



# newsletter

Competition – July 2009

## Competition law regime, UK groceries competition test and fines

### Competition issues in the spotlight

In this issue of our competition newsletter we comment on three significant developments in EU and UK competition law in recent months:

- the EU Commission's announcement of future competition law regime for motor vehicle sector
- the Competition Commission's provisional decision following further analysis of the costs and benefits of the 'competition test'
- the EU Commission's giant fines for E.ON and GDF Suez

We hope that you find the articles interesting and informative, and if they raise any questions that you would like to discuss, please do not hesitate to contact either of us.



**Toby Tyler**  
Associate & Head of Competition Law  
T: 01865 262614  
E: [toby.tyler@morgan-cole.com](mailto:toby.tyler@morgan-cole.com)



**David Whibley**  
Consultant, Competition Law  
T: 01865 262676  
E: [david.whibley@morgan-cole.com](mailto:david.whibley@morgan-cole.com)

## Future competition law regime for motor vehicle sector announced

### New regime will apply from 1 June 2010

#### The EU Commission sets out policy orientations for future legal framework for motor vehicle distribution and after-sale services agreements.

In 2002, following a period of detailed review and consultation, the European Commission introduced Regulation 1400/2002 – the 'block exemption' regulation for the motor vehicle sector (otherwise known as the 'Motor Vehicle BER'). The Motor Vehicle BER expires on 31 May 2010.

On 22 July 2009 the Commission published a Communication setting out "policy orientations for the future legal framework for motor vehicle distribution and after-sale services agreements" that will apply post-expiry of the Motor Vehicle BER. This article examines the issues.

#### Background

Under EU and UK competition law, agreements that have as their object or effect the prevention, restriction or distortion of competition are prohibited. However, it is possible for certain agreements to benefit from an exemption to that prohibition, for example where they improve production or distribution.

To help businesses to decide whether specific types of agreement can benefit from exemption, the European Commission has introduced a number of 'block exemption' regulations. If an agreement complies with the terms of a block exemption, then it will be exempt from the prohibition on anti-competitive agreements. That means that it will be within a 'safe harbour' for competition law purposes – any competitive restrictions that it contains will not infringe competition law.



Please email Toby Tyler at [toby.tyler@morgan-cole.com](mailto:toby.tyler@morgan-cole.com) with your feedback, comments and suggestions on this publication.

## The Motor Vehicle BER

For many years there has been a sector-specific block exemption for motor vehicle distribution. The Motor Vehicle BER is the current version. Dealer and repairer agreements are drafted to comply with the Motor Vehicle BER – to avoid competition law infringement. As a result, the Motor Vehicle BER has had a significant impact on the terms that vehicle manufacturers agree with dealers and repairers. The Motor Vehicle BER is a detailed, sector-specific block exemption. It exempts 'vertical agreements' in the motor vehicle sector – such as those between manufacturers and dealers. Its aim was to liberalise the market for the retail of new motor vehicles, and to open up the repair and maintenance market to greater competition.

It aimed to do this by making the exemption conditional on compliance with a number of sector-specific measures, broadly intended to be pro-dealer and pro-repairer.

## The Vertical Agreements BER

There is also a general block exemption for 'vertical agreements', set out in Regulation 2790/1999 (the 'Vertical Agreements BER'). The Vertical Agreements BER applies to agreements between suppliers and resellers across all industry sectors. It is generally acknowledged to have been successful, and will be renewed without very significant amendment on its expiry on 31 May 2010.

## The future

The Commission's view is that the primary market for the sale of new vehicles is competitive, being characterised by overcapacity and falling real prices. For those reasons, the Commission plans to [withdraw the Motor Vehicle BER from the primary market for new vehicle sales](#), after a three-year transitional period which will end on 31 May 2013.

From that date, the general provisions of the Vertical Agreements BER will apply to agreements between manufacturers and dealers for the sale of new motor vehicles. The Commission intends to supplement the Vertical Agreements BER with a set of sector-specific guidelines for the motor vehicle industry.

However, the Commission considers that the market for repair and maintenance is less competitive, due to its brand-specific nature which means that the manufacturers' authorised networks enjoy high market shares.

In this sector Vertical Agreements BER will apply instead of the Motor Vehicle BER together with either sector-specific guidelines, or a new block exemption regulation focused on the repair and maintenance market, or both. There will be no transitional period for this new regime, which will apply from **1 June 2010**.

## What this means

The Commission's approach will [liberalise](#) the EU motor vehicle sector, [for manufacturers in particular](#). It also implicitly acknowledges that the tight regulatory approach of the Motor Vehicle BER, intended to generate more competition, has failed. The future competitiveness of the sector will be driven by market forces rather than regulatory control.

The changes in the industry that these legal changes will bring should not be underestimated. Protections for dealers and repairers currently contained in the Motor Vehicle BER (such as the right to ['multi-brand'](#), and to open showrooms within a selective distribution system anywhere in the EU) will go. The Commission argues that these stricter rules have not produced benefits, but have backfired – leading manufacturers to tighten their appointment criteria and thereby producing higher investment costs for dealers.

Change will occur rapidly in the repairer sector, with the new regime taking effect on **1 June 2010**. Manufacturers and repairers will need to watch developments at the Commission closely and organise themselves to respond quickly once the Commission's approach is clear.

In the primary market for the sale of new vehicles change will be gradual, with the Motor Vehicle BER in its current form extended until 31 May 2013. That seems likely to be period of significant transition. Parallels can be found in the motorcycle sector, which is already subject to the general rules under the Vertical Agreements BER (the Motor Vehicle BER applying only to vehicles ["having three or more road wheels"](#)). From 2013 the competition law regime that applies to all motor vehicle distribution could be similar to that which already applies to motorcycle distribution.

The Commission is consulting on its proposed approach until 25 September 2009.

Further details can be found at:

[http://ec.europa.eu/competition/sectors/motor\\_vehicles/block\\_exemption.html](http://ec.europa.eu/competition/sectors/motor_vehicles/block_exemption.html)

**Toby Tyler**



## UK groceries - the competition test is back

Competition Commission published provisional decision on 16 July 2009

**In our March and June 2009 bulletins we commented on Tesco plc v. Competition Commission – Tesco's challenge to the Competition Commission's recommendation for a 'competition test' to be introduced to the UK planning system for grocery retail stores. This article summarises the latest development in this ongoing matter.**

On 9 May 2006 the Office of Fair Trading (OFT) referred the supply of groceries by retailers in the UK to the Competition Commission (CC) for investigation. In its report published on 30 April 2008, the CC recommended to the Government that a competition test be applied to grocery retail planning applications, as part of a package of remedies to address the adverse effect on competition that it had found in the grocery retail sector.

Tesco plc (Tesco) challenged the CC's decision to recommend the Test before the Competition Appeal Tribunal (the CAT). In its judgment of 4 March 2009, the CAT upheld Tesco's appeal. In a later judgment on 3 April 2009 the CAT annulled the CC's decision to recommend the competition test, and referred the matter back to the CC to reconsider.

### What is the competition test?

The competition test, in broad outline, means: planning authorities consulting the OFT when considering planning applications for new supermarkets and extensions to existing ones; the OFT assessing the impact on competition in the local grocery market of each such development; and the planning authorities taking account of the OFT's recommendations when deciding whether to give planning consent.

The CC's press release observes that ["the test would block supermarket developments by retailers already powerful in a local area, in order to make room for competing stores from rival retailers"](#).

### What is the latest development?

On 16 July 2009 the CC published a provisional decision following further analysis of the costs and benefits of the test.

The CC comments that its analysis:

["estimated the benefits to consumers of that would result from increased competition, with retailers already powerful in a local area no longer being able to shut out rivals from those areas and with the test also stopping areas from being dominated by individual retailers in the first place"](#)

It continues:

["the analysis compared these benefits against the costs from any delay between the powerful retailer's development being blocked and a rival's alternative taking its place. The analysis concluded that over the longer term, the benefits to consumers would outweigh any such initial costs"](#)

The Chairman of the CC, Peter Freeman, commented: ["What we were asked to do by the Tribunal was to prove the case for the competition test and show that it would have the intended effect—to help bring in competition where it is lacking and to stop individual retailers consolidating their position in local areas to the detriment of consumers. Our detailed analysis has shown that the test is likely to have a positive effect over time for consumers by ensuring that they benefit from greater competition and choice between retailers in their local areas."](#)

### What happens next?

The CC consulted for two weeks on the provisional decision, up to 29 July 2009. It will publish its final decision on the competition test by 5 October 2009.

### Comment

The CC appears determined to push the competition test through. Its provisional decision is designed to address the deficiencies in its original report flagged up by the CAT.

The CC's approach needs to be taken in the context of its investigation as whole – an investigation which lasted nearly two years, during which the CC received around 100 submissions from the main parties and over 600 from third parties, and conducted around 80 hearings. The competition test, therefore, is one of the key planks of a regulatory review that was detailed, and no doubt time- and resource-intensive.

For these reasons it seems highly likely (if not almost certain) that the CC's final decision on the competition test will be to recommend it once more. That will not however rule out any further appeals...

**Toby Tyler**



Please email Toby Tyler at [toby.tyler@morgan-cole.com](mailto:toby.tyler@morgan-cole.com) with your feedback, comments and suggestions on this publication.

## EU Commission fines for market-sharing in France and Germany

**E.ON and GDF Suez fined €553 million each**

**In another blistering attack on cartel activity, the EU Competition Directorate has imposed fines totalling over a billion euros on two companies, for market-sharing in the gas markets in France and Germany. Fines of €553 million each were imposed on E.ON and GDF Suez on 8th July.**

The companies agreed in 1975, when they decided jointly to build the MEGAL pipeline to import gas into Germany and France from Russia, not to sell gas imported in this way in each other's home markets. They maintained the market-sharing arrangement after European markets were liberalised, and only abandoned it definitely in 2005. The agreement helped EON and GDF to maintain strong positions in the French and German markets when they were being liberalised.

Commenting on the case, Competition Commissioner Neelie Kroes said; "This decision sends a strong signal to energy incumbents that the Commission will not tolerate any form of anticompetitive behaviour. Market-sharing is one of the worst types of antitrust infringement. This agreement deprived customers of more price competition and more choice of supplier in two of the largest gas markets in the EU. The Commission has no alternative but to impose high fines."

The E.ON GDF case is the first instance of a fine for anti-competitive behaviour in the gas and electricity markets following the sector enquiry launched by the Commission in 2005. A number of other cases are ongoing. In a separate speech, delivered in Dublin on 17th July, Ms Kroes confirmed the Commission's commitment to prioritising competition law enforcement action in the [energy sector](#), as well as in [transport](#), [technology](#) and [pharmaceuticals](#).

As a footnote to the case, the decision serves to emphasise the paramount importance of indemnity provisions in takeover agreements, indemnifying the purchasing company against any past violations of competition law by the vendor.

E.ON took over Ruhrgas in 2003. It was Ruhrgas who had earlier entered into the unlawful market-sharing arrangement. But because E.ON were the owners of Ruhrgas when the infringement was discovered, they were liable for the fine.

**David Whibley**

### Subscription

These regular updates are provided by Morgan Cole's competition team at no charge. From August 2009 they will be sent out via email only, in line with the Firm's environmental policy of cutting down on printed materials.

If you wish to receive these updates via email, please contact us at [competition@morgan-cole.com](mailto:competition@morgan-cole.com)

This publication is © Morgan Cole and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.