

## EUROPIA comments on the review of provisions currently contained within Regulation 1400/2002 (MVBE)

February 2010

EUROPIA welcomes this opportunity to comment on the draft Block Exemption and Guidelines replacing the MVBE, and strongly supports the Commission's policy objective of preventing the foreclosure of spare parts producers from the automotive after-markets. EUROPIA's members include suppliers of automotive lubricants, which are included in the definition of "spare parts" in the current and proposed legislation. Further to its paper sent on 25 September 2009, EUROPIA wishes to make the following comments.

### 1. What would be the effects of the proposed approach?

EUROPIA understands that the Commission's view regarding non-competes is that "*spare parts distribution and authorised repair agreements would fall outside the safe harbour granted by the Block Exemption Regulations when the spare parts supplier's market share or the authorised repairer's market share exceeds the 30% threshold, which is likely to be the case for most such agreements*"<sup>1</sup>.

EUROPIA believes that this assertion is highly debatable in relation to automotive lubricants, in particular in view of the Communication Notice on the definition of relevant market (97/C372/02) and current case law<sup>2</sup>. Indeed, the lack of certainty as to the appropriate product market definition to use in order to apply the 30% threshold (i) provides legal uncertainty and (ii) would most probably give undertakings of the automotive supply chain greater opportunity to foreclose lubricants suppliers from accessing at least authorized repairers/dealers.

Thus, an undertaking who has the advantage of a presence in the primary market and is therefore the key supplier of spare parts for its primary automotive market but does not hold more than 30% market share specifically on the automotive lubricant market, could arguably make entering a 5 year exclusive purchase obligation for lubricants and/or, other spare parts a condition of becoming a distributor or authorized repairer of its vehicles. This would have the effect of foreclosing lubricants suppliers from large parts of the franchised dealer sector, and eventually would also have serious knock-on effects for conditions in the wider lubricants sector.

<sup>1</sup> Draft Guidelines para. 35.

<sup>2</sup> See for instance merger cases M. 1891 and M. 5250 where market definition has varied depending on the activities of the merging parties.

In addition to the ambiguity about whether the supplier's market share should be measured for the supply of brand-specific spare parts or on a product-by-product basis, the application of the 30% threshold to the authorised repairer's market share (as well as the supplier's) raises further issues. For example, would the relevant market be the supply of automotive lubricants to consumers, the supply of automotive lubricants to owners of Brand X cars or the repair of Brand X cars, and at what geographical scale? EUROPIA notes that not only would there be added complexity in estimating such shares (and suppliers would bear all the risk of unenforceability if the buyer data is incorrect), but the Guidelines do not explain the relevant principles for self-assessment under Article 101(3) where an agreement falls outside the Block Exemption, in particular because of the repairer's market share. It is not clear to EUROPIA members what purpose is served by analysing the buyer's market share when seeking to assess possible foreclosure resulting from a non-compete clause.

EUROPIA supports the Commission's key policy objective for the aftermarkets to prevent foreclosure by undertakings active in the primary car market, but submits that the proposed texts will not be effective without clearer guidance on how the tests should be applied. On the one hand, there is a risk of foreclosure because the relevant market for supplier's threshold is questionable, while on the other hand doubt may be cast on pro-competitive agreements because of the new buyer's threshold and the uncertainties inherent in that calculation.

## 2. The impact of foreclosure

The European lubricants industry is a vibrant sector which contains not only large players but in addition many strong independent lubricant manufacturers. We note with interest that the UEIL who represent independent lubricant manufacturers currently claims to represent 30% of lubricants suppliers. This figure would probably change and decrease in respect of the franchise dealer sector if a supplier with a presence in the primary market is permitted to foreclose it. Furthermore, there will be other significant impacts on both the quality of service to franchise dealers themselves and also to final consumers. These would be as follows:

### (i) Investments into dealers

In the current economic climate it is very difficult for a sector such as motor car dealers to attract capital and external investment from the banks. Lubricant companies will often make either trade loans or equipment loans (as well as provide training to staff) in return for an exclusive supply position. This gives the dealers the opportunity to make capital investments into their business and thereby improve the service to customers.

### (ii) Product innovation and environmental developments

Lubricant manufacturers invest in excess of hundreds million Euros annually in developing products with improved performance. In addition, in recent years they have paid increased attention to achieving more environmentally friendly lubricants, not only in terms of their direct impact on the environment (e.g. increasing the



intervals between oil changes, increasing the life span of engines, etc.) but also in terms of improving the environmental performance of motor vehicles. The high technology lubricant can have both a direct and indirect benefit in reducing harmful emissions. Low viscosity fuel efficient engine oils could deliver in excess of a two per cent reduction in CO2 emissions compared to a non fuel efficient engine oil. In addition to this, lubricants will need to be developed that can interact with the inconsistency and inevitable contaminants that exist when Biofuels enter the fuels supply chain. Research into the long term effects of Biofuels on performance of lubricants in motor vehicles requires significant investment. Lubricants suppliers would have little incentive to develop better products if they cannot access the key franchise dealer sector, which would also mean less product choice in the wider market.

It may discourage investment in quality, innovation and environmental performance which could decrease consumer welfare significantly.

(iii) **Reduction of customer choice**

Ensuring that franchise dealers can source lubricants from any third party not only bolsters their bargaining power for lubricants, but also enables them to offer different products to consumers. Indeed, consumers have more choice in terms of price and quality as to which lubricant they buy from the dealer.

It may discourage investment which would have been invested in technology away from the lubricants industry and discourage continuous improvement of the quality and performance of lubricants. Currently the lubricant industry produces improved specification product support to markets on at least bi-annual basis.

### **3. The way forward**

EUROPIA would request that if the Commission is to proceed on the basis set out in the draft texts we would request that it provides clear guidance on how market power should be measured. One such solution would be that the block exemption would only apply when a supplier's share does not exceed the 30% both for the supply of the product separately (i.e automotive lubricant market as far as EUROPIA members are concerned) and for the supply of a mixed portfolio of OEM-specific spare parts.

EUROPIA does not perceive a need for a buyer's market share test when analysing non-competes, as it does not seem relevant to the question of foreclosure. Should the Commission retain this double test (which EUROPIA respectfully submits is not necessary to prevent foreclosure), we request that the Commission explains what would be the relevant considerations for self-assessment under Article 101(3) TFEU when an agreement falls outside the Block Exemption solely as a result of the repairer's market share.

***For further information, please contact:***

***Hervé Muslin (Direct line: +32 2 566 91 10 / E-mail: [hervé.muslin@europia.com](mailto:hervé.muslin@europia.com))***