



EUROPEAN COUNCIL FOR MOTOR TRADES AND REPAIRS
CONSEIL EUROPÉEN DU COMMERCE ET DE LA RÉPARATION AUTOMOBILES
EUROPÄISCHER VERBAND DES KRAFTFAHRZEUGGEWERBES

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European Council for Motor Trades and Repairs

Comments on the Commission Evaluation Report on the operation of the Block Exemption Regulation 1400/2002



Contact details and information on the activities of the association

The European Council for Motor Trades and Repairs (CECRA) was established in 1983 to represent the interests of automotive dealers, authorised and independent repairers and a number of related activities (motorcycle dealers and petrol stations).

Before CECRA was set up in its current form, from the beginning of the 1970's, it effectively operated as the Europe Committee within the International Organisation for Motor Trades and Repairs (IOMTR) and was composed of representatives of automotive trade and repair associations from across Europe.

The automotive trade and repair sector in Europe is composed of some 350,000 enterprises, of which around 120 000 are authorised dealers and repairers and 230,000 independent repairers. Most of these enterprises are SMEs that employ around 2.8 million people and have an annual turnover in excess of 800bn euros. These enterprises are all represented by CECRA and its member associations.

CECRA's members are:

- 27 national trade associations in 23 EU and EFTA countries, representing: the 350,000 automotive dealers, authorised and independent repairers;
- 14 European Dealer Councils representing the interests of authorised dealers and repairers of a particular brand;
- about 110,000 fuel businesses employing 440,000 people; and some 12,000 motorcycle businesses employing 81,000 people.

CECRA is entirely financed by its membership fees.


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Why a specific BER?

1. The renewal of the legislation 1400/2002 must keep in mind the specificities of the automotive sector.

It's common knowledge: a motor vehicle, after a house, constitutes the most important goal for the average consumer. The automotive sector is still different from markets for other types of goods. Buying a vehicle continues to be an expenditure which differs significantly from most other purchases, and proper servicing has implications not just on family budgets, but also on road safety and the environment. For instance cars need non typical huge capital investment for dealer or repairer, whilst operating on very small margins, European availability for service and warranty, and European part availability. For citizens, the cars confer personal liberty unlike any other commodity, and significant residual/resale value, training requirement, and complicated financing availability for the consumer. This explains the importance, attributed by the European Commission, to protecting conditions of effective competition – for these particular goods more than many other consumer goods - in order to allow consumers to purchase vehicles at the best possible conditions of price and delivery and to enjoy the best possible conditions of post-sales assistance. In order to evaluate properly the economic relevance of the sector, it must be kept in mind that approximately 200 million motor vehicles are currently in use within the European Community Market. They (cars and commercial and industrial vehicles) are subject to more than sixty regulations, imposed both by the European Community and by individual states, related both to construction and to circulation.

From a historical viewpoint, both recognition of particular characteristics and specific regulatory background, are part of the official doctrine of the Commission, dating back to 1974 and continuously confirmed and fine-tuned since then following a consultation procedure with the numerous parties involved. This approach characterized the passage from the “BMW doctrine” to Regulation number 123/1985; and from that to Regulation number 1475/1995 and, finally, to the current BER. In doing so, with abundant European Community and national jurisprudence, a considerable corpus juris has been built over a period of more than 30 years, regarding the distribution and maintenance of motor vehicles. On this issue we refer the Commission to the study of Mr. Pappalardo.

2. The Evaluation Report is now directly and radically questioning the usefulness of a specific discipline, using a reference period of several year (at least since 2003), without addressing the underlying premise, that is, the particular characteristics of the sector.

Dealers and repairers have seized the opportunities given by the Regulation where this was economically feasible, commercially relevant, and secure. In this respect, the analysis of the development of multi-branding throws light upon the Commission's short-term vision. The sector and more particularly the consumer ask for multi-branding but its implementation was clarified by the Commission only in March 2006, when it published the details of the BMW and OPEL commitments in this regard. But there is no absolute economic model, as every entrepreneurial and human situation has its own particularities. The motor-vehicle distribution and repair market is composed of small and medium-sized businesses. The effects on the long term should be measured before taking actions that could jeopardize all the investments that have been made for the past ten years, particularly at a moment where the world economic order is subjected to successive crises — oil, finance and real estate crises, etc, — impacting on the confidence of the economic players. We already see banks refusing loans to dealers and repairers pending the publication of the new rules for the time beyond 2010.

3. Moreover the Commission's Report misjudges some of the market trends. It is wrong to believe that vehicle manufacturers are in a phase of de-concentration, because the examples chosen refer to a short period that cannot properly reflect the reality of the market. All the economic observers agree on a trend to manufacturer concentration in the long term, thus increasing the manufacturers' power on the market. The Commission also believes that inter-brand competition will preserve most of the current achievements of the BER. CECRA does not share this utopian vision of competition. Without any detailed sector-specific regulation of automotive distribution

and after-sales servicing the current situation could in future deteriorate to a deplorable and unsatisfactory situation for everybody: manufacturers, dealers, repairers, legislators (with an increasing number of disputes) and, in the end, consumers who would have to bear the economic cost of such setback.

So we have a different analysis of the market trends in automotive sales and repairs. To CECRA the BER has made it possible to start reorganization dynamism in business structures and models. To support such dynamism, which is not only due to market forces, the specific block exemption should be renewed. It is not possible to change the rules when the play is on hand and more than 3 million jobs and more than 350,000 SMEs are involved, the more so as such SMEs only operate locally. The Commission's communication of 25 June 2008 "Think small first" emphasizes the importance of adapting to SMEs needs. Should be remembered that the automotive sector in its entirety is involved? If vehicles can no longer be adequately sold and repaired, why should they be manufactured?

4. All the detailed items of the document are calling for the Commission's vigilance, not for laxity and easy integration into the scope of the umbrella block exemption regulation. It is not possible to aim at integrating specific provisions into the general restraints regulation while this regulation is also being subjected to revision and no one knows what the conclusions will be. The BER is no "over-regulation"; the BER is "better regulation".
5. To make it clear, we draw attention to the fact that the Evaluation Report suggests the abolition of any reference to the access to technical information, arguing that EURO 5/6 will take over Article 4.2 of the BER. This is a major misinterpretation since EURO 5/6 only refer to vehicles type-approved after September 2009. Moreover it should be emphasized that modern vehicles need regular updates of their software, particularly of the access to their Electronic Control Units. The abolition of the BER will be a market failure leading to a total absence of rules obliging vehicle manufacturers to supply technical information for the ante-EURO 5 vehicle fleet (cars and C.I.V.).
6. The same goes for contractual security. Authorized dealers and repairers depend on their contractual relation with the manufacturer. Contract security is in fact a key condition to a distribution and maintenance market where optimal competition is prevailing: only entrepreneurs with freedom of action can fully meet their customers' expectations and offer them best products at best prices. All investments are made for a brand and they are permanently ruined in the case of contract cancellation. Regulation 1400/2002 has succeeded in reducing the dependence of the weaker party — the dealer or repairer — vis-à-vis the stronger party — the manufacturer — mainly because of Article 3 and its impact on contractual security. The Commission rightly considered, at the time, that imposing some contractual restraints on the stronger party was necessary to enable dealers and repairers to act pro-competitively. We should add that bringing a dispute to court is very risky to small and medium-sized enterprises. Recourse to arbitration is unquestionably a positive achievement for dealers. The balance of 2002 remains the same today. Article 3 should be maintained to ensure the independence of the weaker party, for the consumer's benefit.
7. CECRA's response methodically stresses that the evaluation made by the Directorate General Competition of the European Commission lacks factual analysis and reflects some ideological approach, while it should be an empirical statement: the BER, and the Commission admits it, has undeniably contributed to healthy and positive competition while preserving the balance between the market forces. It is indisputable that the competitiveness in automotive distribution in 2008 is better than the situation prevailing in the period previously to 2002. In such circumstances the abolition of the BER is tantamount to proposing a return to a situation which all were agreed would be catastrophic for the whole automotive sector, with disastrous consequences for consumers.

There is only one sensible conclusion to be retained: the Commission should renew the sector-specific block exemption for motor-vehicle sales and repairs (cars and C.I.V.).

I- General

I.1 Background

CECRA welcomed the possibility to participate actively in the information gathering exercise set up by the Commission prior to the publication of its Evaluation Report on the operation of Regulation 1400/2002 ("the Report"). CECRA and its members strove to give the Commission all the information and data in their possession to allow it to analyse the evolutions in the authorised automotive sales and repair market (cars and C.I.V).

CECRA regretted, however, that the Commission did not pro-actively turn to it as regards the collection of similar information relating to the independent repair market. CECRA did, nevertheless, spontaneously contribute to the Commission's information gathering exercise in this field as well.

CECRA intends to submit further information and remains, naturally, at the Commission's entire disposal for any further information or opinions it may require during the revision process of the Block Exemption Regulation 1400/2002.

I.2 Preliminary comments

CECRA welcomes the Commission's approach taken in drafting the Evaluation Report. However it is felt that the report should limit itself to empirically assessing the market situation and the evolutions that have occurred during the reference period. We have also to keep in mind that some situations may need more time to be analysed in a relevant way (i.e new member states market situation). The role of the Report was not to give or suggest a specific direction for the future EU legislation that will replace the BER 1400/2002 after its expiry in May 2010.

CECRA feels the general approach of the Evaluation Report seems to indicate that the hardcore restrictions and specific conditions of the exemption of BER 1400/2002 are unnecessary to ensure competition in the automotive sector and clearly favours the application of the general rules governing vertical restraints to automotive trade and repairs. CECRA believes the evaluation process should not be influenced by pre-determined policy preferences.

Apart from the fact that Art.11 § 2 of BER 1400/2002 is asking for a Report (which should be neutral) and not for proposals, the Report refers to a General Block Exemption Regulation the text of which is not known because BER 2790/1999 will also expire on 31.05.2010.

The time which has elapsed between the entry into force of BER 1400/2002 and the drawing up of the Evaluation Report is very short. Changes in the automotive branch seldom happen over night but after a time consuming process. Consideration of this fact is missing in the Report which means its conclusions are flawed.

The Regulation only really began to be applied late 2003/early 2004 with the adoption of new commercial policies based upon agreements, the major part of which had been signed at the very end of the transitional period, effective from the beginning of the last quarter of 2003. In most brands the application started later due to the introduction of new standards and the problems of their implementation in practice.

The replies to the questionnaires sent out by the Commission in the first four months of 2007, which at best are based on data available at the end of 2006, were given three years after the entry into force of the provisions of the BER which, from the outset, had been made operative for seven years.

The Commission's adoption of the Small Business Act (SBA) obliges it to take into account the impact of any proposal changes to any legislation or regulatory changes. This should be prior to DG Competition in relation to the BER.

II- Market developments

II.1 State of competition

The Evaluation Report on the operation of the Block Exemption Regulation clearly identifies that automotive retail and repairs (cars and C.I.V.) is a hyper-competitive market. CECRA fully supports this analysis as it is its experience that competition has significantly increased over the reference period.

CECRA also agrees with the Commission's analysis that many factors, including non-Regulation related have played a role in bringing about such a situation but this has not been in isolation but against the background of regulation 1400/2002. CECRA cannot accept the Commission's broad dismissal of the impact of the BER's effects on competition in the market¹.

In 2000, the Commission was justly concerned about the competitive situation in automotive retail and repairs. The fear of market failure was clearly justified at the time. As described in the Evaluation Report and mentioned above, the market is, today, more open and new market entrants have also stimulated competition. This situation is with any doubt significantly due to the BER.

However, such a positive analysis should not translate into a decrease in vigilance or regulatory complacency. Should the Commission choose not to renew with an explicit sector specific regulation, it could favour situations where dealers and repairers treated unfairly are contractually constrained into acting in a non-competitive manner.

Market failure (albeit partial) can still be feared in the future:

- ✚ Before the entry into force of BER 1400/2002, Europe's six biggest manufacturers (Volkswagen, PSA, Renault, General Motors, Ford and Fiat) had a cumulated market share of around 75%. The entry into force of the BER has opened the market and allowed a number of new vehicle manufacturers (from the US and Asia) to penetrate the EU market and develop significant distribution and service networks. However, the cumulated market share of the six biggest manufacturers has not varied to any great extent since 2002.
- ✚ In various national markets, individual manufacturers maintain important market shares. In 2006, for example, Volkswagen had almost a 50% market share in the Czech Republic and over 30% in both Germany and Austria, Fiat maintained a market share of over 30% in Italy similar to PSA in France.
- ✚ Experts expect new attempts to achieve closer contacts between manufacturers in the short or medium term even if this would only be because of the costs of research and development. This will very probably lead manufacturers to conclude at least technical cooperation agreements which could then lead to some capital joint ventures.

¹ "This evolution seems, however, to be mainly due to external factors (...)". Commission Evaluation Report on the Operation of Regulation (EC) n° 1400/2002 concerning motor vehicle distribution and servicing, page 11.

- ✚ In the 2006 issue of their annual survey of the world automotive industry (Momentum 2006, Global Auto Executive Survey), KPMG wrote that auto industry leaders are of the opinion that the coming five years will be characterized by strong reorganisation favourable to concentration and co-operation.
- ✚ Since all parties concerned, for reasons of legal certainty, wish an exemption regulation for the long term (10 years) it might be dangerous and unjustifiable to take a decision based on a tendency to de-concentration, which DG Competition says has been observed, but for only a short period.

II.2 State of intra-brand competition

The cumulative effect of the oligopoly shaped market and the high market shares of individual manufacturers in specific national markets can restrict inter-brand competition. This highlights the necessity of accentuating intra-brand competition.

Vehicle manufacturers are, however, seldom interested in strengthening intra-brand competition. Several factors can be highlighted to this effect:

- ✚ Vertical integration in motor vehicle distribution and services has increased despite the entry into force of BER 1400/2002. This is due, on the one hand, to manufacturers reserving the right in their dealer agreements to sell and deliver vehicles to certain groups of customers (such as fleets) and, on the other hand, by manufacturers taking over or setting up their own outlets.
- ✚ Generally, manufacturers strive to emphasise the uniqueness of their product range, in line with their specific market strategies. Therefore, where dealers choose to multibrand (see below) it is, at best, tolerated by their manufacturers but, on the whole, actively discouraged.
- ✚ Similarly, manufacturers actively discourage and, in fact, hinder dealers from sourcing vehicles from alternative suppliers within the EU network. Although the barriers for dealers to act in such a way are not contractual, manufacturers and importers use a plethora of process and bureaucratic obstacles and unclear bonus systems to, effectively, close such alternative channels.

Such examples illustrate that without a comprehensive sector-specific regulation for automotive distribution and services, the hyper-competitive situation that exists today in the market could, in the future, change negatively.

II.3 Final comment on State of competition

Finally, the two essential features of the motor-vehicle distribution market which have induced the Commission to think it necessary to provide specific exemption conditions since 1985 are still existing, i.e.

- ✚ The existence of a cumulative effect because all manufacturers use distribution agreements which contain similar restrictions of competition, which not only affects the access to the market, but also its functioning, and are liable to justify the inapplicability of the BER 2790/1999 with regard to Article 8.
- ✚ Concentration of demand which remains relative and is not liable to offset the market power of supply, at all events in the area of passenger-cars where the majority of customers remain private persons, despite the development of leasing.

- Betting that inter-brand competition will be able to preserve most of the consumers' interests, particularly in terms of price, evolution of new vehicles up to ten years from now, in a market which continues to show such characteristics, requires consideration.

III- Achievement of objectives of the Regulation

III.1.1 Multibranding

1) The Evaluation Report incorrectly highlights as a partial failure of BER 1400/2002 that there has not been a move towards same-showroom multibranding. For CECRA, the thread which seems to have guided the Commission in evaluating the achievements of the BER in the field of multibranding negatively is fallacious. The Evaluation Report seems to suggest that with the entry into force of BER 1400/2002, all or most dealers should have multibranded with the same marks already represented in their area within the same showroom.

First of all: since the Report complains that dealers have not made sufficient use of a specific provision of BER 1400/2002, namely multi-branding in the same show-room, then the question may be asked: Why is the Report fixed on only one model? Why not leave it to the market to develop the best one? Since the Commission in another instance complained about a straight jacket effect (that is nearly all manufacturers use the same distribution system).

CECRA also has to take into account the consumer's future expectations. Independent Economics studies underline the potential evolution of the market given by a new wave of car-buyers (new generation of consumers who are well acquainted with new technologies, multi-brand comparative environment etc.) and their needs. In doing so the legislator has to anticipate those potential market evolutions with appropriate regulation.

2) The Evaluation Report takes the view that dealers did not take advantage of this provision, since even today not many dealers are selling brands of competing manufacturers within the same showroom. So the Report concludes that this provision will not be necessary any longer as from 2010.

This view is not correct. Multibranding (brands of competing manufacturers as well as brands belonging to the same group as the main brand) has substantially increased.

It is CECRA's experience that dealers have and are continuing to exploit significantly the possibility of multibranding where it makes business sense to do so:

- ✚ Vehicles from new market entrants (such as US or Asian brands) are being used by dealers to complement their original brand's portfolio in the same showroom, where it is big enough;
- ✚ Multibrand groups are using the possibility to rationalise their operations by moving several of the brands they represent to the same showroom;
- ✚ Dealers are using the possibility of same-showroom multibranding to take over a franchise from a fellow dealer that has left the business (i.e. filling another manufacturer's "open point").

3) However, not only the possibility to sell several brands from the same showroom was important for the dealers to engage in multifranchise sales. Another important reason was the fact that no separated legal

entities, no separated accounting and no brand-specific staff could be demanded by the respective manufacturers.

As to the distribution of several brands in one showroom, three aspects have to be considered:

- ✚ For brands belonging to the same group, the manufacturer can prohibit to sell these brands in the same showroom. Therefore it is out of question, at least for dealers who represent the brands of the Volkswagen Group, to sell several brands in the same showroom, because Volkswagen explicitly prohibits them to do so.
- ✚ Moreover, a dealer requires a showroom that is big enough in order to present cars of several brands in it. Since virtually all brands have growing model ranges, the existing showrooms often were not big enough in the past. That means that in such a case, a dealer first has to build an additional showroom if he wants to take up an additional brand.
- ✚ In areas where there are several dealers selling a brand, it makes no sense for more dealers to make the significant investments to take that particular brand on as a new brand. The costs inherent to multibranding are high and the customer potential does not increase. In situations where it does not make business sense to take on a new franchise, it should not come as a surprise that entrepreneurs are cautious especially in the current economic climate.

The Commission takes the view that the provisions of the General Block Exemption Regulation applicable for all industries will be sufficient in the future to protect competition. This is not the case, because the General Regulation allows manufacturers to prevent their dealers from selling competing brands from the same showroom and also not to sell any competing brand from any of its premises for up to five years². It is obvious that in such a case, the investments just carried out by the multifranchise dealers could not be amortized any longer. Moreover, he would lose a substantial part of the sales, so that the interest (for the debt capital raised in order to finance the investment) potentially could not be paid any longer.

4) The Report, furthermore, suggests that over-prescriptive rules in areas such as multi-branding may have encouraged the introduction of more onerous dealership standards, thereby making distribution more expensive, to the detriment of consumers.

- ✚ It is true that manufacturers have used BER to introduce a lot of standards which are by no means necessary to improve sales. But the reason was the introduction of market share thresholds into the present BER which did not exist in the previous ones. This introduction came from the general Vertical Restraints BER and is an alien element in the automotive (cars and C.I.V.) one.
- ✚ In addition CECRA must point out that it is not the case that these unnecessary standards have led to higher prices for consumers. The fierce competition in the market has, in fact, made real car prices fall over the reference period.

² The two relevant provisions of the Umbrella Regulation in the area of multibranding are indeed: Article 5.a which permits direct or indirect non-compete obligations if their duration is limited to five years. Article 1.b which defines the non-compete obligation as obliging the buyer to purchase up to a maximum of 80 % of products from the same supplier, instead of 30 % pursuant to Article 1.b of the Automotive Regulation.

III.1.2 Final comment on multibranding

- However, if the BER 1400/2002 successor Regulation does not contain provisions on multibranding, it is likely that manufacturers will hinder their dealers from taking on new business opportunities. Furthermore, it may jeopardise the dealers that have or are currently investing in same-showroom multibranding.
- On top of this, according to many polls consumers favour multifranchise distribution. Where multibranding makes sense, it brings a plus to consumers in terms of convenience of accessing and comparing different brands and models. However, if multibranding would be restricted again in the future, this would clearly result in disadvantages for the consumers.
- In such a complex and capital industry multibranding development takes time.

III.2 Secondary outlets and location clause

The Evaluation Report considers the 'prohibition of the location clause' a failure, due to the little interest shown by dealers in opening secondary (cross-border) outlets. CECRA would like to remind the Commission that when Regulation 1400/2002 was drafted in 2000, the price differentials for vehicles (cars and C.I.V.) from country to country were large, indicating that there was no Internal Market in car sales. Since the entry into force of the BER and 'encouraged' by the Regulation's introduction of the prohibition of the location clause, the price differentials have reduced considerably, indicating that there has been significant integration in the market, in line with the Commission's objectives.

However, currently from a business point of view, a low price differential between Member States reduces the attractiveness of opening cross-border sales outlets considering the large investments required and the administrative and language barriers that can arise.

The effectiveness of BER 1400/2002 should not, therefore, be judged on the basis of individual – sometimes mutually – contradictory provisions but to the extent that the Regulation's overall objectives have been met. Market integration, as an objective, has to a large extent, been met as the Evaluation Report itself claims, and the prohibition of the location clause played its part.

In addition, one must not forget that, although manufacturers act globally, dealers normally act regionally. Nevertheless this should not lead to the Report's result that Art. 5 § 2 b is superfluous. As said earlier, changes in the automotive sector need time. The Commission therefore should keep this rule (like all others which would help dealers to become more independent from their manufacturer).

From the dealers' point of view it would be wrong to drop this absolutely appropriate provision, because it offers the possibility to implement innovative distribution formats, which is exactly one of the objectives of the EU Commission. Especially for small dealers in rural areas, who are well customer-oriented but not able to survive on their own because of the competitive pressure, this provision provides good opportunities for them. For example they could co-operate with a dealer group, and the dealer could give up vehicle sales and keep an after sales agreement only. He could let his showroom to the dealer group, and the latter could open a sales outlet in the showroom and subcontract after sales servicing to the former dealer. The consumer would benefit from this in as much as he could continue to buy his car on the spot with "his" dealer and have it serviced there.

III.3 Access to technical information

1) CECRA fully agrees with the Commission's analysis that the provisions in article 4(2) of the BER 1400/2002 on the access of technical information to operators outside of the manufacturers' networks has improved on the situation that existed before 2002.

It is, however, important to note that some problems still persist especially as regards security related information. In fact, modern vehicles require "re-commissioning" after many, even very simple, repair and maintenance jobs. It is, thus, necessary for a repairer to access the Electronic Control Units (ECU) to finalise the job after the repair *per se* has been completed.

However, many of these "every day" functions cannot be completed as access is required first to the security related functions before being given to the non-security related ones. As recital 26 of BER 1400/2002 stipulates that it is legitimate and proper to "withhold access to technical information which might allow a third party to bypass or disarm on-board antitheft devices, to recalibrate electronic devices or tamper with devices which for instance limit the speed of a motor vehicle (...)" many manufacturers have "hidden" access behind this "security curtain".

CECRA wishes to remind the Commission that the same recital also stipulates that it is not legitimate to withhold such information where the protection from the above mentioned tampering or recalibration can be "attained by other less restrictive means".

- ➡ It is therefore necessary, for CECRA that the Commission continues to be vigilant on this aspect to avoid setting the clock back on the improvements made when the BER expires in May 2010.

2) CECRA is, however, worried that the Evaluation Report suggests removing reference to access to technical information from the future regulatory framework. The report claims that the provisions in chapter 3 of the EURO 5/6 Regulation³ will effectively take over from article 4(2) of the BER.

As EURO 5/6 only refers to passenger cars type approved after September 2009, the abolition of a reference to access to technical information from the future regulatory network will create a gap: the pre-EURO 5 car park will not be subjected to any legislation requiring vehicle manufacturers to disclose or give access to technical information.

This situation would be prejudicial to all independent repairers (the majority of repair shops in Europe) as well as to dealers who accept "trade-ins"⁴ and/or trade in used vehicles. Furthermore, authorised repairers would also be hampered if they choose to also repair vehicles (cars and C.I.V.) for which they do not hold a franchise (and, therefore, choose to exploit new business opportunities by effectively acting as an independent repairer).

The Evaluation Report dismisses this preoccupation in a cavalier manner by stating that "information on older models should already have been widely disseminated pursuant to article 4(2) of the BER⁵. Such a flawed statement indicates that there is a fundamental misunderstanding on the nature of technical information.

³ Regulation 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles and on access to vehicle repair information.

⁴ Accepting the customer's old car in part-exchange for a new one.

⁵ Commission Evaluation Report on the Operation of Regulation (EC) n°1400/2002 concerning Motor Vehicle Distribution and Servicing, page 7.

As indicated above, modern vehicles require their ECUs to be accessed to complete most repair jobs and regularly need software updates. Such operations require accessing the relevant data and codes from the vehicle manufacturer each time the vehicle comes into a repair shop. A repair shop that has “once in the past” downloaded information for a similar vehicle model will not be able to simply re-use it a second time.

The only information that can be considered to have been “disseminated” is, essentially, technical diagrams and drawings. However, as mentioned above, these are, today, insufficient even to complete some very simple repair jobs like replacing brake pads.

CECRA estimates that EU-wide EURO 5 car park will represent around 50% of the total park by 2020. As regards Heavy Duty Vehicles, the EURO VI Regulation that should, in theory, reproduce the provisions in chapter 3 of Regulation 715/2007 has not yet been adopted. Moreover, the current state of the discussions in the EU institutions suggests that the provisions may be weakened.

- ➡ Therefore, the gap that would be created if the provisions of article 4(2) of the BER were not to be renewed would be considerable and could lead to many market exits and, ultimately, a generalised market failure.

3) The Evaluation Report also claims that the Commission’s decisions in September 2007⁶ have given “valuable guidance” to the sector. Moreover, the Evaluation Report argues that as these cases were brought on the basis of articles 81(1) and 81(3) of the Treaty, “even in the absence of the current rules of the BER, the Commission would still be in a position to take appropriate enforcement action (...)”⁷.

CECRA would like to remind the Commission that these cases were also based on the BER 1400/2002 and that their ensuing commitments will, thus, expire in May 2010. Furthermore, CECRA also wishes to highlight that the cases in question took several years to come to a positive conclusion.

- ➡ Therefore, CECRA fears that without a clear provision, like the current article 4(2) of the BER, the situation as regards access to technical information will worsen considerably.

III.4 Dealer pro-competitive behaviour

III.4.1 General comment

Automotive (cars and C.I.V.) retail and repairs is characterised by a significant imbalance of contractual and market power in favour of the supplier: the manufacturer. Whereby the manufacturer depends on its entire distribution and repair network, it does not depend on its contractual relation with one particular dealer or repairer in a defined place.

The contrary, of course, is not true; a dealer or authorised repairer is wholly dependant on the contractual relationship with its manufacturer. Distribution of motor vehicles, by comparison with other goods, is characterised by extremely high levels of initial investment and an uncommon amount of recourse to finance throughout the enterprises trading life.

⁶ Cases Comp/39.140 to 39.143 concerning Daimler Chrysler, Fiat, Opel and Toyota.

⁷ Commission Evaluation Report on the Operation of Regulation (EC) n°1400/2002 concerning Motor Vehicle Distribution and Servicing, page 7.

More than 80% of the investments made by dealers and authorised repairers is brand-specific. In case of termination of the dealer agreement, the investments and acquisitions not fully amortised become absorbed costs.

A special issue within the manufacturer dealing with the relationship is the debt related to vehicles release by the manufacturer but also by the dealer. Assuming a sixty day supply chain (optimistic), a European annual market of 15 million new cars and an average price of 10,000 euros, means at any time approximately 25 billion euros of debt exists between manufacturers and dealer. This is normally founded on the special relationship within manufacturer finance house. This provides manufacturers with enormous unseen power.

This lack of balance is reflected in the contractual behaviour between the dominant party and the dealers and authorised repairers:

- ✚ Vehicle manufacturers reserve the right to unilaterally modify aspects of the dealer agreement that affect a dealer's profitability at any time during the validity of the latter. This may include significant changes to bonus systems, margin structures, delivery times, corporate standards, etc. Furthermore, the criteria used to bring about such modifications, including in the margin system are often unclear.
- ✚ Authorised repairers are required by contract and legislation (specifically the BER 1400/2002) to carry out warranty work irrespective of where the vehicle was bought. The criteria for warranty refunds, however, also lack clarity and are often reimbursed at a lesser rate than the cost of a similar job carried outside of the warranty and can be unprofitable for the repairer.
- ✚ Dealers and repairers are obliged to regularly inform their manufacturers of their enterprises business data. This allows the manufacturers to potentially "adapt" the margins in areas where the dealer is performing in an outstanding manner.

One of the Regulation's aims⁸ was to give dealers greater independence from their manufacturers to be able to innovate and act competitively. To achieve this, the BER needed to instate a better balance between the manufacturers and dealers and repairers. It is CECRA's experience that this has been, at least in part, the case.

A cornerstone of this approach was the provision of contractual clauses as it was considered justly by the Commission that it is difficult to allow dealers and repairers to act in a pro-competitive manner - and, therefore, guarantee competition in automotive retail - without putting some contractual restrictions on the stronger party.

Indeed, from the first automotive BER (123/1985) through to the current one (1400/2002), the Commission considered it necessary to increase the number of contractual provisions rather than the contrary.

⁸ Commission Communication 2002/C 67/02, of 16th March 2002. Contrary to that, the report says (see page 10 under G) that "the independency of dealers from their suppliers was not an aim of the BER itself".

III.4.2 Evolution of contractual provisions in previous automotive BERs

a) BER 123/85: Article 5 §2,2,3); 3, 4.

The Commission laid down minimum requirements concerning the duration and termination of the distribution and servicing agreement. This was justified as the combined effect of the investments the dealer made in order to improve the distribution and servicing of contract goods and a short-term agreement or one terminable at short notice would greatly increase the dealer's economic dependence on the supplier⁹.

The Commission considered, therefore, that providing for these contractual issues would give dealers the independence needed to act in a pro-competitive manner that may, otherwise, be hindered by their excessive economic dependence on the supplier.

b) BER 1475/95 : Article 5 §2 (2) (a), (b), §2 (2) (3) §3

The same provisions as in the previous BER were maintained and justified substantially in the same way.

The Commission, however, added a provision for the rapid settlement of disputes (arbitration), by obliging manufacturers and dealers to foresee the possibility of referring them to an expert third party or arbitrator.

The Commission considered, therefore, that rapid dispute resolution was positive but did not justify its choice by any particular pro-competitive or consumer orientated argumentation.

c) BER 1400/2002 : Article 3, point 3, 4, 5, 6

The Commission maintained and strengthened the provisions relating to the duration and termination of the distribution and servicing agreement.

The Commission maintained its view on the necessity of providing for these contractual issues as a means of giving dealers the independence needed to act in a pro-competitive manner that may, otherwise, be hindered by their excessive economic dependence on the supplier.

Moreover, the Commission also maintained the provisions on arbitration as it considered that an unresolved dispute may hamper effective competition.

Building on the previous Regulation the Commission made an explicit link between rapid dispute resolution and pro-competitive behaviour in the market.

Furthermore, the Commission added provisions on the necessity of justifying the termination of dealer and repairer agreements. This to prevent a supplier from terminating an agreement because a dealer or a repairer engaged in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services or other unjustified reasons.

Also, the Commission introduced provisions on the possibility of transferring contracts between dealers and repairers in the same network. This was justified by the necessity of fostering market integration in the EU by allowing dealers to seize additional business opportunities.

The Commission considered, therefore, that the best way to achieve market integration in Europe was to intervene at the contractual level.

⁹Notwithstanding, of course, the possibility of terminating agreements where a reorganisation of all or of a substantial part of the network was deemed necessary (maintenance of "flexible and efficient distribution structures").

d) *BER evaluation report 1400/2002 : Article 3, point 3, 4, 5, 6*

As regards justification on the provision of written and objective reasons of termination (Art. 3§4) the report does not mention any negative effects of this obligation.

It puts forward a number of arguments in order to conclude that such an obligation is of no use, but these arguments are not convincing:

- ✚ It would be irrational for a manufacturer to decide to deprive itself of the collaboration of a dynamic distributor, while there is no other means to penalise dealers without dismissing them. It pays no attention to the importance which termination might have in some cases in terms of an example;
- ✚ No case has been reported to the Commission where the obligation of motivation could have made it possible to detect anti-competitive behaviour. A device should not be suppressed because of its preventive effect.
- ✚ Moreover, more fundamentally, the obligation to give the reasons for contract termination is consistent with the decentralization policy in the application of European competition law started by the Commission in 1999.
- ✚ Indeed, the national authorities have no means of investigation enabling them to prove anticompetitive practices. The obligation to justify cancellations can enable them to conclude that such practices do exist, by establishing on the one hand the "pretextuous" character of the reasons given in support of a decision to cancel the agreement and, on the other hand, the coincidence between such decision and a competitive dealer initiative.
- ✚ It would also recognize the significant proportion of the worth of the dealer business was contained in the Goodwill connected to the franchise. If the dealer cannot sell his dealership with the benefit of the franchise, to another dealer in a network, without the permission of the manufacturer than significant value is unjustifiably.

e) *Conclusion*

In all three BERs the Commission's main argumentation was that increased dealer independence from the supplier would increase the possibility of dealers acting in a pro-competitive manner. Taken the other way round, the Commission considered that if left alone, manufacturers would impose restrictions on dealers leading to anti-competitive behaviour.

Importantly as regards arbitration beyond the Commission's argumentation on the link between the provision and pro-competitive behaviour, in the Commission's considerations the full scope of arbitration is significantly broader: one should not overlook the importance of the non-exhaustive list of items in article 3 §6 of BER 1400/2002 which the dealer can refer to an independent arbitrator, such as targets and stock requirements.

In fact, contractual safety is an essential condition for an optimally competing distribution and service market: only a freely operating entrepreneur can fully meet the expectations of his customers and offer them optimal prices for his products.

In order to have contractual safety, the retailer must also be offered financial and legal safety. Before all, the retailer must be certain of the duration of his contract and that it cannot be terminated without valid

reason. The provisions regulating the relations between dealer and vehicle manufacturer can only be effective when the manufacturer is not allowed to alter or terminate the contract at his own discretion or unfairly influence any sales.

In the absence of any contractual rules, dealers would have to fall back on their national legislations. None of the legislations in the 27 EU Member States have any provisions similar to those of the current BER.

III.4.3 No recourses for the weaker part

The abolition of the BER or of its contractual provisions (article 3 §§ 3 to 6) would have nothing to do with "Better Regulation". On the contrary: as described it would lead to detrimental regulation or non-regulation because dealers and repairers are the weaker parties.

Therefore, abolition would have considerable negative effects on the weaker parties and the market as a whole.

We must take into account the difficulties for a dealer to have recourse to justice against the manufacturer:

- ✚ Firstly, it is not easy for the weaker party in a contractual relation to take its supplier to court. A serious breakdown in the dealer/manufacturer relationship would not be a strong basis on which to continue doing business in the future. Such a situation would accentuate the existing imbalance in the automotive (cars and C.I.V.) trade and repair market rather than diminishing it.
- ✚ Secondly, national courts will have few common guidelines to base their decisions on which could lead to similar cases being judged in significantly different ways. Such a situation could create more uncertainty in the market than exists today.
- ✚ Thirdly, bringing such contractual disputes to court is ultimately inefficient – for both the manufacturer and the dealer - in terms of length of the procedure and costs but it would be probably too risky for the average dealer. In order to prove market failure, the dealer or the court will have to perform expensive economic research. In a lot of cases these costs will be prohibitive. The bill for these inefficiencies will have to be, as the Commission itself notes in its Evaluation Report, eventually footed by the consumer, but initially by the entrepreneur.
- ✚ Finally, in the absence of provisions such as those in article 3 of the current BER, dealers risk becoming more economically dependent on their manufacturers. Such a situation could lead to dealers being pressured into adopting anti-competitive behaviours as the Commission itself has acknowledged up to now.

III.5 Code of Conduct

In light of the above, CECRA queries the Commission's suggestion that a voluntary Code of Conduct could adequately replace the pertinent provisions of article 3 of the BER 1400/2002. If the Commission has identified one or more or all of the provisions currently in article 3 as important in regulating the sector, surely it makes sense to have them spelled out in a Regulation rather than a voluntary, informal Code.

Furthermore, CECRA would question the validity of such a Code if it were to be adopted unilaterally by one party without any real and fair negotiation with the other. Clearly, the stronger contractual party unilaterally adopting a Code of Conduct makes little sense in light of the above and would not constitute a guarantee of fair treatment of the weaker party.

Moreover, since the Report mentions only two of the contractual clauses which could be included in a Code of Conduct, manufacturers feel encouraged only to include those two into their proposal of a Code. This is really not acceptable since the Commission and manufacturers know that there are at least four contractual clauses involved and from CECRA's viewpoint there could be more.

IV. Think small first

1) The automotive (car and C.I.V.) trade and repair sector is composed, in great part of Small and Medium sized Enterprises. The Commission, in its Lisbon strategy has developed a new SME policy as a key tool to reach its objectives.

SMEs are the engine of the European economy and the main drivers for achieving sustainable growth and more and better jobs. The Commission's policy, therefore, aims at ensuring that all Community policies and actions are small-business friendly and making Europe a more attractive place for setting up a company and doing business. The SME policy, therefore, wants to create the conditions in which small firms can be created and can thrive so as to achieve economic growth, lasting prosperity and the creation of more and better jobs, thus contributing to the ultimate goal of strengthening Europe's competitiveness.

This was the cornerstone of the public consultation launched on the 31 January 2008, on the content of a European "Small Business Act". Its objective is to put small and medium sized enterprises at the forefront of decision-making in the EU and to introduce concrete measures to unlock the SMEs' growth potential which will include, amongst other things, new initiatives to facilitate SMEs' access to the Single Market.

The automotive (car and C.I.V.) trade and repair sector in Europe is composed of over 350,000 enterprises most of which are SMEs employing some 2.8 million people. Its turnover is of over 800bn euros. These figures are largely superior to those of manufacturers. In compliance with the EU's SME policy and the Lisbon Strategy, improving the business environment for the small and medium enterprises in the automotive aftermarket clearly means maintaining a legal framework, which establishes rules for *fair competition* in the internal market. This can only be achieved by sector-specific, normative rules, which provide legal certainty.

2) The Block Exemption Regulation provides greater clarity than any individual assessment under Art. 81(3) of the Treaty ever could. Such clarity is needed to encourage investments, and to effectively protect smaller players faced with the market and contractual power of vehicle manufacturers. CECRA, therefore, questions why the Commission's Evaluation Report seems to suggest moving away from the clear descriptive legislation currently in place in favour of a system where market failures can only be challenged after they have occurred.

Assessments under Article 81(3) of the Treaty imply a significant degree of uncertainty, given that the motor vehicle sector has been able to rely on specific, yet differing Block Exemption Regulations for more than twenty years. Besides, self-assessments normally require economic evaluations and legal opinions, the cost of which may be excessive for small and medium-sized enterprises (SMEs). Given that vehicle manufacturers already contractually have significant power over their networks and can dominate the repair market, any regulatory mechanism which makes it costly for SMEs to afford legal certainty must be avoided.

Arguing a case in the absence of a Block Exemption Regulation with clearly defined hardcore restrictions is a very costly exercise, from which small and medium-sized enterprises are likely to shy away. Moreover, any such legal costs would inevitably be passed on to the consumer via higher retail and repair prices.

Given this situation, legal clarity and a certain degree of protection for the weaker party is necessary to ensure a competitive market for consumers.

To conclude, CECRA submits that the Block Exemption Regulation has secured positive results for consumers and SMEs in particular, as outlined above. A brutal absence of sector-specific guidance would determine without any doubt a disruptive evolution of automotive (cars and C.I.V.) trade and repair. CECRA therefore urges the Commission to maintain this Regulation in the interest of legal certainty which is in any case also in the interest of consumers for a period of 10 years, in order to ensure fair competition in the market

Brussels, 30 July 2008