

**Response to the Commission's Evaluation Report**

**(dated 28/05/08)**

**on the operation of Regulation 1400/2002 concerning the  
distribution and servicing of motor vehicles**

**NON-Confidential VERSION**

**30 July 2008**

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**REDACTED VERSION**

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Market position and experience of Pendragon PLC

Pendragon PLC is a UK motor dealer group. Since 2000 we have held franchises of every vehicle manufacturer ("VM") of any significance for new car, repair and parts and for most new truck, repair and parts brands. Latest reported turnover of £5.1bn (2007) makes us the UK's No 1 in size. We also have the largest number of franchises in the UK. We have experience of virtually every type of dealer, authorised repair and parts franchise agreement available in the UK. Active in acquisition, disposal, set-up of green field operations and various non-franchised motor retail activities, we believe we have the widest experience of all European retailers of the operation of VMs' distribution systems. Our holding (until June 2007) of significant dealerships in Germany adds to this experience. We believe we are therefore uniquely placed to offer comment on the practical out-working of the MVBER<sup>1</sup>.

Purpose of this paper

This paper aims to offer practical examples of VM behaviour under the MVBER and our insights into: a) the impact of the MVBER on motor distribution in the EU; and b) the likely effect on competition if our sector were to be placed under the successor to the current general block exemption<sup>2</sup>.

1. We stress that the desirable pro-competitive activity now gathering momentum as a result of the MVBER must be preserved and built upon; and explain why some of its measures designed to promote competitive innovation have not, as yet, been taken up.
2. We illustrate the positive effects of the pro-multi-branding provisions of the MVBER on new entrants to the market and customer choice.
3. We contrast the differing behaviours of networks who have fixed term dealer agreements with those who have indefinite length appointments.
4. We point out the damaging effects on competition of weakening or abandoning certain features of the MVBER and draw attention to some likely (if unintended) adverse consequences of placing the motor retail sector under a regulation similar to the VABER without sector-specific guidance or provisos.
5. We make strong representations for a regulation which, both in theory and in practical outworking, produces certainty and clarity for all actors on the market. These are, in our view, prerequisites for "Better Regulation".

Also, as a member of the National Franchised Dealers Association, we firmly endorse the views expressed in their response to the Evaluation Report<sup>3</sup>.

**1. Improvements to Competition brought about by the MVBER**

From our UK experience we conclude that there is growing evidence of the positive impacts of the

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<sup>1</sup> This abbreviation is used throughout for the EC Regulation 1400/2002

<sup>2</sup> Regulation 2790/1999, abbreviated to "VABER", meaning the Vertical Agreements Block Exemption Regulation

<sup>3</sup> RMI National Franchised Dealer Association Response to be submitted on 31 July 2008

MVBER on competition.

We believe a review of the *current position* will demonstrate:

- an **increase in multi-branding**<sup>4</sup>
- a **willingness of dealers' and repairers' to exercise their rights to compete**
  - to help customers exploit the “availability clause”
  - to supply customers via their duly appointed intermediaries
  - to advertise via electronic means in a way accessible to all EU citizens
  - to challenge quantitative restrictions imposed on authorised repairer networks
  - to choose not to be exclusively tied to VM-sponsored suppliers<sup>5</sup>
  - to transfer their business to another network member
- an emergence of **stand-alone authorised repair activity**, not just resulting from the wave of terminations of full-service dealers due to the advent of the MVBER, but also as a result of operators' choice to shed the less financially viable sales operations and retain the more sustainable authorised repair activity
- an increasing **capability of some operators to source matching quality parts** (to use as an alternative to non-captive VM-sourced parts) and bring repair costs down.<sup>6</sup>

This is not to say the VMs have seen no success in their control mechanisms to limit these activities, but at least the clarity provided by the MVBER (or by the Commission's decisions on specific provisions) has provided some boundaries to VMs' controlling conduct. These developments have occurred in the face of what the Commission has acknowledged to be the VMs' increasing creativity in designing mechanisms of control over their networks<sup>7</sup>.

*Independence and certainty promotes independent action*

The boldness dealers have displayed in making the changes listed above has also been significantly bolstered by the MVBER's provisions designed to promote their increased independence from the VMs<sup>8</sup>. The areas in which dealers and repairers have most readily seized their opportunities to act pro-competitively have, unsurprisingly, been those on which the MVBER and early decisions such as *BMW/General Motors*<sup>9</sup> are unequivocal. These decisions provided important clarification that certain so-called quality standards were disguised quantitative restrictions. Conversely, one strand of this decision<sup>10</sup> has not borne fruit<sup>11</sup> because there is no explicit ruling on VMs' use of loyalty-inducing

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<sup>4</sup> See Appendix 1 compiled from “Who owns who in the retail motor industry” January 2008, a Sewells publication. We agree with the reasons given by Bilia AB of Sweden why same-showroom multi-branding has taken time to gather momentum, in paragraph 1 of its response to the Evaluation Report, dated 11 July 2008.

<sup>5</sup> Following on from the Commission's BMW and GM decisions, dealers and repairers began to appoint alternative system suppliers, as that decision clarifies that VMs were not correct to prescribe suppliers of systems, but only the capabilities of such systems. As owner of a dealer management system supplier, Pinewood Technologies, we have seen at first hand the freeing of the market for such systems.

<sup>6</sup> This is not to say that the VMs have seen no success in their control mechanisms to limit these activities, but at least the clarity provided by the MVBER (or by the Commission's decisions on specific provisions) has provided some boundaries to VMs' controlling conduct.

<sup>7</sup> See Paolo Cesarini's speech at IBC Conference on MVBER Brussels, 12 June 2008

<sup>8</sup> Articles 3(3) to 3(6)

<sup>9</sup> IP/06/302 and IP/06/303

<sup>10</sup> ie. the right of parts dealers to form joint stocking and joint purchasing arrangements among themselves.

bonus schemes, which are particularly prevalent in parts supply.

This demonstrates that where a regulation is clear and unequivocal, it will, in the main, be generally adhered to by the relevant parties. However, where an assessment of what does and does not constitute an acceptable practice is dependent on an analysis of broad principles (such as applying the concept of an indirect restriction on competition to a given set of circumstances<sup>12</sup>) rather than a simple reading of an explicit, binding ruling or a provision of the MVBBER, uncertainty arises. This is why VMs retain a significant degree of latitude to establish the alternative control mechanisms referred to<sup>13</sup>.

In our experience, the activities which have seen: a) the most sustained improvement, building on the measures first seen in Regulation 1475/95; and/or b) the greatest exercise of pro-competitive freedoms afforded by the MVBBER, are those for which there has been a co-incident of both the right economic circumstances and sufficient clarity as to what is likely to be regarded as an unacceptable restriction on competition. These are, in addition to those listed on page 2 above:-

- dealers' sale of leasing services<sup>14</sup>
- cost control through absence of VM being able to demand that a dealer's sales persons be brand-dedicated (unless paid for by the VM)
- intra-network dealer business transfers
- absence of VM bonus systems giving rewards based on the destination of the vehicle
- internal efficiencies, through dealers not having to establish a separate legal entity for each outlet

*Why have certain of the MVBBER's "freedoms" not been taken up?*

Unsurprisingly, the areas in which dealers have been slower to seize opportunities for pro-competitive innovation are those where either: A) it is not clear that there is sufficient business advantage to be gained by their innovating; or B) there is ambiguity (either in the MVBBER itself, or in Commission decisions interpreting it or relevant previous sector-specific regulations) as to the extent of the new freedom or the manner in which it may be exploited, in the face of challenge from a VM opposed to it (or a combination of both of these). These types apply as follows:-

No clear business advantage to change or innovate in the prevailing conditions (Type A)

- opening of additional sales and delivery outlets
- dealers sub-contracting out the authorised repair activity

Ambiguity under the MVBBER or wider European competition law / decisions (Type B)

- market access of independent parts suppliers
- dealer and authorised repairer challenges to bonus systems on the grounds that they can operate as an indirect restriction of competition, specifically, constraining multi-branding and the opportunity to separate sales and repair

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<sup>11</sup> As the Commission observes at paragraph 4.5.2 on page 24 of Staff working document No 4.

<sup>12</sup> As would be required to establish whether or not a particular bonus structure amounted to an indirect non-compete obligation; see paragraph 4.5.4 on page 26, *ibid*

<sup>13</sup> See note 6 above

<sup>14</sup> MVBBER Recital (30) and Article 5(2) (a)

*Why have dealers not taken up the “additional outlet” opportunity?*

The conditions prevailing in 2000 to 2002 indicated that the ability to open additional sales and delivery outlets was vital to promoting the availability of vehicles to all consumers across the EU. However, the spread of such outlets was undermined as a result of price convergence at lower levels, instigated by the VMs<sup>15</sup> as a defence to the threat posed by the uncontrolled proliferation of outlets. The business case for dealers to open such outlets therefore disappeared before the “location” clause was banned in October 2005. Although freedom of establishment was the principal objective of this Article<sup>16</sup> its beneficial effects, as felt in price convergence and are undeniable<sup>17</sup>. It follows that, if VMs’ right of veto over the place of establishment of additional sales or delivery outlets (Art 5(2) (b)) is removed, that would remove the main pressure on VMs’ pricing mechanisms and *price divergence* is highly likely.

**To conclude that a right to open additional sales and/or delivery outlets is unnecessary because it has not been used<sup>18</sup> is rather like arguing that, after continuous fair weather, a vessel’s new life rafts have never been deployed and are therefore unnecessary.**

*Why have the rights to operate as sales-only dealers or to sub-contract repair activities not been taken up?*

Before the MVBBER, the cross-subsidy of authorised repair to sales was manifest in the “mixed” incentive schemes, which rewarded authorised repair activity through sales activity-related bonus, principally margin on new cars<sup>19</sup>. These schemes are now expressly prohibited, but the need for cross-subsidy to maintain a viable sales activity remains, now even more so, as new car margins tighten. The continued cross-subsidy of the sales activity by the aftersales activity is a structural problem not capable of being solved simply by provisions such as the new freedoms introduced by the MVBBER in this area. However, this does not mean that measures intended to encourage intra-brand competition in authorised repair or to allow a dealer to innovate through concentrating on vehicle sales should be abandoned, as these support important objectives of the MVBBER.

The prevalence of the fidelity-enhancing bonus schemes for spare parts is directly attributable to the disconnection of sales and repair under MVBBER, but also accounts for the absence from VMs’ distribution systems of a parts-only distribution model. VMs have struggled to adapt their incentive schemes to produce a model suitable to an authorised repairer-only operation. To provide VMs with a powerful control mechanism over their authorised repairers, bonuses have long been weighted to parts *purchasing* (not sales) and all authorised repairer reward systems are entirely dependent for their effectiveness on parts margin and incentives.<sup>20</sup>

## **2. Multi-branding**

Although the Evaluation Report concludes that it is only dealer groups who take advantage of multi-branding, this is not a fair assumption. Whilst dealer groups have the greater opportunity to use their real estate portfolios flexibly, so as to optimise their return on capital by the best deployment of their premises, there are plenty of smaller operators who also multi-brand. In assessing the take-up of multi-

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<sup>15</sup> See further comment on this at paragraphs 4.3 and 4.4 below

<sup>16</sup> Recital (18) MVBBER

<sup>17</sup> The loss of the right to veto additional sales and delivery outlets were signalled in Mario Monti’s speech of 11 May 2000 Speech/00/177 and the trend in price convergence reached its lowest point in 2003, upon the full implementation of the MVBBER (excluding the banning of location clauses) (source ICDP: London Economics/Eurostat).

<sup>18</sup> Staff working document No. 4 pages 11, 15 and 17

<sup>19</sup> This was recognised in the reasoning behind MVBBER Art. 4(1) (g) & (h), in Recitals (21) & (22)

<sup>20</sup> Parts sales are by far the VMs’ most profitable activity, especially in comparison to new car sales.

branding, it is not the percentage of *all dealers* in a member state but the percentage of *all dealers with the potential to dual- or multi-brand* that should be considered<sup>21</sup>. A significant number of operators must be dismissed as VM-owned, and therefore having no such desire. The ability of VMs to prescribe or favour dualling or multi-branding from their own “stable” of brands<sup>22</sup> also eliminates a large number of dealers’ potential to do genuine multi-branding<sup>23</sup>.

There are many considerations involved in a decision to dual- or multi-brand: space requirements, attractiveness of the site to the VMs whose brand(s) you propose to add, presence and effectiveness of other same-brand outlets in the area, workshop capacity, and “fit” of the brands together, in terms of the type of customer they will attract. Business viability or strategic factors will determine the ultimate decision, but the choice to multi-brand is usually immediately beneficial to the consumer, through improved access to greater choice (whether under one roof or several) on the same site. The current rules also allow experimentation with the mix of franchises on a site, particularly helpful to emerging brands, for which entry to the market is undoubtedly eased<sup>24</sup>.

However, it is not fair to conclude that *all* multi-branding consists of weak or emerging brands placed alongside established ones<sup>25</sup>. Multi-branding is essential to provide choice and availability to consumers in areas of strict planning control and/or lower-density or lower-affluence populations. Metropolitan, high-visibility sites also show a higher incidence of multi-brand representation. In each case, the scale of operational efficiencies gained is substantial, as a range of back-office and logistical activities and costs are shared. **It is therefore inconceivable to us that consumers would benefit from a return to physical or site separation<sup>26</sup>. Such a move would lose all the synergy benefits of dual and multi-branding and its positive impact on both inter- and intra-brand competition.**

### 3. The distorting effects of Fixed Term Dealer Agreements

Permitting VMs to select a fixed term agreement excuses them from the obligation to motivate<sup>27</sup> non-renewal. The (perhaps unintended) consequence is to give such VMs disproportionate control of their networks. To illustrate, it is commercially untenable for a dealer to be unaware in July whether he will still have a dealer agreement six months hence<sup>28</sup>. Every dealer therefore acts for the whole of the contract term as if his dealership will be in jeopardy if he displeases the VM, such as by pursuing pro-competitive actions not favoured by the VM. VM expressions of displeasure are swiftly followed by dealer compliance. The positive developments listed in paragraph 1 above are hard to find in these VMs’ networks. A fixed term contract regime therefore provides the VM with an additional and significant layer of control over dealers’ competitive actions even though, on the face of it, the fixed term appears to be purely a commercial arrangement.

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<sup>21</sup> For a fuller explanation of the effect of this, see Appendix 1.

<sup>22</sup> As is increasingly common with General Motors and has long been the case with the DaimlerChrysler grouping

<sup>23</sup> Having excluded dealer sites affected by these factors, the true percentage of UK dealer with three or more sites who dual- or multi-brand rises from 10.35% to 14.73%

<sup>24</sup> We provide further detail on our specific experience with the Kia brand at paragraph 4.2 below.

<sup>25</sup> See in particular Table 2 of Appendix 1, which also shows established brands’ dealers’ tendencies to multi-brand.

<sup>26</sup> There would also be a return of the possibility of VMs’ insisting on each brand being held by a separate legal entity, as was the case under Regulation 1475/95 which, in itself, increases complexity and therefore cost, which the dealer would have to absorb or pass on to the customer.

<sup>27</sup> That is, to give detailed, objective, transparent reasons for termination of a dealer agreement

<sup>28</sup> Yet this is the dealer’s position, as the VM is obliged to give only six months’ notice of non-renewal, under MVER Article 3(5)(a). This creates a double standard when compared to the requirement in Article 3(5)(b) that indefinite duration agreements that a termination notice specify detailed, transparent, objective reasons.

To preserve and promote competition, dealers' freedoms to pursue innovation such as multi-branding must be set in an environment in which they can be practically pursued. A replacement regulation which replicates the current position on agreement duration<sup>29</sup> will allow the continued stifling of competition by VMs who adopt fixed term agreements. Furthermore, VMs who envy the enhanced control enjoyed by the two VMs currently operating fixed term networks may migrate to this model under a new regulation, causing proliferation of the adverse effects described above.

**Proposal – VMs electing for a fixed term agreement may do so on two conditions:-**

- **notice of non-renewal must be motivated with detailed, objective and transparent reasons; and**
- **notice of non-renewal must be a minimum of two years.** This echoes the NFDA's view.

Benefits

- VMs who wish to do so will continue to enjoy any perceived efficiency benefits of having to arrange their entire network expire at the same time (on expiry of the fixed term).
- Dealers in fixed-term networks will have the confidence to pursue more innovative distribution strategies, in the knowledge that VMs will find it more difficult to victimise them for engaging in pro-competitive behaviour. VMs will still be able to terminate for genuine reasons.
- Consumers can be sure that the range of goods and services available at their local dealer (in addition to the new car and a competent repair service) are offered out of genuine choice, because of suitability to the market, not because the dealer is tied into VM-prescribed add-ons which increase costs and impede competitiveness.

**4. Likely unintended consequences of bringing the motor retail sector under the general exemption.**

Whilst it would be presumptuous to assume that the VABER will continue unchanged beyond 2010, this and general EC Treaty Articles are all that is currently available for the purposes of assessing what might "do" in the MVBBER's stead. We aim to demonstrate that, contrary to the Commission's assertions, these instruments do not *in fact* meet the case for effective competition regulation of the motor retail sector, and that therefore some changes to the general exemption regime will be required, otherwise important competition benefits will be lost.

**4.1 Multi branding: (whether from same showroom, same site with physical separation or separate sites)<sup>30</sup> will be lost under a general regulation**

The right to multi-brand has no equivalent in the VABER or general competition regime; the VABER, has an 80% definition of non-compete obligation<sup>31</sup>. Applying it to the motor sector would, in practice, impose 100% loyalty to a single VM's brand, due to the unviability of a dealer's operating on the basis of 80:20 Brand A: Brand B. This would constrict choice long-term by making it difficult for brands

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<sup>29</sup>Article 3(5)(a)'s nearest equivalent is VABER Article 5(a), under which a non-compete obligation (defined as a purchase requirement of over 80%, in contrast to the 30% under the MVBBER) has a maximum five year duration.

<sup>30</sup> MVBBER Articles 5(1) (a) (b) and 1(1) (b); on multi-branding generally we concur with the NFDA Response.

<sup>31</sup> In contrast to the MVBBERs 30% definition, in the case of new cars and parts

(particularly new brands or those with a relatively small foot-print) to enter or expand in the market. Moreover, the Commission's apparent reliance on a belief that multi-branding was possible before the MVBBER is worrying and, in our experience, not based on fact<sup>32</sup>.

#### **4.2 Inter-brand competition through new market entrants will be damaged if multi-branding in its current form is lost**

The new car market is poised to receive more new entrants from India and China. To our knowledge, two such VMs are at an advanced stage of preparation for setting up their UK networks. Imagine the impact on their plans if they see the flexibility which allowed Kia and Hyundai successfully to enter being threatened by the Commission's proposal to have no outright statement in the new rules restraining VMs from physical brand-separation. At one point our Group held eight Kia representation points, configured with more established competing brands as: six same-showroom, and two same-location points. Our boldness in pursuing and at least partially executing this plan was directly derived from the "same-showroom" rules.

**The Evaluation Report makes a number of errors if it regards as expendable the specific rules encouraging multi-branding: it over-plays the (unspecified) adverse impact of so-say "over-prescriptive" rules on same-showroom multi-branding; it has not taken account of the fact that an 80% non-compete definition means putting a stop to multi-branding and even dual-branding; and also underestimates the momentum now built by multi-branding<sup>33</sup>.**

#### **4.3 The abandonment of the availability clause<sup>34</sup> will reverse gains made for consumer choice and price convergence**

The Evaluation Report's dismissal of the relevance of this provision, aimed at guaranteeing to every consumer the right to buy a vehicle of the model and specification of his choice, if it is marketed anywhere in the EU<sup>35</sup>, relies strongly on the Commission's assumption that the price convergence seen in the three year period before the MVBBER came fully into force is a permanent feature of the market. This is not a safe assumption. We comment further at paragraph 4.4 below. As regards availability, a consumer's need to obtain supply from another Member State is usually as a result of higher prices at home. To conclude that the availability clause has done its work and is now irrelevant is placing too much reliance on the future effectiveness of the *Ford of Europe*<sup>36</sup> case and an apparent belief that price convergence at the lower level will not, in any circumstances, reverse.

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<sup>32</sup> At page 3 of Staff working document No 4, the Commission observes that same-showroom multi-branding existed before the MVBBER came into force "since it was in the interest of both dealers and manufacturers to adopt such a model", implying that these specific provisions supporting multi-branding are not required. We question this conclusion, since no evidence to support it is offered. In our experience, under Regulation 1475/95 the only same-showroom display of vehicles of different "brands" was that of brands from the same VM's stable of marques (such as Mercedes-Benz when it added smart; or BMW, when it acquired MINI). Even so, the VM's preference was always for a discrete physical presence, however small, known in the trade as a "pod", liveried with the brand signature and get up. Our consistent 20-year experience is of VMs' strong desire to preserve brand separation in almost all circumstances.

<sup>33</sup> This may be due to the use of data which is not up-to-date; see Appendix 1 for more detailed analysis of multi-branding in the UK market.

<sup>34</sup> MVBBER Art 4(1)(f)

<sup>35</sup> This makes it a hard core restriction for the VM to refuse to sell to a dealer in Member State A a model of vehicle he sells to a dealer in Member State B, which is in the same brand network.

<sup>36</sup> A 1984 judgement quoted at footnote 28 to paragraph 4.3.4 of Staff working document No. 4

#### **4.4 The removal of freedom to open additional outlets will result in price divergence**

In our view, it is clear that price convergence is a direct result of VMs' adaptation of their pricing mechanisms as a defence to the removal of the location clause<sup>37</sup> (and not, as the Commission assumes, largely due to global and market forces). Therefore, unless some measure similar to MVBBER Article 5(2) (b), permitting the establishment of additional sales and delivery outlets is reproduced in any new regulation, VMs will revisit their pricing strategy and a re-emergence of significant price differentials is highly likely. The knock-on effects of this would be not only an increase in cross-border intermediary activity (a good thing in itself, if it benefits the consumer) but also, crucially, a tendency on the VMs' part to develop indirect means of restraining cross-border dealer sales. It is evident that where a prohibition is not made explicit, VMs have a tendency to assume it does not affect them until proven otherwise, following a challenge<sup>38</sup>. Placing reliance on the broad principle of Article 81 to restrain this tendency does not, in our view, provide an adequate safeguard.

**Availability of the model of his choice at the most competitive price to any EU citizen is a crucial right whose protection should not be left to broad principles, or the small print, or to unsafe assumptions about VMs' future conduct on pricing.**

#### **4.5 Separation of sales from aftersales<sup>39</sup> cannot be presumed; the “re-bundling” of these activities likely under a general regulation will reduce the opportunity for multi-brand aftersales and stand-alone authorised repair and impair intra-brand competition in authorised repair**

The Commission approaches this subject from the perspective of the repairer activity, having dismissed the importance of the dealer's right to subcontract repair services<sup>40</sup> and the prohibition of a VM under a qualitative system to require authorised repairers to carrying on sales activities. However, in a quantitative distribution network it would still be open to the VM to insist the dealer carry on repair activities (absent the right to subcontract them). Our impression is that the only impediment to this would be the risk of a finding by the competition authorities that it was anti-competitive, following an effects-based analysis at the instigation of a dealer willing to fund such a challenge.

**Generally speaking, it is our concern that, if the more permissive regime of a general regulation is (as appears likely) regarded by VMs as bringing many of their indirect restrictions on competition “below the radar” of regulation<sup>41</sup>, these indirect behaviours<sup>42</sup> will grow, to the detriment of competition.**

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<sup>37</sup> Signalled by Mario Monti in his key note speech in May 2000 (Speech/00/177) and effective from October 2005

<sup>38</sup> As was the case with the quantitative restrictions General Motors and BMW included in their contracts, until these VMs were required to remove or clarify them (IP/06/302 and IP/06/303)

<sup>39</sup> As supported by MVBBER Article 4 (1) (h).

<sup>40</sup> Article 4(1) (g), on which we comment in detail at page 4 above, regarding the dealers' lack of take-up of this right.

<sup>41</sup> This is because any scrutiny of VMs' their practices will depend on an individual challenge by the weaker party and an effects-based analysis by the relevant competition authority

<sup>42</sup> This has already been noted by the Commission in the context of bonus scheme design, by its comment that, for a case falling under Article 81, an effects-based approach would apply (at paragraph 4.5.4 page 26 of Staff working document No. 4)

## 5. Better regulation: the case for clarity and certainty

**Better regulation must also mean clear regulation. To be effective, regulation needs accessible rules, and parties must be able to understand and apply the rules without reference to courts and competition authorities.**

Simplification is no good if it leads to ambiguities, as it will always be the weaker parties and consumers who will find it difficult to enforce their rights. The Evaluation Report asserts that, in combination, the existing elements of the vertical restraints regime and general competition law principles will give us more or less the same result as the MVBER; and that where they do not, it does not matter. In the light of our comments, particularly in paragraph 4 above, this is not convincing. Though some of these existing alternative sources of guidance or hard law may, on the face of it, provide partial coverage of the competition concerns addressed in more detail by the MVBER, they are no substitute for a clear set of rules (in whatever form) accessible to all players.

Borrowing from Mario Monti's illustration of the intentions of the MVBER<sup>43</sup>, rather than placing the consumer in the driving seat, a general vertical restraints regime without, at the very least, clear sector-specific guidance, will place the consumer at severe risk of harm as he takes to the road:

High level rules will exist: such as which side of the road to drive on and a maximum speed limit, say 120kph. However, within a lighter touch system of general regulation, VMs can otherwise set their own speed limits and rules of the road within certain broad principles such as "do not endanger life". In this analogy, the VM drives the most powerful vehicle on the road. The VM with an aggressive or optimistic interpretation of the broad principles will drive at 120kph, whatever the conditions, as it is not clear when he can be made to slow down or fined for excessive speed. A case by case analysis will be applied retrospectively to decide whether or not on a certain road, at a certain time and in certain specific conditions, it was lawful for him to drive at 120kph, in view of the effect on risk to other road users and the public. The people bringing the cases will not be the authorities, but other road users or pedestrians, paying from their own resources to bring a challenge via a civil action.

**Applying a general regulation may be simpler than the MVBER, because it is less prescriptive but it is undoubtedly more dangerous. The casualties of such a loose system will be consumer choice, availability of all models across the EU, price convergence and access to cheaper parts and local repair services.**

Expecting the sector to apply general principles will, in practice give rise, not to better regulation, but to self-regulation by the VMs<sup>44</sup>. Past experience shows that, left to themselves, VMs choose strategies that do not best serve competition or consumers. VMs will be assessing their own market shares. They will be making judgements on what might amount to a direct or indirect non-compete and establishing arguments to support the benefits and efficiencies of their chosen systems, using data inaccessible to and therefore incapable of challenge by, the other, weaker, players in the marketplace. VMs' natural tendencies are to push their practices to the limit of (and often beyond) what is permissible<sup>45</sup> and wait to see if they are challenged<sup>46</sup>. Due to the imbalance of power and "fear factor" among dealers and parts

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<sup>43</sup> Mario Monti SPEECH/00/177 "Who will be in the driver's seat", Brussels, 11 May 2000

<sup>44</sup> This is so, since the VMs will have even more latitude to design the distribution systems and continue to enjoy their ability to prescribe (in virtually non-negotiable form) the dealer agreements and all ancillary arrangements such as vehicle funding and bonus systems and to determine number of dealers admitted to their quantitative networks.

<sup>45</sup> As may be seen from the BMW and General Motors practices held as unduly restrictive, in March 2006, which the VMs in question were happy to pursue and defend until the Commission's decision.

<sup>46</sup> This has been evident from various VMs' loyalty-including parts bonus system which the Commission has privately

suppliers, challenges of VM practices in the context of the MVBBER have been few, but nonetheless significant, and the resulting Commission decisions or published guidance have improved certainty for dealers and repairers. However, it would be invidious for such a major sector, with such a significant impact on consumers, to be left in future to depend so disproportionately on case by case, effects-based analysis<sup>47</sup> to determine what behaviours are (and are not) damaging to competition. The Commission has expressed its view<sup>48</sup> that the unwelcome (for dealers) VM reaction to an over-prescriptive MVBBER is to find other mechanisms to regain the control weakened by the MVBBER measures designated to curb the VMs' previous "abuse of powers"<sup>49</sup>.

**It seems to us illogical to conclude that such VM tendencies will evaporate under a *less* prescriptive regime. Indeed, because of the degree of self-policing required under the Commission's proposed general regulation, we believe that the scope for even greater VM innovation in designing control mechanisms will radically increase, not least due to the relative inability of affected parties to mount a realistic challenge, using their own limited resources<sup>50</sup>.**

We have serious concerns that lighter touch regulation will return the sector to the levels of VM abuse (and worse) experienced prior to the MVBBER and leave to wither the emerging green shoots of dealers' and other parties' pro-competitive innovation.

We endorse the NFDA's proposal<sup>51</sup> that, absent a sector-specific regulation *per se*, to amount to "Better Regulation", the new regime must contain a sector-specific notice of binding effect and a mandatory industry code of conduct which is contractually enforceable.

In June 2008 the DG Competition's Paolo Cesarini emphasised the need to preserve competition in the motor retail sector at the same level as it is now – not to go backwards<sup>52</sup>. In its drive for simplicity, the Commission is in serious danger of reversing the progress made.

**We therefore ask the Commission to recognise the undeniable shortcomings of a general regulation and to provide a regulatory solution that is indeed "better" because it continues to reflect the uniqueness and importance to the consumer of the motor retail sector.**

**Trevor Finn  
on behalf of Pendragon PLC**

## **Attachments**

### **Appendix 1 Study on UK multi-branding at January 2008**

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confirmed have been impenetrable to them, despite diligent enquiry.

<sup>47</sup> See Evaluation Report Staff working document 4 paragraph 4.5.4 on page 26

<sup>48</sup> Paolo Cesarini conference speech Brussels 12 June 2008

<sup>49</sup> Mario Monti's conference speech "Car retailing at a cross roads", Brussels 6 February 2003.

<sup>50</sup> To indulge further the road user analogy, the case-specific enquiry after the accident will involve not only an investigation of what caused the accident, but a post mortem on the unfortunate consumer's right to choose

<sup>51</sup> NFDA Response paragraph 1.9

<sup>52</sup> Conference speech: Review of current developments and recommendations for reform, Brussels 12 June 2008

## Appendix 1

### 2008 Study of Multi-branding in the UK

Accurate data on the extent of multi-branding is hard to come by, particularly since it is not possible (without visiting each location) to identify what brands are displayed in the same showroom.

The analysis in Table 1 below is compiled from Sewells Information and Research “*Who owns who in the motor retail industry*”, January 2008 edition. The methodology and definitions used are explained below. The results indicate a healthy level of same-location multi-branding developed under the previous Regulation 1475/95 and continuing to grow under the MVBBER. Whilst previous estimates for multi-branding in the UK have been at the 15% level<sup>53</sup> our analysis shows a likely increase in this figure (bearing in mind that our analysis excludes owners of fewer than three new car retailing sites).

### Conclusions

The percentage of sites we have identified in Table 1 as engaging in a form of multi-branding is calculated as the percentage of all those sites which have a *genuine opportunity* to dual or multi-brand and is **14.73%**.

Table 2 also gives a useful picture of those VMs which have a degree of favour towards multi-branding.

### Definitions and methodology

1. The Sewells publication *excludes* owners who have fewer than three sites whereas the 2007 estimate was drawn from *all* UK dealers. Although it is not possible to tell which of the excluded sites are dual or multi-brand, it is not fair to assume that all excluded sites are mono-brand.
2. **Sites** are counted by reference to locations belonging to operators who own three or more new car retailing sites. A Site can include one or many Brands. Locations with the same post code are counted as one site. It is accepted that postcodes can cover areas at opposite sides of a road, and therefore the exact degree of contiguity of brands is not identifiable. However, from the customers’ point of view, access and convenience is enhanced, even when brands are separated by a road.

**Total Sites** is the total number of Sites that are owned by operators with three or more sites in the UK.

**Brands** from the stable of the same manufacturer (for example, Chevrolet, Saab, Vauxhall – all GM marques) are counted as one brand; these are not independent brands

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<sup>53</sup> The RMI’s National Franchised Dealer Association gave this estimate in its 6 July 2007 response to Case No COMP/HT102, the Commission’s request for information dated 25.04.07 as a percentage of the whole network engaging in multi-branding.

**Dual-branding** is where there are **two** independent brands displayed;  
Definitions (continued)

**Multi-brand** is where there are **three or four** independent brands displayed;

**Super multi-brand** For the purposes of Tables 1 and 2 only, we have used this expression to denote sites where there are **five or more** independent brands displayed.

3. **Potential to multi-brand** Parties with commercially no inclination or contractually no inclination to multi-brand have been excluded from the Total Sites figure. The “Before Exclusions” column shows the number of Sites before the exclusion of:-
- 149 VM owned dealer operators;
  - 278 sites which are subject to restrictions on multi-branding (conservative estimates are used); and
  - 595 sites which already represent two or more brands within the VM’s own stable of brands and therefore cannot accommodate any additional independent brand or brands.

**Table 1**

	<b>Before Exclusions</b>		<b>After Exclusions</b>	
Total Sites	3439			
Total Sites with a genuine opportunity to multi-brand			2417	
	<b>Percentage</b>	<b>Number</b>	<b>Percentage</b>	<b>Number</b>
Total Sites involved in Dual Branding	7.79%	268	11.09%	268
Total Sites involved in Multi-Branding	2.30%	79	3.27%	79
Total Sites involved in Super Multi-Branding	0.26%	9	0.37%	9
<b>Total</b>	<b>10.35%</b>	<b>356</b>	<b>14.73%</b>	<b>356</b>

**Table 2**

Extent of representation of Vehicle Manufacturers on sites which are multi-brand

<b>Brand</b>	<b>Total network size (all sales outlets)*</b>	<b>Dual-Brand</b>	<b>Multi-Brand</b>	<b>Super Multi-Brand</b>	<b>Total multi-brand**</b>
Citroen	203	44	15	5	64
Fiat	169	36	20	3	59
Kia	138	36	19	3	58
Mazda	159	33	20	1	54
Ford	537	33	11	2	46
Nissan	180	19	14	6	39
Suzuki	147	22	14	2	38
Hyundai	150	25	12	0	37
Peugeot	301	26	8	2	36
Vauxhall	405	20	9	2	31
Mitsubishi	129	17	11	3	31
Renault	244	16	9	5	30
Honda	195	17	9	2	28
Chrysler Jeep Dodge	80	19	5	3	27
Toyota	190	17	7	3	27
Volvo	119	18	6	1	25
Jaguar	97	16	5	2	23
SEAT	112	11	3	6	20
Volkswagen	223	11	6	3	20
Skoda	132	14	4	1	19
Land Rover	129	11	2	3	16
Chevrolet	96	6	9	1	16
Audi	117	10	0	2	12
Saab	90	8	2	1	11
Subaru	77	8	3	0	11
Alfa Romeo	42	7	3	1	11
Lexus	53	6	3	2	11
SsangYong	50	4	3	2	9
BMW	150	3	3	0	6
MINI	151	3	3	0	6
Mercedes-Benz	134	3	2	0	5
Proton	85	3	0	0	3
Daihatsu	109	2	0	1	3
smart	46	1	2	0	3

\* This should be recognised as the entire network number, including the sites of owners with fewer than three as at 31 December 2007.

\*\* Source: Sewells Information & Research

ENDS