

Comments to the Draft Regulation and Draft Guidelines issued by the Commission
(“The Future Competition Law Framework applicable to the Motor Vehicle sector”)

(Motor Vehicle sales only)

A short foreword.

The Drafts contents are, as expected, perfectly in line with the conclusions of the Evaluation Report issued in May 2008. Since the Report substantially considered that BER 1400/02 had proved to be ineffective as far as car sales or distribution are concerned (including multi branding in show rooms and the opening of secondary outlets), it concluded that a specific BER for the automotive business could be avoided. After all, Regulation 2790/99 “(...) would have ensured an equivalent level of protection of competition in the market(...)” (page 14). On the other hand, the Report considered that Regulation 1400/02 had developed positive effects in after sales activities.

Consequently, the Drafts we are analysing today recommend a specific Regulation for after sales only; and the application of the General Vertical Block exemption for all other matters.

The question is : Are we sure that these recommendations (or more correctly decisions), even if slightly amended after the present Consultation, will favour Competition, and more generally, will do some good to the Automotive industry and grant customers a better choice and a better price ? They surely will, but only as far as After sales is concerned. (This is, by the way, the reason why we will focus on sales).

We should consider two important aspects, which are more interconnected than one would think :

a) The Automotive Branch is absolutely conservative, in the U.E. and elsewhere, especially for what regards distribution. The latest “Black Friday” in New York was characterized by the explosion of “multi channel shopping”... but we are still selling our cars through single branding outlets, more or less like in 1950.

b) The industry is suffering the most severe crisis it ever had to cope with. The lack of competition in the market is at the same time one of the major reasons why the automotive Crisis is so deep (not so much to do with sub primes, at least in the U.E.); and a factor of aggravation, as long as the Crisis goes on.

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Whatever the ineffectiveness of BER 1400/02 in convincing the main players, and especially Vehicle Manufacturers (Vms from now on), to play the game of competition, it would, in our opinion, be a mistake to conclude from that ineffectiveness that the Branch doesn't need more competition. Unfortunately, this seems to be exactly what first the Report, and now the Drafts, draw as a conclusion.

More competition is necessary to renovate the whole European distribution system, which is first of all characterised by high costs for VMs, useless huge premises never asked for by customers, little or no entrance of new entrepreneurs in retail business (except for mere speculation) and a clear incapacity to adapt itself to any new possible sales channel.

If something has to change, the starting point are the Qualitative Criteria.

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I. Qualitative criteria .

I.1. A short analysis.

a) Neither of both drafts seems to consider sufficiently the fact that BER 1400/02 has partially failed because of a lack of competition on the marketplace, and not the reverse.

b) As already noticed in the “Evaluation Report on Block exemption Regulation” issued in May 2008, one consequence of the New BER, concerning the appointment of Car Dealers, was that most Vehicle Manufacturers decided to apply onerous qualitative criteria under various reasons (Brand image, etc.). They could do it because they were and are free to define and increase the investments requested to open a dealership. This enabled VMs to eliminate intra brand competition, and to thwart the development of multi branding.

c) One further consequence of this unlimited freedom granted to VMs has been to prevent many true entrepreneurs to invest in car retail business, because the capital required was out of proportion with any reasonable pay back. Moreover, excessively high levels of investment determined a critical situation in many dealerships, as soon as the Crisis started (2008). Thus, there has been no or little renewal among Dealers; and a strong tendency to concentration since 2008.

d) Is this compatible with a regulation aiming to favour Consumers through a strong competition on prices, and a greater choice of places where to buy cars ? It certainly is not. And the present situation also has the inconvenience to weaken VMs themselves. The (really protectionist) limits they have put to intra brand competition has deprived them from the possibility to let different distributors compete between themselves, and eventually create new kinds of car shops, more adapted than the classical dealership to a difficult market place. The lack of competition induced by excessively high investments is also an obstacle to innovative business.

e) After three more years, BER 1400/02 will be replaced by a new “General Vertical Block Exemption” which probably (from what we could read in the Drafts) will maintain other heavy restrictions to competition, such as the no competition clause contained in art.5 of the present regulation 2790/99. Of course, there is no reason why it should fill in the gaps of Regulation 1400/02.

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I..2. Suggestions.

a) A five years “freeze down” clause for qualitative criteria (either in a new specific BER for the Automotive, which would be welcomed, or in the new coming General Vertical Block Exemption, ore even in specific new guidelines to be applied from May the 31st 2013) would at least reduce the risks of a further “step backward” both in intra and multi Brand competition. Such a clause should fix the maximum level of every criteria, in monetary terms, at the level reached on May the 31st, 2013. Any change from that level, should be downwards.

b) In the first six month following May 31st 2013, VMs should bring their criteria down to the minimum level reached between years 2007 and 2008, provided that this level be lower than the reference of May 31st 2013 . This would soften the counterproductive effect of the increases realised just before, or during, the Crisis.

c) Any increase in the level of criteria, in the years following the “freeze down” period, should be directly and clearly related to a consistent increment in sales and turnover of the Brand in the E.U. and in the Country directly concerned, during a period of at least two full years of activity (i.e. from May 31st, 2018, to May 31st. 20 20, for instance).

II) Quantitative selectivity. Some remarks and one suggestion.

a) Under Regulation 1400/02, free competition has been suffering a permanent drawback from the high market share level beyond which only qualitative selectivity had to be the rule: 40%, as far as motor vehicle sales are concerned. With this limit, which was accepted by the Commission after a reaction by VMs to a first hypothesis, no Car manufacturer has ever been concerned, excepting one or two marginal exceptions (Fiat LCV in Italy).

b) Since the possibility to limit directly the number of dealers everywhere gives VMs all power to limit directly intra Brand competition, and indirectly the growth of multi branding business, this aspect shouldn’t be undervalued. With qualitative selectivity only, a Dealer could freely represent three or more Brands, because no one of these could refuse to appoint him, provided that qualitative criteria are fulfilled. Exactly as it happens today with after sales.

c) We suggest that qualitative selectivity be the only possible for Brands realising a market share of more than 20/ 25 % (instead of 40% in Reg. 1400/02 and... in the Draft) in any major Market inside the E.U.

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A market share of 20/25 % should in our opinion be considered a reasonable limit to the advantage given to a single VM in his national market (and in some others, as is the case for VAG). If we aren't mistaken, this was one of the main hypothesis, if not the only one, made by the European Commission a few months before the publication of the BER 1400/02. If the Commission had stuck to it, and had put a limit to the level of qualitative criteria, competition inside the E.U. would have developed strongly enough; which it has not.

By the way, the definition of “major Market” should include any national market and, in major Countries, any local market with volumes superior to a hundred thousand vehicle registrations a year. There is nothing normal, in terms of competition, in equating a metropolis like London or Paris to a small town anywhere.

III) Multi branding business.

Points 27 and 28 of the Draft (guidelines) are frankly surprising for an outsider like the author of this mean Contribution. What good could we expect from a further limitation of multi branding ? As we already indicated, multi branding business has been strongly hampered in its expansion by VMs, along the whole period of application of Regulation 1400/02. The failure of multi branding is not due, as too hastily indicated in the “Evaluation Report” of 2008, to the fact that dealers were not really interested in it. They were and are. Unfortunately, they simply are not in condition to challenge VMs on this issue.

Two main arguments are quoted as advantages of “non compete clauses” in the Draft. First, “non compete obligations” should avoid free riding of a competitor at the expense of another, in case of promotions directed to customers. Second, they should have positive effects on the brand image. This is absolutely interesting, if not convincing at all. But in any case, what about Customers ? Shouldn't their satisfaction be the main target of any competition policy ? Of course it is, and we have to remember that European Customers never required single branding as a must... They buy almost everything in multi branding outlets. And every market enquiry shows that two out of three would prefer to buy their cars in multi branding dealerships.

As for free riding in case of promotions, it has to be considered a stimulus for VMs to improve their own offers, not to ask some kind of protection; at least if the name of the game remains “competition”. The Brand image, to conclude on this point, has absolutely nothing to do with single Branding; and a lot to do with the product itself, its price and its characteristics. If you sell a Mercedes or a BMW in the same show room, what really matters is the choice of the Customer, who is clever enough to follow his own preference.

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A few suggestions, then:

a) It would be useful, for the development of Competition in Car retailing, to favour in some way multi branding dealerships. The first thing to do, from this point of view, should be to abolish the necessity to define for each Brand specific areas, and specific brandings, in the show rooms. Nobody entering a show room will be confused or horrified, if he sees a Renault Clio and a Fiat Grande Punto sharing the same space. Just in case, it could be useful to check that no supplementary bonus is given to single branding Dealers. The contrary would be better, but this could be considered a provocation, which it is not.

b) Since multi branding generates more competition in favour of customers, this could and should be a target for the E.U. itself , just as the narrowing of price gaps between Countries.

c) Clear communication campaigns, directed to Customers and Dealers, would certainly help.