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Vertical Agreements and Concerted Practices Arising from Commercial Relations. Innovative Legislation in the Matter

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Abstract: *The goal of achieving and maintaining an integrated internal market is to strengthen competition in the European Union. Consequently, in conditions where the elimination of unfair competitive practices has been achieved at the level of the member states, companies cannot resort to prohibited vertical agreements, for which the provisions of art. 101 para. 1 of the Treaty on the Functioning of the European Union apply. However, Regulation (EU) 2022/720 regulates categories of vertical agreements and concerted practices that are not considered incompatible with the common market and the general interest of consumers. Thus, if a vertical agreement restricts competition within the meaning of art. 101 para. 1 of the Treaty, the agreement may still meet the exemption conditions set out in art. 101 para. 3, only under the conditions set out in this Regulation. In June 2022, the European Commission adopted the Communication "Guidelines on Vertical Restraints", a document through which the EU institution provides businesses with guidelines on vertical agreements, how the provisions of art. 101 of the TFEU apply to vertical agreements, the positive and negative effects they have generated. Also, in the communication, the Commission refers to those vertical agreements that do not fall under Article 101(1) of the treaty, also providing explanations regarding the protection regime – "safe harbor" – established by Regulation (EU) 2022/720.*
All these issues will be analyzed in the present study from a personal perspective, substantiated by the legislation appropriate to the matter.

Keywords: *vertical agreements, companies, relevant market, vertical restrictions, consumers.*

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I. INTRODUCTORY ASPECTS REGARDING THE LEGISLATIVE FRAMEWORK APPROPRIATE TO THE THEME DEDUCED FROM THE ANALYSIS

As art. 101 para. 1 of the TFEU (ex-art. 8 TCE) provides that are considered incompatible with the internal market of the European Union and therefore prohibited any agreements or concerted practices made between companies whose object is "preventing, restricting or distorting competition within the common market". The text of the previously mentioned article refers to types of agreements or concerted practices which:

a) set directly or indirectly, as the case may be, the purchase, sale prices or other conditions related to the commercial operation;
b) limit or control "production, marketing, technical development and investment";
c) apply different conditions for equivalent services in the commercial legal relationships they conclude with professional traders, generating, according to competitive practice, a disadvantage for the latter;
d) conditions the completion of commercial contracts on the acceptance by the partners of some additional benefits, which "by their nature or in accordance with commercial customs, are not related to the subject of these contracts;

Consequently, having regard to the provisions of art. 101 para. 1 of the Treaty, we are of the opinion that any clause inserted in a commercial contract establishing rules of execution within the limits of one or more of the agreements listed above, are null and void.

However, art. 101 para. 3 of the TFEU states that agreements or concerted practices are not considered prohibited if they "contribute to the improvement of the production or distribution of products or to the promotion of technical or economic progress, while ensuring to consumers a fair share of the benefit obtained and which: a) they do not impose on the undertakings in question restrictions which are not indispensable for the achievement of these objectives; b) it does not enable undertakings to eliminate competition in respect of a significant part of the products concerned".

We find, therefore, that the provisions of primary Union law, identified above, establish the rule regarding the development of commercial contracts on a Union market without distortion of competition, while also identifying the exceptions and limits of their application. Moreover, we note that the text of the Treaty does not define the fundamental concepts in matters such as

agreements, vertical agreements, concerted practices, etc., leaving this objective to the Union legislator who on May 10, 2022, adopted the Commission Regulation (EU) 2022/720[1] (European Commission, 2022a) on the application of art. 101 para. 3 of the Treaty on the functioning of the European Union in the categories of vertical agreements and concerted practices[2].

Also, the same European Commission considered that it is necessary to issue an official document – the Communication "Guidelines on vertical restrictions" (European Commission, 2022b) – to meet the needs of commercial professionals by establishing the principles on the basis of which they can evaluate their vertical agreements as well as concerted practices in accordance with art. 101 of the TFEU and Commission Regulation (EU) 2022/720.

II. DEFINITION OF THE THEME-SPECIFIC TERMS

As I mentioned in the beginning of this study, the text of the reforming Treaty is limited to identifying those agreements or practices considered incompatible with the internal Union market, without defining the terms it refers to. The purpose of art. 101 para. 1 of the TFEU is to guarantee that undertakings do not use agreements as noted in the previously mentioned text, regardless of whether they are horizontal[3] or vertical[4] agreements, to prevent, restrict or distort competition to the detriment of consumers (C-306/20)(Court of Justice of the European Union, 2021a).

Also, art. 101 para.1 does not make any express reference to which categories of agreements it applies, so we understand that the text is incidental to both vertical and horizontal agreements.

In addition to the primary regulation of Union law, we mention the provisions of art. 1 of Regulation (EU) 2022/720, according to which the following terms are defined as follows:

[1] This regulation entered into force on June 1, 2022, and remains valid until May 31, 2034, being mandatory in all its elements and directly applicable in all Member States. Regulation (EU) 2022/720 replaces, as of June 1, 2022, Regulation (EU) no. 330/2010 of the Commission of 20 April 2010 on the application of art. 101 para. 3 of the Treaty on the Functioning of the European Union to the categories of vertical agreements and concerted practices.

[2] Regulation (EU) 2022/720 does not apply to unilateral actions by companies. However, unilateral actions may fall under art. 102 of the Treaty, which prohibits the abuse of a dominant position.

[3] It is concluded between enterprises carrying out commercial activity at the same level of the production or distribution chain.

[4] It is concluded between enterprises carrying out commercial activity at different levels of the production or distribution chain.

a) "*Vertical agreement*" (C-450/19) means an agreement or concerted practice assumed by at least two enterprises that each act, under the conditions and limits established by the agreement or concerted practice, at different levels of the production or distribution chain, with reference to the purchase, sale or the resale of certain goods or services. For there to be an agreement within the meaning of art. 101 TFEU, it is sufficient that each of the contracting parties has expressed their intention to behave on the market in a certain way (so-called concordant will). In such a scenario, the third party invoking the violation of art. 101 of the Treaty will have to prove that one of the parties has the benefit of the consent of the other party "in connection with its unilateral policy" (Court of Justice of the European Union, 2021b).
b) "*Vertical restriction* means the restriction of competition in a vertical agreement falling under art. 101 para. 1 of the Treaty" (European Council, 2007)
c) "*provider* means an enterprise that provides online intermediation services[5](The European Parliament and the Council, 2015) to other enterprises or to end consumers whether or not transactions are concluded and regardless of where these transactions are concluded".
d) "*non-competition obligation* means any direct or indirect obligation requiring the buyer not to produce, buy, sell or resell goods or services that compete with the contract goods or services....".

As a consequence, some clarifications vis a vis the particularities of commercial relations concluded in the application of this regulation are required.

In concrete terms, the commercial contracts covered by this Union provision are perfected between a supplier of goods or services (including online brokerage services[6] (European Commission, 2022b; European Parliament and the Council, 2015) and the buyer.

[5] "*online service* means any information society service, i.e. any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of the service".

[6] "*online intermediation services* means information society services within the meaning of art. 1 para. 1 let. b) of Directive (EU) 2015/1535 of the European Parliament and of the Council that allow businesses to offer goods or services: a) to other businesses, in order to facilitate the initiation of transactions between these enterprises or (b) final consumers, in order to facilitate the direct initiation between those enterprises and final consumers".

Also, in the sense of the Union regulation, both the supplier and the buyer are both enterprises and associative enterprises[7] (European Commission, 2022).

Last but not least, the relevant markets may present certain particularities as we are in the present:

(i) a "selective distribution system" (European Commission, 2022), in which case the presence of distributors selected by the supplier is highlighted who have a contractual obligation (Genoiu et al., 2010) not to resell the goods or services of distributors not approved by the supplier, or to resell on a market (territory) reserved only for the latter one;

(ii) an "exclusive distribution system" (European Commission, 2022). a situation characterized by the fact that the supplier maintains this exclusive quality in the relationship with a certain group of customers, or with a certain territory, prohibiting, as a consequence, other buyers to operate on the respective market or territory.

III. TO WHAT EXTENT THE PROVISIONS OF ART. 101 PARA. 3 APPLY TO VERTICAL AGREEMENTS CONTAINING VERTICAL RESTRAINTS?

Pursuant to art. 2 of this Regulation, the provisions of art. 101 para. 1 of the TFEU shall not apply to vertical agreements containing vertical restraints, as regulated under art. 1 para. 1 let b) of the Union law. Thus, the aforementioned exception covers vertical agreements:

(1) "concluded between an association of undertakings and an individual member or between an association and an individual supplier, only if all members of the association are retailers of goods and if no individual member of the association together with its associated undertakings achieves a turnover annual total exceeding 50 million euros.." (European Commission, 2022).

(2) "that contain provisions that relate to the assignment by the buyer or the buyer's use of the intellectual property rights...and are directly related to the use, sale or resale of goods or services by the buyer or its customers" (European Commission, 2022).

[7] "Associated enterprises" means: (a) enterprises in which a party to the agreement has, directly or indirectly: (i) more than half of the voting rights; or (ii) the power to appoint more than half of the members of the supervisory board, the board of directors or the bodies that represent the enterprise from a legal point of view; or (iii) the right to manage the company's activities...".

As regards competing companies[8], in principle, as stipulated in art. 2 para. 4 of the Regulation (EU) 2022/720, the exemption as regulated by art. 2 of the Regulation in accordance with the provisions of art. 101 para. 1 does not apply to them (1) TFEU. However, the previously stated provisions are also applicable to competing companies if:

(i) the supplier is a service provider at several commercial levels, while the buyer provides its services at the retail level;

(ii) the supplier operates upstream as a manufacturer, importer or wholesaler and downstream as an importer, wholesaler or retailer of goods, while the buyer is an importer, wholesaler or a downstream retailer and not a competing upstream enterprise from which it purchases the contract goods.

We are of the opinion that no category of agreements or concerted practices should automatically be subject to the provisions of art. 101 para. 1 of the TFEU, as certain types of agreements or practices can generate an increase in economic efficiency within a production chain or distribution, this leading for example to the reduction of distribution costs or to the optimization of the level of sales or investments, as the case may be.

Therefore, in accordance with the provisions of art. 3 para. 1 of the framework regulation, whenever the presence of agreements or concerted practices between two companies (supplier and buyer) that each hold a share of at most 30%[9] and these agreements do not generate certain types of serious restrictions on competition, and to the same extent determine on that market, an improvement in production or distribution and implicitly provide consumers with a fair share of the benefits obtained, for these agreements or concerted practices it is possible assumes that the provisions of art. 101 para. 1 of the Treaty of Lisbon will not apply.

Also relevant is the assumption established in art. 3 para. 2 of the regulation, where, in the case of a multi-party agreement where a first company buys contractual goods or services from a company that is a party to the agreement and later sells them to a third company which is also a party to the agreement, relevant, within the meaning of the provisions of art. 3 para.

[8] "Competing undertaking means an actual or potential competitor: *actual competitor* means an undertaking operating in the same relevant market; *potential competitor* means an enterprise which, in the absence of the vertical agreement, realistically and not just as a mere theoretical possibility, could, in a short period of time, make the necessary additional investments or bear other costs necessary to enter on the relevant market".

[9] That is, the market share held by the supplier should not exceed 30% of the relevant market on which it sells the goods or services and the market share held by the buyer should not exceed 30% of the relevant market on which it buys goods or services.

1 stated above, is the threshold of no more than 30% of the market share of the first undertaking.

On the other hand, as stipulated in point 9 of the Preamble to Regulation (EU) 2022/720, even in the case of companies that have a share above the 30% threshold on the relevant market, there is no presumption that the vertical agreements concluded between they fall under art. 101 para. 1 of the Treaty or do not meet the conditions laid down in art. 101 para. 3 of the Treaty.

To the same extent, those vertical agreements that contain restrictions that generate serious restrictions on competition or that harm consumers' interests must not be exempted under any circumstances (European Commission, 2022). In this sense, it regulates articles 4 and 5 of the Union norm, which specifically identifies the situations for which the above-mentioned exception does not apply, as follows:

i) restricting the buyer's ability to set his selling price, without prejudice to the supplier's ability to impose a maximum selling price;
ii) if the supplier applies an exclusive distribution system, the restriction of the territory in which the exclusive distributor can actively or passively sell the contractual goods or services or the restriction of the customers to whom he can actively or passively sell the contractual goods or services;
iii) if the supplier applies a selective distribution system, the restriction of the territory in which the members of the selective distribution system can actively or passively sell the contractual goods or services or the restriction of the customers to whom they can actively or passively sell the contractual goods or services;
iv) any direct or indirect non-compete obligation with a duration of more than 5 years (European Commission, 2022) or which is indefinite;
v) any direct or indirect obligation requiring the buyer, after the termination of the agreement, not to produce, not to buy, not to sell or not to resell the goods or services;
vi) any direct or indirect obligation requiring members of a selective distribution system not to sell the brands of certain competing suppliers;
vii) any direct or indirect obligation requiring a buyer of online intermediation services not to offer, sell or resell goods or services to end users on more favorable terms through competing online intermediation services.

We are of the opinion that, in order to evaluate the vertical agreements, the following steps should be taken into account:

a) First, the relevant market shares of both the supplier and the buyer must be established;

b) When the market share of both the supplier and the buyer does not exceed the threshold of 30% of the market share, the vertical agreement benefits from the protection regime established by Regulation (EU) 2022/720 provided that the agreement does not contain serious restrictions as are regulated in art. 4, respectively excluded restrictions that cannot be separated by agreement, as regulated in art. 5 of the regulation;

c) If the relevant market share of both the supplier and the buyer exceeds the 30% threshold or the vertical agreement contains one or more serious restrictions or excluded restrictions that cannot be separated from the agreement, it is necessary to determine to what extent the agreement vertical falls or not, as the case may be, under art. 101 para. 1 of the Treaty;

d) When the vertical agreement falls under art. 101 para. 1 of the TFEU, it will be checked to what extent it meets the exemption conditions regulated in art. 101 para. 3 of the reforming Treaty.

CONCLUSIONS

We therefore conclude that for the proper functioning of the internal Union market, in accordance with the provisions of art. 101 para. 1 of the TFEU in conjunction with the provisions of Union law on competition, companies must evaluate their own vertical agreements so that they do not harm the interests of consumers and not to generate restrictions that have as an immediate direct or indirect consequence the serious restriction of competition.

What does this rating mean?

We are of the opinion that this assessment presupposes, first of all, that the enterprise takes into account "all the relevant parameters of the competition" as stipulated in the commercial contracts, such as the price, goods or services from the point of view of their quality, quantity, of their variation etc. (European Commission, 2022).

The typology of the agreement will also be taken into account, to the extent that any vertical agreement as carried out at different levels of the production or distribution chain is much less harmful than any horizontal agreement carried out between competing enterprises

How to explain this element of specificity of the vertical agreement, "less harmful"? The explanation would lie in the fact that in a vertical chain,

the parties tend to agree on lower prices and high services, a policy of agreement considered beneficial for consumers. Moreover, a party to the vertical agreement is usually "incentivized" to oppose the other party's market policy to the extent that that policy would harm consumers, since such action would implicitly reduce the demand for goods and services that would thus harming the commercial interests of the first party.

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