

**RESPONSE TO THE EUROPEAN COMMISSION'S EVALUATION REPORT
ON THE OPERATION OF REGULATION (EC) N°1400/2002 CONCERNING
MOTOR VEHICLE DISTRIBUTION AND SERVICING OF 28 MAY 2008**

1. INTRODUCTION

Belron International Limited and its group companies ("Belron") are grateful for the opportunity of commenting on the Commission's Evaluation Report of 28 May 2008 on the Operation of the Motor Vehicle Block Exemption Regulation 1400/2002 ("MVBE").

2. SUMMARY

- 2.1 One possible outcome of the review is the expiry of the MVBE without replacement save for the general provisions of the Vertical Agreements Block Exemption Regulation 2790/1999 ("VBE") and, in due course, any replacement to the VBE¹. While there may be merit in this approach to vehicle retailing, where there may be few competition concerns, Belron suggests that the need for sector specific regulation of the vehicle repair sector, by which we mean the supply and distribution of spares as well as repair services, is even stronger today than it was in 2002;
- 2.2 As the Evaluation Report notes, the vehicle repair sector shows every symptom of market failure: market power at every level of the vehicle manufacturer, parts manufacturer and authorised repairer supply chain; rising prices of repair; an independent repair sector in steep decline; and the repeated need for antitrust intervention by the Commission;
- 2.3 In the circumstances, there is a compelling case for maintenance of sector specific

¹ Regulation No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L 336/21-25

legislation in the vehicle aftermarket. The market, not least for its sheer size and complexity in addition to the market failures identified above, is quite unlike other aftermarkets. As the Commission recognises, however competitive the primary vehicle market(s), that is no constraint on market power and the potential for anticompetitive harm in the aftermarket;

2.4 Block exemptions remain a highly effective enforcement tool, even after the introduction of self-assessment. The safe harbour for compliant agreements provides significant legal certainty benefits. Block exemptions provide all the undertakings involved with a compliance benchmark around which disputes can be settled without costly, inefficient recourse to individual complaints, investigations and litigation. Belron has first hand experience of the use of the MVBE to persuade vehicle and parts manufacturers to comply with their competition law obligations, obviating the need to pursue regulatory complaints, with all the cost, management time and, ultimately, inefficient use of regulators' scarce resources, which complaints entail. MVBE expiry is likely to lead to further involvement of the Commission in resolving complaints and uncertainties caused by the vacuum of guidance for those in the sector;

2.5 A revised block exemption should address:

(i) **Access to information, in particular unequivocal identification of the part fitted at the time of manufacture** - As the Evaluation Report notes, the emergence of dedicated multibrand repair service providers, such as Belron, are a clear trend in the independent sector. They provide key competitive pressure to authorised repairers, while the traditional small workshop is in steep decline. The position of dedicated multibrand repairers, creating greater competition and consumer choice, needs to be safeguarded through supply of essential technical information. As drafted, neither the access to information commitments in the *Technical Information* cases, nor the type approval regulation, when it comes into force, has this effect. They offer independents only the information provided to authorised repairers. But dedicated multibrand repairers often need different

information to be able to compete because of their different business models. The original wording of the MVBE sought to achieve this by referring to information necessary to effect a repair, regardless of whether that information was provided to authorised repairers. A revised MVBE, with appropriate guidance, should reflect and strengthen this requirement, referring explicitly to unequivocal parts identification information to allow the part fitted at the time of manufacture to be identified. Currently, the information analysed by Belron received from certain manufacturers shows that it fails to identify the correct part in many, or sometimes the majority of, cases. Inadequate parts information currently results in the first-time failure of approximately 10-12% of Belron's replacement jobs in the smaller passenger vehicle segment;

(ii) **Access to spare parts** - Review of the MVBE should be accompanied by:

(a) **a broader list of hard core restrictions that make hardcore the use of trademark, IP or tooling agreements to restrict supply of spares to the independent aftermarket.** Such a broader hardcore list could be linked to a higher market share test to apply only where the vehicle and/or parts manufacturer are in a position of market power;

(b) **a review of the 1978 subcontracting notice.**² Many of the problems which Belron has experienced in the sector, where they result from restrictive tooling or IP agreements, will not fall within the 1978 notice. The Subcontracting Notice is intended to protect the value of the technology transferred from the contractor to the subcontractor, but in the vehicle parts sector, and in particular in respect of glass parts, the parts manufacturer develops the key technology and has the expertise. A proper analysis of such arrangements would show that the 1978 notice does not apply. In any event, the impact of such arrangements is clearly anticompetitive and the 1978 Subcontracting Notice ill suited to modern antitrust

² Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article [81(1) EC] Treaty [1979] OJ C1/2 ("Subcontracting Notice")

analysis, as its inconsistency with the Guidelines on Technology Transfer Agreements demonstrates. The latter analysis is to be preferred;

(c) **a review of the position of market power held by parts and/or vehicle manufacturers, in particular where they benefit from design right or other IP right exclusivity.** That competition law must intervene in circumstances of abuse of market power in relation to protected parts is established in the oldest ECJ case law (*Volvo v Veng*, *CICCRA v Renault*). There are also many circumstances in which vehicle manufacturers can or will have market power, as the high shares revealed in the Commission's working papers attest. In the circumstances, a revised MVBE and clear guidance on the application of Article 82 to the spare parts sector is required to safeguard competition in the aftermarket. Such a review is all the more important given that legislative reform of design rights is under review and the outcome uncertain;

(d) **extending hardcore treatment to ancillary restrictions that seek to foreclose independent competition by other means.** In Belron's experience, vehicle manufacturers and/or authorised repairers are using agreements with consumers or their insurers to foreclose competition by independent repairers. In particular there have been threats to invalidate vehicle warranties *in their entirety* if Belron's services are used, even in circumstances where the glass repair is not performed under the vehicle manufacturer's warranty and affects no other part of the vehicle. Belron understands that the Commission is considering the usefulness of the definition of "spare parts of matching quality" in the MVBE. We are concerned that vehicle manufacturers may use this lack of definition, if the MVBE were to expire, to continue to disparage parts of matching quality and use it as a further means to foreclose independent competition.

3. **THE IMPORTANCE OF THE MVBE AND COMMISSION GUIDANCE ON THE APPLICATION OF COMPETITION LAW IN THE MOTOR VEHICLE SECTOR**

One of the outcomes envisaged by the Commission's Evaluation Report is the expiry of

the MVBE without sector specific replacement.³ The industry would be governed by the VBE and any replacement after the current VBE expires. Sectoral concerns could be dealt with by non-antitrust regulation such as reforms to the Design Rights Directive⁴ or type approval regulation.⁵

3.1 Symptoms of Market Failure in the Aftermarket

Belron understands the Commission's central thesis that where an industry shows no sector specific market concerns, there may be less reason for sectoral regulation. Belron would suggest that, while the Commission's analysis may show that vehicle retailing has little to differentiate itself from other sectors, that is by no means the case for vehicle repairs. The repair sector is characterized at almost every level by market power of the vehicle manufacturers, their chosen parts manufacturers and their authorised repairers.⁶

Those bottlenecks, whether access to information, spares or other restrictions, fundamentally undermine competition, as the market symptoms identified in the Commission's report show all too well. The price of repairs has risen 17.8%.⁷ The independent sector is in steep, long term decline.⁸ Spare parts manufacturers, denied access to authorised repairers, have been forced to vertically integrate to create demand.⁹

³ Evaluation Report, pp.13-14

⁴ Directive 98/71/EC on the legal protection of designs [1998] OJ L 289/28-35

⁵ Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2007] OJ L 171/1

⁶ Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71 on the Legal protection of designs, COM(2004)582 final of 14.9.2004, p.2 (Recognising the detriment to consumers of vehicle manufacturers' market power)

⁷ Working Paper 2, p.30

⁸ Evaluation Report, pp.3-4; Working Paper 2, pp.6, 27; Working Paper 4, p. 18

⁹ Evaluation Report, p.4 (Noting that "certain spare parts manufacturers have developed chains of repairers that bear their brand and largely use their spare parts"). Belron submits that, far from being a sign of healthy competition in the aftermarket, it suggests that parts manufacturers can only grow through creating captive demand, a highly costly means of expansion, due to limited access to authorised repairers.

Design right reform remains blocked politically and prospects of reform to erode the vehicle manufacturers' 88% share of body parts are uncertain.¹⁰ It is telling that of the enforcement cases noted by the Commission, only one decision related to vehicle retailing, while *GM, BMW, Porsche, Audi* and the four *Technical Information* cases all related to services. Indeed, the only success story in the independent sector is the growth of dedicated repairers, such as Belron. As the Commission knows from Belron's earlier correspondence, that position is also challenged by vehicle manufacturers' restrictive practices in relation to information and parts.

3.2 **Primary Market Competition Does Not Cure Aftermarket Failures**

The Commission has already established that competition in the primary product market(s) for motor vehicles does not cure market failures in the aftermarket. The *Technical Information* cases conclude that consumers do not factor in lifecycle costs of repair when making their initial purchasing decision.¹¹ Thus primary market competition cannot constrain secondary market power.

So, too, the Commission has dispelled any theory of system pricing – that vehicle manufacturers keep primary product and aftermarket profits at a competitive level notwithstanding lack of consumer lifecycle costing¹² – in its analysis of the proposed amendments to the Design Rights Directive. It concluded that freeing up competition in the aftermarket would have a negligible effect on primary product prices.¹³ The fact that

¹⁰ Developments in Car Retailing and After-Sales Markets under Regulation 1400/2002, June 2006, London Economics ("London Economics Report"), p.244

¹¹ *DaimlerChrysler* (Decision of 13 November 2007), para. 11 ("[T]here seems to be no immediate constraint from the primary market to the aftermarket, taking into account factors such as the price and the lifetime of the primary product, the relative lack of transparency of prices of the secondary product/service and the objective limits for a car buyer to predict repair and maintenance costs for the whole ownership period.")

¹² DG Competition Discussion Paper on the Application of Article 82 EC Treaty to Exclusionary Abuses (December 2005), para. 259

¹³ Commission Staff Working Document Proposal for a Directive of the European Parliament and of the Council Amending Directive 98/71/EC on the Legal Protection of Designs SEC (2004) 1097, p.18 ("Thus,

vehicle prices are not consistently higher in countries without design right protection (where vehicle manufacturers do not have a statutory monopoly on visible body parts), also contradicts any theory of system pricing.

3.3 **Features of the Vehicle Repair Sector that Warrant Sectoral Intervention**

In those circumstances, Belron submits that sectoral regulation is clearly warranted. The more so when “the unique structure of the automotive spare parts and repair market,” as London Economics stated in its report to the Commission, “is taken into account.”¹⁴ The special circumstances of the vehicle repair sector are well acknowledged by the Commission:¹⁵

(i) the fact that vehicle and parts manufacturers are generally different entities means that parts manufacturers could, if they were freed of restraint, be strong competitors to vehicle manufacturers for the supply of parts;

(ii) the substantial value of the vehicle to consumers – typically their second most expensive purchase after their home - and the long term need for repair work over its lifetime. Unlike many products where the high cost of repair often results in replacement of the faulty products, the cost of vehicle repair is usually low compared to the vehicle’s replacement value. Given the inherent risks associated with driving, repair tends to be a relatively frequent, long term requirement of vehicle owners;

economic reasoning suggests, and available information hints in this direction, that the impact on new car prices, if any, can be expected to be marginal. It is, in any event, comparably less impairing for consumers than prices of spare parts above the competitive level.”)

¹⁴ London Economics Report, p.244

¹⁵ These points have been confirmed by the European Commission in its study leading up to the Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71 on the Legal protection of designs, COM(2004)582 final of 14.9.2004 pp.2-8; MEMO/04/215 “Commission proposes enhancing competition in the market for replacement parts for cars: Frequently asked questions”, 14 September 2004, p. 4 (Citing the importance of a viable repair market for vehicles given their high value, the prevalence of design protection and potential for a strong parts manufacturer competition as unique characteristics of the vehicle repair sector)

(iii) the importance of swift and safe repairs. Vehicles are aesthetic goods, commonly a source of pride and status. Consumers wish to ensure perfect restoration of the look, safety and integrity of the vehicle in any repair;

(iv) the size of the vehicle repair sector, estimated as worth EUR 84bn for servicing and repairing overall, of which EUR 9-11bn represents “must match” parts alone (with more recent estimates for the EU 27 of some EUR 13-14bn).¹⁶ The size of the sector dwarfs the value of many primary product markets, let alone aftermarkets; and

(v) the dependency of the vehicle repair sector on independents as a source of consumer choice and competition, particularly in certain segments of the car parc. The Autopolis Report for the Commission¹⁷ emphasized the importance of independents for conducting service, repair and parts sales in Europe, including safety critical work and some of the most technical service and repair interventions. This is increasingly the case, the older the vehicle gets, when the owner is likely to purchase service and parts from independent providers.¹⁸

3.4 **Appropriate Amendment of the MVBE**

The vehicle repair sector, Belron submits, would be best served by a replacement block exemption that creates the conditions to remove bottlenecks caused by restrictive agreements between vehicle manufacturers, parts manufacturers and authorised repairers, often exacerbated by their market power. The block exemption system, even after the introduction of self-assessment, is still a powerful means of reforming industry practices.

¹⁶ Commission Staff Working Document Proposal for a Directive of the European Parliament and of the Council Amending Directive 98/71/EC on the Legal Protection of Designs SEC (2004) 1097, p.13; ECAR Position Paper “Why a few Member States should no longer block the liberalisation of the vehicle spare parts market”, July 2008, p.5; London Economics Report, p.107 (Estimating the value of the European repair and servicing market in 2004 at EUR 100bn)

¹⁷ The Natural Link between Sales and Service – An investigation for the Competition Directorate-General of the European Commission, Autopolis, November 2000 (“Autopolis Report.”)

¹⁸ Autopolis Report, p.16

The uncertainties inherent in self-assessment under Article 81(3), as well as the adverse burden of proof, mean that those covered by the exemption have a strong incentive to comply with its terms. Belron has first hand experience of use of the exemption to encourage compliance by vehicle and parts manufacturers. Self-enforcement by vehicle and parts manufacturers, incentivised by tools such as the block exemption, rather than the huge time and cost resources of individual investigations or litigation, is manifestly more efficient. It is a waste of resources, both for the complainant and regulator, to reinvent the MVBE rules through multiple complaints procedures. It is far preferable preemptively to set the compliance benchmark by which such disputes can be settled *via* continuation of the well established parameters of the MVBE, subject to suitable amendments.

In the absence of, or in any event to supplement, a replacement block exemption, Belron submits that there should also be sector specific guidance on competition concerns in the vehicle repair sector that address its market failures. Moreover, any replacement VBE should explicitly address vehicle repair markets.

4. ACCESS TO TECHNICAL INFORMATION

The MVBE rightly identifies that the restrictive appointment of authorised repairers within a selective distribution system distorts competition. This restriction can only be exempted if vehicle manufacturers *inter alia* facilitate independent competition *via* provision of technical information. There is a concentration of market power at the authorised repairer level, where the Commission estimates authorised repairers hold 45-60% share and prices are significantly higher than in the independent sector.¹⁹ The Commission has noted that for specific brands and localities the market concentration is likely to be still higher.²⁰ Further, without a strong independent aftermarket, entry or expansion of alternative parts manufacturers is restricted, since authorised repairers

¹⁹ Working Paper 2, p.26; *DaimlerChrysler* (Decision of 13 November 2007), paras. 12-13 and 19

²⁰ *DaimlerChrysler* (Decision of 13 November 2007), paras 12-13 and 19

source parts almost exclusively from the vehicle manufacturers. Exemption for this restriction is only permitted if independents have access to “*technical information... required for the repair and maintenance of those motor vehicles.*”²¹ Access to this information is necessary to maintain independent competition against authorised repairers, reduce prices and increase choice.²²

Belron respectfully disagrees with the Commission’s conclusion that the MVBE is dispensable in relation to technical information. Neither the *Technical Information* cases nor the type approval regulation provide for adequate access to information. Belron’s concern is that both the *Technical Information* cases and the type approval regulation are drawn more narrowly than the MVBE. The MVBE encompasses all information “required for ... repair.” The former require disclosure only of information provided to authorised repairers.

Relying on the apparent equality between authorised repairers and independents has superficial appeal. But that would be misleading. Independents and authorised repairers do not have the same business model. Providing the same information to users in a different position is just as discriminatory as providing different information to users in the same position. Rather, the Evaluation Report notes, the only successful independents in the current market are those that have invested in a dedicated repair model to offer specific repairs across all brands. For dedicated repairers, the information “required for ... repair” may be quite different to that needed by single brand authorised repairers. In particular:

- (i) partial or equivocal part identification makes the data unusable. Multibrand repairers cannot stock all parts at each branch, unlike single brand authorised repairers. Glass parts are extremely bulky, require careful handling and range over 10,000s of individual product items across all brands. Multibrand repairers

²¹ Article 4(2) MVBE

²² *DaimlerChrysler* (Decision of 13 November 2007), paras. 24-25, 39-41.

must ship in specific parts from a central warehouse. Failed part identification is not just a matter of switching a part readily to hand, but will result in a failed job as the part is sent back to warehouse and/or reordered;

- (ii) mobile or while you wait services cannot work with partial or equivocal part identification. The customer will leave or be frustrated when the mobile repair cannot be effected;
- (iii) format is essential for multibrand repairers. They need to amalgamate data for use across brands by call centres and workshops. Data formats or usage restrictions that prevent amalgamation or dissemination within the organization render any information provided useless.

Indeed, as Article 4(2) identifies, many different kinds of operator – wholesalers, publishers, testers, diagnostic tool manufacturers or roadside assistance organisations – are intended to benefit from Article 4(2) MVBE. Each of those operators will have quite different data or format requirements to authorised repairers. It is clear that the legislator intended each such operator should have access to the right information necessary for their businesses. This will often be different to or only partially overlap with that required by authorised repairers.

The type approval regulation suffers from still more significant defects. It does not cover existing vehicles, likely to form part of the car parc for years to come, nor does it cover major categories of large passenger and non-passenger vehicles.²³ Repair of bus, coach, rail, agricultural and other commercial vehicles (collectively referred to as the “bus and coach segment”) is an important part of Belron’s business. It is also one where the problem of lack of access to information is a significant impediment to growing the

²³ The Type Approval Regulation does not cover: motor vehicles for the carriage of passengers comprising more than 8 seats and motor vehicles used for the carriage of goods exceeding a reference mass of 2610 kg or if requested by a manufacturer which exceeds 2840 kg. It also excludes vehicles which run on rails and agricultural tractors and machinery. The Type Approval Regulation will apply to new passenger motor vehicles from 1 September 2009 and to motor vehicles for the carriage of goods from 1 September 2010.

business. The bus and coach segment suffers from similar difficulties to those experienced in the passenger vehicle sector, except that the problems are even more acute given the different dynamics of that segment of the market. Customers are even more price sensitive due to the size and cost of glass parts and the significantly higher rate of breakages (which can be as high as 80% per annum for coaches).

As the Commission knows from our past submissions, vehicle glass parts are widely differentiated in colours, styles, tints and associated accessories. There are at least 20,000 variants of vehicle glass and associated parts in Europe alone, and some estimates put the figure very much higher. For the bus and coach segment, there is even greater design complexity and a larger number of glass parts per vehicle. There are around 20 glass pieces per vehicle and many variants thereof. In the circumstances, technical information to identify the correct glass part on a bus/coach is even more critical.

Belron's research has shown that the information currently offered by certain vehicle manufacturers across all vehicle segments suffers from significant defects. Parts are often not correctly identified or multiple possibilities are returned. Frequently, there is no unequivocal identification of the part fitted at the time of manufacture. This information surely exists within the vehicle manufacturer's organisation, since it will be essential for each vehicle manufacturer to retain this information for product recall purposes. Currently 10-12% of Belron's replacement jobs (not even including the jobs in the bus and coach segment) fail first-time for lack of proper parts identification.

Thus the aim of the block exemption, to maintain a strong independent vehicle repair sector to compete with authorised repairers and as an effective outlet for alternative spare parts, will therefore not be satisfied by provision of "equal" information to independents if that information is still not what the independents need to be effective competitors. Rather, if vehicle manufacturers wish to justify the distortions of competition arising from selective appointment of authorised repairers, they must provide all information that independents require to effect repairs. This may mean providing more or different information than that provided to authorised repairers, if that is what is required to make

independents effective competitors.

Further, “the information must be provided in usable form”²⁴, a condition not adhered to by vehicle manufacturers, in Belron’s experience, who provide information subject to copyright restrictions that make amalgamation or dissemination within Belron’s organisation impossible. Again, that may be appropriate within a discrete repair shop of an authorised repairer, but impossible for a multinational repair chain such as Belron. Neither the *Technical Information* commitments nor the type approval regulations protect against overly restrictive conditions of use.

Finally, Article 82 is an uncertain alternative to the MVBE in relation to provision of technical information. The *Magill*, *IMS* and *Microsoft* line of cases,²⁵ while clearly capable of encompassing provision or licensing of information in usable format, set a test for intervention that has not been fully explored in the case law or practice. It is likely to demand many interventions by the Commission in lengthy investigations before the scope of that case law is fully articulated. Article 81 EC Treaty is the better mechanism for enforcement. The essence of the competitive harm is not purely the refusal to supply information but that refusal in combination with illegal agreements. It is the vehicle manufacturer’s selective appointment of authorised repairers in conjunction with such refusal that causes the harm. Furthermore, restrictive information arrangements enable vehicle manufacturers to restrict market entry or expansion by rival parts manufacturers. For those parts manufacturers, a strong independent aftermarket is an essential source of demand because authorised repairers *de facto* buy exclusively from the vehicle manufacturer. Guidance as to the complementary application of Article 82 EC Treaty may be appropriate, but should not replace the essential function of the MVBE to remove the information bottleneck.

²⁴ Article 4(2), third paragraph MVBE.

²⁵ Case C-241 & 242/91, *RTE & ITP v Commission* [1995] ECR I-743, *IMS*, Case C-418/01 *IMS Health v Commission* [2004] ECR I-5039 and *Microsoft*, Case T-201/04 *Microsoft Corp. v Commission* (17 September 2007, not yet reported).

Belron submits that expiry of the MVBE would leave this key area of compliance by vehicle manufacturers unregulated. The indications are, as currently, that this would be exploited to impede competition from independent repairers.

5. ACCESS TO SPARE PARTS

5.1 Competition Concerns in the Supply of Spare Parts to the Independent Aftermarket

The Evaluation Report rightly identifies competitive concerns in the vehicle spares sector. On an aggregated basis, vehicle manufacturers' shares of spare parts supply remain high, at least 40-65% according to their own estimates,²⁶ but as much as 88% according to London Economics' report for the Commission.

At the initial supply level, the supply of glass parts is characterised by a series of part specific individual markets in which each part has limited or no demand side or supply side substitute.²⁷ The position is frequently one of monopoly in each such market. There will be no alternative source for that part where it is protected by design rights or *via* restrictive agreements. Further, glass manufacturers' agreements with vehicle manufacturers often create *de facto* exclusivity where they involve use of the vehicle manufacturer's trademark, proprietary tools or other intellectual property, in circumstances where there is insufficient demand in the aftermarket to incentivise glass manufacturers to retool for a separate production run to overcome issues of the vehicle manufacturer's trademark, IP or tooling.

There are clear incentives for vehicle manufacturers to foreclose access by independents to spare parts. Vehicle manufacturers earn 30% margins on spares and authorised

²⁶ Commission Staff Working Document N° 4 p.28.

²⁷ See, eg. AG Mischo, Case 238/87 *Volvo v Veng* ECR [1988] 6211 ("The only products which can be substituted for [body panels] are products having exactly the same shape as the parts produced by the manufacturer.") As the Commission notes in the *Technical Information* cases, competition in the primary vehicle market does not constrain market power in the repairs market because consumers lack the information necessary to judge total cost of ownership at the time of purchase.

repairers a further mark-up of 11.9% according to the Evaluation Report.²⁸ Belron's experience is that it pays on average at least 100% premium to buy captive parts from authorised repairers compared to direct purchase from glass manufacturers. Far greater price differentials, 10 or 20 times the glass manufacturer's price, can be observed in some segments. Without competition law protection, *via* the MVBE and other mechanisms, captive parts will continue to erode the competitive position of independent repairers against the authorised repairer network, ensuring the further decline of the independent repair sector and the diminution of consumer choice and value.

Furthermore, Belron understands that the Commission is considering abandoning the MVBE definition of "spare parts of matching quality," which in Belron's view will worsen the situation. Under the MVBE, the Commission has defined the term "spare parts of matching quality" as meaning "exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question." The MVBE has defined this term: "*in order to avoid vehicle manufacturers invoking differences in quality as an objective justification to prevent authorised repairers to use competing parts in the performance of their services.*"²⁹ The Evaluation Report, however, suggests that there may no longer be a need for the definition because, even in the absence of such a definition, an obligation on authorised repairers not to use alternative brands or parts would amount to a direct non-compete obligation which would not be covered by the MVBE over a 30% market share threshold, in line with an equivalent approach under the VBE.

In Belron's view, this definition of matching quality has been of huge practical importance in persuading glass manufacturers to produce a second source of parts in circumstances where the parts manufacturer with the original vehicle manufacturer

²⁸ Working Paper 2, p.39; Working Paper 4, p.20

²⁹ Commission Staff Working Paper No.4 p. 28

contract (the OES) is prevented from or refuses to sell to Belron. By being able to certify the parts as consistent with the MVBE definition of parts of matching quality, parts manufacturers feel comfortable that there will be a ready market to reward their investments in reverse engineering and tooling up to produce the parts. Belron, as well as other authorised and independent repairers are able to purchase those parts.

So too, the definition has been highly effective in Belron's view to fulfil its purpose in preventing vehicle manufacturers from portraying alternative parts as being inferior. As the Autopolis Report for the Commission noted, "*there are suspicions that vehicle manufacturers are deliberately promoting technical differences to support exclusivity in service, exclude independent garage competitors and restore lost parts and service profits to their dealerships.*"³⁰ Belron's view is that those suspicions remain even today and notes below, vehicle manufacturers have used a variety of means to dissuade motorists from turning to independents (see section 6 below). Belron therefore submits that there are strong grounds for believing that vehicle manufacturers would use the lack of definition if the MVBE were to expire to continue to disparage parts of matching quality.

The Evaluation Report suggests that parts manufacturers' access to the aftermarket will remain safeguarded by Article 4(e) VBE, obviating the need for Article 4(1)(j) MVBE. For the rest, the Report seems to concede the continued power of vehicle manufacturers to control the aftermarket, *via* restrictions in tooling agreements and/or design right protection. It suggests reform *via* a review of the Subcontracting Notice³¹ or design right reform, rather than MVBE review. It notes that it has received no formal complaints in relation to restrictive arrangements in relation to parts.

Belron submits that the antitrust problems in the aftermarket, far from being dependent upon the uncertain prospect of legislative reform of design rights, are curable *via* a

³⁰ See p.52 of the Autopolis Report

³¹ Evaluation Report, p.8

replacement MVBE and suitable accompanying competition law guidance from the Commission. It sets out its analysis below. As set out in its earlier correspondence to the Commission, Belron submits there is clear *prima facie* evidence of restrictive arrangements between vehicle and parts manufacturers. The absence of complaints from parts manufacturers should not be equated with the absence of any illegal practices. Rather, their silence is all too understandable in circumstances where parts manufacturers rely on substantial, multiyear, global contracts from vehicle manufacturers to sustain their businesses. They are unlikely openly to challenge, by way of formal complaint, the vehicle manufacturers' positions.

5.2 Replacement of Article 4(1)(j) MVBE by Article 4(e) VBE

Article 4(e) VBE, as drafted, is not an appropriate successor to Article 4(1)(j) MVBE:

(i) **It is too narrow.** It applies only to vehicle manufacturers who buy parts for incorporation into finished products. In many cases, the vehicle manufacturer will not be the immediate buyer. The buyer may be a first tier parts manufacturer. Further, the vehicle manufacturer may be sourcing from the glass manufacturer for resale to the authorised aftermarket rather buying for incorporation;

(ii) **It does not deal with distribution.** Article 4(e) VBE deals only with purchase by users or repairers. Independent distributors, in contrast to Article 4(1)(j) MVBE, do not benefit.

Accordingly, Belron considers that the problems specific to the vehicle repairs sector are best addressed by a sector specific replacement to the MVBE. It suggests that a replacement MVBE should provide that:

(i) **The exemption is withdrawn from selective appointment of authorised repairers in the event of a hardcore restriction of access to parts** – this would make clear the link between the competitive distortion created by selective authorised repairer

appointment and the countervailing justification of ensuring access to parts by independents;

(ii) **A hardcore restriction on access to parts encompasses restrictions in agreements for the use of trademarks, IP or tooling** – such restrictions prevent aftermarket access to parts and, in Belron’s experience, often foreclose any access to the parts at the original parts manufacturer level, forcing Belron to purchase from authorised repairers at exorbitant prices. If considered appropriate such a provision could be accompanied by a market share test applicable only in cases of high market shares.

5.3 Applicability of the Subcontracting Notice

Further, Belron submits that the Subcontracting Notice will often be inapplicable, particularly in relation to the supply of glass parts.

Firstly, the Subcontracting Notice, by its own terms, makes clear that it does not apply “where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods.”³² Vehicle manufacturers generally do not have inhouse glass manufacturing capability. They are reliant upon glass manufacturers’ expertise. In most cases it will be implausible to think that the latter would not have access to the technology necessary to manufacture glass parts in the absence of any tools or IP provided by the vehicle manufacturer.

Secondly, the tooling agreements cannot be considered in isolation. The essential context is the selective appointment of authorised repairers which distorts competition. Exemption is granted only if full access to parts ensures effective competition from independent repairers with selected authorised repairers. It is the restrictions in the tooling agreement *in conjunction with* restrictive appointment of authorised repairers that

³² Subcontracting Notice, para. 3

fall within Article 81(1). The Subcontracting Notice, where applicable, applies only to the subcontracting arrangement at issue. It does not apply if there are other associated distortions of competition.

Finally, the Subcontracting Notice is an old notice, eligible for review, as the Evaluation Report suggests. The better approach is set out in the Guidelines on Technology Transfer Agreements which concludes that restrictions on resale in technology licensing agreements imposed by a powerful licensor can be harmful, unless there is evidence that the restriction is necessary to ensure that technology licensing occurs at all.³³ In the case of glass parts, there can be no question but that vehicle manufacturers are dependent upon glass manufacturers for supply. They would need to license glass manufacturers even without any restriction on supply of parts to the independent aftermarket.

In consequence, Belron considers that the Subcontracting Notice is no impediment to a revised MVBE addressing the bottlenecks in accessing spare parts, together with appropriate guidance setting out how such restrictions should be analysed (replacing the analysis under the Subcontracting Notice as required).

5.4 **Guidance on the Application of Article 82 EC Treaty to Access to Spares and the Refusal to License Design Rights**

Modification of the MVBE should be accompanied by a review of the position of market power held by vehicle and/or parts manufacturers, in particular where they benefit from IP or design right exclusivity. That competition law must intervene in circumstances of abuse of market power in relation to protected parts is long established by ECJ case law.³⁴ The abuses identified in those cases are as relevant today as when they were first decided, in particular:

³³ TTBE Guidelines, para. 172

³⁴ Case 238/87 *Volvo v Veng* ECR [1988] 6211; Case 53/87 *CICRA and others v Renault* [1988] ECR 6039.

- (i) The “arbitrary refusal to supply spare parts to independent repairers”;
- (ii) “[T]he fixing of prices for spare parts at an unfair level.”

Indeed, Veng specifically complained of the exorbitant price of obtaining the same spares from authorised repairers, a concern which Belron has to this day. Belron submits that appropriate guidance as to the circumstances in which vehicle and/or parts manufacturers will have market power and when that power will be abused would be an appropriate accompaniment to a revised MVBE. Commission guidance – naturally without prejudice to the views of the Community Courts - would do much to clarify the application of Article 82 to the sector, an area in which the case law can be contradictory and unclear. Given the uncertain prospect of design right reform, it is likely that this will be the only means of safeguarding the competitive position of independents in the mid-term.

6. **INDIRECT RESTRICTIONS ON INDEPENDENT REPAIRERS**

By way of further examples of the specificity of the vehicle repair sector, it is not just agreements with authorised repairers or parts manufacturers that have the potential to restrict competition. Belron has brought to the Commission’s attention arrangements with other actors in the vehicle repair sector which foreclose competition by independents:

- (i) Agreements between authorised repairers and consumers that the vehicle anti-corrosion warranty, in its entirety, is invalidated if services of independents are used;
- (ii) Agreements between vehicle manufacturers and/or authorised repairers with insurers to use only authorised repair services or, again, threats of warranty invalidation, in its entirety, if independent services are used.

In each case the threat of warranty invalidation was unrelated to glass repairs carried out under manufacturer's warranty. In light of the threat of further foreclosure of the independent sector by such practices, in the context of the high shares of the authorised repairers, Belron submits that any restraints of this nature, whether agreed between vehicle manufacturers or authorised repairers with insurers or consumers, should result in the block exemption being withdrawn from the selective appointment of authorised repairers. This should be reflected in a revised MVBE. As discussed earlier in section 5.1, Belron is concerned that the absence of a definition of "spare parts of matching quality" in any revised MVBE will exacerbate the problem and encourage further foreclosure of the independent repair sector.

7. CONCLUSIONS

Belron believes that there remain specific features of the vehicle repair sector that require continued sectoral protection *via* an industry specific block exemption. There are unique features of the sector: the reliance of vehicle manufacturers upon parts manufacturers that are a potentially strong source of competition, if freed of restraints imposed upon them; the cost and importance of repairs during a vehicle's lifetime; the sector's dependence upon independents as a source of competition and consumer choice; the potentially high levels of vehicle and parts manufacturers' market power in the sector. These features create a strong and compelling case for continued sector specific regulation.

Belron believes that the growth of independent dedicated multibrand repairers are an essential stimulus to strong competition with authorised repairers, providing better service, choice and convenience to consumers. At a time when the traditional independent sector is perceived to be in steep decline, it is all the more important to set out key guidance and self-enforcement mechanisms, such as the MVBE, to remove bottlenecks to free competition in the vehicle repairs sector.

Belron would like to thank the Commission's case team for the opportunity of discussing this submission in September and would be happy to provide any further information that might be of assistance.