

The European Commission's Draft Motor Vehicle Block Exemption and accompanying Guidelines

Observations of Van Bael & Bellis

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1. INTRODUCTION

1. Van Bael & Bellis welcomes the opportunity to submit Observations on the European Commission's (i) draft block exemption regulation on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector (hereafter the "draft MVBER") and (ii) 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 (hereafter the "draft Motor Vehicle Guidelines").¹

2. Overall, Van Bael & Bellis agrees with the Commission's conclusion that a specific block exemption is no longer warranted for the sale of new motor vehicles, particularly given the existence of strong competition in the motor vehicle sector. Van Bael & Bellis also considers it appropriate to adopt a sector-specific block exemption regulation covering motor vehicle aftermarkets given that the current and draft general vertical agreements block exemption regulations ("VABER") would not apply to most aftermarket agreements due to the Commission's approach of defining brand-specific markets.² However, Van Bael & Bellis questions why the Commission declined to even consider applying a higher market share threshold in the draft MVBER to ensure it would actually cover the vast majority of agreements coming within its scope, particularly since the Commission has recognised the clear benefits provided by block exemption regulations in terms of increasing legal certainty.³

3. Given the advanced stage of the Commission's consultation process, Van Bael & Bellis believes it would be best to focus on a number of key legal concerns that should be taken into account in the preparation of the final version of the Motor Vehicle Block Exemption Regulation and accompanying Guidelines. For convenience, these Observations are divided into separate sections concerning motor vehicle sales and aftermarkets.

2. LEGAL CONCERNS REGARDING THE COMMISSION'S PROPOSALS FOR MOTOR VEHICLE DISTRIBUTION AGREEMENTS

4. Although Van Bael & Bellis also has a number of concerns with respect to the Commission's draft VABER and draft Vertical Guidelines,⁴ for purposes of this consultation Van Bael & Bellis believes that it is appropriate to limit its comments to those issues raised by either the draft MVBER or draft Motor Vehicle Guidelines. In this regard, Van Bael & Bellis would like to highlight: (a) the 3-year extension of the current MVBER, (b) the apparent decision to limit the possible use of non-compete obligations by vehicle suppliers under the VABER and (c) the provisions on sales to intermediaries.

A. *The 3-year transitional period*

5. As Van Bael & Bellis noted in its Observations of 24 September 2009, the use of transitional periods are generally of great usefulness when the Commission decides to modify block exemption regulations.⁵ In particular, transitional periods help provide significant legal certainty to undertakings by clarifying that their existing agreements will continue to benefit from the safe harbour while they decide whether to continue with their existing agreements, to terminate their agreements or to modify their agreements in light of the new rules. At the same time, such transitional periods do not unduly

¹ Van Bael & Bellis has previously submitted Observations of 31 July 2008 on the Commission's Evaluation Report and Observations of 24 September 2009 on the Commission's Communication on the future competition law framework applicable to the motor vehicle sector.

² See Van Bael & Bellis Observations of 24 September 2009, ¶¶ 8, 24.

³ *Ibid.*, ¶¶ 6, 25.

⁴ On 28 September 2009, Van Bael & Bellis submitted Observations on the Commission's consultation on the new draft VABER and Vertical Restraints Guidelines.

⁵ See Van Bael & Bellis Observations of 24 September 2009, ¶ 11.

impede technical and economic progress because undertakings are also free to immediately modify their agreements to bring them within the scope of the new rules, which better reflect the Commission's understanding of current market conditions.

6. In Articles 2 and 3 of the draft MVBBER, however, the Commission has decided to forego this traditional approach and instead extend the current MVBBER by a period of three years. In other words, vehicle manufacturers, importers, distributors and dealers will not benefit from any safe harbour if they decide to modify their agreements, or enter into completely new agreements, that accord with the Commission's current policy that motor vehicle distribution agreements do not require sector-specific rules.⁶ The only stated reason for adopting this approach is that it will supposedly "allow all operators time to adapt" their current agreements (see Recital 19 of the draft MVBBER).

7. Although the Commission's statement of reasons explains why it is useful to continue to apply the safe harbour to agreements that benefit from the current MVBBER for a period of three years, it does not explain why it is necessary to deny the safe harbour to vehicle manufacturers, importers, distributors and dealers who enter into new agreements, or agree to modify existing agreements, in accordance with the VABER. Indeed, the Commission's own analysis has shown that there is no reason to subject motor vehicle distribution agreements to industry-specific rules, and that, in fact, the current industry-specific rules may actually be harmful or even fall outside the Commission's competence.⁷

8. Accordingly, Van Bael & Bellis believes that the Commission's decision to extend the current MVBBER by a period of three years is disproportionate to its stated aim of allowing operators time to adapt,⁸ particularly since that application of the standard type of transitional period would also achieve the same end of allowing undertakings to adapt their current agreements. Van Bael & Bellis therefore recommends that the Commission modify Articles 2 and 3 of the draft MVBBER to ensure that undertakings can avail themselves of the VABER when entering into new agreements or mutually agreeing to modify existing agreements. Alternatively, Van Bael & Bellis recommends that the Commission expand on its reasoning to explain why it is also necessary to prevent vehicle manufacturers, importers, distributors and dealers who enter into new agreements, or who wish to modify existing agreements, from immediately being able to benefit from the VABER if they choose this approach. Such guidance would be useful not only to assist undertakings in determining the risk of facing individual enforcement action should they decide to follow the approach set out under the VABER during this 3-year period, but would also be of assistance to the national competition authorities and Member State courts who might be called on to assess such practices.

B. Non-compete clauses

9. The Commission correctly notes in paragraph 25 of the draft Motor Vehicle Guidelines that non-compete obligations are covered by the VABER for a period of five years⁹, and a renewal beyond five years requires explicit consent of both parties. According to Article 5(a) of the VABER, the block exemption does not apply to "any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years", and a "non-compete obligation which is tacitly renewable beyond a

⁶ As the Commission noted again in its press release of 21 December 2009 (IP/09/1984), "In line with its Communication of 22 July 2009 on the review of the competition regime for the motor vehicle sector [internal citations removed], the Commission found no evidence that agreements between vehicle manufacturers and dealers would continue to require different treatment as compared to agreements in any other sector."

⁷ See, e.g., Van Bael & Bellis Observations of 31 July 2008, ¶ 6, and Van Bael & Bellis Observations of 24 September 2009, ¶ 13.

⁸ It should be noted that this reasoning is insufficient to explain why the current MVBBER should be applied to new agreements (where it is unnecessary to allow undertakings time to adapt existing agreements).

⁹ This period can be extended if the contract goods or services are sold by the buyer from premises or land owned by the supplier or leased by the supplier from third parties not connected by the buyer, provided that the non-compete obligation does not exceed the period of occupancy. See Article 5(a) of the VABER.

period of five years is deemed to have been concluded for an indefinite duration.” *A contrario*, vertical agreements that include non-compete obligations which are renewable every five years but only on the express consent of both parties are exempt. This also clearly follows from the Commission’s explanation in the Vertical Restraints Guidelines, in which it notes that “non-compete obligations are covered [by the VABER] when their duration is limited to five years or less, or when renewal beyond five years requires explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five-year period”.¹⁰

10. Interestingly, however, footnote 9 of the Motor Vehicle Guidelines appear to significantly modify these provisions:

“The reference period for the beginning of the five-year period is the start of the contractual relationship between the parties, rather than the replacement of one contractual document by another that covers the same subject matter. In particular, the fact that a pre-existing contractual relationship ceases to become subject to Regulation (EC) No 1400/2002 and instead falls within the scope of the General Vertical Block Exemption Regulation will not allow the supplier to stipulate that its existing distributors sell or repair and maintain only its brands for a period of five years.”

11. This footnote suggests that vehicle suppliers, importers, distributors and/or dealers that will have had an existing contractual relationship of at least five years before the VABER begins to apply on 1 June 2013 generally will not be able to avail themselves of non-compete obligations. Should the undertakings wish to take advantage of these provisions, they would need to ensure that they do not replace one contractual document by another—i.e., they presumably will need to terminate their existing agreement and wait some unspecified amount of time before entering into a new agreement to avoid the possibility that it would be viewed as a “replacement”. This would amount to a significant policy change, yet no explanation is provided for it.¹¹

12. The Commission’s proposal does not seem consistent with an economics-based approach. When assessing the possible foreclosure effects of a non-compete obligation, there is no obvious relevance to the pre-existing length of a given contractual relationship. If a supplier is allowed to enter into an agreement with a new dealer that includes a five-year non-compete obligation without restricting competition, what purpose is served by preventing that dealer from entering into an agreement with an existing dealer (on whom no non-compete obligation has been imposed)¹² that includes a five-year non-compete obligation? The draft Motor Vehicle Guidelines provide no answer.

13. This harsher approach would also seem to contradict the Commission’s previous conclusion that stricter provisions on non-compete obligations in the current MVBER may have had the unintended adverse effect of increasing dealer costs by bringing about higher selection standards and

¹⁰ Vertical Restraints Guidelines, ¶ 58.

¹¹ Issues surrounding whether there is a new agreement or merely the “replacement of one contractual document by another” could give rise to considerable uncertainty, creating a risk of divergent approaches being taken across Europe, the possibility of several referrals to the European Court of Justice and distortions in the way in which the Commission dedicates its enforcement resources, not unlike the Commission’s experience with several provisions of the current MVBER (see the Commission’s Evaluation Report, Section IV, and the Impact Assessment Report, ¶¶ 90-92).

¹² The current MVBER does not exempt non-compete obligations of any duration, and the Commission publicly stated that individual exemptions would also be unlikely, effectively treating non-compete obligations as a hard-core restriction. See Commission statement of 13 March 2006 (MEMO/06/120): “On multi-branding, Regulation 1400/2002 requires that authorised dealers of one brand may not be unduly restricted in exercising their choice to sell cars of another brand. They should be able to do so, if they wish, by using their existing facilities in order to avoid inefficient duplications of investments and to improve their economies of scale and scope.”

reducing vehicle supplier's investments in dealerships.¹³ If the Commission's intent is now to prevent vehicle suppliers, importers, distributors and/or dealers who have an existing contractual relationship from entering into agreements with non-compete obligations (as seems to be the case based on footnote 9), the result will be that the distribution costs borne by dealers will stay at an increased level.

14. Finally, as there is nothing in footnote 9 that limits its clarification of the VABER to distribution agreements concerning new motor vehicles, this approach creates an appreciable risk of bringing about considerable uncertainty for numerous vertical agreements in other sectors as well.

15. Accordingly, Van Bael & Bellis recommends that the Commission remove footnote 9 from the draft Motor Vehicle Guidelines, making it clear that non-compete obligations in all sectors will benefit from the general VABER provided they are limited to five years, regardless of when and if the contracting undertakings have had a long-standing contractual relationship beforehand. Alternatively, Van Bael & Bellis recommends that the Commission set out its reasoning to explain this important clarification, and in particular address whether this clarification is limited to distribution agreements for new motor vehicles, to assist both undertakings who wish to determine the risk of facing individual enforcement action should they decide not to follow this approach and also national competition authorities and Member State courts who might be called on to assess such practices.

C. *Sales to intermediaries*

16. As Van Bael & Bellis has previously explained,¹⁴ the current MVBBER and accompanying guidance have made it difficult for a vehicle supplier to prevent members of its authorised network from selling to supposed intermediaries and leasing companies that are in fact acting as unauthorised resellers. These rules create tension for vehicle suppliers who operate selective distribution systems, as they are required under the MVBBER to ensure that authorised distributors do not sell new motor vehicles to unauthorised resellers.

17. Rather than addressing these concerns, however, the draft Motor Vehicle Guidelines appear to lessen the permissible restrictions that can be placed on intermediaries, stating that “[e]vidence of intermediary status should as a rule be provided by a valid mandate or request including the name and address of the consumer” (¶ 46). In other words, the current draft appears to suggest that vehicle suppliers must normally permit their authorised distributors to sell to someone claiming to be an intermediary if the intermediary merely provides a request including the name and address of a given consumer (presumably with no date or signature required).

18. There is no reasoning set out to explain why this more lenient approach is necessary. On the contrary, our experience has been that companies claiming to be intermediaries can all too easily obtain vehicles from authorised distributors, and there are numerous examples where unauthorised resellers advertise the sale of new motor vehicles from stock on the internet. It is therefore necessary for the Commission to expand on this section of the draft Motor Vehicle Guidelines and explain the circumstances in which vehicle suppliers can require more than a simple name and address or even more than a simple mandate (such as in cases where it can be shown that supposed intermediaries and/or leasing companies have purchased and resold new motor vehicles without a prior mandate from the ultimate customer).

¹³ See the Commission's Communication on the future competition law framework applicable to the motor vehicle sector, ¶ 19: “Same-showroom multi-branding can also dilute brand image, and cause manufacturers to take steps to preserve their corporate identity by adjusting dealership standards to this end. In addition, they may 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 distribution costs borne by dealers.”

¹⁴ See, e.g., Van Bael & Bellis Observations of 31 July 2008, ¶ 10, Example 4, and Van Bael & Bellis Observations of 24 September 2009, ¶ 21.

3. LEGAL CONCERNS REGARDING THE COMMISSION'S PROPOSALS FOR AGREEMENTS REGARDING THE AFTERMARKET

19. Van Bael & Bellis believes that at this point in the consultation process the key legal issues with respect to aftermarkets raised by the draft MVER and draft Motor Vehicle Guidelines concern: (a) a lack of reasoning in the draft Motor Vehicle Guidelines for treating repair networks as selective distribution systems, (b) a lack of clarity in the draft Motor Vehicle Guidelines regarding permissible restrictions on extended (i.e., optional extra) warranties, (c) a lack of analysis in the draft Motor Vehicle Guidelines regarding purchasing requirements with respect to original spare parts, (d) a lack of reasoning in the draft Motor Vehicle Guidelines for statements suggesting that vehicle suppliers must provide technical information even when covered by intellectual property rights, and (e) insufficient detail in the draft Motor Vehicle Guidelines as regards the situations in which it might be permissible to limit the number of authorised repairers.

A. *The attempt to treat repair networks as selective distribution systems*

20. As Van Bael & Bellis has noted on several previous occasions,¹⁵ the proposed approach of treating authorised repair networks as selective distribution systems is inconsistent with the normal definition of a selective distribution system. A “selective distribution system” is normally understood as having two necessary components. First, the supplier undertakes to sell the contract goods or services directly or indirectly only to distributors selected on the basis of certain criteria. Second, the supplier imposes a restriction on its distributors preventing them from re-selling the contract goods or services directly or indirectly to resellers who have not been authorised by the supplier.¹⁶

21. If a supplier’s network meets the first but not the second component (i.e., the resale restriction), it is difficult to see how this practice can be characterised as anything other than a decision by a supplier to choose its business partners.¹⁷ Yet this is precisely the situation with respect to the selection of authorised repairers, who are not reselling any contract product or service supplied by the vehicle supplier when carrying out repairs as they are treated as end users.¹⁸ It therefore does not appear defensible to subject vehicle manufacturers to the onerous requirements of a “qualitative” selective distribution system when setting up their authorised repair networks simply because vehicle manufacturers wish to limit the number of undertakings with whom they wish to deal. Indeed, under the Commission’s approach it would seem impossible for a vehicle manufacturer to decide not to implement a “selective distribution system” for its authorised repair network, effectively excluding vehicle manufacturers from implementing other models such as franchising or “open” exclusivity (i.e., the appointment of one undertaking in a territory not combined with any form of territorial protection).

22. Despite these ongoing questions, the draft Motor Vehicle Guidelines do not set out any reasoning as to why repair networks should be treated as selective distribution systems. This generates significant legal uncertainty because the assessment of various obligations imposed on authorised repair networks in the draft Motor Vehicle Guidelines is essentially limited to a discussion of how these obligations might cause a qualitative selective distribution system to infringe Article

¹⁵ See, e.g., presentation on “Rights of Authorised Repairers” at the IBC Motor Vehicle Block Exemption Conference held in Brussels on 12 June 2008 and Van Bael & Bellis Observations of 24 September 2009, ¶¶ 26-29.

¹⁶ See, e.g., the definition of a selective distribution system in Article 1(d) of the VABER, and Article 1.1(c) of the draft VABER.

¹⁷ It should be noted that under well-established case-law, undertakings are normally free to choose their business partners. See further below at Section 3.E.

¹⁸ The Commission has stated that “Clearly, an independent repairer is an end user within the meaning of the Regulation, and therefore a supplier cannot restrict its distributors’ ability to sell any category of spare parts to independent garages” (Evaluation Report, Staff Working Document, Section 4.4.4). The Commission also echoed this point in Section III.D of the Commission’s Evaluation Report, where it notes that if authorised repairers no longer resold spare parts to other repairers they would be qualified as end users.

101(1) TFEU.¹⁹ This means that, to the extent that the highly debatable premise that authorised repair networks are essentially always selective distribution systems is unfounded, most of the discussion of repair networks in the draft Motor Vehicle Guidelines will be of little use. Van Bael & Bellis therefore strongly recommends that the Motor Vehicle Guidelines set out the Commission’s reasoning on why repair networks should be treated as selective distribution systems, particularly since the MVBBER will cease to apply to agreements regarding the repair and maintenance of motor vehicles as from 1 June 2010.

B. Warranty requirements

23. Paragraph 59 of the draft Motor Vehicle Guidelines states that qualitative selective distribution agreements with authorised repairers may infringe Article 101(1) TFEU if the supplier reserves certain repairs to members of its authorised networks, “for instance by making the manufacturer’s warranty, whether legal or extended, conditional on the end user having all repairs, including those not covered by the warranty, carried out within the authorised repair networks”. Van Bael & Bellis believes that there is insufficient clarity on the scope of this provision.

24. First, the text of paragraph 59 suggests that this reasoning may only be applicable insofar as the repair network is a qualitative selective distribution system. If it is determined that the repair network is not a selective distribution system (see to this effect section 3.A above), questions may arise as to whether this statement continues to apply. The Commission may therefore wish to clarify whether this provision applies regardless of whether the vehicle supplier’s repair network constitutes a selective distribution system or another type of network.

25. Second, the reference to an “extended” warranty in paragraph 59 is unclear, particularly given the contextual reference to it as simply something other than a legal warranty. This leads to two different but equally plausible readings of this provision. One plausible reading of this provision is that it applies to both the legal (i.e., statutory) warranty and the standard manufacturer’s warranty (i.e., the warranty terms offered by a supplier as part of the sale of the motor vehicle that go beyond the requirements of the legal warranty, and which the consumer user has no choice but to accept). A second plausible reading is that this provision applies not only to the legal warranty and standard manufacturer’s warranty, but also to optional warranties that go beyond the standard manufacturer’s warranty. This distinction can have important consequences. Indeed, there would seem to be good reasons to treat optional warranties sold as separate products differently from standard manufacturer’s warranties sold with the motor vehicle, as consumers are in a position to freely decide whether or not to purchase them depending on the applicable terms. If optional warranties could only be provided by vehicle suppliers on the condition that consumers must also have the freedom to use independent repairers for work not covered by the warranty, this would likely add to the costs charged for the optional warranty.

26. To reduce legal uncertainty, Van Bael & Bellis therefore recommends that the reference to “extended” warranties in this provision be clarified. To the extent that this would also be intended to cover optional warranties, Van Bael & Bellis also recommends that the Motor Vehicle Guidelines set out the Commission’s analytical reasoning on this point, particularly because informal guidance provided at both Commission and Member State level has suggested that restrictions can be imposed on the use of independent repairers in the context of optional warranties.²⁰ Moreover, to the extent

¹⁹ See, e.g., draft Motor Vehicle Guidelines, ¶ 36.

²⁰ On the related issue of whether vehicle manufacturers can require the use of genuine spare parts for all repair services under an extended warranty, see Faull & Nikpay, Second Edition (2007), § 15.124, in which the author also noted that “If the extended warranty or guarantee, whether provided by the manufacturer, an insurance company or the distributor, is sold by distributors or authorised repairers to customers, who can freely decide whether they wish to purchase it, the Regulation does not apply and the scheme can provide that spare parts supplied by the vehicle manufacturer must be used for the repair services”. Commissioner Kroes seemingly

that the Commission wishes to reverse its previous position, Van Bael & Bellis recommends that the Commission provide a transitional period to vehicle manufacturers that have sold optional warranties on terms that were consistent with this informal guidance.

C. Purchasing obligations for spare parts

27. The current MVBBER has been understood to allow vehicle suppliers to require that parts distributors and authorised repairers ensure that 30% of their purchases of spare parts were original parts sold under the supplier's trademark (obtained either from the vehicle supplier or from authorised resellers of original parts). This understanding was based on the definition of a non-compete obligation in Article 1.1(b) of the current MVBBER and various provisions of the Explanatory Brochure (see pp. 31-32, and the response to Question 79). Indeed, the Commission concluded that foreclosure of competing spare part suppliers was not possible (and thus there were no "competition problems") provided that such purchase requirements were not set at a level higher than 30% of the buyer's requirements (Explanatory Brochure, p. 32).

28. Unlike the current rules, the draft Motor Vehicle Guidelines do not address the issue of whether vehicle suppliers can impose similar purchase obligations. This creates legal uncertainty particularly since (i) vehicle suppliers will generally exceed the market share threshold set out in the draft MVBBER with respect to spare parts due to the Commission's methodology of defining brand-specific markets and (ii) the current MVBBER will cease to apply to agreements regarding the repair and maintenance of motor vehicles as from 1 June 2010 without any transitional period. Accordingly, Van Bael & Bellis recommends that the Commission add an additional section to the Motor Vehicle Guidelines to specifically address the Commission's assessment of purchase obligations under Article 101(1) TFEU.

D. Provision of technical information covered by intellectual property rights

29. The current MVBBER has been understood to allow vehicle suppliers to refuse to disclose technical information covered by intellectual property rights (including know-how) provided that such refusal did not amount to an abuse of a dominant position under Article 102 TFEU. This understanding was based on the wording of Recital 26 and Article 4.2 of that Regulation and the explanation given in the Explanatory Brochure (see p. 65).

30. The Commission's proposed assessment of the need to disclose technical information is addressed in paragraphs 52-58 of the draft Motor Vehicle Guidelines. According to the draft Motor Vehicle Guidelines, "failing to release technical repair and maintenance information" to independent repairers might cause a repair network that constitutes a qualitative selective distribution system to infringe Article 101(1) TFEU. The Commission adds that "the notion of technical information is fluid", and that the "list of items set out in Article 6(2) of Type Approval Regulation 715/2007 should also be used as a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty".

31. This raises two distinct issues. First, the proposed text suggests that this reasoning may only be applicable insofar as the repair network is a qualitative selective distribution system. If it is determined

confirmed this point, recently suggesting that under the MVBBER vehicle manufacturers could require that genuine spare parts be used for all repairs as a condition of both standard and optional warranties: "The routine refusal to honour warranties on vehicles which have had another manufacturer's spare parts fitted, even where these spares are not linked to the fault for which the warranty is being invoked, could strengthen the negative effects of the qualitative selective repair and parts distribution agreements entered into between vehicle manufacturers and their authorised repairers. At present, it would be difficult for the Commission to apply Article 101 to agreements of this type, since Regulation 1400/2002 grants an exemption for such agreements irrespective of market share." See response of 4 February 2010 to written question E-6070/09, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-6070&language=EN>.

that the repair network is not a selective distribution system (see to this effect section 3.A above), questions may arise as to whether this statement continues to apply. The Commission may therefore wish to clarify whether this provision applies regardless of whether the vehicle supplier's repair network constitutes a selective distribution system or another type of network.

32. Second, the proposed text appears to extend the existing rules by failing to recognise the right of vehicle suppliers to withhold information that is covered by intellectual property rights (including know-how) provided that this is not abusive under Article 102 TFEU. While it is outside the scope of these Observations to address the Commission's decision to require vehicle suppliers to disclose such information in a regulatory context, it is still necessary for the Commission to justify its decision to apparently begin applying Article 101 TFEU to refusals to supply technical information covered by intellectual property rights (including know-how) in a manner that would not infringe Article 102 TFEU. In their current form, however, the draft Motor Vehicle Guidelines provide no explanation for this potentially broad incursion into otherwise legitimate intellectual property rights. Van Bael & Bellis therefore recommends that the Commission set out the justification for this proposed modification.

E. Limiting the numbers of authorised repairers

33. Paragraph 61 of the draft Motor Vehicle Guidelines addresses the situation in which a vehicle supplier might wish to link motor vehicle sales and repair services. First, the draft Motor Vehicle Guidelines state that requiring authorised repairers to also sell new motor vehicles would generally infringe Article 101(1) TFEU as this is not likely to be a qualitative criterion. Second, the draft Motor Vehicle Guidelines state that imposing such a requirement would also be unlikely to benefit from an exemption under Article 101(3) TFEU where the brand is established, as this would restrict access to the authorised repair network and thus reduce competition within the authorised repair network. Third, the draft Motor Vehicle Guidelines recognise an apparent exception to the first two rules, stating that in certain cases it might be necessary for purposes of launching a new brand to limit the appointment of stand-alone authorised repairers, and thus such provisions may fall outside of Article 101(1) TFEU.

34. Van Bael & Bellis believes that the analysis underlying each of these points needs to be expanded. First, it would seem necessary to explain whether a refusal to appoint an authorised repairer would infringe Article 101(1) TFEU if the vehicle supplier did not operate a qualitative selective distribution system (e.g., in cases where the vehicle supplier does not impose resale restrictions on its authorised repair network). Indeed, as discussed above in Section 3.A, it is normally not problematic under EU competition law for a supplier to select its business partners. As the Commission has previously stated, case-law establishes that "undertakings are, as a rule, free to choose their business partners [unless there is an abuse of a dominant position]".²¹ Moreover, while the appointment of authorised repairers will involve a trademark licence from the vehicle supplier to the authorised repairer, the Court of Justice has previously recognised that the mere grant of an exclusive licence may be insufficient on its own to infringe Article 101(1) TFEU.²² In the interests of legal certainty, it would therefore be useful to expand on this issue in the Motor Vehicle Guidelines. In particular, it would be useful for the Commission to set out its reasoning as to whether decisions to license a limited number of undertakings to use the vehicle supplier's trademark rights and carry out warranty services on its behalf would normally be sufficient grounds to infringe Article 101(1) TFEU, particularly if the vehicle supplier grants non-discriminatory access to original spare parts, technical information and training to independent repairers.

35. Second, it would also be useful to set out the assessment underlying the claim that limiting the number of authorised repairers for established brands would not benefit from an exemption under

²¹ See, e.g., *Microsoft v. Commission*, [2007] ECR II-3601, ¶ 107. The General Court confirmed the Commission's view of the case-law. *Ibid.*, ¶ 319.

²² See, e.g., *Nungesser and Kurt Eisele v. Commission*, [1982] ECR 2015.

Article 101(3) TFEU. Indeed, to the extent that a vehicle supplier grants non-discriminatory access to original spare parts, technical information and training to independent repairers, it is not clear that any limitation on competition within authorised networks would necessarily outweigh possible efficiencies (e.g., by permitting even established brands to penetrate new markets) given that there also is competition from outside the authorised network.

36. Third, although Van Bael & Bellis welcomes the recognition that appointing stand-alone authorised repairers may make it difficult for new brands to establish themselves in particular geographic markets, Van Bael & Bellis recommends that the Commission clarify that this is only one example, and note that other situations may exist where it would be justifiable to limit the number of stand-alone authorised repairers. For example, there may be circumstances where established manufacturers have encountered difficulty in recruiting dealers due to the presence of authorised repairers in a geographic market. Evidence of such difficulties should also provide sufficient grounds to allow the vehicle supplier to terminate agreements with stand-alone authorised repairers. As currently worded, however, the draft Motor Vehicle Guidelines indicate that the situation of launching a new brand may be the only scenario under which a vehicle supplier could permissibly limit stand-alone repairers.

4. CONCLUSION

37. Although Van Bael & Bellis continues to welcome the Commission's decision to subject distribution agreements for new motor vehicles to the generally applicable rules, the method chosen by the Commission to implement this change in approach (i.e., the application of a 3-year extension of the MVBBER rather than the adoption of a transitional period) does not appear to reflect an economics-based approach to competition law. Van Bael & Bellis therefore recommends that the Commission reconsider this approach. Should the Commission nevertheless decide to continue with this approach, Van Bael & Bellis would also recommend that the Commission more clearly explain its rationale. Such guidance would be useful not only to assist undertakings in determining the risk of facing individual enforcement action should they decide to follow the approach set out under the VABER during this 3-year period, but would also be of assistance to the national competition authorities and Member State courts who might be called on to assess such practices.

38. In addition, as highlighted in these Observations, Van Bael & Bellis also believes that the draft Motor Vehicle Guidelines require a number of important clarifications. This is particularly important with respect to those sections discussing repair networks, as there appears to be a very strong argument that such networks do not constitute selective distribution systems under the VABER and existing case-law. Pending such changes, it may be necessary for the Commission to consider applying a transitional period to the treatment of aftermarket agreements under the MVBBER.