

## **Observations by Bilia AB on the Commission's Evaluation Report on the Motor Vehicle Block Exemption**

In response to the Commission's Report of the 28<sup>th</sup> of May 2008, we wish to comment on certain conclusions reached by the Commission, and summarise what Regulation 1400/2002 has meant to Bilia AB as the largest provider of new passenger cars and authorized workshops in the Nordic countries.

### **1. Multi-branding**

The Commission begins listing the benefits of increased multi-branding, the positive effects it has had on competition and the lowering of the entry threshold for new entrants – and then concludes that Regulation 1400/2002 has had little effect on multi-branding and puts the increased multi-branding down to market forces. There is little to support the Commission's conclusion. For instance, the lack of appetite for displaying vehicles in the same showroom, is naturally a result of the old block exemption. Separate showrooms are not likely to be knocked down to accommodate this new feature and therefore it will take time before dealers have had a chance to adapt. Concluding that same-showroom multi-branding is not increasing at the desired speed, is not a sufficient reason to favour a legal framework like Regulation 2790/1999. The latter would prevent virtually all multi-branding, be it from the same showroom, different showrooms on one site, different sites or even from different entities with mutual ownership.

The Commission's assessment of enforcement in relation to multi-branding concludes that Regulation 2790/1999 would provide an equally satisfactory outcome to that of Regulation 1400/2002. The Commission states that its approach to dealing with the subject of restricted multi-branding has gone beyond the mechanical application of the non-compete obligation in Article 1 (1) b of Regulation 1400/2002 and therefore the outcome would be no different under the indirect non-compete obligations found in Regulation 2790/1999. However, since non-compete obligations are allowed for short-term contracts, 100% purchase loyalty can be required, and for indefinite contracts purchase requirements of up to 80% are not considered a non-compete obligation. Multi-branding would not be dealt with as an issue under Regulation 2790/1999 as it would be legal to severely restrict or even forbid it according to Article 1 (b) and 5 (a). In practice, an 80% purchase threshold (at best) would most likely result in dealers not being able to invest in a second brand.

The ability to multi-brand is essential. It is beneficial to end-users to be able to browse cars from one site and simplifies the decision-making process for the consumer by facilitating comparisons. Multi-branding also works as a motivation for the industry to offer more competitive products since they will be scrutinised on a level playing field. Multi-branding allows the dealer to take advantage of economies of scale, which can be passed on to consumers. The Commission clearly underestimates the manufacturer's desire to oppose multi-branding. Furthermore it underestimates the benefit for the consumer of multi-branding, which is one of the legal principles which the Commission must uphold in allowing an exemption and particularly in relation to a block exemption. All in all, multi-branding ensures that the consumer can obtain a better deal.

- Therefore, protecting the right to multi-brand is crucial and should not be reduced on the basis of a market assessment which leaves room for several different interpretations.

## **2. Prohibition of location clauses and network density**

Removing the freedom of establishment by abolishing the prohibition of location clauses entailed in Article 5 (2) (b) of Regulation 1400/2002 will, in practice, circumscribe the dealer's ability to grow organically and effectively result in limiting intra-brand competition. Intra-brand competition is still a novelty in the business and needs time to flourish. To assess the development based on statistical material gathered only a couple of years after the prohibition of location clauses took effect, must be considered premature and lacking in due consideration. One of the reasons why dealers have not taken advantage of the prohibition is because of the opportunity to purchase existing dealers. As the right to transfer contracts, existing under Regulation 1400/2002 Article 3 (3), is not found in Regulation 2790/1999, protection against location clauses will be needed more than ever at a time when they are also being abolished.

The Commission observes that suppliers have seized the opportunity offered to them by the selective distribution model to reduce network density, but that the detrimental effects to the consumer is negligible due to inter-brand competition. We strongly disagree with the Commission's conclusion as we still have confidence in dealers being capable of finding more efficient ways of carrying on their business and to compete – assuming the regulatory platform will not remove the dealers' tools.

When concluding that intra-brand competition is of minor importance, the Commission is failing to take into account the oligopolistic nature of the car industry, in its economic analysis and market assessment.

Innovation in the distribution systems at retail level is rare – by removing the freedom of establishing new outlets it will be even more absent and network density will continue to diminish. All to the detriment of the consumer whose option is limited to the dealer which receives the grace of the supplier to work the district where he resides - probably not the dealer embracing intra-brand competition to offer the consumer a better deal.

- Therefore, in view of the nature of the market, intra-brand competition adds an extra competitive edge to the benefit of the consumer, which should not be ignored in view of the express provisions of the EC Treaty.

## **3. Alternative ways of sourcing spare-parts**

There is a built in 'terror mechanism' when it comes to sourcing parts. Manufacturers of spare parts are unwilling to do business with authorised repairers as it might ultimately result in losing the big business provided by the car manufacturers. The fact that the Commission does not receive any hard evidence or even complaints is just a symptom of how ill the market is functioning. Who wants to be the whistleblower and risk losing their contracts and become a pariah?

- Therefore, it is clear that the Commission has failed to produce an in-depth economic analysis in general and with respect to particular contexts such as spare parts, failing to reflect the true forces in their assessment of the market.

#### **4. Safeguarding the independence of dealers**

Regulation 1400/2002 provides legal certainty to the sector and has become a handy road-map to guide the market players and to stifle attempts from suppliers to hamper competition. The value for business in knowing the framework which it has to work within must surely provide a cost-efficient tool for everyone. Fewer resources are spent on legal advice and action since the framework provides clarity. Contractual protection ensures the dealers rights to multi-brand, open new outlets etc. in practice and not just on paper.

- Therefore, the Commission's underestimation of the value of a detailed framework might result in higher costs for all parties involved, particularly the consumer.

#### **5. Bilia's experiences of Regulation 1400/2002 in short**

Bilia has expanded its portfolio of brands from 4 to 9 (going on 10) and has opened or purchased new outlets in Sweden, Norway and Denmark. Most outlets are multi-branded within the same showroom. Bilia is predominantly based in the larger cities in areas with high population. When buying an existing dealer a detailed submission is sent to the national competition authority who examines the implications of competition before choosing to approve or reject a purchase.

When Bilia purchased another Volvo dealership in the Stockholm area, Volvo objected to the competition authorities, who found Volvo's objection to lack substance. As a response to Bilia's actions, Volvo appointed another dealer in the same region and Bilia subsequently decided to advance its position in the 'home territory' of the new competing dealer. This was possible because of Regulation 1400/2002. The resulting fierce intra-brand competition which we are experiencing has been to the benefit of one party – the consumer who gets a better deal.

The above is just one example of the positive competition enhancing effects of Regulation 1400/2002.

- Therefore, Bilia's experience is that Regulation 1400/2002 has increased competition on all levels, and the consumers are reaping the benefits.

#### **6. Conclusion – Legally objectional analysis**

Thus there are serious problems with the Commission's evaluation that indicates a failure to perform an essential legal requirement and a lack of respect for the spirit and text of the foundation document of EC law. There is a general failure to focus on the interests of the consumer and also of the interests of small and medium sized business. The proposed shift to treatment as by the standard Vertical Regulation is inappropriate to the particular industry. If the supply of goods in a market is oligopolistic then the facilitation of vertical integration can only perpetuate and extend the concentration of market power ultimately to the detriment of the consumer. This general objection is part of an overall weak economic analysis and market assessment.

More particularly, in view of the positive effects noted in the after-sales market, it is surprising that the Commission wants to decrease competition for the sale of new motor vehicles. Bringing the business under the umbrella framework of Regulation 2790/1999 (as it

is currently drafted) will effectively limit the dealers' right to decide what to offer, by taking away (or at best, severely restricting) the right to multi-branding, and where to open outlets, by allowing for location clauses. When choosing to take away the dealers' right to make the above decisions there is little ability left to manoeuvre. By allowing suppliers to restrict the dealers' freedom there is no room left for innovation, economies of scale or other cost-cutting measures. In a low-margin market, without a suitable legal framework, no one will be equipped to find new ways of offering the consumer a better deal.

The market assessment is obviously flawed in relation to the maturity of economic conclusions. It has been a very short time since Regulation 1400/2002 came into force, and even less time since it took full effect, by removal of the location clause. In addition, many dealer contracts were not readily negotiated until well into Spring 2004. No reliable figures can be available after such a short evaluation term and there is a vast degree of uncertainty as to whether the observations of the market can be attributable to Regulation 1400/2002 or other factors. Therefore, the conclusions reached by the Commission in its Report lack sufficient economic analysis, contrary to what is required of the Commission as determined by the Court of Justice in the Wood Pulp II case.<sup>1</sup> The consequences of failure to assess the market adequately may be serious. Significant numbers of dealers have made substantial investments in multi-branding and new outlets. To them, removing the ability to multi-brand and decide on location, will result in loss of sunk-costs and serious financial harm which will ultimately affect consumers.

The Commission has repeatedly been complemented on its bravery by the car industry, which is delighted with the turn of events, since the Commission's Report was published. However, how much courage does it take to say yes to a multi billion €industry? If the EU is seen to be only a friend of big business it is no surprise that citizens become disenchanted and suspicious. Diverting the sector into a legal framework dictating a purely qualitative selective distribution system – open to all who meets the criteria - for the sale of new motor vehicles as well as after-sales services, would finally allow competition to blossom and consumers to reap the benefits thereof . That would be bravery! Where is the courage? But it is not only a matter of politics, this is a central requirement of the EC Treaty, which is still the fundamental law of the EU and which binds the Commission.

- Therefore, in view of the nature of the market and the lack of sufficient economic analysis and the goals of competition law, our opinion is that Regulation 1400/2002 should be extended. Alternatively, that Regulation 2790/1999 would be altered, allowing for multi-branding (maximum purchase threshold 30%) but not location clauses – or, if not amended, declared not applicable to dealerships through an appropriate exemption.

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Gothenburg 11<sup>th</sup> of July 2008

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<sup>1</sup> Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, Re Wood Pulp Cartel: Ahlström oy v. Commission (Wood Pulp II) [1993] ECR I-1307, [1993] 4 CMLR 407.