



Commission announces its proposals for the future of motor vehicle distribution after May 2010

The European Commission has just published its proposal for the new regulatory framework of motor vehicle distribution after May 2010. It intends to bring the automotive sector under the rules of the general block exemption regime for vertical agreements. This will entail changes in particular over multi-branding, additional sales outlets and the lack of a safe haven for repair and parts contracts. Against the background of the financial crisis, the Commission envisages a three-year transition period for new car distribution contracts, but not for service and spare parts contracts, to which the new rules are to apply from 1 June 2010.

On 22 July the European Commission published its long-awaited proposal for the regulatory framework of motor vehicle, service and spare parts distribution after the expiry of the current Motor Vehicle Block Exemption 1400/2002 (MV-BER) at the end of May 2010.

In short, the Commission proposes that the competition rules for the automotive sector be aligned to those of the general block exemption regime for distribution contracts – ie the successor to the current Block Exemption Regulation for Vertical Agreements 2790/99 (Vertical-BER). Its draft for the successor regulation to the Vertical-BER is expected to be published for consultation before the Commission's summer break. The proposed changes to the current Vertical-BER are believed not to affect the issues virulent in the automotive sector. To allow the automotive sector, which has been particularly hit by the financial crisis, a smooth transition, the Commission furthermore suggests a transitory period of three years – in which the current rules will continue to apply – for motor vehicle distribution contracts but not for service and spare parts contracts. The latter will be subject to the new regulatory framework from June 2010.

Major changes in the framework for motor vehicle distribution under the proposed regime of the successor Vertical-BER will be:

- a maximum market share for exemption under the BER of only 30 per cent (compared with a maximum of up to 40 per cent for quantitative selective distribution systems and 50 per cent for qualitative selective distribution systems under the MV-BER);

- the possibility of imposing stricter single branding requirements on dealers than under the MV-BER;
- the possibility of preventing dealers from opening additional sales outlets;
- the possibility of requiring dealers also to operate a repair shop; and
- contractual protection for dealers will no longer be a prerequisite for exemption.

The Commission has furthermore announced that it will issue sector-specific guidelines on the issues of single-branding (indicating very close monitoring of the new freedom, including the possibility of withdrawing the exemption in cases of abuse), for market shares above 30 per cent, for the imposition of price discipline by manufacturers and for potential barriers to cross-border trade (comparable to the 'availability clause' in the MV-BER).

In the repair and spare parts sector, we should expect a major shift in the regulatory framework. Applying the Commission's current position on market definition, most repairer networks will have a market share above 30 per cent and so will fall outside the scope of the Vertical-BER. This means that any restriction on competition in contracts that fall within the scope of article 81(1) of the EC Treaty in the future will have to meet the criteria of an individual exemption (and hence require an individual assessment).

However, the Commission has indicated in its proposal that – in most cases – a strictly qualitative selective system would fall outside the scope of article 81(1) of the

EC Treaty. To increase transparency and legal certainty it intends to publish either sector-specific guidelines that outline specific situations in which a qualitative selective distribution system may nevertheless come within the scope of article 81(1) of the EC Treaty or to enact a sector-specific BER focused on the motor vehicle aftermarket only. The guidelines and/or the Aftermarket-BER will address in particular the following issues:

- refusal to grant access to the authorised repairer network;
- refusal to grant access to technical information to independent repairers;
- direct or indirect restrictions for the use and distribution of competing spare parts and for sourcing such parts directly from the spare parts manufacturer;
- misuse of (extended) warranties preventing competition from the independent repairer sector; and
- specific conditions under which a combination of service and sales may exceptionally be justified.

The Commission has invited interested parties to comment by 25 September 2009 and will then proceed with the necessary legislative steps to enact the proposed – or modified – rules in due time.

For further information please contact

Dr Joachim Pfeffer
Partner
T +49 221 20 50 72 05
F +49 221 20 50 73 19
E joachim.pfeffer@freshfields.com

Anne Wegner
Principal associate
T +49 221 20 50 72 17
F +49 221 20 50 73 19
E anne.wegner@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.