

**COMMISSION EVALUATION REPORT ON THE OPERATION OF
REGULATION EC NO 1400/2002 CONCERNING MOTOR VEHICLE
DISTRIBUTION AND SERVICING**

Observations of the Association of European Distribution Lawyers (EDL)

1. INTRODUCTION

The EDL is an amalgamation of European lawyers with 22 members from 19 countries addressing distribution and other anti-trust issues relating thereto. The EDL has also previously submitted a position statement to the Commission on the London Economics Study on Regulation EC1400/2002 hereinafter referred to as "the BER".

The EDL attaches significance to the fact that the following statement was not commissioned by any manufacturer or importer, distributors, groups of distributors or amalgamations of manufacturers, nor has it made any arrangements whatsoever with such actors. The EDL is stating its opinion herein on distribution and anti-trust issues which its members are confronted with virtually on a day-to-day basis.

1.1 General Lack of References (MH)

First of all, EDL welcomes the opportunity to comment on the Commission's Evaluation Report on the operation of the BER (hereinafter referred to as "the Report"). The Commission has made great efforts to provide a comprehensive evaluation of the BER. On the whole, the Commission's primary conclusions appear to suggest that the BER has helped to promote competition in the markets for new motor vehicle distribution and in the markets for after-sales services to the benefit of consumers¹. However, according to the Commission, the BER has not reached all of the seven objectives initially set by the Commission.

¹ Page 2 of the Report

The Commission forthrightly admits that some of the sector-specific rules in the BER have proven to be ineffective and even unnecessary. To this extent, the Commission must be commended for the truly open and self-scrutinizing approach it has taken in the evaluation of the BER. Nevertheless, we have several points and remarks relating to the Commission's conclusions and the Report in general, upon which we make the following comments.

After thoroughly examining the Report and focusing particularly on the Commission's rather controversial conclusions, our initial observation relates to the general lack of reference or, to be more precise, the absence of specific cross-references. The Commission mentions that as a basis for the Report at hand it launched a fact-finding exercise in mid-2007 by sending questionnaires to various groups of stakeholders within the motor vehicle industry². On the second page of the Report, the Commission refers to the answers given to those questionnaires as well as three other reports that it relies upon as sources. To be exact, the Commission does not even mention all the "numerous other sources" upon which it bases the Report³.

A recurring theme throughout the Report is the Commission's tendency to state bluntly the conclusions that it has made without giving the specific evidence that has led it to those conclusions. For instance, on numerous occasions in the Report, the Commission resorts to attributing the improved competitive state of the sector to "changed market circumstances", "increased globalization" and "external factors", without precisely mentioning what it means by these terms and where these observations have been made⁴. Furthermore, in the section that evaluates the achievement of the objectives of the BER, the Commission frequently relies on random observations by unmentioned stakeholders as the basis for its conclusions and then states them as fact⁵. We recognize and accredit the fact that the Commission's four Annexes to the Report give further insight into specific matters, but even these staff working papers lack precise and scientifically accepted cross-references to the sources that have led the Commission to its conclusions.

² Page 2 of the Report.

³ Page 2 of the Report; in particular footnote 4.

⁴ Pages 4,5 and 11 of the Report.

⁵ Section III of the Report.

From the perspective of an interest group that does not fully agree with the Commission's findings, the general lack of reference along with the limited timeframe to comment on the Report present a true problem when contradicting the scientific basis of the Commission's conclusions and introducing other evidence.

1.2 Quality of References (CG)

Back in our position statement on the London Economics Study, we noted that their report on "developments in car retailing and after-sales markets under the BER was, in many respects, inaccurate and displayed a lack of understanding of factors in the automotive sector. We are also aware that a whole host of other institutions, interest representatives and lobbies have also voiced objections. As a result of the reference to the study, and the fact that the Report does not critically examine the study in any detail, we assume that the results of the study have been adopted without question in the assessment contained in the Report.

The Report fails to mention the following, however: After the introduction of The BER there was considerable legal uncertainty and a large number of disputed legal issues, only a part of which could be resolved by the guidelines and the publication of the "additional questions". Back in 2002 and 2003, however, a large number of formal and informal enquiries were answered and clarified by DG Competition, which responded quickly, without red tape and with considerable acumen to all of the queries or took action, thus helping to bring about considerable legal certainty - including in the design of agreements. As a result of the approach of the EU Commission back then - which was clearly characterised by hard work - in the opinion of the EDL, a large number of legal disputes were avoided which would without doubt (also) have led to different results and rulings by national courts.

The activity of DG Competition has accordingly itself furnished evidence that a comprehensive statutory arrangement is necessary and that only such a statutory arrangement can provide legal certainty.

1.3 Time Limits and Procedure

When DG Competition is inviting stakeholders to submit position statements in connection with the assessment of a group exemption regulation, it is, regrettably, not the first time that such statements are supposed to be issued during the summer holiday period. This generally causes observers problems because materials, documents and surveys can only be carried out to a limited extent or under tremendous time pressure with the relevant individuals and institutions. We view this in a negative light, just as we do the deadline which has been set: The well-founded statements which are to be submitted to the Commission need to be based on market research, market analyses and opinion surveys. It is absolutely impossible to carry out all this within a period of two months. The possibility of producing a well-founded statement has thus been undermined - to the detriment of all stakeholders.

2. WRONG PREMISES - WRONG CONCLUSIONS

2.1 Reference to Non-Existing Umbrella Regulation (PL)

As an overall assessment, the Commission has stated that the competitive environment in the motor vehicle distribution markets improved considerably since 2000, mainly due to external (global) economic factors. According to the Commission, the BER has supported industry's adjustments to this changing environment and has, particularly in the aftermarket, stimulated a pro-competitive and dynamic stakeholder response. The Commission, however, attributes this outcome mainly to the effect of Regulation 2790/1999, rather than to the BER. Therefore, the Commission regards the BER as an overly strict straitjacket and prefers for the future the more effects-based and flexible approach of Regulation 2790/1999.

This (preliminary) view of the Commission implies, however, an assessment of the effectiveness of Regulation 2790/1999, although the review process of that general BER is yet to begin. At this stage, it is hard to predict the outcome of this process. The new version of the general BER is only yet in *status nascendi*, so it seems somewhat premature to speculate on the new umbrella (general) Regulation.

This type of speculation also raises the question, especially in the aftermarket, whether the new general BER will be capable of stimulating a pro-competitive environment in the automotive sector, particularly in view of the general threshold of 30% above which quantitative selective distribution is not exempted. Lowering this threshold from 40% (article 3(1) of Regulation 1400/02) to 30% will raise complicated disputes about market share and market definition and how to calculate those shares, especially in the distribution of new vehicles. These disputes may lead to economic and legal uncertainties which will detract from the legal position of distributors of new vehicles, spare parts and aftersales services

2.2 Assertion of a Changed Market (CG)

Generally speaking, we agree with the EU Commission that the situation with respect to competition in relevant markets, which prompted the Commission to issue a stricter specific sectoral Group Exemption Regulation, improved perceptively from 2002 to 2007. It is clear that the BER was the key underlying factor here. In the Report, it is especially clear in the comments of Mr. Cesarini, however, that additional changes in market factors are needed in order for it to become unnecessary to continue to apply the BER or to take it out of force. This is inconsistent with the analysis produced by the EU Commission, which rightly established that the level of competition has increased. Moreover, additional market factors have not changed significantly since 2002, either: the number of contractual partners has declined since then and will continue to decline. This was the basis for the analysis which led to the introduction of the BER, however, and has therefore already been taken into account. Market indicators, such as stagnation of sales opportunities (saturation of the market) in Europe, were just as well known at the time as was the increase in imports from Asia, especially China. Thus, no significant change has taken place in market developments since the analysis in 2002 - with the exception of the fact that the amount of competition has increased perceptively - an undisputed fact which is also good news for consumers. For this reason, we are unable to perceive any reason for the abolishment of the BER, and only see reasons why it should continue to apply.

2.3 No Case Law - No Problems? (AH)

In its Report, the Commission has noted that since the entry into force of the BER, it has adopted five decisions involving car manufacturers which related to

practices excluded from the benefit of the BER. It is noteworthy to mention that in only one of these cases, the Commission imposed a fine pursuant to Article 7 of Regulation 1/2003 (the *Peugeot* case⁶). In the other four cases, the Commission implemented commitment decisions pursuant to Article 9 of Regulation 1/2003. In addition, the Commission has received 46 formal complaints in this sector since 2002. Furthermore, the Commission points out that none of these complaints resulted in prohibition decisions and only three settlements were reached. Hence, the Commission concludes that there is a clear downward trend in the yearly number of official complaints. Even the number of informal complaints by consumers and other stakeholders has, according to the Commission's statistics, decreased year by year to only 55 complaints in 2007⁷.

On the Member State level, the total number of complaints, according to the Commission, was about 340 since the entry into force of the BER, almost all of which concerned passenger cars and related especially to the aftermarket. In general, the overall view of the majority of National Competition Authorities ("NCAs") regarding the impact of the BER on the market is fairly positive. Several NCAs pointed specifically to an increased level of competition in the aftermarket. On the other hand, some NCAs noted that due to the introduction of more demanding selection standards, the BER has failed in its aim of strengthening the independence of dealers⁸.

In light of this background, it is fair to say that the BER has had a positive effect on the market, and its influence in keeping the manufacturer side in check which can be seen from the decrease in the number of cases. Despite the effect on the number of cases and adopted decisions, the Commission concludes that a more flexible regime, possibly in the form of the General Verticals Block Exemption, ie Commission Regulation (EC) No 2790/1999 (lithe Verticals Regulation"), would have ensured an equivalent level of protection of competition in the market, while entailing lower compliance costs for companies and a more efficient enforcement system for competition authorities⁹.

In this regard, the Commission fails to acknowledge that the preamble

⁶ Casos COMP F-2/36.820/37.275.

⁷ Page 13 and Annex 3 of the Report, ie the Commission's Staff Working Document No 3.3.1.1

⁸ Annex 3 of the Report, ie the Commission's Working Document No 3.3.2.

⁹ Page 14 of the Report.

paragraphs along with the actual articles and, most importantly, the underlying principles of the BER in the form of the Commission's initial objectives, have all contributed to the decrease in the number cases and the positive effects on the automotive market. The assumption that this could also be achieved under the Verticals Regulation is pure speculation, and by way of a metaphor it is the same as claiming that lamb in a fenced area would continue to be safe from the wolves even if the fence was brought down. It must be underlined that the current rules protect the achieved competitive state of the sector, not the behaviour nor the goodwill of the main actors, who vigorously compete for higher market shares.

3. OBJECTIVES OF BER 1400/2002

3.1 Multi-branding

According to the Report, multi-branding has increased only through large dealer groups and dealers who have the use of different showrooms.

On the other hand, the specific possibility created by Article 1.b) of the BER to sell several brands in the same showroom has not shown a sufficient increase to be maintained and an alignment with Regulation 2790/1999 would, on this point, also be logical.

In fact, it is much too early to conclude to uselessness of multi-branding in the same showroom(i). Moreover, the implementation of Article 5.a) of Regulation 2790/1999 to car distribution would be hugely harmful from a competitive point of view(ii).

- (i) A conclusion of uselessness of multi-branding in the same showroom would be neither fair nor exact.

The Report observes that this form of multi-branding has already had a significant development in certain brands which were not performing well and in sparsely-populated areas, such as Finland.

According to other sources, multi-branding has already shown a real development in other countries. For instance, a study conducted by Federauto (Belgium) of 842 of its members in 2007 shows that +/- 27% of them were

active in multi-brand sales (18.4% sells two brands; 6.5% three brands and 1.8% represents more than three brands). All these dealers do not, of course, sell these brands in the same showroom, but a scaling-up, a greater choice for the customer and the decrease of dependency on one brand, leads an increasing number of them to opt for this form of distribution progressively.

Moreover, it is premature to conclude that multi-branding in the same showroom has no economic interest if one considers that the conditions to develop this form of sale were only very recently specified. It is really through GM and BMW cases closed in March 2006 that clarification was given on major points, such as:

- trivialization of the inside of showrooms, the only exception being areas specially devoted to the display of cars;
 - prohibition of a requirement of double investment for the satisfaction of brand standards;
 - limitation of reporting obligations to prevent commercial espionage of other brands;
 - prohibition of sales target producing an effect similar to an indirect non-compete obligation.
- (ii) On the other hand, an alignment with Regulation 2790/1999, as suggested in the Report, constitutes a worrying prospect from the point of view of competition.

Regulation 2790/1999 allows a non-compete obligation for a period of five years (Article 5.a) within a ceiling of 80% of maximum annual purchases (Article 1.b).

Contrary to the statement of the Report (Content IV point 4.1.3), it is unlikely that the practices examined in the GM and BMW cases could have qualified as indirect non-compete obligations under Regulation 2790/1999. The estimation of the indirect effect is, indeed, necessarily very different if the non-compete obligation is exempted up to 80% or only up to 30%.

In fact, the implementation of the arrangements of Regulation 2790/1999 for cars' distribution would allow the manufacturers to require dealers to give up not only the sale of different brands in the same showroom, but even in separate showrooms, unless a separate company is created. The obligation would

probably have no important effect for large dealer groups, but could lead small dealers to go back to mono-branding without any economic justification.

It is also important to underline that the limitation to a period of five years for non-compete obligation exempted by Regulation 2790/1999 is not sufficient to prevent this risk. After five years of mono-branding, a dealer can rarely refuse to conclude a new agreement including a new non-compete obligation for five years. All the more so since the duration of the majority of the agreements proposed for activities covered by Regulation 2790/1999 are inferior or equal to five years. Consequently, the acceptance of a new non-compete obligation is generally the condition for a new contract perpetuating mono-branding

3.2 Independence of Dealers (MC)

The Report states that the "independence of dealers was not an aim of the BER in itself but its promotion was, instead, seen as a flanking measure to encourage pro-competitive conduct".

First of it, it must be pointed out that the European Commission has suddenly changed its view as regards the need to ensure the independence of dealers in order to reinforce inter-brand and intra-brand competition. One of the aims of the previous Regulations, ie BER 123/85 and BER 1475/95, was to strengthen the dealer's independence from manufacturers seeking to increase the dealer's competitiveness (Recital 17 of these Regulations). Moreover, the importance of this aim was reiterated in numerous instances in the Report of BER 1475/95, for instance, in the following paragraphs:

- (42) "Regulation 123/85 also tried to protect the dealer's economic independence from the supplier."
- (50) "The third aim pursued by the new Regulation is to strengthen the dealer's independence from manufacturers with the aim of increasing the dealer's competitiveness"
- (250) "(...)These provisions were introduced in 1995 in order to give legal certainty to dealers as to their contractual relations with car manufacturers and to better protect dealers' investments and give them a reasonable period to change their commercial activity."

What has changed since then? Nothing, except that the dealers and their investments are now protected thanks to some of the provisions contained in Article 3 of the BER. For more than 20 years, DG Competition has been concluding that due to the imbalance of powers in the relationship between distributors (dealers) and manufacturers/suppliers, the distributors needed more protection with the aim of increasing their competitiveness and for the benefit of consumers. On this basis, the provisions of the Block Exemption Regulations aiming to achieve this goal have been increasing since then.

The Report shows that the European Commission has now, unexpectedly, decided that the protection provided by the BER has not been used by the dealers and that it does not seem justified for any future regime to contain specific provisions analogous to those in Article 3 of the BER.

1. Right to transfer the dealership (Article 3.3)

According to the Report, this provision has proven ineffective in achieving the goal of fostering market integration and might have had undesirable side effects in contributing to develop the concentration of dealers at a local level, weakening competition.

In our opinion, this analysis is not well founded. The majority of distributors are small enterprises which are unlikely to develop their businesses in other Member States, when they have not acquired a sufficient size in their Member State of origin. Concentration of dealers is inevitable, especially taking into account the pressure of manufacturers in this respect. However, it would be preferable - in favour of competition - that concentration results from the initiative of all the operators and not from the exclusive control of the market by manufacturers (as happened up to 2002).

Therefore, it does not seem justified to eliminate the right to transfer the dealership, which can contribute to market integration, without having granted enough time for the full implementation of this measure and on the basis of a hypothetical risk to reduce competition in certain local areas.

2. Obligation to give reasons for contract termination (Article 3.4)

The Report does not state any negative effect of this obligation. It gives some arguments to defend the uselessness of this provision which appear pointless:

- (i) No examples or cases have been brought by the stakeholders in which this obligation to give reasons for contract termination permitted a judge or an arbitrator to determine that notice had in fact been given in order to punish pro-competitive conduct.

This provision contains a preventive measure and the absence of examples or cases, as indicated, confirms that it is actually working. Therefore, eliminating this measure is not justified.

- (ii) It would be irrational for vehicle manufacturers to have systematic recourse to contract termination as a means of "disciplining" dealers who acted pro-competitively but against the manufacturer's wishes.

This statement is not grounded at all. The overall behaviour of manufacturers (domination and total control of the relationship) evidences the contrary.

3. Minimum duration of contracts and notices (Article 3.5)

As well as the other provisions referred to above, the Report considers that it is doubtful that this provision has had much effect and bases this statement on the fact that in the vast majority of cases suppliers have given dealers indefinite contracts which can be terminated on two years' notice. Then, the Report continues saying that this provision "hardly gives much protection to a dealer's brand-specific investments" not supporting this statement with any argument. However, in the Report of Regulation 1475/95, the Commission was convinced that: "(51) an extension of the minimum duration of distribution agreements with limited duration from 4 to 5 years and an extension of the period of notice for termination of agreements concluded for an indefinite period from 1 to 2 years were introduced in order to better protect dealers' investments."

A justification of these statements should be provided.

4. Arbitration (Article 3.6)

The Report acknowledges the need and advantages of submitting the disputes between manufacturers/suppliers and distributors to arbitration by an independent expert. Therefore, eliminating this provision is not justified and less, trying to substitute this compulsory rule with the suggestion of

agreeing a Code of Conduct between the parties, which would not be compulsory or enforceable.

3.3 Consumer Interest (FK)

The Report has not evaluated the mobility rights of consumers, but refers to the mobility of their cars. Motor vehicles are the sole consumer products, which will travel at any time anywhere in the EU.

Motor vehicles are expensive and technically complex mobile goods which require repair and maintenance at regular and irregular intervals at any time (Guidelines to the BER, Nr. 21). This legitimate interest of end-users cannot be covered only with the BER 2790/1999.

The Report does not realise that warranties and free servicing work have to be done anywhere within the EU, not only for new cars, but also for older models, which are protected with long time warranties from national importers. Even Regulation 715/ 2007 and Directive 2007/46 cannot cover the need of mobility of the existing cars in the EU.

4. LEGAL PROTECTION

4.1 Abolishment of BER 1400/2002 (MH)

It is evidently clear that the BER has not been a tremendous success. In fact, it has probably even complicated matters in its nearly six years of existence. However, it must be pointed out that the BER has affected motor vehicle distribution in a consumer friendly way and is even favourable to dealers. Although small and medium sized distributors/dealers have lost ground, large and successful ones are making the most of the BER¹⁰. Renewal of the sector specific block exemption for the automotive industry is supported by the fact that all of the main market actors have learned to apply and interpret the current rules¹¹.

The general opinion of the Commission quite clearly indicates that sector

¹⁰ See, for instance, CECRA Press Release, page 1.

¹¹ For further guidance on this issue, please see *"Regulating Motor Vehicle Distribution under EC Competition Law"* by Matti Huhtarnaki, University of Lapland 2006, p 94.

specific block exemptions are relics of the past. Altogether, the Commission is moving in that direction by favouring fitting everything under the Verticals Regulation. Nevertheless, this type of radical change would entail unpredictable effects on the automotive industry. The Verticals Regulation was the structural example for the BER. Therefore, those two provisions are, in many ways, similar but by no means identical. Although the underlying principles are the same, the BER is more detailed and, to a large extent, stricter than its exemplar statute, the Verticals Regulation. The divergence of these two block exemptions is most apparent in Articles 3 through 5 of the BER¹².

Compared to the existing state of affairs, the sector would be subject to dramatic changes if motor vehicle distribution were to fall under the Verticals Regulation. Basically, due to the different market share caps, suppliers would most likely have to rearrange their distribution networks to fit under the Verticals Regulation¹³. Exclusivity combined with selective features would with great certainty resurface as the most popular distribution method amongst suppliers. Furthermore, dealers would almost completely lose the contractual protection and other advantages, which they have been able to benefit from under the BER. The link between sales and repair services could be reinstated by suppliers¹⁴, and, in addition, dealers could face losing the right provided by the so-called 'availability clause'¹⁵. Altogether, moving motor vehicle distribution under the Verticals Regulation would mean taking significant steps backwards in the competitive state of the automotive industry to the way things were before the BER or the sector specific exemptions that preceded it¹⁶.

On the positive side, the Verticals Regulation would in all likelihood simplify motor vehicle distribution agreements and clarify certain problems in the application stage. In this respect, the Commission is definitely on the right path. The BER is indisputably a part of EC competition law. However, it contains features relating to contractual protection which are outside the purpose of competition law and, instead, integral parts of contract law. If the Commission

¹² One of the most important differences between the Verticals Regulation and the BER relates primarily to the use of non-compete obligations in exempted agreements. Contrary to the motor vehicle block exemption the Verticals Regulation permits the use of non-compete obligations, which do not exceed five years in duration. For further guidance on this issue, please see *"Regulating Motor Vehicle Distribution under EC Competition Law"* by Matti Huhtamäki, University of Lapland 2006, pp 95-97.

¹³ See Article 3 of Regulation 2790/1999 and Article 3 of Regulation 1400/2002.

¹⁴ See Article 4(1)(g) of Regulation 1400/2002.

¹⁵ See Article 4(1)(f) of Regulation 1400/2002

¹⁶ For further guidance on this issue, please see *"Regulating Motor Vehicle Distribution under EC Competition Law"* by Matti Huhtamäki, University of Lapland 2006, p 97

desires to continue promoting consumer welfare and market integration through dealer independence and intra-brand competition, it must distinguish the line between competition law and contract law. Thus, the Commission should consider harmonizing legislation in all Member States in relation to the contractual law aspects of the BER¹⁷.

As the Commission has already indicated¹⁸, this could be done by drawing inspiration from the *Agency Directive*¹⁹ whereby actors in the retail market would be given substantial protection in issues, such as investments, contract termination, transfer of rights and dispute resolution. An amended Agency Directive that would, to a certain extent, also encompass distributors could act as a supplement to the Verticals Regulation and thereby give the Commission the ability to pursue separately the competition law aspects related to distribution agreements under one single block exemption²⁰.

4.2 National laws? (CG)

In the "Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC)", the Recitals state:

"Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the Community and are detrimental both to the protection available to commercial agents vis-a-vis their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agents are established in different Member States; Whereas trade in goods between Member States should be carried on under conditions which are similar to those of a single market, and this necessitates approximation of the legal systems of the Member States to the extent required for the proper functioning of the common market;

¹⁷ For further guidance on this issue please see "Regulating Motor Vehicle Distribution under EC Competition Law" by Matti Huhtarnaki, University of Lapland 2006, p 102.

¹⁸ See Annex 4 of the Report, ie the Commission's Staff Working Document No 4, 4.7.4, p 36.

¹⁹ See Council Directive 86/653/EEC.

²⁰ For further guidance on this issue please see "Regulating Motor Vehicle Distribution under EC Competition Law" by Matti Huhtarnaki, University of Lapland 2006, pp 102-105.

whereas in this regard the rules concerning conflict of laws do not, in the matter of commercial representation, remove the inconsistencies referred to above, nor would they even if they were made uniform, and accordingly the proposed harmonization is necessary notwithstanding the existence of those rules"

It was thus viewed necessary for law governing commercial agents to be harmonised to provide additional security for traffic in goods - and thus to protect consumers as well - as far back as 1986.

Barely 17% of all distribution systems in Europe as a whole still have agent status; this compares with 68% of all distribution systems having the status of a distributor. The rest are franchise or commission agents (of which there are only a small number).

In the automotive sector, this relationship is even more pronounced: merely one supplier (Daimler AG) uses the agent status as a distribution tool for its most important contractual partners, but this is by no means the case in all European countries. The agent status is otherwise still only used for the small garages of a few suppliers which work as authorised brokers. These account for considerably well under 5% of distribution. The status of distributor is thus used as the distribution system by more than 90%.

Enclosed we provide the Commission with a summary of the legal situation of distributors in a series of EU member states. This summary alone (which is not even complete - in particular it does not include the eastern European member countries) - clearly indicates that there are

- completely different legal situations and
- completely different bodies of national case law

in the member countries.

Reference to the fact that national courts have to perform a certain regulatory function will be stood on its head, however, if the basic rules themselves as contained in the BER are once again removed, as it will then all the more so be left up to each individual judge to decide what is "law" and what is not. This not only harms authorised contractual partners which are already fighting a defensive battle against powerful suppliers, it also hurts consumers: legal

uncertainty leads to greater costs, greater risk provisions and makes contractual products even more expensive than they already are at present.

In this connection, we must also take issue with the view of the Commission that the provisions in Article 3 should no longer apply in the Group Exemption Regulation in the future. It may well be the case that the independence of dealers from their suppliers is not the primary objective of the BER. The Commission was nevertheless of the opinion - at least in 2002 - that these provisions were necessary in order to increase the independence of distributors from their suppliers - ultimately to the benefit of consumers. The reasoning behind this was, in particular, that suppliers had abused their power and for this reason anti-trust provisions were needed. Nothing has changed in this regard. Although it is true that abuse of power has been reduced, the reason for this is to be found precisely in the guise of the BER. Otherwise it is apparent that abuse will once again begin to occur anew, as indicated by the fact that some suppliers are apparently already beginning to ignore the still-valid BER: several car-makers, such as BMW, Audi and Alfa Romeo, have raised their standards for the equipping of garages to a tune of more than €100,000 in cost per garage, justifying this, in some cases, by clearly stating that their intent is to reduce the density of the network of garages - ultimately at the expense of consumers and to the detriment of competition.

This will result in the following: as long as no other protection is provided to distributors against suppliers - for instance by extending the 1986 Council Directive for commercial agents to distributors, the provisions set out in Article 3 of the BER will continue to be of fundamental importance in providing a uniform legal framework in Europe.

4.3 Code of Conduct? (IT)

The Commission is indicating that a code of conduct could be an alternative to certain provisions of Article 3 of the BER. This is not a satisfactory alternative to a binding EC regulation. A code of conduct must be negotiated between each producer and the dealer associations for the different brands. Based on the strong negotiating power of the producers and the dealers' dependency on producers, this alternative appears to be an inefficient instrument to safeguard dealer independence of the producers. It is also an open question whether the different producers are willing to initiate negotiations for a code of conduct as long as they do not have an obligation by law. If a code of conduct is

concluded, neither producers nor dealers will be legally bound by the code of conduct. It is therefore obvious that a code of conduct cannot substitute binding law.

4.4 Changing the Agent Directive:

DG Competition does not seem to reject the need for dealers' protection; it just considers that this protection should not be included in an Exemption Regulation, which is a matter of competition law and not of contractual law.

Elimination of the dealer protection provided for in Article 3 of the BER could only be justified and understood (in spite of the Commission having maintained for years the need for this protection in previous reports) on the basis of changing the legal tool where these provisions shall be contained: for example, from an Exemption Regulation (competition law) to a Directive (contractual law).

Notwithstanding this, it is still the Commission's responsibility to offer and promote the inclusion of these provisions (for so many years broadened, developed and defended by this authority) in another legal framework, since these provisions have been proven to be needed and beneficial for consumers.

In this respect, the Report concludes that there could be other alternatives for the protection of dealer investments, such as making the sales agents' directive (Directive 86/653/EEC) applicable to dealers. In a footnote, the Report even indicates that, for instance, Article 17 of that Directive (relating to protection of investments) may also be extended to dealers.

As stated in paragraph 4.2 above, extending the legal scope of the sales agents' Directive is also justified on the same grounds given for the need of an agents' regulation in the Recitals of that Directive: basically, harmonising the law governing distributors in the European Member States, promoting a balance of powers between suppliers and distributors and providing legal certainty in the market, all these measures for the benefit of consumers.

However, this extension of the Directive shall not only cover dealers' investments' protection but also many other issues (some of them provided for in Article 3 of the BER), such as: minimum duration of contracts, contract termination, termination notices, economic compensations, disputes resolution,

etc.

Therefore, the European Commission should study, support and promote the adoption of the required legal measures which would substitute Article 3 of the BER in view of its possible disappearance.

5. CONCLUSION (AB)

Given all the above, the members of EDL hereby express their surprise in view of the observations and conclusions reflected in the Report on the BER.

It is very surprising that the circumstances on which the promulgation of the different and consecutive versions of the Block Exemption Regulations for the automobile sector was based, now seem overcome when DG Competition knows perfectly indeed that the relationships between the economic operators have not varied at all.

There is not one single ground in the Report that is able to support the elimination of the BER and able, instead, to justify the application of the General Regulation on Vertical Restraints (2790/1999) to the automobile sector.

In this sense, the General Regulation of Vertical Restraints - the effectiveness of which has not yet been assessed - does not offer any solution to the competition problems in this specific sector. It does not even guarantee the improvement of consumers' expectations.

It must not be forgotten that the provisions contained in Regulation 2790/1999 constitute a totally different approach for distribution systems and problems to the approach defended, promoted and implemented for the automobile sector, ie on the one hand, short-term contracts, non-competition clauses and exclusivity in the General Regulation on Vertical Restraints and, on the other hand, promotion of multi-branding and preference for selective distribution systems by suppliers with regard to the BER.

Promoting a voluntary "code of good practice" between the parties as an alternative for the provisions contained under Article 3 of the BER leaves us to

believe that the automobile sector is being viewed as the greatest failure of the guidelines and strategy of DG Competition, and the return to the situation in 1985, after having this authority watched over a reality for more than 20 years.

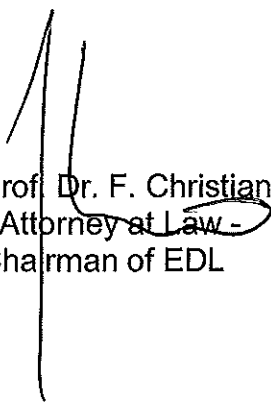
No one better than DG Competition can explain the reasons why there are not enough cases, arbitrations nor effective solutions to optimise the competition in this sector.

After such a long time, it is unbelievable that DG Competition should suggest that the regulation of markets should be left in the hands of the strongest operators. DG Competition also knows that there are not enough rules (if any) in the different Member States for the balanced regulation of the markets and effective competition in the automobile sector.

It is clear from this that the sector has been seized by "irrationality",

Even so, we believe in the need for a special and sector specific Regulation in view of known experiences,

Let us raise a question just as a way of reflection: Is DG Competition able to glimpse at what will happen in the sector in case the General Regulation on vertical restraints is made applicable?, Who would believe that this solution would benefit the consumer?



Prof. Dr. F. Christian Genzow
- Attorney at Law -
Chairman of EDL

Summary of the legal situation of distributors in several EU member states

Austria

Since a decision in 1989, the Austrian Supreme Court judges dealers like sales agents, if they are involved like sales agents as part of the distribution network, especially by contracts with exclusivity clauses.

Since Aug. 2003, § 454 Unternehmensgesetzbuch (commercial law) has given entrepreneurs, taking part in a vertical distribution system, a compensation for frustrated investments, which they was obliged to carry out by contract in the case of termination of the sales-contract.

At the moment, the protection of dealers depends mainly on the goodwill of the judges at the Supreme Court.

Belgium

Belgian law does not grant a sufficient protection for dealers.

The Belgian Law of July 27th only protects agreements of indeterminate duration and not those of determinate duration. Moreover, some lawyers consider that this law does not apply any more to car sector since BER 1400/2002 has come into effect.

Finland and Sweden

There is no statutory legal protection for distributors in Finland or in Sweden. Both countries have implemented the EU directive on Commercial Agents. There is no case law, where the Agent Laws based on the directive would have been applied to distributors based on analogy. In Finland there is, however, a Supreme Court decision from 1987 (KKO 1987:42) whereby the termination provisions of the previous Finnish Agent Law could be analogically applied to termination of a distributor. This means that such analogy for the benefit of distributors has by no means been ruled out.

Protection of investments made by distributors does not exist unless there are contractual provisions to that effect. There are, however, recent signs in both countries that the distributors have a growing interest in having their cases tried in courts (in Sweden: NJA 2007:99, NJA 2007:122).

Both Swedish and Finnish contractual jurisprudence and legal praxis rely on the duty of loyalty, which translates to the duty of good faith. Therefore, a distributor relying on the principal's representations about continued business relationship may have grounds to sue on abrupt and unexpected termination.

France

Two legal provisions protect the distributor but their effect is limited:

- Compulsory precontractual information (article L-330 of Commercial Law resulting from a law of December 1989).

The party who proposes an agreement including an obligation of exclusivity or quasi exclusivity in return of the use of a trade mark, must communicate at least twenty days before signing the agreement, a document including informations about its own firm, the main clauses of the future agreement (exclusivity, duration, termination), the network (in particular the number of distributors who left the network during the last 12 months and the

reasons for their departure) and foreseeable evolution of the national and local market for the products or services concerned by the agreement.

This legal precontractual information is justified by the fact that this type of agreements are concluded "*in the interest of the both parties*".

This notion is quite similar to the case law notion of the "*mandat d'intérêt commun*", on the ground of which the protection of commercial agents relied before the legal protection took place.

Nevertheless, since 1989 the Supreme Court has always refused to recognize a right to compensation to distributors similar to the legal compensation due to commercial agents. The Supreme Court considers that the effect of article L-330 of Commercial Law is limited to precontractual information and has judged in different decisions that the fact that this article indicates that the agreements concerned by its provisions are concluded in the "*interest of the both parties*" has no effect in case of termination.

• Prohibition against brutal break down of commercial relations (article L-442-6-I-5°) of Commercial Law resulting from a law of December 1986).

According to these provisions, termination of a commercial relation requires that "*sufficient notice*" is given.

Case-law considers that "*sufficient notice*" must be determined by taking into consideration two main elements :

- the importance of the relation (sales and/or profit) in the general business of the firm,
- the duration of the relation ; which is appreciated since the first agreement, if several agreements have been concluded.

Consequently, if the relations are very old, the notice can be judged insufficient, even if the contractual notice has been respected.

In case of insufficient notice, the compensation is the most frequently calculated on gross profit generated by the activity, less immediately reducible expenses.

Up to now, these provisions were not used on car distribution agreements. The situation would probably be different if article 3.5 of regulation 1400/2002 disappears.

2. Apart for this two legal provisions, there is no general protection for the distributors (who buy and resell) in case of termination of the agreement.

In case of recent investments, the French Supreme Court has judged in some cases that the termination was exorbitant, although the contractual notice has been respected. But those judgements are relying on the general obligation of good faith and are linked to an appreciation of circumstances case by case, and do not give a general protection for investments.

Germany

There is no legal protection for dealers by law in Germany, but by jurisdiction. Since 1982, the German Supreme Court (BGH) has stated that the law of agents (§§ 84 ff. Handelsgesetzbuch) finds corresponding use. There is one exception; ordinary termination periods are longer: a minimum of one year, depending to the circumstances of the contract up to two years.

Furthermore the Terms and Conditions Act controls clauses of a formular contract. This law is very strict and includes the obligation to use only clauses which are transparent and in good faith.

A special legal shelter for investments does not exist till now; court decisions are very differing.

Greece

Art. 14 § 4 of the recent law 3557/2007 stated that the provisions of Presidential Decree 219/1991 (which incorporated the Directive 86/653/CEE in the Greek legal system) is applied by analogy to contracts of representation of Services and to "exclusive distribution dealership" contracts, provided that the dealer acts, as a consequence of the contract, as part of the commercial organization of the principal. The question that arises from the application of this law is whether the application by analogy can be granted to other forms of distribution and specifically to contracts of selective distribution, as was the case until now. The majority of the jurists that commented on the subject are for the application by analogy, based on the ratio of the Law, but there is not respective jurisprudence yet. The minority's position is that, since the new law specifically recognizes the application by analogy on certain conditions only to contracts of "exclusive distribution" there is not an "involuntary legal void" that must or can be filled by analogy from the Judge.

Italy

At the present time, there is no specific legal regulation for the distribution contracts in Italy. The parties, hence, are free to regulate their commercial relationship, with only two general principles to be observed:

- the so called "vexatious clauses" (which are intended to reduce the responsibility of one party) must be approved in written form (art. 1341 and 1342 of the Italian Civil Code)
- parties should behave transparently respecting the rules of fairness and good faith (art. 1375 civil code).

The Courts, nevertheless, traditionally apply by analogy, the provisions expressly set forth by the law, to different kinds of agreements to other kind of contracts: supply of goods, contracts of sale, agency contracts etc., but for the time being, no indemnity or allowance is granted to the distributor upon termination of the agreement.

Norway

There is no special legal protection of dealers in the case of termination of the dealer contract, neither any protection of their investments.

However, some discretionary protection, might be found under special circumstances such as the principle of loyalty in contract and application of the Norwegian Act on Agency Agreements of June 19th 1992 (based on the EC directive) by analogy. The application of the Agency Act by analogy on dealer contracts has only been used in some very few cases and normally only in relation to exclusive/sole dealers. Also the preparatory acts of the Agency Act explicitly states that the Act could be applied on other type of distribution arrangements by analogy. However, the Act gives under any circumstances only limited protection for marketing efforts and not investments.

Portugal

The Portuguese Law does not foresee any specific legal regime applicable to distribution contracts. Therefore, such contracts are considered to be atypical contracts, which means, the parties are to regulate their commercial relationship according to the general principle of contractual freedom foreseen in article 405.º of the Portuguese Civil Code. The written agreements executed between the parties rule the existing commercial relationship.

Nevertheless, in order for the said agreements to be considered valid and in force, there are some legal requirements that must be observed (articles 406.º and 227.º of the Portuguese Civil Code):

- The agreement must be totally and punctually fulfilled;
- The agreement may only be amended or terminated by mutual consent of the parties or in the limited cases allowed by law;
- The parties must comply with rules of good faith during the negotiation and execution of the agreements; otherwise the non-complying party shall be responsible for all damages caused to the other party.

Furthermore, since there is no specific legal regime applicable to distribution contracts, the provisions expressly set forth in the Agency Contract Regime are applicable. The Agency Contract is ruled by the Decree-Law nr. 178/86, dated of July 3rd, further amended by the Decree-Law nr. 118/93 of April 13th.

Briefly, the Agency Contract implies that one of the parties – the Agent – assumes the duty to promote, on behalf of the other party, the execution of contracts, with total independence and upon the payment of retribution. The Agency Contract Regime establishes specific clauses determining the protection of the dealers, namely rules related to exclusive dealers, which allow the dealers to receive a customer indemnity upon termination of the agreement.

The provisions set forth in the Agency Contract Regime are also applied to other forms of distribution contracts that do not have any applicable legal regime, such as Franchising and Supply of Goods Contracts.

Furthermore, in similarity to the German law, our legal system foresees a special law, which controls the clauses set forth in non-negotiable agreements (i.e., Adhesion Agreements). This law is also very strict and includes the obligation of the parties to use simple and clear clauses in compliance with good faith.

Spain

As of May 2008, there is no law or statutory rule in the Spanish legal system which regulates the contractual relationship between a supplier and a distributor (a legal protection for dealers is not regulated by law).

Therefore, the only national regulation applicable in this matter in Spain is:

- General provisions on contracts and obligations in the Spanish Civil Code, and
- Spanish case law.

In general, the Spanish case law – with few exceptions – admits the application by analogy of the rules contained in the Agency Contract Law (Law 12/1992 of 27th May), especially under article 28 (compensation for clientele), to distribution contracts.

United Kingdom

There is no specific legal protection for motor dealers in the UK. There are statutes which apply to the sale and supply of goods or services, and unfair contract terms but no provision for payment of compensation for investments made on termination unless a claim lies for breach of contract or there is material non-conformity with the BER.