MOTOR LAW 2010 CONFERENCE

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Speaking Notes - James Dilley, Martineau,
Head of Competition Law, Public Procurement and State Aid Team

The Future of Vehicle Distribution in the EU - The Impact on Manufacturers, Dealers and the Aftermarket

Focus on: Manufacturers' Position

(11.20 to 11.45)

Note on current and draft legislation

With two block exemptions being reviewed and replaced at the same time it is potentially necessary to reference 4 block exemptions and 4 sets of accompanying guidelines. In relation to the motor vehicle ("MV") regimes it is necessary to compare and contrast both the current and the draft rules. However, in relation to the general verticals regimes, to reduce the potential for confusion, these notes refer to the draft proposed vertical block exemption and associated draft guidelines wherever possible rather than the current verticals block exemption (Regulation 2790/1999) and the current verticals guidelines (2000 OJ C291, page 1) as these will expire as of 1 June 2010. Therefore the main pieces of legislation referred to in these notes are as follows:

Sector-specific legislation

- Current MV block exemption (Commission Regulation 1400/2002)
- Current MV explanatory brochure (2002 OJ L203, page 30)
- Draft MV block exemption
- Draft MV guidelines

General legislation applicable to all vertical agreements

- Draft verticals block exemption
- Draft verticals guidelines

This bulletin summarises complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

New treaty numbering

Please also note that references to Article 101 of the Treaty on the Functioning of the European Union ("TFEU") should be read as references to Article 81 of the EC Treaty. The new numbering and name change are consequences of the Lisbon Treaty coming into force after ratification by the Czech Republic in November 2009. However, the provisions on competition law are essentially unchanged.

Introduction

In the next 20 to 25 minutes I am going to look at the implications of the new regulatory framework for vehicle distribution in the EU from the perspective of the vehicle manufacturers. Primarily I will be looking at the main changes and the implications for distribution structures from the manufacturers' viewpoint in relation to the sale of new vehicles.

I will also address, if only briefly, how the new regime has addressed manufacturers' concerns as expressed throughout the review process and the outstanding issues.

Finally I will outline the main practical compliance issues that seem likely to arise.

The Commission has found that as regards the distribution of new vehicles competition is strong and so a full move to the general verticals regime is warranted. Broadly speaking manufacturers are supportive of the proposed move to a less burdensome regime under the general verticals rules. While the Commission has noted the serious negative impact of the economic crisis during the later parts of the review process the manufacturers are perhaps even keener that the new rules should be applied as soon as possible to help assist the industry within the European Union.

Transitional Arrangements

New vehicles - no change for 3 years

As regards the distribution of new vehicles the first main point to note is that there will be no change as yet.

In relation to the sale of new motor vehicles the draft MV block exemption provides (at Article 2) that Regulation 1400/2002 will be prolonged from 1 June 2010 (the date at which it is set to expire) to 31 May 2013. Article 3 provides that the verticals regime will then apply to sales of new vehicles as of 1 June 2013.

This is in contrast to the position for the aftermarket in relation to which the draft verticals block exemption and the draft MV block exemption (together with the two sets of associated guidelines) will apply as of 1 June 2010.

… and no possibility of change till 1 June 2013

The draft MV guidelines go on to make it quite clear (point 14) that until 1 June 2013 the sale of new vehicles is subject only to the current MV block exemption (1400/2002) and the current MV explanatory brochure and indeed specifically notes that neither the draft MV guidelines nor the general vertical block exemption should be used in the interim.

What this means is that distribution agreements for new vehicles must conform to the current rules until 31 May 2013 and then, the very next day, conform to the new regime.

A consistent concern of manufacturers

Clearly this proposal gives manufacturers a very considerable amount of time to think about and prepare for the new regime. As the draft MV guidelines note (Article 14) this approach has been adopted to allow "all operators time to adapt to the general regime, in particular in view of relationship-specific investments which were made in the long term."

However, it does mean that it is not possible for those manufacturers that wish to adapt to the new regime, before the 3 years are up, to do so.

A further level of complexity will also be added by the fact that agreements that relate to both the primary (new vehicle) market and the aftermarket may need to be adapted at different times.

From the manufacturers' perspective it seems clear that a proper transitional period would be preferable - a period during which both the current regime or the new regime could be applied - rather than a long period of consideration followed by a fixed date for change over.

Both the European Automobile Manufacturers Association (ACEA) and the Japan Automobile Manufacturers Association (JAMA), and a number of other contributors, have made this point in their contributions following the July 2009 consultation.

ACEA notes that simply extending the current exemption carries the risk that current distribution structures would be "frozen in time" until 1 June 2013 - which runs counter to the benefits flowing from the "less prescriptive and more flexible legal framework" offered by application of the new verticals regime. ACEA suggests that the new rules should be applied to both primary and the aftermarket as of 1 June 2010 with a period of adaptation of 2 years during which compliance with both the old and the new regimes would be valid.

JAMA notes that "a key JAMA concern" is that "the significant benefits intended from the transition of rules for the sales market into the [new draft vertical block exemption regime] must not be delayed" and also concludes that these rules need to enter into force simultaneously this year with a 2 year transition period.

Surely the changes to the regime are significant enough to warrant a proper 2 year transitional period?

In practice the manufacturers' proposals on this point do appear to be valid.

While a transitional period may not be necessary where the new regime is substantially similar to the old one - where the changes are more significant the arguments in favour of short period of adjustment must be stronger.

From the Commission's perspective it could be said that the changes are not actually as major as they appear - indeed they are simply applying the general rules which apply to most other sectors of the economy. However, given the long running existence of detailed sector specific legislation in the automotive sector it may be best to give the industry a more flexible window in which to adapt.

Indeed the current vertical restraints regime started with a short transitional period which worked well and was useful given the relatively major changes to the regime that happened at that time (i.e. 1 January 2000 to 31 December 2001 when Regulation 2790/1999 replaced Regulations 1983/83 and 1984/83).

Such a period should be no longer than absolutely necessary but given the current structure of 1400/2002 and in particular the obligation to provide 2 years notice of termination for agreements of indefinite duration - a 2 year transitional period during which compliance with both the old and new rules would be permissible does seem like a very sensible approach to allow a smooth transition. This is perhaps especially the case when moving from a more highly regulated environment to a relatively more lightly regulated one.

Major change - 100% non-competes permitted

Multi-branding not obligatory

Probably the most visible change to the regime is that it will no longer be obligatory to allow multi-branding - as single branding will be permitted.

In relation to the primary market (i.e. sales of new vehicles) the Commission has during the review process found there to be strong competition between the brands and that to prohibit non-competes (i.e. to make multi-branding obligatory) would be disproportionate (see for example point 21 EC Communication of 22 July 2009).

Pre-conditions for application of the new vertical block exemption

It is important to underline that a pre-condition for using permissible non-compete has always been, and will be, that all the other conditions for use of the block exemption are met - the agreement essentially needs to be a vertical one and must not contain listed hardcore and excluded restrictions. Importantly in relation to the vertical block exemption this means that the market share threshold of 30% (for both the supplier and the distributor) is met - I will look at this threshold more closely in a moment.

As pointed out a number of times during the public consultation (see, for example, point 20 EC Communication of 22 July 2009) authorised repair services will mostly not benefit from the block exemption in any event due to high market shares, over 30%, of the manufacturers' authorised repair networks. So in these cases non-competes cannot

be used unless they fulfil the conditions for exemption under Article 101(3) on an individual basis.

Non-competes, exclusive purchasing obligations, quantity forcing and single branding

Under the existing rules the current MV block exemption will not apply to any agreement containing a direct or indirect non-compete (Art 5(1)). The current regulation defines a non-compete as an obligation on the distributor to purchase more than 30% of its requirements from the supplier (Art 1(1)(b)). This means that a distributor must be permitted to sell other brands if it wishes to.

Under the current (and the draft) vertical block exemption a non-compete is defined in the same way but the percentage is significantly higher as an obligation to purchase "more than 80%" of the distributor's requirements (Art 1(1)(b)). So this means that an obligation to purchase 80% up to 100% of requirements is a non-compete.

Now there are a number of terms that are worth quickly clarifying here. For these purposes the term "non-compete" can basically be read as meaning "exclusive purchasing obligation" - although it should be noted that it is in fact wider - it would also cover an obligation not to manufacture a competing product. Exclusive purchase means there will only be one brand - hence the general term "single-branding". References in the vertical guidelines to "quantity-forcing" have a similar meaning - implying that a distributor takes large volumes from one supplier but will cover something weaker than an 80% or more non-compete.

5 years only

Under the verticals rules non-competes are permitted but their duration must not exceed 5 years (Art 5(a) draft verticals block exemption). It is important to note that this 5 year period is absolute - and the block exemption will not apply to agreements that are of indefinite duration or have a rolling term. Any pressure applied by a supplier during the 5 year team to ensure renewal on similar terms would also not be permitted - the draft vertical guidelines (point 62) give two good examples:

(1) any loan from the supplier needs to be repayable without hindering the distributor from terminating the agreement after 5 years

(2) any equipment supplied by the supplier (unless it is relationship specific) needs to be able to be taken over by the buyer at its market asset value at the end of the non-compete.

As far as vertical agreements in general are concerned this is a very standard and well understood position. Exclusive purchasing obligations can be put in place for fixed 5 year terms and, if there is no obligation or pressure to do so, the parties are free to enter into a further exclusive purchasing obligation for another 5 years. The important policy concern that is addressed is that a distributor is not "foreclosed" from the market for a very long period and this is not the case if every 5 years they can choose to change the manufacturer that supplies them.

Footnote 9 of the new MV Guidelines

Footnote 9 of the draft MV guidelines should be mentioned and I think probably needs clarification. Footnote 9 states that “[T]he reference point 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” and “[I]n particular, the fact that a pre-existing contractual relationship ceases to become subject to 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 5 years”.

This is confusing for a number of reasons:

(1) It suggests that a 5 year non-compete if imposed under the new rules could only run from the start date of the relationship between the parties which may be some time in the past and indeed more than 5 years ago.

(2) It is also unclear why the length of the previous relationship should be relevant to the use of a 80-100% non-compete under the new rules as such non-competes were not permitted in the past.

(3) If correct it means that all manufacturers would be better off starting new contractual relationships with new distributors so as to benefit from the new rules.

(4) Finally, even if these points do not reflect the Commission’s real intention it leaves space for some uncertainty as to how parties to an existing agreement can move forward and enter into a new agreement that complies with the new rules while including a 5 year non-compete as to 80% or more of purchases.

I think the Commission’s intention is to say that an existing agreement cannot simply be extended to include a 5 year non-compete when the rules change on 1 June 2013.

However, it would be helpful if this could be clarified in the final version as at present the wording seems to run counter to the position under the current and draft vertical block exemption. The important point is that the agreement comes to an end after 5 years and that a new one only comes into existence only if both parties freely agree.

Manufacturer owns the land

It is worth noting that the general verticals block exemption allows non-competes to exceed 5 years where the manufacturer owns the land from which the distributor operates the dealership (Art 5(a) draft verticals block exemption). Indeed in these circumstances the non-compete can last for as long as the distributor operates from the land owned by the supplier. This also applies if the manufacturer leases the land from third parties.

Of course one way of obtaining control of a distribution system is to own it outright in which case the competition law prohibition on restrictive agreements (Article 101 TFEU - previously Article 81 EC) cannot apply. However, and this is just speculation, if manufacturers were to own land and then rent it to distributors they would be able to have non-competes lasting longer than 5 years without the need to obtain full ownership and control of the distribution network. A possible opportunity for sale and lease back arrangements perhaps - although I should also note that the draft vertical guidelines warn that "artificial ownership constructions intended to avoid the 5 year limit cannot benefit from this exemption" (point 63) - so there could be quite considerable focus on the scope of this wording.

Foreclosure - a function of time and market structure

The potential problem with non-competes is that they tie up distributors meaning that other suppliers and manufacturers can't use them - this problem is termed "foreclosure".

Dealing with foreclosure in a matter of balance. On the positive side non-competes can allow manufacturers and distributors to focus their efforts and investment without fear that these efforts will allow competing brands to "free-ride" - which can be the case in a multi-branding scenario and indeed the Commission has identified concerns that distribution costs may have increased because of this concern even if actual take-up of multi-branding has been low (point 19 EC Communication of 22 July 2009). On the negative side non-competes can make it harder for competitors to reach the market by tying up distribution outlets leading to (and this is the real concern) higher prices and lower choice or quality for final consumers.

As the 5 year rule shows one aspect of the possible foreclosure effect of a non-compete is its duration. However, the other aspect is the market structure and in particular how much of the market is subject to non-compete obligations (i.e. how much of the market is tied up and therefore closed off to competitors). The general block exemption deals with the power of the manufacturer as it only applies where its market share is below 30%. But this still leaves the concern that a large proportion of the market could be tied up with non-competes by a variety of manufacturers.

The general block exemption deals with this issue by allowing withdrawal of the benefit of the exemption in relation to a specific agreement where what it terms the "cumulative effects of parallel networks" of similar agreements containing non-competes exist and these are deemed to significantly restrict access to the market. In the draft MV guidance, depending on market structure, the Commission suggests that such situations are unlikely to arise where only 30% to 40% of the market is subject to non-competes (point 32). However, above those thresholds concerns must increase that non-compete obligations are at some risk.

Where parallel networks cover over 50% of the market in question the Commission may also dis-apply (by Regulation) the block exemption generally.

It is worth noting that above these indicative total tied market thresholds even non-competes as to less than 80% (i.e. "quantity forcing") may causes concerns and add to

the cumulative effects that may cause the Commission and national competition authorities concerns - potentially leading to withdrawal.

So, if there is significant take-up of non-competes across the automotive industry it will be interesting to see whether the foreclosure effects are such that the withdrawal provisions have to be used. It certainly puts a cap on the ability of manufacturers to use non-competes and a compliance burden in terms of ensuring that they understand how much of the market is tied.

The concerns of manufactures with more limited EU presence

Although the majority of manufacturers have expressed support for the use of single branding not all manufacturers support this move, for example, Kia Motors (in its contribution to the July 2009 public consultation). The concern is that smaller manufacturers may be foreclosed from the market given that the number of available distributors they can deal with may be reduced as they are tied in by the major manufacturers with non-competes.

While there may be some merit to this concern to the extent that both manufacturers and distributors want to and do enter into 5 year non-competes a few points are worth noting:

(1) There is nothing to stop distributors operating as multi-branded outlets if they can negotiate this with manufacturers - it is possible that some distributors could specialise in vehicles with lower market penetration.

(2) As already explained parallel networks of non-competes across the majority, let alone all, of a geographic market may lead to the withdrawal of the block exemption.

(3) Also, as I understand Peter Crockford will discuss in detail the possibility of very narrow local retail markets may cause difficulties for the application of the vertical block exemption.

(4) A possible solution - and I say this with a note of extreme caution as to the possibility of creating a cartel as it is invariably potentially very risky to speak to competitors about anything at all - but it is not impossible to conceive of compliant solutions under which smaller manufacturers could work together in markets where their shares are low to negotiate with the larger distributors and/or those with prime retail outlets. Although as I say such an approach needs to be very carefully thought through and could certainly not include any element of price fixing, exchange of commercially sensitive information or too greater alignment of input costs.

(5) Finally, under the general vertical block exemption it is possible to combine a non-compete with selective distribution - a scenario that seems most likely for the distribution of new vehicles. However, this needs careful drafting as you must be careful not to fall foul of Article 5(c) of the draft vertical block exemption which prohibits obligations on members of a selective distribution system from selling the brands of a particular competing supplier. So while a 100% non-compete is permissible what is not

permitted is to target a particular competitor for a "collective boycott" by suppliers and members of a selective distribution system - so this does provide some additional safeguard for those manufactures with smaller market shares within the European Union.

30% Threshold (both ways) and permitted structures

Changes to the threshold %

The new vertical block exemption (which comes into force on 1 June 2010) only applies where the market share of both the manufacturer supplier and the distributor on their respective markets are both below 30% (Art 3). This is a departure from the current vertical block exemption which, unless there is an exclusive supply obligation (i.e. the supplier is obliged to sell only to one distributor), requires only that the supplier's market share is below 30%. Indeed this is perhaps the most obvious difference between the current and the draft verticals rules

Peter Crockford is going to look in more detail at the application of the 30% threshold at the distributors' level so I am going to focus on the implications at the manufacturers' level and their application to selective distribution systems.

The current MV block exemption has a general market share threshold of 30% which rises to 40% in the case of quantitative selective distribution systems while for qualitative selective distribution systems there is no threshold.

So at first sight the draft vertical block exemption seems to have more stringent requirements. It will exempt both quantitative and qualitative selective distribution systems but only if both contracting parties have market shares of less than 30%.

In relation to qualitative selective distribution systems it is however important to remember that they need not fall within Article 101 TFEU in the first place if they are: (i) necessary for the product in question, (ii) distributors are chosen on the basis of objective criteria applied on a non-discriminatory basis, and (iii) the criteria are genuinely necessary. The draft MV guidelines do make this point quite clearly (see points 47 to 51).

Quantitative selective distribution systems go further and limit the number of distributors to a fixed number or by reference to a minimum sales level. Now although quantitative selective distribution systems are more likely to infringe Article 101(1) TFEU (previously Article 81(1) EC) the Commission guidance also makes it clear that even with a market share of up to 40% the conditions for exemption under 101(3) TFEU (previously Article 81(3) EC), i.e. individual exemption, should generally be met. Using the guidance is of course dependent on a full analysis and in particular not including any other serious restrictions of competition.

In practice selective distribution systems for the sale of new vehicles are likely to be drafted to comply with the new vertical block exemption.

Peter Andrews will cover the application of selective distribution to authorised repairers and the 3 specific prohibited restrictions that make up the bulk of the new MV block exemption in a moment. Now, I am going to look at some of the implication of the new rules for the selective distribution of new vehicles.

"Location" clauses and "sales only" clauses

The main potential problem with selective distribution systems is that by limiting the number of distributors of the same products it decreases the level of competition for those products (i.e. intra-brand competition).

For this reason, under the current MV block exemption restrictions on distributors from opening new outlets (Art 5(2)(b)) ("location" clauses) are not permitted and similarly restrictions on distributor's sub-contracting repair and maintenance work are also not permitted (Art 4(1)(g)) ("sales only" clauses). However, the Commission's findings (see points 23 to 27 of the EC Communication of 22 July 2009) are that it is only in a limited number of cases that additional sales outlets or sub-contracting of repair and maintenance have occurred while the possibility of these occurring has led to higher qualitative standards being imposed leading to higher investment costs. The result is that the prohibitions on these restrictions have not been maintained - and so long as the market share threshold of 30% is met the vertical block exemption will apply.

Above the thresholds location clauses may causes problems if they exacerbated limited intra-brand competition because the supplier's market share is very high. Indeed the draft MV guidelines note (point 50) that location clauses may prevent a quantitative distribution system from benefiting from exemption under Article 101(3) TFEU.

Parallel trade and "Availability" clauses

Facilitating free trade across the Single Market is a corner-stone of the European project so unsurprisingly the strict prohibitions on restricting parallel trade are maintained under the new framework. The draft MV guidelines make it very clear that in relation to selective distribution systems (where intra-brand competition may be at risk) it is very important that parallel trade is not restricted and also that flow of product within a selective distribution system is not impeded.

The draft MV guidelines (see points 40 to 44) go to some lengths to underline the direct and indirect means that could be used to restrict parallel trade including so-called "availability" clauses and the need to ensure that distributors in one Member State will be provided with vehicles with the specification required in another Member State.

However, the provisions in the current MV block exemption ensuring that free flow of product within a selective distributions system and the prohibition on restricting any type of sale whether as the result of active marketing or simple receipt of an order (i.e. active or passive sales) are maintained as they find mirror images in the verticals rules.

The new wording in the new verticals block exemption for hardcore restrictions which substantially maintains the spirit of the current MV block exemption wording is as follows:

(Draft verticals block exemption Art 4(b) third indent / current MV block exemption Art 4(1)(b)(iii))

[The list of hardcore restrictions includes]: the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, except:…. the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is operated,

(Draft verticals block exemption Art 4(c) / current MV block exemption Art 4(1)(d))

[The list of hardcore restrictions includes]: the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(Draft verticals block exemption Art 4(d) / current MV block exemption Art 4(1)(c))

[The list of hardcore restrictions includes]: the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

So while the draft MV guidelines do underline the importance of these issues the position is not significantly changed - the circumstances in which parallel trade may be restricted remain very limited indeed.

End users

The draft MV guidelines also reiterates the definition of end users found in the current MV explanatory brochure and the distinction between an intermediary acting on behalf of an end user (which a distributor operating within a selective distribution system may not be prevented from re-selling to) and independent re-sellers (which as they are not end users a distributor can be restricted from supplying).

Use of the internet

It is worth noting in passing that while the review of the vertical block exemption has led to considerably less far reaching changes as compared to review of the automotive exemption - the new vertical block exemption is quite similar to the current one - the new verticals Guidelines do provide more detail on the use of the internet by distributors and underline the Commission's continuing concern that the internet is an important method of encouraging parallel trade.

Since the start of the current vertical exemption in 2000 usage of the internet has obviously increased very considerably so the clarifications are very welcome.

In a nutshell a distributor that operates a physical store cannot be prevented from using an internet site to resell product. This of course has the potential to promote competition between distributors selling the same product in different locations across the European Union (i.e. intra-brand competition).

Compliance Burden

To finish up and summarize I would like to run through the main compliance points raised by the changes

Transitional arrangements

As noted under the current arrangements not only is there no change this year in relation to sales of new motor vehicles there is no possibility of changing to the new rules

However, the changes are a relaxation of the rules - so it is likely that if agreements are compliant today they are also likely to be compliant under the new rules.

Non-competes

Use of non-competes to allow single branding rather than multi-branding will likely be the area that throws up the most questions and concerns. With the experience gained under the verticals regime to date the use of fixed 5 year terms should from a legal perspective not be difficult, however, in practice the conduct surrounding re-negotiations and the presence of any pressure to effectively extend the contract needs to be monitored closely. It is important to remember that competition law is today often more concerned about the effect or end result than the details of how the parties to an agreement managed to get there.

As noted one difficulty with the new rules is that manufacturers really need quite a bit of information about the market and in particular they need to know how much of the market is tied by non-competes and consequently whether there is any real risk of withdrawal of the benefit of the exemption.

Parallel trade

Other than the avoidance of obvious competition law infringement such as resale price maintenance a main thrust of the new regime is to underline the importance of allowing parallel trade. Any issue relating to cross border sales needs to be carefully considered.

Hand-over

Thank you. I will now hand over to Peter Crockford who will look at the impact of the new rules from the perspective of the dealers.

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The Future of Vehicle Distribution in the EU - The Impact on Manufacturers, Dealers and the Aftermarket

martineau

www.martineau-uk.com

E: lawyers@martineau-uk.com

Transitional Arrangements

- New vehicles
  - Prolongation of Regulation 1400/2002
  - Application of new rules as of 1 June 2013
- Aftermarket
  - New rules apply as of 1 June 2010
- New vehicles
  - No changes possible until 1 June 2013
  - Plenty of time to consider termination and new agreements
  - Practical difficulties of different dates

Transitional Arrangements

- Manufacturers' concern
  - Maintains structural rigidities at a crucial time
  - "frozen in time"
  - Preference for a 2 year period during which both the current and the proposed regime can be applied
- Would a wider transitional period better reflect the scale of the changes?

Multi-branding and non-competes

- Multi-branding no longer mandatory
- Pre-conditions for application of the vertical block exemption
  - 30% threshold
  - No hard-core or excluded restrictions
- 5 year "non-competes"
  - Differences in definition – 30% to 80% plus
  - Exclusive purchase, quantity forcing and single branding
  - The importance of a fixed term
  - Real freedom to terminate

Multi-branding and non-competes

- Footnote 9 of the new MV Guidelines
- Non-competes - manufacturer owns/leases the land
- Foreclosure
  - The underlying policy concern
  - A function of time and tied market share
  - Cumulative effects of parallel networks
  - Possibility of withdrawal
  - 30% to 40% - depending on market structure

Multi-branding and non-competes

- Manufacturers' Views
  - Support in general
  - Concerns of manufacturers with lower market shares
    - Single branding not obligatory
    - Non-competes cannot tie up the whole market
    - Narrow local retail market definitions
    - Joint selling
    - Collective boycotts not permitted under guise of a non-compete

30% Threshold – the new vertical block exemption

- The new vertical block exemption – 30% both ways
- Selective distribution systems
  - Qualitative
  - Quantitative
- Location and sales only clauses
- Parallel trade and availability clauses
- The importance of the internet
- End users

Compliance Issues

- Unless transitional arrangements can be changed
  - 3 years of preparation time for new vehicles
  - 1 June 2010 for aftermarket
- More flexibility under the vertical block exemption
  - Non-competes
    - Need careful drafting to ensure “fixed term”
    - Must be careful with any “indirect” pressure
    - Difficulties of monitoring “tied” market
  - Importance of not restricting parallel trade