Part II

VERTICAL AGREEMENTS UNDER REGULATION 330/2010

2

ROAD MAP

A. At a Glance	2.01
B. First Block: General Scope of Application	2.09
(1) First step: two or more undertakings	2.10
(2) Second step: vertical agreement	2.19
(3) Third step: effect on trade between Member States	2.30
(4) Fourth step: vertical restraints	2.34
(5) Conclusion	2.47
C. Second Block: Limitations to the General Scope of Application	2.48
(1) Fifth step: associations of undertakings	2.49
(2) Sixth step: IPR	2.52
(3) Seventh step: involvement of competitors	2.65
(4) Eighth step: other block exemptions	2.72
(5) Conclusion	2.76
D. Third Block: Market Share Limits	2.77
(1) Ninth step: what is (are) the relevant product and geographic market(s)?	2.79
(2) Tenth step: do the relevant market shares exceed 30 per cent?	2.81
E. Fourth Block: Substantive Assessment	2.84
(1) Eleventh step: does the vertical agreement contain hardcore restrictions?	2.85
(2) Twelfth step: does the vertical agreement include excluded restrictions?	2.91
F. Fifth Block: Non-Application and Withdrawal	2.96
(1) Thirteenth step: has the Commission adopted a regulation declaring the block exemption inapplicable to the vertical agreement?	2.98
(2) Fourteenth step: has the Commission or an NCA withdrawn the benefit of the block exemption from the vertical agreement?	2.101
G. Practical Conclusions	2.104

A. At a Glance

The objective of this chapter is to provide the practitioner with a road map covering the various steps and questions to assess whether a given vertical agreement benefits from Regulation 330/2010. Experience teaches us that one must not conclude too hastily that a vertical agreement falls within the scope of application of Regulation 330/2010 or meets the conditions to be block exempted. A step-by-step assessment is called for to avoid the risk of inaccurate conclusions. **2.01**

There are various ways to conduct such an assessment. The approach proposed in this chapter follows the sequence of Regulation 330/2010. For each step, the questions that must be resolved to arrive at reliable conclusions are outlined. If the analysis in the context of a particular step results in a finding that Regulation 330/2010 is not applicable, the road map outlines the legal consequences and, where relevant, points at the available options. It is important to stress in this context that a BER, such as Regulation 330/2010, is not mandatory law. Instead, it creates a rebuttable presumption of compliance with the conditions of Article 101(3) TFEU. Accordingly, the failure to meet the conditions of Regulation 330/2010 does not automatically imply that the agreement runs afoul of EU **2.02**

competition law. As the road map indicates, there are other ways to secure compliance with EU competition law.

2.03 The road map consists of five blocks. Each block consists of one or more steps. Each step can be broken down in a number of questions.

2.04 The first block addresses the general scope of application of Regulation 330/2010 and reflects the requirements of Article 2(1) of Regulation 330/2010. In order to conclude that an agreement or concerted practice falls within the general scope of application, the following steps must be completed:

- First step: two or more undertakings must be involved (paragraphs 3.04–3.47);
- Second step: the agreement must qualify as a vertical agreement (paragraphs 3.48–3.108);
- Third step: the vertical agreement must affect trade between Member States (paragraphs 3.109–3.164); and
- Fourth step: the vertical agreement must contain vertical restraints (paragraphs 3.165–3.246).

2.05 The second block deals with subject-matter related limitations to the general scope of application. The steps included in this block pertain to the limitations of Articles 2(2) to 2(5) of Regulation 330/2010. The relevant steps cover limitations related to the following subject matter:

- Fifth step: the involvement of associations as a party to the vertical agreement (paragraphs 4.03–4.12);
- Sixth step: the inclusion of IPR in the vertical agreement (paragraphs 4.13–4.37);
- Seventh step: the involvement of competitors as parties to the vertical agreement (paragraphs 4.38–4.48); and
- Eighth step: the subject matter of the vertical agreement being covered by another BER (paragraphs 4.49–4.90).

2.06 The third block addresses the market share limits of Article 3 of Regulation 330/2010. For purposes of calculating these limits account must be taken of the methodology in Article 7 of Regulation 330/2010. Checking the market share limits requires completion of the following steps:

- Ninth step: definition of the relevant market (paragraphs 5.12–5.52); and
- Tenth step: calculation of market shares (paragraphs 5.53–5.88).

2.07 With the fourth block we are leaving the assessment of the applicability of Regulation 330/2010 and enter into the substantive evaluation of the vertical agreement. This evaluation is split into two steps so as to take account of the different legal consequences attached to the inclusion in a vertical agreement of:

- Eleventh step: hardcore restrictions (Article 4 of Regulation 330/2010) (Chapter 6); and/or
- Twelfth step: excluded restrictions (Article 5 of Regulation 330/2010) (Chapter 7).

2.08 The fifth block consists of a sanity check that the vertical agreement, in whole or in part, is not excluded from the safe harbour of the block exemption as a result of:

- Thirteenth step: a specific Commission regulation declaring the block exemption inapplicable (Article 6 of Regulation 330/2010) (paragraphs 8.03–8.08); or

- Fourteenth step: a withdrawal decision of the Commission or a competent NCA (Article 29 of Regulation 1/2003) (paragraphs 8.09–8.18).

B. First Block: General Scope of Application

2.09 Chapter 3 describes in detail the general scope of application of Regulation 330/2010. In order to ensure that certain market conduct meets the requirements of Article 2(1) of Regulation 330/2010 and is covered by the general scope of application of the block exemption, the following steps must be completed.

(1) First step: two or more undertakings

2.10 Similar to Article 101 TFEU, the applicability of Regulation 330/2010 is dependent on the involvement of at least two undertakings. In order to determine whether this requirement is met, the following questions must be addressed:

Do the parties qualify as 'undertakings'?

2.11 The concept of 'undertaking' is not defined in the TFEU. In accordance with settled case law, 'undertaking' for the purposes of EU competition law means 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'. The functional test developed in the case law can cover legal entities, unincorporated entities as well as physical persons. Hence, the nature or legal form of the party is not important. It is the nature of its activities that is decisive.

2.12 The vast majority of vertical agreements involve commercial companies that, by definition, qualify as undertakings. A more careful review is needed where public bodies or organizations acting in the context of social solidarity are involved. Consumers purchasing for private use do not qualify as undertakings.

2.13 If the parties involved in a given practice do not qualify as undertakings, the legal consequences are quite straightforward. Such practice will not be covered by Article 101 TFEU and similarly falls outside the scope of Article 102 TFEU. As a result, Regulation 330/2010, which grants an exemption from the prohibition included in Article 101(1) TFEU, does not apply.

2.14 A more detailed description of this question is contained in paragraphs 3.05–3.22.

Are there at least two parties meeting this qualification?

2.15 It is not sufficient for the application of Regulation 330/2010 that at least one of the parties involved qualifies as an undertaking. Similar to Article 101 TFEU, Article 2(1) Regulation 330/2010 requires that at least two of the parties are undertakings.

2.16 Most vertical agreements are typically concluded between two independent commercial companies. There are however scenarios that require particular attention. The most important of such scenarios concerns vertical agreements entered into between related companies. If the relationship between these companies is such that the so-called intra-group theory applies, they do not qualify as two independent undertakings but form a single undertaking. The same may apply in certain agency scenarios where the agent is considered part of the same undertaking as its principal.

2.17 In cases where only a single undertaking is involved (eg on account of the intra-group theory), Article 101 TFEU does not enter into play. By the same token, Regulation 330/2010 does not apply. This does not mean that the conduct is completely immune from competition law scrutiny. The conduct may still run counter to Article 102 TFEU (abuse of dominant position) or stricter national competition rules governing unilateral conduct.

2.18 A more detailed description of this question is contained in paragraphs 3.23–3.47. Figure 2.1 shows a summary of the first step.

(2) **Second step: vertical agreement**

2.19 Article 2(1) of Regulation 330/2010 specifies that the block exemption applies only if two or more undertakings have entered into a vertical agreement. Article 1(1)(a) of Regulation 330/2010 defines a 'vertical agreement' as:

> [A]n agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.

In order to check whether a given practice meets this definition, the following questions have to be answered.

Does the conduct amount to an agreement or concerted practice or is it unilateral conduct?

2.20 In most cases the answer to this question will be easy. If two commercial companies enter into a distribution agreement, it is obvious that an agreement within the meaning of Article 1(1)(a) of Regulation 330/2010 is involved. It is only in borderline cases that a more in-depth review will be called for. A typical example is where a supplier decides to limit the quantities it delivers to its national importers in order to reduce cross-border trade. While at least two undertakings are involved, it remains to be assessed whether

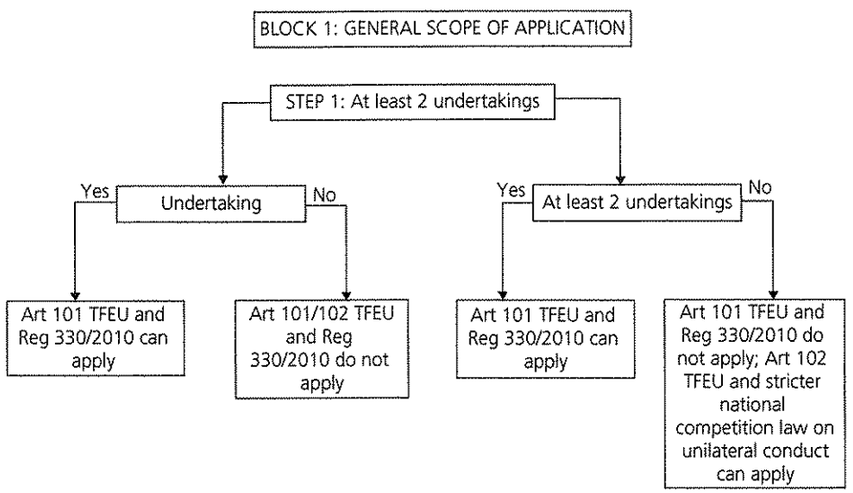

Figure 2.1 First step: two or more undertakings

the decision of the supplier qualifies as a vertical agreement or amounts to no more than unilateral conduct.

If unilateral conduct is involved which does not qualify as an agreement or concerted practice, Article 101 TFEU and Regulation 330/2010 do not apply. Such conduct must be assessed only on the basis of Article 102 TFEU or stricter rules of national competition law governing unilateral conduct. **2.21**

A more detailed description of this question is contained in paragraphs 3.54–3.93. **2.22**

Is the agreement 'vertical'?

Competition law distinguishes between horizontal and vertical practices. The differentiating factor is whether the undertakings involved act at the same or at different levels of the production, supply, or distribution chain. If they act at the same level, the practice is characterized as horizontal. If they operate at different levels, the practice is considered vertical. **2.23**

Article 2(1) of Regulation 330/2010 requires that the agreement is 'vertical' in order for Regulation 330/2010 to apply. Article 1(1)(a) of Regulation 330/2010 adds however that the vertical nature of the relationship must (only) exist 'for the purposes of the agreement'. This addition is important. It means that undertakings that are active at the same level of the production, supply, or distribution chain can still qualify for the block exemption provided that they are acting at different levels for the agreement under review. More concretely, an agreement (or concerted practice) between two competing producers qualifies as a 'vertical agreement' in the sense of Article 2(1) of Regulation 330/2010 if, in the context of that agreement, the first producer acts as the supplier and the second as the buyer. The fact that they act at the same level in other contexts does not deprive that specific agreement of its vertical character. **2.24**

If the agreement is horizontal, Article 101 TFEU remains relevant. However, the parties will not be able to rely on Regulation 330/2010 to secure an exemption in accordance with Article 101(3) TFEU. The parties can still turn to two other BER that govern horizontal relationships, notably Regulation 1217/2010 (R&D agreements) and Regulation 1218/2010 (specialization agreements). If these BER are inapplicable, the parties can conduct a self-assessment on the basis of Article 101(3) TFEU. **2.25**

A more detailed description of this question is contained in paragraphs 3.94–3.96. **2.26**

Does the vertical agreement relate to the purchase, sale, or resale of goods and/or services?

In addition to being 'vertical', the agreement must also relate to the purchase, sale, or resale of goods and/or services. This requirement poses problems for rental or lease agreements, as well as for licensing agreements that do not include the purchase, sale, or resale of goods and/or services. **2.27**

If the vertical agreement does not relate to the purchase, sale, or resale of goods and/or services, it may still be covered by Article 101 TFEU, but cannot benefit from Regulation 330/2010. Depending on its exact nature, it may qualify for a block exemption under Regulation 316/2014 (technology transfer agreements), Regulation 1217/2010 (R&D agreements), or Regulation 1218/2010 (specialization agreements). In case of the inapplicability of these BER, the parties can conduct a self-assessment on the basis of Article 101(3) TFEU. **2.28**

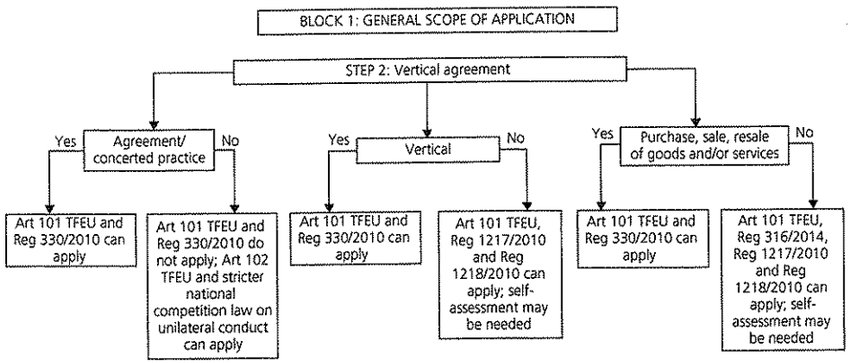

Figure 2.2 Second step: vertical agreement

2.29 A more detailed description of this question is contained in paragraphs 3.97–3.103. Figure 2.2 shows a summary of the second step.

(3) Third step: effect on trade between Member States

2.30 The effect on trade between Member States that is needed for the applicability of Article 101 TFEU is likewise required for the applicability of Regulation 330/2010. While this is not stated in Article 2(1) of Regulation 330/2010, it follows naturally from the references in that provision to Article 101(1) and 101(3) TFEU.

2.31 It is logical to take this condition as a third step in the assessment process. The effect on trade requirement does not have to be measured at the level of the individual restrictions of competition, but at the level of the vertical agreement as a whole. This implies that the condition is met if the agreement as a whole has the required effect on trade between Member States, even though the restrictions of competition individually do not meet the test.

2.32 If there is no or insufficient effect on trade between Member States, Article 101 TFEU does not apply and Regulation 330/2010 is not directly relevant. However, this does not exclude national competition law from providing that the vertical agreement may benefit from a (national) exemption if the other conditions of Regulation 330/2010 are met—that is, save for the effect on trade requirement. In addition to national competition law of the Member States, the parties must take account of the competition laws of third countries if the vertical agreement has the effects required for the national competition laws of such countries to apply.

2.33 A more detailed description of the effect on trade between Member States required by Article 101 TFEU and Article 2(1) of Regulation 330/2010 is contained in paragraphs 3.109–3.164. Figure 2.3 shows a summary of the third step.

(4) Fourth step: vertical restraints

2.34 The final step in the assessment of the general scope of application of Regulation 330/2010 consists in checking whether the vertical agreement contains vertical restraints.

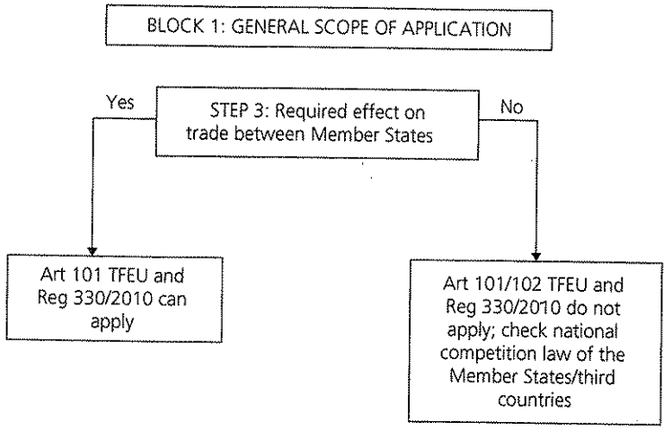

Figure 2.3 Third step: effect on trade

The concept of vertical restraint is defined in Article 1(1)(b) of Regulation 330/2010 as 'a restriction of competition in a vertical agreement falling within the scope of Article 101(1) TFEU'.

2.35 The need for vertical restraints is directly related to the fact that Regulation 330/2010 is a block exemption, that is, an automatic exemption in accordance with Article 101(3) TFEU. In cases where there are no restrictions of competition (here, no vertical restraints), there is no need for an exemption and hence no need to make use of Regulation 330/2010.

2.36 In order to assess whether a vertical agreement contains vertical restraints, the following questions must be addressed:

Does the vertical agreement include restrictions by object and/or restrictions by effect?

2.37 A vertical restraint can take the form of a restriction by object or a restriction by effect. In the case of an object restriction, there is no need to prove that the restriction results in restrictive effects. For restrictions that do not qualify as an object restriction, the effects must be established.

2.38 The distinction between the two types of restrictions plays a limited role for the applicability of Regulation 330/2010, which covers all object restrictions (with the exception of the hardcore restrictions listed in its Article 4) and all effects restrictions (with the exception of the so-called excluded restrictions contained in its Article 5).

2.39 The distinction is of greater importance when establishing whether vertical restraints are involved (put differently, whether Article 101(1) TFEU is infringed). Case law devotes quite some attention to the distinction between restrictions by object and restrictions by effect. The lessons from that case law are very relevant for making the necessary assessment under Article 101(1) TFEU.

2.40 A more detailed description of this question is contained in paragraphs 3.168–3.185.

In the case of restrictions by effect, do they meet the standard of appreciability?

2.41 Restrictions of competition must be appreciable before coming within the scope of the prohibition of Article 101(1) TFEU. The same applies for vertical restraints within the meaning of Article 1(1)(b) and Article 2(1) of Regulation 330/2010.

2.42 Case law confirms that restrictions by object are presumed to meet the standard of appreciability, so there is no need to conduct any further appreciability check for object restrictions. This is different for restrictions by effect. Such restrictions qualify only as a vertical restraint if they are proven to be appreciable. The most important tool to conduct an appreciability check is the so-called De Minimis Notice, which links the appreciability of the effects restriction to the market shares of the parties on the relevant market.

2.43 A more detailed description of this question is contained in paragraphs 3.186–3.209.

Do any of the escape routes apply to the vertical agreement or the vertical restraints?

2.44 Even if the vertical agreement contains restrictions by object or appreciable restrictions by effect, either one of the following three escape routes may render the prohibition of Article 101(1) TFEU inapplicable: government compulsion, ancillary restraints, or objective justifications.

2.45 If any of these escape routes applies, the vertical agreement or the vertical restraint to which the escape route applies, is not caught by the prohibition of Article 101(1) TFEU and hence needs no exemption on the basis of Regulation 330/2010.

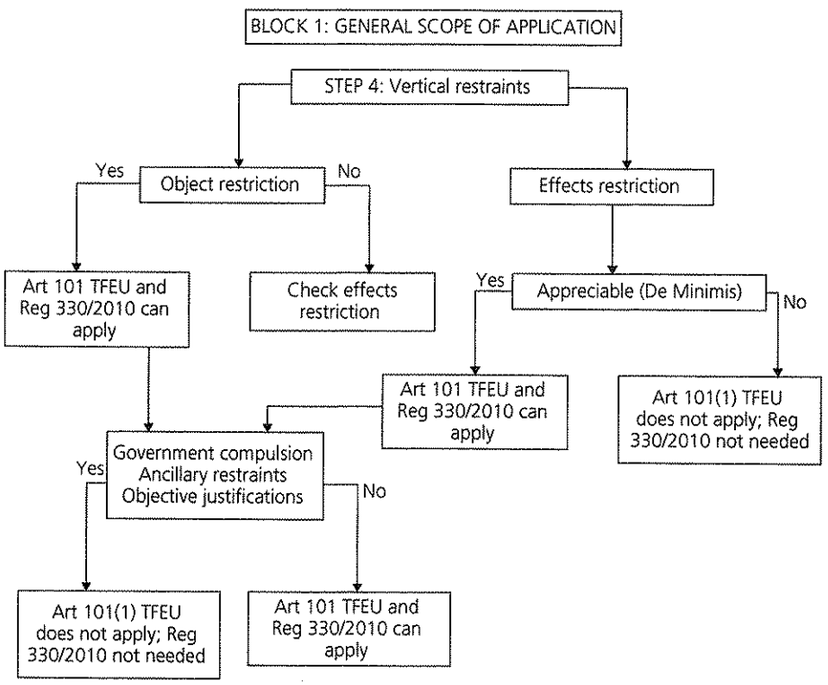

Figure 2.4 Fourth step: vertical restraints

A more detailed description of these escape routes is contained in paragraphs 3.210–3.243. Figure 2.4 shows a summary of the fourth step. **2.46**

(5) Conclusion

The completion of these four steps establishes whether a vertical agreement is within the general scope of application of Regulation 330/2010. This first block is not the end of the assessment. Whether the vertical agreement effectively falls within the scope of application of Regulation 330/2010 depends on the outcome of the second and third blocks of the assessment. **2.47**

C. Second Block: Limitations to the General Scope of Application

Chapter 4 of this book discusses the limitations to the general scope of application of Regulation 330/2010 that result from Article 2(2) to (5) of Regulation 330/2010. The following steps must be taken to determine whether one of the limitations applies. **2.48**

(1) Fifth step: associations of undertakings

Pursuant to Article 2(2) of Regulation 330/2010, the block exemption, as a rule, does not apply to agreements between an association of undertakings and its members or agreements between such an association and its suppliers. As an exception to this rule, the block exemption applies if all the members are retailers and none of them exceed a total annual turnover of EUR 50 million. Article 8 of Regulation 330/2010 provides details to calculate the turnover limit. **2.49**

If the exclusion applies, Article 101 TFEU remains applicable and Regulation 330/2010 cannot be relied upon for securing an exemption. A self-assessment is required to establish whether the prohibition of Article 101(1) TFEU applies and whether the practice meets the conditions of Article 101(3) TFEU so as to benefit from an individual exemption. **2.50**

A more detailed description of this fifth step is contained in paragraphs 4.03–4.12. Figure 2.5 shows a summary of the fifth step. **2.51**

(2) Sixth step: IPR

Vertical agreements with IPR provisions are not automatically within the scope of application of Regulation 330/2010. Article 2(3) of Regulation 330/2010 contains limits to the applicability of the block exemption to such agreements. Four questions must be addressed to find out whether any of such limits apply: **2.52**

Are the IPR assigned to, or licensed for use by, the buyer?

Regulation 330/2010 applies only if the IPR are provided by the supplier to the buyer and not vice versa. A typical case where the buyer and not the supplier provides the IPR is an industrial supply agreement whereby the supplier manufactures and supplies components that are integrated in machines produced by the buyer. Regulation 330/2010 does not **2.53**

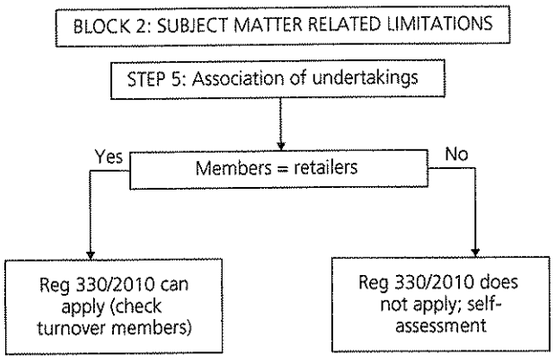

Figure 2.5 Fifth step: associations of undertakings

apply to such cases where the buyer provides IPR to the supplier to enable the supplier to produce the components.

2.54 Scenarios in which the buyer provides IPR to the supplier can usefully be checked under the Subcontracting Notice. If they fall within the prohibition of Article 101(1) TFEU, a block exemption may be available through Regulation 316/2014 (technology transfer agreements), Regulation 1217/2010 (R&D agreements), or Regulation 1218/2010 (specialization agreements). If none of these BER apply, a self-assessment on the basis of Article 101(3) TFEU is required to check whether the vertical agreement qualifies for an individual exemption from the prohibition of Article 101(1) TFEU.

2.55 A more detailed description of this question is contained in paragraphs 4.21–4.22.

Do the IPR not constitute the primary object of the vertical agreement?

2.56 Regulation 330/2010 applies only if the primary object of the vertical agreement is the supply, purchase, or resale of goods and/or services. The application of Regulation 330/2010 is not excluded if the vertical agreement includes the provision of IPR to the buyer as long as such IPR support the supply, purchase, or resale of goods and/or services without being the primary object of the vertical agreement.

2.57 Cases where the IPR constitute the primary object of the vertical agreement may qualify for an exemption pursuant to Regulation 316/2014 (technology transfer agreements). Otherwise a self-assessment will be called for to establish the compatibility of the vertical agreement with Article 101 TFEU (and possibly Article 102 TFEU).

2.58 A more detailed description of this question is contained in paragraph 4.23.

Are the IPR directly related to the use, sale or resale of goods and/or services by the buyer or its customers?

2.59 There must be a direct link between the IPR and the use, sale, or resale of goods and/or services by the buyer or its customers. For example, IPR (such as the right to use the supplier's trademarks) that are made available to enhance the marketing of the goods or services covered by a distribution agreement normally meet this test.

If the direct link does not exist, the vertical agreement (or at least the part of the agreement dealing with the IPR) does not qualify for an exemption pursuant to Regulation 330/2010. Regulation 316/2014 (technology transfer agreements) may present a useful alternative. Otherwise, a self-assessment will be required. **2.60**

A more detailed description of this question is contained in paragraphs 4.24–4.25. **2.61**

Do the IPR provisions not contain restrictions of competition having the same object as vertical restraints that are not exempted under Regulation 330/2010?

The rationale of this question is to avoid that parties use IPR provisions to incorporate in their vertical agreements restrictions which are not exempted. More specifically, the restrictions linked to the IPR must be tested against the hardcore list of Article 4 of Regulation 330/2010. **2.62**

If the restrictions related to the IPR present a problem for the applicability of Regulation 330/2010, Regulation 316/2014 (technology transfer agreements) may apply. The more likely scenario is that the parties will need to conduct a self-assessment. **2.63**

A more detailed description of this question is contained in paragraphs 4.26–4.28. Figure 2.6 shows a summary of the sixth step. **2.64**

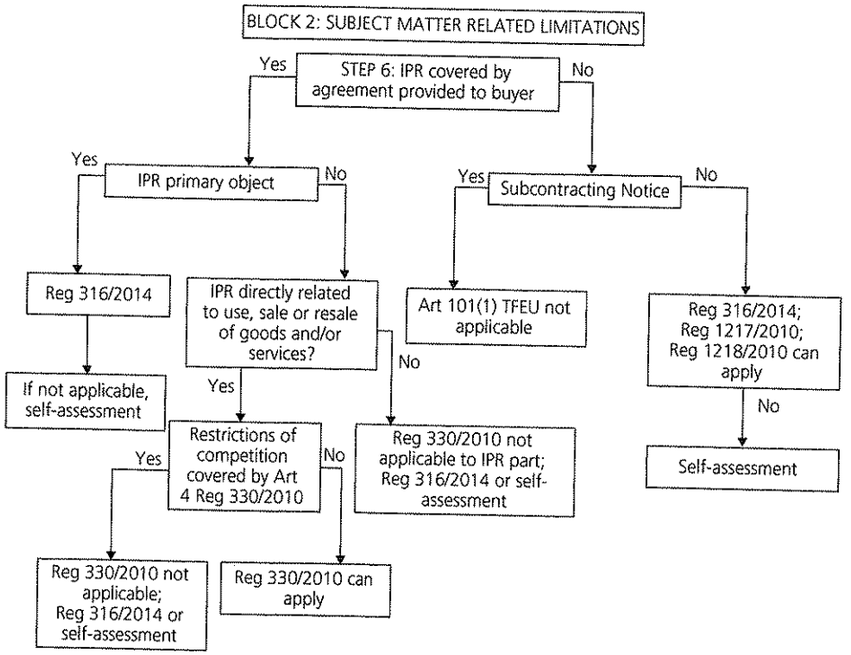

Figure 2.6 Sixth step: IPR

(3) Seventh step: involvement of competitors

2.65 As a rule, Regulation 330/2010 does not apply to vertical agreements concluded between competing undertakings. The concept of 'competing undertaking' is defined in Article 1(1)(c) of Regulation 330/2010. Article 2(4) of Regulation 330/2010 contains limited exceptions to this rule. In order to determine the applicability of these exceptions, the following questions must be addressed:

Is the vertical agreement non-reciprocal?

2.66 Reciprocal agreements between competing undertakings are excluded from the scope of application of Regulation 330/2010. This is so even if the test addressed in the next question is met.

2.67 Reciprocal agreements in most cases require a self-assessment. Exceptionally, Regulation 316/2014 (technology transfer agreements), Regulation 1217/2010 (R&D agreements) or Regulation 1218/2010 (specialization agreements) may apply.

2.68 A more detailed description of this question is contained in paragraphs 4.39–4.41.

Is a case of dual distribution involved?

2.69 Non-reciprocal vertical agreements between competing undertakings can only benefit from the block exemption in the case of dual distribution. This means that the undertakings must meet each other as competing undertakings at the downstream level and not upstream. This is the case where the supplier is a manufacturer and a distributor of certain goods and the buyer a distributor but not a competing undertaking at the manufacturing level.

2.70 Non-reciprocal agreements that do not fit within a dual distribution scenario fall outside the scope of application of Regulation 330/2010. While in most cases a self-assessment will be needed, Regulation 316/2014 (technology transfer agreements), Regulation 1217/2010 (R&D agreements), or Regulation 1218/2010 (specialization agreements) may apply.

2.71 A more detailed description of this question is contained in paragraphs 4.42–4.47. Figure 2.7 shows a summary of the seventh step.

(4) Eighth step: other block exemptions

2.72 A vertical agreement is outside the scope of application of Regulation 330/2010 if its subject matter falls within the scope of any other BER. It is irrelevant in this context whether the agreement is actually exempted pursuant to that other regulation. From the moment that the agreement is within the scope of application of another BER, even if it contains one or more hardcore restrictions so that the other BER is not available, Regulation 330/2010 no longer applies.

2.73 At the time of writing, the following other BER are available:

- Regulation 461/2010 (motor vehicles), discussed in paragraphs 4.87–4.89 and in greater detail, in Chapter 11;
- Regulation 316/2014 (technology transfer agreements), discussed in paragraphs 4.75–4.86;
- Regulation 1217/2010 (R&D agreements), discussed in paragraphs 4.56–4.64; and
- Regulation 1218/2010 (specialization agreements), discussed in paragraphs 4.65-4.74.

2.74 If Regulation 330/2010 does not apply for the reason mentioned here, the solution is obviously the application of the relevant other BER. If the vertical agreement is within the scope of application of such other regulation, but does not benefit from its safe harbour, a self-assessment of the agreement is called for.

2.75 A more detailed description of this question is contained in paragraphs 4.49–4.90. Figure 2.8 shows a summary of the eighth step.

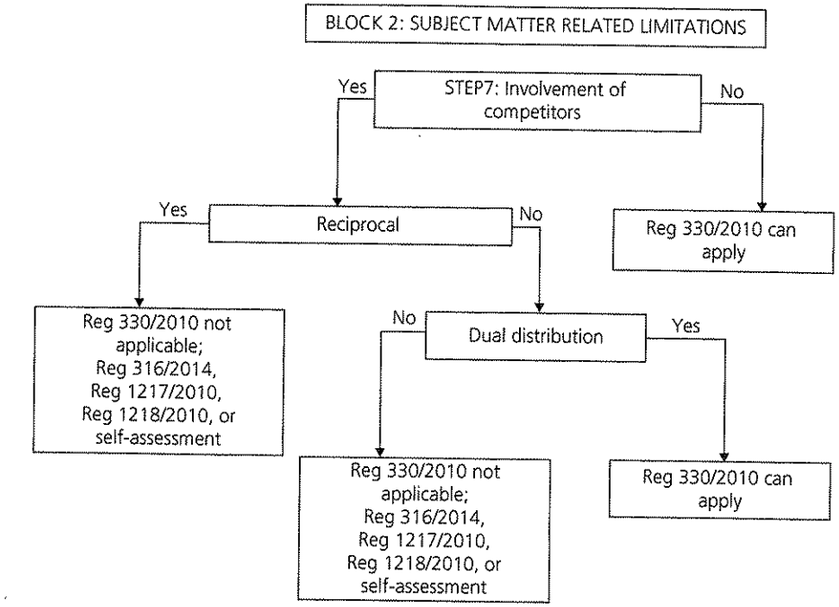

Figure 2.7 Seventh step: involvement of competitors

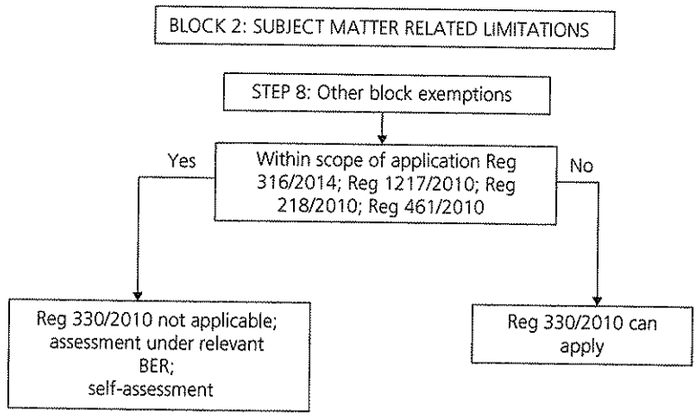

Figure 2.8 Eighth step: other block exemptions

(5) Conclusion

2.76 In case none of the above limits applies, the subject matter of the vertical agreement falls within the scope of application of Regulation 330/2010. The only remaining step before assessing the vertical restraints included in the vertical agreement is the application of the market share limits included in Article 3 of Regulation 330/2010.

D. Third Block: Market Share Limits

2.77 The application of Regulation 330/2010 is subject to the double market share limit of 30 per cent of Article 3 of Regulation 330/2010, one applying to the supplier and the other to the buyer.

2.78 In order to determine whether the market share limits are met, the following questions must be addressed:

(1) **Ninth step: what is (are) the relevant product and geographic market(s)?**

2.79 Market shares must be measured on a properly defined relevant market. Such market has a product dimension and a geographic dimension. Guidance on the definition of relevant markets can be found in the Relevant Market Notice. Useful input can also be found in past (merger) cases in the relevant sector.

2.80 A more detailed description of this question is contained in paragraphs 5.12–5.52. Figure 2.9 shows a summary of the ninth step.

(2) **Tenth step: do the relevant market shares exceed 30 per cent?**

2.81 The market share of the supplier is calculated on the market on which it sells the goods or services. The market share of the buyer is calculated on the corresponding purchasing market (and hence not on the market on which the buyer, in turn, sells the goods or services). Guidance on the calculation of the market shares can be found in Article 7 of Regulation 330/2010.

2.82 If the market share limit of 30 per cent is temporarily exceeded, Articles 7(d) to 7(f) of Regulation 330/2010 provide a transitional regime during which the vertical agreement continues to qualify for an exemption pursuant to Regulation 330/2010. In cases where the transitional regime does not apply, a self-assessment under Article 101(3) TFEU is called for.

2.83 A more detailed description of this question is contained in paragraphs 5.53–5.88. Figure 2.10 shows a summary of the tenth step.

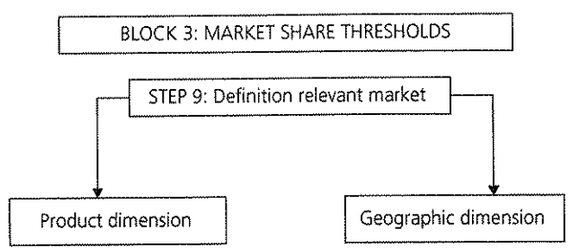

Figure 2.9 Ninth step: relevant product and geographic market(s)

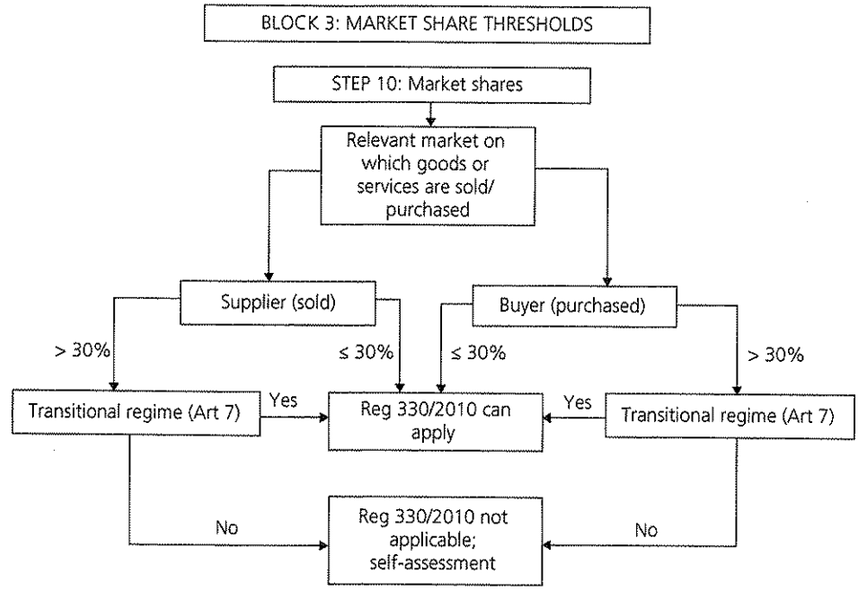

Figure 2.10 Tenth step: relevant market shares

E. Fourth Block: Substantive Assessment

2.84 The successful completion of the first three blocks means that the vertical agreement falls within the scope of application of Regulation 330/2010, and that it is useful to conduct a substantive assessment of the vertical restraints involved on the basis of Articles 4 and 5 of Regulation 330/2010. The distinction between these two provisions is important because the failure to comply attracts different legal consequences. The substantive assessment can therefore usefully be split in two based on the following questions:

(1) **Eleventh step: does the vertical agreement contain hardcore restrictions?**

2.85 The hardcore restrictions are listed in Article 4 of Regulation 330/2010. The list is exhaustive. This implies that object restrictions that are not listed do not qualify as hardcore restrictions for the purposes of Regulation 330/2010 and therefore can benefit from the block exemption.

2.86 The hardcore restrictions concern the following restrictions imposed on the buyer: RPM, territorial restrictions, and customer restrictions.

2.87 The nature of the chosen distribution formula has a considerable impact on the territorial and customer restrictions that are permissible. A major distinction must be made between selective and non-selective distribution systems. Similarly, it is important to distinguish between exclusive and non-exclusive distribution. The level of the supply chain at which the buyer is active (wholesale as opposed to retail) also influences the characterization of customer restrictions as hardcore restrictions.

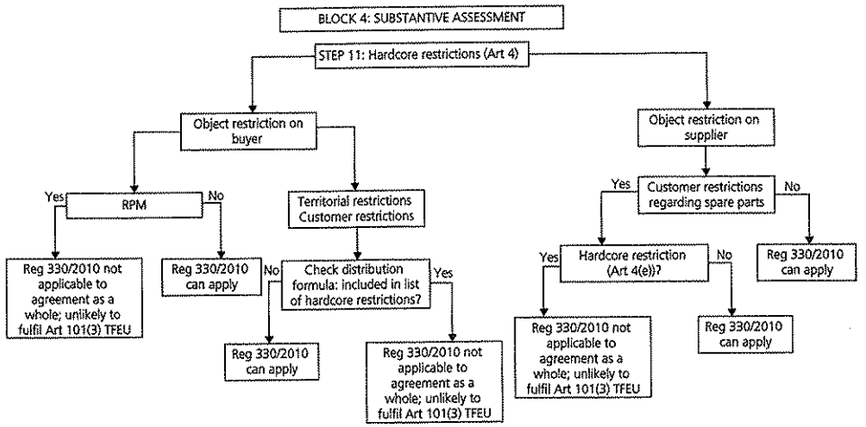

Figure 2.11 Eleventh step: hardcore restrictions

2.88 Restrictions imposed on the supplier are generally not hardcore restrictions and are exempted. There is one limited exception, namely customer restrictions imposed on a supplier of components wishing to sell the components as spare parts in the aftermarket (Article 4(e)). Ordinarily, restrictions imposed on the supplier in a standard distribution agreement will never be hardcore restrictions and may benefit from the block exemption.

2.89 If the parties include a hardcore restriction in their vertical agreement, the block exemption is no longer applicable to the agreement as a whole. Put differently, the benefit of the block exemption is completely lost as a result of the inclusion of a single hardcore restriction in the vertical agreement. In addition, the Commission advances in the Vertical Guidelines (paragraph 47) a presumption that an agreement with a hardcore restriction 'is unlikely to fulfil the conditions of Article 101(3) TFEU'. This implies that such a hardcore restriction considerably complicates any self-assessment of the vertical agreement on the basis of Article 101(3) TFEU due to this (rebuttable) negative presumption. Such a self-assessment will however be needed to establish the compatibility of the vertical agreement with Article 101 TFEU.

2.90 Detailed guidance with regard to the hardcore restrictions listed in Article 4 of Regulation 330/2010 is provided in Chapters 6 and 9 of this book. Figure 2.11 shows a summary of the eleventh step.

(2) Twelfth step: does the vertical agreement include excluded restrictions?

2.91 The excluded restrictions are listed in Article 5 of Regulation 330/2010. Like for the regime of the hardcore restrictions, the list of excluded restrictions is exhaustive. This implies that effect restrictions that are not listed do not qualify as excluded restrictions for the purposes of Regulation 330/2010 and can benefit from the block exemption.

2.92 The excluded restrictions concern the following restrictions imposed on the buyer: a non-compete or single branding obligation, an obligation to purchase more than 80 per cent of its requirements from the supplier or another undertaking designated by the supplier, a post-term non-compete obligation, or a boycott of particular competing suppliers in a selective distribution system.

2.93 With the exception of that last restriction (boycott in selective distribution), the compatibility of such restrictions with Article 5 of Regulation 330/2010 does not depend on the applicable distribution formula. In order to assess the conditions under which such restrictions amount to excluded restrictions, it is important to read Article 5 of Regulation 330/2010 in combination with the definition of 'non-compete obligation' contained in Article 1(1)(d) of Regulation 330/2010. Such a combined reading makes it clear that the restrictions mentioned in paragraph 2.92 do not always qualify as excluded restrictions. They escape such qualification, for instance, by being subject to certain time limits (eg in cases of single branding) or certain additional geographic and product scope limits (eg in cases of post-term non-compete obligations).

2.94 Different from the regime applicable to hardcore restrictions, the inclusion of an excluded restriction does not lead to the inapplicability of the block exemption to the vertical agreement as a whole. Only the excluded restriction will not benefit from the block exemption. There is no negative impact on the applicability of the block exemption to the remainder of the vertical agreement. In order to determine whether the excluded restriction is compatible with Article 101 TFEU, a self-assessment related to that restriction is called for.

2.95 Detailed guidance with regard to the excluded restrictions listed in Article 5 of Regulation 330/2010 is provided in Chapters 7 and 9 of this book. Figure 2.12 shows a summary of the twelfth step.

F. Fifth Block: Non-Application and Withdrawal

2.96 A final check to be made is whether the Commission or an NCA adopted a measure resulting in the inapplicability of Regulation 330/2010 to the vertical agreement under investigation. To follow the sequence of Regulation 330/2010, we put this check at the back-end of the proposed methodology. Given that such measures are specific and highly exceptional, companies that may be affected by them should normally be aware of their existence. For that reason such measures will typically be taken into account earlier in the assessment process.

2.97 The following questions are relevant in this context:

(1) Thirteenth step: has the Commission adopted a regulation declaring the block exemption inapplicable to the vertical agreement?

2.98 Article 6 of Regulation 330/2010 provides that the Commission may by regulation declare the block exemption inapplicable where parallel networks of similar vertical restraints cover more than 50 per cent of a relevant market. The regulation shall specify the vertical agreements that are affected because they contain these specific restraints relating to the market concerned. It is important to note that the regulation causing the non-applicability of the block exemption is not addressed to individualized companies, but concerns a well-defined group of vertical agreements.

2.99 Vertical agreements covered by a non-application regulation issued by the Commission must be the subject of a self-assessment to establish their compatibility with Article 101 TFEU.

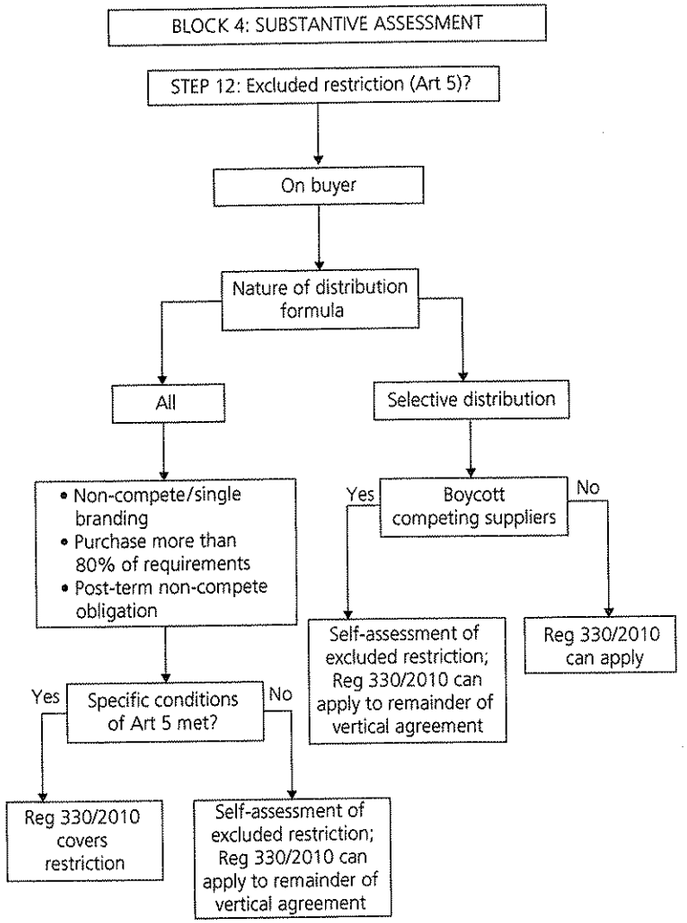

Figure 2.12 Twelfth step: excluded restrictions

2.100 A more detailed description of this question is contained in paragraphs 8.03–8.08. Figure 2.13 shows a summary of the thirteenth step.

(2) **Fourteenth step: has the Commission or an NCA withdrawn the benefit of the block exemption from the vertical agreement?**

2.101 Article 29 of Regulation 1/2003 grants the Commission the authority to withdraw the benefit of the block exemption in any particular case where a vertical agreement has certain effects that are incompatible with Article 101(3) TFEU. NCA have the same powers if the negative effects occur in the territory of their Member State, or in a part thereof, which has all the characteristics of a distinct geographic market. The withdrawal decision of the NCA must be confined to that distinct market.

2.102 Also in this case, a self-assessment is the way forward to establish whether the vertical agreement is consistent with Article 101 TFEU.

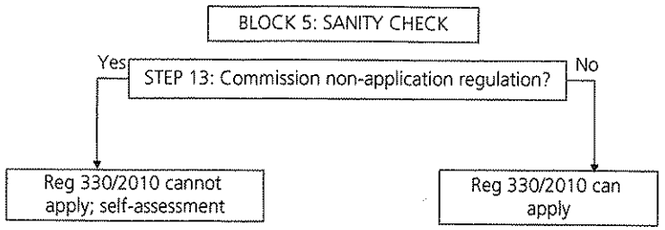

Figure 2.13 Thirteenth step: non-application

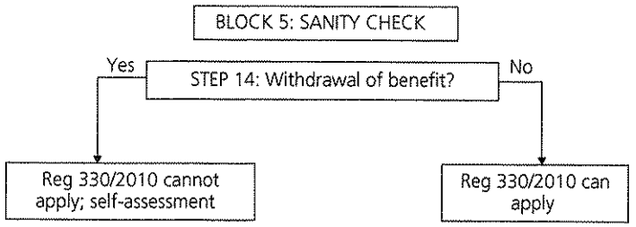

Figure 2.14 Fourteenth step: withdrawal

A more detailed description of this question is contained in paragraphs 8.09–8.18. Figure 2.14 shows a summary of the fourteenth step. **2.103**

G. Practical Conclusions

The road map provided in this chapter provides a high level introduction to all of the steps that are required to apply Regulation 330/2010 correctly. **2.104**

Practitioners with experience in the application of Regulation 330/2010 will be able to deal very quickly with many of the steps and questions outlined in this chapter. This does however not do away with the fact that each of the steps and questions is important. As the road map shows, an omission in checking one or more of the questions related to IPR or an incorrect assessment of the exception that applies to vertical agreements between competing undertakings, may be sufficient to arrive at incorrect conclusions regarding the applicability of Regulation 330/2010. The road map therefore contains a checklist of points which must all be addressed. **2.105**

Behind many of the steps and questions, there are a number of detailed issues that may play a role in the final outcome of the assessment. Hence, unless it is truly obvious that a particular step or question does not present a problem for the applicability of Regulation 330/2010, it is recommended to consult the more detailed description that is cross-referenced earlier. Such description contains both the necessary legal explanations and practical examples, many from our own practice, that illustrate how such issues are best analysed and handled. **2.106**