

COMMISSION EVALUATION REPORT
ON THE OPERATION OF REGULATION (EC) N° 1400/2002
CONCERNING MOTOR VEHICLE DISTRIBUTION AND SERVICING

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This is the report which the Commission is required to draw up by 31 May 2008, pursuant to Article 11(2) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector¹ (hereinafter referred to as "the BER"). The report evaluates the impact of the BER on industry practices and the effects of those practices on competition in the markets for motor vehicle retailing and in after sales servicing within the EU², and is intended to prepare the ground for the regime that will follow the BER's expiry on 31 May 2010.

The report is accompanied by four technical annexes. The first of these is an overview of the objectives behind the BER, while the second analyses how the EU markets for motor vehicle sales and after-sales services have evolved since the BER was adopted. The third examines the Commission's experience of the application of the BER, while the final annex expands on the analysis contained within the body of this report.

I. THE OBJECT AND RESULT OF THE REVIEW

The BER creates a safe harbour for motor vehicle distribution and servicing that follows the more effects-based approach of Regulation 2790/1999³, which applies Article 81(3) to vertical agreements in all other sectors. However, more detailed provisions were introduced into the 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, forecasts of growing concentration among vehicle manufacturers, and risks of reduced competition on the after-markets.

DG COMP launched a fact-finding exercise in mid-2007, by sending questionnaires to various groups of stakeholders in the motor vehicle industry, including individual car and truck manufacturers as well as the associations ACEA and JAMA, individual parts manufacturers and their European association CLEPA, the national and European associations of authorised dealers and repairers (e.g. CECRA) as well as independent repairers and parts dealers (e.g. FIGIEFA), independent vehicle traders associations, consumer organisations and the national competition authorities. In addition to the replies received, the Commission's analysis draws on other sources of information, including studies and external statistical databases.⁴

On the basis of this material, 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, and has therefore complied with the conditions in Article

¹ Commission Regulation (EC) No 1400/2002 of 31 July 2002 OJ L 203, 1.8.2002, p. 30–41.

² Pursuant to the Decision of the EEA Joint Committee No 136/2002 of 27 September 2002 amending Annex XIV (Competition) to the EEA Agreement (OJ 2002 L336, p. 38), Regulation 1400/2002 is also applicable in the EEA Member States. This report therefore covers the EEA even if normally reference is made only to EU Member States.

³ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, EN Official Journal of the European Communities L 336/21, 29. 12. 1999.

⁴ Apart from the answers to the questionnaires, we draw on numerous other sources, e.g. a report from London Economics on Developments in car retailing and after-sales markets under Regulation No. 1400/2002, the ACEA industry report, the European Commission report: Cars 21: A Competitive Automotive Regulatory System for the 21st Century, and Eurostat data.

81(3). This conclusion remains valid despite indications that certain sector-specific measures such as the application of different market share thresholds for selective distribution (Article 3(1) of the BER) and certain provisions protective of dealers' commercial interests (Articles 3(3) and 3(5)) may have actually run counter the Commission's policy objective of promoting innovative distribution models and lowering entry barriers to authorised networks.

In the Commission's analysis, the BER cannot be said to have extended the scope of the exemption to encompass agreements that have potentially harmful effects for consumers. On the contrary, several provisions of the BER risk constraining contracting parties in a way that may not be indispensable to protect effective competition. This would conflict with the principles of Better Regulation applicable to all EU legislation, in particular in the light of the evolution of other parts of the EU regulatory framework applicable to the sector.

II. MARKET DEVELOPMENTS

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.

On the vehicle sales markets, a significant decline in real prices for new motor vehicles, successful new entries, relatively few exits, significant fluctuations in market shares, moderate and decreasing concentration, increased consumer choice within the various market segments combined with shortening of model life-cycles are evidence of a generally dynamic competitive environment. Comparatively modest but fluctuating average profits and constant R&D expenditure are further supportive elements. Competitive pressure can be expected to increase further as car manufacturers from emerging countries enlarge their presence on the EU markets.

Furthermore, contrary to concerns identified during the 2000 review, intra-brand competition appears not to have decreased to any significant extent. Although concentration among car dealers has increased moderately following a significant growth of major groups in the main national markets and a relative decrease in network density, distribution structures across the EU still appear relatively fragmented when compared to markets such as the US. The profit margins of both manufacturers and dealers as regards vehicle sales appears on average to be low, which excludes possible risks of market power being exercised to the detriment of consumers. It should also be observed that there has been considerable price convergence across the EU for passenger cars, and that real prices for such vehicles have declined. In addition, there has been an evolution of consumption patterns away from outright purchase and towards alternative arrangements such as leasing, which adds to the competitive pressure on car dealers. Competitive pressure is further sustained by direct selling by vehicle manufacturers to leasing companies and other "fleet buyers".

In the after-market, both numbers of authorised repairers and overall network density have rebounded, in large part due to the BER. Many authorised repairers no longer sell new cars, and it is more common for them to be authorised to repair the brands of different manufacturers.

Many independent repairers have found it difficult to make the investments in technical skills, equipment and training needed to repair increasingly technologically complex vehicles, and the sector has slowly lost ground to the authorised networks. However, the independent sector has undergone considerable consolidation and structural adjustment, leaving it in a better state to compete. In particular, large chains of independent repair shops have emerged, which are

broadening the range of services that they offer to consumers. Although repair prices have risen, due to increased costs for skilled labour and the greater investments in equipment and training required by modern vehicles, the yearly cost of car maintenance has declined in real terms because of lengthening service intervals and greater reliability.

Spare parts manufacturers have maintained their position on the aftermarket, despite the fact that their main customers - independent repairers - have lost market share, while authorised repairers still purchase most of their requirements from the vehicle manufacturers. Part of the reason is that certain spare parts manufacturers have developed chains of repairers that bear their brand, and largely use their spare parts.

III. ACHIEVEMENT OF THE OBJECTIVES OF THE REGULATION

This section evaluates whether the seven objectives initially set by the Commission⁵ have been achieved in practice and to what extent the sector-specific rules in the BER have proven to be effective and/or necessary.

A. Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market

In today's changed market circumstances, characterised by increasing globalisation and vigorous inter-brand competition resulting from successful new market entries and production overcapacities, the residual risks that parallel networks of single-brand vertical agreements will create entry barriers are far lower than those assessed by the Commission in 2000.

Against this background, it is clear that dealers have not taken up the enhanced opportunities offered by Articles 1(1)(b) and 5(1)(a) of the BER to sell brands of competing manufacturers within the same showroom. In many instances, this form of multi-brand sales is used in the same circumstances as it was before the BER was adopted, for instance in areas with lower population density, as well as for certain brands which are not performing well, and where adding a competing brand consequently becomes a necessity to enable the dealers and brand in question to stay on the market. Although certain car manufacturers new to the EU market, along with some dealer associations, argue that by not exempting exclusive dealings with incumbents, the BER has made it easier to access existing networks, it is clear that the main driver behind multi-brand sales has been external market developments. It can be assumed that even in the absence of the relevant provisions in the Regulation, many car manufacturers would conclude contracts allowing for multi-branding where it made commercial sense to do so.

It should also be noted that some stakeholders argue that in encouraging same-showroom multi-branding, the BER may have led car manufacturers 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. On the other hand, there may be a risk that in the future, a proliferation of parallel single-brand networks of agreements covering a substantial proportion of the market could foreclose newcomers from the markets.

⁵ See Commission Communication 2002/C 67/02, of 16.03.2002.

It therefore appears that the sector-specific rules on multi-branding have not been fully effective and that the limits to the ability of vehicle manufacturers to impose direct or indirect non-compete obligations on their dealers set out in Regulation 2790/1999 could have ensured an equivalent level of protection of competition in the market.

B. Reinforcing competition between dealers of the same brand by encouraging diversity in distribution formats

Three main observations should be made as to how the market has developed since Regulation 1400/2002 came into force.

Firstly, the objective of removing the straitjacket associated with Regulation 1475/95 brought about by Articles 2(1) and 3(1) of Regulation 1400/2002 has not been achieved, in that virtually all car manufacturers have opted to use quantitative selective distribution agreements in all Member States. The fact that Article 3(1) of the BER provides for a more generous 40% market share threshold for quantitative selective distribution systems may have skewed this choice and contributed to the uniformity. This higher threshold appears anomalous, since it is generally felt that quantitative selective distribution is more restrictive of intra-brand competition than are systems such as exclusive distribution.

Secondly, the use of quantitative selection has permitted suppliers to reduce network density over the period from 2002 to 2006. It might therefore be questioned whether the exemption of this form of distribution may have led to a reduction of intra-brand competition, to the detriment of consumers and in contrast with the principles set out in Article 81(3) of the Treaty.

As to the postulated negative effects, one should firstly note that cars are expensive items, and consumers are therefore likely to travel long distances more readily to obtain a lower price. Network density would therefore have to fall to relatively low levels before any impact on intra-brand competition were to occur. In this regard, it should be pointed out that overall concentration levels for new vehicle retailing still remain relatively moderate, especially when compared to those in the US. It therefore seems unlikely that reductions in network density can have had an appreciable impact on intra-brand competition. On a more general note, it may also be observed that the widespread use of selective distribution across the motor vehicle distribution sector does not seem to have hampered the move towards more integration of national markets within the EU. It should be born in mind that selective distribution is commonly held to bring benefits, in particular because it prevents distributors that are not members of the brand networks from free-riding on the marketing and brand-building efforts of dealers. Quantitative selection has other particular advantages, in that it allows suppliers to take greater control of the geographic organisation of their networks, thereby bringing about economies of scale, reducing transaction costs, avoiding uneven brand representation.

Thirdly, as regards the opportunities offered by the BER for dealer-driven innovation in distribution, it appears that the sector-specific provisions of the Regulation have done little to encourage diversity within the quantitative selective model. Almost all observers agree that Article 5(2)(b) of the Regulation seems to have had little effect, in that few dealers have opened secondary outlets. Moreover, Article 4(1)(g) of the Regulation, which provides that dealers must be free to specialise in motor vehicle sales by sub-contracting out repair and maintenance has also been ineffective, in that few dealers have chosen to abandon what is a very lucrative part of their

businesses. Other opportunities for dealer-driven innovation, such as the distribution of the brands of different manufacturers from the same showroom, have not been taken up to any significant extent.

Overall, the BER has not succeeded in removing the straitjacket effect of the previous sector-specific block exemption, and the second objective has therefore not been met.

C. Facilitating cross-border trade in motor vehicles

The Commission's third objective was to encourage intra-brand competition across borders. The objective appears to have been achieved, as prices between Member States have converged and cases of hindrances to parallel trade, including complaints from final consumers, have significantly diminished. The abolition of the Commission's Notice⁶ concerning the activities of intermediaries in the car sector, which allowed car manufacturers to impose quotas on their dealers regarding their sales to intermediaries operating across borders, has contributed to this development. Moreover, Article 4(1)(e) of the BER, which followed the general regime by ruling out restrictions on active and passive sales in selective distribution systems, appears to have had beneficial effects.

Despite the potential of selective distribution systems to hinder arbitrage between territories, and in contrast to the position in the 1990s, declining price differentials indicate that cross-border trade in new vehicles is now sufficient to exert effective competitive pressure.

However, Article 5(2)(b), which relates to dealers' contractual rights to open additional sales outlets (the so called "location clause") has not resulted in any observable change in behaviour and have proven largely unsuccessful, although it may have been helpful in signalling to market players the Commission's determination to protect cross-border arbitrage and to bring down price differences. As to the availability clause in Article 4(1)(f), this appears redundant from a legal perspective, given that the application of the general principles of the case law would qualify a refusal to supply vehicles with foreign specifications as an indirect restriction on reselling⁷. It is, however, worth considering whether some form of guidance recalling the relevant case law might be useful in order to improve transparency.

Overall, therefore, it would appear that the application of the general principles of competition law could be sufficient to protect parallel trade in the current market context. It should also be noted that Directive 2007/46/EC⁸ ought to help make parallel trade easier, since it has clarified the rules regarding certificates of conformity, making it plain that suppliers must provide these documents in paper form with each vehicle.

⁶ Commission Notice concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements (OJ No C 17, 18.1.1985, p. 4)

⁷ See judgment of 28 February 1984, joined cases 228 and 229/82 Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission ECR (1984) 1129.

⁸ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJ L 263 of 9.10.2007, p.1

D. Enabling independent repairers to compete with the manufacturers' networks of authorised repairers

Independent repairers are the only source of inter-brand competition on the aftermarket, and provide consumers with valuable choice. In 2000, the Commission saw two inputs as essential to the ability of such repairers to compete: technical information and spare parts. The BER therefore contains provisions to protect access to each, which appear to have helped the independent sector through a period of structural adjustment to changing technological needs.

While Article 4(2) of the BER, which provides that suppliers have to give independent repairers access to technical information, has had a positive impact, it should be noted that, from 1 September 2009, EURO5 and 6 Regulation 715/2007⁹ will oblige suppliers to release all such information for new models. Information on older models should already have been widely disseminated pursuant to Article 4(2) of the BER. The Commission will continue to monitor the situation, and will assess any complaints received from the independent repair sector. It should be noted in this respect that the four Commission decisions adopted in September 2007¹⁰, which gave valuable guidance to the sector, analysed the failure to grant access to technical information on the basis of Articles 81(1) and 81(3) of the Treaty, as well as with reference to the BER. Consequently, even in the absence of the current rules in the BER, the Commission would still be in a position to take appropriate enforcement action on the basis of Articles 81 and/ or 82 of the Treaty.

Spare parts manufacturers have maintained their share of aftermarket supply, and there are few instances of authorised repairers refusing to supply spare parts to their independent competitors, largely because they make considerable profits by doing so. Although the presence of a sector-specific hard-core clause in Article 4(1)(i) of the BER may have helped to clarify the legal position, the enforcement of the general rule, whereby a supplier using selective distribution cannot restrict its distributors from selling to end users, would protect competition to the same degree. It should also be noted that in the unlikely event that a vehicle manufacturer were to distribute its parts itself rather than through a selective distribution system, its authorised repairers would lose their distribution function and would be qualified as end users. In these circumstances the hardcore provision in the BER would be ineffective, since it does not apply to restrictions imposed on such users.

A number of spare parts remain captive: i.e. they are only available from vehicle manufacturers. These are (i) visible spare parts covered by design protection in several Member States and (ii) spare parts produced under a variety of subcontracting agreements, such as tooling arrangements which, in the light of the Commission's 1978 notice on subcontracting agreements¹¹, presently fall outside the scope of Article 81(1), and in respect of which the application of Article 81(3) of the Treaty therefore does not arise. As to the first category of captive spare parts, the situation is

⁹ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, Official Journal L 171/1 of 29.6.2007.

¹⁰ Cases Comp/39.140 -39.143, DaimlerChrysler, Fiat, Toyota and Opel.

¹¹ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty

the result of the existing legislative framework on the protection of design rights¹². The second category may only be dealt with by reviewing the subcontracting notice to better explain the circumstances in which certain practices may be caught by Article 81(1).

E. Protecting competition within the authorised networks

Overall, the BER has been successful in protecting competition between authorised repairers, in that Article 3(1) has led to the introduction of qualitative selective repair systems. As a consequence, market forces have led numbers of authorised repairers to increase, since all repairers meeting objective criteria can join a network.

While vehicle manufacturers have set more demanding quality standards for their networks of authorised repairers, this does not seem to have operated against consumers' interests. The new standards have not only increased the quality of service provision, but have also had an influence on the independent sector, which has reacted by setting up competing networks and franchised chains with common standards, so as to better respond to consumers' demand for high quality, efficient and reliable services.

It should be observed, however, that the enforcement of the general principles applicable to qualitative selective distribution could achieve the same result even in the absence of the specific "hardcore" restriction in Article 4(1)(h). It is clear that a requirement for a repairer to also sell new vehicles could not be regarded as qualitative in nature and that agreements containing such a restriction would therefore fall under Article 81(1). Since in most cases, manufacturers' authorised repair networks have market shares largely exceeding 30%, the agreements in question could not take advantage of the safe harbour applicable to quantitative selective distribution under Regulation 1400/2002, so that the direct application of Article 81 could ensure an equally open access to such networks for newcomers.

Furthermore, Article 4(1)(k) of the BER, which relates to the purchase of alternative brands of spare parts by authorised repairers, has not caused any significant change in their commercial behaviour, in that such repairers continue to purchase most of their needs from vehicle manufacturers. It should firstly be noted that it is difficult for authorised repairers to purchase from more than one source, since this would necessitate duplication of logistics and increased IT costs. This implies that since vehicle manufacturers oblige authorised outlets to use carmaker-branded parts for warranty repairs, the vehicle manufacturer is the natural source for all parts requirements. The fact that the car manufacturers are the only suppliers able to offer the whole range of parts constitutes an added attraction. This however is linked to the existence of IPRs held by vehicle manufacturers, or is the result of subcontracting agreements, which may fall outside Article 81(1). By contrast, in some cases bonus and rebate schemes may have a fidelity-enhancing effect. Whether such schemes constitute a form of competition on the merits, or are so constructed as to unduly foreclose competing parts producers by enhancing the fidelity of authorised repairers is a question that can be answered only on a case by case basis, by taking into account the economic context surrounding such practices and by weighing any potentially anti-competitive effect against possible efficiency-enhancing effects. This may involve the

¹² Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998. The Commission has proposed to revise this Directive. The revision is currently through the legislative process.

application of Article 82, while remaining coherent with the exclusion of non-compete obligations from the block exemption, in particular when the vehicle manufacturer's share of the relevant market for spare parts exceeds – as is generally the case - the 30% threshold. Therefore, even in the absence of Article 4(1)(j) and 4(1)(k), any serious foreclosure risk could be appropriately addressed through enforcement actions.

F. Facilitating spare part producers' access to the aftermarket

A number of provisions of Regulation 1400/2002 were aimed at ensuring that Original Equipment Suppliers and producers of matching quality spare parts could have access to both independent and authorised repairers, in order to allow these latter to offer consumers a choice of spare parts. Article 4(1)(j) excludes from the benefit of the block exemption agreements that restrict OES' ability to sell spare parts directly to aftermarket, while as has been seen, Article 4(1)(k) provides that agreements preventing authorised repairers or distributors from sourcing matching quality parts or other brands of original parts may not benefit from the block exemption.

In addition, Article 4(1)(l) qualifies as a hardcore restriction any agreement that restricts OES' ability to place its trade mark or logo on spare parts or components supplied to a vehicle manufacturer for the purposes of their first assembly into a motor vehicle ("dual-branding").

Moreover, Article 1(t) defines the term "original spare parts" as including spare parts of the same quality that are produced by an OES according to specifications of the vehicle manufacturer concerned. This clarification was intended to allow OES to sell their products to repairers as being "original" and not just of matching quality so as to improve their marketing opportunities. Finally, in order to avoid vehicle manufacturers invoking differences in quality as an objective justification to prevent their authorised repairers to use competing parts in the performance of their services, Article 1(u) also defines matching quality spare parts as parts that match the quality of the original components.

Overall, spare part suppliers seem to have maintained their position on the aftermarket, despite the fact that their main customers - the independent repairers - have lost market share. In particular, the definition of "original spare parts" provided in Article 1 of the BER has created a valuable marketing tool. However, this definition has in the meantime been superseded by Directive 2007/46¹³, which provides for an essentially identical definition of "original parts" to that in the BER. As to parts which are not original, it should be noted that even in the absence of a definition of matching quality parts an obligation placed by a vehicle manufacturer on its authorised repairers not to use alternative brands of parts would amount to a direct non-compete obligation which would not be covered by the BER over a 30% market share threshold, in line with an equivalent approach in Regulation 2790/1999.

Article 4(1)(j), on the other hand, appears to have been effective, as far as it concerns OES' sales to the independent aftermarket, in that parts manufacturers have been able to maintain their market position as regards such sales. However, the same would have happened under the general regime applicable to vertical restraints, as the same restriction is also treated as hardcore by

¹³ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, OJEU L 263/1 of 19.10.2007.

Regulation 2790/1999. It is also doubtful whether dual-branding on the basis of Article 4(1)(l) has contributed to repairers' ability to identify compatible replacement parts, given that this type of information ought already to be made available pursuant to Article 4(2).

G. Protecting dealer independence vis-à-vis vehicle manufacturers

The independence of dealers from their suppliers was not an aim of the BER in itself, but its promotion was instead seen as a flanking measure to encourage pro-competitive conduct¹⁴. Article 3 of the BER therefore lays down minimum durations for contracts (Article 3(5)), and for minimum notice periods in case of termination (in which case reasons have to be given (Article 3(4)) or non-renewal, and also provides for dealers to be free to sell their dealerships to other firms of their choice within the networks, as well as for an arbitration mechanism for contractual disputes (Article 3(6)).

It should be recalled that inter-brand competition has increased since the block exemption entered into force, which implies that the protection of competition within the brand networks may have become less important in keeping pressure on quality and prices to the benefit of consumers.

In any event, it is doubtful that Article 3(5) of the BER can have had much effect, given that in the vast majority of cases, suppliers have given dealers indefinite contracts that can be terminated on two years' notice: something which hardly gives much protection to a dealer's brand-specific investments. Moreover, in today's climate of strong inter-brand competition, it seems unlikely that a manufacturer would choose to respond to pro-competitive dealer behaviour by threatening expulsion from the network. Instead, over-rigorous auditing or the setting of artificially high sales targets that preclude a dealer from obtaining volume bonuses would be more subtle and more effective tools for disciplining dealers that stepped out of line. It should further be noted that the Commission's investigation has not unearthed a single case in which the obligation to give reasons for contract termination (Article 3(4)) permitted a judge or an arbitrator to determine that notice had in fact been given in order to punish pro-competitive conduct.

It should also be emphasised that the minimum duration of five years for dealer contracts set out in Article 3(5)(a) is not solidly justified from an economic standpoint, as it does not address the fact that longer term agreements may actually prove more restrictive of competition as a result of that longer duration. In particular, they may prevent manufacturers from replacing poorly-performing dealers with more efficient newcomers, and may delay the introduction of new contracts that respond to changes in market circumstances.

As regards Article 3(3) of the Regulation, which was intended to foster market integration through the development of cross-border dealerships, the Commission's inquiry has shown that virtually all transfers of dealerships within the authorised networks have occurred at national level. The aim has therefore not been achieved, and the BER may instead have led to dealer concentration in certain local areas, potentially creating future problems for the national competition authorities.

Article 3(6), which provides for arbitration in case of dispute, appears to have had a generally positive effect, in limiting the number of costly and long-drawn out court proceedings. Judges are often less well-equipped than independent arbitrators to act expediently on technically complex

¹⁴ See Recital 9 of the BER.

issues, relating for instance to the achievement of quality standards. In addition, while suppliers need flexibility in order to adjust their motor vehicle distribution networks to changes in market conditions, it would not be in their interests to promote instability and short term thinking within the networks, since they need loyal dealers willing to make significant investments. The provision of an effective mechanism for dispute resolution is more closely related to the efficient implementation of contracts than it is to competition concerns. From a dealer's perspective, having a clear and quick mechanism for resolving disputes potentially deters the stronger contractual party from abusing its position, while from the point of view of the supplier, arbitration permits them to sanction contractual breaches in a timely manner and avoids the bad publicity that court actions can bring. Therefore, even in the absence of Article 3(6) of the BER, it may be beneficial to all parties to agree to a voluntary code of good practice that sets out an arbitration procedure for resolving contractual disputes, as well as minimum standards for what constitutes good faith and a respect for the legitimate expectations in the context of contractual relations between parties.

IV. OVERALL ASSESSMENT

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. In particular, vigorous and increasing inter-brand competition has translated into falling real prices against a background of increased market integration at EU level. Therefore, the Commission has not at this stage found enough indications of market failure or actual or potential consumer harm distinguishing motor vehicles from other economic sectors.

The BER has supported industry's adjustments to this changing environment and, particularly in the aftermarket, has stimulated a pro-competitive and dynamic stakeholder response. However, this outcome seems in the main to stem from measures inspired by general principles derived from the case-law of the European courts and currently reflected in Commission Regulation 2790/1999, rather than from provisions specific to the BER. For instance, the application of the general principles governing qualitative selective distribution seems to have had positive effects on the after-markets, where it has led to a significant rebound in the number of authorised repairers.

As regards the sector-specific hardcore restrictions laid out in Article 4 of the Regulation, the Commission's inquiry has not revealed any clear causal link between these provisions and the improvements of the competitive conditions in the market which could be observed during the reference period. Although Article 4(2) of the BER, which provides for full and non-discriminatory access by independent after-market operators to vehicle manufacturers' brand-specific technical repair information, may have had some use in signalling the Commission's concerns, enforcement action in response to persistent problems in this area has involved the application of Article 81, and such action will remain possible even in the absence of the current rules in the BER. In addition, this particular measure, as well as Article 1(1)(t), which was designed to enhance access of competing spare part producers to the after-market, will be superseded in 2010, following the entry into application of the new regulatory framework concerning the system of type-approval of motor vehicles and parts, namely Regulation 715/2007 and Directive 2007/46. It is also doubtful whether Article 4(1)(j) of the BER, which extends the

scope of the corresponding hardcore restriction in Article 4(e) of Regulation 2790/1999 in order to prohibit restrictions preventing original equipment suppliers to sell parts to both independent and authorised repairers, has played any significant role in protecting parts producers' access to the aftermarket.

In particular, as regards competition in the market for automotive spare parts, it should be recalled that the intellectual property rights held by vehicle manufacturers and the widespread use of a variety of sub-contracting arrangements with original equipment suppliers (including so-called "tooling arrangements") have meant that certain spare parts remain captive to the vehicle manufacturers' networks. This may have somewhat weakened the position of independent parts wholesalers and translated into higher overall repair prices. However, these potential competition issues depend on the application of Article 81(1) to this type of arrangements in each individual case and do not relate to any possible failure of the BER to properly address such problems under Article 81(3). It should be observed in this context that the Commission proposed the introduction of a "repair clause" in its proposal for a revised Design Directive¹⁵.

In addition, the Commission's inquiry leads to the same conclusions as regards the sector-specific conditions set out in Article 5 of the BER, which have either proven unnecessary to achieve the desired objective (e.g. the protection of parallel trade through the exclusion of locations clauses from the scope of the exemption) or have not shown any robust causal link with the observable improvements of the competitive conditions in the market (e.g. the prevention of foreclosure risks through stricter rules for multi-branding).

Finally, as the analysis in Annex 4 demonstrates, the specific rules in Article 3 of the BER may have been counter-productive in some cases. Firstly, the BER may actually have encouraged uniformity in distribution by setting the market share threshold for the exemption of quantitative selective distribution agreements at a level that is higher than that for other forms of distribution. Secondly, by only exempting long-term contracts, the BER may have made it more difficult for newcomers to access the networks. Thirdly, the specific rules meant to facilitate the transfer of dealerships amongst the existing members of a network have not only missed their initial policy objective, which was to allow for the development of distributors with an international footprint, but their future application might further the growth of larger dealer groups at national level which, in some cases, could lead to a loss of both inter- and intra-brand competition in local areas.

In summary therefore, it appears that the provisions of the BER which diverged from the general principles derived from the case-law of the European courts and currently reflected in Commission Regulation 2790/1999 may be regarded, in the current economic context characterised by increasingly globalised and competitive automotive markets, as overly strict, too complex and/or redundant, particularly in view of the introduction of new EU legislation for motor vehicles.

In the light of the foregoing, it would seem that a more effects-based and flexible approach would deliver better results for consumers.

¹⁵ Directive 98/71/EE of The European Parliament and of The Council of 13 October 1998 on the legal protection of designs, Official Journal L 289, 28/10/1998. A proposal to revise this text is currently pending before the Council: COM(2004) 582.

Firstly, such an approach would allow the Commission to better focus its efforts on the most harmful anti-competitive practices and avoid risks of distortions of its enforcement priorities. It is notable in this respect that despite the Commission having received 46 formal complaints in this sector since 2002, this did not result in any prohibition decisions¹⁶ and only three informal settlements¹⁷ were reached. More strikingly, of the 322 informal complaints that the Commission received between 2004 and 2007, only 36 merited additional investigatory steps and none of them resulted in the opening of formal proceedings. In fact, the vast majority of these informal complaints did not relate to genuine competition issues but rather to *inter partes* commercial disputes. It seems reasonable to surmise that these activities have used Commission's resources which could have otherwise been dedicated to the detection and prosecution of more harmful anti-competitive practices with clear detrimental effects on consumer welfare. At national level, the figures are broadly comparable. While National Competition Authorities were seized with a total of about 340 complaints, they were able to take enforcement actions resulting in envisaged decisions within the meaning of Article 11(4) of Regulation 1/2003 in only 7 cases.

Secondly, it is notable that the complexity of the current sector-specific rules has entailed a concrete risk of divergent interpretations by national courts which, in one case, has required the Commission intervention in the form of an *amicus curiae* brief within the meaning of Article 15(3) of Regulation 1/2003¹⁸. It is therefore likely that more effects-based and simpler regulation would better ensure the coherent application of Community competition rules throughout the EU.

Thirdly, it is submitted that less formalism would lead to more legal certainty for firms in the sector. It should be recalled that, despite having deployed considerable efforts on the publication of an explanatory brochure and a set of frequently-asked questions, the Commission has been faced, during the whole reference period, with frequent requests for assistance from stakeholders, which in the main did not relate to any impact that agreements could have on the market, but rather to the interpretation of particular contractual clauses. More importantly, the number of requests for preliminary rulings made to the ECJ and concerning the automotive distribution sector reflects the relatively high level of legal uncertainty which seems to result from a too detailed and formalistic approach. Four of the thirteen preliminary rulings that the European Court issued from 1 January 2003 to 31 December 2007 in the field of antitrust related to the interpretation of block exemption-related clauses regarding conditions for contract terminations in the motor vehicle sector. This represents 80% of all such rulings relating to vertical distribution agreements over the period¹⁹.

¹⁶ The four commitment decisions adopted by the Commission the 13 September 2007 in the cases *Toyota*, *Fiat*, *DaimlerChrysler* and *Opel* stemmed from ex-officio investigation, while the Commission's prohibition decision in the case *Peugeot* of (of 5 October 2005 was based on complaints predating the entry into force of the BER.

¹⁷ See IP/06/302 – 303 of March 2006 in *GM* and *BMW* cases, as well as IP/03/80 of 20 January 2003 in the *Audi* case.

¹⁸ In order to ensure the coherent application of Article 81 of the EC Treaty the Commission submitted a written observations to the Cour d'Appel de Paris concerning the case *Garage Grémeau / Daimler Chrysler France*, case RG 05/17909.

¹⁹ Three of the four concerned the issue of contract termination with one year's notice where a network was allegedly being reorganised, while the remaining case sought clarification of the meaning of Article 3(6) of the Regulation on the role of arbitration when a contract was terminated - Case C-125/05 *Vulcan Silkeborg v Skandinavisk Motor*, 07.09. 2006; joined cases C-376/05 and C-377/05 *Brünsteiner, Hilgert v BMW*, of 30

Finally, it seems probable that a more effects-based and flexible approach would help to reduce compliance costs for market players²⁰. There is no doubt that the strong emphasis on quality standards witnessed after 2002 has been to some extent provoked by the shift from a system that combined elements of both exclusivity and selectivity towards a more open system. It is notable in this regard that virtually all national dealer associations responding to the Commission's investigation expressed the view that the entry into force of the BER could be linked to major changes in contractual standards, and some associations put the resulting increase in costs faced by dealers at around 20%. However, this regulatory change was accompanied by numerous conditions and by an extensive list of hardcore clauses which, in certain cases, failed to deliver the expected improvements of the competitive conditions in the market. This is particularly evident for those regulatory constraints designed to promote sub-contracting arrangements for repair services, the free opening of additional sales and delivery outlets as well as, to some extent, multi-branding. It therefore seems likely that if the superfluous regulatory constraints in the BER were removed through a more effects-based approach, the parties would be likely to enter into more cost-efficient arrangements, which would bring benefits to consumers.

The Commission therefore concludes at this stage that a more flexible regime, drawing closer inspiration from the general principles applicable to vertical restraints as currently reflected in Regulation 2790 would have ensured an equivalent level of protection of competition in the market, while entailing lower compliance costs for companies and a more efficient enforcement system for competition authorities.

V. NEXT STEPS

It should be noted that the report confines itself to representing the Commission's preliminary views on the functioning of Regulation 1400/2002 and does not prejudice in any respect a final decision on the outcome of the review. The report is the initial step of a comprehensive consultation process to which all stakeholders are asked to contribute.

Based on the insights gained during the upcoming consultation, the Commission will undertake a subsequent assessment of the likely positive and negative impacts of regulatory solutions. It should also be noted that the review process on the general Block Exemption Regulation 2790/1999 will be coincidental with the publication of such impact assessment. Should this process lead the Commission to take the view that the motor vehicle sector may be adequately covered within a general regime on vertical restraints, all stakeholders would have ample opportunity to ensure that their concerns are properly examined in the framework of the future legislative procedure.

In order to identify the most appropriate solution for a future regime, the Commission invites third parties to provide their comments on the findings of the present Report

Observations should be sent by 31.07.2008

November 2006; Case C-273/06 Auto Peter Petschenig v Toyota Frey, 26.01.2007; Case C-421/05 City Motors Groep v Citroen Belux, 18.01.2007.

²⁰ For Spain the regional dealer association estimates that costs increase due to higher standards amounted to 20% after the introduction of the MVBER; Answer to question 2.13 of the Commission's questionnaire HT1021-ADL-026.

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