# On the compatibility with EU Law of the new Section 43 A of the Spanish Hydrocarbons Act (introduced by Act 11/2013 of July 26Th)

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## 1. Introduction

By means of Act 11/2013 of July 26th concerning measures to support entrepreneurship and stimulate growth and job creation, a number of amendments have been made to the Hydrocarbons Sector Act 34/1998 of October 7th (hereinafter the "Hydrocarbons Act") whose compatibility with EU competition law is, at the very least, controversial.

Specifically, Act 11/2013 introduces a new section 43 *a* in the Hydrocarbons Act[1] by virtue of which the usual and not always well settled exclusive distribution agreements in the Hydrocarbons industry are more strictly regulated. Thus, according to this new section, sale agreements within the sector "*cannot contain exclusivity clauses which [ ... ] set, recommend or affect, directly or indirectly, the retail price of fuel*" and clauses which "*determine the sale price of fuel with reference to a particular fixed, maximum or recommended price, or any others that contribute to indirect fixing of the sale price*" (underlining added) shall be void and deemed deleted.

Thus, by means of this regulation the legislator prohibits not only fuel resale price fixing -something that, as we shall see, EU competition rules already prohibit under certain conditions- but also mere price recommendations.

On the other hand, the new section 43 *a* of the Hydrocarbons Act sets out the maximum term of exclusive supply agreements (one year, with a maximum of two renewals).

It is precisely these issues that have caused the mentioned controversy.

Over the following lines we analyse the conformity of the new prohibition with EU law and its validity.

## 2. Compatibility of the prohibition on price recommendations with EU law

### *2.1. Incompatibilities between the Hydrocarbons Act and European Competition law*

Under Article 101 of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), all agreements between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited and void. According to Regulation 330/2010 on the application of article 101(3) TFEU to categories of vertical agreements and concerted practices[2] (hereinafter, the "Block Exemption Regulation" or "Regulation"),

[1] Section 39 para. 3 of Act 11/2013.

[2] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1, 23.04.2010.

which prohibits the imposition of resale prices, where the market share held by each of the undertakings party to an agreement does not exceed 30 % and on condition that the sale price does not amount to a fixed or minimum price as a result of pressure from or incentives offered by either party, such agreement is exempt from the prohibition in article 101.1 TFEU.

The exemption provided for in the Regulation thus implies a presumption of legality regarding recommendations of prices where the market share of each party does not exceed 30% and such are not accompanied by manoeuvres that, taken together, lead to the imposition of a fixed or minimum price. However, the Spanish legislator leaves the presumption without effect in one fell swoop, and prohibits by means of section 43 *a* of the Hydrocarbons Act any price recommendation, even if it is a mere recommendation, or even if the market share of the parties is below the 30% threshold set forth in the Regulation of Vertical Agreements.

Similarly, and as noted above, the aforementioned new section 43 *a* of the Hydrocarbons Act sets forth (in terms which, on the other hand, leave much to be desired) that the maximum term of the agreement shall be one year, with a maximum of two consecutive annual renewals. Under the Hydrocarbons Act, any agreement exceeding this term is also deemed void *ab initio*.

Once again, here article 5 of the Regulation authorises purchase exclusivities with a duration of up to five years where the parties to the agreement have a market share below 30 %, stating that those exceeding such duration shall be presumed anticompetitive; a long distance from the year the new Spanish provision authorises (or three years, if we take into account possible renewals).

*2.2. The primacy of EU law and its impact on the Spanish rule*

This disparity of rules begs the question of which should prevail. Well, according to article 3 of Regulation 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty (current 101 and 102)[3], the application of national competition law may not lead "*to the prohibition of agreements [ ... ] which may affect trade between Member States but [ ... ] which are covered by a Regulation for the application of Article 81(3) of the Treaty*" (underlining added).

In other words, if the recent Spanish legislation is "national competition law" it should not prohibit (as it does), what EU law allows or authorises by way of exemption. Naturally, the prohibition could take place if it responds to reasons other than the protection of effective competition in the market. Therefore, we must examine the underlying purpose (*ratio legis*) of the new section 43 *a* of the Hydrocarbons Act. Well, the preamble to Act 11/2013 indicates that the amendment of the Hydrocarbons Act aims to regulate competition[4].

Therefore, section 43 *a* of the Hydrocarbons Act is contrary to EU law and, consequently and by virtue of the principle of primacy of EU law[5], would lack effect.

Notwithstanding the above, the exemption under the Block Exemption Regulation is but a presumption of legality of the agreement which may be:

- withdrawn where the agreement in question (considered in isolation

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1/1, 4.01.2003.

[4] *"[…] a series of measures are adopted at both the wholesale and retail markets, that will increase effective competition with in the sector, reducing entry barriers to new entrants and having a positive impact on the welfare of citizens".*

[5] Enshrined by the European Court of Justice in its judgment of 15 july 1964, case 6/64, Costa c. Enel.

or together with other agreements of similar competitors) does not meet all the conditions laid down in article 101.3[6], which can occur where market entry or competition in the same are restricted by the cumulative effect of parallel networks of similar vertical agreements[7], or

- declared inapplicable by Regulation where parallel networks of similar vertical restraints exist covering more than 50 % of a relevant market[8].

The Guidelines on vertical restraints[9] (hereinafter, the "Guidelines") contain various pointers[10] to evaluate the possible withdrawal of the exemption on price recommendations on account of the risk of these working as a focal point for resellers and might be followed by most or all of them.

The Spanish legislator can thus be viewed as just removing the exemption or declaring it inapplicable, availing itself of the possibilities provided for by the Regulation itself. Thus, according to the preamble of Act 11/2013, the inclusion of this new section in the Hydrocarbons Act aims to address precisely the risk pointed at by the Commission in the Guidelines and to avoid "*economic regimes in the management of service stations under exclusive agreements where the retailer acts as a reseller with a fixed discount or as a commission agent*", because "*the existence of retail supply agreements is considered one of the main barriers to entry and expansion of alternatives to the main operators in Spain*."

According to the foreword, it appears that the aim of the legislator with the introduction of this section 43 *a* is to open the Spanish market and limit the anticompetitive effect of the existence in Spain of parallel networks of exclusive distribution agreements.

However, the Spanish legislator should not have regulated this matter in this manner as the withdrawal of the block exemption falls to, in individual cases[11], either the European Commission or the competition authority of the Member State, whereas the general declaration of inapplicability of the Block Exemption Regulation is reserved to the European Commission, which can only do so adopting a new Regulation[12].

In view of the foregoing and to the extent that the Spanish legislator has neither the power to declare prohibited by law agreements exempted by the Block Exemption Regulation nor the jurisdiction to derogate the exemption, section 43 a of the Hydrocarbons Act is contrary to EU law and, therefore, without effect.

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[6] Art. 29 of Regulation (EC) No 1/2003.

[7] Paragraph 75 of the Guidelines.

[8] Article 6 of Regulation (EC) No 330/2010.

[9] Guidelines on vertical restraints, OJ 130/1, 19.05.2010.

[10] Paragraphs 227–229 of the Guidelines.

[11] Paragraphs 77 and 78 of the Vertical Guidelines.

[12] Article 6 of Regulation (EC) No 330/2010.