

OBSERVATIONS TO THE COMMISSION'S EVALUATION REPORT ON THE OPERATION OF REGULATION 1400/2002 CONCERNING MOTOR VEHICLE DISTRIBUTION AND SERVICING – reference number HT-1021

Introduction:

VDV Lubricants N.V. is an independent, small producer of lubricants, included lubricants for the vehicle industry.

Dirk Jongert, Managing Director of VDV Lubricants has been involved during long time with competition affairs for lubricants on the European market since 1980.

During more than 23 years (1980-2003) - as President of the Competition Committee of the UEIL, I conducted discussions with DG IV, D-4- Automobiles et autre moyens de transport- on the different BER's for Motor Vehicles, namely 123/1985, 1475/1995 and 1400/2002.

These discussions were undertaken with Dr.K.Stöver, Mr. Dieter Schwarz, Mr. H. Verlackt and Mr. E Van Ginderachter, the different Heads of Unit over the years, on distortions of competition, exclusive recommendations etc. from the side of Vehicle Manufacturers regarding lubricants used in cars.

Since 2003, I have not been involved anymore within the UEIL for competition matters, but as producer of lubricants for the vehicle industry, following closely competition policy.

In this regard, the observations are strictly the opinion of a small producer with some background on competition policy, but also convinced this opinion is shared by all small independent producers of lubricants selling their products on the European market.

History

Already in 1987, the Commission intervened to restore competition in the car oil market.

"The Commission emphasizes that any kind of pressure from a car producer whether through contractual obligations or by means, which goes beyond a mere recommendation to its car dealers, in order to impose the use and sale of its own lubricants or indeed those of any supplier, is likely to be illegal under the EEC Treaty competition rules." IP (87) 500.

In 1988, Dr. Stöver confirmed to the UEIL in writing: *"Lubricants, antifreeze, brake fluids and others are in no case parts for purpose of Regulation 123/85. As a result, lubricants may not be taken in the parts bonus system."*

Before the BER 1475/95 we have given proof to the Commission, this during submissions in writing and during meetings, about the position of lubricants in the Motor Vehicle Distribution. Some facts:

-Vehicle manufacturers are **not** producers and/or distributors of lubricants.

In the light of above, lubricants were not regarded as spare parts under Regulation 1475/95.

In the explanatory brochure of the General Directorate IV- Competition-EC-DOC IV-9509/95EN is confirmed by Question 21 that **"dealers are free to get those products wherever they wish"**

By this, the customers, repairers and dealers maintained their freedom to purchase.

Regulation 1400/2002

Under Regulation 1400/2002 lubricants are now regarded as spare parts.

The study from the London Economics comments on lubricants: page 269

"For some types of spare parts additional problems may arise. For example in case of lubricants, which only under the new BER began to be legally considered as "spare parts" Given the way in which oil is used in a repair shop, it is not practical to have oils from different suppliers. In effect, then, a restriction on 30% works exactly as a restriction on 100%, actually foreclosing the supply of oil for anyone but the VM"

Note: The VM will not supply the lubricant but direct the repair shop to the selected lubricant supplier.

Also on this page a footnote: ***"Prior to the adoption of Regulation 1400/2002, Regulation 2790/99 applied to the distribution of lubricants, and that 100% non-compete obligations were exempted under that Regulation."***

This statement is absolutely incorrect, referring to the explanatory brochure 1475/95.

These facts are reality and totally against the main objectives of the BER 1400/2002:
"Creating increasing consumer choice and competition."

On page 187 under 4.1.1: ***"the Commission considers that certain agreements have hitherto hindered the achievement of those objectives."***

Also VM's are completely **misusing** article 4(1)k, which is a hardcore restriction.

The VM can require the use of specific spare parts "lubricants" supplied by it for

-repair under warranty

-vehicle recall work

-free service

The use of specific lubricants are now more and more imposed during the whole time of the warranty period, not only for repair, and not supplied by it. We have seen that 3, 5 and even 7 years warranty are offered by the VM's and by this, closing the market for any competition.

Conclusion

Including in Regulation 1400/2002 the lubricants as "spare parts" have dramatic consequences.

The Commission offered the opportunity to the lubricant suppliers of major oil companies and VM's to close all access for independent lubricant suppliers.

If no action is undertaken in very short time by the Commission to restore the competition, the result will be that by 2010 the vehicle market for independent lubricant suppliers will be finally closed.

But if Regulation 2790/1999 will apply without specific protection for the lubricant industry, the result will be the same.

During the period 1980/2002 the Commission understood very well the situation and acted consequently.

With the Olio-Fiat case (see IP87-500) the Commission concluded that such behaviour would be likely illegal under the EEC Treaty competition rules. This was 1987.

Now under Regulation 1400/2002 the Commission is allowing such behaviour by including lubricants as "spare parts". By the Block Exemption Regulation it became legal in 2002. But the main Competition policy –Art 85 did not change. The Commission should act consequently to restore competition.

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