(2009) 138, and Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 358/2003, SEC(2009) 364. See also Commission Regulation (EC) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2010, L83/1; and Explanatory Communication from the Commission

outcome sends mixed messages. It is to be expected that future revisions of other industry specific BER may cause further lack of system consistency. For several reasons, the Commission's work in this area raises questions about the need and function of industry specific BER. Firstly, they cannot be reconciled or synthesized with a consistent trend of competition policy-making. Secondly, some of them have been repealed and substituted with guidelines (maritime transportation and, partially, motor vehicles),¹¹ others are to be renewed (liner shipping companies or *consortia*), and still others have only been renewed partially (insurance). A possible reading of the situation hints towards a general strategy of the Commission to *substantially dismantle the system of sector-specific BER* and substitute it with (more general) guidelines on the application of Article 101(3) TFEU in those sectors—unless there are good reasons to keep sector-specific BER.¹² Therefore, the Commission seems to consider industry specific BER as lying somewhere in between 'specific comfort' to the sector concerned and 'general guidance' of relevance to a 'broader audience' of undertakings and enforcers—indeed, they are; and seems to be willing to minimise (if not abandon) the scope and coverage of industry specific BER. However, this trend does not affect its position as regards general BER—where there is no indication of a similar strategy of substituting them with general guidelines.

In our opinion it can be argued that, contrary to the position of the Commission in its Report on Regulation 1/2003,¹³ the role of BER in the antitrust field has changed after the modernization of EU competition law by means of Regulation 1/2003.¹⁴ Even further, this change is not limited to sector-specific rules but, most notably, affects the essence of the BER instrument and should apply equally to general BER. In broad terms, there are reasons to support the view that the system has moved from a scenario of BER primarily conceived as instruments aimed at ensuring the *administrability* of a system where the Commission held the monopoly in the application of Article 101(3)

on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2010, C82/2.

¹⁰ Communication from the Commission—The Future Competition Law Framework Applicable to the Motor Vehicle Sector, COM(2009) 388 final. See also Marco Colino, 'Counting Down Regulation 1400/2002 EC – Questioning the Logic of Sector-Specific Rules for the European Car industry', (Paper presented at 14th CLaSF Workshop, 'Reforming EU competition law', London, 10 Sept. 2009, *mimeo*) 1. The Commission has finally approved a new BER for the car industry; see Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2010, L129/52.

¹¹ See Commission Notice, Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ 2010, C138/16.

¹² An approach consistent with the initial proposals of the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (*infra* §2).

¹³ Communication from the Commission to the European Parliament and the Council—Report on the Functioning of Regulation 1/2003, COM(2009) 206 final.

¹⁴ The situation in the antitrust field should be distinguished from the State aid arena, where the development of the exemption policy follows a separate path and is still justified by the enforcement monopoly granted to the Commission.

TFEU (if attainable), towards a new scenario where *consistency and uniformity* in the decentralized application of Article 101(3) TFEU is achieved primarily through guidelines—in order to guarantee i) proper self-assessment by undertakings, and ii) effective enforcement by the ‘decentralised’ authorities.¹⁵ Under the new paradigm, BER can hardly find a place of their own.

For that reason, rather than adopting a piecemeal approach to the revision and probable repeal of existing sector-specific BER, it would be desirable to design an all-encompassing strategy for the development of proper rules and guidance under the new paradigm of Regulation 1/2003—which, in our opinion, should entail the complete abrogation of general and sector-specific BER. Such an approach would also benefit the review process of non-sector-specific BER and guidelines; for instance in relation to the Horizontal Guidelines¹⁶ and the recently completed review of the vertical restraints BER.¹⁷ Hence, in order to complete the modernisation of EU competition law, we would recommend that the Commission should adopt a clear-cut policy to abrogate *all* BER (both general and industry specific) and to issue the corresponding substitutive general guidelines (*infra* §5).

For that purpose, in this paper we advance a general conceptual framework for the analysis of the BER policy post-modernization in light of the abolition of the Commission’s monopoly for the enforcement of Article 101(3) TFEU (and the ensuing bureaucratic limitations), with particular focus on the function that these instruments are called upon to serve in a paradigm of self-assessment and decentralized enforcement (functional approach) (*infra* §2). Furthermore, we submit that the ‘more economic’ or ‘effects approach’ promoted by the Commission in the enforcement of antitrust prohibitions is ontologically opposed to the maintenance of BER (*infra* §3). We then proceed to highlight the unfitness and/or systemic incompatibility of BER (both industry specific and general) with the new approach under Regulation 1/2003: they are instruments of the past and some of their features distort enforcement and

¹⁵ In similar terms, see Goyder, *EC Competition Law*, 4th ed, Oxford, Oxford University Press, 2003 47-51; and G Monti, ‘New Directions in EC Competition Law’ in Tridimas & Nebbia (eds) *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Hart Publishing, Oxford, 2004, 186-187, who stressed that ‘as the administrative burden of an ex ante notification [vanishes], the original *raison d’être* for block exemptions disappears’ and stressed that the issuance of guidelines eliminated the need for BER. Apart from guidelines, specific Commission interventions taking over Member States’ competence to decide in those instances in which their proceedings might lead to an inconsistent application of article 101(3) TFEU or BER is envisaged [see art. 11(6) of Regulation 1/2003]. On the exceptional circumstances under which the Commission might resort to such power, see Gilliams, ‘Modernisation: From Policy to Practice’ (2003) 28(4) *Eur L Rev* 451, 467.

¹⁶ Commission Notice, Guidelines on the Applicability of Article 81 of the Treaty to Horizontal Co-operation Agreements, OJ 2001, C3/2. The Commission has recently published a Draft Communication-Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements SEC 2010 (528), 5.5.2010, Brussels, http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf

¹⁷ See the very recent Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L142/1.

may generate legal uncertainty under the new paradigm (*infra* §4). As briefly mentioned, we conclude with some general recommendations for the completion of the reform of this aspect of EU competition law, with the aim of streamlining the application of Article 101 TFEU by means of a complete substitution of all existing BER with interpretative guidelines (*infra* §5).

2. THE CHANGE OF PROCEDURAL PARADIGM BROUGHT FORWARD BY REGULATION 1/2003

In order to properly appraise the fitness of BER in the paradigm created by Regulation 1/2003, it is important to understand the origins of this regulatory device—which are clearly rooted in the prior model for the enforcement of EU competition law and, more specifically, are the result of a *shortcoming* in that system.

BER were born as a tool to free the Commission of part of the administrative burden generated by the notification procedure envisaged in Regulation 17/62¹⁸ for the application of Article 101(3) TFEU under an individual exemption regime—and, hence, they were primarily conceived as an *administrative device*¹⁹ aimed at releasing some of its resources to allow the Commission to become more active in the pursuit of serious competition infringements.²⁰ BER were an effective complement to the Commission's individual authorizations—and were adopted once the Commission had achieved a

¹⁸ Council Regulation No. 17 implementing Articles 85 and 86 of the Treaty, OJ 1962, 13/204 (hereinafter, Regulation 17/62). The economic logic, functionality and limits of this system are examined in Wils, 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24(2) Eur L Rev 139, and compared with the new one after (the then proposed) Regulation 1/2003 in *ibid*, 'The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation n. 17' (2001) 24 Fordham Int'l L J 1655.

¹⁹ On potentially different conceptualisations of BER, see Greaves, *EC Block Exemption Regulations*, London, Chancery Law Publishing, 1994, 3-4.

²⁰ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶5 & ¶¶14-15). The need for a significant reform of the institutional structure (systemic issues) of EU competition law had been stressed and anticipated by Gerber, 'The Transformation of European Community Competition Law?' (1994) 35(1) Harvard Int'l L J 97, 98-100 & 124-134. In this regard, specifically taking into account the re-orientation of the Commission's resources aimed at the approval of Regulation 1/2003, the modernisation strategy has been rather successful, since it 'has substantially reduced the Commission's workload in terms of case-work. More significantly, the nature of the cases is now radically different, as the flow of notifications has ceased and all new cases concern by definition alleged or suspected infringements' of EU competition rules; see Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003—Institutional Report' in Koeck & Karollus (eds) *The Modernisation of European Competition Law—Initial Experiences with Regulation 1/2003*, 2 FIDE XXIII Congress Linz 2008, Wien, Nomos - Facultas.wuv, 2008, 379-382. A situation that should not be surprising and that was anticipated by Di Federico & Manzini, 'A Law and Economics Approach to the New European Antitrust Enforcing Rules' (2004) 1(2) Erasmus L & Econ Rev 143, 153, who generally concluded 'that the reform will prove to be more efficient than the system set up by Regulation No. 17/62, although the passage from an ex ante to an ex post regime might entail some additional costs both for the undertakings under investigation and for the public authorities responsible for the correct and uniform implementation of EC antitrust law' (*ibid*, 143). See also Wesseling, 'The Draft Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26(4) Eur L Rev 357.

consistent and solid knowledge of the innocuousness for competition in the market of certain practices and agreements under certain conditions,²¹ especially when small and medium size firms were involved.²²

Even if the adoption of BER initially contributed to improving the actual enforcement of EU competition law, the individual notification and authorization technique soon proved insufficient to effectively unburden the system - which was substantially ineffective and unable to absorb the excessive workload of the Commission and an increasing backlog in the issuance of exemption decisions, both to the detriment of the Commission (as enforcer) and European business (as addressees of the EU competition rules).

Therefore, after forty years of continued enforcement of Article 101(3) TFEU through the individual exemption regime established by Regulation 17/62, the modernisation of EU competition law conducted by means of Regulation 1/2003 dismantled the system and opted for a new model of legal exemption based on the self-assessment conducted by undertakings. The burden of the enforcement system partially shifted to the affected undertakings themselves.

Indeed, the main aim of Regulation 1/2003 was to abolish the enforcement monopoly that the Commission held over Article 101(3) TFEU and to design a more efficient decentralised system for the enforcement of EU competition law.²³ Specifically, the

²¹ In this regard, it should be acknowledged that BER had a secondary or implied guiding role, given that they synthesised the stock of knowledge of the Commission in a given area of economic activity. Nonetheless, particularly in the case of sector specific BER, they served a limited guidance function due to their structural limitations and the rigidity of their content; which made the analogical application of their content in other areas of economic activity rather difficult.

²² See, European Commission, *VII Report on Competition Policy for 1977* (1978) 28, expressly conceiving BERs to alleviate the Commission's workload by lifting the notification requirement. The cause-effect relationship between BER and less notifications is expressly acknowledged, see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶33).

²³ See White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1 (¶¶19-21 & ¶28); Ehlermann, *The Modernization of EC Antitrust Policy*, op cit, n 5, 557-563; Tesouro 'Modernisation and Decentralisation of EC Competition Law' in Rivas & Horspool (eds) *Modernisation and Decentralisation of EC Competition Law*, The Hague, Kluwer Law International, 2000, 9 and ibid, 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy' in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 261; M Monti, 'La Nueva Política Europea de la Competencia', in Beneyto & Maillo (eds) *El Nuevo Derecho Comunitario y Español de la Competencia. Descentralización, Análisis Económico y Cooperación Internacional*, Barcelona, Bosch, 2002, 22; Gauer et al, 'Regulation 1/2003: A Modernised Application of EC Competition Rules' (2003) 1 Competition Pol'y Newslet 3; Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40(3) CMLR 545, 553-559; and Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) Governance 431, 434-436. This justification is put into question by Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You!—Part 1: Regulation 1 and the Notification Burden' (2003) 24(11) ECLR 604, 613-615, on the basis that significant self-assessment was already being carried on by undertakings and their legal advisors pre-modernisation—so that the abandonment of the notification system 'made the modernisation programme look a lot more radical than it actually was' (ibid, 615).

reform had as its *leit-motif* the reduction of compliance and enforcement costs of Article 101 TFEU by allocating full responsibility for the assessment of the possible anticompetitive character of their contracts and practices to undertakings.²⁴ Legal certainty was improved through direct enforceability of business agreements and decisions initially caught by Article 101(1) TFEU that, however, did not require individual authorisation in order to fulfil the conditions of Article 101(3) TFEU.²⁵

However, this change of paradigm did not include the repeal of BER—which, given its very close links with the notification system and the ensuing administrative burden, should have been the logical consequence of the change of paradigm. The Commission clearly indicated its intention to adopt a new approach to BER (at least in relation with vertical and horizontal agreements²⁶ and, with more limited effects, *i.e.* merely procedural, in special sectors such as agriculture and transport²⁷)—but the option for a complete suppression of BER did not receive serious attention during the modernisation process. BER survive as a result of inertia, strengthened in the case of industry specific BER by industry and business pressure for their maintenance,

²⁴ On the huge compliance costs the prior system carried, especially for small and medium sized firms, see Müller, ‘The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition’ (2004) 5(6) German L J 721, 725. In exchange for the lightening of the administrative burden of the individual notification that previously weighted on undertakings, they were assigned the additional responsibility of assessing the legality of their actions according to Article 101(3) TFEU, something for which they were allegedly better-placed.

²⁵ Müller, ‘The New Council Regulation (EC) No. 1/2003’, *op cit*, n 24, 729. There were, however, concerns about the diminished level of legal certainty in the new system. Notwithstanding, the legal certainty afforded by Regulation 17/62 should not be exaggerated, see Montag & Rosenfeld, ‘A Solution to the Problems? Regulation 1/2003 and the Modernization of Competition Procedure’ (2003) 2 ZWeR 107, 112, 114-117 & 133-134.

²⁶ Indeed, the Commission indicated that its new approach to vertical and horizontal restraints should simplify the law in these fields, which would result ‘from the Commission’s intention to adopt a new type of block exemption regulation that will no longer be based on an approach that restricts exemption to certain specific agreements and clauses identified in the regulation. The new type of exemption will provide general exemption for all agreements and all clauses in a given category, subject only to a list of prohibited restrictions (‘blacklisted clauses’) and specific conditions of application, on the one hand, and a restriction of the benefit of general exemption through a market-share threshold criterion, on the other. [...] Notices will also be issued to clarify the conditions governing the application of Article [101] to cases not covered by the block exemption regulations’; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶27). Furthermore, in order to promote legal certainty, the Commission intended to reinforce the binding character of BER vis-à-vis decentralised competition authorities; (*ibid*, 31). On this, see Bishop, ‘Modernisation of the Rules Implementing Articles 81 and 82’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 59-61; and Schaub, ‘The Reform of Regulation 17/62: The Issues of Compatibility, Effective Enforcement and Legal Certainty’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 256-257. As we shall see in further detail (*infra* §4), this approach (even if preferable to the prior and more formalistic BER policy) is still too-closely pegged to principles of the previous system and does not sit well with the new paradigm of Regulation 1/2003.

²⁷ In fact, mention of sector-specific BER was only made in passing in the White Paper and, other than adjusting relatively far-reaching procedural aspects of industry specific regulation to adapt it to decentralised enforcement, no substantive changes were proposed; see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶43-45).

although they lack any substantial grounding.²⁸ Bureaucratic simplification (through the abolition of the individual notification system) should have been followed by legislative simplification (through the axing of BER), and that would not necessarily mean less legal certainty for businesses.²⁹

In our opinion, the permanence of BER after the modernisation of EU competition law constitutes a *conceptual oddity*³⁰ that could be seen as a *fossilized* administrative device - the existence of which is hard to square within the profiles of the new system.³¹ If this is the case, the relevance of the issue should not be restricted to the undue permanence of an inadequate procedural device (*i.e.* as merely an inappropriate administrative tool) but, in our view, should rather be derived from the substantive negative effects that the maintenance of BER can generate under the new paradigm.³² In order to better appraise whether this is the case (*infra* §4),³³ it might be useful to briefly explore the contours of the new enforcement paradigm created by Regulation 1/2003.

²⁸ See Farrell & Klemperer, 'Coordination and Lock-in: Competition with Switching Costs and Network Effects' in Armstrong & Porter (eds) *Handbook of Industrial Organization*, Amsterdam, Elsevier, 2007, 2015; and Liebowitz & Margolis, 'Path Dependence' in Bouckaert & De Geest (eds) *Encyclopedia of Law and Economics*, vol. 1, Cheltenham, Edward Elgar, 2000, 982 & 995.

²⁹ See the convincing call for legal simplicity by Epstein, *Simple Rules for a Complex World*, Cambridge, Harvard University Press, 1995, 21-46.

³⁰ Along the same lines, see Wißeman, Decentralised Enforcement of EU competition law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999, (2000) 23(2) *World Comp* 123, 142; and Riley, EC Antitrust Modernisation (Part 1), *op cit*, n 23, 605 ('A conceptually curious part of Regulation 1 is that the existing block exemption system is retained [... which] is at first sight undoubtedly conceptually odd'). It was, indeed, hard to fit conceptually within the new framework; see Whish & Sufrin, 'Community Competition Law: Notification and Individual Exemption: Goodbye to All That' in Hayton (ed) *Law's Future(s)*, Oxford, Hart Publishing, 2000, 138 fn 17, which sought an impossible balance with the view that 'since a constitutive act will no longer be necessary under Article 81(3) [in the Regulation 1/2003 system, BER] will be block 'clearances' rather than block 'exemptions' (without digging any deeper on the meaning, need and implications of such 'block clearances').

³¹ However, some commentators considered that there were sound practical reasons to keep BER under the system established by Regulation 1/2003 as a means to generate legal certainty. As Riley pointed out, 'This access to legal security is even more important given that there is likely to be a period of legal uncertainty following the coming into force of Regulation 1', see Riley, *op cit*, n 23. On similar terms, Pijetlovic, 'Reform of EC Antitrust Enforcement: Criticism of the New System is Highly Exaggerated' (2004) 25(6) *ECLR* 356, 358-359. However, such justification might have lost relevance over time, both as a result of the practice in applying Article 101(3) TFEU during the intermediate years and, maybe more remarkably, due to the legal uncertainty and enforcement shadow that BER generate (see *infra* this Section).

³² The need to link procedural and substantive aspects of the modernisation process is stressed by Gerber, 'Two Forms of Modernisation in European Competition Law' (2008) 31(5) *Fordham Int'l L J* 1235, 1255-1258; and G Monti, 'New Directions in EC Competition Law', *op cit*, n 15.

³³ *Contra*, see Wils, 'Regulation 1/2003: A Reminder of the Main Issues' in Geradin (ed) *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp, Intersentia, 2004, 35-36, who considers that the continued use of BER under the new paradigm 'does not appear to pose any particular problems' and that BER continue to be a useful and efficient mechanism of EU competition law as a result of the enforcement savings and reduction of *ex post* litigation that they generate—also in a decentralised paradigm of self-assessment. Similarly, Fiebig, 'Modernization of European Competition Law as a Form of Convergence' (2005) 19 *Temple Int'l & Comp L J* 63, 67-68, considers BER 'ancillary to the modernization program' and, although he praises the self-assessment process under Article 101(3) TFEU, he concludes that 'revised block

On the other hand, regardless of the issue of the decentralization of enforcement (which does not significantly affect the analyses conducted in this paper), Regulation 1/2003 brought forward a new methodology for the appraisal of seemingly anti-competitive conduct. Undertakings and enforcers need to appraise the relevant conduct in a two-step approach. It has become commonplace to understand that, first, they have to determine whether it runs against the prohibition of Article 101(1) TFEU and, if that is the case, they need to check whether the conditions for exemption set in Article 101(3) TFEU apply.³⁴ At first sight, this does not seem to substantially depart from the enforcement mechanics under the previous regime. However, it is important to stress that the new paradigm implies the ability of undertakings and enforcers to balance pro- and anti-competitive effects (or anti-competitive effects and economic efficiencies) *unconditionally and without limits*. The *prima facie* most restrictive agreement or concerted practice can be *fully exempted* if sufficient pro-competitive effects or efficiencies are generated and meet the additional requirements of Article 101(3) TFEU. This is the logical result of the *economic or effects-based approach* adopted simultaneously with the modernisation of EU competition law (*infra* §3). Hence, under this new paradigm, any instrument that limits or conditions the way or extent in which undertakings can seek to benefit from the exemption of Article 101(3) TFEU—and in which enforcers can appraise whether that is the case or not—risks generating either over-inclusion or under-inclusion, and is at odds with the abovementioned principles of unconditional and unlimited (self)assessment.³⁵ This is the point of departure of our rejection of BER under the new paradigm (*infra* §4).

3. THE DIFFICULTIES OF CONCILIATING BER WITH THE ‘EFFECTS APPROACH’ TO EU COMPETITION LAW

The modernization of EU competition law enforcement runs parallel to a relevant change in the understanding and interpretation of articles 101 and 102 TFEU (and also of merger review).³⁶ In the last few years, the Commission has advocated a change in its approach regarding the enforcement of competition prohibitions. A decentralized system has been established whereby the Commission shares enforcement powers with National Competition Authorities and Courts, contemplating an increasing role for private judicial claims by victims of anti-competitive practices.³⁷

exemptions will be important to the success of the modernization efforts’. See also Carlin & Pautke, ‘The Last of its Kind: The Review of the Transfer Technology Block Exemption Regulation’ (2004) 24 Nw J Int’l L & Bus 601, 603), ‘companies are likely to increasingly rely on the block exemption safe harbours as a guarantee of legal certainty’.

³⁴ For another view of this balancing process, see Nicolaidis, ‘The Balancing Myth: The Economics of Article 81(1) & (3)’ (2005) 32(2) Leg Iss Econ Integration 123.

³⁵ Regarding vertical restraints, see G Monti, *EC Competition Law*, Cambridge, Cambridge University Press, 2007, 358-359.

³⁶ See Gerber, ‘Two Forms of Modernisation in European Competition Law’, *op cit*, n 32.

³⁷ It might be argued that this decentralisation or change in the enforcement structure could justify the continued existence of BER as a tool of harmonisation in the enforcement of Article 101 TFEU, at least until

Moreover, enforcement of competition rules has moved from a rather formalistic position - in which the prohibitions were applied whenever the conditions set out in the rule were met by certain business practices (regardless of their effects) - to a more functional position³⁸ - in which the application of the prohibition looks at the actual consequences of those presumably anticompetitive business practices.³⁹ This can be considered an unavoidable consequence of the institutional embeddedness of economics in competition law.⁴⁰

In contrast with the traditional view of EU competition law as a set of rules declaring the illegality of certain conduct prescribed in them (*per se*), in the last decade the Commission has followed and suggested a more functional understanding of the prohibitions under which the economic effects resulting from the apparent anticompetitive actions are crucial for the final decision.⁴¹ Indeed, the structure and wording of the Article 101(1) TFEU prohibition are amenable to such economic

modernisation matures in practice (for example in the application of Article 101(3) TFEU at the national level). However, in our view, such a plausible goal should be pursued through alternative devices (particularly through collaboration of all authorities within the European Competition Network). Keeping BER with that aim seems inappropriate, equivalent to the use of a sledgehammer to crack a nut.

³⁸ See this seminal idea already in the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶56- 78), further commented in Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust: Unspoken Consequences and Incomplete Treatment of Alternative Options' (1999) 20(10) ECLR 420, 422-423.

³⁹ Of course, this issue is debatable, particularly as regards Article 101(3) TFEU—where an option or preference for policy goals other than economic efficiency (at least in certain circumstances) can be identified—see Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51 Antitrust Bull 915, 952-67; Whish, *Competition Law*, 6th ed, Oxford, Oxford University Press, 2009, 153-155; Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81*, Oxford, Oxford University Press, 2006, 159/174; Craig and De Búrca, *EU Law: Texts, Cases and Materials*, 4th ed, Oxford, Oxford University Press, 2007, 981-982; and Townley, *Article 81 EC and Public Policy*, Oxford, Hart Publishing, 2009, *in totum*. Then, if it were true that there is a relatively big gap between the economic rationale underpinning the Commission's guidelines on Article 101(3) TFEU and the policy grounds upon which the exception has been granted in practice (environment, employment etc), this could be a justification for the continued existence of BER. However, in our view, there is very limited scope to take non-economic considerations into account in the enforcement of Article 101(3) TFEU and, in any case, BER do not seem to be in a better position to provide legal certainty as to the applicable (non-economic) criteria than guidelines (equally based on non-economic criteria).

⁴⁰ See Gerber, 'Competition Law and the Institutional Embeddedness of Economics' in Drexler (ed) *Economic Theory and Competition Law*, Cheltenham, Edward-Elgar - ASCOLA, 2009. In similar and more detailed terms, Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32(2) Cambridge J Econ 295; Budzinski, 'Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits' (University of Southern Denmark, Department of Environmental and Business Economics, IME Working Paper 93/09, June 2009) available at http://www.sdu.dk/~media/Files/Om_SDU/Institutter/Miljo/ime/wp/budzinski93.ashx; and Muris, 'Improving the Economic Foundations of Competition Policy' (2003) 12(1) Geo Mason L Rev 1.

⁴¹ This does not necessarily mean that decisions have increasingly been more discretionary as the economics ('effects-based') influence may be incorporated in the drafting or content of the rules or eventually in the notices and guidelines that might be issued, minimizing costs and mistakes; see Christiansen & Kerber, 'Competition Policy with Optimally Differentiated Rules instead of "Per Se Rules vs. Rule of Reason"' (2006) 2(2) J Comp L & Econ 215.

analysis of effects, although greater controversy has come from its use within the framework of conduct proscribed under Article 102 TFEU.⁴²

The subsistence of several BER that exempt certain categories of agreements, universally or in specific sectors, from the prohibition of Article 101(1) TFEU runs against the dictates of the effects-based approach. The analysis that has to be pursued following such an approach is curtailed by the rigid conditions and the strict requirements imposed by each BER.⁴³

There is no reason to keep BER when individual notifications have been abolished, because the same degree of legal certainty can be assured by self-assessment⁴⁴—which may be assisted by suitable and reasonable guidelines. Of course, it can be argued that there are two levels of legal certainty: a rather abstract one, where certainty reaches all agents and derives from the clarity and predictability of the system (*i.e.* certainty of textual language, methodological consistency, and predictability in the decision-making of the relevant authority), and a more particular one, where certainty is specific to a given agent that benefits from the exemption provided by a individual authorization decision (in the prior paradigm, from the Commission itself) - that is, where certainty derives from a binding and specific legal document. Once the second level of legal certainty is unavailable to undertakings (because individual exemption decisions have been abrogated by Regulation 1/2003); under the new paradigm legal certainty must stem from the clarity and predictability of the rules exclusively. In this regard, BER do not add to legal certainty - as they do not have any ontological advantage over more general guidance (or any other type of regulatory document, for this matter) on certainty or clarity of the textual language of the competition rules. On the contrary, and from the standpoint of methodological consistency, BER perform an inappropriate and misleading guiding role, since they interfere with the more general guidance functions in the new system and limit the consistency and effectiveness of the more economic approach to EU competition law. Moreover, they can diminish enforcement

⁴² See Röeller & Stehmann, 'The Year 2005 at DG Competition: The Trend Towards a More Effects-Based Approach' (2006) 29 *Rev Ind Org* 281; Etro, 'Competition Policy: Towards a New Approach' (2006) 2(1) *Eur Comp J* 29; and Geradin, 'Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful?' (Working Paper, 2010) available at <http://ssrn.com/abstract=1569502>.

⁴³ See Case T-51/ *Tetra Pak v Commission* [1990] ECR II-309 ¶29: '[I]t is true that regulations granting block exemption, like individual exemption decisions, apply only to agreements which, in principle, satisfy the conditions set out in Article 85(3). But unlike individual exemptions, block exemptions are, by definition, not dependent on a case-by-case examination to establish that the conditions for exemption laid down in the Treaty are in fact satisfied. In order to qualify for a block exemption, an agreement has only to satisfy the criteria laid down in the relevant block-exemption regulation. The agreement itself is not subject to any positive assessment with regard to the conditions set out in Article 85(3)'. Along these lines, see e.g. regarding the 2004 revision of the technology transfer BER, Patterson, 'Revision of the New Technology Transfer Block Exemption Regulation: Convergence or Capitulation?' in Ullrich (ed) *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, Cheltenham, Edward-Elgar - ASCOLA, 2006, 65-70.

⁴⁴ The same reasoning which inspired the choice of the Commission regarding the notification regime—see White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶¶12-13)—should mark the policy to be followed regarding BER.

and negatively impact upon the consistency and predictability of the decision-making by competition authorities (both the Commission and National Competition Authorities - particularly in the case of industry specific BER, given the shadows they cast on the affected economic sectors). In general, hence, BER seem to have rather negative potential effects on legal certainty, broadly understood.

Besides, soft law instruments (such as non-binding general guidelines) are essentially better suited to explain or give interpretation to rules of an economic nature.⁴⁵ Retaining the BER (or revising the existing BER) may interfere with business practices as firms may be led to strictly follow BER requirements (for example, when drafting the terms of contract) - thereby thwarting a crucial element in the competitive process.⁴⁶

4. WHAT ROLE FOR BER UNDER THE NEW ENFORCEMENT DYNAMICS?

In light of the logical consequences that we extract from the modernisation of EU competition law (*supra* §2), coupled with the twin shift towards a *more economic approach* (*supra* §3), it seems necessary to appraise whether BER can be made to fit within the (constitutional) boundaries of the new system (§4.1), and to consider the frictions and distortions that its retention within the new paradigm may generate (§4.2). Even further, industry specific BER pose additional problems and difficulties on their own (§4.3).

4.1. Lacking an Administrative Justification, BER become (Quasi-)Legislative Instruments with Difficult Insertion and Justification in the EU Constitutional System

BER were approved as a kind of ‘aggregate’ exercise of the administrative discretion (or administrative discretion *en masse*) that the Commission enjoyed exclusively for the application of Article 101(3) TFEU.⁴⁷ Indeed, the approval of BER has been termed an ‘administrative fix’ for the unmanageable workload generated by the system of individual notifications and exemptions.⁴⁸ For that reason, once the enforcement monopoly has disappeared by virtue of Regulation 1/2003, it is doubtful whether the general delegation/authorisation issued by the Council to the Commission for the

⁴⁵ Bishop, ‘Modernisation of the Rules Implementing Articles 81 and 82’, op cit, n 26, 61 and Pijetlovic, ‘Reform of EC Antitrust Enforcement’, op cit, n 31, 310.

⁴⁶ See Korah & Horspool, ‘Competition’, (1992) 37 Antitrust Bull 337, 356-357; and Wesseling, *The Modernisation of EC Antitrust Law*, Oxford, Hart Publishing, 2000, 101 & 107. According to Weibrecht, ‘From Freiburg to Chicago and Beyond – The First 50 Years of European Competition Law’ (2008) 29(2) ECLR 81, 86 they ‘had begun to act as straightjacket for the development of contractual practice’.

⁴⁷ The ‘special’ nature of the ‘legislative’ powers granted to the Commission for the approval of BER is described by Gerber, ‘The Transformation of European Community Competition Law?’, op cit, n 32, 107 & 133, who stressed that DG COMP is the only Directorate General within the Commission to hold this particular competence.

⁴⁸ See Riley, EC Antitrust Modernisation (Part 1), op cit, n 23, 605; and Budzinski, *The Governance of Global Competition. Competence Allocation in International Competition Policy*, Cheltenham, Edward Elgar, 2008, 128.

approval of BER is still justified—or, on the contrary, it has acquired a different nature (being a more purely delegated ‘legislative’ power that, at least, deserves careful reconsideration under the new circumstances).

Moreover, in the system set by Regulation 1/2003, the adoption and enforcement of BER has entered a new dimension. Whereas in a centralized paradigm BER could be seen as an ‘*exercise of self-restraint*’ by the Commission - which decided not to intervene in specific cases as long as certain conditions were fulfilled (in a clear trade-off between accuracy and administrability of the system of EU competition law enforcement) - in a decentralized system the adoption of BER by the Commission becomes an instance of ‘imposed limitation or restriction’ of National Competition Authorities’ enforcement discretion and Courts’ adjudication powers.⁴⁹ Whereas such limitation is probably within the bounds of the attribution of (shared) competences in competition law issues between EU and national authorities,⁵⁰ its legitimacy might raise doubts.⁵¹ Finally, doubt might be cast on the conceptual compatibility of the *universal* legal exemption contained in Article 101(3) TFEU and the *specific* exemptions contained in general BER (or the ‘*super-specific*’ exemption of industry BER) - particularly when the conditions for the application of the latter could distort the application and effectiveness of the former.⁵²

⁴⁹ Hence, it could be seen as one amongst the various elements that have led commentators to consider that, regardless of the apparent or institutional decentralisation, the modernisation process has centralised EU competition law (at least from a substantive standpoint) far beyond the prior system of Regulation 17/62; see Riley, EC Antitrust Modernisation (Part 1) op cit, n 23, 604 & Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1’ (2003) 24(12) ECLR 657; and, Wilks, ‘Agency Escape’, op cit, n 23, 438-439.

⁵⁰ See Mavroidis & Neven, ‘From the White Paper to the Proposal for a Council Regulation: How to Treat the New Kids on the Block’ (2001) 28(2) Leg Iss Econ Integration 151, 159-166. See also Budzinski, *The Governance of Global Competition* (2008) 126-127; and Budzinski & Christiansen, ‘Competence Allocation in the EU Competition Policy System as an Interest-Driven Process’ (2005) 25(3) J Public Pol’y 313, who strongly criticise the system of competence allocation.

⁵¹ The legitimacy concern is similar to the concern associated with substantial shifts in the interpretation and enforcement adopted unilaterally by the Commission; see Gerber, ‘Two Forms of Modernisation in European Competition Law’, op cit, n 32, 1261. However, this needs to be weighed against the role of the Commission as the guardian of the Treaties—which is reinforced by the key position that the modernisation package has granted the Commission in setting competition policy and ensuring consistent interpretation and application of Articles 101 and 102 TFEU throughout the single market (thereby granting it ‘pre-eminence’); see Gerber & Cassinis, ‘The “Modernisation” of European Community Competition Law: Achieving Consistency in Enforcement’ (2006) 27(1) ECLR 10 & (2006) 27(2) ECLR 51, 14-15 & 57; and Forrester, ‘Modernisation: An Extension of the Powers of the Commission?’ in Geradin (ed) *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp, Intersentia, 2004, 86-89.

⁵² In similar terms, doubt was cast on the possibility that the Commission could continue to adopt BER in a legal exemption paradigm, on the basis of a contradiction between the general legal exemption in Article 101(3) TFEU (post-modernisation) and specific constitutive determinations of exemption in BER; see Deringer, ‘Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Arts. 85 und 86 EG-Vertrag (Arts. 81 und 82 EG)’ (2000) 1 EZW 5, 7 & 8) (*apud* Marengo, ‘Does a Legal Exception System Require an Amendment of the Treaty?’ in Ehlermann & Atanasiu (eds) *The Modernisation of EC Antitrust Policy*, Oxford, Hart Publishing - EUI Robert Schuman Centre, 2001, 173). However, it has also been argued that those concerns do not seem to pose significant impediment

In our opinion, it is justifiable to consider that the empowerment of the Commission to adopt the BER has become a significant *anomaly* within the constitutional system of the EU and that, in light of its very low level of democratic legitimacy - and in the absence any practical need - should be abolished. In any case, this position is supported not only by constitutional reasons and, hence, we will not discuss this issue in further detail.

4.2. BER Generate Significant Risks of Inconsistency and Effectiveness of Enforcement of EU Competition Law in the Markets Concerned (Particularly in the Case of Industry Specific BER) and, hence, Can be Self-Defeating

From a different perspective (and assuming that the previous considerations were not enough to justify the repeal of BER), the need and desirability of the BER mechanism within the paradigm of Regulation 1/2003 merit further scrutiny. Given that the main concerns guiding the reform undertaken by Regulation 1/2003 were i) increasing the *effectiveness* in the enforcement of EU competition rules, while ii) ensuring *consistency*⁵³ - these seem the relevant parameters to conduct such (re)assessment.

BER can run against the '*more economic approach*' associated with the modernisation of EU competition law,⁵⁴ and their repeal could contribute to the development of better and more precise competition enforcement.⁵⁵ BER can also run against the analysis of Article 101 TFEU as a whole by requiring a two-step process (*supra* §2)—particularly by imposing mandatory rules (such as the exclusion of exemption for *blacklisted clauses*) that

to the adoption of BER under the paradigm of Regulation 1/2003, see Marengo (*ibid*, 173). Therefore, the issue is still unresolved.

⁵³ The key role of consistency for the success of the modernisation project is stressed by Gerber & Cassinis, *The "Modernisation" of European Community Competition Law*, *op cit*, n 51.

⁵⁴ G Monti, *New Directions in EC Competition*, *op cit*, n 15, 186, who advocated for the abolition of block exemptions, given that they are based on oversimplified economic analysis 'and are at once over and under inclusive'.

⁵⁵ G Monti, 'New Directions in EC Competition', *ibid*, 187-188, and Monti, *EC Competition Law*, *op cit*, n 35, 399-400, indicated that there are several benefits derived from the axing of block exemptions, such as the equal treatment of all agreements (overcoming the 'straightjacket' effect of BER), the elimination of overly-restrictive clauses included in BER, promotion of a more economic-oriented analysis of agreements, and greater significance granted to the *de minimis* rule. Interestingly, the superiority of the *de minimis* rule over BER was stressed by Bishop, 'Modernisation of the Rules Implementing Articles 81 and 82', *op cit*, n 26, 56. It is noteworthy to stress that the Commission intended to achieve some of these goals through the adoption of a revised BER policy that went hand-in-hand with modernisation; 'the Commission intends to adopt block exemption regulations with a wider scope of application. The use of market share thresholds will allow the Commission to eliminate the straight-jacket effect of the current regulations and to cover the vast majority of agreements, and in particular those concluded by small and medium-sized undertakings. The Commission will adopt guidelines and individual decisions to clarify the scope of application of Articles [101](1) and [101](3) outside the block exemptions', White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶30). However, as anticipated, any shift in BER policy that falls short of repeal might be insufficient to (completely) achieve the desired results.

could contravene the holistic analysis required for the proper application of Article 101 TFEU post-modernisation.⁵⁶

Therefore, BER seem to distort the proper understanding of the rules contained in Article 101 TFEU and their application and, in general terms, can distort the enforcement of EU competition law. Additionally, this effect might have been buttressed by the fact that some member States adopted EU BER and applied them to exempt conduct under their domestic competition laws.⁵⁷

Moreover, BER also cause a relatively unnoticed distortion of EU competition law enforcement. Inadvertently, BER may generate limits on monitoring and enforcement (as they create an *aura* or *shadow* that blurs surveillance activities in the sectors concerned).⁵⁸ If that is true, the mere existence of BER (and with particular intensity in sector-specific BER) may create a false impression of a blanket exemption for undertakings, as well as perverse (diminished) incentives for enforcers to control actual compliance with the conditions set out in the BER. In other words, BER increase the *uncertainty* that affects both the decisions of undertakings and the monitoring and enforcement efforts of authorities and, ultimately might significantly reduce the effectiveness of EU competition law in the concerned industries. In this regard, it is quite telling that, according to the national reports presented in the XXIII FIDE Congress (2008), no decision to withdraw the BER benefit had been adopted by the national competition authorities of member States—either on the basis of Article 29(2) of Regulation 1/2003 or the equivalent domestic provisions.⁵⁹ This also reflects the

⁵⁶ In similar terms, it has been stressed that the Commission has traditionally used BER to impose (quasi)mandatory rules; see Wesseling, *The Modernisation of EC Antitrust Law*, op cit, n 20, 84; and Forrester, ‘Modernisation: An Extension of the Powers of the Commission?’ op cit, n 51, 87 (‘Block exemptions [...] might not in theory set compulsory rules [...] but in actual practice they became quasi-mandatory codes of conduct’). See also Gerber, ‘The Transformation of European Community Competition Law?’, op cit, n 32, 134-135 (who further stressed that ‘the case of block exemptions illustrates that legislation tends to broaden the existing prohibitions beyond levels established by the [European Court of Justice]’). Also, in case of sector-specific BER that co-exist with general BER on a same type of conduct (as it happens with vertical agreements on the motor-vehicle sector,) the question is ‘why are car distribution contracts unable to benefit from this general exemption for similar contracts for the distribution of other consumer goods?’, Marco Colino, ‘On the Road to Perdition? The Future of the European Car Industry and its implications for EC Competition Policy?’ (2007) 28(1) *Nw J Int’l L & Bus* 35, 74.

⁵⁷ Such is the case in Spain, where Article 1(4) of the Competition Act (Ley 15/2007, de 3 de Julio, de Defensa de la Competencia. BOE 159, 04.07.2007, 28.848-28.872) establishes that ‘The prohibition in Section 1 [equivalent to article 101(1) TFEU] shall not apply to agreements, collective decisions or recommendations, or concerted or consciously parallel practices that comply with the provisions set out in the Community Regulations on the application of Article 81(3) of the EC Treaty for certain categories of agreements, decisions by associations of undertakings and concerted practices, including when the corresponding conduct may not affect trade between EU Member States’ (emphasis added).

⁵⁸ An idea that we have advanced in relation to the insurance BER; Marcos & Sanchez Graells, ‘Some Preliminary Views on the Revision of the Insurance Block Exemption Regulation’ (2009) 30(10) *ECLR* 745.

⁵⁹ See the reports included in Koeck & Karollus (eds) *The Modernisation of European Competition Law—Initial Experiences with Regulation 1/2003*, 2 FIDE XXIII Congress Linz 2008, Wien, Nomos - Facultas.wuv, 2008, according to which the first four years of enforcement of Regulation 1/2003 had generated scant results in this area—not to say an absolute lack of results. Most countries report no decisions on this issue (Croatia,

practice of the Commission as regards the enforcement of BER through withdrawal of their benefits.⁶⁰

In general, then, from the perspective of increasing the effectiveness of EU competition law, the BER mechanism - at least under the new paradigm brought forward by Regulation 1/2003 - tends to raise more obstacles than to make a positive net contribution. As we shall see immediately, the situation is similar from the perspective of ensuring the consistency of enforcement of EU competition law.

Indeed, contrary to what could appear, BER have a *relatively limited power to ensure the consistent interpretation* and application of EU competition law. First, because they are highly dependent on market definition in order to determine whether the firms concerned are covered by the *safe harbours* contained therein (which, as a result of the new BER strategy adopted by the Commission post-modernisation, are less formal and more centrally grounded on economic criteria; and, particularly, on market share thresholds).⁶¹ The difficulties involved in the definition of markets in certain industries may blur the analysis and assessment of conduct by firms whose market shares may be near the thresholds frequently used by BER, with the ensuing uncertainty that this may provoke.⁶² Moreover, the assessment of practices and conduct by firms in an industry covered by an industry specific BER is further complicated when they are placed slightly out of the safe harbour provided by the BER (due to the market share condition, or for not being the type of practice or conduct expressly mentioned in the BER). Second, because they can give rise to divergent interpretations as regards the application of the *de minimis* rule.⁶³ Finally, because they offer no guidance whatsoever

Czech Rep., Denmark, Estonia, Finland, Hungary, Ireland, Luxembourg, Netherlands, Portugal, Slovenia, Spain and Sweden). Only in France has there been a complaint requesting the withdrawal of BER benefit (which was rejected) and, in Greece, there was a case pending decision in which withdrawal had been proposed. There was no information available for other member States (Poland and the United Kingdom—where, reportedly, there has been an instance of withdrawal—provided no data in their reports, and the rest of the countries were not included in the 2008 FIDE Report).

⁶⁰ See e.g. Jones & Sufrin, *EC Competition Law. Text, Cases and Materials*, 3rd ed, Oxford, Oxford University Press, 2008, 288-289; and, specifically, in relation with vertical (distribution) agreements, Whish, *Competition Law*, op cit, n 39, 659-660.

⁶¹ See Carlin & Pautke, 'The Review of the Transfer Technology Block Exemption Regulation', op cit, n 33, 608; Rodger, 'The Commission White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty' (1999) 24(6) Eur L Rev 653, 663. Of course, it must be acknowledged that market definition is well rehearsed in both Article 102 TFEU and the practice related to merger control by the Commission. Moreover, with complicated areas of law (for example vertical restraints where the same practice can be harmful in some markets and beneficial in others), market power is the most straightforward way of regulating potentially harmful practices. Nonetheless, in our view, the strong dependence of current BER on market definition severely limits their ability to generate a 'net contribution' to legal certainty in the affected industries.

⁶² See Bishop, 'Modernisation of the Rules Implementing Articles 81 and 82', op cit, n 26, 60 & 64; and Waelbroeck, 'Vertical Agreements: 4 Years of Liberalisation by Regulation N. 2790/99 after 40 Years of Legal (Block) Regulation' in Ullrich (ed) *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, Cheltenham, Edward-Elgar - ASCOLA, 2006, 87-88.

⁶³ Indeed, the practice of the Commission to extend certain requirements of BER to the analysis of *de minimis* agreements—such as the inexistence of *black clauses*, see Notice on Agreements of Minor Importance Which

as to the criteria to be applied in cases not covered by the BER—and generate uncertainty as to the possible application of Article 101(3) TFEU according to general criteria if the specific criteria set out in the BER do not exempt a given agreement (due, for instance, to the inclusion of a *black clause* that triggered automatic exclusion of the BER).

For all these reasons, BER seem to lie ‘in the middle of nowhere’ as regards guidance to undertakings and enforcement authorities and in most, if not all instances, need to be complemented with more general guidance. Broadly considered, then, BER do not seem to effectively contribute to enhance consistency (or, at least, they seem insufficient to guarantee it). Hence, the shift to a model of ‘pure’ guidance seems preferable to the current mixed model of BER *plus* guidance,⁶⁴ since it would at least exclude the need to conduct a preliminary assessment under the rules of the BER and, failing that, a second assessment under the more general criteria contained in the guidelines (particularly in those cases in which inconsistencies could be reached between the content of the BER concerned and the assessment according to the alternative guidelines).

4.3. Specific Questions and Problems Posed by Industry Specific BER

The issues posed by BER, in general, are exacerbated in case of some industry specific BER, for two reasons. First, the exemption of the application of EU competition law prohibitions to anticompetitive practices and conduct in certain industries may run contrary to the goals and principles on competition law as not being grounded in any public interest, and for diminishing consumer welfare.⁶⁵ In many cases, industry specific exemptions contained in BER may be no more (and no less) than a form of *economic protectionism*, providing shelter to inefficient industries and firms and running against market efficiency. Occasionally, industry specific BER may be the result of lobbying

Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001, C368/13 (¶11) and G Monti, ‘New Directions in EC Competition’, op cit n 15, 187 - is highly debatable and it would not be surprising that national competition authorities could opt for a different approach, exempting *de minimis* agreements regardless of their content (as we understand that it should be done under the more economic and holistic approach outlined *supra* §3).

⁶⁴ The Commission itself acknowledged the benefits of notices and guidelines, which ‘are particularly well suited to the interpretation of rules of an economic nature, because they make it easier to take account of the range of criteria that are relevant to an examination under the competition rules. They might not be binding on national authorities, but they would make a valuable contribution to the consistent application of Community law, because in its decisions in individual cases the Commission would confirm the approach they set out’; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ 1999, C132/1 (¶31).

⁶⁵ See Adams, ‘Business Exemptions from the Antitrust Laws: Their Extent and Rationale’ in Phillips (ed) *Perspectives on Antitrust Policy*, Princeton, Princeton University Press, 1965; Tollison, ‘Public Choice and Antitrust’ (1985) 4(3) *Cato J* 905, 911; and De Alessi, ‘The Public Choice Model of Antitrust Enforcement’ in McChesney & Shuggart (eds) *The Causes and Consequences of Antitrust. The Public Choice Perspective*, Chicago University of Chicago Press, 1995, 200.

efforts by concerned business without any credible economic basis⁶⁶—*i.e.* may result in regulatory capture of the Commission.

Second, differently from those BER of general scope and application, sector-specific BER tend to become instruments of (an almost purely) regulatory character. As they attempt to face the theoretical singularities of markets and competition in certain industries, they change the focus and use of the exemption device rather as a channel through which solutions are given to their endogenous market failures and competition problems that might exist—hence, giving rise to an instance of undercover regulation or *regulatory tunnelling*. Therefore, in so doing, the Commission transforms its powers related to enforcing competition prohibitions contained in EU law into an industrial policy tool to engineer the marketplace, thereby sacrificing competition law goals.⁶⁷ Moreover, from a regulatory technique perspective, the fact that the Commission may be using disparate instruments within the same sector simultaneously (*i.e.* BER and pure regulatory tools run in parallel) may distort its objectives, introducing conditions or requirements that may be redundant or unnecessary.

5. COMPLETING THE MODERNISATION PROCESS: STRATEGY AND RECOMMENDATIONS FOR A MORE CONSISTENT EXEMPTION POLICY

As we have tried to show in this paper, BER are *relics* from the past. Under the new paradigm brought forward by Regulation 1/2003, they have (inadvertently) *mutated* from administrative devices or fixes into *pseudo* or *quasi*-legislative instruments and, as a consequence, their justification and legitimacy should be reassessed under a new light—which shows the pitfalls embedded in the retention of this institution in the context of a decentralised system. Moreover, BER run counter to the main goals of the modernisation process, as they generate obstacles for an effective enforcement of EU competition law and shade and blur the consistent enforcement of Article 101 TFEU *as a whole*. Therefore, overall, there seems to be no (proper) role for BER in the realm of Regulation 1/2003.

As a consequence of this analysis, and in order to complete the modernisation of EU competition law in a *second wave* (*i.e.* as a consequence of the process of revision of Regulation 1/2003 currently underway), we would recommend that the Commission

⁶⁶ In general terms, Adams & Brock, 'The Political Economy of Antitrust Exemptions' (1990) 29 Washburn L.J. 215, 216; American Bar Association, *Federal Statutory Exemptions from Antitrust Law*, Chicago, ABA Section of Antitrust Law, 2007, 330-332; Bush, 'Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries' (2006) 3 Utah L. Rev. 613, 635; and Khemani, 'Application of Competition Law: Exemptions and Exceptions' 11 & 32 (UN Conference on Trade and Development, UNCTAD/DITC/CLP/Misc.25, 2002) available at http://www.unctad.org/EN/docs/ditclpmisc25_en.pdf.

⁶⁷ See Wesseling, *The Modernisation of EC Antitrust Law*, op. cit., n. 20, 40. Besides, as a learning from other jurisdictions, block exemptions might blur the enforcement of antitrust rules in regulated and deregulated areas as the intermingling of antitrust and regulatory instruments may lead to unwanted outcomes, see the U.S. experience analysed by Bush, 'Antitrust Exemptions and Immunities as Applied to Deregulated Industries', *ibid.*

adopt a clear-cut policy to abrogate *all* BER (both general and industry specific) and to issue corresponding substitutive general guidelines—which could even absorb some or most of the content of current BER, but presenting it with a real informative and non-binding character. The effects of such a policy would most likely be to increase flexibility in the enforcement of Article 101 TFEU (in line with the *more economic approach* and the requirements of a decentralised system) that would not significantly impair either the effectiveness or consistency of the enforcement of EU competition law (which, as we have seen, are not significantly advanced by BER). This policy should be especially beneficial in markets covered by industry specific BER, where the negative consequences resulting from BER seem to be greater.