The Eurocouncil of the Fédération Internationale de l'Automobile
European Bureau

FIA response to the Commission Evaluation Report

on the Operation of Regulation EC N° 1400/2002 concerning Motor Vehicle Distribution and Servicing

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The European Commission is called upon to build on the existing motor vehicle block exemption regulation's (MVBER 1400/2002) regulatory framework and deliver further improvements to safeguard consumer choice and benefits in the automotive sector. European Competition policy must safeguard consumers' access to safe clean mobility by car that remains affordable beyond 2010

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Executive summary

FIA is the leading organisation for mobile consumers in the EU. We are concerned that the current momentum at the European Commission for reform of the motor vehicle sector is to remove much-needed and helpful sector-specific regulation. Removal of the Motor Vehicle Block Exemption Regulation (MVBER EC 1400/2002), and reliance on the Vertical Restraints BER (VRBER EC 2790/1999) and case law simply does not make sense, and puts at risk motoring consumers. As explained in this submission, our members have not been consulted appropriately on these changes. The report's limited evaluation of consumer detriment, inconsistencies between the report's in-depth analysis and its conclusions and the case made for reliance on general rules are strongly resisted. Instead we argue and call for a strengthened MVBER.

The interest of the FIA as a consumer representative

The Fédération Internationale de l'Automobile (FIA) as Europe's leading organisation for motoring consumers -and its member automobile clubs - have as their priority, affordable, safe, clean and sustainable mobility throughout the 27 member States. Some 34 million European citizens are members of FIA clubs and they depend on them for a range of consumer services and advice including breakdown assistance. These motorists are the owners of 20% of Europe's passenger cars. Across Europe on a daily basis, FIA clubs deal with members' queries regarding where and how to purchase their vehicles and after sales servicing issues. Moreover, the clubs' roadside assistance patrols answer to in excess of 10 million rescue calls annually. In the majority of cases, cars are put back on the road to complete the journeys started that day. Thus the FIA is well placed to respond to this consultation first and foremost as a representative of consumers. [1]

FIA is committed to safeguarding consumers' choice of vehicles that are safe, clean and affordable to purchase and maintain

Motor vehicles are the preferred transport mode accounting for 80% of all trips. In remote or rural areas, the car may be the only mobility option covering all needs. The car is generally the second largest investment for the average household. Apart from the purchase costs, repair and maintenance are key costs for motorists. Over the life of a vehicle the repair and maintenance will cost as much as the purchase price if not more. Stringent and mandatory safety and environmental standards require that cars be repaired, maintained and inspected regularly during their lifetime. Moreover well maintained vehicles are safer, more fuel efficient and less polluting. With cars becoming evermore technologically complex - effectively 'computers on wheels', repair and maintenance costs have increased.

1 In response to the London Economics Report, the FIA requested to be included in subsequent consultations as a consumers' representative body. It is indeed regrettable that in the 2007 fact-finding exercise, DG Comp did not consult FIA at all and the FIA automobile clubs that were contacted were consulted only in their capacity as independent repairers and not consumer organisations. It is worth noting here that the ADAC (an FIA member in Germany) with 15 million members (European citizens and consumers) is a registered consumer organisation in Germany. Only two of the 24 consumer organisations contacted responded. This low response rate is reflected in the dearth of consumer perspective presented in the various arguments of this review. If useful, FIA would still be ready to complete DG comp's consumer questionnaire for thebenefitof this evaluation exercise.

The competition policy framework governing the automotive sector must deliver affordable mobility to consumers via effective competition between all market players, competitive prices for vehicles and after market services and optimal consumer choice and benefit. The framework at present does not yet guarantee that, but the European Commission has moved ever closer to that goal with the establishment of the MVBER. To now cast these protections aside, and reply on a general framework regulation is worrisome, and the opposite of better regulation.

Any discussion concerning the future competition regulation of the automotive sector must recognise that for consumers, aftermarket services are as important as the distribution and sale of new vehicles. The average car on the road in the EU is eight years old (according to ACEA[1]) and no longer under warranty. Most cars sold in Europe are not new but second hand. Owners of such vehicles tend not to be ready to pay the premium rates of the authorised repair network but rather rely on the independent aftermarket for servicing, breakdown rescue, repairs and spare parts. Most of the suppliers of these automotive services suppliers tend to be SMEs (small and medium sized enterprises). Any changes in the future regulation of competition in the automotive sector that hampers them in competing fairly in their respective markets possibly even resulting in foreclosure, will of course be detrimental to consumers.

Relying on framework legislation that is not yet complete jeopardises consumers

In looking to the future, the European Commission's (EC) evaluation report formally leaves open the answer to how competition should be regulated post 2010 but clearly renewal and extension of the existing motor vehicle BER is not the Commission's preferred option. Instead, undue reliance is placed by reformers on a general vertical restraints BER (VRBER)[2] ; the general competition rules set out in articles 81 and 82 of the EC Treaty, Regulation EC N° 1/2003[3] flanked by other legislative measures that already exist or are currently in the pipeline. However, it should be noted that the VRBER will also expire in 2010. Review of this BER will not take place until a decision has been made as to the future of the MVBER, which adds an element of legal uncertainty and non-transparency to the current debate, which jeopardises consumers' rights, welfare and perhaps also safety.

Mobility, competition and consumer freedom of choice are essentials for a fully functioning market. Until the sector specific measures contained in the BER protecting consumers' welfare and competition are adopted in other legislation and fully implemented, a sector specific MVBER albeit in an improved form, remains essential.

1 The European Automobile Manufacturers Association
2 Commission Regulation (EC) N°2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices OJ L 336/21, 29.12.99 is also due to expire in May 2010 but will only be reviewed once proposals have been made about the future of the BER 1400/2002
3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 001, 04/01/2003 P. 0001 – 0025

Leaving individual consumers to safeguard their own rights exacerbates the imbalance of power between them and the vehicle manufacturers

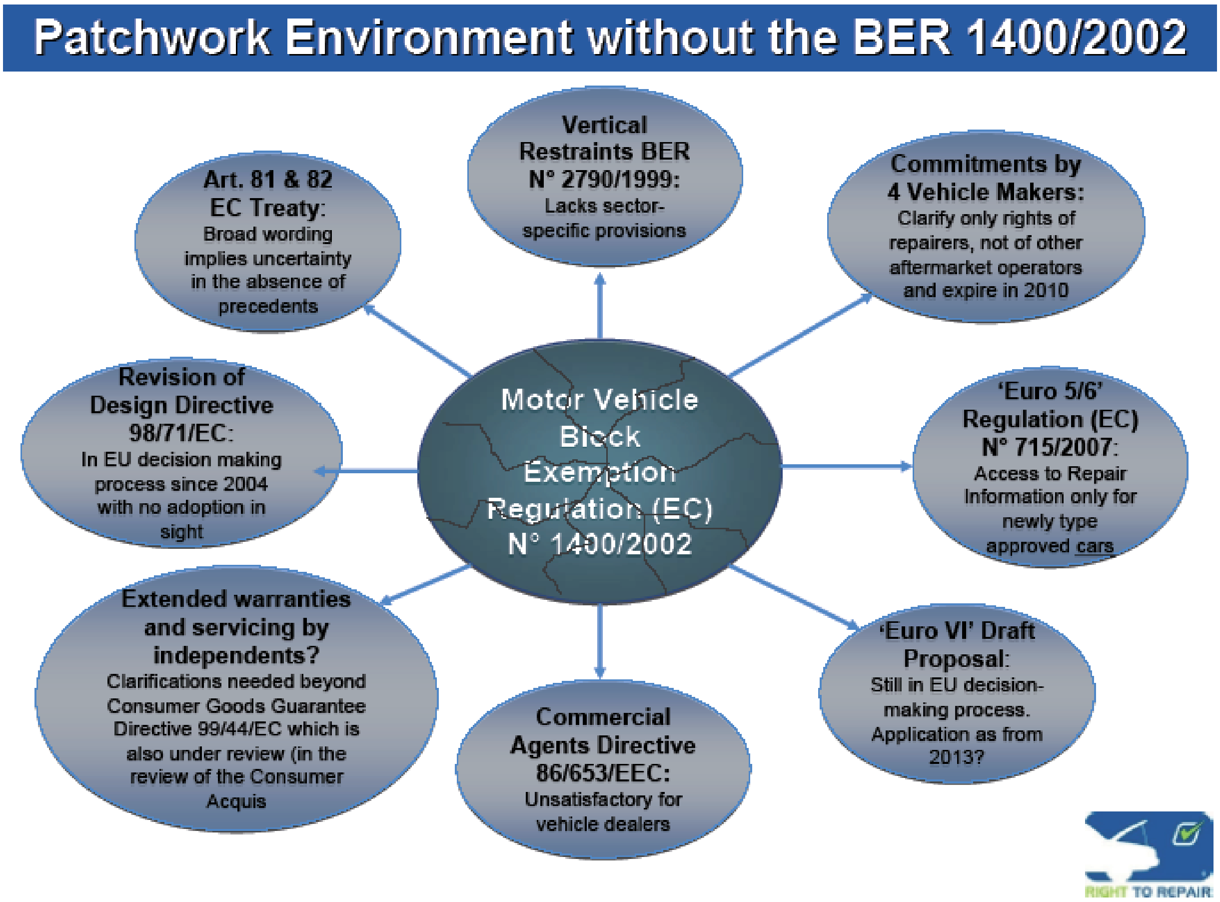
FIA fears that, without the clear rules of the MVBER, legal certainty and clarity will be compromised, for both consumers and suppliers. Regulation 1/2003 puts the onus on undertakings to conduct their own assessment of compliance with competition rules, a legally certain environment, and consequently the BER, is needed even more. The BER avoids the uncertainty involved in each stakeholder having to verify for themselves (at quite some expense) whether or not the criteria set out in the EU competition law are being met.

Removing red tape for businesses is laudable, but never at the expense of the safety and welfare of European citizens

The Commission defends its approach as “Better regulation”. This EU priority policy seeks to reduce the red tape, administrative costs and burdens associated with the European regulatory framework (particularly for SMEs). Improvement is targeted through simplification, consolidation or repeal of legislation with better enforcement of remaining rules. The MVBER is not redtape. For those who wish to use it, contrary to imposing burdens, the safe harbour that it offers provides legal certainty. Removal of EC Regulation 1400/2002 would leave the sector reliant on at least eight different regulatory or legislative measures some of which are still proposals waiting to be adopted (see table). These measures should not only be implemented by 2010 but that they should be fully functioning by this time to secure all the protections contained in the current MVBER covering consumer issues such as warranties and extended warranties, distance selling of vehicles over the internet, contractual relations between manufacturers and dealers, liberalisation of spare parts used for repair, legislation giving comprehensive access to data needed to carry out repairs etc. Effectively the current regulatory framework would be replaced by a legislative patchwork of measures that would weaken competitive market conditions and put consumers at risk. This is not “Better Regulation”. Reliance on a general vertical restraints BER and articles 81 and 82 would lead to even more litigation with all stakeholders including the Commission and national competition authorities mired in costly and burdensome legal cases.

Macro-economic forces that are increasing competition in the sector do not justify abandoning necessary consumer protection

FIA believes that the regulation of competition in the automotive sector provided by the motor vehicle BER remains needed. FIA is not satisfied that the Commission evaluation has demonstrated sufficient justification for the removal of the motor vehicle BER. The Commission itself decided to implement the BER in 1985, 1995 and 2002 because it considered that it was objectively justified. Bearing in mind that the Regulation was only fully implemented in 2005, it is difficult to see how the regulatory, operational or market environment could have changed to such an extent that the Commission should change its position on this issue. Indeed, to a greater extent, the Commission’s analysis shows that the MV BER has succeeded in attaining some of its objectives. However, other improvements to competition in this sector are due to macro-economic forces. What the MVBER provides, uniquely, is black and white, clearly defined rules, which are important also as a yardstick in commercial negotiations.



Without the MVBER, it would be even more difficult for weaker parties to press for certain results, and the influence of already dominant players would increase. The FIA believes that the BER was legitimate in 2002, that it still is today and that sector specific regulation will remain necessary in 2010. The specificities of the automotive sector coupled with remaining rigidities used as a justification by the Commission when adopting the previous BER still exist and quite likely will remain for some time in the future

The MVBER is unique and still necessary

The Motor Vehicle BER remains the only regulation fully functioning Europe wide that deals with key aspects affecting directly or indirectly the consumer interests concerning the purchase, maintenance and repair of motor vehicles. It has brought about multi-brand stores and even car purchasing over the internet. The mere existence of the BER has put a brake on many potential abuses of the competition in the automotive sector. Withdrawal of the MVBER would abandon consumers to market forces and legal 'protections' that they are ill-equipped to enforce. Application of a general vertical restraint BER would give vehicle manufacturers the benefits of exemption from normal competition without the obligation of having to respect specific conditions needed by independent operators and consumers set out in the motor vehicle BER.

Reviewing the MVBER is appropriate; abandoning it is not

Any review of the MVBER should ultimately seek to strengthen the competitiveness of all stakeholders in the automotive sector. Securing access to technical information is crucial. With the on-going development of in-car electronics systems and technologies, standardised open access to vehicle manufacturers data is crucial if independent repairers including the automobile clubs (members of the FIA) are to have a chance of competing and remaining in business to the benefit of consumers. Captive spare parts are still an issue recognised as hindering competition in the aftermarket.

Rather than getting rid of this sector-specific BER more should be done to improve it, thus giving greater legal certainty and clarity to consumers and operators alike. Warranties and in particular extended warranties still require further clarification and transparency.

The MVBER is not as strong as it needs to be, and has not finished its essential work

Even with additional guidelines and explanation, under the MVBER some practices are still not addressed properly. In our view, in the interest of better regulation, there is a greater than ever need to retain this sector specific block exemption regulation, although a more streamlined version may be possible, and we are willing to work with the European Commission to that end. Measures which have not provided optimal legal certainty and transparency should be either removed or made more precise and competition protection and benefit to consumers improved. Important provisions to the benefit of consumers covered by this regulation are simply not covered by other EU legislation to the same extent and it is unlikely that they will be by 2010 or beyond. Elimination of sector specific regulation would create problems, not solutions.

II. Improving the MVBER: strength not weakness

Detailed response to the EC Evaluation Report

i Introduction

While FIA clearly does not favour abandoning the MVBER for reliance on the general VRBER, it can offer direction in solving some of the MVBER's weaknesses that warrant correction, e.g. the various thresholds (below which selective distribution systems can be exempted) in the MVBER could be reduced to a single threshold of 30% as in the current VRBER.

The combined market share of the five largest vehicle supplier groups is much greater than 50%. In such circumstances, the conditions of article 81(3) are unlikely to be fulfilled because the market is foreclosed to price discounters and consumers have to purchase vehicles in high service/ high price outlets leading to reduced inter-brand competition between the five main suppliers.

In order to discourage multi-branding, vehicle manufacturers seem to have set exaggeratedly high qualification standards. However, in terms of the provision of repair and maintenance, distribution without the quantitative element has promoted much more competition and innovation especially in the independent aftermarket. Thus in this respect a slimmed down MVBER would benefit from the application of a single 30% threshold.

ii Multi-branding

***The Commission** concludes that dealers have not taken up the opportunities provided for by articles 1.1(b) and 5.1(a) of the MVBER to sell brands of competing vehicle manufacturers (i.e. multi-branding) from the same showroom to the extent desired. The Commission points out – as it does quite frequently in its report – that similar results could have been achieved under Regulation 2790/1999. It argues that sector-specific rules on multi-branding brought no additional benefits. It submits that without any sector-specific rules, the proceedings against BMW and GM would have been concluded with the same measures imposed on the two manufacturers.*

FIA Opinion

While multi-brand sales have indeed not developed to the extent desired, it is important to maintain specific rules preventing manufacturers from blocking multi-brand sales. The fact that multi-branding has been met with resistance from vehicle suppliers has also had an impact (see proceedings against BMW and GM). They have not encouraged or facilitated this development[1].

The application of sector specific rules is absolutely essential if legal certainty, transparency and competition are to be protected in the highly complex sector of automotive sales and servicing. Without specific rules, problems would have to be addressed under the much more general regime of Regulation 2790/1999, or Article 81 of the EC Treaty.

1 See MEMO/06/120, 13.03.06 Complaints against BMW and General Motors regarding contractual standards required from their dealers and repairers

Reasons for some of the problems identified may lie in revising the thresholds for the various types of selective distribution (qualitative and quantitative in particular), the contractual agreements drawn up with dealers and the prevailing climate. The start of the reference period saw quite some restructuring and consolidation of suppliers' dealership networks which afforded them the possibility to terminate dealer contracts at short notice while still controlling the numbers of dealerships in the network overall. The investment required by dealers to take on competing brands in such a climate where due tough inter-brand competition means low profit margins prevail clearly does not make multi-branding look appealing.

Reliance only on the current VRBER 2790/1999 would not have promoted multi-brand sales in the form provided for in the MVBER. Indeed, in the general VRBER multi-branding is not even recognised as being important for protecting competition. Articles 1(b) and 5.1(b) of the MVBER which restricts any 'non-compete' obligation on dealers where they are obliged to purchase more than 30% of their supplies from a single manufacturer. This is specifically intended to facilitate dealers wishing to sell multiple brands. Thus they are free to sell the vehicles of at least three different manufacturers. Under articles 1(b) and 5(a) of VRBER 2790/1999, a manufacturer can oblige the dealer to purchase up to 80% (or even more for up to five years) of his total purchases/supplies from the manufacturer.

Measures must be kept to facilitate multi-branding. Even if it has failed to materialise as intended, multi-branding remains in principle good for consumer choice and inter brand competition. It must be protected in the future. The Commission argues that this will happen anyway where it makes commercial sense. However, this does not necessarily equate with consumer benefit, for example consumers living in remote rural and peripheral regions (e.g. the Scottish Highlands and Islands) are losing dealerships irrespective of whether they supply one or multiple brands.

iii Distribution format diversity and selective distribution thresholds

The Commission *states that one of the objectives of the MVBER is the promotion of an increased diversity of innovative distribution format as a means of increasing intra-brand competition. According to the Commission, however, this was not confirmed in their studies. Virtually all manufacturers opted for quantitative selection. Also, there was little innovation and diversification within the selective distribution networks. The exclusion of the so-called location clause (Article 5.2(b) and the break in the so-called 'natural link' between supplying vehicles and providing repair and maintenance (article 4.1(g) has not resulted in any observable change in behaviour, since only a few dealers have used these opportunities.*

FIA Opinion

Intra-brand competition has not decreased but neither has it significantly increased where the sale of new vehicles is concerned. The Commission accepts that this lack of intra brand competition has been offset by increased inter brand competition. The decision taken by virtually all vehicle manufacturers to opt for a system of quantitative selective distribution which is more restrictive of intra brand competition is visible.

The dealers whose profit margins are close to zero have in addition faced increased competition from the vehicle manufacturers due to their direct selling activities in particular to leasing companies[1] who are able to negotiate and get better rates. Private consumers as opposed to corporate end users have benefited least from the absence of increased intra-brand competition.

Lower network density means consumers may travel further to obtain a lower price which cannot be significantly lower as generally dealers already have low profit margins and thus there is a limit to what they can pass on to the consumer in terms of reductions. Furthermore, since few dealers who sell cars have opted to subcontract out their repair business "a very lucrative part of their businesses" [2] it seems vehicle sales are being cross-subsidised by the dealers' servicing sector, paid for again by the private consumer.

It should however be borne in mind that the break in the former link coupled with the application of the qualitative selective distribution has been extremely beneficial for the development of the authorised repair network to the benefit of consumers. While consumers may be prepared to travel long distances for an interesting one off car purchase, when it comes to repairs, a higher density of outlets is preferred. Consumers generally are not prepared to travel further than a 30-40 minute journey for repair and maintenance work.

Thus, to set a clear signal for safeguarding competition and as a means of correcting some the of the current weaknesses of the current MVBER, there is a strong case to be made for applying a single threshold of, 30% to quantitative and exclusive selective distribution. With a market share of 30%, manufacturers could choose their dealer network on the basis of qualitative selection only. An example of the functioning of such system is the Czech Republic where the VW group exceeds the currently applicable market share threshold of 40% and only qualitative selection is admissible.

The observation that not many dealers have taken advantage of the exclusion of location clauses is, in addition to budget reasons, certainly due to the relatively short life of this exclusion (since 2005). The evaluation report only reflects the experiences made in a period of two years. Other factors should also be taken into account: greater convergence in the prices of new cars, increased investment requirements on the part of the dealers, development of the second hand market for pre-registered nearly new cars; lack of certainty for dealers in the period of general re-organisation by vehicle makers pre-2005 are not optimal incentives for planning new outlets cross border.

1 According to ACEA during the reference period "44% of all cars were sold to fleet owners and leasing companies – Staff Working Document 2.1.3 Evolution of consumption patterns
2 Evaluation Report ch.111.para B, p.5

iv Cross Border Trade in Motor Vehicles

The aim of the motor vehicle BER, according to ***the Commission****, was to promote parallel trade and remove obstacles in cross-border sales. The Commission concludes that parallel trade is no longer hindered and price levels have been largely brought into line. The Commission suggests that these are due to macro-economic factors, and the so-called location clause (article 5.2(b)) and the availability clause (Article 4. 1 (f)) have either been unsuccessful or not necessary in achieving the current situation. According to the Commission, the same results could have been achieved under the VRBER 2790/1999 without these sector specific measures.*

FIA Opinion

Following the entry into force of the current MVBER, ADAC, the German automobile club[1] observed that hardly any of their members complained about obstacles encountered in making cross-border car purchases. However, we understand that for dealers subtle obstacles still remain, for example, extended waiting periods for the delivery of orders for foreign residents or regional-based incentives included in the purchase price, such as free petrol for a year, which cannot be deducted from the purchase price offered to the consumer resident in another EU-country.

Germany continues to be a high-priced country where the purchase of new motor vehicles is concerned. But the fact that manufacturers no longer block parallel trade shows that the system under the motor vehicle BER functions quite well. In fact, there is no reason to change the regime. If more dealers opt to open retail outlets in other countries over the next few years, we expect prices to align even more. This would also strengthen cross-border intra-brand competition.

1 ADAC has a membership in excess of 16 million motoring consumers

Provision for consumers to buy either left or right-hand drive vehicles as part of the contract range in Member States where such vehicles are not supplied remains necessary.

There needs to be a definition for "contract range" to ensure that distributors do not lose sight of the fact that they can continue to supply vehicles which conform to the specification of the Member State from which the goods are ordered. This is not provided in the current VRBER and the case law cited by the Commission dating from the 1980s on indirect restrictions on reselling[2] did not prevent restrictions on the supply of contract range under the preceding MVBER 1475/95 prior to 2002[3] .

2 EC Evaluation Report (judgment of 28 February 1984, joined cases 228 and 229/82 Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission ECR (1984) 1129.)
3 See http://ec.europa.eu/comm/competition/car_sector/distribution/#fines many of the cases where fines have been imposed concern to some extent restrictions on the supply of contract range

v Competition between independent repairers and the authorised repair networks

In 2002, the Commission sought to promote competition between authorised dealers and independent repairers to the benefit of consumer choice and affordability. Two key tools essential for effective competition from independents were identified: access to spare parts and access to repair information. In its analysis the Commission concedes that provisions contained in the MVBER have helped the independent sector in a period of structural adjustment to changing technological needs.

The Commission concludes that the supply of original spare parts supply for independent repairers functions. Rights to access vehicle manufacturers' technical information needed for repair information has had a positive impact. However, as of 1st September 2009 when the Euro 5 and 6 Regulation takes effect, obliging vehicle manufacturers to release all such information for new models, the provisions (Article 4.2) of the MVBER will no longer be necessary since information on existing models should already be available thanks to article 4.2.

Further guidelines are also available from the four Commission decisions of Sept 2007 which set out vehicle manufacturers' commitments on providing technical information to independent repairers. Moreover enforcement of obligations to provide technical data could rely on articles 81 and 82 without the MVBER.

Captive spare parts (such as visible spare parts covered by the design directive or parts produced under subcontracting agreements) available only from the vehicle manufacturer have impeded aftermarket inter brand competition but solutions to these problems lie in the still pending Design Directive and a review of the Commission's subcontracting notice of 18.12.78.

FIA Opinion

The European market for the service and repair of vehicles was worth 100 Billion euro in 2004[1] . In it staff working document 4 chap. 4.4, the Commission confirms that independent repair outlets are important to European consumers, because they exert competitive pressure on the franchised networks. They are only source of inter brand competition to the vehicle manufacturers the authorised networks. For consumers, who mostly do not drive new cars, this competition is good for choice and affordability while retaining the quality essential for safeguarding the environment and road safety. This inter brand competition is heavily dependent on the independent after-market's access to vehicle manufacturers' technical information and original spare parts which during the reference period has not been optimal. Tough competition in vehicle sales seems to have led concerted efforts being made to recoup losses in the aftermarket services and repair market.

Article 4.2 has provided clear and specific rules regarding what repair and maintenance information is to be provided by vehicle manufacturers, how it should be provided and to whom. The rules cover all motor vehicles both passenger cars and commercial vehicles. This provision, essential to competition in the aftermarket sector, is not covered comprehensively anywhere else in EU legislation. Restrictions in the provision of access to technical information have had a major impact on the ability of the independent aftermarket to compete causing a decline in the number of independent operators and to the detriment of consumers.

Throughout the reference period FIA and other aftermarket stakeholders have fought for additional legislative measures to underpin the provisions of the MVBER but none are as comprehensive as the MVBER. Moreover, restricted access to technical information has already been the subject of enforcement action during the life of the MVBER. Allowing article 4.2 to expire without renewal in the absence of alternative measures facilitating optimal competition conditions would send a wrong message and threaten the viability of many in the independent repair sector.

The Commission report citing the four decisions binding GM, Fiat, DaimlerChrysler and Toyota to commitments regarding the provision of technical repairs information, points out that these obligations derive from general principles of competition law and not article 4.2. While these decisions are helpful for independent repairers, their effect is limited: firstly the commitments are only binding until 31 May 2010, and technically they concern only the four manufacturers which offered them.

1 Staff working document 2, chap. 2.1.2 The motor vehicle aftermarket

The decisions do not address the particular needs of those indirectly involved in the repair or servicing of motor vehicles, namely, providers of roadside assistance, manufacturers of multi-brand diagnostic equipment, publishers of multi-brand databases, or parts wholesalers supplying workshops with parts and related information.

The new Euro 5 and 6 Regulation (EC) No. 715/2007 does oblige vehicle manufacturers to provide repair information to the independent aftermarket but only for passenger cars and light commercial vehicles, and then only for newly type-approved cars models as of 2009 or later. These provisions do not cover the existing vehicle parc already on the road today nor do they cover heavy duty or commercial vehicles. Vehicle manufacturers will continue to collect and update data for vehicles not covered by the 'Euro 5' Regulation (EC) No. 715/2007, and provisions are needed to ensure that this data is also available to independent operators. Another remark to be noted is that the objective of this regulation is in principle to regulate car emissions. It is already envisaged that the access to technical data provisions will be reviewed with regard to transferring them in to the framework directive 2007/46. Thus the future of these provisions is not certain.

Contrary to the Commission's assessment, there are *not* major differences with regard to maintenance and repair between passenger cars and commercial vehicles with regard to user characteristics and user needs. Both sectors have authorised and independent workshops both have roadside assistance and repair organisations, both have individual and business customers, and both have fleet maintenance repairers. For example in Germany, up to 50% of the market is covered by independent repairers. In 2007, ADAC alone in Germany responded to 125.000 truck call-outs of all brands to provide roadside assistance. Similarly, independent repairers' access to vehicle repair and maintenance information is just as problematic as it is for passenger cars hence the reason why the draft Euro VI Regulation (COM (2007) 851 final)[1] governing truck emissions and access to technical information contains provisions, identical to those provided in the Euro 5 and 6 Regulation for light duty vehicles. Robust legislation that guarantees optimal access to the technical data required for repair in the heavy duty sector is needed as much as it is for the passenger vehicle sector.

In view of the highly technical complexity of vehicles, where independent repairers are in practice excluded from competing with authorised repairers an explicit antitrust regime is still required. It should go further than the present MVBER in covering all motor vehicles and requiring vehicle manufacturers to freely provide affordable standardised access to technical data needed for the repair of all vehicles and putting them back on the road. Most diagnostic repair tools are made by a very small number of tool makers to the brand specifications of each vehicle maker. Vehicle makers could and should make raw data available in a format which enables independent operators to include such data in their multi-brand products. The benefits to competition, cost savings to repairers and consequently to consumers would be significant.

Captive spare parts remain a problem in that these parts are only available to independent repairers via the authorised repairers and at consumer retail prices for original spare parts. Indeed, captive parts amount to a double marginalisation for independent repairers. Amendment of the Directive 98/71/EC on the legal protection of designs with **the "Repairs clause" proposed by the Commission in 2004 (COM(2004) 582 final) would resolve much of the problem** but this legislative proposal, on the table since 2004, is still not adopted and unlikely to be for the foreseeable future.

1 Proposal for a Regulation of the European Parliament and of the Council on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information

In the design protection debate it has been repeatedly proven that liberalization of designs of spare parts needed for repairs does not infringe IP rights. It would seem that recognition of IPRs is more important than foreclosure of legitimate downstream market competitors and resulting consumer detriment, dependency on the vehicle manufacturers branded parts must be addressed. Spare parts distribution under own parts contracts between a manufacturer and independent wholesalers has yet to develop, and is sometimes refused by vehicle manufacturers.

The Commission's evaluation does not seem to offer any solution to this on-going unresolved sector specific hindrance to fair competition. Again removal of the MVBER could send a wrong message. This issue could not be resolved within a general debate on design protection in 1998 and it will not be resolved by reliance on a general VRBER. Competition from independent repairers will additionally be restricted for long periods thanks to certain marketing practices within the authorised networks The development of long-term customer retention through the offer of specific packages of services is a clear trend among manufacturers. These include all-inclusive carefree packages, very long warranties, \matching warranty terms, etc. Such "additional services" are reflected in the purchase price. Overall inspection costs are calculated in a way to cover servicing in the package or warranty, but not parts repair which has a much higher profit margin. Via this relatively low-cost tool manufacturers are able to persuade consumers to have all work "voluntarily" done in an authorised garage. Legal clarification of this situation via an explicit provision in BER would be recommendable.

vi Competition within the authorised repair networks

The Commission also aimed at strengthening competition in the spare parts market by giving authorised garages the option to buy original parts either from the car manufacturer or from component suppliers. The Commission indicates that in practice this has not worked as most authorised garages continue to buy parts from the car manufacturer encouraged by special discount and bonus systems. According to the Commission, no potentially anti-competitive effects are at stake but possible efficiency-enhancing effects, which had to be accepted.

FIA Opinion

Experience shows that authorised repairers do not avail themselves of the possibility to buy parts from alternative suppliers. The obvious reason for this is that there are no incentives to do so, given the existing ordering arrangements and special bonus and margins systems. The report refers to cases in Denmark which had to deal with fidelity rebates, but does not render clear whether anti-competitive bonus/rebate schemes are a problem in other member states. Buying spare parts directly from equipment suppliers or wholesalers is not of interest as long as it would put the relationship with the vehicle manufacturer at risk, or where it would lead to financial consequences which an authorised repairer cannot afford. Therefore, authorised repairers shy away from using alternative sources of supply even where these offer quality products at advantageous price levels. This is to the detriment of consumers who have to pay higher spare parts prices. It has been clearly stated that the after market servicing and repair is by far the more lucrative aspect of the motor vehicle sector. The hard core restrictions in the MVBER covering this issue in the motor vehicle BER should be retained and modified such that they promote more competition in the spare parts market to the benefit of consumers.

Breaking the natural link between vehicle sales and servicing

The MVBER has been important in that it broke the presumed natural link between new car distribution and after-sales servicing and repair. Competition visibly increased after it was stipulated that garages meeting the qualitative selection criteria could have access to the manufacturer's authorised repair network.

FIA Opinion

This issue is not addressed in the VRBER but it would seem expedient to maintain this regime in which vehicle retailing and servicing are recognised as distinct markets.Access to authorised repair based purely on qualitative criteria in selective distribution systems where vehicle manufacturers exceed the 30% market share threshold, has in fact proved successful in promoting competition and innovation. There has been a rapid development of various types of multi-brand repair chains. Indeed some repair outfits have been created by manufacturers themselves. Consumers want access to conveniently located repairers (ideally within a radius of 30-40 minutes from home) when they are in need of repair or service work. Evidently the more competition in the market from both the vehicle manufacturers and independent repairers, the more consumer choice can influence the quality and affordability.

Spare parts producer's access to the aftermarket

The MVBER put a number of provisions in place to improve consumers' choice of spare parts from both original suppliers and independent parts producers.

FIA Opinion

The broadening of the definition of the term "original spare part" to include certain parts supplied by parties other than the vehicle manufacturer, as well as the ability of authorised repairers to source parts of matching quality, the possibility for authorised garages to sell spare parts of independent suppliers and the original spare parts purchase options for independent repairers provided in the BER were intended to enhance competition. However, hardly any improvements are noticeable on the spare parts market. It is nearly impossible to buy spare parts from independent producers in authorised garages. This is effectively prevented by particular spare parts agreements between the vehicle manufacturer and its authorised network (margin arrangements) and ordering systems. As seen from the London Economics Study prices for spare parts remain at a premium.

vii Dealer independence

The Commission *concludes that dealer protection was not an objective under competition law or the motor vehicle BER but merely a means to promoting more pro-competitive conduct. Consequently it is deemed that there is no need for special provisions.*

FIA Opinion

A regulatory framework without any dealer protection also involves certain risks for the consumers. If their contracts can be cancelled at any time without giving any reasons, dealers and garages incur considerable investment risks. With a view to ensuring consumer safety, however, certain investments in the equipment of a workshop are required. Since this also applies to independent repairers the question is whether or not, from a consumer's point of view, investments by authorised dealers or garages require particular protection.

viii New Car Warranties

Consumers should not be tied to a specific network of repairers or a certain brand of replacement parts for general servicing and repair of their vehicle even when under warranty. They should be free to have their vehicle serviced or repaired at the workshop, and with spare parts of their choice. Such choice requires that information and parts required for a particular inspection or repair job are indeed available to independent operators. Any agreement restricting their ability to source what the motorist requires should be considered incompatible with EU law.

As the European Commission stated in its Explanatory Brochure on the current MVBER, a vehicle manufacturer should not be allowed to make his warranty obligations dependent on the requirement that the vehicle being exclusively serviced in his authorised network. The Explanatory Brochure makes it clear that - for normal repair and maintenance during the warranty period - the vehicle manufacturer may not require either the use of specific spare parts, or the obligation that a customer must revert to an authorised workshop. These principles apply not only to basic statutory warranties, but also to extended long-term warranties (anti-corrosion, mobility etc.).

FIA Opinion

The provisions regarding consumers' rights regarding servicing and repair during the warranty period of their new cars are set out not in the MVBER itself but the Explanatory brochure . The guidance provided is not binding and has not been respected in full.

There have been continued problems with general principle that the validity of a new car warranty must not be tied to an obligation that a consumer must obtain all maintenance, inspection and repair services from an authorised garage during the warranty period. While some manufacturers simply do not accept this principle, other dealers/manufacturers demand exaggerated proof of proper servicing provided by independent repairers. It would be highly desirable to have some legal clarification here. Also, binding customers to a garage with so-called "all-round carefree packages" is a clear attempt to restrict competition. When purchasing a vehicle, Customers pay for a package consisting of the vehicle and all secondary services such as insurance and service or even repair work. Such offers plus rather long warranty periods with inspection and servicing cover are often included in the purchase price, or offered in special promotional campaigns.

The result is that independent repairers are excluded from competing with the authorised repair network for customers for the term of the package deal, which tends to be at least five years.

Inherent to such requirements is the risk of total foreclosure of the respective independent after-markets for parts and/or servicing. In Staff Working Document n° 2, the Commission rightly points out in its concluding chapter

"… part of the key to maintaining aftermarket competition lies in the hands of consumers, who until now have demonstrated a certain reluctance to turn to the independent sector, particularly for the repair and maintenance of younger vehicles".

This will only be possible when consumers have legal certainty and clarification about their rights regarding sourcing of parts, repair and maintenance of their vehicles. It is unfair blame consumers for not using independent repairers in the absence of clarity as to what renders their warranties or guarantees on these expensive and complex products null and void.

Further uncertainty is added when the warranty cover provided by the vehicle manufacturer is confused with rules governing after-sales guarantees (deriving from Directive 99/44/EC), rules which are also under review in the general EC revision process of the Consumer Acquis and hence could be significantly revised by 2010. Under such circumstances, consumers cannot be sure of their rights and from whom to claim them in the event of a product defect.

Legally binding rules included in a future MVBER are absolute essential to clarify this situation as guidelines do not work. In a recent case (November 2007) the German Federal Court of Appeals (Bundesgerichtshof) ruled that a limitation in a long-term warranty was compatible with consumer protection law - the decision did however not elaborate on the compatibility with Competition law, indeed competition law was not taken in account at all during the case.

ix Enforcement

The Commission focuses heavily on the high resource and effort (allegedly misdirected) put into monitoring and enforcing the MVBER without much success. It concludes that reliance on a general VRBER possibly with guidelines plus articles 81 and 82 of the EC Treaty would have been far more efficient and left more capacity for chasing real cartels.

FIA Opinion

The MV BER on its adoption put in place a new regime with which all stakeholders including the Commission had to become acquainted which of course takes time and involves a process of testing what can and cannot be achieved under the regime.

In a complex sector with players possessing largely different levels of market power, the MV BER sets out black on white clearly defined rules which serve to clarify the rights and duties of all players with the clear objective of protecting competition to benefit of consumers.

The MVBER contains provisions that are not found in the general VRBER which have contributed to improving the protection of competition:

- Non compete rules in the MVBER kick in at 30% where as (in cases in which the manufacturer holds a market share of less than 30%) they can be accepted up to 80% in the VR BER - which would not facilitate multi-branding

- OE parts suppliers' ability to sell their products as spare parts to the aftermarket is specifically promoted in the MVBER, and to a greater extent than is the case in the VRBER.

- The MVBER breaks the 'natural link' in providing both vehicle sales and after sales services.

- Contract range is provided for

- Article 5 of the MVBER insists contains specific conditions not found in the VRBER.

- Many of the hard core restrictions of article four, in particular article 4.2, are also not found in the VRBER.

Though these rules have proven difficult to enforce effectively have put they have clearly set out rules that should not be abused and thus have provided an important deterrent known and feared by all. The monitoring efforts of the Commission or national competition authorities may not have led to a large number of successful cases or official notices based on the MVBER but this does not take into account the large number of instances where by simply bringing an issue informally to the attention of the Commission or the national competition authorities has led to its resolution. The fact that every market player has known that the market is being watched has greatly influenced behaviour. Should this strict framework of rules disappear, the Commission could find that even more time is misdirected dealing with complaints at the EU and national level.

Moreover the lack of cases or formal notifications should not be taken as evidence of the market working sufficiently well to now remove the MVBER. Many market players who depend for business on their relationships with vehicle manufacturers (even if they have the economic means to bring an action) are reluctant to do so for fear of jeopardising the relationship that sustains their business. This is also applies to many SMEs who do not have the resources to bring actions where the final outcomes may take several years in which time they may have foreclosed.

The current general vertical restraints regulation does not address issues in detail specific to the automotive sector (such as access to technical information needed for repair). Supplementary provisions for the automotive sector would have to be included which may not be suitable for all sectors. The Commission has indicated that additional guidance could be developed.

Experience with guidance linked to MVBER shows that it does not bring legal certainty or transparency and more over as soft law does not have teeth – no sanctions are imposed if the guidance is not respected. In the absence of hard core restrictions set out in the BER, reliance on the treaty articles 81 and 82 would mean going to court for each individual complaint, thus making complaints prohibitively expensive for consumers and operators who are often small and medium sized enterprises. More over in the absence of cases and legal precedents, reliance on a case driven approach would mainly benefit vehicle manufacturers to the detriment of other market players and consumers.

Reliance on general rules and case law would also mean more work for competition authorities who would need to give guidance and ensure compliance with competition rules. Issues such as resource prioritisation and lack of confidence that costly investigations will lead to successful outcomes could allow sub-optimal competition conditions to prevail (e.g. clarification of the situation regarding new car warranties).

The Commission has had consultations with national competition authorities in the development of this evaluation report. It would be interesting to have an overview of the readiness of all 27 member states (with the very different levels of experience with regulating competition) to drop sector specific legislation in favour of reliance of general rules and a limited body of case law.

In any event, the Commission's enforcement actions and its continued readiness to monitor the markets and provide guidance are much appreciated. Without it, compliance levels would drop significantly. As it is essential for keeping mobility affordable, ensuring effective competition in the automotive sector should remain a priority for competition authorities.

III. Conclusions

***The Commission** concludes that a more effects-based and flexible approach to protecting competition in the motor vehicle sector would deliver better results for consumers by permitting better monitoring and compliance with simpler competition rules more consistently and coherently applied across the EU thus bringing higher levels of legal certainty. This approach would reduce compliance costs for all market players. Moreover removal of compliance with strict and superfluous regulatory constraints would lead parties to enter in to more cost efficient arrangements which would bring benefits to consumers. On this basis a future regime more closely aligned to that of the VRBER 2970/99 would assure the same levels of competition protection.*

FIA Opinion

The MVBER has put in place a regime that has met most of objectives and improved competition. As yet the situation is better than before but **not optimal**. Rather than replace it with a new regime so shortly after it was fully implemented, FIA would prefer to see the current regime extended in an improved more streamlined version, preserving the key sector specific principles protecting competition and consumer welfare. Weaknesses in the MVBER should be corrected.

Multi-brand sales have not established themselves as the Commission had hoped for although the development of clusters of sales showrooms in close proximity is beneficial for consumers. New distribution channels such as the Internet have not yet achieved full acceptance. A reason for this is that most consumers still prefer to buy a new vehicle from a dealer. However, as a communication and contact platform the Internet is of major importance for motor vehicles sales.

The Commission has noted a better convergence of prices but towards a higher level particularly in the aftermarket servicing and repair. The assumption that multi-branding and competing brands will lead to more price competition and thus lower prices for consumers is not always the case.

Competition in the aftermarket sector, still experiences a number of rigidities which must be dealt with if foreclosure and consumer detriment is to be avoided, most importantly warranties. The fact that quality is the only criterion for selecting authorised garages promotes competition. Enhancements are required for access to repair information. This also applies to competition in the spare parts market which could be promoted by dedicated regulations.

As outlined above, there is a strong trend of manufacturers to create customer loyalty towards authorised dealers by means of additional services marketed together with a new car. This may pose a serious threat to competition in the future.

Enforcers must have the means to regulate this problem

The Commission should not step back from sector specific regulation in the motor vehicle sector. Competition is not optimal (especially in the aftermarket servicing sector) for either independent players or consumers. There is an indisputable imbalance in levels of market power between vehicle manufacturers and other stakeholders. Reliance on the general VRBER and Articles 81 and 82 will not assure in this unique sector effective competition on each level of the automotive aftermarket which is of the essence when it comes to fostering innovation and keeping mobility affordable.