A MISSING STEP IN THE MODERNISATION STAIRWAY OF EC COMPETITION LAW -ANY ROLE FOR BLOCK EXEMPTION REGULATIONS IN THE REALM OF REGULATION 1/2003?

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Abstract: Block exemption regulations (BER) survived the modernisation of EC 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 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 is sending in the review of existing general and sector-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*. After reminding the initial justification for BER under the prior enforcement system, the paper stresses the difficulties for its fitness within the new paradigm, focusing on the distortions that they generate for an effective and consistent enforcement of EC competition law.

Keywords: EC Competition Law, Modernisation, Block Exemption Regulations, More Economic Approach.

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1.Introduction

The practical impact and effective consequences of the modernisation package of EC Competition Law enforcement 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.[5] The disagreement seems particularly acute as regards the link between procedural and substantive aspects of the reform. In this paper, amongst the latter, we focus on block exemption regulations (hereinafter, "BER").

Although the European Commission has recently noticed in its review on the functioning of Regulation 1/2003 currently underway,[6] that "*Regulation 1/2003 did not change the instrument of block exemption regulations*";[7] in our view, such an assessment remains highly debatable. The Commission's position that all BER are aligned and consistent with the general philosophy underlying the modernisation or decentralisation of enforcement of Article 81(3) EC—*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*"[8]—seems to overlook that the change in approach should leave behind instruments not of an actual universal character and that 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).[9] 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. And, in our opinion, that conclusion is even more difficult to reach for sectoral BER.

From a different perspective, the parallel developments regarding the revision of sectoral BER (*e.g.* liner shipping companies,[10] maritime transportation,[11] insurance[12], and motor vehicles sector[13]) are conducted on fragile ground and their outcome sends mixed messages. Moreover, it is to be expected that future revisions of other sectoral BER may cause further lack of system consistency. The Commission's works on such sector-specific BER raise questions on their need and function. Some of them have been repealed and substituted with guidelines (maritime transportation and, most probably, motor vehicles), others are to be

[5] 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 L1, 04.01.2003, 1-25 (hereinafter, "Regulation 1/2003").

[6] EUROPEAN COMMISSION (2009c).

[7] EUROPEAN COMMISSION (2009d: ¶25).

[8] EUROPEAN COMMISSION (2009c: ¶9) and EUROPEAN COMMISSION (2009d: ¶43).

[9] 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 (2000: 566).

[10] Lately the Commission has received the mandate to draft a new BER; see Council Regulation (EC) No 246/2009, of 26 February 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 L 79, 25.03.2009, 1-4.

[11] EUROPEAN COMMISSION (2008).

[12] See EUROPEAN COMMISSION (2009a) and (2009b).

[13] EUROPEAN COMMISSION (2009e).

renewed (liner shipping companies or *consortia*), and the situation is still open as regards yet other sectoral BER (insurance, where partial renewal seems the preferred policy option). 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 81(3) EC in those sectors—unless there are good reasons to keep sector-specific BER.[14] Therefore, the Commission seems to see sector-specific BER as 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 sectoral BER. However, this trend does not affect its position as regards general BER—where there is no indication of a similar strategy of substitution of BER exclusively 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,[15] the role of BER in the antitrust field has changed after the modernization of EC competition law by means of Regulation 1/2003[16]. 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 seem to be reasons to support the conclusion that the system has moved from a scenario of BER primarily conceived of and drafted as instruments aimed at ensuring the *administrability* of a system where the Commission held the monopoly in the application of Article 81(3) EC (if attainable), towards a new scenario where *consistency and uniformity* in the decentralized application of Article 81(3) EC should be achieved primarily through guidelines—in order to guarantee i) proper self-assessment by undertakings, and ii) effective enforcement by the "decentralised" authorities.[17]

Then, rather than adopting a piecemeal approach to the revision and probable repeal of existing sector-specific BER, it would be desirable to design and discuss 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 favour the complete abrogation of general and sector-specific BER. Such a more universal approach would also benefit the review

[14] An approach consistent with the initial proposals of the Modernisation White Paper, EUROPEAN COMMISSION (1999) (*infra* §2).

[15] EUROPEAN COMMISSION (2009c).

[16] 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.

[17] In similar terms, see GOYDER (2003: 47-51) and MONTI (2004: 186-187), who clearly held 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 81(3) 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 (2003: 467).

process of non-sector-specific BER and guidelines, such as the Horizontal Guidelines[18] and the vertical restraints BER[19], currently undergoing.

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 81(3) EC (and the ensuing bureaucratic limitations), with particular focus on the function that these instruments are called upon to develop 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 sectoral and general) with the new approach under Regulation 1/2003: they are instruments of the past and some of their features distort enforcement and may generate legal uncertainty in the new paradigm (*infra* §4). We conclude with some general recommendations for the completion of the reform of this aspect of EC competition law, with the aim of streamlining the application of Article 81 EC (*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 seems important to understand the origins of this regulatory device—which are clearly rooted on the prior model for the enforcement of EC competition law and, more specifically, are the result of an *anomaly* or *shortcoming* of that system.

BER were born as a tool to partially free the European Commission of the administrative burden generated by the notification procedure envisaged in Regulation 17/62[20] for the application of Article 81(3) EC under an individual exemption regime—and, hence, as an *administrative device*[21] aimed at releasing some of its resources to allow the European Commission to become more active in the pursuit of serious competition infringements.[22]

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[18] EUROPEAN COMMISSION (2001a).

[19] On July 28, 2009, the Commission has launched a public consultation on review of competition rules for distribution sector, including a Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, and a Draft Commission Notice—Guidelines on Vertical Restraints. All consultation materials are available at http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

[20] Council Regulation No. 17 implementing Articles 85 and 86 of the Treaty. OJ 13, 21.2.1962, 204–211 (hereinafter, "Regulation 17/62"). The economic logic, functionality and limits of this system are examined in WILS (1999), and compared with the new one after (the then proposed) Regulation 1/2003 in WILS (2001).

[21] On potentially different conceptualisations of BER, see GREAVES (1994: 3-4).

[22] EUROPEAN COMMISSION (1999: 5 & 14-15). The need for a significant reform of the institutional structure (systemic issues) of EC competition law had been stressed and anticipated by GERBER (1994: 98-100 & 124-134). In this regard, specifically taking into account the re-orientation of the Commission's resources aimed at with 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 EC competition rules; see GIPPINI-FOURNIER (2008: 379-382). A situation

BER were an effective complement of Commission's individual authorizations once the Commission had achieved a consistent and solid knowledge of the innocuousness for competition of certain practices and agreements under certain conditions, especially when small and medium size firms were involved.[23]

Even if the adoption of BER contributed to improving the actual enforcement of EC competition law in the first years, this technique soon proved insufficient to effectively unburden the system—which was in general terms ineffective, both to the detriment of the European Commission (as enforcer) and European business (as addressees of the EC competition rules).

Therefore, after forty years of continued enforcement of Article 81(3) EC through the individual exemption regime established by Regulation 17/62, the modernisation of EC 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. Indeed, the main aim of Regulation 1/2003 was to abolish the enforcement monopoly that the Commission held over Article 81(3) EC and to design a more efficient decentralised system for the enforcement of EC competition law.[24] 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 European Commission clearly indicated its intention to adopt a new approach to BER (at least in relation with vertical and horizontal agreements[25] and, with more limited

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that should not be surprising and that was anticipated by DI FEDERICO & MANZINI (2004: 153), who generally concluded that '*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*' (id.: 143).

[23] See, EUROPEAN COMMISSION (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 EUROPEAN COMMISSION (1999: ¶33).

[24] See EUROPEAN COMMISSION (1999: 19-21 & 28); EHLERMANN (2000: 557-563); TESAURO (2000: 9 & 2001: 261), MONTI (2002: 22); GAUER *et al* (2003: 3); VENIT (2003: 553-559) and WILKS (2005: 434-436). This justification is put into question by RILEY (2003a: 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*' (id.: 615).

[25] 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* [81] *to cases not covered by the block exemption regulations*'; EUROPEAN COMMISSION (1999: 27). Furthermore, in order to promote legal certainty, the Commission intended to reinforce the binding character of BER vis-à-vis decentralised competition authorities; EUROPEAN COMMISSION (1999: 31). On this, see BISHOP (2001: 59-61) and SCHAUB (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.

effects, *i.e.* merely procedural, in special sectors such as agriculture and transport[26])—but the option for a complete suppression of BER was not paid serious attention during the modernisation process.

In our opinion, the permanence of BER after modernisation constitutes a *conceptual oddity*[27] that could be seen as a *fossilized* administrative device—which existence is hard to square within the profiles of the new system.[28] If such is the case, the relevance of this 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 effects that the maintenance of BER can generate in the new paradigm.[29] In order to better appraise whether this is the case (*infra* §4),[30] it might be useful to briefly explore the contours of the new enforcement paradigm created by Regulation 1/2003.

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 common place to understand that, first, they have to determine whether it runs against the prohibition of Article 81(1) EC and, if that is the case, they need to check whether the conditions for exemption set in Article 81(3) EC apply.[31] At first sight, this does not seem to substantially depart from the enforcement mechanics under the previous regime. However, it

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[26] In fact, mention to sector-specific BER was only made in passing in the White Paper and, other than adjusting relatively far-reaching procedural aspects of sectoral regulation to adapt it to decentralised enforcement, no substantive changes were proposed; see EUROPEAN COMMISSION (1999: 43-45).

[27] Along the same lines, see WIBEMAN (2000: 142) and RILEY (2003a: 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 (2000: 138 fn 17), who tried an almost impossible equilibrium by holding 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'.

[28] 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'* (id.). On similar terms, PIEJTLOVIC (2004: 358-359). However, such justification might have lost relevance over time, both as a result of the practice on the application of article 81(3) EC during the intermediate years and, maybe more remarkably, due to the legal uncertainty and enforcement shadow that BER generate (see *infra* this Section).

[29] The need to link procedural and substantive aspects of the modernisation process is stressed by GERBER (2008: 1255-1258) and MONTI (2004).

[30] *Contra*, see WILS (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 EC 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 (2005: 67-68) considers BER '*ancillary to the modernization program*' and although he praises the self-assessment according to article 81(3) EC, he concludes that '*revised block exemptions will be important to the success of the modernization efforts*'. See also CARLIN & PAUTKE (2004: 603), '*companies are likely to increasingly rely on the block exemption safe harbours as a guarantee of legal certainty*'.

[31] For a (maybe not that different) view of this balancing process, see NICOLAIDES (2005).

seems 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 unlimitedly*. 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 81(3) EC. This is the logical result of the *economic or effects-based approach* adopted simultaneously with the modernisation of EC 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 81(3) EC—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.[32] 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 EC Competition Law

The modernization of EC competition law enforcement runs parallel to a relevant change in the understanding and interpretation of articles 81 and 82 EC (and also of merger review).[33] In the last few years, the European Commission has advocated a change in its approach regarding the enforcement of competition prohibitions. A decentralized system has been established in which the Commission shares its enforcement powers with National Competition Authorities and Courts, contemplating an increasing role for private judicial claims by victims of anticompetitive practices.

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 or effects-based position[34]—in which the application of the prohibition looks at the actual consequences of those presumably anticompetitive business practices. This can be considered an unavoidable consequence of the institutional embeddedness of economics in competition law.[35]

In contrast with the traditional view of EC competition law as a set of rules declaring the illegality of certain conducts 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.[36] Indeed, the structure and wording of Article 81(1) EC prohibition are

[32] Regarding vertical restraints, see MONTI (2007: 358-359).

[33] In general, see GERBER (2008).

[34] See this seminal idea already in EUROPEAN COMMISSION (1999: ¶¶56, 57 & 78), further commented in WESSELING (1999: 422-423).

[35] See GERBER (2009). In similar and more detailed terms, BUDZINSKI (2008a & 2009) and MURIS (2003).

[36] 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 (2006).

essentially prone to such economic analysis of effects, although the greater discussion has considered its use within the framework of conduct proscribed under Article 82 EC.[37]

The subsistence of multiple BER that exempt certain categories of agreements, universally or in specific sectors, from the prohibition of Article 81(1) EC runs against the dictates of the effects-based approach. The analysis that has to be pursued following such approach is curtailed by the rigid conditions and requirements imposed by each BER.[38] There is no reason to keep BER when individual notifications have been abolished, because the same certainty can be assured by self-assessment[39]—which may be assisted by suitable and reasonable guidelines. Besides, these soft law instruments are essentially better suited to explain or give interpretation of rules of economic nature.[40] Keeping the BER enacted (or revised ones) may have a negative impact in business practices as firms may be led to strictly follow BER contents and clauses (for example, when drafting the terms of contract)—thereby thwarting a crucial element in the competitive process.[41]

4. What role for BER under the new enforcement dynamics?

In light of the logical consequences that we extract from the modernisation of EC 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 which are the frictions and distortions that its import into or permanence within the new paradigm may generate (§4.2). Even further, sectoral 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 European Commission enjoyed exclusively for

[37] See ROELLER & STEHMANN (2006) and ETRO (2006).

[38] See CFI Judgment of 10 July 1990 – Tetra Pak Rausing SA v. Commission of the European Communities, Case T-51/89, ECR 1990 II-00309, ¶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 (2006: 65-70).

[39] The same reasoning which inspires the choice of the Commission regarding the notification regime—see EUROPEAN COMMISSION (1999: 12-13)—should mark the policy to be followed regarding BER.

[40] BISHOP (2001: 61) and PIEJTLOVIC (2004:310).

[41] See KORAH & HORSPOOL (1992: 356-357) and WESSELING (2000: 101 & 107).

the application of Article 81(3) EC.[42] Once the enforcement monopoly disappears by virtue of Regulation 1/2003, it is doubtful whether the general delegation/authorisation issued by the Council to the Commission for the 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, the adoption and enforcement of BER has entered into a new dimension. Whereas in a centralized paradigm BER could be seen as an 'exercise of self-restraint' by the Commission—that 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 EC 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.[43] Whereas such limitation is probably within the bounds of the attribution of (shared) competences in competition law issues between EC and national authorities,[44] its legitimacy might raise doubts.[45] Finally, doubt might be cast on the conceptual compatibility of the *universal* legal exemption contained in Article 81(3) EC and the *specific* exemptions contained in general BER (or the "*super-specific*" exemption of sectoral BER)—particularly when the conditions for the application of the latter could distort the application and effectiveness of the former.[46]

In our opinion, it is not out of the picture to consider that the empowerment of the European Commission for the adoption of BER has turned to be significant *anomaly* within the constitutional system of the EU and that, in light of its very low level of democratic legitimacy—and lack of practical need—should be abolished. In any case, constitutional reasons are not the only ones that support this position and, hence, we will not discuss this issue in further detail.

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[42] The 'special' nature of the "legislative" powers granted to the Commission for the approval of BER is described by GERBER (1994: 107 & 133), who stressed that DG COMP is the only Directorate General within the Commission to hold this particular competence. In similarly critical terms, the approval of BER has been termed an 'administrative fix' to the unmanageable workload generated by the system of individual notifications and exemptions; see RILEY (2003a: 605) and BUDZINSKI (2008b: 128).

[43] 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 EC competition law (at least from a substantive standpoint) far beyond the prior system of Regulation 17/62; see RILEY (2003a: 604 & 2003b: 657) and WILKS (2005: 438-439).

[44] See MAVRODIS & NEVEN (2001: 159-166). See also BUDZISKI (2008b: 126-127) and BUDZINSKI & CHRISTIANSEN (2005: 313 *et seq.*), who strongly criticise the system of competence allocation.

[45] The legitimacy concern is similar to the one associated to substantial shifts in the interpretation and enforcement adopted unilaterally by the Commission; see GERBER (2008: 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 81 and 82 EC throughout the single market (thereby granting it "pre-eminence"); see GERBER & CASSINIS (2006: 14-15 & 57) & FORRESTER (2004: 86-89).

[46] In similar terms, doubt was cast on the possibility that the Commission continued to adopt BER in a legal exemption paradigm, on the basis of a contradiction between the general legal exemption in article 81(3) EC (post-modernisation) and specific constitutive determinations of exemption in BER; see DERINGER (2000: 7 & 8) *apud* MARENCO (2001: 173). However, it has also been argued that those concerns do not seem to pose significant impediments to the adoption of BER under the paradigm of Regulation 1/2003, see MARENCO (id. 173). Therefore, the issue is still unresolved.

4.2. BER Generate Significant Risks of Inconsistency and Effectiveness of Enforcement of EC Competition Law in the Markets Concerned (Particularly in the Case of Sectoral 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 shall not be taken for granted and merit further scrutiny. Given that the main concerns that guided the reform undertaken by Regulation 1/2003 were i) increasing the *effectiveness* in the enforcement of EC competition rules, while ii) ensuring *consistency*[47]—these seem the relevant parameters to conduct such (re)assessment.

BER can run against the '*more economic approach*' associated to the modernisation of EC competition law,[48] and their suppression could contribute to the development of better and more precise competition enforcement.[49] BER can also run against the analysis of Article 81 EC as a whole in a two-step process (*supra* §2)—particularly by imposing mandatory rules (such as the exclusion of exemption for *blacklisted clauses*) that could contravene the principles of the holistic analysis required for the proper application of Article 81 EC post-modernisation.[50] Therefore, BER seem to distort the proper understanding of the rules

[47] The key role of consistency for the success of the modernisation project is stressed by GERBER & CASSINIS (2006).

[48] MONTI (2004: 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*'.

[49] MONTI (2004: 187-188; and 2007: 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 granting greater significance to the *de minimis* rule. Interestingly, the superiority of the *de minimis* rule over BER was stressed by BISHOP (2001: 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* [81]*(1) and* [81]*(3) outside the block exemptions*' EUROPEAN COMMISSION (1999: 30). However, as anticipated, any shift in BER policy that falls shy from their suppression might be insufficient to (completely) achieve the desired results.

[50] In similar terms, it has been stressed that the Commission has traditionally used BER to impose (quasi-)mandatory rules; see WESSELING (2000: 84) and FORRESTER (2004: 87) ('*Block exemptions* […] *might not in theory set compulsory rules* […] *but in actual practice they became quasi-mandatory codes of conduct*'). In the same terms, see also GERBER (1994: 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]'). This effect might have been boosted by the fact that some member States adopted EC BER and applied them to exempt conduct under their domestic competition laws.

Such is the case in Spain, where Article 1(4) of the current 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 81(1) EC] *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).

contained in Article 81 EC and their application and, in general terms, can distort the enforcement of EC competition law.

Moreover, BER generate a relatively unnoticed distortion of EC competition law enforcement. BER generate limits on monitoring and enforcement (as they create an *aura* or *shadow* that blurs monitoring activities in the sectors concerned).[51] The mere existence of BER (and with particular intensity of sector-specific BER) generates a (wrong) impression of blanket exemption on undertakings, as well as perverse (diminished) incentives for enforcers to control the actual compliance with the conditions set in the BER. In other words, BER increase the *incertitude area* that affects both the decisions of undertakings and the monitoring and enforcement efforts of authorities and, in the end, might be significantly reducing the effectiveness of EC competition law in the sectors concerned. In this regard, it seems 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.[52] This situation does not depart from the practice of the European Commission, which has also been meagre as regards the enforcement of BER trough withdrawal of their benefits.[53]

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

Indeed, contrary to what could appear, BER have a *relatively limited power to ensure consistent interpretation* and application of EC 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).[54] The difficulties implied in the definition of markets in certain industries may blur the analysis and assessment of conducts by firms whose market shares may be near the thresholds frequently used by BER,

[51] An idea that we have advanced elsewhere in relation with the insurance BER; see MARCOS & SANCHEZ GRAELLS (2009).

[52] See the reports included in KOECK & KAROLLUS (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, Czech Rep., Denmark, Estonia, Finland, Hungary, Ireland, Luxembourg, Netherlands, Portugal, Slovenia, Spain and Sweden). Only in France there has 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 provided no data in their reports, and the rest of the countries were not included in the 2008 FIDE Report).

[53] See *e.g.* JONES & SUFRIN (2008: 288-289) and, in relation with vertical (distribution) agreements, WHISH (2009: 659-660).

[54] See CARLIN & PAUTKE (2004: 208); RODGER (1999: 663).

with the ensuing uncertainty that this may provoke.[55] Moreover, the assessment of practices and conducts by firms in an industry covered by a sectoral 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 realized expressly mentioned in the BER). Second, because they can give rise to divergent interpretations as regards the application of the *de minimis* rule.[56] Finally, because they offer no guidance whatsoever as to the criteria to be applied in cases not covered by the BER—and generate uncertainty as to the possible application of Article 81(3) EC according to general criteria if the specific criteria set 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 or all instances, need to be complemented with more general guidance. In general, then, BER do not seem to effectively contribute to boost 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,[57] 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 there could be inconsistencies between the BER concerned and the alternative guidelines).

4.3. Specific Questions and Problems Posed by Sectoral BER

The issues posed by BER, in general, are exacerbated in case of some sectoral BER, for two reasons. First, the exemption of the application of the EC competition prohibitions to anticompetitive practices and conducts on certain sectors may run afoul the goals and principles on competition law for not being grounded in any public interest, and for diminishing consumer welfare.[58] In many cases, sectoral exemptions contained in BER may be no more than a form of *economic protectionism*, providing shelter to inefficient industries and firms and running against market efficiency. Occasionally, sectoral BER may be the result of lobbying efforts by concerned business without any credible economic basis[59]—*i.e.* may result in regulatory capture of the Commission.

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[55] See BISHOP (2001: 60 & 64) and WAELBROECK (2006: 87-88).

[56] 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 EUROPEAN COMMISSION (2001b: ¶11) and MONTI (2004: 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* §2 and §3).

[57] 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*'; EUROPEAN COMMISSION (1999: 31).

[58] See TOLLISON (1985: 911) and DE ALESSI (1995: 200).

[59] In general terms, AMERICAN BAR ASSOCIATION (2007: 330-332) and KHEMANI (2002: 11 & 32).

Second, differently from those BER of general scope and application, sectoral 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 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 EC into an industrial policy toll, sacrificing competition law goals.[60]

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 keeping of this institution in the context a decentralised system. Moreover, BER run counter the main goals of the modernisation process, as they generate obstacles for an effective enforcement of EC competition law and shade and blur the consistent enforcement of Article 81 EC *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 the prior analysis, and in order to complete the modernisation of EC 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 European Commission adopted a clear-cut policy to abrogate *all* BER (both general and sectoral) and to issue the corresponding substitutive general guidelines—which could even absorb some or most of the content of current BER, but present it with a real informative and non-binding character. The effects of such a policy would most likely be an effective flexibilization of enforcement of Article 81 EC (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 EC competition law (which, as we have seen, are not significantly advanced by BER). Such policy should be especially beneficial in markets covered by sector-specific BER, where the negative consequences brought forward by BER seem to be larger.

[60] See WESSELING (2000: 40).

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