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Competition Law Enforcement in the Motor Vehicle Industry: Vertical Agreements

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Specific features of the motor vehicle industry

- Economic and political importance
- Particular importance for the Internal Market
- Importance for consumers
- Environmental and safety concerns
- Importance of vertical agreements
  - Car manufacturers / authorised dealers and repairers
  - Car manufacturers / producers of spare parts
Competitive structure

Sales markets

Supply and distribution of cars
Highly competitive
- Prices
- Innovation
- Consumer choice
No major concentration trend
No particular competition problems

Aftermarkets

Provision of repair and maintenance services / distribution of spare parts
Structurally less competitive
Competition from the independent sector is imperative
Important to keep authorised networks open
Aftermarkets - Key area for scrutiny

**Car Repair**
Ensure that authorised networks remain open
Avoid foreclosure of independent repairers
Ensure the honouring of warranties on cars repaired in the independent sector
Ensure access to technical information for independent repairers

**Spare Parts**
Protect spare parts manufacturers' access to aftermarkets:
- Ensure that competing brands are available to authorised and independent repairers,
- Ensure that competing brands are available to parts wholesalers
Article 101 TFEU addresses agreements between firms which are independent from each other.

**Art. 101(1)** prohibits agreements that have as their object or effect to restrict or distort competition.

**Art. 101(3)** declares the prohibition inapplicable if the agreement and its restrictions are indispensable to create efficiencies which benefit consumers, without eliminating competition.

**Effects-based approach:** overall outcome for competition and consumers determines assessment.

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**Article 101 (ex Article 81 TEC)**

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

   — any agreement or category of agreements between undertakings,
   — any decision or category of decisions by associations of undertakings,
   — any concerted practice or category of concerted practices,

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
Restrictions by object

Agreements having as their **object** to restrict competition are considered serious restrictions of competition (e.g. price-fixing cartels)

Hardcore restrictions:

- Presumption of negative effects under Article 101(1)
- Presumption that it is unlikely that the conditions of Art 101(3) are met
- Does not exclude individual exemption (if convincing evidence of efficiencies) – highly improbable
Restrictions by effect

Agreements that have as their effect to restrict competition:

- Authority/plaintiff must show likely negative effects under Article 101(1)
- Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established ("consumer welfare test")
- "Safe harbour" created by Block Exemption Regulations (BERs) for many types of agreements below certain market share thresholds
  - Net positive balance presumed
  - Exception: hardcore restrictions
- BER Guidelines give guidance for a case-by-case assessment of negative and positive effects (for cases above the "de minimis" market share thresholds)
Main instrument: specific Block Exemption Regulations (BERs) for vertical agreements in the motor vehicle sector (+ accompanying interpretative documents)

Successive generations of motor vehicles BERs:

1985 BER (Regulation 123/85)
1995 BER (Regulation 1475/95)
2002 BER (Regulation 1400/2002)
2010 BER (Regulation 461/2010)
Latest comprehensive reform of the regulatory framework for cars in 2010

Aims of the 2010 reform:

Creation of a legal framework that better reflects the intensity of competition on the various car markets

More flexibility to adapt to economic circumstances

More commonality in rules to increase certainty and uniformity
« I strongly believe the new framework will bring tangible benefits for consumers by bringing down the cost of repairs and maintenance that represent an excessive share of the total cost of a car over its lifetime. It will also reduce the cost of distribution by doing away with overly restrictive rules. »

Joaquín Almunia
EU Commission Vice-President in charge of Competition Policy
Commission Notice: 
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 (2010)
Frequently Asked Questions (FAQs) on the application of EU Antitrust Rules in the Motor Vehicle Sector, of 27 August 2012

Since the adoption of the new motor vehicle Block Exemption Regulation\(^1\) and the Supplementary Guidelines\(^2\), the Commission's services have received a number of questions relating to the application of the new framework for motor vehicle distribution and repair and for the distribution of spare parts for motor vehicles. Where these questions have been frequently asked, or are otherwise likely to be of wider interest, they are reproduced below together with answers and explanations.

These Frequently Asked Questions (FAQs) are intended to complement the Supplementary Guidelines and do not replace them. The FAQs aim, in particular, at helping firms and individuals operating in the sector and legal practitioners to understand how the Commission's Directorate General for Competition approaches particular issues regarding the motor vehicle markets.\(^3\) The FAQs are not intended to constitute a statement of the law and are without prejudice to the interpretation of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") by the European Courts. Finally, the FAQs do not prejudge the application by the Commission of Articles 101 and 102 to the specific circumstances of an individual case.

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\(^3\) These FAQs concern particular restrictions in the motor vehicle sector that, under certain circumstances, may cause the agreement between the vehicle manufacturer and its authorised dealers or repairers (or eventually with a supplier of spare parts, repair tools or diagnostic components for the initial assembly of motor vehicles, or other equipment) to infringe EU competition rules. Generally, this will be the case because: (1) the restrictions at stake are likely to cause or strengthen the anti-competitive effects of the agreements between the vehicle supplier and its dealers or authorised repairers; (2) the agreements in question are unlikely to benefit from the block exemption, because of the supplier’s market share; and (3) these agreements are unlikely to benefit an individual buyer on an individual basis from the exception set out in Article 101(3) TFEU. In some other cases, particular conduct referred to in these FAQs may constitute a violation of the prohibition of the abuse by an undertaking of its dominant position, pursuant to Article 102 TFEU. Finally, the FAQs refer as well to conduct or agreements that are unlikely to be in breach of EU competition rules. In any event, the application of the said rules must ultimately be assessed in each particular case, having regard to its specific factual and legal circumstances.
The markets for the supply and distribution of motor vehicles
Application of the general regime for vertical restraints from June 1, 2013:

Vertical Restraints Block Exemption Regulation (Rec. 330/2010): VRBER


More flexibility for car manufacturers to organise their networks

Disappearance of the former «dealers’ protection clauses»

Abolition on specific rules on multi-branding and location clauses
Basic features of the VRBER/VRGL

A wide block exemption with...

... a limited hardcore list (cf. article 4 VRBER), and...

... a limited list of excluded restrictions (cf. article 5 VRBER)

Safe harbour below 30% market share threshold (cf. article 3 VRBER)

No presumption of illegality above the market share threshold
Hardcore Restrictions

Art. 4 BER: serious restrictions of competition which exclude the benefit of the block exemption for the whole agreement

- Do not exclude individual exemption if there is convincing evidence of likely efficiencies, but this is unlikely (high risk of fines)

Resale Price Maintenance (RPM)

Agreeing fixed or minimum resale price

Sales restrictions on buyers
Sales Restrictions

Sale restrictions: market partitioning and price discrimination

In principle buyer/distributor should be free to resell where and to whom he wants:

Passive sales: sale in response to unsolicited requests

Passive sale restrictions are hardcore (main exception selective distribution)

Active sales: sale as a result of actively approaching customers

Active sale restrictions are hardcore except to protect areas where there is exclusive distribution
Quantitative v. qualitative selective distribution and access to authorised networks

Supplementary guidelines clarify key issues:
- Assessment of single-branding obligations
- Assessment of selective distribution
The motor vehicle aftermarkets
General Regime on Vertical Agreements (Regulation 330/2010 and Guidelines) applies also to the aftermarket.

Supplemented by three hardcore provisions on spare parts distribution, set out in Regulation 461/2010.

Additional guidance in the Supplementary Guidelines.

The European Commission,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 1997/68/EC of the Council of 2 March 1994 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (1), and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Regulation No 1997/68/EC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (2) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty. Block-exempted regulations apply to vertical agreements which fulfill certain conditions and may be general or sectorspecific.

(2) The Commission has defined a category of vertical agreements which regards as normally satisfying the conditions laid down in Article 101(1) of the Treaty and to this end has adopted Commission Regulations (EC) No 330/2010 of 20 April 2010 on the application of Article 101(1) of the Treaty on the Functioning of the European Union (3) which replaces Commission Regulation (EC) No 2790/1999 (4).

(3) The motor vehicle sector, which includes both passenger cars and commercial vehicles, has been subject to specific measures provided for in Commission Regulation (EC) No 461/2002 of 31 May 2002 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (5). Regulations (EC) No 2790/1999 expressly stated that it did not apply to vertical agreements the subject matter of which fell within the scope of any other block exemption regulation. The motor vehicle sector therefore fell outside the scope of that Regulation.

(4) Regulations (EC) No 1400/2002 expires on 31 May 2010. However, the motor vehicle sector should continue to benefit from a block exemption in order to simplify administration and reduce compliance costs for the undertakings concerned, while ensuring effective supervision of markets in accordance with Article 108(3) of the Treaty.

(5) Experience acquired since 2002 regarding the distribution of new motor vehicles, the distribution of spare parts and the provision of repair and maintenance services for such vehicles are also relevant. A number of vertical agreements in the motor vehicle sector which can be regarded as normally satisfying the conditions laid down in Article 101(1) of the Treaty.

(6) This category includes vertical agreements for the purchase, sale or resale of new motor vehicles, vertical agreements for the purchase, sale or resale of spare parts for motor vehicles and vertical agreements for the provision of repair and maintenance services for such vehicles, within the framework of the manufacturer-authorized network, between non-competing undertakings, between certain competitors, or by certain associations of retailers or repairers. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term ‘vertical agreements’ should be defined accordingly to include both such agreements and the corresponding concerted practices.


Specific hardcore provisions on spare parts distribution:

Restrictions on authorised dealers' sales of spare parts to independent repairers

Restrictions on the ability of suppliers of spare parts or repair tools to sell to authorised or independent distributors or repairers

Restrictions on a component supplier’s ability to place its trade mark or logo on components supplied or on spare parts
2012 Frequently Asked Questions provide additional guidance:

Honouring of warranties
Servicing in the context of leasing contracts
Supply of spare parts
Use and purchase of electronic diagnostic and repair tools
Access to technical information
Access to authorised repairer networks

FREQUENTLY ASKED QUESTIONS (FAQS) ON THE APPLICATION OF EU ANTITRUST RULES IN THE MOTOR VEHICLE SECTOR

27 August 2012

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³ These FAQs concern particular restrictions in the motor vehicle sector that, under certain circumstances, may cause the agreement between the vehicle manufacturer and its authorised dealers or repairers (or eventually with a supplier of spare parts, repair tools or diagnostic components for the initial assembly of motor vehicles, or other equipment) to infringe EU competition rules. Generally, this will be the case because: (1) the restriction at stake is likely to cause or strengthen the anti-competitive effects of the agreements between the vehicle supplier and its dealers or authorised repairers, and (2) the measures adopted in the agreements in question are unlikely to benefit from the block exemption, because of the supplier’s market share, and (3) these agreements are unlikely to benefit an individual basis from the exception set out in Article 101(3) TFEU. In some other cases, particular conduct referred to in these FAQs may constitute a violation of the prohibition of the abuse by an undertaking of its dominant position, pursuant to Article 102 TFEU. Finally, the FAQs refer as well to conduct or agreements that are unlikely to be in breach of EU competition rules. In any event, the application of the said rules must ultimately be assessed in each particular case, having regard to its specific factual and legal circumstances.
Technical information cases
Decisions of 13 September 2007

Agreements between several car manufacturers and their after-sales service partners restricting the release of technical information to independent car repairers, which risked foreclosing the latter from the car aftersales markets
- Non-discriminatory provision of technical information to independent repairers
- Technical information, tools, equipment, software and training also made available to independent repairers
- Information, etc. available in a proportionate manner to independent repairers’ needs