

EVERSHEDS LLP

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION DRAFT MOTOR VEHICLES BLOCK EXEMPTION AND DRAFT SUPPLEMENTARY GUIDELINES

FEBRUARY 2010

1. INTRODUCTION

- 1.1 Eversheds LLP welcomes this opportunity to comment on the European Commission's consultation draft motor vehicles block exemption (the "new MVBBER") and the consultation draft supplementary guidelines (the "new guidelines").
- 1.2 Eversheds LLP has extensive experience in advising clients in the motor vehicles sector on the competition law issues affecting their businesses. In particular, Eversheds has advised clients at all levels of the supply chain on the application of, and compliance with, the current motor vehicles block exemption (the "current MVBBER").
- 1.3 Our response comprises an executive summary which sets out our views on the proposed changes, followed by our views on the specific proposals relating to the new car sales market and the aftersales market. Our response does not contain any confidential information.

2. EXECUTIVE SUMMARY

- 2.1 Eversheds broadly agrees with the Commission's proposed approach in respect of the new car sales market, whereby this will be brought within the scope of the general vertical agreements block exemption (the "new VBER"). Eversheds does not however consider there is a need for a three year extension of the current MVBBER since such an extension could result in unnecessary costs of compliance with the current MVBBER even though it has been acknowledged that some of its provisions are no longer necessary. As detailed below, a one year extension would appear to be sufficient for transition purposes.
- 2.2 We consider that the proposed approach in respect of the aftersales market is flawed, whereby this will be brought within the scope of the new VBER provided that both parties do not exceed the 30% market share threshold and their agreements do not contain the hardcore restrictions set out in the new VBER or the new MVBBER. Owing to the market share threshold under the new VBER, there will be a large number of agreements not falling within the safe harbour of a block exemption.
- 2.3 Should the Commission proceed with its current proposals in relation to aftersales, we consider this will result in:

- 2.3.1 Increased uncertainty and costs of compliance as parties seek to assess their (and their counterparties') market shares across a range of disparate markets;
 - 2.3.2 Further increased uncertainty and costs as parties then seek to self-assess their agreements;
 - 2.3.3 Some suppliers deciding to become vertically integrated and take some of their aftersales functions in-house. In our view, this cannot have been the outcome intended by the Commission; this would further reduce intra-brand competition on the aftersales market.
- 2.4 We consider that a more appropriate approach for aftersales would be to continue a regime similar to that under the current MVBBER, whereby suppliers operating a purely qualitative selective distribution network would benefit from block exemption irrespective of the parties' market shares.

3. **NEW CARS**

- 3.1 We welcome the Commission's proposal to bring the new car sales market within the scope of the general vertical agreements block exemption (the "new VBER"). We consider that the provisions of the current MVBBER are overly prescriptive and therefore increase compliance costs. They also cover areas such as change of control and notice periods for termination that do not relate to the functioning of effective competition, which introduce discrepancies with national law and which more properly ought to be dealt with by national law having regard to the need for such protection in each Member State.

Three year extension

- 3.2 We agree with the Commission that operators in the new car sales market will need some time to adapt to the regime under new VBER. We consider however that a one-year extension to the current MVBBER would be sufficient for this purpose:
- 3.2.1 The regime under the new VBER will largely represent a relaxation of the regime under the current MVBBER. Thus, in most cases, it will not be *necessary* to amend agreements in order to stay within the safe harbour of a block exemption. The parties to agreements may *elect* to amend their terms or enter into fresh agreements so as to take advantage of the more lenient regime under the new VBER, but they do not need a three year extension during which to do this.
 - 3.2.2 Any period needed to adapt will in any case be provided for by the mandatory termination notice periods which must be included in dealer agreements pursuant to the current MVBBER. The current MVBBER aims

to protect brand-specific investments made by dealers, by *inter alia* requiring the parties to include mandatory term/termination periods and change of control provisions in their dealer agreements. These terms (in our experience, many suppliers opted for indefinite term agreements requiring two years' notice of termination) will give the parties the time required to adapt to the new regime; a three year extension period in addition is not necessary.

3.2.3 There may be some agreements that benefit from the current MVBBER but that will not benefit from the new VBER (e.g. where either party's market share exceeds the proposed 30% threshold in the new VBER)¹. In these circumstances, the parties *might* need to terminate/amend their existing dealer agreements, e.g. to enter into replacement agreements that fall outside Article 101(1) TFEU altogether. However, at worst this would require one party to serve two years' notice of termination (we have not come across dealer agreements containing longer notice provisions). In practice, this situation is most likely to arise in relation to dealer agreements with large dealer groups (i.e. where the *dealer's* market share exceeds 30%), in which case it is in both parties' interest to terminate/amend their agreements by consent. Therefore, even in these circumstances we do not consider that a three year extension is required.

3.3 We note that on the coming into force of the current MVBBER, parties were given a one year transition period to comply with a regime that was stricter than that under the previous motor vehicles block exemption. In our experience, this one year period provided parties with enough time to make any necessary changes to their agreements.

3.4 We consider that the proposal for a three year extension creates uncertainty and compliance costs in respect of new dealer agreements entered into during this period. We assume the Commission's proposal is that *new* agreements entered into during this period must comply with the conditions set out in Article 3 of the current MVBBER (in addition, of course, to not containing any of the hardcore restrictions set out in Article 4). Article 3 requires *inter alia* that agreements be entered into for a minimum term of 5 years in which case they must provide for at least six months' notice of termination, or for an indefinite term in which case they must provide for at least two years' notice of termination. This means that, if parties enter into new dealer agreements during the period from 1 June 2010 to 31 May 2013, potentially these agreements will not be able to take immediate advantage of the relaxation in the law that will take effect on 1 June 2013.

¹ As noted in our response to the Commission's proposal for a revised block exemption and guidelines on vertical agreements and restraints, we have real reservations about the proposed changes to the market share threshold whereby it will be necessary to assess both the supplier's and each distributor's market share on any relevant market. We consider that this will result in increased uncertainty and cost. We do not repeat those concerns here.

- 3.5 We would therefore recommend that the Commission provide for a much shorter extension to the current MVBER of, say, one year. During any extension, in order to avoid creating unnecessary costs of compliance, parties should be given the freedom, should they choose to do so, to draft their *new* agreements so as to fall within the new VBER.

Single branding obligations

- 3.6 We note the provisions of paragraphs 31 to 33 of the draft new guidelines in relation to non-compete provisions: that the benefit of the new VBER may be withdrawn in circumstances where competition is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements containing single branding obligations. We would note in this regard that, despite the absence of non-compete provisions in current dealer agreement (on the basis that they are not exempt under the current MVBER), take-up of multi-branding opportunities has been low in particular because of investments required by vehicle display constraints; therefore even in circumstances where the total tied market share in a given geographic market exceeds 40%, this may not in practice have a strong foreclosure *effect*, because dealers in any case may opt against multi-branding irrespective of any such prohibition imposed by the dealer agreement.
- 3.7 Additionally, in the motor vehicles sector, both the supplier and its dealers make large financial investments. In particular the supplier may provide dealers with low cost funding or a lease of premises, which may justify a non-compete of limited duration even where this results in a tied market share exceeding 40%.
- 3.8 We note also the provisions of paragraph 34 of the draft new guidelines: that minimum purchase obligations, even below the 80% limit established by the new (and current) VBER, may give rise to cumulative anticompetitive effects justifying the withdrawal of the benefit of the new VBER. Specifically, that "*The parties need to consider, whether in the light of the relevant factual circumstances, an obligation on the distributor to ensure that a given percentage of its total purchases of vehicles bear the supplier's brand will prevent the distributor from taking on one or more additional competing brand*". In our view, this statement overlooks the fact that in principle a non-compete complying with Article 5 of the new VBER will be *permitted*.
- 3.9 We consider that this creates uncertainty and potential discrepancies between the new VBER, which treats a minimum purchase obligation as a non-compete only where it exceeds 80%; and the new guidelines, which could treat an obligation over e.g. 50% as being anti-competitive.

4. AFTERSALES

Market share threshold

- 4.1 We agree in principle with the Commission's proposal that spare parts distribution and authorised repair agreements be brought within the new VBER provided that they do not contain any of the hardcore restrictions of competition set out in Article 4 of the new VBER or Article 5 of the new MVBER. However, we consider that the application of a 30% market share threshold will leave many such agreements outside the safe harbour of a block exemption and will leave the parties needing to self-assess their agreements, resulting in unnecessary additional costs of compliance and uncertainty.
- 4.2 We note the Commission's position that markets for repair and maintenance services and for spare parts distribution are "*brand-specific*" and that "*spare parts distribution and authorised repair agreements would fall outside the safe harbour granted by the Block Exemption Regulations when the spare parts supplier's market share or the authorised repairer's market share exceeds the 30% threshold, which is likely to be the case for most of such agreements*" (emphasis added).
- 4.3 We do not comment here on whether the Commission is correct in its analysis of the relevant markets, but if it were, in our view the consequences of this would be as follows:
- 4.3.1 Most spare parts distribution and authorised repair agreements will fall outside the safe harbour of a block exemption. Parties will therefore need to draft their agreements so as to fall outside of Article 101 TFEU altogether or seek to qualify for individual exemption under Article 101(3), but in either case will need to self-assess, resulting in increased costs of compliance. The only risk free option would be to operate an open network containing no restrictions of competition; even a purely qualitative selective distribution would not be without risk. Alternatively, suppliers may decide to become vertically integrated and take some or all of the aftersales work in-house.
- 4.3.2 The new MVBER will have little application in practice. The new MVBER is aimed at eliminating the perceived competition law problems associated with brand-specific parts and services, but the agreements relating to these parts and services would not fall within the new MVBER owing to the market share threshold. Presumably the only agreements that could fall under the new MVBER would be those relating *only* to generic parts; to the extent that these exist, they would be adequately regulated by the new VBER.
- 4.3.3 It will become harder for the Commission and National Competition Authorities to police the sector, which will consist of self-assessed agreements.

- 4.4 We would recommend that the Commission adopt a position similar to that under the current MVBBER, whereby a purely qualitative selective distribution agreement will benefit from block exemption (assuming of course that it does not contain any hardcore restrictions of competition) irrespective of the parties' market shares. In order to address the concerns set out at paragraphs 52-60 of the new guidelines (see below), specific non-exempted conditions could be made applicable to those agreements where the 30% market share threshold is exceeded.
- 4.5 We recognise that purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that it complies with three conditions, the first of which is that the nature of the product *necessitates* the use of selective distribution. However, in the motor vehicles sector, spare parts distribution and authorised repair agreements will cover a range of goods and services, some of which will necessitate the use of selective distribution whilst others (although closely inter-connected) may not. This will make it harder for parties to self-assess whether their agreement falls outside Article 101(1) altogether.
- 4.6 In all the circumstances, we consider that competition on the markets can be protected by *exempting* purely qualitative selective distribution, irrespective of the parties' market shares, provided that the agreements do not contain any of the hardcore restrictions set out in Article 4 of the new VBER or Article 5 of the MVBBER.

Conduct aimed at insulating the authorised repairer network

- 4.7 We note paragraphs 52-60 of the new guidelines relating to specific conduct which may restrict competition by preventing independent repairers from being able to access technical information, by misusing legal and/or extended warranties to exclude independent repairers, or by making access to authorised repairer networks conditional upon non-qualitative criteria. We would question however whether the new guidelines (rather than the new MVBBER) are the appropriate place to proscribe this conduct.

EVERSHEDS LLP

FEBRUARY 2010