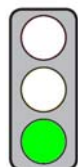


Status: 22 February 2010

MAIN ISSUES

Objective of the Regulation: Certain vertical agreements between the producers of motor vehicles and distributors and between the producers of motor vehicles and repairers are to become legally valid in terms of competition law.

Parties affected: Motor vehicles manufactures, suppliers of spare parts, distributors and repairers.



Pros: (1) The Regulation increases legal certainty and releases companies and competition authorities from being subjected to individual scrutiny.

(2) The motor vehicle block exemption strengthens competition, in particular in the maintenance market for motor vehicles and in the distribution of spare parts for motor vehicles.

Cons: –

CONTENT

Title

Draft [without number] of 21 December 2009 for a Commission **Regulation on the application of Article 101(3) of the Treaty to categories of vertical agreements** and concerted practices **in the motor vehicle sector** and

a draft of 21 December 2009 for a Commission **Notice on supplementary guidelines on vertical restraints** in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

Brief Summary

The articles quoted refer to the Draft Regulation and numbers quoted to the Draft Guidelines.

► Background

Agreements between companies impeding competition within the common market are generally prohibited (Art. 101 (1) TFEU). However, exemptions from this prohibition are possible if consumers benefit from the effect of an agreement (Art. 101 (3) TFEU). This is often the case with “vertical agreements”.

- “Vertical agreements” are entered into by companies operating in the same production or distribution chain at different levels. Examples are, for instance, supply and distribution agreements for end products or intermediate products with the target to reduce distribution costs.
- Through block exemption regulations the Commission can:
 - define blocks of agreements that are in line with competition law and
 - exempt them from the prohibition laid down in Art. 101 (1) TFEU.
- Agreements not covered by a block exemption regulation are not considered anti-competitive per se, but are subject to individual assessment.

► Targets of the block exemption for motor vehicles

- The aim of the Draft is to continue with an amended version of the existing Motor vehicle Block Exemption Regulation (cars and commercial vehicles), which is due to expire on 31 May 2010 [Regulation (EC) No. 1400/2002].
- The Guidelines are aimed at helping companies to assess themselves whether or not a vertical agreement is in line with European Competition law (No. 1).

► Vertical agreements regarding the distribution of new motor vehicles

- Regarding agreements for the distribution of new motor vehicles, the following rules apply:
 - Until 31 May 2013, the Motor Vehicle Block Exemption Regulation (EC) No. 1400/2002 together with the accompanying Guidelines (Art. 2) and
 - From 1 June 2013 to 31 May 2020, the General Vertical Block Exemption Regulation and the General Vertical Block Exemption Guidelines (Art. 3).
- According to the Commission, the distribution of new motor vehicles does not create anti-competitive restraints that are any different from those in other sectors. Therefore, motor vehicle distribution agreements fall within the scope of the “General Vertical Block Exemption Regulation” and the accompanying “General Vertical Guidelines” [Draft C(2009) 5365/23 of 28 July 2009; cp. [CEP Policy Brief](#)].
- Pursuant to the exemption requirements of the General Vertical Block Exemption, in order to benefit from block exemption (“market share threshold”, Art.3 of the General Vertical Block Exemption), the companies party to a vertical agreement may not hold a market share exceeding 30%.

► **Vertical Agreements regarding motor vehicle aftermarkets**

- As regards agreements for the distribution of spare parts and for repair and maintenance services (“aftermarkets”), from 1 June to 31 May 2020 the new Motor Vehicle Block Exemption Regulation applies.
- According to the Commission, the rules of the General Vertical Block Exemption are not sufficient to ensure effective competition among authorised repairers, neither amongst themselves nor with independent repairers on the aftermarket.
- As regards the aftermarket, stricter exemption requirements are to apply, in addition to the exemption requirements of the General Vertical Block Exemption (“hardcore restrictions”, Art. 4 (1) in conjunction with Art. 5).
- “Hardcore restrictions” substantiate the disputable presumption that a vertical agreement is altogether anticompetitive and thus leads to the invalidity of the entire agreement.
- The additional hardcore restrictions for the aftermarket prohibit agreements which:
 - restrict the sale of spare parts by authorised or independent repairers or (Art. 5 lit. a and No. 21),
 - limit the supplier’s ability to sell spare parts, repair tools, diagnostic or other equipment to distributors, repairers or consumers (Art. 5 lit. b and No. 22) or
 - prohibit suppliers of components from placing their trademark or logo in a visible place on these components during initial assembly (Art. 5 lit. c and No. 23). This is to enable suppliers of original components to gain easier access to motor vehicle aftermarkets.
- Pursuant to the exemption requirements of the General Vertical Block Exemption, the resale of spare parts to independent repairers or consumers must not be restricted (Art. 4 lit. e General Vertical Block Exemption).

► **Vertical agreements on selective distribution systems**

“Selective distribution systems” are widespread both among motor vehicle distribution (“authorised distributors”) and motor vehicle aftermarkets (“authorised repairers”). In such systems, suppliers undertake to sell contract goods or services only to distributors selected on the basis of “specified criteria” (Art. 1 (1) lit. e).

- **Selective distribution system and block exemption regulations**

- Selective distribution systems are exempted only if they comply with both the requirements of the General Vertical Block Exemption and the Motor Vehicle Block Exemption.
- Pursuant to two of the restrictions in the General Vertical Block Exemption, which relate specifically to selective distribution, selective distribution systems are not exempted if they contain agreements that
 - restrict so-called “cross-supplies” between dealers within a selective distribution system, even if they operate at different trading levels (Art. 4 lit. d General Vertical Block Exemption and No. 41) or
 - restrict sales to end users through retailers (Art. 4 lit. c General Vertical Block Exemption and No. 41); the notion of “end users” includes leasing companies and intermediaries who purchase new motor vehicles on behalf of a certain consumer (No. 45 and 46).
- A further exemption requirement in the General Vertical Block Exemption prohibits the restriction of the sales territory and of the customer group. The restriction of sales by members of a selective distribution system to unauthorised distributors, however, is exempted from this rule (General Vertical Block Exemption Art. 4 lit. b and No. 41).
- If all exemption requirements are complied with – in contrast to the expiring Motor Vehicle Block Exemption – it will be possible to make agreements
 - which oblige authorised distributors to also offer repairs and maintenance [SEC(2009) 1052 and 1053, p. 8],
 - which prohibit authorised distributors from opening sales outlets outside the territory assigned to them [SEC(2009) 1052 and 1053, p. 7] or
 - which provide for a brand obligation (obligation to distribute one single brand) for a maximum of five years (No. 25). This applies particularly to authorised repairers (No. 25).

- **Selective distribution system and individual scrutiny**

- If selective distribution systems fail to fulfil the exemption requirements of Block Exemption it is necessary to assess on a case-by-case basis whether or not the agreements are in line with competition law.
- Individual scrutiny is of particularly high relevance to the aftermarket, since the networks of authorised repairers and spare parts distributors of a brand are likely to be well above the market threshold of 30% [SEC(2009) 1052 and 1053, p. 10].
- As a general rule, selective distribution systems are anti-competitive especially if
 - they cause technical information to be withheld from independent repairers or parts distributors (No. 52),
 - the legal and extended warranty of a manufacturer are made conditional on the end user having all repairs, including those not covered by warranty, carried out within the authorised repair networks (No. 59),
 - they oblige authorised repairers to sell new motor vehicles (No. 61) or

- further criteria for selection are added that directly limit the number of potential repairers, either by directly fixing their number or, for instance, requiring a minimum level of sales (quantitative selective distribution system).
- ▶ **Further amendments to the current Draft**
 - If a contract party does not wish to renew a vertical agreement, they should give notice of this – in compliance with the Code of Conduct by the car manufacturers’ associations ACEA and JAMA – between six months and two years in advance (No. 7). In the expiring Motor Vehicle Block Exemption, the notice periods were an integral part of the exemption requirements (Regulation 1400/2002 Art. 3 (5)).
 - Also in the case of litigation between contract parties, the current Draft Guidelines refer to the Code of Conduct by the car manufacturers’ associations ACEA and JAMA (No. 7). It enables each contract party to appeal to an independent expert or arbitrator. In the expiring Motor Vehicle Block Exemption this right was explicitly an exemption requirement (Regulation 1400/2002 Art. 3 (6)).

Changes Compared to the Status Quo

See content above.

Statement on Subsidiarity

Not relevant.

Policy Context

The Commission will adopt a new Motor Vehicle Block Exemption as soon as possible in order to follow on from the expiring Motor Vehicle Block Exemption. The public consultation will be followed by the hearing of the Advisory Committee. Parallel to the Motor Vehicle Block Exemption, the Commission will adopt a new General Vertical Block Exemption, which is to take effect on 1 June 2010 and will replace the existing General Vertical Block Exemption.

For the motor vehicle sector the Regulations (EC) No. 715/2007 and No. 595/2009 are of particular importance because they safeguard access to repair and maintenance information for independent repairers.

Options for Influencing the Political Process

Leading Directorate: DG Competition

Formalities

Legislative competence: Empowerment of the Commission pursuant to Art. 105 (3) TFEU in conjunction with Regulation No. 19/65/EEC

Legislative procedure: Approval procedure: public consultation and hearing of the Advisory Committee for restrictive practices and monopolies

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Vertical agreements can on the one hand impede competition; on the other hand, however, they can have the effect of increasing efficiency. For instance, an agreement stipulating a single brand obligation can increase the costs for the consumer who is comparing different vehicles. At the same time, it can prevent the phenomenon of “free riding”. This occurs, for instance, if each car manufacturer relies on the fact that another manufacturer will carry out trainings for distributors. Thus manufacturers hope to save money by offering cars that are cheaper than those of their competitors.

Whether or not the disadvantages of vertical agreements outweigh their benefits depends mainly upon two criteria. First of all, **there is the market power of the companies concerned:** the greater the market power, the more likely it is that vertical agreements create negative impacts. Secondly, there is the question of the **duration of vertical agreements.** Agreements with long-term binding effects on distributors foster brand-specific investments on the one hand. On the other hand, however, they can be used to keep competitors out of markets. **Both criteria have been included in the current Draft.** The threshold of 30% of the market share and the term of five years for agreements with single brand obligations represent a good compromise.

The distinction between the distribution of new motor vehicles and the aftermarket is also justified. As due to brand specificity competition on the aftermarket is less pronounced than on the market for motor vehicles, the former needs more restrictive conditions to ensure that vertical agreements create positive effects. Thus particularly independent repairers can put enormous pressure on the authorised repairer

networks of manufacturers if they receive access to the technical information and spare parts provided by the Block Exemption.

Impact on Efficiency and Individual Freedom of Choice

The Motor Vehicle Block Exemption releases numerous companies from the obligation to examine individual agreements for whether or not they are subject to exemption. Thus the Motor Vehicle Block Exemption contributes to legal certainty, simplifies administrative procedures and reduces compliance costs for companies.

On the aftermarket, there will be an increase in efficiency and individual freedom of choice, as independent repairers are also to be given access to all spare parts, and unfair warranty practices, which have until now put independent repairers at a disadvantage, will be no longer be possible.

Impact in Growth and Employment

An increase in employment is to be expected for independent repairers. Authorised repairers, however, are likely to experience a fall in employment, as the competition between authorised repairers and independent repairers will be exacerbated. Thus the overall effect is uncertain.

Impact on Europe as a Business Location

Insignificant.

Legal Assessment

Legislative Competence

The EU is empowered to grant exemptions (Art. 101 (3) TFEU) to the prohibition of anti-competitive agreements (Art. 101 (1) TFEU). The Commission is empowered to adopt regulations on exemption requirements with a restricted term (Art. 105 (3) TFEU in conjunction with Regulation No. 19/65/EEC).

Subsidiarity

As competition law is subject to the exclusive legislative competence of the EU (Art. 3 (1) lit. b TFEU), the principle of subsidiarity is not applicable here (cp. Art. 5 (3) TFEU).

Proportionality

It is appropriate that exemption requirements specified in the Regulation (EC) No. 1400/2002 for the purchase, sale and resale of new motor vehicles will be in effect for a transitional term until 31 May 2013. This is necessary in order to allow for a little leeway for the adapting of existing agreements to the new legal position. Brand-specific investments made on the basis of trust in those rules should have a chance to amortize (No. 14). Furthermore, the regulations for the aftermarket do not go into any more depth than necessary.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

The law against restraint of competition (GWB) as a rule for exempted agreements in German law (§ 2 (2) GWB) refers directly to the European Block Exemption, so its exemption requirements also apply to the German practice.

Possible Future EU Options

Not evident.

Conclusion

The current Draft increases legal certainty and releases companies and antitrust authorities from being subjected to individual scrutiny. The distinction between the distribution of new motor vehicles and its aftermarket makes sense. Extending the existing Motor Vehicle Block Exemption to include trade with commercial vehicles until 31 May 2013 is appropriate, as investments in this area are usually made in the long term. At the same time, it makes sense that the trade in new motor vehicles will be subject to the General Vertical Block Exemption upon the expiry of that term; thus it will be relieved from unnecessary burdens. On the aftermarket, too, there will be an increase in efficiency and individual freedom of choice, as independent repairers are given access to technical information and spare parts, and unfair warranty practices, that put independent repairers at a disadvantage, will no longer be possible.