

RMI National Franchised Dealers Association

Response to the Commission's Evaluation Report (dated 28/05/2008) on the operation of Regulation 1400/2002 concerning the distribution and servicing of motor vehicles

*"Businesses expect public authorities to ensure a level playing field and boost competitiveness. Regulation is key to meeting these challenges."*¹

European Commission (2006)

1. Summary

Better regulation?

- 1.1 Regulation 1400/2002 ("**Motor BER**") is boosting competition in the automotive sector. It also provides the foundation for a more level playing field through a package of measures designed to facilitate greater independence of retail and aftermarket operators vis-à-vis VMs. Consumers are receiving a fair share of the resulting benefits, through lower prices and greater choice.
- 1.2 It follows that the Commission's latest proposal – to replace the Motor BER with a system of general regulation - will not further the Community's aim of "Better Regulation"². Simplification is not an aim in itself³; its purpose must be to improve regulation and deliver real benefits, such as greater competition.
- 1.3 If simplification fails to achieve such objectives, it opens the door to negative effects; relying on the cooperation and goodwill of those parties with the greatest bargaining power and the most questionable compliance record.

"European law is at the heart of what makes the European Union special. Without it, we would rely on cooperation and goodwill: essential components to make Europe work, but not enough to guarantee the freedoms and rights enjoyed by today's Europeans. So we have to ensure that European laws and regulation are well targeted... and proportionate to need." (Emphasis added)

José Manuel Barroso, President of the European Commission⁴

- 1.4 The NFDA believes that the Commission, in its desire for a simpler system of regulation, is being overly optimistic in suggesting that the market will properly regulate itself without the Motor BER going forward.

¹ 2006 European Commission brochure – "Better Regulation – simply explained", page 3

² Better Regulation is about clarity, ensuring that rules are straightforward for European citizens to understand and apply without a significant degree of interpretation and uncertainty; it is not about using the least amount of words or pursuing a 'one size fits all' approach at all costs.

³ In any event, the removal of the Motor BER, a centralised point-of-reference for the automotive sector, would not simplify the system of regulation given that industry participants would be left to rely on a far more disparate range of materials to help them self-assess the competitiveness of their agreements and behaviour. It is also surprising that the Commission criticises the number of questions initially generated by the Motor BER given that it was heralded as such a radical change to the then current rules. Ironically, a switch to a general system of regulation (without meaningful sector specific provisions and detailed guidance) is likely to generate far greater uncertainty and, as a result, unleash an even greater wave of questions.

⁴ 2006 European Commission brochure – "Better Regulation – simply explained", preface

Key features

- 1.5 Certain elements of the Motor BER are more important than others from a competition and investment perspective. In the NFDA's view, the following measures are essential:
- (a) the right to multi-brand (vehicles and aftersales, including parts);
 - (b) the separation of sales and aftersales activities (and the application of genuine qualitative-only criteria to aftersales); and
 - (c) not for their own sake, but because they produce the necessary environment to support pro-competitive exploitation by dealers of the measures outlined above, the preservation of key features underpinning 'dealer independence', namely:
 - (i) unrestricted intra-network business transfers;
 - (ii) the obligation on VMs to give detailed and objective reasons for termination;
 - (iii) the right to appoint an independent expert or arbitrator for settling disputes; and
 - (iv) a minimum of two years' notice of termination.

The whole is greater than the sum of its parts

- 1.6 The measures and features listed in 1.5(a) to (c) above should not, in the NFDA's view, be analysed and valued on an individual basis; rather they constitute a package, which is improving and, if nurtured, will continue to improve competition in European automotive markets.
- 1.7 The side-effects that the Commission has identified as arising from the Motor BER, for example:
- (a) its tendency to favour quantitative selective distribution (to the exclusion of other forms of distribution) through the provision of a more generous market share threshold⁵; or
 - (b) the possibility that it has led to standards being raised above proportionate levels in order address certain VMs' concerns over multi-branding or the removal of the location clause,

could be easily remedied with a modified Motor BER which:

- establishes a single market share threshold for all forms of distribution except for those which are purely qualitative (to remedy side-effect 1.7(a) above); and
 - provides clearer guidance, perhaps using examples and mini case studies, on quality standards and indirect non-competes (including sales and purchase targets) together with more effective enforcement (in the case of side-effect 1.7(b) above).
- 1.8 The Commission lends significant weight in its analysis to improvements in inter-brand competition; and uses this as a justification for less regulation. It should be remembered however, that at the manufacturing level in many Member States (including the UK), levels of market concentration (and VM power) are still high. Accordingly, the continued promotion of inter and intra-brand competition is vital to healthy competition as are those measures (as outlined in 1.5 above) which support such improvements. Indeed, whilst not always obvious, rights such as the right to transfer dealerships intra-

⁵ Quantitative selective distribution is, under the Motor BER, exempted up to market share threshold of 40% (on the part of the relevant VM). However, the Motor BER imposes a stricter market share threshold of 30% for certain other forms of distribution, for example, exclusive distribution. The Commission believes that this has led VM's to favour a single quantitative selective model, to the exclusion of others.

network, are key to supporting intra-brand competition, even though their positive effects may be indirect.

Substance over form

- 1.9 It follows that the NFDA continues to favour meaningful sector-specific regulation post-2010 to best ensure the development of competition and safeguard the improvements seen over the last six years.
- 1.10 However, it is substance over form that is important. If the Commission is still minded to remove the Motor BER (or, indeed, to pare it down to a level where it has no real sector-specific relevance), the NFDA urges the Commission to pursue the following alternative:
- (a) a separate chapter annexed to the new general regulation⁶, which would take into account the elements mentioned in 1.5 above and address the specific competition problems that continue to exist in the automotive sector; and
 - (b) a special notice or interpretive guidelines for the automotive sector, providing a detailed and adaptable point-of-reference for sector-specific competition issues (including guidance on market definition); and
 - (c) mandating a clear, practical and enforceable code of practice, to be written into each contract. This would provide more vulnerable parties (particularly those operating in Member States which do not have local rules supporting the concept of good faith or commercial fairness) with a means to challenge the restrictive behaviour of VMs.
- 1.11 Whilst the NFDA acknowledges that the Commission has little discretion over timing, it is concerned that the Commission's present conclusions are premature and underestimate the amount of innovation that dealers are putting in place in the retail and aftersales environment. Moreover, the NFDA believes that the Evaluation Report relies on a number of assumptions and a certain degree of speculation in order to justify a proposal that is fraught with risk (particularly given the compliance record of certain VMs).
- 1.12 However, the NFDA is grateful for the opportunity to comment on the Evaluation Report and reaffirms its commitment to assisting the Commission with its ongoing assessment.

2. Overview

The purpose of sector-specific regulation

- 2.1 To help understand the purpose of sector-specific regulation (and the magnitude of the Commission's current proposal, namely, the removal of the Motor BER), it is helpful to reflect on one of the main reasons why the Motor BER was introduced almost six years ago:

"...more detailed provisions were introduced into the [Motor] BER in order to narrow the application of the block exemption in view of a number of competition problems specific to the sector, including persistent attempts by certain vehicle manufacturers to segment the EU Single Market..."⁷

⁶ The replacement for Regulation 2790/1999

⁷ Evaluation Report, page 2, Section I (The Object and Result of the Review)

2.2 Indeed, in the words of the then Competition Commissioner, Mario Monti, the Motor BER:

"...reduces the opportunities for car manufacturers to abuse their powers, as we know has occurred in the past."⁸

2.3 It is clear that, prior to the introduction of the Motor BER, consumers were suffering real financial harm as a result of the sustained anti-competitive practices of a number of major VMs including Volkswagen (two separate infringements), Opel and DaimlerChrysler. These practices, which prevented consumers from exploiting the Single Market, resulted in the Commission imposing a series of fines totalling well over €200 million. As Commissioner Monti observed in an earlier speech:

"It is indeed surprising to see that manufacturers seem to flout the Regulation⁹ in a way which is close to falling under one of its black clauses: by such behaviour they risk losing the benefit of the Regulation for their whole distribution network."¹⁰

The impact of sector-specific regulation

2.4 Since 2002, competition within the automotive sector has improved, although there is more room for improvement¹¹. The Evaluation Report acknowledges repeatedly that competition has increased under the Motor BER, for example:

"...it may be concluded that the BER has helped to protect competition in the markets for new motor vehicle distribution, and especially in the markets for after-sales services, to the benefit of consumers..."¹²

"All relevant economic indicators analysed tend to confirm that the degree of competition in the relevant markets, which had determined the Commission's choice for a stricter, sector-specific block exemption, improved appreciably between 2002 and 2007."¹³

2.5 As part of the Evaluation Report, the Commission attempts (with some worrying reservations) to attribute this improvement, at least in part, to factors which are unrelated to the BER:

"The competitive environment on the motor vehicle distribution markets appears to have considerably improved since the Commission last evaluated the position in 2000. This evolution seems, however, to be mainly due to external factors, in that in an increasingly global economic context, market forces have led the sector to develop positively in a way initially not foreseen by the Commission."¹⁴ (Emphasis added)

2.6 However, given the stakes, namely the welfare of millions of consumers and thousands of businesses, the NFDA considers that the conclusion in 2.5 above is not sufficiently well founded to justify the wholesale removal of safer, sector-specific regulation. It is indeed impossible to assess how the market would have developed and market players would have reacted to market forces had the Motor BER not been implemented in 2002; but the above statement makes dangerous assumptions at a time when the

⁸ "The new legal framework for car distribution" Ninth Annual European Automotive Conference: Car retailing at a crossroads (Brussels 06/02/03)

⁹ Regulation 1475/95 (the predecessor to the Motor BER)

¹⁰ "Who will be in the driver's seat?" Forum Europe Conference (Speech 00/177; Brussels 11/05/2000)

¹¹ The Commission has been obliged to take further enforcement action since 2002 although with the exception of the Peugeot decision (IP/05/1277), the relevant infringements appear to be of a lesser gravity than previously. However, certain decisions (in particular, those involving BMW and GM - IP/06/302 and 303 respectively) emphasise the need to maintain clear, specific regulation in the automotive sector, which general rules may not deliver. Indeed, such decisions suggest that certain VMs will, where interpretation or uncertainty permit, seek to constrain network entry, multi-branding and dealer business development.

¹² Evaluation Report, page 2, Section I (The Object and Result of the Review)

¹³ Evaluation Report, page 3, Section II (Market Developments); See also Commission press release IP/08/810

¹⁴ Evaluation Report, page 11, Section IV (Overall Assessment)

full package of measures has been in play for less than three years and its full contribution to improved competition is not yet fully developed.

- 2.7 The Commission's view is also difficult to accept when market trends (such as price convergence towards lower levels across Member States), which are indicative of improving competition, appear to track the implementation of the Motor BER¹⁵.

3. Key issues

Multi-branding

- 3.1 Multi-branding is considered in the Evaluation Report under the section '*Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market*'. The Commission makes several observations regarding multi-branding:

- (a) **Commission's view:** *The risk of market foreclosure is lower now than it was in 2000. By implication, multi-branding, which is a tool designed to facilitate market entry and expansion, is not as essential as it was previously.*

NFDA comment: It is obvious that a general regulation permitting single branding will make it difficult¹⁶ for new market entry and expansion, particularly in those markets, such as the UK, where suitable dealership sites are expensive and scarce. Incumbent VMs will seize the opportunity under a general regulation to restrict the proliferation of new brands which would otherwise be facilitated by multi-branding. This will restrict consumer choice and limit price competition. The fact that inter-brand competition is, currently, perceived to be adequate does not serve as a justification for limiting it in future.

- (b) **Commission's view:** *Dealers have not taken up the enhanced opportunities to multi-brand.*

NFDA comment: Dealers are taking up opportunities to multi-brand and multi-branding is gathering momentum. The NFDA is aware of a range of dealers within the UK who are taking up same-showroom multi-branding opportunities, from smaller and medium sized dealerships such as Cleckheaton Holdings Ltd¹⁷, to the largest groups, such as Pendragon Plc¹⁸.

The reason that not all dealers have exploited the opportunity of same showroom multi-branding is that prior to the Motor BER, interested dealers had already been obliged to invest in separate facilities. That said, research undertaken for the Commission contradicts the Commission's own conclusions and supports the view that multi-branding is still attractive to significant numbers of dealers¹⁹, even in the face of measures taken by certain VMs to slow it down. As new brands appear, same showroom multi-branding will increase (unless restricted).

¹⁵ Please refer to the price convergence table set out in section 1.1 of the NFDA's supplemental submission to the Commission dated 21/01/08. This uses Eurozone figures from Commission car price reports (01/11/03 – 01/05/07).

¹⁶ See *Stergios Delimitis v Henniger Brau AG* – Case C234/89

¹⁷ The following is an extract from the dealer's own website 'www.clemo.co.uk' (About Us section) "*In 2003 the company took advantage of the new commercial freedoms available under the Block Exemption Regulations to take on the Daihatsu franchise and the Citroen Authorised Repairer contract at the Bradford Road site. A year later and the company seized the chance to take on the Fiat franchise at the Bradford Road site.*"

¹⁸ At one point under the Motor BER, the Pendragon group held eight Kia representation points alongside established competing brands in the form of six same-showroom and two same-location points. The NFDA would also refer the Commission to Sewells "Who Owns Who" (July 2008), which gives an indication of the considerable number of multi-franchised sites for other dealers in the UK. We understand that Pendragon has prepared an analysis of this data (which it has submitted to the Commission separately), which reveals a significant take-up of multi-branding generally.

¹⁹ London Economics: 2006 Report - page 65, Figure 46

- (c) **Commission's view:** *It can be assumed that even in the absence of multi-branding provisions in the Motor BER, many VMs would conclude contracts allowing for multi-branding where it made commercial sense to do so.*

NFDA comment: This conclusion is entirely speculative. It also goes against research used by the Commission in its evaluation of the previous block exemption²⁰, which states: "Although in the UK, for example, the number of multi-franchise dealers increased strongly between 1990 and 1995 it is said that in general manufacturers support exclusivity at all costs."²¹. It is difficult to envisage how VMs, particularly the European majors, would have had such a change of heart since 2000. It is highly unlikely that the increased threat of competition from new entrants combined with a more permissive regulatory regime, would encourage these VMs to continue to permit multi-branding.

- (d) **Commission's view:** *In encouraging same-showroom multi-branding, the Motor BER may have led VMs to react to an anticipated dilution of their brand images by setting higher selection standards: something which may in turn have driven dealers into larger brand-specific investments and resulted in higher overall distribution costs.*

NFDA comment: This concern relates to a question of enforcement (and challenging the steps taken by VMs to circumvent the Motor BER) rather than to a feature of the Motor BER itself. If standards are disproportionate then the Commission can challenge VMs (as it has done previously²²). Clear guidance on quality standards and indirect non-competes in the automotive context would help. VMs will not, in the event of softer regulation, relax standards anyway.

- (e) **Commission's view:** *On the other hand, there may be a risk that in the future, a proliferation of single-brand networks covering a substantial proportion of the market could foreclose newcomers from the markets.*

NFDA comment: The NFDA agrees. However, this statement underlines the Commission's uncertainty on the issue and its confusion over the interpretation of its own data. This is not a solid basis on which to proceed with the removal of a valuable measure supporting consumer choice.

- (f) **Commission's view:** *Limits to the ability of VMs to impose direct or indirect non-compete obligations on their dealers set out in the general regulation (Regulation 2790/1999) could have ensured an equivalent level of protection of competition in the market.*

NFDA comment: The definition of non-compete obligation in the general regulation is entirely different to the one contained in the Motor BER. Subject to certain conditions, the general regulation would (if unamended) allow VMs absolute exclusivity in terms of the brands sold through their networks. This cannot be reconciled with the rights to multi-brand (supported by the 30% criterion) as set out in the Motor BER. The removal of the right to multi-brand, whether same-showroom or otherwise, would have dramatic and negative implications for competition (specifically market entry and expansion) in the automotive retail sector.

Equally, the reinstatement of VMs ability to insist on exclusivity would also have negative implications for parts distribution. The more permissive provisions of the general regulation would encourage VMs to take even further measures to restrict the ability of their authorised repairers to source spare parts from other channels.

²⁰ Regulation 1475/95

²¹ Commission Evaluation Report – COM(2000)743 – Para. 273 – Source ICDP

²² Recent examples include the BMW and GM decisions

- 3.2 The obvious conclusion is that multi-branding as provided for under the Motor BER, which is essential to lowering barriers to market entry and expansion and, thus, supporting consumer choice and greater price competition, must be retained.

Separation of sales and aftersales activities

- 3.3 The separation of sales and aftersales activities is considered in the Evaluation Report under the section '*Protecting competition within the authorised networks*'. The Commission, whilst noting the positive effect on competition of giving dealers/repairers the right to separate out authorised repair functions, makes the following observation:

- (a) **Commission's view:** *Even in the absence of categorising the forced combination of sales and aftersales activities as a hardcore restriction of competition, the same result would be achieved under a general regulation on the basis that the tying of retail activities to aftersales is not a qualitative standard. Assuming the VM has a market share in excess of 30% for aftersales, only qualitative standards are covered by the exemption and, thus, the tie itself would not be exempted.*

NFDA comment: The NFDA notes the Commission's point, however, the removal of the specific hardcore provision under the general regulation would, to all intents and purposes, signal a downgrading of the offence. Moreover, it would open up a debate on market definition, which would play into the hands of the stronger, better resourced party, namely, the VM.

VMs keen to stop the spread of more lucrative service/parts-only outlets, may be more disposed in future towards risking the tying of such aftersales activities to retail operations (or vice versa). This could arise through the use of bonuses to tie the two functions together, with VMs seeking to justify such arrangements on the basis that such incentives are, notionally, optional.

This would, ultimately, result in consumers being forced to travel further (and pay higher prices) for repair and maintenance.

- 3.4 In order to preserve competition and customer service in relation to aftermarkets, distribution networks must have the explicit right to separate and retain authorised repair operations (subject to meeting quality standards). Without this, the natural consequence will be that the growth of authorised repair-only outlets will cease.

Dealer independence measures

- 3.5 Dealer independence measures are considered in the Evaluation Report under the section '*Protecting dealer independence vis-à-vis vehicle manufacturers*'. The Commission makes the following observations:

- (a) ***Intra-network transfers***

Commission's view: *This measure was intended to foster market integration through cross-border dealerships, however, virtually all such transfers have occurred within national borders, which may have led to the side-effect of dealer concentration at a local level, thus creating problems for domestic competition authorities.*

NFDA comment: The NFDA accepts that if one looks at intra-network transfers in isolation, the competition justification for them is not immediately apparent (although it does believe that certain efficiencies can be achieved through greater scale²³). More importantly, however, the removal of

²³ The NFDA would also remind the Commission that allowing dealers to 'seize business opportunities' and to achieve greater efficiencies through growth was also one of the Commission's objectives in permitting intra-network transfers under the Motor BER (Recital 10)

such a measure would provide VMs with a disproportionate degree of leverage over dealers (whether the dealers are seeking to realise their investment, rebrand or grow their business). This leverage is used to restrict pro-competitive dealer behaviours.

The NFDA also believes that more dealers are beginning to develop cross-border businesses to the benefit of consumers²⁴ and it is premature to discount the value of this measure. Indeed, the absence of intra-network transfers from any new regulation, particularly if the non-exemption of location clauses is also lost (which is worrying in itself), undermines the Community objective of a Single Market within automotive retail.

Furthermore, concerns over dealer concentration at a national level are unfounded, given that automotive retail remains highly fragmented²⁵ and dealers have no market power over consumers (so no risk of double marginalisation). In any case, domestic authorities are easily equipped to deal with any concerns that may arise under national merger control rules.

The harm to competition of allowing VMs to control intra-network transfers far outweighs the benefit. If such transfers can be restricted, VMs will keep their dealership networks fragmented and less able to negotiate improved terms which can be passed on to consumers. Investment by dealers and entry at the retail level will be discouraged to the detriment of future innovation.

The right for dealers to transfer their businesses is a key part of the package of measures designed to help dealers achieve greater independence from VMs and be better able to exploit the competitive opportunities open to them.

It is also worrying that under the current form of general regulation, former dealers might be restricted from pursuing legitimate opportunities within other franchises (for example, under post-termination non-compete clauses, which can be permitted for up to one year according to the Commission's guidelines on vertical restraints). Such restrictions will further undermine innovation and consumer choice, aside from being used by VMs as yet another tool to restrict the behaviour of dealers.

It follows that the ability of dealers to transfer their dealerships in this way is important in the longer term to encourage competition and investment.

(b) ***Other measures underpinning dealer independence.***

Commission's view: *The Commission notes that the two year notice period for the termination of open-ended contracts is, in any event, inadequate to protect dealer investments and can be circumvented easily by VMs.*

NFDA comment: The fact that a notice term is acknowledged as being insufficient surely merits its extension rather than its removal. At the very least, the two year notice period allows dealers to manage their orderly exit from a network (for the benefit of their existing customers) and seek out alternative franchises.

Moreover, it is open to the Commission to introduce other measures to ensure that it is increasingly difficult for VMs to circumvent the two year notice requirement. If no minimum notice is required of VMs, then the situation will be open to abuse and will be exploited so as to further undermine the competitive independence of dealers. In turn, dealers will be less disposed to longer term investment.

It is worth noting that adverse effects can be attributed to fixed term agreements where VMs are not

²⁴ The NFDA was recently advised by the Swedish group, Bilia AB, that the Motor BER has facilitated Bilia's expansion in several Nordic markets, including Sweden, Norway and Denmark (both in terms of opening new outlets or purchasing existing outlets)

²⁵ London Economics: 2006 Report - page 55, Figure 38

obliged to explain their reasons for the non-renewal of dealers' contracts. This too can operate as leverage over dealers' independence and behaviour.

Commission's view: *As far as the obligation on VMs to give detailed, objective and transparent reasons for termination is concerned, the Commission observes that such a right has not resulted in any successful court challenge.*

NFDA comment: This overlooks the usefulness of such a provision in encouraging manufacturers to review decisions to terminate dealers in the light of allegations of anti-competitive behaviour. Its effects are difficult to measure but are seen as positive by dealers. In any event, it has no harmful side-effects on competition. Moreover, the obligation on a VM to give detailed, objective and transparent reasons on any termination (including the termination or non-renewal of a fixed term agreement) will facilitate any subsequent dispute resolution process.

Commission's view: *The Commission accepts that the right to refer disputes to an arbitrator or expert has had positive effects but questions whether or not it should be included in a regulation as opposed to a voluntary code of conduct.*

NFDA comment: The risks associated with a voluntary code of practice are self-evident where you have one negotiating party in a consistently stronger position than the other.

The threat of disputes being referred to an arbitrator or an independent expert has, according to feedback from the NFDA's members, often been useful in averting the need for formal challenge where VMs (and their field staff) have sought to implement measures which are questionable from a competition perspective. If the possibility of such a referral were optional, it could be ignored by VMs with little fear of sanction.

Therefore, regardless of its ultimate form, the right to refer disputes to an arbitrator or independent expert should be mandatory.

4. Conclusions

- 4.1 Over the last six years, the Motor BER has improved competition. However, because the Motor BER comprises a number of interlinked measures, it is difficult to assess which of its features have been most effective. Indeed, it is not appropriate to consider them individually. The assessment is all the more difficult when much of the data upon which it is based has been collected with half of the Motor BER's operative term left to run²⁶. Put simply, it is too soon to judge accurately the Motor BER's full effectiveness. In the NFDA's view, this undermines the Commission's own objectives in the field of "Better Regulation":

"An important part of making better laws is having a full picture of their impacts. Proposals can then be tailored to have the best effect, and to minimise negative side-effects."²⁷

- 4.2 Against this background and given the questionable compliance record of certain VMs, the Commission's conclusion - attempting to discredit individual features of the Motor BER and using this piecemeal approach to justify its removal - is not only a disproportionate reaction to the Commission's own findings but is high risk from a competition perspective.

²⁶ The effect of the Motor BER was, largely, suspended until 01/10/2003 (and the non-exemption of 'location clauses' delayed until 01/10/2005). Arguably, the Commission began its evaluation using the data collected by London Economics - gathered in 2005/early 2006. In any event, the other body of research, namely the Commission's questionnaires, would only have captured information up to the end of 2006/beginning of 2007, only three years after the main implementation of the Motor BER.

²⁷ European Commission brochure - "Better Regulation - simply explained", page 7 - Emphasis added

- 4.3 In the NFDA's view, the real value of the Motor BER is as a package of measures designed to encourage competitive behaviours. Clearly, choice through multi-branding is only effective if a dealer has some means to challenge the threat of termination or non-renewal, whether in terms of the obligation on VMs to provide transparent and objective reasons or the right of referral to an expert.
- 4.4 Likewise, huge disparities in bargaining power, which allow VMs to impose competitive constraints on dealers, are unlikely to be addressed unless dealers are free to choose the purchaser of their business (within their network) or to grow through intra-network acquisitions. The unrestricted right of intra-network transfer (as well as the assurance of a two year term) will encourage greater dealer independence from the VM as well as a greater willingness to invest at the retail level.
- 4.5 The pace of change shown by non-VM players in exercising their pro-competitive rights is gathering momentum. Such momentum should be encouraged rather than impeded. This is particularly so when such rights do not have negative side-effects for competition. The Commission must acknowledge the inequality in bargaining positions between different members of the supply chain and the very limited resources that smaller players have at their disposal to challenge competition law concerns. For the enforcement of competition law to be effective, it needs to be accessible to all parties wishing to pursue self-help remedies. Faced with the prospect of a looser system of regulation, the retrograde effect on competition would begin well before May 2010 as dealers would, in fear of the further shift in power towards VMs, be even more reluctant to exercise their competitive freedoms.
- 4.6 With these concerns in mind, the NFDA believes that the Evaluation Report does not provide a sufficiently compelling case for the removal of sector-specific regulation. The wholesale removal of the Motor BER without any meaningful allowance for sector-specific conditions (both in view of the economic importance of the sector and the consequences to competition of "getting it wrong"), will not result in "Better Regulation"; instead, it will have retrograde effects on competition at the retail and aftersales level.
- 4.7 A new Motor BER is not an aim in itself. The NFDA wishes to preserve access to a centralised system of clear, practical rules, albeit the substance rather than form of such rules is the main concern. With this in mind, some of the recommendations contained within the Evaluation Report merit positive consideration. For example, the industry-wide 'code of practice'. Such a code would be essential in the absence of sector-specific regulation, although in the NFDA's view, compliance with it must be mandatory (with a clear system of monitoring and enforcement) as opposed to voluntary as currently recommended. In any case, such a code should be complemented by other measures (such as those listed in 1.9 above), which would support the key objectives outlined in 1.5 above and build on the growth in competition achieved under the Motor BER.

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