

## TECHNICAL ANNEX 4

### COMPARING AND CONTRASTING THE FOUR POLICY OPTIONS

#### A) Main elements common to all policy options

1. All four policy options are based upon the Commission's overall current policy for vertical restraints, as embodied in Regulation 2790/1999 and in the current Commission proposals for the replacement of that regulation.
2. All four options provide for the application of a block exemption for the motor vehicle sector that:
  - Has the same material scope – all vertical agreements, with the exclusion of certain agreements between competitors
  - Grants exemption on the basis of market share threshold(s)
  - Has the same basic architecture: general conditions that agreements have to meet to benefit from the block exemption, hardcore clauses which exclude agreements in their entirety from exemption, and specific conditions, which withhold the exemption from particular clauses
3. As regards the material content of such conditions and hardcore restraints, all four options entail some basic similarities as, under all of them, the benefit of the block exemption would not be applicable to :
  - Resale price maintenance, i.e. the restriction of the buyer's ability to determine its resale price, without prejudice to the possibility for the supplier to impose a maximum price, or to recommend resale prices.
  - Vertical agreements which restrict passive sales by dealers into other territories or customer groups, or active and/or passive sales to end users by dealers in markets where selective distribution is used
  - Vertical agreements restricting the ability of original equipment suppliers to sell spare parts to independent repairers.
  - Any direct or indirect non-compete obligation placed on authorised dealers for an indefinite duration.
  - Selective distribution agreements that prevent the distributor from selling goods from particular suppliers (no boycott rule)
  - provisions imposing post-term non-compete obligations on the parties

## **B) Elements specific to each policy option**

### ***Option 1: no change to the current sector-specific block exemption***

4. Policy Option 1 is a baseline scenario that envisages no change to the law as it stands. Technically, this would require either the adoption of another block exemption regulation modelled on Regulation 1400/2002, or the adoption of a regulation prolonging the application of Regulation 1400/2002.

#### *Scope of the exemption*

5. While the general block exemption Regulation applicable to vertical restraints only exempts agreements containing such restrictions up to a market share of 30%, Article 3(1) of sector-specific Regulation 1400/2002 provides for a particularly broad exemption for two categories of agreements.
6. Firstly, as far as quantitative selective distribution agreements are concerned, the regulation exempts these agreements for the sale of new motor vehicles up to a market share threshold of 40%. Quantitative selective distribution agreements are rather restrictive agreements, under which the number of dealers are determined by the manufacturer and where dealers are only authorised to sell to end customers or to other members of the authorised network.
7. Secondly, it covers agreements establishing qualitative selective distribution agreements irrespective of the vehicle manufacturer's market share. It should be recalled that pursuant to well-established case law, purely qualitative selective distribution (i.e., based on selection criteria which are objectively justified by the nature of the goods, are fixed uniformly and applied in a non-discriminatory manner) are not restrictive of competition and do not therefore fall under Article 81(1), unless inter-brand competition is weak and the proliferation of such systems in the market leaves no room for alternative forms of distribution.

#### *Hardcore restrictions*

8. Option 1 would be characterised by the definition of a number of hardcore restrictions going beyond those to be found in the general regulation which are enumerated below. In particular, it would provide for an "availability clause", which would exclude the benefit of the exemption from agreements that restrict a distributor's ability to obtain vehicles with specifications current in other Member States.
9. In addition, the exemption would not apply to agreements restricting an authorised repairer's ability to limit its activities to the provision of repair and maintenance services, nor to agreements restricting the distributor's ability to subcontract its repair and services to other firms within the same brand network.
10. As regards competition in the spare parts market, both the access of independent and authorised repairers to alternative spare parts would be protected through specific "hardcore" provisions. In particular, vertical agreements which restricted a parts manufacturer's ability to supply authorised repairers or which restricted a distributor's or authorised repairer's ability to obtain original spare parts or spare parts of matching quality from competing producers would be treated as hardcore. Vehicle

manufacturers could however require the use of original spare parts supplied by them for repairs carried out under warranty, free servicing and vehicle recall work.

11. With a view to facilitating repairers' ability to identify the original supplier of a spare part, the exemption would not apply to vertical agreements between a manufacturer of motor vehicles which used components for the initial assembly of motor vehicles and the supplier of such components which limited the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on components or spare parts.
12. A specific hardcore provision would clarify that the exemption would not apply where the supplier of motor vehicles refused to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles. Finally, in order to ensure that independent repairers could access "captive" parts, i.e. parts only available from the vehicle manufacturer, Option 1 would provide that any agreement that included a restriction preventing members of the authorised networks from selling spare parts to independent repairers would not be covered by the exemption.

*Specific conditions for the application of the Regulation*

13. Unlike hardcore clauses, which exclude an agreement in its entirety from the exemption, specific conditions merely withhold the exemption from a particular clause in an agreement. In line with the current Regulation 1400/2002, Option 1 would contain stricter conditions than the general regime for vertical restraints.
14. In particular, non-compete obligations would be defined more broadly to include any obligation causing the buyer to sell or resell goods that accounted for more than 30% of its total purchases of the contract goods. In theory, therefore, this provision would allow a dealer to take on the brands of up to two additional competing suppliers. Moreover, an obligation on the distributor to sell motor vehicles from other suppliers in separate showrooms would not constitute a non-compete obligation for the purposes of the Regulation.
15. Finally, in order to enhance intra-brand competition, the exemption would not apply to any obligation on an authorised repairer or a distributor of passenger cars or light commercial vehicles within a selective distribution system which limited its ability to establish additional sales or delivery outlets in locations other than its principal place of establishment.

*Preserving the deterrent effect of Article 81*

16. A number of provisions would be maintained in order to preserve the deterrent effect of Article 81.
17. Firstly the exemption would only apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer is either entered into for an indefinite period or a period of at least five years.
18. Secondly, only agreements containing notice periods for non-renewal or termination would be exempted. If a definite term of five years or more were used, each party

would have to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement. If a contract were signed for an indefinite term, the period of notice for its regular termination would be at least two years for both parties; this period would be reduced to one year where: the supplier was obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or if the supplier were to terminate the agreement in order to re-organise the whole or a substantial part of the network.

19. Thirdly, in order to facilitate dispute resolution, and to free dealers from what could be expensive court proceedings, there would be a measure providing for a contractual arbitration mechanism for defined categories of dispute.
20. Fourthly, the exemption would only apply on condition that the agreement in question provided that a supplier who wished to give notice of termination had to give such notice in writing, giving detailed, objective and transparent reasons.
21. Moreover, the exemption would only apply on condition that the agreement in question stipulated that the supplier agreed to the transfer of the rights and obligations resulting from the vertical agreement to another distributor or repairer within the distribution system and chosen by the former distributor or repairer.
22. It should be noted that these provisions do not have a "hardcore" character. Therefore there would be no presumption of illegality in respect of agreements that did not contain these stipulations. Instead, such agreements would have to be individually assessed as to whether they fell foul of Article 81.

***Option 2: Letting the sector-specific regime lapse, leaving the motor vehicle sector to be covered by the general block exemption regulation applicable to vertical restraints***

*Uniform threshold for the exemption of distribution networks*

23. Option 2 applies the general block exemption on vertical agreements to the motor vehicle sector<sup>1</sup>. As such, it provides for a uniform threshold of 30% for the exemption of distribution agreements, to be measured with reference to the market share of the supplier and the buyers. As compared to option 1, there is no higher (40%) market share threshold for quantitative selective distribution networks for car sales, nor an exemption up to 100% market share for distribution networks based on qualitative selection criteria.
24. Compared to Option 1, Option 2 would also contain a reduced number of restrictions defined as hardcore, would provide for a less strict definition of non-compete obligations, would put no limits on location clauses and would not contain the flanking measures which were supposed to strengthen the independence of dealers.

*Hardcore restrictions*

25. Option 2 would include a list of "hardcore" restrictions which, based on the draft block exemption regulation proposed by the Commission, would be very similar to the restrictions to be found in the current general Regulation 2790/1999.

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<sup>1</sup> See Regulation 2790/1999 and the current Commission proposals for a renewed regime on vertical restraints, which will be taken as a benchmark for this option.

26. In practice, as far as the market for the sale of new vehicles for new vehicles distribution is concerned, Option 2 would differ from Option 1 in that it would not contain:
- any clarifying provision equivalent to the "availability clause" set out in Regulation 1400/2002. This means that restrictions impeding dealers in one Member State to sell vehicles with specifications pertaining to another Member State (e.g. right-hand drive cars) could be regarded as hardcore practices indirectly restricting active and/or passive sales by dealers in accordance with the *Ford-Werke* case law, but without any specific reference in the block exemption Regulation;
  - any provision prohibiting car manufacturers to prevent their dealers from subcontracting repair of maintenance services to other authorised repairers of the same brand network.
27. As far as the aftermarket is concerned, Option 2 would not contain any specific hardcore provision as regards:
- The obligation imposed by vehicle manufacturers on authorised repairers to also sell new vehicles.
  - The restriction to the OES' ability to sell spare parts to authorised repairers
  - The restriction of the authorised repairers' ability to sell parts to independent repairers,
  - Access by independent repairers to technical information
  - The double branding of component supplied by OES
28. It should be emphasized, however, that under Option 2 these specific practices affecting competition in the aftermarket would not be presumed as legal. As the vehicle manufacturers' market shares in the brand-specific aftermarket usually exceed the 30% threshold applicable pursuant to this option, the legal consequence for agreements containing such restrictions would be that they would fall outside the safe harbour and be subject to individual assessment.

*Additional specific conditions for the application of the Regulation*

29. Under Option 2, the conditions applying to non-compete obligations are less strict than those under Option 1. Suppliers falling below the 30% market share for exemption would be allowed to oblige their dealers to limit supplies of vehicles from competing carmakers to less than 20% of total purchases and not to trade with any competing brand at all from any of their premises for up to 5 years. However, a contract containing a non-compete obligation tacitly renewable beyond a period of five years would be deemed to have been concluded for an indefinite duration and would not be covered by block exemption. Moreover, in contrast to Option 1, in certain circumstances the incumbent manufacturer would still be able to prevent dealers from selling the brands of competing manufacturers within one and the same showroom.

*No measures specifically aimed at preserving the deterrent effect of Article 81*

30. The main difference between Option 2 and Option 1 would be that the former would not contain any specific provisions regulating the duration of agreements, the notice periods for contract termination, the use of an arbitration mechanism in case of dispute, or the transfer of dealership agreements between dealers belonging to the same network. These issues would therefore remain solely subject to the application of the relevant provisions of national contract laws, and for certain measures to the code of practice which has been put forward by ACEA and JAMA.

***Option 3: As Option 2, but with sector-specific Guidelines on the application of Article 81***

31. Given that stakeholders in the motor vehicle sector have been accustomed to sector-specific regulations since 1985 and that dealers and repairers have expressed a significant degree of apprehension about the application of competition law to vertical agreements in the sector without some form of guidance, it appears appropriate to consider a third option.
32. This third policy option would let Regulation 1400/2002 lapse and apply the general principles as currently reflected in Regulation 2790/1999 and in the proposed new block exemption for vertical agreements, but allow for some sector-specific clarifications as to how and on what basis the rules laid down in Option 2 would be interpreted and implemented with respect to the motor vehicle sector. Compared to Option 2, Option 3 would strengthen the predictability of the rules and facilitate self-assessment by the parties through appropriate sector-specific guidance.
33. In particular, the following issues affecting competition could be the object of sector-specific guidelines.

*Parallel trade*

34. Firstly it could be explained that agreements restricting the availability of vehicles with foreign specifications (such as right-hand drive vehicles on the Continent) are inadmissible in accordance with the relevant case-law<sup>2</sup>. On the other hand, if a carmaker were to unilaterally refuse to supply such vehicles to dealers for sale to foreign consumers such behaviour would not be caught by Article 81.

*The use of location clauses in selective systems for distributing new vehicles*

35. Secondly, under Options 2 and 3, a vehicle manufacturer's selective distribution agreements would not be exempted if it held more than 30% of the relevant market. The use of a location clause in such a case would therefore not be covered by the block exemption. Future guidelines could contain the necessary orientations in order to enable the parties to carry out their self-assessment, by recalling when the use of clauses prohibiting the opening of new sales or delivery outlets without the supplier's consent ("location clauses") may have negative effects on competition, in particular by reducing intra-brand competition.

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<sup>2</sup> Judgment of the Court of 17 September 1985. *Ford- Werke AG and Ford of Europe Inc. v Commission of the European Communities*, Joined cases 25 and 26/84, European Court reports 1985 Page 02725

### *Access to the authorised repair networks*

36. Quantitative selective agreements in the motor vehicle repair and maintenance markets would not normally benefit from exemption under either Option 1 or Option 3 because the market shares of the authorised networks normally exceed 30%. Option 3 would also achieve exactly the same result as Option 1 in the scenario where a network of agreements was not caught by Article 81(1)<sup>3</sup>. The only legal difference would occur in respect of qualitative selective authorised repair agreements that were nonetheless caught by Article 81(1). Under Option 1, such agreements could nonetheless benefit from exemption, providing that they did not contain hardcore restrictions, and assuming that the specific conditions for the application of the block exemption were met. Under Option 3, on the other hand, such agreements would not benefit from exemption, since the authorised repair networks usually have market shares well in excess of 30%, and would be subject to individual analysis under Article 81(3). The end result, assuming that the self-assessment concluded that the conditions for exemption under Article 81(3) were met, would be essentially the same in terms of ease of access to the networks. Compared to Option 2, however, Option 3 would improve legal certainty by facilitating self-assessment through appropriate sector-specific guidance.
37. In the specific case where an agreement contained an obligation on authorised repairers to sell new vehicles, that agreement would not be exempted under Option 3 on account of the authorised repair networks' high share of the aftermarket. However, an individual analysis might conclude that quantitative criteria and, in particular, obligations imposed on authorised repairers to also sell vehicles could comply with Article 81 if this were shown to be indispensable or more efficient, for instance in that it fostered the entry or the expansion of a new/smaller brand in the market. This additional flexibility would be designed to respond to certain concerns expressed by vehicle manufacturers new to the EU markets in respect of the rules currently in Regulation 1400/2002 and which would be carried over into Option 1.

### *Availability of technical information to independent repairers*

38. An agreement which provided that authorised repairers were to be the exclusive recipients of technical information would not be exempted by the general Block Exemption in the first place, on account of the authorised networks' high share of the aftermarket. Unlike Option 1, which would continue to exempt authorised repair agreements based on qualitative selection criteria up to 100% market share threshold, a specific provision not exempting this possible refusals to provide repair technical information to independent operators would not be necessary in order to apply Article 81 directly against authorised repairer agreements.
39. The Commission would therefore be able to continue to enforce access to technical information for independent repairers, based on the approach followed in the four commitment decisions which were adopted in 2007 in the Opel, Toyota,

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<sup>3</sup> This would be the case if the product in question merited a form of selective distribution; (ii) resellers were chosen on the basis of objective criteria of a qualitative nature which were laid down uniformly for all potential resellers and were not applied in a discriminatory fashion; (iii) the system in question aimed to achieve a result which enhanced competition and thus counterbalanced the restriction of competition inherent in selective distribution systems; and (iv) the criteria laid down went no further than what was necessary.

DaimlerChrysler and Fiat cases. Moreover, in certain cases, enforcement could also be based on Article 82 of the EC treaty. The guidelines envisaged in Option 3 could develop more detailed orientations on this issue to the benefit of all independent operators.

*Alternative channels for spare parts distribution, including the sale of alternative brands of spare parts to all repairers*

40. An obligation on authorised repairers not to use spare parts supplied by third parties would amount to a non-compete obligation, which, due to the high market shares generally enjoyed by car manufacturers on the relevant spare part markets, would in any event fall outside the block exemption. This would allow therefore the Commission to take enforcement action in case of harmful effects on competition. The Commission would in such a case make an effects-based analysis of the resulting foreclosure in the market for spare parts and future guidelines could develop the type of analysis to be followed in this respect.
41. If authorised repairers would be unable to get supplies from matching quality parts producers, for instance because the parts in question were only produced by OES, then the market share of the OES and vehicle manufacturers concerned would be likely to be above the 30% market share threshold and, in such circumstances, Articles 81 and 82 could be enforced against restrictions imposed by car manufacturers which would prevent the OES from selling to authorised repairers. Again, future guidelines could further elaborate on this issue.
42. Finally, guidelines could explain, on the basis of the *Volvo Veng* case law, that agreements preventing authorised repairers from selling parts to independent repairers would be unlikely to benefit from Article 81(3). In addition, they may breach Article 82, when the supplier enjoys a dominant position in respect of a certain category of original parts (i.e. when such parts are "captive" to the vehicle manufacturer) and if it can be shown that excluding independent repairers will likely eliminate effective competition on the market.

***Option 4: a more focussed sector-specific block exemption based on the general principles of Option 2:***

43. Similar to option 2 and 3, this option is based on the general rules as currently reflected in Regulation 2790/1999, limiting among other things, exemptions up to a market share threshold of 30%.
44. In the light of vehicle manufacturers' high market in the aftermarket and the highly competitive market for the sales of new motor vehicles, option 4 would maintain the sector-specific hardcore provisions relating to the aftermarket.
45. In particular, all the sector-specific hardcore clauses in the baseline scenario (option 1) would be carried over into the new block exemption. Such a more focused block exemption would be based therefore on the general block exemption for vertical agreements but, differently from Option 2, would add to the "hardcore" rules commonly applicable to all economic sectors a limited number of sector-specific "hardcore" rules derived from the current Regulation 1400/2002. These would concern:

- The obligation imposed by vehicle manufacturers on authorised repairers to also sell new vehicles.
- The restriction to the OES' ability to sell spare parts to authorised repairers
- The restriction of the authorised repairers' ability to sell parts to independent repairers,
- Access by independent repairers to technical information
- The double branding of component supplied by OES

46. It should be observed, however, that these provisions would make a significant difference only in the exceptional cases where the authorised network's share of the brand-specific aftermarket was below the threshold of 30%; in all other cases, the agreements would not benefit from the block exemption in any event.