

EC motor vehicle block exemption reform: are you ready for the new regime?

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The motor vehicle sector, in particular the distribution of passenger cars, commercial vehicles, spare parts and repair services, is subject to a specific block exemption, Regulation 1400/2002 (the motor vehicle block exemption), which is due to expire on May 31, 2010.¹ Following a review launched in mid-2007, the European Commission (the Commission) adopted a Communication on July 22, 2009 to set out the basic policy orientations for the future legal framework that should apply to motor vehicle distribution and after-sales services agreements after the expiry of the motor vehicle block exemption.

Currently, the motor vehicle sector is subject to a specific competition law regime which deviates from the general rules applicable to supply and distribution agreements. In particular, the motor vehicle block exemption provides for rules that are stricter than those provided in the general vertical block exemption, Regulation 2790/1999 (the vertical block exemption).² Such stricter rules grant an increased protection for distributors and repairers in the motor vehicle sector.

Overall, the Commission proposes to scale back specific competition rules in the motor vehicle sector and intends to subject most of the motor vehicle sector to the general competition regime. The Commission proposes in particular that the general competition rules should apply to the distribution of new motor vehicles after May

31, 2013. It is further proposed to retain some specific rules for the aftermarket and spare parts markets. The revised aftermarket rules are supposed to take effect earlier, namely at the expiry of the motor vehicle block exemption, i.e. after May 31, 2010. In addition, the Commission proposes to publish guidelines to address sector-specific competition issues and to aid companies in the competition analysis of intended arrangements in the sector.

This article summarises the current status of the review of the motor vehicle block exemption; discusses relaxed single-branding rules, a new approach to “location”, “sales only” and other contractual clauses in dealer agreements as well as restrictions on parallel trade in motor vehicle distribution agreements; and addresses the proposed rules governing open access to technical information, repair services networks and spare parts in the aftermarkets.

Stakeholders should carefully consider the impact of the planned revisions on their business practices. All interested parties were invited to submit comments on this Communication before September 25, 2009.

The motor vehicle block exemption reform at a glance

The motor vehicle block exemption creates a safe harbour for categories of agreements in the motor vehicle sector that are caught by the prohibition in art.81(1) of the EC Treaty, relieving companies concerned of the need to analyse whether those agreements meet the conditions of art.81(3). Agreements not covered by a block exemption are not presumed to be illegal and are generally assessed on an individual basis unless the practices are identified as hardcore restrictions, in which case they are illegal. The motor vehicle sector has had its own block exemption regulation for over 20 years.³

On July 22, 2009, the Commission adopted a Communication to set out policy orientations for the future legal framework for motor vehicle distribution and after-sale services agreements after the expiry of the motor vehicle block exemption in May 2010.⁴ The Commission’s services have produced an Impact Assessment Report appraising the potential benefits and costs of various policy options for the future regime applicable to the motor vehicle sector. The Communication is therefore to be read in

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In this issue of E.C.L.R., references to the EC Treaty use numbering which predates the Lisbon Treaty coming into force.

1 Commission Regulation 1400/2002 on the application of art.81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L203/30.

2 Commission Regulation 2790/1999 on the application of art.81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

3 Commission Regulation 1475/95 on the application of art.85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [1995] OJ L145/25, and the current motor vehicle block exemption.

4 Communication of July 22, 2009 on “The Future Competition Law Framework applicable to the motor vehicle sector” COM(2009) 388 final.

conjunction with the Impact Assessment Report. The Communication is based on an extensive fact-finding mission undertaken by the Commission, which began in mid-2007.

Overall, the Commission proposes to scale back specific competition rules in the motor vehicle sector and intends to subject most of the motor vehicle sector to the general competition regime, in particular the general vertical block exemption, which is currently under reform.⁵ In the recent past, namely in its Evaluation Report of May 2008, the Commission had envisaged making the automobile sector subject to the general vertical block exemption.⁶ Following the lobbying efforts of a number of stakeholders and the onset of the general economic crisis, the Commission has weakened its commitment to reform. In its Communication and Impact Assessment Report of July 2009 the Commission assesses four options, ranging from allowing the general vertical block exemption to apply to the motor vehicle trade, to the renewal of the current motor vehicle block exemption with two intermediate solutions: adopting

sector-specific provisions in the form of guidelines accompanying the general vertical block exemption and adopting sector-specific provisions in the form of a motor vehicle block exemption regulation focusing on restrictions of competition in the aftermarket and complementing the provisions of the general vertical block exemption.

The Communication draws a basic distinction between the primary market for the distribution of new vehicles, where it has found no indications of significant competition shortcomings in the European Union, and the so-called aftermarkets (markets for repair and maintenance services and/or for spare parts distribution), where the Commission considers that competition is less intense. As regards the distribution of new motor vehicles, the Commission proposes the application of the vertical block exemption along with sector-specific guidelines. As regards the aftermarkets, the Commission is still considering whether to complement the vertical block exemption with sector-specific provisions designed to address a number of problematic issues, retain a specific limited motor vehicle block exemption, and/or publish its views in guidelines.⁷

New vehicle distribution

The Commission has found that the markets for the distribution of new motor vehicles are highly competitive and customers benefit from falling prices. The Commission has also found that concentration levels are declining, and that Asian brands (e.g. Chinese and Indian manufacturers) are increasingly present on the EU markets. Therefore, the Commission considers that special rules are no longer warranted and proposes to apply the general rules within the vertical block exemption to sales of new motor vehicles. To address some remaining sector-specific issues, the Commission envisages discussing issues such as single branding, quantitative selective distribution and contractual terms between car manufacturers and distributors/dealers,⁸ as well as some guidance on parallel trade issues in sector-specific guidelines. In order to allow all operators time to

5 On July 28, 2009 the Commission published for consultation a revised draft vertical block exemption and accompanying Guidelines. Overall, the Commission considers that the rules should not be fundamentally modified. The Commission identifies two major developments in the 10 years following the entry into force of the current vertical block exemption and Guidelines, namely a perceived increase in the market shares held by large distributors, and the increased importance of sales over the internet. As a result, the Commission proposes that for an agreement to benefit from the block exemption set forth in the vertical block exemption, not only the supplier's market share (as is currently the case) but also the buyer's market share should not exceed 30%. Moreover, the Commission refines, in the online context, the distinction between sales made as a result of active marketing and sales made as a result of the consumer taking the initiative. The Commission proposes other changes including the clarification that the vertical block exemption applies to agreements and concerted practices (as opposed to unilateral conduct); when there is no explicit agreement expressing the concurrence of will, the Commission will have to prove that the unilateral policy of one party receives the (explicit or tacit) acquiescence of the other party. The latter change will be relevant also for the motor vehicle sector as in the past the Court of First Instance (CFI) annulled Commission decisions in the car industry as there was no evidence of an agreement or concerted practice and the alleged behaviour was purely unilateral (see Commission Decision 2001/711 relating to a proceeding under art.81 of the EC Treaty (COMP/F-2/36.693-Volkswagen) [2001] OJ L262/14 and in Commission Decision 2002/758 relating to a proceeding under art.81 of the EC Treaty (COMP/36.264-Mercedes-Benz) [2002] OJ L257/1).

6 Commission Evaluation Report of May 28, 2008 on the operation of Regulation 1400/2002 concerning motor vehicle distribution and servicing, available at http://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf [Accessed November 18, 2009]. The Commission in its Evaluation Report considered the provisions of the current motor vehicle block exemption as "overly strict, too complex and/or redundant" (p.12) and concluded that "a more flexible regime, drawing closer inspiration from the general principles applicable to vertical restraints as currently reflected in Regulation 2790 would [ensure] an equivalent level of protection of competition in the market, while entailing lower compliance costs for companies and a more efficient enforcement system for competition authorities" (p.14).

7 Following the modernisation of the EU competition rules, companies do not need a specific approval from the Commission for agreements that fall under art.81(1). Instead, companies must conduct a self-assessment to verify that the conditions of art.81(3) are met. As a result, block exemptions have lost some of their importance. That said, block exemptions continue to play an important role as, in particular, their safe harbour provisions provide legal certainty for companies. At the same time, Commission guidelines assist companies in assessing arrangements that may fall outside those safe harbour provisions.

8 Motor vehicle and spare part manufacturers distribute their products through networks of distributors. As far as motor vehicles are concerned, these distributors are commonly known as dealers.

adapt to the general regime, the Commission proposes that the provisions of the motor vehicle block exemption remain in force in this area until May 31, 2013.

In the Communication, the Commission considers in particular the following policy choices in relation to the markets for the distribution of new motor vehicles:

Relaxed single-branding rules

Single-branding obligations prevent or otherwise restrict dealers from selling competing brands. The current motor vehicle block exemption is stricter than the vertical block exemption in respect to single-branding obligations. It prohibits obligations on dealers that go beyond 30 per cent of their requirements. Thus dealers are theoretically free to sell at least three different brands, while such obligations are generally allowed to cover up to 80 per cent of the requirements of the dealer under the vertical block exemption.

The Commission observes that in practice the motor vehicle block exemption has had no significant impact in this area, as dealers using this option account for less than 1 per cent of all sales. In addition, the Commission found that same-showroom multi-branding can dilute brand image, and can cause manufacturers to take steps to preserve it by adjusting dealership standards. They may also refrain from investing in their dealerships, for instance through training, in order to avoid free-riding risks. In practice, these factors have led to a general increase in the distribution costs borne by dealers, and ultimately by consumers.

Therefore, the Commission proposes the application of the vertical block exemption to single-branding obligations with its higher 80 per cent threshold. However, the mechanism that allows the Commission to withdraw the benefit of the vertical block exemption will be maintained as a safeguard. Moreover, the Commission plans to include its analysis of single-branding in the motor vehicle sector in the proposed sector-specific guidelines.

“Location” and “sales-only” clauses in selective distribution

The current motor vehicle block exemption exempts quantitative selective distribution systems for new motor vehicles up to a 40 per cent market share threshold and combines such a wide safe harbour with stricter hardcore provisions and specific conditions concerning, in particular, restrictions preventing dealers from sub-contracting repair and maintenance activities (“sales-only” dealers) and the opening by dealers of additional sales outlets (the so-called “location clause”). These stricter conditions were intended to stimulate diversity in car distribution models. However, the Commission

observes that this has led to higher investment costs and lower margins for dealers.

The Commission proposes the application of the vertical block exemption. This implies that selective distribution will become subject to the general market share threshold of 30 per cent. “Location clauses” as well as restrictions of “sales-only” dealers will be exempted up to this reduced threshold, and will be open to an individual assessment above this threshold. Moreover, the Commission proposes to include guidance on assessing those cases where the relevant market share exceeds the applicable threshold of 30 per cent in its proposed sector-specific guidelines.

Contractual clauses

The current motor vehicle block exemption contains a number of conditions to protect the dealers’ independence such as: contract duration; one-year periods of notice for terminations for network reorganisation; motivation of contract terminations; and transfer of dealerships contracts between the members of the same networks, as provided by art.3 of the current block exemption. These provisions were intended to safeguard the dealers’ sunk costs.

The Commission observes that the regulation of particular contractual clauses in the context of a block exemption is no longer an effective means to protect dealers’ independence as the violation of the supposedly protective provisions cannot be sanctioned. Moreover, the ability to reorganise the dealers’ network is vital for the car manufacturers’ industry.

The Commission envisages abandoning such safeguards to apply the general rules. The Commission plans to include guidance on possibly anti-competitive practices by manufacturers in its new sector-specific guidelines.

Parallel trade issues

Almost in passing, the Commission notes that its new guidelines on the motor vehicle sector are going to include guidance on the circumstances in which agreements restricting dealers’ ability to obtain and re-sell vehicles with foreign specifications (“availability clauses”) would amount to an indirect restriction on active and/or passive sale and therefore infringe art.81 EC.

The Commission has issued a number of decisions against car manufacturers in relation to this hardcore restriction. Thus the proposed guidance will be most useful to the industry.⁹

⁹ Since 2000, the Commission has issued approximately 10 decisions with respect to vertical hardcore restrictions, four

Repair, maintenance and spare parts

As regards the aftermarket(s), the Commission finds that competition there is by its nature limited because the Commission considers that there is a specific market for each brand of vehicle. This means that manufacturers' authorised networks are generally considered to enjoy high market shares. Car repair is important to consumers, for safety reasons, but also because repair services account for around 40 per cent of the lifetime cost of owning and running a car. The Commission finds that repair prices have risen and the prices of spare parts remain very high. Therefore, the Commission considers that it may be necessary to complement the general rules within the vertical block exemption with more focused provisions covering these issues. The Commission proposes that the new regime will apply to agreements for the provisions of repair and maintenance services as well as for the supply and distribution of spare parts as from May 31, 2010 (i.e. the date of expiration of the current motor vehicle block exemption). The new guidelines will contain additional guidance.

In the Communication, the Commission considers in particular the following policy choices in relation to the repair, maintenance and spare parts markets:

Technical information

The current rules are intended to make sure that independent repairers operate on a level playing field with the authorised networks, and in particular that they can access the technical information they need to repair today's complex vehicles. Technical information must be made available in a way that is proportionate to independent repairers' needs. This implies both unbundling of information and pricing that takes into

of which related to parallel imports in the car industry. See Commission Decision 2001/146 relating to a proceeding under art.81 of the EC Treaty (COMP/36.653-*Opel*) [2001] OJ L59/1; COMP/F-2/36.693-*Volkswagen* [2001] OJ L262/14; COMP/36.264-*Mercedes-Benz* [2002] OJ L257/1; Commission Decision 2006/431 relating to a proceeding pursuant to art.81 of the EC Treaty against Automobiles Peugeot SA and Peugeot Nederland NV (Cases COMP/E2/36623, 36820 and 37275-*SEP and others/Automobiles Peugeot SA*) [2006] OJ L173/20. In *Volkswagen* and in *Mercedes-Benz* the CFI annulled the Commission decisions as there was no evidence of an agreement or concerted practice; the alleged behaviour was purely unilateral. See judgment of the CFI of December 3, 2003 in *Volkswagen AG II v Commission of the European Communities* (T-208/01) [2003] E.C.R. II-5141 (as upheld by the European Court of Justice); see judgment of the court of July 13, 2006 in *Commission of the European Communities v Volkswagen AG* (C-74/04 P) [2006] E.C.R. I-6585 and judgment of the CFI of September 15, 2005 in *DaimlerChrysler v Commission of the European Communities* (T-325/01) [2005] E.C.R. II-3319. In *Peugeot* the CFI reduced the Commission fine because the effect on the market had been overestimated. See judgment of the CFI of July 9, 2009 in *Peugeot v Commission of the European Communities* (T-450/05), not yet reported.

account the extent to which independent repairers use the information.¹⁰

In addition, if repairs were carried out without the correct technical information, this could lead to vehicles being driven in an unsafe condition, and add to air pollution and wasted fuel. In this regard, the vehicle emissions regulation, Council Regulation 715/2007, provides for a detailed set of rules ensuring full and non-discriminatory access to such information for all independent operators. This regulation will become mandatory for the new type approvals from September 2009 onwards (however, for several years, a large number of vehicles will not be covered by it).

The Commission also considers it important that warranty terms are not misused to prevent the owners of newer vehicles from using independent workshops for repairs and maintenance that are not covered by warranty.

The Commission proposes that sector-specific provisions deal with the circumstances in which a refusal to grant full and non-discriminatory access to technical information to independent operators, or a misuse of warranties, would infringe art.81.

Open access to the authorised repair networks

Repair and maintenance services are considered to be brand-specific markets. As the network of the authorised repairers and parts distributors of a given brand normally holds market shares well in excess of 30 per cent, the safe harbour of a block exemption (whether motor vehicle or vertical block exemption) is typically not available. Thus, vehicle manufacturers are typically limited to choosing qualitative selective distribution systems, which fall outside the scope of art.81 or can be justified under art.81(3). Such systems must meet stringent requirements. In particular, access to the network of authorised repairers must be based on selection criteria which are objectively justified by bringing benefits to the final consumers.

The Commission proposes to clarify through future sector-specific provisions the circumstances in which qualitative selective distribution would fall outside the

10 For instance, in 2007, the Commission obtained commitments (under art.9(1) of Regulation 1/2003) to provide technical information about car repairs to all independent garages in the EU from DaimlerChrysler, Toyota, General Motors and Fiat. See Commission press release IP/07/1332, September 14, 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1332&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed November 26, 2009]. The commitments were given after a Commission investigation considered that inadequate access to the full range of technical information could drive independent repairers from the market and that the agreements between the carmakers and their authorised repairers would therefore infringe EC competition rules. The commitments will be binding until the current motor vehicle block exemption expires in May 2010.

scope of the prohibition in art.81 (e.g. agreements linking sales and after-sales services may be possible for newcomers trying to enter a market).

Open access to spare parts

Parts made on the same production line as the original component of the vehicle (OES parts) as well as parts made by “matching quality” parts manufacturers are often cheaper than identical parts bearing the brand of the vehicle manufacturer (OEM parts). Alternative supply channels for the distribution of spare parts to both independent and authorised repairers must remain open. On the one hand, independent repairers must have access to the full range of parts, including those that are only available from the vehicle manufacturer. On the other hand, authorised workshops must be entitled to purchase and use alternative brands of parts.

Under the current motor vehicle block exemption, restrictions by car manufacturers that prevent suppliers from selling to the aftermarket(s) are treated as hardcore restrictions. Under the vertical block exemption such restrictions would not be considered as hardcore restrictions. While it may still be somewhat unlikely that parties could benefit from the safe harbour market share threshold of 30 per cent, such provisions would in the future be subject to individual assessment. The Commission considers that this individual assessment would allow it to target those agreements that do not benefit consumers. The Commission notes that agreements preventing independent repairers from getting access to original spare parts may also violate art.82, when the vehicle manufacturer enjoys a dominant position in respect of a certain category of parts (e.g. captive parts).

The Commission will clarify in sector-specific provisions the circumstances in which the restrictions at issue would bring the underlying agreements within the scope of art.81.

Next steps

The Commission adopted this Communication to set out the basic policy orientations for the future legal framework that should apply to motor vehicle distribution and after-sales services agreements after the expiry of the motor vehicle block exemption.

On the one side, the application of the general vertical block exemption provisions to the motor vehicle sector would entail a more efficient enforcement system for competition authorities and lower compliance costs for companies.¹¹ Moreover, the review of recent case law in various Member States shows that the ordinary regime is applied without any major difficulties arising.¹² On the other side, distributors and spare part suppliers have the interest to campaign for a renewal of the motor vehicle block exemption as is, or at least for specific guidance in certain areas. Ultimately, in view of the economic crisis a maintaining of the status quo for a few years cannot be ruled out.

At this stage, it is not entirely clear how much, if anything, will remain of the sector-specific motor vehicle block exemption and whether the relevant provisions will be integrated into the general vertical block exemption or will find their way into a “scaled down” sector-specific block exemption. It will also be interesting to see the proposed new guidelines for the motor-vehicle sector as it appears that the Commission plans to elaborate on some of the competition concepts applicable to the motor vehicle sector perhaps more extensively than it had previously. Typically, such guidelines would be published in draft form for comments prior to adoption.

Stakeholders should carefully consider the impact of the planned revisions on their business practices.

¹¹ See Commission Evaluation Report, 2008, pp.13–14.

¹² The enforcement of motor vehicle agreements mostly occurs at the Member State level as dealer agreements have a national scope. For decisions of the Commission and case law of the EC and national courts, see http://ec.europa.eu/competition/sectors/motor_vehicles/cases/cases.html [Accessed November 18, 2009].