

## Staff working document No. 4

### 4 The impact of Regulation 1400/2002: an effects-based analysis

This Working Document analyses the seven objectives of the Regulation on the basis of the market data presented in Working Document 2 and the enforcement experience of competition authorities and the European courts. As stated in Working Document 1, the seven objectives of the Regulation are preventing foreclosure on the vehicle retailing and repair markets, ensuring effective intra-brand competition within national sales networks, protecting parallel trade between Member States, ensuring effective competition between authorised and independent repairers, ensuring competition within the authorised networks of repairers and spare parts distributors, improving spare parts producers' access to the automotive aftermarket and, lastly, safeguarding the independence of dealers and authorised repairers.

For each of these objectives, the following Working Document sets out the relevant provisions of Regulation 1400/2002, whether the objective has been achieved and whether the provisions in question were effective and relevant. Particular attention is given to whether the current regulatory framework has led to either Type I or Type II errors, i.e. to either under- or over-regulation. Each objective then is checked against a hypothetical application of the general regime to establish what the likely effects on the market would have been had the general principles applicable in the field of vertical restraints, as contained in Regulation 2790/1999 and the Guidelines on Vertical Restraints, been applied.

#### *4.1 Preventing foreclosure on the vehicle retailing and repair markets*

Both new entrants and brands that wish to expand their presence on the EEA market need access to sales outlets so that they can build a sufficiently dense network to be successful. While in some cases, it may be possible to contract with potential dealers that are not currently on the market, in many cases it may be cheaper for a supplier to distribute its vehicles through firms that currently sell the brands of other manufacturers. To facilitate this process, the Regulation does not block-exempt agreements with dealers and repairers which prevent them from distributing brands of different vehicle manufacturers<sup>1</sup>. Although the term "multi-branding" is sometimes used by market operators to include the situation where a dealer sells two or more brands from the same manufacturer, the Regulation only excludes from the benefit of the block exemption non-compete obligations, i.e. contractual arrangements which prevent the dealers, directly or indirectly, from selling vehicle of competing manufacturers not belonging to a single group of undertakings.

In practice, multi-brand retailing may follow three different models: selling the brands of competing manufacturers in different locations, often as a result of taking over another dealership; selling such brands in different showrooms on the same site, and selling more than one manufacturer's brands from the same site and from a single showroom. Multi-branding of the latter two kinds has always been particularly popular in sparsely populated Member States such as Finland, where 80% of the dealers currently sell two or more brands.

---

<sup>1</sup> Where a dealer takes on different brands from the same manufacturer, this is not considered to be multi-branding.

### 4.1.1 Relevant provisions

In its evaluation report on the application of Regulation 1475/95 in 2000, the Commission observed that multi-brand arrangements were very rare, and consequently, the widespread use in the market of similar single branding arrangements could constitute a barrier to entry or to expansion of competing manufacturers, thereby contributing to the stifling of competition across the European Union.<sup>2</sup> One major reason was believed to be the rather lenient provision contained in Article 3(3) of Regulation 1475/95, which exempted certain restrictions on multi-branding<sup>3</sup> irrespective of the market share of the manufacturer. Consequently, the provisions of the previous Regulation allowing manufacturers to oblige dealers engaged in multi-branding to have separate sales premises were not carried over into Regulation 1400/2002. In particular, **Article 5(1)(a)** excluded from the benefit of the block exemption all types of direct or indirect restrictions to multi-branding so as to allow dealers to also sell competing brands, either from separate premises or from the same showroom.<sup>4</sup> Furthermore **Article 5(1)(b)** aimed at ensuring free access to the markets for the servicing of motor vehicles by limiting the opportunities for vehicle manufacturers wishing to benefit from the block exemption to impose single branding obligations on repairers and distributors of spare parts. These articles should be read in conjunction with **Article 1(1)(b)**, which defines a non-compete obligation as any direct or indirect obligation on the buyer to purchase from the supplier more than 30% of the buyer's total purchases of the contract goods or services. It should be recalled that the provisions of Regulation 1400/2002 are stricter than those in Regulation 2790/1999, which allow the supplier to oblige its distributors not to sell any competing brand from any of its premises for up to 5 years if the supplier has a market share of below 30% (Article 5(a)). In addition, Article 1(b) of Regulation 2790/1999 confines itself to fix a general principle whereby the concept of non-compete obligation encompasses any arrangement "causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services", without regulating the details of the specific distribution models which should be regarded as a legitimate form of multi-branding. Furthermore, Regulation 2790/1999 defines a non-compete obligation as any direct or indirect obligation on the buyer to purchase from the supplier more than 80 % of the buyer's total purchases of the contract goods or services.

It should also be noted that, in line with the general policy approach reflected in Regulation 2790/1999, Regulation 1400/2002 does not treat non-compete obligations as hardcore restrictions but rather as special conditions. Therefore, if a supplier on the market has a market share of below 5%, it may benefit from the de-minimis rule.<sup>5</sup>

### 4.1.2 Achieving the objective

On the basis of the market data presented above in Working Document 3, there does not seem to be a real foreclosure problem in today's markets for the sale of new vehicles and their repair and maintenance: indeed all relevant indicators point to the contrary. Levels of

---

<sup>2</sup> Report on the evaluation of Regulation (EC) No 1475/95, Para. 209, page 72

<sup>3</sup> In particular, Regulation 1475/95 exempted agreements that allowed multi-branding only if undertaken from separate sales premises, under separate management, in the form of a distinct legal entity and in a manner which avoids confusion between makes.

<sup>4</sup> Speech 03/59 by Mario Monti, 6 February 2003, p.4

<sup>5</sup> Commission Notice on [agreements of minor importance which do not appreciably restrict competition](#) under Article 81(1) of the Treaty establishing the European Community (de minimis), Official Journal C 368, 22.12.2001, p.13-15. The threshold is set to 5% due to the cumulative effect of agreements entered into by different suppliers or distributors in the sector.

concentration have decreased, market shares have become more volatile and, in a context of increasingly global markets, barriers to entry are at a relatively low level, while retail prices and manufacturers' margins are currently subject to an appreciable degree of downward pressure.

In this context, it would seem that the provisions of the Regulation on multi-branding have played a role, by lowering entry barriers, thereby making access to retail markets easier for newcomers. A number of replies from stakeholders underline the risks associated with the cumulative effect resulting from parallel networks of single branding agreements and point to the positive role played by the Regulation in introducing more open and flexible distribution systems across the EU. More specifically, a first evaluation of the new opportunities for multi-branding by London Economics<sup>6</sup> revealed that, in the twelve countries surveyed, the proportion of dealers engaged in such practices increased from 7% to 17% over the period from 1997 to 2004 and that the trend quickened in more recent years, particularly after 2002. This finding has been confirmed by the Commission's inquiry.

However, according to the responses the Commission received from manufacturers and dealer associations, the prevailing multi-branding model varies considerably, depending on the brand. While there is little or no multi-branding for premium brands, recently arrived volume brands such as Hyundai and Kia state that about 50% of their dealers are multi-brand. The same holds true for smaller manufacturers entering the market such as Ssangyong. In addition, while CECRA indicates a recent increase in multi-branding from the same premises and the same showroom, the majority of respondents to the Commission's inquiry indicate that multi-branding from the same showroom has either not taken off at all, or is less popular than other types of multi-branding, due to the complexity of reconciling distinct corporate identities, brand images, and operating standards within a single sales outlet. CECRA itself observes that a large proportion of the increase reported in multi-branding over the past five years can be attributed to the emergence of large dealer groups which have a number of brands in their portfolio but operate from different showrooms mainly at different geographic locations. In some Member States such as Spain multi-branding from the same showroom is almost non-existent. In others such as Poland a niche brand is occasionally added to an existing showroom, whereas in Belgium, France and the UK multi-branding has been taken up to a limited degree since Regulation 1400/2002 was introduced.

Concerning trucks, a recent study shows that the share of multi-brand contracts has risen from 3.1% to 9.5% between 2002 and 2006. However, cases in which one outlet sells competing products of different brands are rather the exception. In most cases the second brand complements the pre-existing product offer, for example where a heavy trucks dealer adds a brand for light commercial vehicles.<sup>7</sup>

In the light of the above, the Commission comes to the conclusion that same showroom-multi-branding has not met with significant success either for passenger cars or for trucks. In the vast majority of cases, where such a sales model is used, this choice results from market forces rather than from the provisions of the Regulation. The main example is in areas of low population density, where mono-brand sales would not attract sufficient buyers to make a business viable. In such circumstances, same-showroom multi-branding existed even before the entry into force of Regulation 1400/2002 since it was in the interests of both dealers and manufacturers to adopt such a model.

---

<sup>6</sup> London Economics, report on the block exemption, 2006, page 63

<sup>7</sup> "The European Commercial-Vehicle Sales and After-Sales Landscape" BCG Report, 2007, p.25/26

### 4.1.3 The Commission's enforcement experience

The benefit of the Regulation was made dependent on the condition that manufactures would remove all direct or indirect obstacles to multi-brand distribution and servicing on dealers and repairers. The Commission has not received any complaints by vehicle manufacturers claiming that entry was not possible due to foreclosure of distribution and service points. Several dealer associations reported, however, that multi-branding and servicing from the same site is hindered by the manufacturers' standards, especially those relating to the manufacturer's corporate identity, which may be seen as one reason why this form of multi-branding has not taken up as expected.

The Commission sought actively to preserve free access of competing brands to existing dealers and repairers and took up two lead cases designed to clarify these core principles of the Regulation. These two cases, concerning the distribution and servicing agreements of **General Motors (GM)**<sup>8</sup> and **BMW**<sup>9</sup>, were closed in March 2006. The Commission's aim was to ensure that GM and BMW dealers and repairers were not hindered from using their existing facilities to sell or service cars of competing brands, by having to unnecessarily duplicate investments.

Both car manufacturers agreed to remove contract provisions hindering their dealers and repairers from using existing facilities to sell or service cars of competing brands. In particular, GM removed a mechanism aimed at penalising dealers who failed to achieve certain market penetration targets calculated on the basis of GM's nationwide market share and agreed to take account of the local business circumstances of each dealer, including the decision to sell competing brands. Sales targets of this kind produce an effect similar to an indirect non-compete obligation. Moreover, GM and BMW clarified that dealers and repairers can use generic (multi-brand) IT infrastructure and management systems, including accounting methodology and accounting frameworks, and that they are not required to disclose commercially sensitive information on those parts of their businesses relating to the brands of other manufacturers.

It should be underlined that the satisfactory results achieved by the Commission in the context of these investigations were not based on the application of the specific definition of non-compete obligations contained in Article 1(1)(b), including the ceiling of 30% of maximum annual purchases calculated on the basis the total yearly requirements of the dealers. As the agreements at issue formally respected such provisions, the fidelity-enhancing effects scrutinized by the Commission in these cases were rather linked to the methods used by the manufacturers and their dealers to negotiate the yearly sale targets to be fulfilled by each individual dealer. This required an in-depth examination of the factual circumstances of the case, as well as a careful analysis of both the potentially negative and efficiency-enhancing effects of the practice at issue, which went beyond a mechanical application of the specific rules contained in Regulation 1400/2002. It is worth noting that, following such an approach, the practices at issue could also have been qualified as indirect non-compete obligations under Regulation 2790/99, so that the final outcome of these cases would have not been different even in the absence of a sector-specific block exemption Regulation.

---

<sup>8</sup> See Commission press release IP/06/303 of 13th March 2006.

<sup>9</sup> See Commission press release IP/06/302 of 13th March 2006.

#### 4.1.4 Assessment of the effectiveness and relevance of the provisions of the Regulation

There is evidence that the number of dealers carrying two or more competing brands has increased over the relevant period. There is also a positive correlation between new entry and expansion by smaller brands and the increase in multi-branding. It is, however, less clear to what extent there is a causal link between the sector-specific provisions of the Regulation and the increase in multi-branding. First of all, the opportunity to sell competing brands from the same showroom, which was the main change introduced by the current Regulation as compared with the previous one, has not met with great success. Multi-branding from the same showroom has only slightly increased and is less popular than other types of multi-branding. Same-showroom multi-branding is mostly used by low volume brands in low volume markets, by smaller dealerships lacking the funds to make the required investments to construct a separate showroom, and in sparsely-populated areas such as Finland.

Secondly, it is noteworthy that multi-branding was already on the increase before the current block exemption was adopted, for certain brands which were not performing well, and where adding a competing brand consequently became a necessity to enable the dealers and brand in question to stay on the market. It is therefore fair to say that general market developments have been the main driver behind multi-branding and servicing, and that the applicable competition law regime has not had an appreciable effect. It can, therefore also 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.

Thirdly, while all forms of multi-branding have certain advantages with regard to shared costs and other synergies, the case for efficiencies is less clear when it comes to selling competing brands from the same showroom. Both vehicle manufacturers and some dealer associations reported disadvantages to this form of multi-branding in terms of potential negative impacts on the manufacturer's corporate identity and specific brand image, as well as on dealers' management of operating standards. It should be noted in this regard that efforts at brand differentiation are becoming ever more important, and are also mirrored by increasing budgets for advertising and other promotional efforts to create and improve brand image as a key tool to face increased inter-brand competition.

Fourthly, where multi-branding takes place within a dealer group, this can also have a negative, as well as a positive impact on competition. It should in particular be noted that the market share of the top 25 dealer groups in each of the major markets has grown from 2003 to 2006 between two and seven percentage points<sup>10</sup>. While dealer groups may have higher buyer power *vis-à-vis* the vehicle manufacturer and in some cases pass on the savings to consumers, competition can diminish at local level where such a group owns a large proportion of outlets selling competing brands in a given area. However, it should be noted that cars are expensive goods, and that consumers may therefore be prepared to travel long distances to obtain a better price. Cases where a dealer group may gain a high level of market power within a local retail market will therefore only occur in extreme circumstances, and may be dealt with on an individual basis by national competition authorities.

In general, it can be observed that same-site multi-branding has clearly helped some new brands to gain access to the European market, and it also is in the commercial interests of both manufacturers and dealers to enter into such arrangements in less-populous areas. However, outside these particular circumstances, same-site multi-branding has not taken off to any great degree, and the provisions of the Regulation have in many cases only served to encourage the

---

<sup>10</sup> ICDP: The future shape of car distribution, conference paper, ICDP autumn forum 2007

growth of large dealer groups, which may have negative as well as positive effects on competition.

Against this background, it appears therefore that the provisions contained in Article 1(1)(b) with regard to same showroom multi-branding, as well as in relation to the definition of non-compete obligations by reference to the ceiling of 30% of maximum annual purchases calculated on the basis the total yearly requirements of the dealers, have not produced any observable significant effect during the reference period. It is rather the general non-compete clause of Article 5(1)(a) which had a concrete role in preserving open and accessible retail markets across the EU, since most of the increase in multi-branding came from dealers selling from different showrooms at the same location or from different locations, and concrete cases of fidelity-enhancing sale targets required a careful examination of the economic effects of the practices at issue, going beyond a mechanical application of the 30% ceiling.

In the light of the above, it should be observed that general policy approach followed by the Commission in respect of single-branding obligations is reflected in Article 5 of Regulation 2790/1999, which provides that any direct or indirect non-compete obligation applied by a supplier with less than 30% market share can be exempted only for a period of up to five years. Under this provision, an agreement tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. Since the vast majority of all distribution and repair contracts in the automotive sector are concluded for an indefinite period, and only a tiny minority of such contracts are concluded for a period of five years (which is under normal circumstances automatically prolonged), it is possible to infer that had the motor vehicle sector been subject to Regulation 2790/1999, the level of protection of competition in the market would have not been any lower than that achieved under Regulation 1400/2002.

The same can be said with regard to the effectiveness and relevance of Article 5(1)(b), which excludes from the block exemption non-compete obligations applied in the context of agreements concluded between a manufacturer and its authorised repairers. Since all vehicle manufacturers have a market share exceeding 30% on the relevant market for brand-specific repair and maintenance services, the application of Regulation 2790/1999 would have led to the same result.

To sum up, it can be said that competition in the markets for car distribution and repair services works better than it did before the Regulation entered into force and that the provisions in the Regulation aiming at ensuring rivals' access to retail networks have overall contributed to increase competition. As shown above, there is a positive correlation between market entries and multi-branding, and one may therefore conclude that the current regime has not given rise to what is referred to in anti-trust circles as a Type II error; in other words, it has not systematically block-exempted agreements that have potentially harmful effects on consumers. By contrast, it seems that the sector-specific rules which have been added to the current block exemption Regulation with a view to introducing a more regulated system compared to the general policy approach reflected in Regulation 2790/1999, may have been a Type I error, in the sense that the provisions are to a degree ineffective, and may have unduly placed on the parties a regulatory burden which was not indispensable, and led to less efficient transactions.

## ***4.2 Ensuring effective intra-brand competition within national sales networks***

The distribution landscape at the time of the Commission's Evaluation Report in 2000 demonstrated a remarkable uniformity<sup>11</sup>. All vehicle manufacturers applied similar vertical restraints, combining selective and exclusive distribution, with a network organisation which *de facto* prevented or, at least, limited the development of multi-brand distribution. Furthermore, all dealers were contractually obliged to repair new vehicles and their organic growth was hampered by agreements preventing them from actively marketing their vehicles to consumers in geographical areas allocated to other dealers through, *inter alia*, the establishment of additional outlets. In 2002, it was felt that this stark homogeneity within the networks was not conducive to a degree of intra-brand competition such as to compensate for a perceived lack of sufficient competition between brands of different makes. Regulation 1400/2002 therefore contained provisions intended to encourage diversity and innovation in distribution through the development of sales-only outlets run by dealers specialised in retail activities, and through the expansion of multi-brand outlets. Furthermore, in order to favour organic growth of dealerships and strengthen their countervailing power, location clauses were no longer permitted in selective agreements for new vehicle distribution, and it was to be made easier for dealers to sell their dealerships to other dealers within the relevant brand networks.

### **4.2.1 Relevant provisions of the Regulation**

**Article 2(1)** of Regulation 1400/2002 delineates a block exemption with a broad scope, applying to all categories of vertical agreements in the motor vehicle sector, in contrast to the single model exempted by Regulation 1475/95. The aim was to bolster diversity and innovation in distribution by creating a safe harbour covering vertical agreements irrespective of their form. In this way, the risk of cumulative effects resulting from a wide-spread use of similar distribution systems would be reduced, since diversity would lower the chance that the same vertical restraints in a high percentage on the same relevant market. In accordance with this objective, **Article 3(1)** of the Regulation introduces a flexible and responsive system enabling manufacturers to freely determine the most efficient solutions for the distribution and provision of after-sales services for their products, provided that their market power remains constrained by a sufficient degree of inter-brand competition. To this end, Article 3(1) sets out a series of thresholds expressed in terms of market shares, below which various distribution models may be exempted. All vertical agreements, including those providing for exclusive distribution are exempted up to a market share of 30%, whereas for quantitative selective distribution, the threshold is set at 40%. Even if a supplier's market share exceeds this latter figure, its networks will still be covered by the exemption, so long as only qualitative selection is used.

In addition to a list of hardcore restrictions reflecting a similar list enshrined in Regulation 2790/1999 (including in particular provisions that remove the benefit of the exemption from agreements combining exclusive and selective distribution), Regulation 1400/2002 also contains a specific measure intended to promote the diversification of distribution models

---

<sup>11</sup> Like its predecessor, Regulation 1475/95 exempted only one business model, combining elements of both selective and exclusive distribution. To take the benefit of the exemption, all contracts also had to combine both sales and after-sales activities. At the same time, Article 3(3) of the Regulation explicitly allowed a supplier to impose a series of restrictions on distributors that wished to be authorised to sell competing carmakers' brands.

within national networks by removing the benefit of the exemption from agreements that restrict dealers' ability to operate vehicle sales businesses without having to carry out repair services for the brands that they sell (**Article 4(1)(g)**).

Furthermore, in contrast to Regulation 2970/1999, **Article 5(2)(b)** of Regulation 1400/2002 was intended to allow efficient dealers to expand organically through the opening of additional sale outlets and to better equipped to compete with other dealers belonging to the same national network. Finally, by removing the benefit of the exemption from non-compete obligations irrespective of their duration, and by regulating certain specific forms of multi-brand distribution, **Articles 5(1)(a) and 1(1)(b)** were not only intended to prevent possible foreclosure risks (see section 4.1 above), but were also aimed at promoting innovative distribution models through the development of same-site/same showroom multi-branding.

#### **4.2.2 Achieving the objective**

Three main points can be observed as to how intra-brand competition has evolved since the Regulation entered into force.

Perhaps the most notable feature of the post-2002 car distribution landscape is the fact that the overall distribution model is no less homogeneous than it was before the Regulation entered into force. In almost all cases suppliers have chosen to distribute their vehicles through broadly similar quantitative selective networks. In addition, contractual standards have generally become more rigid and demanding, leaving little room for individual dealers to innovate with new retail formats that distinguish them from other dealers of the same brand<sup>12</sup>.

Secondly, it is evident that the application of quantitative selective distribution has allowed vehicle manufacturers to reduce the overall density of the authorised dealer networks, with a potential concomitant effect on intra-brand competition. Car manufacturers have reported that numbers of both dealer contracts and dealer outlets shrank by around 6% between 2002 and 2006. This observation should however be tempered by vehicle manufacturers' observations that while dealer numbers fell by 12% between 2002 and 2004, they rose by 6% over the following two years. The growth of dealer groups is a major phenomenon within this trend, particularly in certain Member States. London Economics reported that the market share of the top twenty dealers is increasing in all Member States for all brands except one, and the majority of manufacturers replying to the Commission's questionnaire confirm this trend. Although such groups may enjoy a stronger countervailing power vis-à-vis their suppliers, which could have positive effects on downstream competition, their development may also have a negative impact in some geographic areas where most or all of the outlets selling a given brand belong to the same firm.

Thirdly, it is evident that there has been little move towards innovation and diversification within the selective distribution networks. Associations representing dealers, as well as those representing vehicle manufacturers and those standing up for consumers, report that only a very few dealers have opened additional outlets within the same Member State. The high degree of commercial risk associated with such a move together with a lack of sufficient resources seems to have deterred all but a few from taking advantage of the exclusion of location clauses from the benefit of the block exemption. Instead, dealer growth appears to have occurred mainly through the expansion of groups gaining control of several dealerships,

---

<sup>12</sup> It is, however, notable that key contractual terms do vary to a significant extent: target and bonus schemes in particular vary between Member States and between manufacturers.

rather than through existing dealerships opening additional outlets. Furthermore, as to multi-brand sales, these have developed since the Regulation came into force, but not in a way that the Commission intended. As has been observed in section 4.1 above, multi-branding from the same showroom has not taken off as initially hoped, while the main driver for the development of multi-brand dealers has been the growth of large groups, each controlling several mono-brand dealerships for different brands. Finally, stand-alone sales outlets do not seem to have met with great success either; all manufacturers replying to a Commission questionnaire put the percentage of dealers outsourcing repair services in the low single figures in almost all Member States. Dealer associations confirm this position, pointing out that specialisation in sales is rare or non-existent, as the current cross-subsidisation of resale activities through profits generated by the dealers' after-sales business practically remove all economic incentives for dealers to take advantage of this option.

### **4.2.3 The Commission's enforcement experience**

No formal complaints have been made to the Commission concerning the operation of Article 3(1) of the Regulation. It seems that where a supplier's market share goes over the relevant threshold on a national market, it uses purely qualitative selection. Nor have any such complaints been received as regards Article 4(1)(b). Thus, although quantitative selective distribution has been chosen almost across the board, it would appear that vehicle manufacturers have removed elements of exclusivity from their distribution agreements, as provided for in Regulation 1400/2002.

Articles 5(2)(b) and 4(1)(g) of the Regulation have also not raised serious enforcement issues from the Commission's point of view. Possibly because the opportunities afforded by these two articles were not economically attractive in any event, no formal complaints have been made to the Commission as regards the use of location clauses in selective distribution agreements, or as regards restrictions on dealers who did not wish to operate a repair business for the brands of vehicle that they sold.

The application of Articles 5(1)(a) and 4(1)(b) has been rather more problematic. It has already been noted that in the GM and BMW cases, the Commission had to intervene to ensure that access to the authorised sales networks was not restricted through measures that had the effect of limiting a dealer's ability to take on an additional brand, thereby protecting nearby dealers of that brand from increased competitive pressure. It should also be underlined that national competition authorities, such as the UK's Office of Fair Trading have intervened to check whether strict corporate branding requirements, such as Peugeot's "blue box" dealership standards effectively prevented multi-brand sales within the same showroom. As far as the Commission's experience is concerned, these interventions served to underline that competition authorities may not be well placed to balance the wishes of carmakers as regards the way in which their products are displayed against the desire of dealers to maximise their sales potential. The Commission's experience also showed the difficulties of analysing on a case-by-case basis whether often-complex contractual provisions have the effect of preventing multi-branding to any significant extent.

### **4.2.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

Section 4.2.2 above makes three main observations as to how the market has developed since Regulation 1400/2002 came into force.

As to the first of these, the removal of the straitjacket associated with Regulation 1475/95 brought about by Articles 2(1) and 3(1) of Regulation 1400/2002 has not encouraged the use of diverse distribution models. As already observed, the vast majority of new vehicles in the EU are still distributed through near-identical quantitative selective networks. In retrospect, this choice seems predictable, given that suppliers of goods for which brand identity is important tend to want to determine how their wares are presented to the end consumer. The higher market share threshold provided for qualitative selective distribution may also have encouraged suppliers to use this method, since (with the exception of qualitative selection) other forms of distribution are only exempted up to a market share of 30%. This meant that suppliers using, for instance, exclusive distribution, would have run the risk of exceeding this lower threshold in some Member States.

Although Articles 2(1) and 3(1) have not been successful promoters of intra-brand competition through diversity, it would appear that Article 3(1) of the Regulation has achieved its aim of responding flexibly to increasing degrees of market power. Where a supplier exceeds the 40% threshold for quantitative selective distribution on the relevant market<sup>13</sup>, as is for instance currently the case for Volkswagen in the Czech Republic, where the Skoda brand is very popular, the flexibility in the regulation comes into play and a qualitative selective system that is less restrictive of intra-brand competition is generally used. Therefore, the application of a market share cap for selective distribution appears to be both relevant and effective at promoting flexibility, while limiting the scope of the exemption on the basis of the supplier's market power.

The second observation was that although dealer numbers have fluctuated, the use of quantitative selection has permitted suppliers to reduce network density when the whole of the period from 2002 to 2006 is considered. It might therefore be argued that the exemption of this form of distribution may have led to a reduction of intra-brand competition, to the detriment of consumers. In line with the principles set out in Article 81(3) of the Treaty, one should therefore examine whether quantitative selective distribution in the motor vehicle sector has benefits that outweigh the negative effects on competition.

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. Although CECRA<sup>14</sup> reports that average passenger car sales per dealer contract in the EU-15<sup>15</sup> increased from 301 in 2002 to 340 in 2005, the average US dealership sold 628 passenger cars in 2006<sup>16</sup>. Some sources observe that from 2004 to 2006, dealer numbers in the EU actually increased by 6%. It therefore seems unlikely that reductions in network density have had an appreciable impact on intra-brand competition.

Even if one accepts the thesis that intra-brand competition has declined, the balancing exercise envisaged by Article 81(3) of the Treaty would still be likely to have a positive

---

<sup>13</sup> For a discussion as to how the relevant market should be determined, see the Verboven report entitled "Quantitative Study to Determine the Relevant Market in the Car Sector", published in September 2002, and available on DG Competition's web site.

<sup>14</sup> Reporting data from the HWB handbook

<sup>15</sup> including Switzerland

<sup>16</sup> Dealership number NADA data 2007; Automotive Alliance.

outcome. Quantitative selective distribution is commonly held to bring benefits, 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, and ensuring that each distributor has the minimum margin needed to compete. If these benefits were truly outweighed by the postulated reduction in intra-brand competition, one would expect that dealers protected by quantitative selection would reap significant financial rewards. However, an analysis of the financial position of dealers as regards new car sales shows that operating margins remain low, suggesting that individual dealers have little room to raise prices. It therefore seems likely that while there may have been a decline in intra-brand competition, this has not been significant, and that dealers remain under considerable competitive pressure strong inter-brand competition.

One may therefore conclude that the exemption of quantitative selective distribution provided for in Article 3(1) of the Regulation meets the requirements of Article 81(3) of the Treaty. However, it might be questioned whether it is appropriate for the threshold for quantitative selection to be set at 40%, compared to the 30% threshold for all other types of vertical agreements including exclusive distribution, given that quantitative selection might be expected to be more restrictive of intra-brand competition. Furthermore, the bias introduced in Regulation 1400/2002 in respect of quantitative selective distribution may be partly responsible for the fact that virtually all manufacturers use this form of contract in all areas of the EU. While such a regulatory bias may be seen as inconsistent with the general policy approach followed by the Commission in the field of vertical restraints, it should be recalled that a re-alignment of this sector-specific rule to the general market share threshold of 30% would not imply any presumption of illegality for those few networks where the carmaker's share of the relevant market would be above 30%, as efficiency considerations could lead to the conclusion that such agreements could take advantage of the exception under Article 81(3). Furthermore, such a move might lead manufacturers to apply less restrictive purely qualitative selective distribution systems, which they already appear to do in those Member States where they exceed the current 40% cap for quantitative selective distribution.

The third observation was that the provisions of the Regulation have done little to encourage diversity within the quantitative selective model for new vehicle distribution. Almost all observers agree that Article 5(2)(b) of the Regulation seems to have had little effect, in that few dealers have opened extra outlets. Some have speculated that since the transitional period for the implementation of this provision only ended in October 2005, it may still prove to have some effects. However, one might realistically suppose that dealers wishing to take advantage of this provision would have already begun their preparations during the transitional period, and that by now, not-insignificant numbers of dealers should already be opening additional outlets. Instead, no market player has indicated such a take up, and dealer growth appears to have occurred through the expansion of dealer groups, rather than through additional outlets from existing dealerships. It appears that dealers looking to extend their activities have found the acquisition of existing dealerships to be a more attractive option than opening of a new outlet, which would then have to compete with established dealers experienced with the local market. While some caution should be exercised, one may nevertheless conclude that at this stage, Article 5(2)(b) has been of little use in promoting intra-brand competition. Given the fact that dealers derive more profits from after-sales than they do from their vehicle sales activities, it is perhaps not surprising that very few dealers have chosen to contract-out their repair activities to other firms within the networks as provided for in Article 4(1)(g). The provision therefore seems to have been almost totally ineffective. One may also question its relevance, since it is difficult to imagine how contracting out could have any impact on intra-brand competition in vehicle sales, even if the

difference in margins between sales and after-sales were to be ironed-out. It seems in particular unlikely that freeing-up space in dealers' premises would lead to an expansion of multi-branding, given that on the one hand, dealers show no appetite for selling more than one brand in the same showroom, and that on the other hand, the spatial requirements for a workshop are very different from those of a showroom. Article 4(1)(g) can therefore be seen to have been ineffective and to lack relevance.

While multi-brand sales have developed since the Regulation came into force, this has not occurred in a way that the Commission intended, and mainly not as a result of the sector-specific rules set out in Articles 5(1)(a) read in conjunction with 1(1)(b) of the Regulation. Instead, the main development in multi-brand sales has been the growth of large dealer groups<sup>17</sup>. It would therefore appear that Articles 5(1)(a) read in conjunction with 1(1)(b) have been neither effective nor pertinent as promoters of intra-brand competition.

In summary, one can conclude that although the flexible system in Article 3(1) of the Regulation seems to have worked well, the measures in the Regulation intended to promote diversity in new vehicle retailing have met with only very limited success. The same basic quantitative selective distribution model has been adopted in almost all cases, and even within this model there has been little move towards diversity and innovation. One may also conclude that although the exemption of quantitative selective distribution has allowed manufacturers to reduce network density, any potential decline in intra-brand competition seems to have been outweighed by the benefits brought about by such a distribution model. Moreover, any theoretical decline in intra-brand competition has not translated into consumer harm, since inter-brand competition is strong and strengthening, as evidenced by fluctuating market shares, declines in levels of concentration, the extension of brand ranges, decreasing prices and price differentials, the arrival of new entrants, and the low profit margins accruing to dealers' sales businesses.

It follows from the foregoing that the current regime does not appear to have stretched the scope of the block exemption too widely so as to unduly cover agreements potentially limiting competition to the detriment of final consumers (Type II error). On the contrary, the sector-specific hardcore rules and additional conditions which were intended to improve intra-brand competition by promoting diversification in retailing methods for motor vehicles, and which were designed limit the scope of the exemption beyond what is generally admissible pursuant to Regulation 2790/1999, have been largely ineffective and/or irrelevant. As a result, Regulation 1400/2002 may have placed on the parties concerned a regulatory burden which was not indispensable and which may therefore conflict with the principles of better regulation applicable under EU law.

### ***4.3 Protecting parallel trade between Member States***

Prior to the adoption of Regulation 1400/2002, there were persisting high intra-brand price differentials between the national European car markets: something which should normally have encouraged cross-border sales. The Commission was concerned<sup>18</sup> that despite these

---

<sup>17</sup> Although such groups may exert a countervailing power within the supplier-distributor relationship, and they may be able to exact economies of scale that are passed on to the consumer, there is also the risk that in some circumstances they may weaken intra-brand competition, if many of the dealerships for a given brand in a local area are owned by the same group.

<sup>18</sup> OJ C 67/2 16.03.2002, Communication pursuant to Article 5 of Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) of the Treaty to categories of agreements and concerted practices on a

considerable differentials<sup>19</sup>, cross-border trade was marginal, and the Commission had received numerous consumer complaints indicating that car manufacturers were inhibiting cross-border trade by putting pressure on authorised dealers not to sell cars to consumers from other Member States. This behaviour was particularly harmful for competition, as within the selective and exclusive distribution systems exempted by Regulation 1475/95, cross-border purchases by consumers and cross-border sales between authorised dealers are the only means of arbitrage.

In order to counter this restrictive behaviour the Commission had adopted a number of decisions before 2002, imposing fines on those carmakers which impeded cross-border sales (see Working Document 3) and, in the context of the adoption of the new block exemption Regulation 1400/2002, introduced specific measures designed to remove potential obstacles to parallel trade between Member States.

### 4.3.1 Relevant provisions

The previous sector-specific block exemption laid down by Regulation 1475/95<sup>20</sup> exempted a single model of distribution agreement combining elements of selective and exclusive distribution. Under this model, authorised dealers were not allowed to sell vehicles to other distributors outside the distribution system and could also be prohibited from actively selling outside their attributed territory. Regulation 1400/2002 put an end to the exemption of this combination and, as with Regulation 2790/1999, **Article 4(1)(b)** of the Regulation exempts selective distribution agreements only on condition that both passive and active sales by authorised dealers to end consumers are not directly or indirectly restricted.

Furthermore, vehicles with foreign specifications which are appreciably different from those in a consumer's home country are not seen as substitutes. This is particularly the case for Continental-specification (left-hand-drive) vehicles imported to the UK, Ireland, or Cyprus, since these are difficult to drive on local roads. In the light of this, **Article 4(1)(f)** of the Regulation provides for an "availability clause" that excludes the benefit of the exemption from agreements that restrict a distributor's ability to obtain vehicles with specifications current in other Member States so as to fulfil orders from foreign final consumers. It should be observed that Regulation 2790/1999 only contains a general rule prohibiting all *direct* or *indirect* restrictions to active and passive sales to final consumers irrespective of their country of residence, but it does not explicitly clarify that restrictions limiting the availability of products with foreign specifications may constitute an indirect restriction to parallel trade. Therefore, the Commission perceived that it would be more effective if an explicit provision were included in the Regulation (**Article 4(1)(b)**) clarifying that European consumers had the right to obtain, anywhere in the EU, vehicles with specifications current in their own Member States<sup>21</sup>.

In line with Regulation 2790/1999, **Article 4(1)(c)** of Regulation 1400/2002 takes the benefit of the exemption away from agreements that contain provisions restricting cross-supplies

---

draft new Regulation for the motor vehicle sector, ANNEX I Reasons for a new block exemption for Motor Vehicle Distribution.

<sup>19</sup> As highlighted by the Commission's Annual Car Price Report. The standard deviation, a measure indicating the degree of price dispersion accounted in November 2002 still for 7.0%.

<sup>20</sup> See Articles 1 and 8 (3) of Regulation 1475/95.

<sup>21</sup> Article 4(1)(f) is in substance a direct transposition of a similar provision contained in the previous block exemption Regulation 1475/95 which, in turn, constituted the codification of the principles set out by the Court of Justice in its judgment of 28 February 1984, joined cases 228 and 229/82 *Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission* ECR (1984) 1129.

between distributors belonging to the same selective distribution system. This provision was intended to promote arbitrage by allowing dealers to purchase vehicles where they are cheapest, including in Member States with lower prices.

A sector-specific provision to protect intra-brand competition and enhance the scope for parallel trade was introduced in **Article 5(2)**, which excludes "location clauses" contained in selective distribution agreements concerning new passenger cars or light commercial vehicles from the benefit of the block exemption. Such clauses prevent dealers from establishing additional sales or delivery outlets at other locations, including in other Member States. It was felt that this opportunity would significantly contribute to stimulate intra-brand competition, by allowing dealers to sell more directly into higher-priced markets. This provision entered into force only after an extended transition period lasting until 1<sup>st</sup> October 2005.

The Commission also aimed at removing certain obstacles for intermediaries purchasing cars on behalf of end customers, typically across borders. To that end it repealed a previous notice<sup>22</sup> that had allowed suppliers to impose several restrictions on sales via such operators.

### **4.3.2 Achieving the objective**

Car price differentials may be used as a proxy to gauge cross-border competitive pressure between dealers of the same brand, although it has to be borne in mind that such differentials may also be affected by changes in vehicle tax regimes, and as far as new Member States are concerned, by the wider effects of integrating into the EU. As far as measuring the effects of the Regulation is concerned, it is therefore perhaps more instructive to look at how price differentials have evolved within the 15 countries that were members of the EU when the Regulation entered into force. The Commission's twice-yearly car price report indicates that the standard deviation (without taxes) between the EU-15 Member States (the countries that were EU Members before 2002) decreased from 7.0% in November 2002 to 5.5% in May 2004<sup>23</sup>, since when it has remained broadly stable<sup>24</sup>. This convergence has been particularly stark for premium brands, in respect of which certain manufacturers harmonised their prices soon after the Regulation came into effect, thereby contributing to the reduction in average price differentials during the first two years. More importantly, the trend has developed in a context of relative decline of real consumers prices and has not taken place at the expense of consumers in high tax Member States where the pre-tax prices are the lowest.

This convergence compares favourably with price variations of final consumer goods in the EU-25 in general, which slightly increased between 2002 and 2004, from 13.8% to 14.4%, although the latter figure includes indirect taxes<sup>25</sup>. The comparison appears even more favourable, if one considers that the trend in the 25 Member States should be positively influenced by effects of the economic integration of those countries that have recently acceded to the EU.

Despite the reduction in price differences between Member States, several manufacturers and national dealer associations report that the activity of intermediaries buying cars on behalf of

---

<sup>22</sup> 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) and Clarification of the activities of motor vehicle intermediaries.

<sup>23</sup> over the same period, the deviation in the Euro-zone countries came down from 5.2% to 4.4%

<sup>24</sup> However, in the EU-25 the deviation has continued to decrease from 6.9% in May 2004 to 6.4% in May 2007 as the new Member States have begun to integrate into the broader European economy.

<sup>25</sup> Fabienne Ilzkowitz et al.: Steps towards a deeper economic integration the Internal Market in the 21st century, European Commission Economic Paper No 271, 2007, page 40.

consumers in another Member States stable has remained stable or may even have increased<sup>26</sup>. While only limited information has been provided to the Commission on the value or volume of cross-supplies between members of distribution networks in different Member States, two dealer associations estimate that such trade has increased during the reference period.

Finally, it should be stressed that replies to the Commission's questionnaires tend to indicate that very few, if any, dealers have opened additional outlets of any kind in other Member States.

#### **4.3.3 The Commission's enforcement experience**

Over the period in question, the Commission continued to enforce the rules where suppliers had impeded parallel trade. However, the sole formal enforcement proceeding after Regulation 1400/2002 entered into force related to behaviour which had ceased in October 2003, i.e. at the moment when the new Regulation entered into force<sup>27</sup>. It should be added that during the reference period the Commission has continued to receive informal complaints from consumers and intermediaries concerning obstacles to cross-border sales, such as car manufacturers instructing their dealers not to sell vehicles to intermediaries or foreign residents. In a majority of cases the problem could be solved informally, and in other instances there was not sufficient evidence to pursue a case. However, it is important to underline that numbers of informal complaints from intermediaries have been decreasing since 2004, while consumer complaints in this area have been on a downward trend since 2003. No complaints have been received from dealers regarding restrictions on cross-border cross-supplies of vehicles within the authorised networks. Nor have authorised dealers signalled any problems concerning the establishment of additional sales or delivery outlets.

#### **4.3.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

The price convergence reported in 4.3.2 above, together with indications of broadly increased activities by intermediaries, suggests that the main EU markets for new motor vehicles are more integrated today than was the case in 2002. Although changes in tax regimes have perhaps contributed to this integration, it seems likely that the potential for a major increase in parallel trade, in particular through direct active sales by authorised dealers to foreign consumers, as well as via intermediaries, may have pushed vehicle manufacturers to keep price differentials at a sustainable low level. The reduced number of consumer complaints and the fact that the last formal enforcement activity by the Commission related to behaviour taking place prior to the entry into force of the Regulation would also seem to indicate that car manufacturers are more willing now than in the past to refrain from hindering parallel trade in new motor vehicles.

It would therefore appear that Article 4(1)(b) of the Regulation has been a relevant and effective means of protecting cross-border competition between dealers of the same brand. It should be noted, however, that these provisions are identical to those introduced two years earlier in Article 4(b) of Regulation 2790/1999.

---

<sup>26</sup> However, in the UK, the activity of such operators is reported to be very limited. It should be noted in this regard that price differentials between the UK and other Member States are considerably lower than they were when the Regulation was adopted.

<sup>27</sup> In 2005, it imposed a fine of €9.5 million on Peugeot for impeding exports of new cars from the Netherlands over a period that ended in September 2003, when Regulation 1400/2002 entered into force.

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 seriously hampered competition by preventing a fuller integration of national markets within the EU. In this respect, 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 benefits, 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, and ensuring that each distributor has the minimum margin needed to compete. On the other hand, selective distribution has the potential to restrict intra-brand competition, in particular because it does not allow cars to be sold to specialist independent cross-border traders who may be better-placed than private buyers to take advantage of price differentials and negotiate reductions, including bulk discounts. Instead, arbitrage is confined to trade within the authorised dealer networks and to purchases by individual end customers (assisted in some cases by intermediaries). If such trade is not effective, then it may be that the potential negative effects of intra-brand competition are translated into reality and outweigh any expected benefit. However, in contrast to the position in the 1990s, which led the UK Competition Commission in particular to call for an end to the exemption of selective distribution, declining price differentials indicate that cross-border trade in new vehicles is now sufficient to exert an effective competitive pressure.

In the light of the foregoing, it would seem that the introduction of stricter rules to protect active and passive sales to end consumers by authorised dealers, combined with the repeal of the previous Notice on the activities of motor vehicle intermediaries, which allowed car manufacturers to impose a 10% limit to the turnover achieved by authorised dealers through sales to intermediaries, has positively contributed to this trend.

As noted in section 4.3.1 above, few if any dealers have taken advantage of Article 5(2) of the Regulation to open up additional sales outlets or delivery points in other Member States. Although some have argued that in view that the extended transitional period for the implementation of this measure may mean that some of its effects are yet to be felt, one might imagine that dealers wishing to open additional outlets would have made preparations right from the start, and that there would now be small but significant numbers of such outlets. In reality, there is no sign of any such take-up. It would therefore appear that the commercial, bureaucratic, cultural and language barriers associated by such activity have outweighed any potential financial benefits that such a move would bring. One also surmise that although opening an extra outlet in a high-priced Member State may have seemed an attractive proposition to dealers with sufficient resources in 2002, the perceived financial advantages would have diminished sufficiently with the subsequent reduction in price differentials to deter such a risky enterprise. Article 5(2) of the Regulation may therefore be seen as relevant, but ultimately redundant, given the apparent success of the other provisions in averting the risk of selective distribution being used as a toll to stifle competition between dealers by preventing arbitrage by consumers across different national markets.

The same conclusion applies as regards the role played by the availability clause set out in Article 4(1)(f). As observed above (section 4.3.1), Article 4(1)(f) was mainly intended to single out one specific indirect territorial restriction preventing final consumers to obtain, anywhere in the EU, vehicles with specifications current in their own Member States. However, such a restriction is implicitly covered by the definition of territorial restrictions contained in Article 4(1)(b) which, differently from the previous block exemption Regulation

1475/95, expressly applies to all direct and indirect restrictions as to the territory in which and the customers to whom the dealer may sell the contract goods. This interpretation is supported, in particular, by the clear indications provided by the Court of Justice<sup>28</sup>. One may therefore consider that, although relevant, this specific provision is ultimately redundant. Moreover, given the fact that price differentials have now dropped, one can conclude that the availability clause has done its job, and is no longer necessary. Any manufacturer tempted to re-introduce price discrimination appears likely to lose market share in climate of heightened inter-brand competition.

In sum, as for the two previous objectives, it appears that Regulation 1400/2002 has not hampered the development of an effective competition between dealers established in different Member States but has rather contributed to the creation of a more integrated internal market. However, not all its provisions have been effective and/or relevant in achieving such an objective. Altogether, it seems that the sector-specific provisions designed to complement the general rules applicable in the field of vertical restraints may amount to a form of over-regulation, contrary to the principles of better regulation under EU law.

#### ***4.4 Ensuring effective competition between authorised and independent repairers***

Independent repair outlets are important to European consumers, because they exert competitive pressure on the franchised networks. Over and above the need for a skilled labour force, such repairers essentially require two inputs in order to compete: spare parts, together with technical information and tools. In order to ensure that this category of repairers could continue to exist on a sustainable basis the, the Commission took measures to ensure that these two basic categories of inputs were not blocked.

##### **4.4.1 Relevant provisions**

As regards the distribution of spare parts, the Regulation aimed at ensuring free access by independent repairers to original spare parts, whether supplied by the carmaker's network, or by the Original Equipment Supplier.

Within the carmaker's networks, authorised repairers also act as spare parts distributors, supplying parts to the independent repair sector. There are also a few "stand-alone" spare parts distributors within the authorised networks, although most vehicle manufacturers have no separate contract for spare parts distribution. Article 4(1)(i) of Regulation 1400/2002 provides that any agreement that includes a restriction preventing members of the authorised networks to sell spare parts to independent repairers will not be covered by the block exemption.

Moreover, Original Equipment Suppliers do not only provide vehicle manufacturers with components for first assembly in new motor vehicles and with original replacement parts for onwards resale to the after-market, but they also have an economic incentive to sell the same parts directly to the aftermarket, either through their own distribution systems, or via independent parts wholesalers. Article 4(1)(j) of Regulation 1400/2002 provides that the

---

<sup>28</sup> Judgment of 28 February 1984, joined cases 228 and 229/82 *Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission* ECR (1984) 1129.

block exemption does not cover agreements between vehicle manufacturers and OES that prevent the latter from selling spare parts directly to the aftermarket.

Finally, as noted in Working Document 3 above, repairers working on modern vehicles need brand-specific technical information, as well as electronic diagnosis and repair tools. When Regulation 1400/2002 was conceived, the Commission was conscious that restrictions on access to such information and tools could foreclose independent repairers from the market. **Article 4(2)** of the Regulation therefore provides that the exemption will not apply where the supplier refuses to give independent operators access to any technical information, equipment and tools required for the repair and maintenance of its motor vehicles.

#### **4.4.2 Achieving the objective**

As results from the data reported in Working Document 2 above, it would appear that the independent repair sector has been progressively losing its ability to compete with the authorised networks. London Economics, for instance, estimates that the average turnover of the independent repairers that they had sampled had grown at a rate of only 1.2% per year: a clear decline in real terms<sup>29</sup> over the past ten years, showing that independent repairers are steadily losing ground to their authorised rivals. The London Economics study showed that while in 1999, there were 7.3 times more independent repairers than authorised repairers, by 2003, there were only 5.2 times as many<sup>30</sup>. The Commission's investigation has shown that this ratio has continued to decline steeply in most Member States for which information was supplied. However, this comment must be tempered by the observation that these market exits appear to consist of the smaller "traditional" independent garages, and that certain stronger groups of independent repairers are emerging which may be more capable of rivalling the authorised repair sector, particularly as regards certain targeted categories of repair. In response, vehicle manufacturers have themselves introduced soft-franchising concepts.

Although the average vehicle on the roads in many Member States is now older<sup>31</sup> than it was when the Regulation was adopted, the slice of the market that is captive to the authorised repair sector would appear to have grown, due to the increase in the warranty periods available to consumers. Since consumers have a preference for a one-stop-shop, this captivity can spill over into other types of work not covered by the warranty. Combined with the structural adjustments that the whole repair sector is undergoing due to the technological evolution of repair methods for modern cars, this phenomenon is at the origin of the relative fragility that independent repair business have suffered from in recent years.

Although the position of independent repairers has weakened over the past five years, it would appear that the situation as regards the supply of spare parts has remained roughly stable over the period, and that technical information provision has improved. Taking spare parts first, authorised repairers continue to carry out their function of distributing spare parts to their independent competitors, while the independent channel brings important competitive pressure to bear on the authorised sales networks as far as non-captive parts are concerned. As

---

<sup>29</sup> See page 145 of the London Economics study.

<sup>30</sup> See figure 94 of the study, on page 135. Ratios of repairer numbers do not reflect the true relative strengths of independent and authorised repairers. In 2001, (the much higher numbers of) independent repairers carried out on average about 50% of all repairs on motor cars – see the Andersen study carried out for the Commission in December 2001 on p. 254, appendix 8; and the Accenture study carried out for ACEA on p. 11.

<sup>31</sup> See section 2.2.3 of the London Economics Study

has been seen in Working Document 3, parts producers continue to have a strong position on the aftermarket, either directly (for example, Bosch), or indirectly, through parts distributors. Many parts producers now have integrated importers in the main national markets. This competitive pressure manifests itself in two main ways. Firstly, vehicle manufacturers' target and bonus schemes commonly grant authorised repairers considerable rebates for buying (and therefore selling) non-captive parts, whereas few rebates are available as regards captive spare parts. Secondly, studies have estimated that where parts are captive because they enjoy design protection, prices are considerably higher<sup>32</sup>. These two points demonstrate that the availability of alternative brands of parts forces vehicle manufacturers to keep their prices down.

As regards technical information, independent repairers' associations report that access to technical information has clearly been improving as a consequence of the Regulation<sup>33</sup>. These associations continue to emphasise the importance of technical information for their members' businesses. This importance appears to be growing rather than declining, as the technology content of vehicles increases.

#### **4.4.3 The Commission's enforcement experience**

Since the Regulation entered into force, the Commission has received hardly any complaints indicating that independent repairers had difficulties in obtaining original spare parts from authorised outlets. Moreover, the Commission's investigations during 2007 did not reveal a single instance in which Article 4(1)(i) had not been correctly implemented.

The implementation of Article 4(1)(j) of the Regulation also seems to have had a relatively smooth passage, although parts producers' associations have expressed concerns that, in some cases, carmakers use tooling arrangements to get around the provision and thwart parts manufacturers' attempts to reach the aftermarket directly. However, as such tooling arrangements are generally regarded as constituting a specific type of sub-contracting agreements, this issue does not fall under the scope of the block exemption, but mainly relates to the application of Article 81(1) of the Treaty rather than to Article 81(3).

Furthermore, in order to allow competition on certain parts (e.g. body panels) which until now have been captive, the Commission has proposed to introduce a so-called "repair clause" in the context of the on-going review of the Design directive, providing that a vehicle manufacturer may not invoke design protection to prevent a component manufacturer from producing parts for the aftermarket. In such case, the absence of effective competition for captive parts is in fact the result of over-protective national IPR law rather than of restrictive agreements between undertakings which could fall foul of Article 81.

The implementation of **Article 4(2)** of the Regulation appears to have been far more problematic. Following the adoption of the block exemption, the Commission became aware that this provision was not being correctly interpreted, and launched a study into the issue, resulting in a report<sup>34</sup>, finding that many carmakers were not giving independent repairers full

---

<sup>32</sup> London Economics, for instance, studied a limited number of models in France, and noted that while the average price of mechanical parts registered practically no increase between 1999 and 2004, the price of (captive) body parts increased by 14%. In the Design Directive Impact Assessment, the Commission itself noted that after the introduction of competition, the average prices for OEM parts in the USA declined by 14% within two years.

<sup>33</sup> FIGIEFA, GVA, FMA, SBF, AUTIG

<sup>34</sup> [http://ec.europa.eu/comm/competition/sectors/motor\\_vehicles/documents/ika.html](http://ec.europa.eu/comm/competition/sectors/motor_vehicles/documents/ika.html)

access to all technical information in a proportionate manner. The Commission subsequently adopted four decisions with commitments pursuant to Article 9(1) of Regulation 1/2003<sup>35</sup>, finding that the practices in question were likely to be contrary to Article 81(1) of the Treaty, in that they strengthened the restrictive effects of the carmakers' authorised repair agreements. By virtue of Article 4(2) of the Regulation, it did not seem that the block exemption could extend to agreements between carmakers and repairers where the former withheld technical information from independent repairers. Moreover, such practices were unlikely to be exemptible under Article 81(3) of the Treaty. The commitments made binding by the decisions are broadly similar and have three core elements. The first of these clarifies the notion of technical information and provides that all such information provided to authorised repairers must also be made available to independent repairers on a non-discriminatory basis. Secondly, although car manufacturers may withhold information relating to anti-theft or performance-limiting functions of on-board electronics, they have to ensure that this does not prevent independent repairers from performing repairs not directly related to these functions. Thirdly, the commitments ensure that independent repairers can obtain information that is both unbundled and priced in a way that takes into account the extent to which they use it. The websites chosen by the parties as their main means to provide technical information will be kept operational during the validity period of the commitments. Access will be based on time slots, with the price for one hour set at a level which ensures equality between independent and authorised repairers.

#### **4.4.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

As regards Article 4(1)(i) of the Regulation, the aim of which was to protect the authorised channel for spare parts supply, it might be surmised that it would not be in the interest of either the vehicle manufacturers or the authorised repairers to block the sale of spare parts by the authorised networks, since this is a lucrative business for both parties. The NFDA, for instance, has informed the Commission that authorised dealers enjoyed an 11.9% operating profit on parts sales in 2005, while the equivalent figure for new car sales was a mere 1.0%.

There remains the possibility that at some future point in time, vehicle manufacturers might seek to reserve certain categories of repair to their authorised networks by restricting the supply of particular captive spare parts to independent repairers. However, it is difficult to see how Article 4(1)(i) adds anything in this respect, since it simply restates a basic principle of selective distribution: namely, that distributors must be free to sell to all end users. Clearly, an independent repairer is an end user within the meaning of the Regulation, and therefore a supplier cannot restrict its distributors' ability to sell any category of spare parts to independent garages. One might therefore conclude that Article 4(1)(i) is superfluous, in that it simply applies the principle already set out in Article 4(1)(b) to contracts for the distribution of spare parts.

Turning to Article 4(1)(j), which was intended to protect the independent channel for spare parts supply, as has been seen, the position of independent spare parts distribution may have weakened slightly over the period, but the remaining distributors appear larger and stronger, pointing to effective consolidation. Article 4(1)(j) of Regulation 1400/2002 therefore appears to have enabled the OES to compensate for the market share lost with the extension of warranties and the spread of "free" servicing packages. The ageing car parc has also helped in this regard, in that older cars tend to be repaired in independent garages and, according to

---

<sup>35</sup> See press release of 14/09/2007 in cases Comp/39.140 – 39.143, IP/07/1332.

CECRA, independent repairers source between 70% and 80% of their spare parts requirements from independent wholesalers. In conjunction with other factors, Article 4(1)(j) would therefore appear to have been a relevant and effective means of underpinning the independent channel for the supply of original spare parts. It should be however observed that this provision is not specific to the motor vehicle sector, as a similar rule is contained in Article 4(e) of Regulation 2790/1999, which does not extend the exemption to agreements between vehicle manufacturers and OES that prevent the latter from selling spare parts to independent repairers or other independent service providers. It should be noted that agreements preventing sales to distributors which are serving independent repairers would constitute an agreement serving the same purpose which is not exempted by provision as well.

As regards Article 4(2), which aims at ensuring that independent repairers have adequate access to technical information, this would appear to have had some relevance when the Regulation was adopted, in that it clarified what information should be provided, and what could legitimately be withheld. However, it may be questioned whether Article 4(2) of the Regulation is still necessary for assuring that access is given, in view of the detailed guidance given in the four decisions, or indeed that the continued existence of a similar provision would be pertinent after 2010.

It should in particular be noted that Article 4(2) may lack relevance after 2009, once Regulation 715/2007, which regulates the type approval of vehicles with respect to emissions, enters into application. That regulation contains a broad provision requiring vehicle manufacturers to provide repairers with all technical information. Although this provision only applies to newly launched models, it should be underlined that the period of validity of the two regulations will overlap by one year, and that during 2009 carmakers will still be under an obligation to also release technical information on older models.

At first glance, one might imagine that if no provision similar to Article 4(2) were in force after 2010, this would create a loophole allowing carmakers to no longer release technical information on pre-2009 vehicles, but here two observations should be made. Firstly, it is notable that Article 4(2) of the Regulation is not the legal basis for deciding whether or not withholding technical information amounts to a specific restriction of competition. Any such analysis must of necessity involve the application of Article 81(1) and/ or Article 82 of the Treaty. Article 4(2) simply makes it plain that withholding of technical information would strengthen the negative effects stemming from a carmaker's authorised repair agreements, and would imply that the block exemption could no longer apply to such agreements. There is therefore no reason why the Commission could not intervene on the basis of either Article 81 or Article 82 if information on older models was withheld at some point after 2010. The second reason why it is unlikely that the lack of retrospective coverage under Regulation 715/2007 would not pose any practical problem is that the information in question would already be in circulation, having been accessible before 2010. A refusal to supply technical information after Regulation 1400/2002 expires would simply create a business opportunity for technical publishers already in possession of the information in question.

As far as the foreclosure of independent repairers during the warranty period is concerned, it should be noted that regardless of the provisions laid down in Regulation 1400/2002, a general obligation to have a motor vehicle maintained or repaired within the authorised network as a precondition for having the (extended) warranty honoured would not be admissible as it would deprive consumers of their right to choose to have their vehicle repaired by an independent repairer and would prevent independent repairers from competing effectively with the authorised network.

In summary then, it may be concluded that although it may be desirable to protect the independent spare parts channel, and that Article 4(1)(j) has had some success in this respect, Article 4(1)(i) may be seen as a belt-and-braces text, since it merely re-states a basic principle of selective distribution. As far as the supply of technical information is concerned, Article 4(2) would appear not to be relevant, since experience has shown that any action taken by the Commission must of necessity involve the application of Article 81 and/or Article 82 of the EC Treaty. Moreover, beyond 2009, Regulation 715/2007 is likely to remove the need for competition regulation of technical information supply.

#### ***4.5 Ensuring competition within the authorised networks of repairers and spare parts distributors***

The previous Regulation was based on the assumption that a natural link existed between vehicle sales and after-sales services. Consequently, car manufacturers could only benefit from the previous Regulation if they concluded contracts obliging their authorised repairers to also sell new vehicles.<sup>36</sup> However, the Commission concluded in 2000 that this link was no longer warranted.<sup>37</sup>

In its report on the functioning of the previous Regulation 1475/95 in 2000, the Commission also stated that spare part producers reported that tying sales to after-sales had induced dealers to source all or almost all of their spare parts requirements from the car manufacturers. Consequently, only between 5-20% of an authorised repairer's overall requirements were purchased from sources other than the vehicle manufacturer.<sup>38</sup> The commercial policy of the vehicle manufacturers, and in particular the practice of obstructing sales to repairers by spare-parts producers, was cited as one of two main reasons why the percentage was so low.<sup>39</sup> In order to overcome these shortcomings Regulation 1400/2002 lifted the obligation to link sales and after sales activities and did not exempt agreements that prohibited authorised repairers from sourcing spare parts from suppliers other than the vehicle manufacturer.

##### **4.5.1 Relevant provisions**

Regulation 1400/2002 contains several provisions which aim to protect competition within the manufacturers' networks of authorised repairers and parts distributors. In line with the principles of the general regime for vertical restraints, as set out in Regulation 2790/1999, **Article 3(1)** of the Regulation lays down a threshold of 30% above which quantitative selective distribution is not exempted. As the network of authorised repairers and parts distributors of a given brand is normally considered to have market share above 30% of that brand-specific repair market, vehicle manufacturers that wish their networks to benefit from the block exemption are induced to apply qualitative selective distribution and admit into their networks all candidate service partners that met their selection criteria. It is important to note in particular that it is not a qualitative selection criterion for repairers to be required to also sell vehicles. Thus, the application of the general principles regulating the conditions for access to selective distribution systems was designed to stimulate the development of

---

<sup>36</sup> Article 5 of Regulation 1475/95

<sup>37</sup> Report on the evaluation of Regulation (EC) No 1475/95, Para. 244, page 81

<sup>38</sup> Report on the evaluation of Regulation (EC) No 1475/95, Para. 248, page 82

<sup>39</sup> The other reason cited was that many consumers did not have complete information and believed that OEM-parts were of superior quality. See report on the evaluation of Regulation (EC) No 1475/95, Para. 247-249, pages 82/83

authorised outlets specialised in the provision of after-sale services and to facilitate new entries into the networks. It was hoped that such developments would result in increased competition within each network and in improved quality of service, since it would be left to market forces to decide on the optimum network density.<sup>40</sup>

In order to achieve this objective, Regulation 1400/2002 also introduced a specific provision to the list of hardcore restrictions in Article 4, which had no equivalent in Regulation 2790/1999. This additional rule is contained in **Article 4(1)(h)** of the Regulation which provides that agreements may not benefit from the exemption if they make the access to the after-sale service networks conditional upon the acceptance by authorised repairers and parts distributors of the obligation to also sell new motor vehicles<sup>41</sup>.

As regards access to spare parts, Regulation 1400/2002 does not confine itself to the specific condition in **Article 5(1)(b)**, which excludes from the benefit of the block exemption all direct and indirect non-compete obligation restricting the ability of authorised repairers and parts distributors to source spare parts from competing producers. It also contains additional hardcore restrictions which go beyond the list set out in Regulation 2790/1999 and which further limit the scope of the exemption. **Art.4(1)(k)** qualifies as a hardcore restriction any agreement limiting the authorised repairer's or distributor's ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work. The purpose of this provision is to enable authorised repairers to purchase original spare parts from sources other than the vehicle manufacturer and also to source matching quality spare parts, as defined in Article 1(1)(u), in order to increase competition within the network on a substantial part of the overall repair bill. Furthermore, **Article 4(1)(j)** of the Regulation may be seen as complementing Article 4(1)(k), in that while 4(1)(k) protects the demand side, Article 4(1)(j) protects the ability of OES to sell original parts to the members of the manufacturers' authorised networks.

#### 4.5.2 Achieving the objective

As stated in Working Document 2 above, car manufacturers report that numbers of stand-alone authorised repairers (i.e. repairers that do not sell new cars) have been increasing considerably since 2002<sup>42</sup>. The London Economics study shows that numbers of authorised repairers have rebounded quite sharply since Regulation 1400/2002 came into force. While the number of authorised repair partners in the twelve Member States under study fell from 43,000 to 40,000 from 1997 to 2002, the figure had rebounded sharply to over 50,000 by 2004<sup>43</sup>. The Commission's investigation has confirmed this trend, showing that the number of

---

<sup>40</sup> Speech 03/59 by Mario Monti, 6 February 2003, p.4

<sup>41</sup> With regard to the structure of the network, **Article 5 (3)** has also to be mentioned which provides that the exemption does not apply to any direct or indirect obligation as to the place of establishment of authorised repairers within selective distribution systems. In other words, the authorised repairer is free to decide not only on the location of his repair shop but also on the location of any additional outlet from which he provides repair and maintenance services for the brand in question. Also this specific condition has no equivalent in Regulation 2790/1999.

<sup>42</sup> BMW, Daimler, Ford (Volvo Brand), Honda, Kia and PSA provided EU-wide percentages quantifying the spread of repairer-only outlets. Volkswagen, Mitsubishi Nissan and GM, did not provide EU-figures but point to an increase as well.

<sup>43</sup> See figure 97, on page 138 of the study.

authorised repair outlets increased by 9% between 2002 and 2004. Several manufacturers have explicitly acknowledged that this rebound was induced by Regulation 1400/2002, and dealer associations confirm that the Regulation has made access to the network easier and increased competition between authorised repairers. However, most of the newly admitted stand-alone repairers are dealers who were expelled when the authorised networks were rationalised, and which applied to re-join those networks, and only to a limited extent former independent repairers. The reason often cited is that, in general, the selection standards applied by most manufacturers involve entry costs of such a magnitude as to deter many independent repairers, especially for smaller garages, from joining the authorised networks. In this respect, it should be observed however that increased requirements for training and tooling are not only a cost burden, but also help to improve the service to the benefit of final consumers, as some dealers' associations acknowledge.

While the measures designed to stimulate new entries within manufacturers' repairers networks have met with some success, in that the authorised networks are now considerably denser and more accessible compared to the situation prior to the entry into force of the Regulation, the provisions which were supposed to facilitate the sourcing of spare parts and components independently from the manufacturer appeared not to have been effective. The survey by the Commission showed that repairers' purchases of alternative brands of spare parts as a percentage of their total requirements varied widely between Member States. The lowest figure is found in Portugal with 50%, while the UK has the highest, with the members of the authorised networks buying 100% of their parts purchases from the vehicle manufacturers concerned. However, it cannot be excluded that those national associations reporting high percentages for the purchase of alternative brands of spare parts have included spare parts used for the repair of used vehicles from other brands in respect of which the authorised repairers act as independent outlets. It may also be that the figures include lubricants, tyres and batteries, which generally do not bear the carmakers' brands in any event. Calculating a weighted average, the figures provided for by the respondents to the Commission's questionnaires are in line with data put forward in the London Economics study, which show that authorised repairers still obtain between 87 and 95% of their spare parts from vehicle manufacturers.

It should also be noted that very few repairers have set up co-operative alliances since 2002 to jointly buy spare parts, or even to use common warehousing facilities.

#### **4.5.3 The Commission's enforcement experience**

Right after the entry into force of the current Regulation in September 2002, the Commission received many formal complaints and letters from car and truck dealer-repairers, whose agreements were terminated by the vehicle manufacturer and where the vehicle manufacturer refused to conclude service contracts with those who nevertheless fulfilled the qualitative criteria for becoming an authorised repairer. The Commission was able to settle the issue by taking up the complaints against *Audi* in January 2003.<sup>44</sup> Since then, the Commission took up a number of other complaints directed against *BMW* and *General Motors'* distribution and servicing agreements as lead cases to clarify core issues in this area and, on 13 March 2006, it closed its investigation following the enactment of contractual amendments and clarifications designed to bring these agreements into line with Regulation 1400/2002<sup>45</sup>. In particular,

---

<sup>44</sup> See Commission press release IP/03/80 of 20th January 2003.

<sup>45</sup> See Commission press release IP/06/302 of 13th March 2006.

BMW and General Motors had to remove all quantitative criteria from their repairer contracts, thereby allowing previously independent as well as repairers of competing brands to become members of the network.

As regards in particular the specific provisions imposing on authorised repairers certain minimum stocking requirements for original spare parts, the two manufacturers concerned accepted to modify their service contracts so as to keep the minimum stocking requirements to what was regarded to be necessary to fulfil consumer demand for fast moving wear and tear parts. At the same time, in order to respond to the Commission's concerns, the two manufacturers clarified that their authorised repairers were entitled to enter into joint stocking and joint purchasing arrangements amongst themselves, as a means to bolster the development of alternative logistical systems for the procurement of competing spare parts from different suppliers.

#### **4.5.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

Based on the above, it appears that the introduction of a 30% market share threshold for after-sales service agreements, above which quantitative selective distribution is excluded from the benefit of the block exemption, has positively contributed to improve the functioning of the aftermarket in the automotive sector to the benefit of consumers. As commonly recognised, the provision of after-sales services for each vehicle brand constitutes a relevant anti-trust market on which the market share of the respective authorised networks normally exceeds 30%. As a result, virtually all vehicle manufacturers have reviewed their agreements in order to admit into their authorised networks all service partners fulfilling a limited number of purely qualitative selection standards aimed at establishing an efficient and reliable system for the provision of after-sales services, strictly justified by their nature.

The current Regulation has therefore allowed market forces rather than the vehicle manufacturer to determine the density of the network. As a result, during the reference period, the number of service outlets and the density of the networks have increased, leading to more competition on the market. The fact that vehicle manufacturers have set up rather demanding quality standards for their network of authorised repairers does not seem to have operated against consumers' interests, as the systems at issue have not only increased the quality of the service, but have also had an influence on the independent sector who has been forced to react by increasingly setting up competing networks and franchised chains with common standards (see 4.4 above), so as to better respond to consumers' demand for high quality, efficient and reliable services.

It is important to note that such a positive result could presumably have been achieved also without Article 4(1)(h). If the after-sales service for a given brand has, due to the market share of the vehicle manufacturer, to be organised as a qualitative selective distribution system, then it would be hard to accept that the obligation to also sell new vehicles of that brand could constitute a qualitative selection criterion objectively necessary for providing repair and maintenance services. As a matter of fact, the enforcement experience of the Commission shows that in those few cases where certain manufacturers tried to raise unjustified obstacles to the entry of newcomers into their authorised repairers networks, they did so not by contractually linking the provision of after-sales services with the sale of new motor vehicles, but by applying dubious selection standards which, in certain cases, proved not to be justified by the nature of the services to be rendered to consumers.

In this context it is submitted that Article 5(3) on the freedom of location for repair and maintenance services or the sale of spare parts has also proven to be redundant in the sense

that qualitative selective distribution already provides the adequate legal framework for ensuring that repairers fulfilling the necessary criteria may open additional service outlets at appropriate locations.

With regard to spare parts, it stems from the observations made above that the new provisions granting easier access to parts from sources other than the vehicle manufacturer were not taken up by industry players as the Commission had hoped for. There seem to be three main reasons why sourcing behaviour of authorised repairers has not been substantially affected by the entry into force of the new Regulation.

Firstly, for captive parts and for those parts which are used for warranty work the authorised repairer has no choice but to source from the vehicle manufacturer. This situation, however, cannot be remedied by Articles 4(1)(k) and 4(1)(j) as it is either linked to the existence of IPRs held by vehicle manufacturers, or is the result of subcontracting agreements falling outside Article 81(1) or is the direct consequence of manufacturers' legitimate requirements as to the parts to be used for repair works covered by their warranties.

Secondly, ordering parts from a different supplier normally requires additional IT infrastructure and entails another logistical system which may not match the efficiency of the systems currently operated by vehicle manufacturers. This would suggest that authorised repairs have neither a clear-cut incentive, nor the ability to operate multiple systems for the procurement of parts. If it is objectively more efficient to have just one IT-system for the ordering and administration of spare parts instead of two or more, then any hardcore clause approach would go against market reality. This would explain why Articles 4(1)(k) and 4(1)(j) appear to have been ineffective in achieving the objective that they were initially designed to pursue.

Thirdly, vehicle manufacturers generally apply rebate schemes and grant bonuses which make it attractive for authorised repairers to source from them most of their requirements in spare parts. 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 weighting any potentially anti-competitive effect against possible efficiency-enhancing effects. It is highly questionable, however, whether such a balancing exercise could be compatible with a hardcore-list approach. Furthermore, during the reference period, the Commission has received no complaint alleging a violation of Articles 4(1)(k) and 4(1)(j), nor its market monitoring activities have revealed cases of agreements expressly obliging authorised repairers to purchase parts only from the vehicle manufacturers concerned. Therefore, the absence of any observable impact of the Regulation in this area does not seem to be related to a persistent violation of its provisions but rather to the inadequacy of its hardcore-list approach in fostering the expected changes in industry behaviour.

It would seem instead that the correct legal framework for addressing this type of problems is provided by Article 5(1)(a) of the Regulation which excludes from the benefit of the block exemption any direct or indirect non-compete obligation. Pursuant to this provision, in those cases where a certain rebate scheme would be structured in such a manner so as to induce authorised repairers to buy all or most of their requirements for spare parts exclusively from the vehicle manufacturer concerned, such a scheme would amount to an indirect non-compete obligation not covered by the block exemption. However, as Article 5 does not qualify this obligation as restriction by object, the analysis of the rebate schemes at issue could still take into account possible efficiency-enhancing effects, in accordance with the effects-based

approach that the Commission usually applies in other sectors to similar cases falling under Article 81.

It follows from the foregoing that by integrating a more effects-based approach to the analysis of vertical restraints and by limiting the scope of the block exemption through the application of market share thresholds, Regulation 1400/2002 has positively contributed to foster competition between authorised repairers and parts distributors. However, not all its provisions have been effective and/or relevant in achieving such an objective. Altogether, it seems that the sector-specific hard-core restrictions designed to complement the general rules enshrined in Regulation 2790/1999 may amount to a form of over-regulation, contrary to the principles of better regulation applicable to EU law.

#### ***4.6 Improving spare parts producers' access to the automotive aftermarket***

In 2000, the Commission noted certain rigidities in the spare parts markets that had the effect of limiting consumer choice over the spare parts used to repair their vehicles. Spare parts producers, including original equipment suppliers (sometimes referred to as OES or component manufacturers) appeared to have certain difficulties in supplying the aftermarket without passing through the vehicle manufacturers' distribution systems. Authorised repairers (at the time these were all "dealers" in that they all sold new vehicles) sourced a very high percentage of their spare parts purchases from vehicle manufacturers, despite the fact that parts from other sources were identical or of matching quality, and were often available at lower prices.

##### **4.6.1 Relevant provisions**

A number of provisions of Regulation 1400/2002 were aimed at ensuring that Original Equipment Suppliers (OES) and producers of matching quality spare parts could have access to both independent and authorised repairers, in order to allow them to offer a choice to consumers, in competition with the original parts supplied by vehicle manufacturers. Some of these provisions have already been analysed in the previous sub-sections 4.4 and 4.5 and they will be not commented on further in the present sub-section. This is the case in particular for **Article 4(1)(j)**, which excludes from the benefit of the block exemption agreements restricting OES' ability to sell spare parts directly to aftermarket, and **Article 4(1)(k)**, which 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 to these provisions, Regulation 1400/2002 set out other sector-specific rules whose aim is to improve the conditions in which competing spare part producers may market their products on the aftermarket. In particular, **Article 4(1)(l)** qualify as 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"). It was felt that repairers lacked the necessary information enabling them to identify which spare parts from alternative suppliers matched a given vehicle and were consequently driven to source parts bearing the carmaker's brand.

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.

#### **4.6.2 Achieving the objectives**

As pointed out in Working Document 2 above, the market share enjoyed by vehicle manufacturer-branded and spare parts producer-branded parts appear to be broadly stable, although this depends slightly on the viewpoint of the different categories of stakeholders having provided relevant data in the context of the Commission's inquiry.

CLEPA, the association of spare parts producers, estimates that the market for spare parts is divided equally between parts branded by the vehicle manufacturers and those bearing other brands and that vehicle manufacturer-branded parts have increased their share slightly over the last four years due to longer warranty periods, limited access to repair information for independent repairers and more aggressive marketing. Most vehicle manufacturers report the overall market share of their own brands of spare parts to be high (in most cases between 40-65%). Many also point to a broadly stable market share over the period 2000-2006. According to information received from spare part producers, their sales to the aftermarket (i.e. sales that do not pass through the vehicle manufacturers) are broadly robust, although market shares vary considerably from producer to producer. Producers expect that products from low-cost countries will increasingly penetrate the European aftermarket: a perception that may suggest that there are few significant barriers to entry. As for commercial vehicles, the claimed market shares of the vehicle manufacturers' brands vary considerably depending upon the brand, with no overall trend. For bus parts, the market share of the vehicle manufacturer-branded parts appears to be higher than is the case for truck parts.

Most original equipment suppliers indicated that they were able to place their own brand on parts and components as foreseen in the block exemption. Sometimes, where small parts were concerned, it was reported that it was difficult to dual-brand simply due to lack of space. Several respondents to the Commission's questionnaires underlined that being able to market their parts as "original" enabled them to enter the aftermarket more effectively.

Producer-branded parts reach the aftermarket via two main means. Certain parts are sold directly to repairers by the producer itself. This direct route to the aftermarket may have been favoured by the evolution of franchised repair chains run by the parts producers and operating under their own brands. Other parts are supplied via wholesalers that are independent of both the vehicle manufacturers and the parts producers. Repairers' associations' estimates regarding the evolution of the market shares held by independent distributors in the wholesale market show a mixed picture, with no overall trend in either direction. Overall, however, they appear to hold around half of the overall market.

As has already been observed in sub-section 4.5, little appears to have changed as regards authorised repairers' purchasing patterns. According to the London Economics study, authorised repairers of cars still obtain between 87 and 95% of their spare parts from car manufacturers. Figures provided by most market participants support this position. Moreover, many of the parts bought by authorised repairers that do not bear the carmaker's brand are likely to be tyres, batteries, and lubricants. These figures demonstrate that the spare parts

producers and independent distributors have failed to gain a significant foothold within carmakers' authorised networks. The main market for the independent spare parts supply channel is therefore the independent repair sector. Independent repairers continue to exhibit far different purchasing patterns to their competitors operating within the manufacturers' networks. According to CECRA, they source between 70% and 80% of their spare parts requirements from independent wholesalers. The remaining parts are probably captive to the authorised networks (i.e. no alternative brands are available on the market).

In such case, the limited competition for captive parts is in fact the result of national IPR law rather than of restrictive agreements between undertakings which could fall foul of Article 81. Parts producers continue to be limited in their ability to reach the aftermarket by the fact that in many Member States, carmakers are able to exercise design rights over visible parts to prevent the parts manufacturers from selling directly to repairers. In other cases, tooling arrangements between vehicle manufacturers and parts producers appear to prevent the latter from supplying the aftermarket more directly.

#### **4.6.3 The Commission's enforcement experience**

It is notable that although some commentators have suggested that in some cases pressure is put on parts manufacturers not to enter the aftermarket or not to place their brands<sup>46</sup> on components or spare parts, the Commission has not been provided with any firm evidence to this effect. Nor has the Commission received any evidence showing that car manufacturers have unlawfully prevented the members of their authorised networks from purchasing matching quality or original spare parts. Despite the prevalence of counterfeit parts on the market, there have been very few instances reported to the Commission where parts claimed to be original or of matching quality turned out to be otherwise.

#### **4.6.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

As already observed in sub-sections 4.4 and 4.5, Article 4(1)(j) appears to have been partially successful, in that spare parts producers have maintained their position on the after-markets, despite the prevalence of captive parts that prevent independent parts distributors from offering a full range. It should be noted, however, that as far as supply to independent repairers is concerned, Article 4(e) of Regulation 2790/1999 would have had a similar effect, and in this respect Article 4(1)(j) could be seen to be a redundant diversion from the general regime. As for supply to the authorised networks, it would appear that repairers generally do not buy alternative brands of parts for vehicles for which they have authorised status. The exceptions would seem to be lubricants, tyres, and batteries. Furthermore, while independent distributors do sell certain parts to authorised repairers, it seems likely that many of these are parts for brands of vehicle in respect of which the authorised repairer is acting as an independent, for instance when an authorised Fiat garage carries out servicing on a Ford vehicle. In this respect, Article 4(1)(j) can be seen to have been ineffective. The same can be said for Article 4(1)(k).

Despite the fact that the dual-branding provided for in Article 4(1)(l) has not been taken up in all cases, the Commission has received no indication that today's repairers generally find it difficult to identify which parts fit a given vehicle. It would therefore appear that Article 4(2)

---

<sup>46</sup> Two parts manufacturers claimed that this was the case, without providing any evidence. CLEPA confirmed that this happened in some cases.

of the Regulation, which provides for independent repairers to have access to technical information,<sup>47</sup> has made it possible for repairers to identify the spare parts needed. In these circumstances, one can conclude that although Article 4(1)(l) has not always been effective, it was not needed in order to pursue the stated aim. Such conclusion will remain valid in the future when, following the entry into force of the specific regime for dissemination of technical information provided for in Regulation 715/2007, all spare parts catalogues, including parts identification codes will be available on-line to all after-market operators.

The definition of "original spare parts" in Article 1(1)(t) of Regulation 1400/2002 has apparently been effective in enhancing competition, in that it has improved market transparency and provided better marketing opportunities to OES. However, it should be noted that the same definition of "original parts" has meanwhile been included in Article 3 (26) in the Framework directive for the approval of motor vehicles<sup>48</sup> ("Type Approval Directive") that entered into force in October 2007. Article 1(1)(t) therefore appears to have been both relevant and effective, but to lack relevance for the future.

As to parts which are not original, it should be noted that even in the absence of a definition of matching quality parts such as that in Article 1(1)(u), 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. Should a car manufacturer restrict its repairers' ability to purchase such parts, it would be incumbent on him to bring evidence to the effect that such a restriction is objectively justified in the light for instance of consumer safety or the reputation of the vehicle manufacturer's brand. It should be underlined that the possibility to invoke such an objective justification exists also under the current BER as it is always possible for vehicle manufacturers to contest the validity of the self-certification delivered by the part producer concerned in spite of the mechanism provided for in Article 1(1)(u). Consequently, access to competing parts by authorised repairer would be adequately ensured, in accordance with an appropriate effects-based analysis, even in the absence of this specific rule.

#### ***4.7 Safeguarding the independence of dealers and authorised repairers***

Contractual protection is not normally considered to be a competition aim, and indeed Regulation 2790/1999 contains no specific measures to protect weaker contractual parties. However, the contractual relationship between suppliers on one side and dealers and repairers on the other side is generally marked by a certain imbalance of power in favour of the supplier. In many cases, the dealer or repairer may be economically dependent on his supplier, and may be unwilling to act against the wishes of his supplier even where do so would bring him immediate financial benefits. Article 3 of Regulation 1400/2002 was therefore intended as a flanking measure, intended to encourage dealers to take advantage of certain provisions of the Regulation that were protective of intra-brand competition. It was thought necessary to promote such competition, since the Commission perceived that inter-brand competition was weak and liable to get weaker in the face of consolidation among vehicle manufacturers.

---

<sup>47</sup> Information on spare parts codes counts as technical information within the meaning of Article 4(2). See, for instance, the Commitments offered in cases Comp- 39140 -39143.

<sup>48</sup> Directive 2007/46/EC 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 9.10.2007, Article 2, 26.

#### 4.7.1 Relevant provisions

**Article 3(3)** of the Regulation grants an authorised distributor or repairer the right to transfer his dealership to another distributor or repairer of his choice within the same distribution system without the prior consent of the vehicle manufacturer. According to Recital 10, the purpose of this provision is to foster market integration, by allowing distributors or authorised repairers to seize additional business opportunities, in particular in other Member States.

According to recital 9 of the Regulation, the aim of **Article 3(5)** is to strengthen the independence of distributors and repairers from their suppliers. To this end, it provides for a minimum contractual term of five years, and for minimum notice periods to be given in case of contract termination or non-renewal. Where the supplier opts for a contract with a predetermined duration, notice of intent not to renew the contract has to be given to other party at least six months' prior to expiry. If the agreement is concluded for an indefinite period, the period of notice for regular termination of the agreement has to be at least two years for both parties. However, in exceptional circumstances, this notice period can be reduced to at least one year where (i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or (ii) the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.

Moreover, **Article 3(4)** imposes on suppliers who wish to give notice of termination of an agreement the obligation to give such notice in writing to include detailed, objective and transparent reasons for the termination. Again, the *ratio legis* of this provision is to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under the Regulation, i.e. which are pro-competitive. Recital 9 of the Regulation states in this respect that such pro-competitive behaviour may consist of active or passive sales to foreign consumers, multi-branding or subcontracting repair services.

Lastly, **Article 3(6)** provides that each party to an agreement falling within the scope of the Regulation should have the right to refer contractual disputes to an independent expert or arbitrator. The article contains a non-exhaustive list of types of dispute, including the setting or attainment of sales targets, the implementation of an obligation to provide or use demonstration vehicles and the issue as to whether the termination of an agreement is justified by the reasons given in the notice. According to recital 11 the underlying idea of that provision is to favour the quick resolution of disputes which arise between the parties to a distribution agreement and which might otherwise hamper effective competition.

#### 4.7.2 Achieving the objective

As pointed out above in Working Document 3, inter-brand competition has increased since the block exemption entered into force, and the protection of competition within the brand networks has therefore become less important in keeping pressure on quality and prices to the benefit of consumers. Furthermore, the Commission's analysis shows that despite the reductions in network density seen from 2002 to 2004, intra-brand competition has not appreciably diminished since the Regulation entered into force. Dealer's margins are stable at low levels, showing that competition is working effectively to ensure that the benefits of efficient selective distribution are passed on to consumers.

Although the sector has witnessed the growth of dealer groups, the emergence of larger dealers with a cross-border footprint has not materialised, as virtually all acquisitions and mergers between dealers belonging to the same manufacturer's network have taken place at purely national level. Hence, Article 3(3) underlying aim to foster market integration at the EU level has not been followed by industry's practice. While the growth of dealer groups may well have positive effects on intra-brand competition, namely if such groups are able to exercise countervailing power vis-à-vis their suppliers and are constrained by residual competition to pass the resulting benefits on to consumers, in certain cases they may actually weaken competition, in particular where one single dealer group controls all or most of the sale outlets in a relatively large geographic area. It would appear therefore that further consolidation within national sales networks may even reverse, in the future, the currently positive development of competition in the motor vehicle retailing sector.

As to the condition laid down in Article 3(5), one might observe that the vast majority of agreements entered into during the reference period have an unlimited duration, and suppliers may therefore terminate them on two years' prior notice. This flexibility has enabled suppliers to adapt their networks to market conditions, with a view to ensuring cost-efficiency, optimal territorial coverage, and dynamic distribution structures. It is notable in this regard that since the Regulation entered into force, no formal complaint has been brought to the Commission's attention indicating that suppliers would have used their powers to terminate contracts as a retaliatory measure to eject pro-competitive dealers from their networks. As regards the obligation to give reasons for termination, the Commission's enquiry only uncovered ten cases across the whole of the EU in which the requirement to give reasons as required by Article 3(4) enabled dealers to bring legal actions against suppliers to contest the termination of their contracts<sup>49</sup>. Nor have any examples been brought to the Commission's attention where reasons given for full-notice termination were proven to be bogus in the course of arbitration or Court proceedings.

As to Article 3(6) of the Regulation, stipulating that agreements must provide the possibility for the parties to refer disputes to an independent expert or arbitrator, it would appear that dealers that wish to contest an allegedly abusive termination of their contracts tend to choose the Courts as a forum for dispute resolution, rather than turning to an independent expert or arbitrator. Only one association, Federaicpa of Italy, was able to quantify the number of cases in which a dealer sought the help of an independent arbiter to resolve a dispute with the vehicle manufacturer. According to Federaicpa, there have been 7 cases submitted to an arbiter in the first quarter of 2007, in particular with regard to the attainment of sales targets.<sup>50</sup>

### **4.7.3 The Commission's enforcement experience**

The Commission's experience of enforcing Article 3 of the Regulation has been rather limited. There have been no formal cases concerning Article 3(3) relating to the transfer of rights and obligations under a contract by one dealer or repairer to another within the same network. As regards Article 3(4), it is notable that in no case has a contractual obligation to give reasons for contract termination helped the Commission detect serious restrictions of competition.

---

<sup>49</sup> According to the Czech SACR there have been approximately 10 cases of this kind. See answer to question 2.14 of SACR

<sup>50</sup> See answer to question 2.15 of Federaicpa

In contrast, the one-year period for termination on short notice in special cases provided for in Article 3(5) has caused legal uncertainty and resulted in legal action in a number of cases brought before national courts. In particular, there have been four applications for preliminary rulings pursuant to Article 234 of the Treaty in which national courts asked the European Court of Justice to rule on what constituted a necessary network re-organisation and whether the entry into force of Regulation 1400/2002 was an acceptable ground for giving notice to the entire network. In this connection, it has to be noted that the ECJ has not interpreted the notion of "necessity to reorganise" as dealers had hoped for. According to the ECJ it is not for the national judges or arbitrators to call into question the economic or commercial considerations of the vehicle manufacturer; rather, if the supplier can plausibly demonstrate that absent the re-organisation he would suffer adverse economic consequences the one year notice period is in line with the Regulation.<sup>51</sup>

Finally, as regards Article 3(6), in the *General Motors* case, the Commission closed its investigation on the grounds that, *inter alia*, GM had confirmed that its dealers had the right to seek arbitration if disputes arose regarding sales targets and performance, which seems to confirm a certain practical utility of the arbitration mechanism in certain specific circumstances.<sup>52</sup>

#### **4.7.4 Assessment of the effectiveness and relevance of the provisions of the Regulation**

The vast majority of dealer associations were of the opinion that the provisions in Article 3 have had, during the whole reference period, mainly a useful preventive effect, in that they effectively deterred vehicle manufacturers from ending contracts and exercising other forms of pressure as a means of retaliation against pro-competitive behaviour by dealers. However, almost none of the respondents were able to submit concrete data to support their claims.

In general, the effectiveness of the provisions in Article 3 in creating a deterrence effect on manufacturers must be subject to some caution as the Regulation does not entail any presumption of illegality for practices diverting from these provisions. For example, if a contract termination notice is given without a detailed, objective and transparent motivation, it can not automatically be concluded that the supplier in question has acted in an anti-competitive way. The only consequence of such a practice would be that the agreement at issue would lose the benefit of the block exemption. However, in this event, a case-by-case analysis would still be required in order to ascertain whether the contested agreement actually falls under Article 81(1) and, if so, whether it fulfils the conditions set out in Article 81(3) of the Treaty. .

Turning to the specific measures devised by the Commission to address the issue of dealers' independence, it stems from the observations already made above in sub-section 4.7.2 that Article 3(3) does not appear to have achieved its main objective<sup>53</sup> of fostering market integration at the EU level. Although dealers have reported to the Commission that Article 3(3) has allowed them to sell their dealership to other dealers within the same network without the explicit consent of the supplier, it would appear that only very few dealers have entered into such transactions with dealers established in other Member States. The provision has also had the side-effect of facilitating the growth of large dealer groups as shown by the

---

<sup>51</sup> Case C-125/05 *Vulcan Silkeborg v Skandinavisk Motor*, [2007] ECR I-xxxx, para. 35-38

<sup>52</sup> See IP/06/303 of 13 March 2006

<sup>53</sup> See recital 10 of the Regulation

fact that the market share of the top 25 such groups in the large Member States has increased between two and seven percentage points between 2003 and 2006.<sup>54</sup> While this growth may have helped to strengthen dealers' countervailing power, it also has the potential to reduce both inter- and intra-brand competition in certain local areas where all competing dealerships would fall under the control of a single dealer group. Lastly, Article 3(3) has not brought much added value for authorised repairers and spare parts distributors, as all of them currently operate within qualitative selective distribution networks, which means that the owner of an authorised repair outlet can always sell his business to another member of the same authorised network without being deterred by the threat of a veto by the manufacturer concerned. In these circumstances, in fact, the outlet to be sold fulfils already the qualitative criteria relating to the physical set up and operational standards of authorised repair outlets, while the purchaser, being himself a member of the same network, is supposed to comply already with the professional standards required by the manufacturer concerned.

It would appear therefore that Article 3(3) has proven overall ineffective in achieving the goal that it was specifically designed to pursue and might have had undesirable side-effects in terms of inducing further consolidation in retail markets, which could in turn contribute to a further weakening of the position of smaller dealerships on the market.

With regard to the specific safeguards in Articles 3(4) and 3(5) concerning the minimum contract duration, minimum periods for termination notices and manufacturers' obligation to state the reasons for such terminations, the assessment of their impact varies depending on whether they are invoked in respect of dealer contracts or after-sale service contracts.

As regards the latter, it should be noted that Article 3(4) and Article 3(5) do not seem indispensable for ensuring contract stability and protecting pro-competitive behaviour by repairers and parts distributors since the manufacturers' networks generally control a share exceeding 30% of the relevant retail markets and, for this reason, the contracts applied throughout the sector are based on purely qualitative selective distribution criteria. In such circumstances, vehicle manufacturers have to allow into their network any service partner fulfilling the required standards. Therefore, contract terminations are basically limited to instances where the authorised repairer or part distributor concerned does not fulfil the selection standards or acts otherwise in breach of its contract. It follows that contract terminations (or threats thereof) served without just cause and merely designed to sanction a pro-competitive behaviour by authorised repairers and/or parts distributors would not achieve the disciplining effect allegedly sought for by the manufacturer as the service partner concerned could always re-apply for authorised status and, in case of refusal, could successfully seize a national court or an arbitrator to settle the dispute in his favour.

As regards dealer contracts, which are generally based on quantitative selective distribution, it should be recalled that following the entry into force of the Regulation, the vast majority of vehicle manufacturers has chosen to conclude distribution contracts of indefinite duration which are therefore subject to a two-year termination notice. In this context, it is highly doubtful that Articles 3(4) and 3(5) have effectively contributed to either strengthen the protection of dealers' investments through a guaranteed minimum period of contract duration or to prevent manufacturers to terminate a contract as a means to sanction pro-competitive conducts by the dealer concerned.

---

<sup>54</sup> ICDP: The future shape of car distribution, conference paper, ICDP autumn forum 2007

On the one hand, as virtually all dealer contracts currently in force have been concluded for an indefinite duration, the purported protection of dealers' investments appear to be limited *de facto* to a temporal framework of two years, corresponding to the ordinary notice period that the manufacturer has the discretion to serve at any point in time pursuant to Regulation 1400/2002. Given the magnitude of the investments required from the dealers to meet the manufacturer's standards, this timeframe for the amortisement of dealers' sunk costs is by no means more protective than what is generally provided by national contract laws in most Member States, notably in relation to cases of contract terminations without just cause and involving bad faith by the party serving the termination notice. Certainly in cases in which the vehicle manufacturer lures the dealer into large investments swiftly followed by termination of the contract, the dealer may be able to obtain damages under the applicable national laws. Furthermore, it would probably be impossible, for most dealers, to get the necessary up-front finance from banks without a minimum contract period guaranteeing the dealer's ability to pay off its loan. It is therefore likely to be in the interest of vehicle manufacturers themselves to agree with their dealers on minimum contract durations so as to allow dealers to do the required investments, in particular those which are brand-specific and therefore sunk. Finally, and more importantly, the specific mechanism enshrined in Articles 3(4) and 3(5) appears difficult to reconcile with the approach followed by the Commission in other sectors, which is based on the assumption that the longer is the duration of an agreement the more likely is that such agreement may foreclose the market or have other anti-competitive effects.

On the other hand, after the radical rationalisation of most vehicle manufacturers' networks beginning in 2000, and against a backdrop of new market entries and increased competition between brands, it would be irrational for vehicle manufacturers to have systematic recourse to contract terminations as a means of "disciplining" dealers who acted pro-competitively but against the manufacturer's wishes. Such a move would risk excluding efficient dealers from the network that could be less easily replaced than in the past due to the greater economies of scale and investments needed. Moreover, termination of efficient dealers would simply create new opportunities for market entry or expansion to the benefit of smaller rivals or newcomers interested to integrate these dealers into their networks, with an ensuing negative impact on the market shares of the manufacturer concerned. It seems therefore more likely that, in today's competitive environment, suppliers would be more prone to retaliate against wayward dealers for instance by setting high volume targets, which if missed would lead to a substantial reduction in bonuses, or by over-aggressive auditing, rather than by threatening contract termination. Again, this type of unfair commercial conducts by the stronger contracting partner would be more appropriately dealt with under the existing national laws either before civil courts or, possibly, before an arbiter.

It may also be observed that should a manufacturer make use of threats of contract termination or other forms of pressure in order to deter dealers from acting pro-competitively on the market (in order for instance to prevent them from selling vehicles to foreign consumers), such a conduct could constitute circumstantial evidence of an infringement of Article 81 regardless of any possible concomitant violation of the conditions enshrined in Article 3 of Regulation 1400/2002. Thus, for instance, in the Commission Guidelines on Vertical Restraints it is clearly stated that not only direct obligations but also indirect measures aimed at inducing the distributor not to sell to foreign customers, such as refusal or reduction of bonuses or discounts, refusal to supply, reduction of supplied volumes or threat of contract termination or profit pass-over obligations are seen as a hardcore restriction making the agreement void<sup>55</sup>. This means that the application of the general principles in the

---

<sup>55</sup> See para. 49 of guidelines on vertical restraints, Official Journal C 291 , 13/10/2000 P. 1 - 44

field of vertical restraints already provides adequate protection against these forms of illegal pressures by manufacturers, independently from any additional condition enshrined in a block exemption.

Finally, as regards the specific obligation for manufacturers to provide objective and transparent reasons supporting a termination notice, it must be recalled that, in a quantitative selective distribution system, a supplier may terminate a dealer with two years' notice, simply on the grounds that it no longer has any need for a dealership in a particular geographic area, due for instance to a changed assessment of the optimal territorial coverage at that location. This suggests that the specific safeguard provided for in Article 3(4) is in any event easy to circumvent.

As to Article 3(6) of the Regulation, and to the condition that agreements must provide for the parties to be able to refer disputes to an independent expert or arbitrator, this provision would appear to have met with some success, in that it may have helped the parties to avoid long drawn-out and expensive litigation, in particular as regards the attainment of sales targets and standards. It should also be noted that in the four cases on access to technical repair information, the car manufactures concerned accepted a dispute resolution mechanism which is similar to that in Article 3(6).<sup>56</sup> However, unlike Article 3(6), the means provided for in the commitments offered in those four cases is not contractual, but is rather required for the extra-contractual relationship between independent repairers and the carmakers in question. Arbitration may be of particular value in those Member States where the normal court procedures are long-drawn out. In these circumstances a refusal to accept arbitration could be seen as a form of delaying tactics which would be considered to be form of indirect restriction of competition. Consequently, it appears to be of interest to both car manufacturers and dealers to have an arbitration mechanism in place.

In sum, the relatively healthy inter-brand competition indicated by the evidence gathered by the Commission to date suggests that it would not be justified for any future regime to contain specific provisions analogous to those in Article 3 of Regulation 1400/2002. If dealer investments are to be protected, a competition regulation no longer seems the appropriate instrument. Alternatives include making the sales agents' directive<sup>57</sup> applicable to dealers, or making active use of existing provisions in national commercial law granting protection against unfair commercial conducts by one of the contracting parties. While it seems desirable for arbitration to be the standard means of resolving contractual disputes in the sector, as this method is beneficial to both parties, the imposition of such a mechanism through a regulation based on competition rules is perhaps not a necessary solution.

#### ***4.8 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

---

<sup>56</sup> Cases COMP/E-2/39.140 – DaimlerChrysler, COMP/E-2/39.141 – FIAT, COMP/E-2/39.142 –Toyota and COMP/E-2/39.143 –Opel, decisions of 13 September 2007

<sup>57</sup> E.g. by extending Article 17 of Directive 86/653/EEC to dealers

competition has translated into falling real prices against a background of increased market integration at EU level.

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 in the main stems from measures inspired by general principles derived from the case-law of the European courts and currently reflected in Commission Regulation 2790/1999, rather from provisions specific to the BER. The few sector-specific measures that have been effective will become unnecessary in the future and may be discontinued in the light of the principles of Better Regulation applicable to all EU legislation.

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 force of the new regulatory framework concerning the system of type-approval of motor vehicles and parts, namely Regulation 715/2007 and Directive 2007/46.

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") has meant that certain spare parts remain captive to the vehicle manufacturers' networks, and 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) 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 has proposed the introduction of a "repair clause" in the proposal for a revised Design Directive<sup>58</sup>.

The evidence to date suggests that other provisions may have been ineffective. The aim of removing the straitjacket effect of previous block exemptions so as to ensure diversity of distribution systems and better protect intra-brand competition has not been achieved. Instead, 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 for other forms of distribution.

Moreover, the introduction of specific rules meant to protect dealers that acted pro-competitively, and to allow for the development of distributors with an international footprint have not only been ineffective but may instead have furthered the growth of large dealer groups at national level, which have the potential to lessen both inter- and intra-brand competition in local areas. In addition, by only exempting long-term contracts, the BER may have made it more difficult for newcomers to access the networks.

Although the BER has protected competition for repair and maintenance services by allowing market forces to determine the numbers of repairers within the authorised networks, this result

---

<sup>58</sup> 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.

could be equally achieved on the basis of the common principles applicable to qualitative selective distribution under Article 81(1).

Further examples of such measures which may have over-regulated the market include specific rules relating to multi-brand sales, to dealers' specialisation in sales activities, to spare part producers' sales to authorised repairers, to the availability of vehicles with specifications from other Member States and to the ability of component manufacturers to affix their brand to their products. In all these instances, it would appear that an equivalent level of protection of competition could be achieved without any of the sector-specific "hardcore" restrictions and additional conditions contained in the BER.

It follows from the foregoing that a more flexible regime, drawing closer inspiration from the general principles applicable to vertical restraints, may be appropriate for the future. The form that such a regime will take will be discussed in the impact assessment which will follow the public consultation on the Report.