

July 1997

**COMMENTS OF THE SECTION OF ANTITRUST LAW
AND THE SECTION OF INTERNATIONAL LAW AND PRACTICE
OF THE AMERICAN BAR ASSOCIATION
ON THE EUROPEAN COMMISSION'S
"GREEN PAPER ON VERTICAL RESTRAINTS IN EC COMPETITION POLICY"**

The American Bar Association ("ABA") Section of Antitrust Law and Section of International Law and Practice ("the Sections") appreciate this opportunity to present their views on the European Commission's "Green Paper on Vertical Restraints in EC Competition Policy" (the "Green Paper"). The views expressed herein are based on the Report of a Working Group¹ of the Sections on the Green Paper. They are being presented only on behalf of the Sections and have not been approved by the ABA House of Delegates or the ABA Board of Governors and should not be construed as representing the position of the ABA.

The Sections commend the Commission for undertaking a comprehensive review of its policies in this important area. The Commission's rules and enforcement policies with respect to vertical restraints have a major effect on the distribution strategies adopted by firms doing business in the European Union, the competitiveness of firms doing business in the EU, and the integration of the Single Market. The Green Paper's thorough review and analysis of the laws and practices in this area and its suggestion of several options for modifying the legal framework to be applied by the Commission opens the way for a productive dialogue that can lead to constructive reform.

I. Summary of Suggestions

The Sections do not purport to comment on all of the issues and specific questions raised in the Green Paper. For example, we do not address issues specific to the beer or petrol sectors, nor do we provide the type of empirical information sought by the Commission in several areas, which we believe is better provided by firms that can relate their particular experiences or the results of surveys in this area. In addition, the Sections' comments are based exclusively on competition principles, based on our experience with vertical restraints in both the United States and the European Union. We recognize that the Commission's policies are motivated by additional policy concerns, most importantly the creation and maintenance of the Single Market. However, we view these concerns as outside the purview of our expertise, and leave to EU policy-makers the task of weighing them against the economic principles that underlie competition policy.

In our experience as U.S. antitrust counsel, we believe that vertical restraint clauses in contractual agreements often have pro-competitive, consumer welfare maximizing, and efficiency enhancing rationales and effects. We recognize, however, that in particular cases such contractual clauses may have anticompetitive or market restraining rationales or effects.

¹ The Working Group is co-chaired by Mark A. A. Warner and Frank L. Fine, and also includes Donald I. Baker, Molly S. Boast, Ky Ewing, Jr., Anthony L. Gardner, Professor Valentine Korah, Abbott B. Lipsky, Jr., and Randolph W. Tritell. The Working Group would like to thank Elizabeth Krause and Nancy Scott for their research assistance.

Consequently, U.S. law has adopted a more positive view of the effects of vertical restraints in recent times, and therefore the effects of these

contractual clauses are increasingly analyzed under a rule of reason approach that is capable of balancing these effects. Furthermore, as explained within, by strengthening inter-brand competition, vertical restraints may, in some cases, actually facilitate market integration. Thus, a rule of reason approach has the advantage of promoting rational decision-making that links facts to conclusions and conclusions to policy simplifying both enforcement and business planning decisions. We suggest, therefore, that the Commission consider using its authority under Article 87(e) to propose an appropriate regulation to the Council that would set forth the relationship between national laws and the approach to European competition policy that we advocate herein.

In the event that the Commission believes that this approach is not feasible at this time, then we have also suggested, in the alternative, a more modest approach. The Sections' principal alternative suggestions can be summarized as follows:

1. All vertical agreements² entered into by parties having a market share below 10% of the relevant market should enjoy a rebuttable presumption of compatibility with Article 85(1). Absent exceptional circumstances, vertical restraints in such agreements are unlikely to pose risks to competition and should not concern the Commission.

2. All vertical agreements in which the parties have a market share between 10% and 40% of the relevant market should be covered by a single block exemption. Unlike the current block exemptions, the proposed exemption would apply to goods that undergo further processing prior to resale, agreements involving services, and agreements among more than two parties. The proposed exemption would include, *inter alia*:

- ! A "White List" containing a non-exhaustive list of common vertical restraints, including those involved in the establishment and operation of a selective distribution or franchising system;
- ! A provision exempting restraints that are similar to or less restrictive than the clauses in the "White List";
- ! A "Black List" limited to (i) minimum (but not maximum) resale price maintenance, and possibly (ii) restrictions that confer absolute territorial protection on the distributor, accompanied by a Recital clarifying that such clauses may qualify for individual exemption or clearance in appropriate cases where entry barriers are low or a new product is being introduced;
- ! Provisions ensuring the legality of exempt clauses notwithstanding the presence in the agreement of non-exempt or unlawful restraints;
- ! An opposition procedure allowing parties to use an abbreviated notification to obtain a determination within four months on the legality of vertical restraints not clearly covered by the block exemption.

II. Analytical Framework

² The Sections note that the competition analysis of vertical restraints often involves a consideration of intellectual property rights. The analysis of such agreements would often benefit from a similar approach to the one we suggest here. However, for the purposes of this Comment, the Sections intend to exclude from the term "vertical arrangements" the licensing of intellectual property, which is covered by Commission Regulation (EC) No 240/96 (the "Technology Transfer block exemption").

The Sections share many of the core observations set forth in the Green Paper, including that vertical restraints are likely to be pro-competitive in markets in which there is significant inter-brand competition, and that the competitive effect of a particular vertical restraint is likely to be influenced by market structure and various product/ distribution conditions such as those set forth in Table 2 of the Green Paper. We believe the current approach to vertical restraints can be improved by incorporating into the legal framework the recognition that vertical restraints among parties lacking market power are generally procompetitive.

When the current block exemptions involving vertical restraints were introduced, they represented a significant improvement over the existing framework under which virtually all such restrictions were construed to infringe Article 85(1) and, to avoid nullity, require individual exemption through a lengthy notification process. These exemptions have served their purposes, including minimizing the Commission's expenditure of resources for the limited classes of agreements they cover.

However, our experience indicates several important limitations to the efficacy of the current approach. In our experience, the provisions of the block exemptions are not closely calibrated with the manner in which vertical agreements are often drafted, and do not cover a wide variety of benign vertical restraints. As a result, a large class of agreements of the type covered by the block exemptions do not fall within the parameters of the exemptions and are therefore subject to Article 85 notwithstanding the minimal possibility that they will operate anticompetitively. These include global distribution agreements that do not raise competition issues in other jurisdictions.

Parties to the many vertical agreements that do not conform to the current block exemptions must either (i) devote resources to modifying agreements away from the commercially optimal solution in order to fit within an exemption, (ii) undertake an often burdensome and lengthy notification procedure, (iii) accept legal risks that include the nullity of their agreements in national courts, or (iv) be subjected to substantial fines if a firm's decision that a particular transaction was not notifiable later proves to have been wrong. Not only are these alternatives commercially unappealing to the parties, but they can discourage commercial activity in the EU by encouraging inefficient opportunistic behavior, such as free-riding, in a way that may reduce the incentive to invest in modern distribution systems on an efficient scale. These alternatives may also provide incentives to vertically integrate instead of using distribution channels.

With the benefit of our experience with vertical restraints, the Sections believe that economic and practical evidence supports a much more tolerant approach to vertical restraints. We believe that the operative principle should be that, absent market power, vertical restraints should be presumed not to operate anticompetitively. U.S. law has adopted this more positive view of the effects of vertical restraints in recent times, and therefore the effects of these contractual clauses are analyzed under a rule of reason approach that is capable of balancing these effects. Furthermore, by strengthening inter-brand competition, vertical restraints may, in some cases, actually facilitate market integration.

We suggest, therefore, that the Commission consider using its authority under Article 87(e) to propose an appropriate regulation to the Council that would set forth the relationship between national laws and European competition laws so that the benefits of this rule of reason approach can be applied in a unified and consistent manner across the European Union. If the Commission feels that this approach is not feasible at this time, then we have also suggested, in the alternative, a more modest approach.

Devising an alternative approach to regulate vertical restraints in an efficient manner involves a trade-off between complete analytical precision and legal certainty. An approach that relies purely on the former would subject all vertical restraints to case-by-case analysis. Particularly given the constraints imposed by the structure of Article 85 and Regulation 17, such an approach is highly undesirable because an enormous number of benign agreements would be at risk of nullity even if notified. The converse approach, driven solely by the objective of legal certainty, is also undesirable because rules are inflexible and are inevitably both overinclusive, inhibiting efficient conduct, and underinclusive -- for example, the current block exemptions allow exclusive arrangements by monopolists. Thus, the Sections favor a mixed approach based on presumptive legality and block exemptions to provide certainty where the danger of anticompetitive effects is very low, and individual analysis of agreements falling outside the block exemptions.

Since there is no bright line by which the Commission will be able neatly to divide procompetitive and anticompetitive conduct, whatever approach is taken will entail risks of both allowing some anticompetitive conduct and prohibiting some neutral or procompetitive conduct. The Sections believe that, at the margin, the Commission should be willing to err on the side of allowing potentially anticompetitive conduct because it can later amend its rules based on experience, and possibly withdraw the application of a block exemption applicable to arrangements that prove anticompetitive. If too much is prohibited, however, it is difficult to gather the information base necessary to make appropriate adjustments to the regulatory structure.

Market Share Based Thresholds

The Sections' suggestions include thresholds based on market shares. The Sections recognize that this introduces inherent uncertainty because market share data permits different conclusions based on reasonable interpretation of the evidence. We recognize, however, that market definition difficulties are likely to be reduced once the Commission adopts market definition guidelines.³ We submit that this should clarify applicable analysis to the extent possible, and suggest that it may be better to have a very vague answer to the correct question, than a precise answer to the wrong question. As many interested parties pointed out during the Commission's consideration of the Technology Transfer block exemption regulation, the determination of relevant markets and the calculation of market shares is, at best, a difficult exercise (although this concern may be less acute with respect to the markets at issue in distribution as opposed to licensing agreements which often involve new technologies).

Accordingly, the Sections support market share screens in the analysis of vertical restraints for two reasons. First, market shares are one of the best, if highly imperfect, proxies for market power. Second, our experience indicates that, notwithstanding some inevitable cases at the margin in which parties will be uncertain, in a large percentage of cases parties will be able to conclude with a high degree of confidence whether or not they are below a given threshold. For example, with reference to our proposed threshold for presumptive negative clearance, we believe that many small firms and new entrants will be able to conclude quickly that they each lack a 10% market share. Similarly, we believe that in a very significant percentage of cases, parties will be able to determine that their respective market shares are below 40%, allowing them to avail themselves of the proposed block exemption. Nevertheless, where entry barriers are low, even very large market shares may not be indicative of effective market power, and in that context vertical restraints might be treated as not infringing Article 85(1).

³ It is worth noting that geographic market definition is also an important part of assessing market shares. The Sections are not offering specific comments on market definition principles, but generally welcome the Commission's draft Guidelines on Market Definition as noted in the Sections Comments on that Draft in June, 1997.

The use of market share thresholds raises the issue of the timing of the calculation -- i.e., whether (i) the parties' market shares at the time of the agreement are permanently controlling, (ii) the later attainment of a share above the threshold removes the agreement from the exemption or, conversely, a later loss of market share can bring the agreement within the exemption, or (iii) the determination should be made at periodic intervals. The Sections believe that it would be unjustified to allow parties with market power to benefit indefinitely from a block exemption simply because their market shares were once below a particular level. However, it would be excessively burdensome to require firms to monitor their shares continuously, with the constant risk of legal exposure should their shares exceed the threshold. Accordingly, we propose that the initial determination control, but that the block exemption be applicable for a limited duration, for example to five (but in any event not less than three) years following the agreement. This would confer legal certainty for a reasonable period of time, while providing for periodic review of whether the circumstances that gave rise to the exemption continue to obtain.

We suggest that eligibility for exemption not depend, however, on the agreement's explicitly providing for a limited duration, as required by the current exclusive purchasing block exemption. Rather, the protection of the block exemption should expire after the specified period, and automatically restart if its conditions remain fulfilled; if not, the parties can decide whether to notify the agreement for individual exemption. This will ensure the validity of automatic renewal provisions that are common in distribution and other vertical agreements .

III. Rebuttable Presumption of Legality For Agreements Among Parties With A Market Share Below 10%

The Sections suggest that the Commission extend a rebuttable presumption of legality to vertical agreements in which each of the parties has a market share in its relevant market of less than 10%. As the Commission has recognized in its draft Notice Concerning Agreements of Minor Importance, it is highly unlikely that conduct by non-competing parties with a market share below 10% can have an appreciable effect on competition. Affording a presumption of legality to such arrangements will enable many small firms and new entrants to enter into procompetitive arrangements without diverting resources to determining whether mutually agreed restraints risk violating Article 85 and, if so, whether they fit into a block exemption.

The Green Paper's Option IV proposes that the presumption not apply to restraints relating to impediments to parallel trade or passive sales, or those contained in distribution agreements between competitors. The Sections believe that the danger of anticompetitive harm is so remote when these practices are undertaken by firms with such a small market position that the presumption should extend to these practices as well. If the Commission has reason to believe that such a clause is operating anticompetitively notwithstanding the parties' small market shares, the Commission can overcome the presumption and apply Article 85.

We recognize that the Commission has proposed in Option IV a 20% market share screen for presumptive legality. We believe, however, that parties with market shares between ten and twenty percent should benefit from the greater legal certainty conferred by a block exemption.

We recognize that this argument can also be made for agreements between parties where each party has a market share in its relevant market of less than 10%. However, we do not see a significant risk of legal challenge in the Member States under such circumstances. Moreover, we believe that it is important that the Commission, by adopting a rebuttable presumption of legality, affirm its view, supported by the case law of the European Court of Justice (e.g., in the *Delimitis* case), that agreements between parties with insignificant market positions cannot appreciably restrict competition.

Finally, we do not support a turnover test for presumptive legality because there is no inherent correlation between firm size and the ability to exercise market power.⁴

IV. Proposed Block Exemption Covering Vertical Agreements Between Parties With A Market Share Below 40%

The Sections suggest that the Commission issue a single block exemption regulation that would apply to any vertical restraint⁵ among parties whose respective shares of the relevant market do not exceed 40%, provided that the agreement does not provide for minimum resale price maintenance or attempt to exclude parallel trade.

Unified Vertical Restraints Block Exemption

The Sections support the enactment of a single block exemption that would encompass all vertical restraints. When the Commission issued its original block exemptions covering vertical conduct -- i.e, exclusive distribution, exclusive territories, exclusive purchasing, and franchising -- it based its action on its experience indicating that certain distribution practices were very unlikely to produce anticompetitive effects. These block exemptions provide parties deciding how to structure their commercial arrangements in the EU an incentive to use the types of distribution arrangements covered by the block exemptions rather than other arrangements that may be commercially preferable without posing additional risks to competition. For example, parties might choose an exclusive territorial distribution arrangement, when customer restrictions may be a more efficient means to accomplish their goals.

With the benefit of additional experience with a variety of forms of distribution practices and other vertical arrangements, the Sections believe that there is sufficient evidence that, with certain possible exceptions discussed further below, a very wide range of vertical arrangements among parties lacking market power can be analyzed from an economic point of view in the same manner. In general, such restraints are agreed to in order to provide sufficient economic incentives to induce dealers and distributors to invest in and promote products and services without having their efforts undermined by free riders. Where there is sufficient inter-brand competition and the parties lack market power, vertical restraints are generally procompetitive or neutral in their competitive effects. The Sections therefore encourage the Commission to adopt a unified block exemption covering vertical practices.

To implement this proposal, we propose that the exemption set forth a "White List" of clauses that would be covered by the exemption. This list should cover common non-price vertical restraints such as exclusive distribution clauses, exclusive purchasing clauses, customer restrictions, and dealer location clauses. We believe it is appropriate to include restraints inherent in selective distribution or franchising systems within the block exemption, as these are unlikely to injure consumers when the seller lacks market power.

Our proposed exemption would also apply to services, as we see no economic analytical distinction between the competitive effects of vertical restraints in the distribution of goods and services. Because the exemption would apply to all vertical arrangements, not only to pure

⁴ For instance, even a small turnover might involve market power where entry barriers are high.

⁵ Any conduct that arose from a horizontal agreement would not be covered by the proposed exemption. Dual distribution, where the supplier competes with its downstream distributors, presents specific issues. Our experience, consistent with the evolution of the case law in the United States, suggests that restraints in the context of dual distribution are generally properly analyzed as vertical in nature. As such, we would leave them within the ambit of the proposed block exemption.

distribution, it would also cover the supply of goods and services that a purchaser will transform or perfect. This would remedy somewhat the current gap in the block exemptions that leave exclusive sales arrangements among parties with no market power vulnerable to Article 85 challenge if the buyer further processes the goods. Finally, we would eliminate the current requirement that the agreement involve no more than two parties, as this also should not affect the competitive analysis as long as the relationship remains vertical rather than horizontal.

The list of covered restraints should be illustrative rather than exhaustive in order to maintain the flexibility to cover variants of current practices that may arise in the future. To ensure such flexibility, we suggest strongly that the exemption, like the Technology Transfer block exemption (Art. 2, ¶ 3) provide that it applies to restrictions that are similar to or less restrictive than those listed. It would also be helpful if it were subject to a recital such as Recital 18 of the Technology Transfer block exemption which provides that such clauses rarely infringe Article 85(1), but are exempted in the event that they do infringe.

Forty Percent Market Share Cap

The Sections agree with the Commission's observations in the Green Paper that it is more likely that vertical restraints will have anticompetitive effects if the parties can exercise market power. Hence, the Sections would not object to a system under which block exemptions applicable to vertical practices apply only if the parties' market share is below a specified level. As discussed above, although many factors influence whether firms can exercise market power, market share provides the most readily applicable filter.

Although whichever market share is chosen is inherently arbitrary, we suggest a level of 40%. There is ample precedent for using this figure -- for example, the Commission chose this level as the threshold at which it would consider rescinding the benefits of the Technology Transfer block exemption, and the case law of the Commission and the European Court of Justice suggests that 40% is a level above which concerns regarding dominance begin to arise. Limiting the applicability of the exemption to instances in which the parties' respective market shares do not exceed 40% is also consistent with Option III and Option IV, Variant II, of the Green Paper.

The limitation of the exemption by market share should not prejudice the possibility for parties with greater market shares to obtain an individual exemption or comfort letter. In many cases, notwithstanding a market share above 40%, there can be strong inter-brand competition and vertical restraints can be procompetitive. In order to avoid a misperception that vertical restrictions are unlawful if the parties' respective market shares exceed 40%, the Sections suggest that the Commission include a Recital inviting notifications of agreements among parties with a greater market share where the parties believe they can justify the presence of vertical restraints under Article 85(3).

Blacklisted Clauses

The Green Paper identifies two types of restrictions that would continue to be denied the benefit of a block exemption under any circumstances - resale price maintenance and impediments to parallel trade. The Sections do not suggest a reversal of policy in these areas, except that we would limit the prohibition on resale price maintenance to the establishment and enforcement of minimum, rather than maximum, prices.

Resale price maintenance. The Sections believe that maximum resale price maintenance can often have the same pro-competitive economic effects as other vertical restraints, such as territorial exclusivity, that are subject to block or individual exemption. Absent market power, neither restraint is likely to be anti-competitive. Moreover, maximum resale price

maintenance can enhance consumer welfare by limiting the ability of dealers and distributors to exploit market power in their territories.⁶ In most circumstances, maximum resale price maintenance does not pose the risks of anticompetitive effects that may be present in minimum resale price maintenance.⁷ Accordingly, the Sections recommend against automatically eliminating the benefits of block exemptions covering vertical restraints to maximum resale price maintenance clauses. Rather, these should be covered by the exemption and subject to revocation of the exemption if the Commission has reason to believe they are operating in an anticompetitive manner in particular cases.

The Sections recognize that minimum resale price maintenance can have anticompetitive effects. In part because such restrictions have been unlawful both in the US and the EU, there is not a sufficient body of evidence to support the automatic exemption of such clauses. In addition, minimum resale price maintenance is unlawful in most Member States. Accordingly, the Sections would not object to including minimum resale price maintenance in a "Black List," thus requiring parties to seek an individual exemption of this practice. However, we would encourage the Commission to maintain an open mind to the possibility that minimum resale price maintenance may be pro-competitive under certain circumstances, and to indicate, for example in a Recital, that the Commission does not foreclose the possibility of individually exempting such clauses in appropriate cases.

Restrictions on parallel trade. The Green Paper echoes the prevailing Commission and Court precedents holding that agreements that restrict parallel trade and confer absolute territorial exclusivity infringe Article 85(1) and generally do not qualify for exemption.

Based purely on antitrust principles, the Sections believe that absolute territorial exclusivity is not inherently anticompetitive.⁸ The Green Paper recognizes that territorial exclusivity can be a procompetitive incentive to promoting products and facilitating new entry. Absolute territorial protection maximizes these incentives. Where the parties lack market power and inter-brand competition is vibrant, the absence of other channels for the product in question would not be expected to produce anticompetitive effects in the relevant market. Hence, the

⁶ As a related point, vertical integration can also mitigate "double marginalization." Specifically, a profit-maximizing monopolist in the supply market will charge a monopolist in the distribution market a marginal input price in excess of the marginal cost of producing the input. The higher input price, in turn, increases the cost of the downstream distributor. The profit maximizing downstream monopolist sets its marginal revenue equal to the marginal cost of production (which includes the mark-up of the upstream monopolist), raising the retail price and reducing the quantity sold to the end-consumer. If this double marginalization occurs, where the supplier takes the marginal revenue curve of the downstream firm as its demand curve, the combined profits of the manufacturer and retailer will be lower than if the input price was equal to the marginal cost of production. Vertical integration theoretically resolves this problem by internalizing the input pricing process so that true marginal costs are automatically reflected in the downstream retailer's final product-pricing decision. See Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 523-25 (2d ed. 1994).

⁷ See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 343 n.13 (1990) where the U.S. Supreme Court stated that "the procompetitive potential of a vertical maximum price restraint is more evident now than it was when" in 1968 it rejected a proffered economic justification for setting maximum prices.

⁸ See also, Erauw-Jacquery v La Hesbignonne, Case 27/87 [1988] ECR 1919; [1988] 4 CMLR 576 (CFI) at para 10: "in this respect, it must be pointed out that, as the court acknowledged in its Judgment of 8 June 1982 in Case 258/78 Nungesser v Commission (1982) ECR 2015, the development of the basic lines may involve considerable financial commitment. Consequently, a person who has made considerable efforts to develop varieties of basic seed which may be the subject-matter of plant breeders' rights must be allowed to protect himself against any improper handling of those varieties of seed. To that end, the breeder must be entitled to restrict propagation to the growers which he has selected as licensees. To that extent, the provision prohibiting the licensee from selling and exporting basic seed falls outside the prohibition contained in Article 85 (1)." (emphasis added). The ECJ made a similar comment in Coditel v Cine Vog Films (No 2), Case 262/81 [1982] ECR 881; [1983] 1 CMLR 49. The ECJ held that the existence of copyrights and exclusive exhibition licences confined to a Member State are not subject to Article 85's prohibition. In addition, the ECJ noted that in examining whether the exercise of such rights would fall within Article 85, the national court should "ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market."

Sections believe that the vertical restraints block exemption need not include restrictions on parallel trade in a "Black List."

The Sections recognize the Single Market objectives that motivate the Commission's strong concern in this area. We note, however, that in many cases the strong incentives provided by absolute territorial protection can also provide the necessary incentives to encourage cross-border distribution.⁹ Furthermore, because of the prevailing illegality of such restraints, the Commission may not have adduced sufficient evidence of the procompetitive potential of absolute territorial restrictions to support their block exemption. If the Commission retains parallel trade prohibitions in a "Black List," we suggest that the Commission make clear, for example in a Recital, the possibility of not condemning such restrictions outright, so it retains the flexibility to allow such restraints when they can be shown to be procompetitive and market-opening. This is most likely to be the case where entry barriers are low or a new product is being introduced.

Severability

The Sections suggest that the Commission specify in any block exemption issued in this area that the ineligibility of a particular clause for block exemption does not automatically deprive other qualifying clauses of their exemption, nor invalidate the entire agreement. Many vertical agreements will inevitably consist of clauses that fall under the block exemption and other clauses that do not or are ambiguous. In such cases, the legal and economic reasoning supporting the exemption of the benign clauses should not be affected by the presence of other invalid clauses or practices. The Sections believe parties should be able to count on the legality of exempt clauses notwithstanding the presence of non-exempt or unlawful clauses both to provide legal certainty to restrictions that do not threaten competition, and to avoid windfalls to parties that might otherwise stand to benefit from the invalidation of agreements pursuant to Article 85(2).

Non-Opposition Procedure

The Sections support the use of a non-opposition procedure. No block exemption can foretell the types of vertical arrangements that may come into use in the future, hence no White List or Gray List can provide an exhaustive compendium of covered arrangements. The non-opposition procedure provides an efficient mechanism to enable parties to obtain a determination on the legality of unlisted vertical restrictions without the burden and delay of a full notification. At the same time, the Commission retains the ability to review and, if desired, investigate restrictions not specified in the block exemption.

The Sections suggest that the Commission be required to express its opposition, if any, within four months of the parties' notification, in order to minimize the period of uncertainty in which the parties must operate. The Sections further suggest that the Commission take or propose appropriate steps to ensure that the legal effect of non-opposition is equivalent to falling within the explicit parameters of the block exemption, so that notified and non-opposed agreements are clearly immune from challenge in national courts. Finally, to encourage the use of this procedure, the Commission should make clear, as it did in the Technology Transfer block exemption (Recital 25), that the Commission can waive the requirement to supply all information called for in Form A/B and that it will generally accept only the agreement and market share and structure data. In other words, the Commission's decision should be based on directly available

⁹ The integration of the Common Market has brought many benefits. In two cases, however, an inability to restrain parallel trade may delay or prevent market integration: (a) where national markets are distorted by government measures; and (b) where there is a need to encourage sunk costs to deter free-riding.

data. However, it should remain the responsibility of the requesting party to provide the Commission sufficient data upon which to make its decision.

We recognize, however, that this proposal likely would be burdensome for the Commission, and would raise resource allocation concerns for the Commission. The Sections note that the history to date with non-opposition procedures in block exemptions has been their under- rather than over-use. Reviewing requests for individual exemptions could be administratively complex, and so the non-opposition procedure might allow for certain cost savings. In addition, if the Commission receives many notifications, it could consider using a "quick look" approach to screen out, for example based on market share, obviously non-problematic arrangements, saving its resources to perform full Article 85(3) analyses on the remaining agreements.

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The Sections again thank the Commission for the opportunity to participate in this process. We would be pleased to answer any questions the Commission may have regarding these comments, or to provide whatever additional input may be of assistance to the Commission.