

Kluwer Competition Law Blog

Results of the Commission's public consultation on the review of the Motor Vehicle Block Exemption Regulation

Adrien Giraud, Pierre Bichet (Latham & Watkins LLP) · Monday, March 22nd, 2021

On 17 March 2021, the European Commission (EC) has published the results of its public consultation on the review of the Motor Vehicle Block Exemption Regulation (MVBER).

Key Points

- The automotive sector is under surveillance as it has been affected by a number of EC-issued cartel decisions in the last few years. Distribution systems and agreements relating to automotive aftermarkets are also an increasingly high-risk area from an EU competition law compliance perspective. EC regulators are closely watching how companies collect and use data to lock in aftermarket revenues.
- The current EU motor vehicle sector competition law regime contains a complex patchwork of applicable block exemptions and guidelines. The revision of these rules started in December 2018, and the EC is seeking to ensure that these legal instruments fit neatly together.
- Overall, the responses to the consultation show a consensus that the motor vehicle block exemption rules have met their objectives and created legal certainty.
- The responses, however, show that the competitive landscape of the automotive sector can be further strengthened. In particular, views are split as to whether competition for repair and maintenance services for motor vehicles has increased since 2010. For example, many respondents referred to the need to address access to in-vehicle-data and to the fact that access to technical information is unsatisfactory.
- The EC likely will maintain the motor block exemption rules, while taking the opportunity to simplify and fine-tune the current regime, notably in light of market developments over the last decade.

Background

On 12 October 2020, the EC launched a public consultation to gather information and feedback in order to assess whether and to what extent the objectives of the MVBER are fulfilled. The consultation closed on 25 January 2021.

The MVBER will expire on 31 May 2023 and the EC must draw up an evaluation report on its operation by 31 May 2021. This report will serve as the starting point for determining whether the

EC should let the MVBER lapse, prolong its duration, or revise the regulations.

The stated objective of the consultation was “to collect in-depth and high-quality facts and evidence on the key competition issues arising in vertical relationships on the motor vehicle distribution and after-sales markets from the perspective of stakeholders”.

The EC received 84 contributions to the public consultation, which were submitted through the online questionnaire tool. In addition, 17 participating stakeholders submitted position papers.

The EC has also launched a public consultation concerning the functioning of the EU Vertical Block Exemption Regulation (VBER) that applies to the automotive sector. Additionally, the EC is currently reviewing its horizontal cooperation rules that will also provide useful guidance to automotive players regarding cooperation with competitors.

Reform focus areas: What do the responses show?

The EC’s consultation questionnaire explored a number of areas, including:

- Intensity of competition in the automotive sector
- The scope of the safe harbour contained in the MVBER
- The prevalence of particular restrictions in distribution agreements
- Whether the current regime has made self-assessment easier and increased legal certainty
- Whether the MVBER is still relevant today
- Whether the MVBER (and the VBER) have helped national competition authorities (NCAs) and national courts to apply the rules consistently

Intensity of competition

The results of the consultation give a mixed overview of the state of competition in the automotive sector. While 36.1% of the respondents believe competition in new motor vehicle distribution has intensified since 2010, 21.7% believe competition has weakened. Meanwhile, 39.8% are unsure.

In the case of repair and maintenance services for motor vehicles, respondents were equally divided. Nearly half believe competition has intensified since 2010, whereas nearly half believe competition has weakened. In particular, respondents noted issues in accessing technical information (e.g., restrictions, cumbersome or expensive processes), restrictive warranty terms, or captive spare parts, and requirements to activate spare parts after installation.

Competition seems to have intensified in one market: the distribution of spare parts for motor vehicles. More than half (54.2%) of the respondents believe competition has intensified since 2010. Just under 30% believe competition has weakened. Close to 10% believe there has been no change.

Clearly, there is no unanimous view on the competitive landscape of the automotive industry. While it is too early to draw conclusions, one can imagine that the EC will renew the MVBER and accompanying guidelines to give further clarity and enhance the competitive dynamics of the market.

Scope of the safe harbour

According to the MVBER, certain vertical agreements are presumed competition compliant if neither party has a market share in excess of 30%.

More than 50% of the respondents expressed the view that there is no reason to depart from the 30% market share threshold. Should a new MVBER be adopted, the 30% threshold will likely remain. However, the outcome of the VBER consultation might have an impact on the level of the MVBER safe harbour threshold as the VBER also contains a 30% threshold.

The consultation also sought to determine whether any additional types of restrictions should be regarded as hardcore — 41% of respondents encountered vertical restrictions that should be considered as hardcore. For example, respondents consider the following restrictions as hardcore, not benefitting from the safe harbour:

Restrictions linked to direct or indirect quantitative criteria on the access to authorised networks (including refusal of access when quality criteria are met)

Restrictions on access to technical information and in-vehicle data for aftermarket operators (including data publishers) or bundling sales and aftersales markets for example, by offering inclusive maintenance plans by default

On the opposite side of the spectrum, the majority of respondents (close to 69%) believe there are no hardcore restrictions listed in the current MVBER that should not be qualified as such.

Prevalence of certain restrictions

The consultation sought to determine whether certain types of restrictions in agreements (e.g., resale price maintenance) or conduct could be regarded as an indirect means of achieving anticompetitive results.

Some of the restrictions with potentially the most anti-competitive results do not seem to be widespread. For example:

- Only 12 respondents reported encountering instances of resale price maintenance, out of which four contested them.
- Only seven respondents reported seeing restrictions on authorised dealers' ability to sell motor vehicles or spare parts in other Member States (six of which contested the restriction).
- Only one respondent acknowledged being subject to a post-term non-compete obligation.
- Only six respondents declared being subject to restrictions on authorised dealers not to sell motor vehicles or spare parts from particular competing suppliers. However, 33 respondents indicated that they had encountered single-branding/non-compete obligations in their agreements.

The responses regarding the aftermarket/repair market were more divided. For example, 34 respondents have seen restrictions on original equipment suppliers' ability to sell spare parts to end customers or repairers. Twenty-six respondents have seen restrictions on authorised dealers' ability

to sell spare parts to independent repairers. Some respondents have also seen refusals to access the official network of repairers which, in their view, results in a decrease in intra-brand competition.

A significant number of respondents also encountered restrictions on independent operators' access to technical information as well as misuse of warranties (46 and 41 respondents accordingly).

Nevertheless, the respondents found that, overall, the objectives of the MVBER (e.g., ensuring access to vehicle retail and repair markets for vehicle manufacturers wishing to enter new markets or expand their market presence, protecting competition between dealers of the same brand, or preventing restrictions on cross-border trade in motor vehicles) have been achieved (fully or partially).

Legal certainty and efficiency

The majority of respondents (48) believe the MVBER has achieved legal certainty. Overall, the respondents also believe the MVBER has achieved legal certainty compared to a situation in which no such rules existed.

To the question of whether respondents consider costs to have been proportionate to the benefits that the MVBER have brought, only a few of the respondents (11%) consider the costs to be disproportionate. However, some of the respondents that considered costs to be disproportionate agreed that if the MVBER were not prolonged, legal uncertainty would increase.

Relevance, coherence, and EU added-value

The results of the consultation show that the objectives of the MVBER are still relevant today. The large majority of respondents (59) believe the motor vehicle block exemption rules have made it easier for NCAs and national courts to apply the rules consistently, and a larger majority (64) believe national provisions would have been less effective in the absence of the motor vehicle block exemption rules.

The MVBER

Primary market

In relation to the market for the purchase, sale, and resale of new motor vehicles (primary market), the MVBER clarifies that the general VBER will address the primary market.

The VBER presumes that vertical agreements in the primary market are legal if both of the following are true:

- Neither party's market share exceeds 30%
- The agreements do not contain "hardcore restrictions" (e.g., resale price maintenance, territorial and customer restrictions, or restrictions on members of a selective distribution system from making active or passive sale to end users)

In September 2020, the EC published a Staff Working Document, summarising the findings of its evaluation of the VBER. The EC will issue a draft of the revised rules for public consultation later in 2021. The VBER will expire on 31 May 2022. The EC intends for the new rules to be in force by the date the VBER expires.

Aftermarket

In relation to the market for the provision of repair and maintenance services for motor vehicles and the distribution of spare parts (aftermarket), the MVBER provides a specific block exemption.

For vertical agreements relating to the aftermarket to benefit from the safe harbour of the MVBER's block exemption, two criteria need to be satisfied:

- Neither party's market share exceeds 30%, and the agreement does not contain any hardcore restriction
- The agreement must not contain any of the motor vehicle specific hardcore restrictions listed in Article 5 MVBER, i.e.:
 - The restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers that use those parts for the repair and maintenance of a motor vehicle
 - The restriction, agreed between a supplier of spare parts, repair tools, or diagnostic or other equipment, and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end-users
 - The restriction agreed between a manufacturer of motor vehicles that uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trademark or logo

Agreements not satisfying the VBER and MVBER criteria may still be compatible with Article 101 TFEU. This may involve a costly assessment of the likely effects on competition and customer benefits.

Vehicle manufacturers will usually exceed the 30% market share threshold since the EC's practice is to define separate national markets for the relevant brand-specific parts and repairs. The main purpose of the MVBER has therefore not been to exempt agreements but rather to set out what provisions will be treated as hardcore restrictions of competition that should be avoided in aftermarket agreements.

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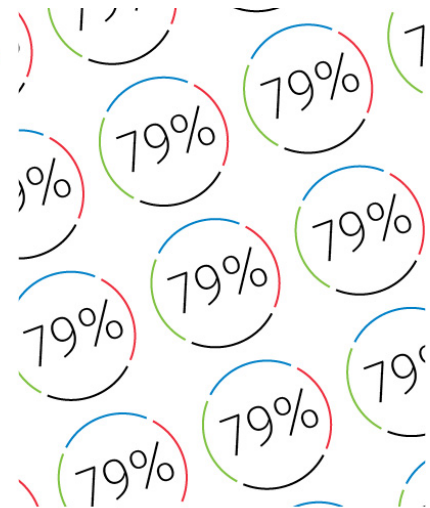
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