New rules for motor vehicle distribution and servicing

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This article is essentially a follow-up to the fuller article that appeared in the June 2002 edition of the Competition Policy Newsletter. Rather than repeat the contents of the earlier piece, which covered the background to the adoption of the draft Regulation, and explained its main provisions, this article sets out the procedural steps that were taken following the publication of the draft new motor vehicle block exemption regulation ('the Regulation') on 16 March 2002 (2), and explains the main changes that were introduced prior to the adoption of the final text of what is now Regulation 1400/2002 on 17 July (3).

1. Procedural steps taken following publication of the initial proposals on 16 March

The publication of the proposal for a new sector-specific regulation on 16 March ushered in a public consultation period of one month. During the consultation, many meetings and conferences were held with various interested parties to explain the project. Numerous contributions were received from various commentators, including trade associations, car manufacturers, consumers, dealers, repairers, component manufacturers, lawyers and consultants. The large number of replies received reflected the wide publicity that the project attracted in the press, as well as its importance for the motor vehicle sector and for the European consumer.

After a full analysis of all of the comments received, and of the comments made by representatives of the Member States in the first advisory committee meeting on 7 March, an amended draft of the regulation was submitted to the Member States on 6 May in view of the second meeting of the advisory committee held on 6 June (4).

2. Amendments made to the initial text prior to the second advisory committee meeting on 6 June

While the revised draft retained most of the basic features of the original, in that it laid down a stricter regime using Regulation 2790/99 as a framework, and contained a longer list of black clauses better tailored to the specific competition problems identified in the sector (5), it nevertheless contained several important amendments as regards both vehicle retail and repair markets.

Vehicle Retail

The new text clarified that the Regulation also covers what are commonly referred to as ‘two-tier’ retail distribution systems; i.e. where a manufacturer supplies vehicles to main dealers who supply some of them on to sub-dealers.

Secondly, a new requirement was added to the effect that reasons given for terminating a dealer agreement of indefinite term have to be in writing and must be transparent and objective; this was done in order to help arbitrators and judges to decide on the merits of any claim.

In order to avoid the use of very short-term dealer agreements that might increase insecurity among dealers, the new text was amended to allow for fixed-term dealership agreements to have a minimum term of five years; in such circumstances the parties must give a minimum of six months’ notice of their intention not to renew the agreement.

A new general condition was added to allow dealers and authorised repairers the freedom to sell their businesses to any other dealer or repairer already appointed by the manufacturer. This should give dealers and authorised repairers a greater degree of economic independence and

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(3) Published in the OJ L 203/30 of 1 August 2002 and on the Internet at: http://europa.eu.int/comm/competition/car_sector/distribution/
should encourage the emergence of cross-border dealerships.

The Regulation allows suppliers to choose between exclusive and selective distribution systems. In the second draft, text was added to the recitals to clarify the consequences of using exclusive systems in some markets and selective systems in others. This was done to ensure that suppliers could not protect the market in a high-price Member State by using a different type of distribution system in that country to that used elsewhere in the Common Market.

The second draft also gave some clarification with regard to the prohibition on the use of location clauses. New text was added to clarify that while the use of location clauses in selective distribution systems to prevent dealers from opening secondary outlets was prohibited in respect of the sale of cars and light commercial vehicles, this ban did not extend to dealers in heavier vehicles. The text was also modified so that location clauses could be granted for such vehicles for an unlimited period; in the draft adopted by the Commission in February, location clauses were only authorised for a maximum of five years. In addition, text was added to make it plain that suppliers would retain the ability to specify where a car dealer’s initial outlet was located, and to prevent such a dealer from moving that outlet elsewhere.

In order to facilitate multi-brand sales, the threshold above which an obligation to purchase a given percentage of vehicles or spare parts will be considered as a non-compete obligation and will not be exempted was reduced from 50% to 30%.

**Vehicle repair and distribution of spare parts**

The new Regulation not only covers the distribution of new vehicles, but also repair and maintenance and the distribution of spare parts.

In response to calls for greater consumer information, a new clause was added requiring those dealers who sub-contracted repair and maintenance provision to an authorised repairer within the manufacturer’s network to inform consumers of the distance to the repairer’s premises. Moreover, clarification was added to the effect that a supplier could oblige a dealer who sub-contracted repair and maintenance provision to maintain ultimate responsibility towards his customers for ensuring that warranties are honoured and free servicing and recall work is carried out. If the subcontractor repairer does not carry out such work satisfactorily, the consumer can return to the dealer who sold him the vehicle, and the dealer will then have to carry out the work satisfactorily himself or ensure that a third party does so. This is in line with the principles of Directive 99/44.

The right of independent operators to obtain technical information from vehicle suppliers is a cornerstone of the new Regulation. The text submitted to the second advisory committee introduced an exception to this rule where access would enable a third party to bypass anti-theft devices, or re-calibrate or manipulate devices that limit vehicle speed. A supplier could, however, only rely on this exception where there was no other way of protecting the devices in question.

The definition of original spare parts was amended in the second draft of the Regulation to take account of the fact that while original spare parts are all made according to the same processes and standards as the vehicle components, not all of them are made on the same production line as those components. Following the change, the term ‘original spare parts’ now encompasses all spare parts which are of the same quality as the vehicle components and which are made according to the same specifications and production standards used with the manufacturer’s consent to make those components. The new draft also created a presumption that all parts made according to these specifications and standards matched the quality of the original components.

**Other technical changes**

The way in which the Regulation was set out was re-structured, mainly to satisfy a general request from the Member States for more clarity, and various other technical changes were made to make the text clearer.

The recitals to the Regulation were clarified to explain that hardcore restrictions always appreciably affect competition and that even if a supplier has a market share of less than 5%, a vertical agreement containing such restrictions will not be considered to be De Minimis. A definition was added for light commercial vehicles. A definition was also added to clarify how market shares are to be calculated for the purposes of the Regulation.

3. Issues still in debate after the second advisory committee

The text submitted to the second advisory committee and published on the Internet was generally well received, particularly as regards the
improved format and the provisions governing the aftermarket. Three issues, however, still provoked considerable debate on all sides (1): the operation of secondary outlets (ban on the location clause), the conditions that a supplier may impose on dealers taking on an additional brand (multi-branding) and the ability of dealers to sub-contract servicing to an authorised repairer within the manufacturer’s network (re-organisation of the sales-service link).

Just prior to the advisory committee meeting, on 30 May the Parliament (2) voted in plenary session on a report by the MEP Dr Werner Konrad concerning the Commission’s plans for the block exemption. The Parliament was generally supportive of the objectives pursued by the Commission, and of the necessity of a substantial reform. Opinion was diversified (3), however, regarding the ban on the location clause, although a majority voted to see the ban delayed for three years, and its introduction made conditional on the outcome of an evaluation by the Commission showing that the conditions of Article 81(3) would not be met unless location clauses were prohibited. The Parliament also wished to allow suppliers more leeway to agree extra conditions for the operation of multi-brand outlets, and also proposed that dealers should only be able to sub-contract servicing provision provided at least one of authorised repairer sub-contractors was in the vicinity of the sales outlet.

4. The final text

The text adopted by the Commission on 17 July 2002 took account of many of Parliament’s concerns, and incorporated many of the proposed amendments, either entirely or in part. Since the prohibition on location clauses represented a major change, a special extended transition period of three years was provided for in respect of this provision (4). The Commission did not, however, see the need for a further evaluation of the need for such a ban, since this would create and prolong legal and economic uncertainty, and be bad for business.

The provisions on sub-contracting repair, and in particular the requirement to give information to consumers regarding the distance to the authorised repairer sub-contractor were further refined.

A new provision was introduced allowing a supplier to pay the additional cost where a dealer running a multi-brand dealership decided to have brand-specific sales personnel.

The list of operators to whom suppliers have to provide technical information was expanded to include spare part distributors, and further clarification was added to the definitions for original spare parts and spare parts of matching quality.

The definition for light commercial vehicles was amended to only include vehicles up to 3.5 tonnes (5).

5. The way forward

Block exemption 1400/2002 enters into force on 1 October 2002, although operators will have a year to amend pre-existing contracts (6) that comply with Regulation 1475/95. The ban on the use of location clauses in selective distribution systems will take effect on 1 October 2005.

The Commission will closely monitor the way that the new rules are applied, and will not hesitate to act, as it has in the past (7), should any breaches of the competition rules come to light.

As the new rules represent a major change compared to Regulation 1475/95, guidance needs to be provided as to the way they should be applied. The freeing of the sector from the strait-jacket effect associated with Regulation 1475/95 may also be expected to lead to a need for more direction. With this in mind, DG Competition will publish an explanatory brochure on the Internet in September before the entry into force of Regulation 1400/2002. The brochure will contain detailed explanations of the provisions of the Regulation, together with examples and answers to a series of questions of interest (8). Interested parties may refer to this in addition to the Commission’s Guidelines on Vertical Restraints (9).

(1) These three issues are discussed in more length on page 32 of the June edition of this newsletter.
(2) The Economic and Social Committee also adopted an opinion in plenary session on 29 May.
(3) Article by Dr Konrad, Kangaroo group newsletter July 2002, page 5.
(4) This corresponded to the period wished for by a majority of MEPs.
(5) The second draft included vehicles up to six tonnes within the definition of LCVs.
(6) i.e. agreements in force on 1 October 2002.
(7) See, for example, the fines imposed on Volkswagen (twice), Opel, and DaimlerChrysler. Details available at http://europa.eu.int/comm/competition/car_sector/distribution/#fines
(8) A similar, though less detailed brochure was published following the adoption of Regulation 1475/95.
(9) Published in the OJ C291/1 of 30 October 2000, and available at http://europa.eu.int/comm/competition/antitrust/legislation/entente3_en.html#iii_1
In addition, DG Competition will continue to issue (1) a twice-yearly report comparing the prices of vehicles in all of the EU Member States.