

# PENDRAGON

3379/tab/V2

9 February 2010

Mr Paolo Cesarini  
Head of Unit  
European Commission  
Office J-70 01/114  
B-1049  
Brussels



**Pendragon PLC**  
Loxley House  
2 Oakwood Court  
Little Oak Drive  
Annesley  
Nottingham NG15 0PR

Telephone 01623 725000  
Facsimile 01623 725016

Your Ref: HT 1021-stakeholder  
By post and email: [comp-car-sector@ec.europa.eu](mailto:comp-car-sector@ec.europa.eu)

Dear Paulo

## **Response to public consultation on the review of the competition rules for the motor vehicle sector (IP/09/1984 dated 21/12/2009)**

Pendragon is grateful for the opportunity to submit comments on the Commission's proposal for the successor regime to Regulation EC1400/2002. Details of our interest in these matters are attached. We offer the following comments. In support of these comments, we attach at Appendix 1 a table of perceived risks to competition, together with our suggestions for mitigation of these risks.

### **1. Impaired effectiveness of the proposed rules, with no sector-specific regulation**

We have commented, in our earlier submission, on the adverse impacts on competition which we perceive will flow from the adoption of a more permissive regime for the primary sector (new vehicle sales).<sup>1</sup>

In our view, the risks to the promotion of healthy competition arise from the following causes:-

- the artificial segregation of sales and aftersales, which are in reality a bundled activity by franchised operators and inextricably linked markets
- the complexity of the rules, and difficulty of interpretation, where there is no sector-specific regulation
- the dangerous assumption which seems to underlie the reforms, that vehicle manufacturers can be trusted to apply the new, more permissive, rules in a way which does not exploit their ambiguity and complexity, even though their track record amply demonstrates the contrary.

### **2. Perceived weakening of the Commission's resolve to preserve the deterrent effect of Article 101**

The Commission's proposals signal the abandonment of certain features of the current MVBBER which have promoted price convergence and dealers' and repairers' pro-competitive activity for the benefit of consumers. We understand the Commission's reasons for not wanting to prescribe parties' contract terms, but we feel that this (in our view) overly purist approach pays insufficient regard to the realities of supplier/dealer-repairer relations and the need to preserve a contractual framework which supports, rather than undermines the ability of all players to act pro-competitively. Accordingly, given the risks to healthy competition posed by this approach, the Commission needs to be in a position to assess at an early stage whether it will be found to be a "relaxation too far" of regulation for this sector.

<sup>1</sup> Summarised on page 3 of Pendragon's submission to the Commission dated 25 September 2009 (extract enclosed).



The Commission could seek *now* to adopt measures designed to mitigate the adverse effects of under-regulation. It could do this by committing to performing an evaluation of competition on the primary and secondary markets in, say, May 2015. This would produce a double benefit:-

- enable any adverse consequences for competition to be identified early into the new regime and measures to be put in place to halt and reverse any adverse trends; and
- act as a deterrent to VMs' tendencies to view the new, more relaxed regulations, as a green light for conduct which harms competition and consumers' interests.

The Commission could also signal that, if the new regulatory framework produces the adverse effects on competition many operators fear (or indeed others not yet envisaged) there is a real possibility of the re-introduction of sector-specific regulation.

### Summary

It is my company's considered view that the proposed new rules will be bad for competition, bad for the sector and bad for consumers. I should of course be delighted to be proved wrong, but I am not optimistic about the likelihood of this. In seeking to develop my own Group's businesses I daily come across examples of initiatives within car sales and repair which will benefit consumers, but which I am convinced the vehicle manufacturers will be able to squash, owing to the restrictions they will soon be able, indirectly or directly, to impose on our freedom to be competitive.

Discussing our reasons for this view with officials at the UK's Competition Authority, they defer to the Commission on matters of cross-border trade, which is where a major risk for the UK market exists. I should when next we meet be interested in your view on this.

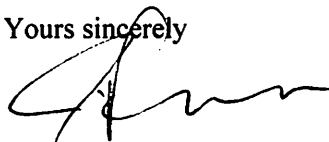
I believe that, even at this advanced stage (absent a proper motor-sector-specific Regulation) the Commission has certain opportunities to improve the proposals. I therefore urge you and your colleagues, in the interests of preserving and enhancing current levels of competition in the sector, to seize them:-

- clearer and more detailed guidelines for the new rules
- a confirmed commitment to enforcement of the *current* rules until 2013
- a clearer and stronger public commitment to continued policing of this sector.

I hope the Commission will be minded to accept some or all of my suggestions above, and attached, and the more detailed ones to be put forward by the UK's Retail Motor Industry Federation (of which we are an active member).

As always, I remain available to deal with any queries you may have arising from these comments. I should also like to convey my personal thanks for the engagement you and your officials have afforded to me and my colleagues throughout the review process.

Yours sincerely



**TREVOR FINN**  
Chief Executive

(approved by Mr Finn and signed with his authority, in his absence)



## Addendum

9 February 2010

### Extracts from

Comments of Pendragon PLC on the Commission Communication COM(2009) 388 final Brussels 22.07.2009 (the “Communication”)

“The Future Competition Law Framework applicable to the motor vehicle sector”

25 September 2009

#### Extract 1

##### “Market position and experience of Pendragon PLC

Pendragon PLC (“Pendragon”) is a UK motor dealer group (and until 2006 also had motor dealerships in Germany) and over the last 20 years has held franchises of every vehicle manufacturer of any significance in Europe. By turnover, Pendragon is the largest European franchised motor retail group (£5.1bn 2007; £4bn 2008; 2009 est. £3.2bn\*). Although holding predominantly passenger car and light commercial franchises, Pendragon also has heavy truck, other commercial vehicle and motorcycle authorised dealerships, repair shops and body shops. Our activities also encompass non-franchised motor retail such as contract hire and leasing, independent used car supermarkets and independent repair and parts supply and the design and provision of dealer management software systems. Through our franchised dealerships in California we also have experience of the competition regime in the US.

Pendragon is an active member of the UK’s dealer trade body the *National Franchised Dealer’s Association (“NFDA”)* part of the *Retail Motor Industry Federation*, on whose Executive Council Pendragon’s CEO, Trevor Finn serves. Trevor Finn participated in each of the round-table meetings on this subject held in 2009 by former Commissioner Neelie Kroes in Brussels. Trevor Finn is one of the motor retail industry figures consulted by the UK’s *Office of Fair Trading* and government’s *Department for Business, Innovation and Skills* on sector issues.”

*\*text added*

#### Extract 2

##### **“3 Comments on those aspects of competition put at risk by the Commission’s proposal**

We believe the proposed approach (to be selected from Options 3 and 4 as described in the Communication and IAR) poses serious risks to competition (particularly in the primary market), damaging:-

- **inter-brand competition**
  - by signalling the *de facto* end of multi-branding<sup>2</sup>;
- **intra-brand competition and parallel trade**
  - by creating conditions ripe for a return to wide price differentials between member states; and
- **the deterrent effect of Article 81**
  - by handing control of supply to those players with long records of abuse of competition<sup>3</sup>;
  - by creating a *more* difficult-to-apply set of rules, giving more latitude to VMs, which will deny dealers the ability to challenge and seek correction of VM restrictions *and* deny them access to redress.

---

<sup>2</sup> On this subject we align our comments with those of the NFDA in their response to the Communication.

<sup>3</sup> In the primary market, the greater latitude afforded by the VABER will lead to VMs “self-exempting” a wide range of restrictions on competition without there being any safety valve to protect other players and the consumer from abuse of this looser system. The tendency demonstrated so far is to “self-exempt” practices and restrictions which do in fact have a distorting effect on competition – see *GM/Opel* and *BMW* on the use of unduly restrictive standards in authorised repair IP06/302-303 and the September 2007 cases on access to technical information.

**The consequences for the specific objectives for the motor sector<sup>4</sup> are likely to be:-**

- the renewal of opportunities for VMs to eliminate or distort competition by subjecting dealers both to their tried and tested earlier forms of pressure<sup>5</sup> and new ones<sup>6</sup>;
- the resurgence of restrictions on the distribution of motor vehicles, both cross-border and in local markets<sup>7</sup>;
- lack of availability of vehicle supply to dealers cross-border and, in particular in the UK, RH drive vehicles from Continental dealers;
- the loss of the benefits consumers have enjoyed from the MVBER, including the opportunity to shop around for the model of their choice and transact, at the best price, with the dealer of their choice;
- that the freedoms to act competitively will once again be determined by the domestic legal landscape, re-partitioning the market and returning it to pre-2002 distortions to parallel trade and correspondingly high price differentials;
- widening price differentials, and higher distribution costs, leading to higher prices to consumers;
- the loss of investment in competitive innovations resulting in poorer service for consumers.”

---

<sup>4</sup> As described at IAR paragraph 72 Section 3.2 (page 20).

<sup>5</sup> Such as forbidding dealers to sell cross-border and heavily policing and penalising of sales to cross-border intermediaries. Insisting on their brand being represented by a separate legal entity also greatly increased the cost of distribution. In our group for example, we could be obliged to set up hundreds of different companies, adding to compliance costs, with no benefit to consumers.

<sup>6</sup> Our educated guesses at new forms of pressure and restrictions are ones connected with dealers' web-presences, uses of internet referral sites, methods of electronic communication to customers and restrictions disguised as protections of VMs' intellectual property.

<sup>7</sup> The VMs favour the use of restrictions on dealers (and intermediary activity) which (a) go beyond what is necessary to deliver wide distribution and availability of motor vehicles throughout the EU; and (b) are disproportionately restrictive of competition, when compared to the consumer benefits they confer, and these tendencies, in our recent experience, still prevail.



**Appendix 1 Impacts of the Commission's Proposals: a Risk and Mitigation Matrix**

	<b>Risk to healthy competition</b>	<b>Suggested Mitigation</b>	<b>Where to Implement</b>
1.	<b>Legal uncertainty created by:-</b>		
	"staggered" introduced of new rules	extension of Reg 1400/2002 in full until 2013 or if not feasible, see mitigation items set out below	- Commission Notice
	artificial segregation of the primary (sales) and secondary (repair and parts) markets	- clear statements that <i>cross-pressuring practices</i> by VMs against an operator as dealer, to restrain his pro-competitive behaviour as an authorised or independent repairer <i>or vice versa</i> will amount to an indirect restriction	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>paras.7 &amp; 11</b> and/or - GBE Guidelines
	disparate sources of regulation and guidance with effect from 2010	- emphatic Commission statements that Reg. 1400/2002 is fully in force and will be fully policed until June 2013	- <b>Recital 19</b> to MVBE - <b>Para. 2</b> MVBE Guidelines - Commission Press release
	complexity of self-assessment process  <b>leading to higher costs of compliance and absence of private enforcement</b>	- more detailed, sector-specific examples to assist assessment of agreements and practices	- <b>Recital 2</b> to MVBE Guidelines - MVBE Guidelines <b>para. 7</b> - GBE Guidelines
2.	Proposals signal to VMs that is there little risk under the new rules of being held to account for <b>restrictions which distort competition</b> , leading to:-	Commission needs to add more weight to Draft MVBE <b>Recital (19)</b> as to the continuing in force of Reg 1400/2002	
	widespread disregard of 1400/2002 for its remaining life	- emphatic Commission statements that Reg 1400/2002 will be fully policed until June 2013 - Commission actively to invite contact from operators who believe Reg 1400/2002 is being disregarded by VMs/others	- <b>Recital 19</b> to MVBE - Commission Press release
	wholesale VM terminations of dealer and repairer agreements in run-up to 2010 and 2013	- clear statement that wholesale VM terminations of dealer/repairer agreements are not necessary in order to benefit from continued exemption post 2010/2013	- Commission Press release
	VMs continuing to push at the boundaries of what restrictions they can achieve without fear of challenge	- Commission commitment to produce a review report on the new regulatory system by <b>May 2015</b>	MVBE, alteration to <b>Article 6</b> (date of review)
		- clear statement that the Commission will consider a return to sector-specific regulation if the report reveals has damaged competition through too much latitude being allowed	- MVBE Guidelines addition to <b>para. 14</b> - Commission Press release

	<b>Risk to healthy competition</b>	<b>Suggested Mitigation</b>	<b>Where to Implement</b>
3.	<b>Weakening of deterrent effect of Art 101 by:</b>		
	removal of Reg 1400/2002 Article 3 independence measures	Commission to amplify its expectations of VM behaviour on:- - what “transparency” of relations means, - the giving of reasons for termination; and - effective implementation of the ACEA Code provisions on termination and dispute resolution	-add conditions for application of exemption in MVBE <b>Article 3</b> - MVBE Guidelines - GBE Guidelines
	unfounded faith in VMs’ ability and willingness to effectively self-regulate under the proposals’ self-assessment framework	- inclusion of express text describing the above - express text describing:- <ul style="list-style-type: none"> <li>• supplier/VM activities aimed at arriving at restrictions</li> <li>• what practices amount to indirect restrictions</li> <li>• what restrictions are incapable of meeting the “efficiencies” test</li> </ul>	- MVBE Guidelines <b>para. 7</b>
	ability of VMs to use the following pressures to achieve indirect restrictions which will go unchecked by effective dealer / repairer challenge:	- inclusion of more specific text on all these pressures and explanation of they can amount to an indirect restriction	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>para. 7</b>
	- VM refusal of right of transfer (1400/2002 Art. 3.3)	- add a precondition to the application of the exemption	- add to <b>Art. 3</b> MVBE
	- imposition of unrealistic sales or other targets	- inclusion of more specific text on all these pressures and explanation of they can amount to an indirect restriction	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>para. 7</b>
	- heavy policing of sales via intermediary and/or cross border	- inclusion of more specific text to discourage the VMs’ “over- policing” of intermediary sales and cross-border sales	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>para. 7</b>
	- threats of termination	see mitigation under section 2 above	- add to <b>Art. 3</b> MVBE
	- discriminatory application of quality standards	- inclusion of more specific text on all these pressures and explanation of they can amount to an indirect restriction	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>para. 7</b>
	- discriminatory application of earnings-related systems for dealer bonuses, incentives, rebates - discriminatory supply of attractive model types and RH drive vehicles	- inclusion of more specific text on all these pressures and explanation of they can amount to an indirect restriction	- <b>Recital 9</b> to MVBE - MVBE Guidelines <b>para. 7</b>
	<i>References: MVBE : the draft Motor Vehicle block exemption</i>	<i>GBE: the draft vertical agreements block exemption</i>	

4.	<b>Adverse impacts on inter-brand and intra-brand competition</b> through growing prevalence of single-branding:	Conduct an earlier study of the effects of the new regulation <b>May 2015</b> with the possibility of re-introduction of more specific regulation if relaxation causes regression from current healthy levels of competition in the primary market	MVBE <b>Art. 6</b> (change date)  Commission Press release
	high threshold of what is deemed a non-compete obligation (80%)		
	absence of any statement allowing opening of additional outlets	Commission statement that a VM refusal of additional outlets can amount to a non-exempted restriction	MVBE Guidelines <b>para. 43</b>
	insufficient deterrence against VMs achieving non-competes by indirect means	clear examples of types of VM practices which can amount to non-exempted restrictions; clearer definition of starting point of a five year restriction	MVBE Guidelines <b>para. 7</b> MVBE Guidelines <b>para.25</b>
	insufficient detail on consequences of <i>de facto</i> widespread single-branding	automatic Commission review of the effectiveness of the new Regulation(s) if single brand networks account for > 30% of a market	MVBE Guidelines <b>para.32</b>
	possibility of VMs imposing post-term non-competes	indication of unlikely ability of post-term non-compete restrictions to satisfy the “efficiencies” test in the motor sector	MVBE Guidelines <b>para.27</b>
5.	<b>Restriction of competition on the aftermarket</b>		
	foreclosing entry by authorised repairs into VMs’ networks and by independents info repair activity	amendment to MVBE Art 5 (b) to extend it not only to vertical agreements between VMs and spare parts OEMs but also between <i>any</i> of the relevant operators, including VM / authorised repairer and VM / dealer-repairer, regarding technical / diagnostic equipment supply or parts purchase	- change MVBE <b>Art. 5(b)</b> and - add to MVBE Guidelines <b>paras. 20 &amp; 22</b>
	no express right for authorised repairers to install matching spare quality parts	although implicit in the current text, this needs to be made wholly unambiguous	- <b>Recitals 15 &amp; 17</b> to MVBE - MVBE Guidelines <b>paras. 20 &amp; 22</b>
	no express censure of discriminatory or arbitrary refusal of entry to VM’s authorised repair network	- express text on the characteristics of a genuine qualitative-only selective distribution network	MVBE Guidelines <b>para. 60</b>
	<i>References: MVBE : the draft Motor Vehicle block exemption</i>	<i>GBE: the draft vertical agreements block exemption</i>	