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Accompanying the

COMMUNICATION FROM THE COMMISSION

The Future Competition Law Framework applicable to the motor vehicle sector

IMPACT ASSESSMENT

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1. BACKGROUND

1.1. Introduction

1. This Impact Assessment Report accompanies the Communication from the Commission determining what competition policy approach is to be followed in respect of the motor vehicle sector once Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (hereinafter referred to as "the Regulation" or "Regulation 1400/2002") expires in May 2010.

2. The Directorate-General for Competition is the lead service on the Communication. The other departments involved are: DG Enterprise, DG Internal Market, DG Health and Consumer Affairs, DG Economic and Financial Affairs, the Legal Service, the Secretariat-General and the Bureau of European Policy Advisers.

1.2. Historical overview

3. In the motor vehicle sector, there are approximately 120,000 "vertical" agreements between car manufacturers and authorised dealers and repairers alone, not including other agreements, such as those involving spare parts producers. The vast majority of car sales to private customers are undertaken by authorised dealers which have entered into such agreements and, depending on the Member State, approximately 45-60% of all car repairs are conducted by authorised repairers which have concluded vertical agreements with vehicle manufacturers. Vertical agreements also determine the business relations between spare part producers and car manufacturers.

4. The motor vehicle sector has had a sector-specific block exemption regulation since 1985. Commission Regulation 1475/95[1], the former sector-specific regulation for the motor vehicle sector, expired on 30 September 2002 and was replaced by the current Regulation 1400/2002.

5. When the Regulation was adopted, the Commission was of the view that the previous sector-specific block exemption 1475/95 had failed in its objectives, and moreover that the way in which this regulation was drafted was out of line with the more economic policy approach for vertical restraints laid down in Commission Regulation (EC) No 2790/1999[2], and in the Commission Notice on vertical restraints[3].

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1 Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, hereinafter "Regulation 1475/95".

2 Commission Regulation 2790/1999 on vertical restraints (OJ L 336 of 29.12.1999, p. 21) (hereinafter "Regulation 2790/1999") Regulation 2790/1999, which was adopted on 22 December 1999, established a block exemption which applies for all distribution agreements in all economic sectors which are not subject to the application of specific rules, such as motor vehicles (see Article 2(5) of Regulation 2790/1999).

3 Commission notice - Guidelines on vertical restraints (OJ C 291 of 13.10.2000, p. 1).

6. Today, unrestricted cross-border trade in cars, and the development of the Internet as a means of promoting and selling new vehicles enable consumers to take advantage of price differentials between Member States. In 2000, on the other hand, it was plain that the combination of exclusive and selective distribution within the vehicle manufacturers' authorised networks was not working to the consumer's advantage. Consumers frequently complained that they were unable to take advantage of the then high price differentials that prevailed between Member States. German and British consumers were particularly vocal; in the latter country, consumer sentiment was strengthened by a campaign ("rip-off Britain") against high prices in general. The Commission had brought four cases against vehicle manufacturers for impeding parallel trade, and imposed substantial fines[4]. Pressure on real consumer prices exerted by inter-brand competition (i.e. competition between car manufacturers) was lower than today, and the Commission was concerned that ongoing concentration would lead to a further decline.

7. Against this background, the Commission was of the view that the motor vehicle sector could not at that time be brought within the general safe harbour of Regulation 2790/1999, since its application would not remedy the competition problems in the sector. This shortcoming was due on the one hand to the homogeneity of distribution systems in the sector which could result in significant loss of intra-brand competition[5] at a time when inter-brand competition was perceived to be weak and, on the other, to the fact that specific provisions were needed to address particular problems identified by the Commission in its evaluation report. In the light of this, it chose a new sector-specific instrument that was based on Regulation 2790/1999, but which was stricter than the general regime in a number of ways

1.3. The review of Regulation 1400/2002

8. As has been observed, given the specific market conditions characterising the markets for motor vehicle sales and servicing in early 2000, stricter and more specific rules were thought necessary, going over and above those already provided for in Regulation 2790/1999. By introducing these special rules, Regulation 1400/2002 pursued a number of sector-specific competition policy objectives, whose content is briefly recalled in Annex 1 of the present Impact Assessment .

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4 On 28 January 1998, Volkswagen was fined EUR 102 million for impeding parallel trade in Italy (reduced by the CFI to EUR 90 million). On 20 September 2000 the Commission fined Opel Nederland EUR 43 million for restricting parallel trade in the Netherlands. On 30 May 2001, Volkswagen was fined a second time for price fixing in Germany, this time involving the VW Passat (fine EUR 30.96 million), and on 10 October 2001 DaimlerChrysler was fined EUR 71.825 million for impeding parallel trade in Germany, restricting sales to leasing companies and engaging in price fixing in Belgium. The latter decision was subsequently annulled by the Court of First Instance, with the exception of the part relating to price-fixing on the Belgian market.

5 In 2002, all brands of new cars in every Member State were sold through similar networks of franchised dealers combining elements of exclusivity and selectivity together with other vertical restraints, including single-branding.

1.3.1. Experience of the Regulation: the findings of the Commission's Evaluation Report of May 2008

9. Pursuant to Article 11(2) of the Regulation, the Commission was required to draw up an Evaluation Report by 31 May 2008.[6] That Evaluation Report on the operation of block exemption regulation 1400/2002 ("the Report") evaluates the impact of the Regulation on industry practices and the effects of those practices on competition in the markets for motor vehicle retailing and in after sales servicing within the EU.

10. The Report shows that on the market for the sale of new vehicles, competition between car manufacturers has become more intense and that the Single Market in the sector appears to be functioning better than in the past. This increase in inter-brand competition appears to be driven by factors other than the Regulation, such as manufacturing over-capacity, technological innovation and closer integration of markets.

11. On the repair and maintenance markets, the Report explains that independent repairers now have better access to technical information, thanks to Commission enforcement action[7]. Meanwhile, the number of authorised repair outlets has increased, because - in line with general competition policy - manufacturers (whose networks have high market shares as regards the repair of their vehicles) have allowed all repairers meeting certain qualitative criteria into their networks. Suppliers of spare parts have maintained their competitive position vis-à-vis the vehicle manufacturers' own spare parts distribution channels.

12. The Report concludes that the general framework of the block exemption has had positive effects overall, especially on the aftermarkets. However, many of the detailed sector-specific provisions may have been unnecessary, and some may have been counter-productive. For instance, the higher (40%) market share threshold below which quantitative selective distribution agreements may benefit from the exemption may have skewed manufacturers' choice towards a uniform distribution model. In addition, over-prescriptive rules in areas such as multi-brand vehicle sales and the opening of additional sales outlets may have encouraged the introduction of more onerous dealership standards, thereby making distribution more expensive, to the detriment of consumers. Other provisions, such as those enabling dealers to sub-contract repair services to other members of the same authorised network have simply not been taken up by market operators. The Report therefore suggests that car owners might benefit from improvements in competition if less complex rules were to apply to the sector, particularly in the very competitive vehicle sales sector.

1.3.2. Public consultation on the Commission's Evaluation Report

13. Following the publication of the Report, the Commission received around 120 comments on the Evaluation Report from a wide range of stakeholders, including vehicle manufacturers, dealers and authorised repairers, the independent motor trade, consumers, national authorities and the legal community. The comments received have been published on DG Competition's website at the following address: http://ec.europa.eu/competition/consultations/2008_motor_vehicle/index.html

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6 http://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf

7 See Cases 38140-38143, Fiat, DaimlerChrysler, Opel and Toyota.

14. The two main **vehicle manufacturers**' associations (ACEA and JAMA) sent in comments that were supportive of the end of sector-specific block exemption, and in favour of the application of the general rules to the motor vehicle sector. All comments received from individual vehicle manufacturers, with the exception of a contribution from Ford (which has aligned itself with the position taken by its dealers) supported the position taken by their respective associations.

15. The main opposition to any change to the current regime came from **authorised car dealers** and their associations, including the European association CECRA, which made up over half the total number of comments received. With few exceptions, this group of stakeholders supports the maintenance of the current measures on contractual protection for dealers[8], arguing that competition will only prosper if there is regulatory compensation for the economic imbalance that exists between dealers and vehicle manufacturers. Dealers also argued that the competition regime ought to continue to provide for them to be free to take on the brands of competing manufacturers, and many, including the European Association CECRA also expressed the view that location clauses ought not to be exempted. This represents a change in the position expressed by this organisation, which in October 2005 adopted a position paper arguing that ending the exemption of location clauses was a "step too far"[9].

16. The response of the **independent motor trade** focussed on specific competition issues, with different categories of commentators pleading for continued protection of the automotive aftermarket. Thus, the spare parts manufacturers' association CLEPA pleads in particular for protection of the supply of spare parts and the provision of technical information, as well as the ability of original equipment suppliers to place their brands on components and spare parts. The independent repairers' association FIGIEFA sets particular store by the provisions protecting access to technical information, and the supply of spare parts to independent repairers by members of the authorised networks. Similarly, the Féderation Internationale de l'Automobile (FIA – international alliance of Automobile Clubs, including roadside repairers) wishes for additional safeguards to enable independent repairers to have better access to vehicles during the warranty period. It also places particular emphasis on the provision of technical information to independent repairers.

17. Vehicle **leasing firms** also wished for a particular provision to be maintained: in this case, their inclusion in the definition of "end user"[10]. Such operators fear that in the absence of such a definition, dealers in selective distribution systems may be prevented from selling vehicles to them.

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8 Article 3 of the Regulation.

9 Article 5(2)(b) of the Regulation. It should be recalled that dealer associations where fiercely opposed to the Commission's proposal aimed at including location clauses in the list of non-exempted practices and obtained support by the European Parliament during the final phase of the consultation process. This led to the compromise solution enshrined in Regulation 1400/2002 which consisted in extending up to October 2005 the transitional period for the exclusion of this clause from the Regulation's safe harbour.

10 Article 1(1)(w).

18. The response from **consumer groups** was muted, in that few associations responded. DG Comp's efforts to stimulate interest from this quarter revealed that such associations do not view the motor vehicle distribution sector as being affected by specific competition problems having regard to the intense rivalry between manufacturers which characterises the current market situation. The European Consumers' Association BEUC expressed concern that harmful effects for consumers could result if current levels of competition in the automotive aftermarket were to decline[11].

19. Member States were consulted on 19 December 2008 within the framework of the sub-group for Motor Vehicles of the European Competition Network. It appeared from this consultation that no **National Authority** was against a reform of the current regime, having regard to the shortcomings highlighted in the Commission Evaluation Report. In particular, most delegations were in favour of reform in respect of certain of the rules applying to the market for the sale of new vehicles, namely the dealer protection measures provided for in Article 3 of the Regulation. However, a majority was also in favour of a continued sector-specific legal framework for the sector, in the light of the importance of motor vehicles for consumers and the high level of investments involved in distribution and aftermarket activities.

20. Independent responses received from the **legal community** were split, with some lawyers arguing forcefully for an end to the sector-specific regime, while others submitted that the Commission should not turn its back on more than twenty years of block exemptions, in particular as regards the contractual protection of dealers.

21. IG Metall was the only example of a **social partner** commenting on the Report.

22. The areas of concern for the **European Parliament** can be gauged by a letter addressed to Commissioner Kroes on 19 March 2009. In that letter, the Committee on Economic and Social Affairs asked the Commission to prolong the current Regulation 1400/2002 by two years and to re-evaluate the situation in light of the current economic crisis. Commissioner Kroes responded by acknowledging that the motor vehicle sector was among those worst affected by the current economic crisis, and that therefore any proposal placed before the College would take the economic circumstances fully into account.

23. The ECOSOC's Consultative Commission on Industrial Change confirmed in its "Opinion on the components and downstream markets of the automotive sector sector (own-initiative opinion)" of 23 June 2009 the high degree of competition in the primary market as opposed to the aftermarket and pointed out that that the high degree of complexity of the Regulation makes it difficult for SMEs in particular to understand. .

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[11] The Commission's services have made further efforts to engage with consumer organisations by firstly giving the European Consumer Consultative Group (ECCG) an overview of the findings of the report on at a meeting on 19 June 2008 and then on a second occasion on 30 September 2008, giving a preliminary overview of the results of the consultation exercise. Moreover, a consumer representative was present at a specially-convened meeting of a high-level group of experts in the sector, held by Commissioner Kroes on 9 February 2009.
http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/legislation.html

1.3.3. Elaboration and assessment of future options

24. An inter-service steering group was set up for this Impact Assessment Report and met on various occasions – on 22 September 2008, 19 December 2008 and 16 June 2009.

25. A formal Inter-Service Consultation was launched on 2 July 2009. The Directorate-General for Competition took due account of the various comments received during this consultation.

26. A draft of this Impact Assessment was submitted to the Impact Assessment Board on 2 June 2009, which duly met on 24 June. In its opinion dated June 26 2009, the Board found that the report developed a detailed analysis of the legal dimension of the issue and provided a well-written summary of the public consultation on the recent evaluation of the Regulation.

27. The IA Board recommended a number of changes to the Report, mainly with a view to strengthening the analysis of the identified problems, to improve the assessment and comparison of the options, to place the review in a broader context and to improve the presentation of the text. The Report has been amended in accordance with the Board's comments.

28. In order to strengthen the analysis of the problems, a more consolidated examination of the sector's competition problems has been introduced which is supported in greater detail by two additional annexes specifying competition-related and general economic indicators, the latter giving an overview of the economics of vertical restraints under different competitive conditions. Moreover, the Report now distinguishes more clearly between those provisions in the current Regulation motivated by objectives which are not relevant any more and those measures which address valid competition concerns, albeit in an inefficient manner, while explaining in greater detail how certain adverse effects, such as an increase in distribution costs, may have been influenced by the current Regulation.

29. With a view to better assessing the alternative options, the analysis of the comparative advantages and disadvantages of the relevant options in addressing the problems has been reinforced as well as the examination of their impact on market entry and other dimensions, such as employment and SMEs' entrepreneurial freedom. In particular, the impact of a possible shift of negotiating power between manufacturers and dealers on consumer welfare and the costs resulting from an increased need for self-assessment under certain options has been underpinned by additional analysis. Furthermore, the final comparison of the options which was based on an aggregation of scores which raised methodological concerns has been replaced by a qualitative analysis.

30. The implications of the current economic crisis have also been taken into account in greater detail, and the implications of possible changes in the general competition framework applying to vertical restraints is now considered more exhaustively. Finally, the text has been shortened in order to enhance its readability and clarity, by moving more detailed information into annexes.

2. PROBLEM TO BE ADDRESSED: – THE "WHY"

2.1. Applying Article 81 to vertical agreements in the motor vehicle sector

31. Manufacturers of motor vehicles usually distribute their products through authorised dealer and repairer networks, i.e. networks which consist of a bundle of similar agreements between the motor vehicle manufacturer and the individual distributors or repairers. For the purposes of competition law, these agreements are referred to as vertical agreements, as the manufacturer and distributor or repairer each operate at different levels of the production or distribution chain[12].

32. Such agreements may, in certain circumstances, restrict competition within the meaning of Article 81(1). In particular, there may be an anti-competitive effect if competitors are foreclosed from a market where inter-brand competition is weak, and the parties enjoy significant market power. Moreover, where inter-brand competition is weak, vertical agreements between parties with significant market power may restrict inter-brand competition to the detriment of consumers and may also facilitate collusion between incumbent suppliers and/or distributors.

33. Vertical restraints may also have positive effects. They may for instance help a manufacturer to enter a new market, enhance brand image, or avoid a situation in which one distributor 'free rides' on the promotional efforts of another distributor. In these circumstances, agreements which have an anti-competitive effect may nonetheless be held to fall within the exception defined in Article 81(3) of the Treaty, providing that a sufficient share of the benefits arising from the agreement are passed on to consumers. In this context, the notion of market power (which reflects the ability of an undertaking to apply supra-competitive prices) has to be distinguished for the notion of bargaining power, which describes a situation in which one of the parties is economically dependent on the other.

34. Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. Vertical agreements therefore require an assessment aimed at establishing whether they are caught by Article 81(1) and if so, whether they comply with all the

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12 Other technical terms used in this report

Selective distribution systems are networks in which dealers are not allowed to sell to resellers outside the own network, thus ensuring that end consumers only buy vehicles from authorised dealers that have met certain standards aimed at protecting the brand image of the vehicle manufacturer.

Qualitative selective systems are based on agreements under which the vehicle manufacturer does not put a limit on the number of repairers or dealers, but is bound to accept all applications to join the network when objective criteria required by the nature of the goods or service are fulfilled.

Quantitative selection allows vehicle manufacturers to directly or indirectly limit the number of dealers in the network, so that they can refuse to let a dealer join, even if he meets the usual quality standards.

Multi-branding describes a situation in which authorised dealers sell brands of competing vehicle manufacturers. By contrast, non-compete obligations or single branding, describe clauses in agreements preventing dealers from selling the brands of competing manufacturers.

Location clauses are contractual terms that prevent dealers from opening additional sales outlets.

Dual branding is a practice whereby parts producers place their own brand alongside that of the carmaker on components used in vehicle manufacture.

conditions set out in Article 81(3) so as to benefit from the legal exception provided for therein. Agreements falling under Article 81(1) which would not comply with Article 81(3) are null and void pursuant to Article 81(2). More details about the economics of vertical restraints can be found in Annex 2.

35. Following the adoption of Council Regulation n°1/2003, it is for the parties to carry out such assessment. In case of complaints or *ex-officio*, the Commission and national competition authorities (NCAs) may require that the parties to such agreements bring any infringement to Article 81 to an end, and in case of serious violations they may impose fines upon the infringing parties. Moreover, national courts can apply these provisions directly, for instance in case of actions for damages brought before them.

36. Individual assessment can entail expenses for parties to an agreement, not only in terms of legal costs, but also because assessing agreements on an individual basis carries a greater risk of error in the form of false negatives or false positives[13].

37. Block exemption regulations therefore create safe harbours for categories of agreements, relieving the contracting parties from the need for individual assessment. A block exemption regulation allows market players to enter into agreements they can assume to be *ex ante* in line with EU competition law, enabling them to flexibly conclude or adjust them, while reducing their compliance costs, enhancing legal certainty and contributing to the coherent application of EU competition rules across the EU. Agreements not covered by a block exemption are not presumed to be illegal, but instead have to be assessed individually.

38. In the motor vehicle sector, there are approximately 120,000 vertical agreements between car manufacturers and authorised dealers and repairers alone, not including other agreements, such as those involving spare parts producers. In the absence of a block exemption, the risk of assessment errors would therefore be significant. It is for this reason that distribution and repair agreements in the sector have been able to benefit from consecutive block exemptions regulations since the mid-eighties, the most recent being Commission Regulation 1400/2002, which was adopted in July 2002 and became applicable on1 October 2003. This Regulation will expire on 31 May 2010. Not surprisingly, given the implications for compliance costs and legal certainty, stakeholders are virtually unanimous about the continued need for a block exemption regulation, whether general[14] or sector-specific, after 31 May 2010.

2.2. Competitive conditions on the relevant markets

39. When deciding whether to grant the benefit of a block exemption to a category of agreements, the Commission must take account of competitive conditions on the affected markets. If too broad a block exemption is granted for agreements on a problematic market, the result may be to shield contracting parties from the deterrent

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13 i.e. that the assessment will conclude that an agreement complies with Article 81 whereas in fact it can not, or vice versa. In the first case, a firm is risking a fine, while in the second, it is needlessly and possibly expensively over-complying.

14 It should be recalled that vertical agreements concerning sectors other than motor vehicles are subject to the provisions laid down in Commission Regulation (EC) No 2790/1999

effect of Article 81 of the Treaty. On the other hand, if a block exemption applying to a competitive market is fenced about with unneeded conditions or hardcore clauses, the result may be to impose an unnecessary burden on companies, which may ultimately translate into loss of efficiency. All block exemptions therefore apply market share thresholds in order to reflect the relative market power of the parties and the likelihood that efficiency-enhancing effects may offset any potential anti-competitive effects caused by the agreements in question.

40. As regards the competitive situation in the motor vehicle sector, the very competitive conditions on the market for new vehicle sales stand in contrast to those on the less competitive aftermarket. The various economic indicators underpinning this observation are described in detail in Annex 3, and are summarised below.

41. Strong inter-brand competition has been a feature of the vehicle sales markets since the late nineties at least, and the introduction of the block exemption has neither attenuated nor enhanced this. Constantly falling real price levels are one illustration. The London Economics study[15] shows that real prices were on a downward trend between 1996 and 2004, falling 12.5% overall. The introduction of the Regulation did not alter this trend one way or the other, demonstrating that the observed price trend is due to external factors rather than to the applicable competition regime. In 2007 and 2008 car prices fell by more than 3% in both years. The crisis appears to have steepened this trend, with substantial discounts being offered in order to rid the distribution chain of built-up excess stock.

Real prices	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
	-	-	-	-	-	-	-	-	-	-	-	-	-
EU	-1.6	-0.5	-0.3	-2.7	-1.8	-1.3	-0.8	-0.6	-1.9	-1.3	-1.2	-3.2	-3.1

42. Strong and increasing inter-brand competition is also evidenced by a number of successful entries, such as Kia, and relatively few exits (Rover being the only significant example). Other indications include significant fluctuations in market shares, increased choice in the sub-segments of the market, and shortening model life-cycles indicated by a higher rate of range renewal. In addition, levels of market concentration remain moderate, with an HHI of less than 2000. No carmaker has a market share of above 20% at EU level, and market shares above 30% can only be observed in a limited number of Member States. This is mainly the case for certain manufacturers' "home" markets. The London Economics study[16] demonstrates that the Regulation has had no impact on levels of concentration; although they fell in three out of six Member States sampled between 1997 and 2004, there is no discernable downward change in trend in 2003; indeed in Germany and the United Kingdom (two of the biggest markets), concentration levels actually rose from 2003 to 2004, by 71 to 73% and 58 to 59% respectively. The crisis has so far had little overall impact on concentration levels. Rather than reducing the number of overall competitors, the main effect has been that certain brands have changed hands. Ford,

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15 London Economics: Developments (...), p. 101-102.

16 London Economics: Developments (...), p. 28.

for instance, sold Jaguar and LandRover to the Indian firm Tata Motors, while Chrysler (which only has a modest presence on the EU markets) is now under the control of Fiat. As to GM's European brands, Saab has been taken over by the Swedish sports car maker Koenigsegg, and rival buyers[17] have made proposals to gain control over the Vauxhall and Opel brands.

43. Margins are comparatively modest - carmakers' operating margins were as low as 3.9% in 2004[18]- and R&D expenditure is undiminished. Looking forward, competitive pressure is not expected to lessen, as car manufacturers from India and China enlarge their presence on the EU markets.

44. The Commission's enquiries have shown that while multi-branding has increased, this has been through the expansion of dealer groups rather than through same-showroom sales. Moreover, there appears to be little overall correlation between the percentage of multi-brand dealers and the Regulation's entry into force in that although there was acceleration in multi-branding in some Member States after the millennium, in most cases this took place in 2002 or earlier rather than in 2003[19]. This is also the case for the Scandinavian and Baltic states in which same-showroom multi-branding has been a traditional model, particularly in sparsely-populated areas. On the basis of London Economics' analysis, it can be observed that there are only three countries - Hungary, Poland and Portugal - out of 12 analysed where there may have been some correlation between the entry into force of the Regulation and a subsequent increase in multi-branding of between 5 % and 10%. However, two of these (Hungary and Poland) are very dynamic markets with volatile market shares; the average standard deviation of market shares was 1.8% and 2.1% respectively in the period 1997-2004[20] with no indication of increased volatility after the entry into effect of the Regulation. The entry into force of the specific provisions regarding multi-branding can therefore only have had an impact on the Portuguese market. It should also be noted that dealers selling the brands of different manufacturers within the same-showroom make up less than 5% of all dealers across the EU, accounting for only 1% of total sales[21] so any impact that the block exemption can conceivably have had can only have been marginal at best.

45. There also seems to be little correlation between multi-branding and market entry. Although some brands have entered the EU markets over the past ten years, there is no sign of any correlation with the specific provisions of the Regulation. It is notable that the Commission received no complaint from any manufacturer that difficult access to existing dealership networks was hindering its market access, either prior to or after October 2003. Moreover, same-showroom multi-branding does not appear to have been used by manufacturers as a means of entry or expansion. Japanese manufacturers such as Toyota, which entered the EU markets in the 1970s, and have since expanded their presence, have preferred to develop their networks through the addition of mono-brand outlets. The Korean motor vehicle association KAMA has

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17 Magna/ Sberbank and Beijing Automotive Industry Holding Co. If either of these prospective buyers completes a transaction, the result will be a decline rather than a rise in concentration levels.

18 London Economics: Developments (...), p. 110, reference: Reuters.

19 Given the opposition of ACEA and JAMA to same-showroom multi-branding, it seems very unlikely that any manufacturer would have consented to this model before it was legally obliged to.

20 London Economics: Developments (...), figure 13, Page 30.

21 See ESMT study, commissioned by Daimler, and published in June 2009.

expressed the view that the ability to multi-brand is important for new entrants. However, in this respect it is notable that even though the Korean Hyundai-Kia Automotive Group, which has recently entered the EU market, it does not sell the Hyundai and Kia brands in the same showroom as each other. The downsides that same-showroom multi-branding can have in terms of brand dilution and sales cannibalisation are further illustrated by the stance of Renault, which introduced strict joint representation standards for Nissan (another brand that it controls) when the Regulation came into force. Overall, same-showroom multi-branding within the same manufacturing group (such as combined VW-Audi showrooms) is on the decline[22], showing that this model may only be economically efficient in certain circumstances.

46. Demand for passenger cars has fallen sharply from more than 16 million units in 2007 to 14.7 in 2008, or 8.7%. For those few manufacturers such as Hyundai and Kia for whom access to existing dealers is a factor facilitating entry, the crisis and the accompanying fall in demand is likely to provide an opportunity, in that the inevitable network rationalisations of incumbent brands will mean that suitable sites will become available and that dealers whose contracts have been terminated will be searching for an alternative supplier.

47. While multi-branding can have benefits if it allows new entry into markets where inter-brand competition is low, it can also have broader costs. The threat that their vehicles may be sold alongside competitors' brands has led manufacturers to raise standards for the whole of the network to address possible free-riding concerns and the risk of brand image dilution. In turn, these legitimate counter-strategies have brought about a shift in brand-specific investment from carmakers to dealers. Multi-branding can also have anti-competitive effects if it allows dealers with a powerful local presence to sell a broad portfolio of brands.

48. It therefore seems likely that in encouraging same-showroom multi-branding, the Regulation has not facilitated market entry to any significant extent. Instead, by stimulating counter-strategies, it may have increased the distribution costs that are borne by the whole network, and ultimately by consumers. Dealers associations generally indicated that their investment costs associated with the introduction of selection standards designed to prevent free-riding effects and brand dilution risks, are considerable. One association quantify this increase at 20% of the total distribution costs borne by dealers. As regards intra-brand competition, the Commission's Evaluation Report[23] has shown that there has been no real move on the part of either car dealers or vehicle manufacturers to innovate at distribution level, and the vast majority of cars are still sold through very similar selective distribution networks. Very few dealers have opened additional outlets, and few have sub-contracted the provision of repair services to other firms within the authorised networks, which were two specific forms of innovation in car retailing that Regulation 1400/2002 aimed to promote.

49. However, due to the existing degree of effective competition between brands, a relative uniformity in distribution models is not likely to be problematic. Firstly, all

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22 See ESMT study, commissioned by Daimler, and published in June 2009.

23 See Annex 3

stakeholders converge in recognising that the current retailing model, which is based on selective distribution is the most appropriate to ensure the marketing of complex technical products such as motor vehicles under optimal conditions. Secondly, a lack of diversity in distribution could only raise concerns in markets in which the parties enjoy significant market power and inter-brand competition is weak. This risk does not appear to currently arise in any EU national market. Thirdly, competitive interaction between dealers of the same brand is mainly the result of price competition through discounts, special promotions and other forms of economic incentives granted to consumers. In this light, it would seem that the main potential harm which could arise from a lessening of intra-brand competition would stem from agreements that restricted dealers' ability to freely determine their retail prices (i.e. resale price maintenance).

50. Another potential source of harm resulting from a lessening of intra-brand competition is linked to the persisting price dispersion between Member States and with the ensuing risk that vehicle manufacturers could prevent arbitrage by creating obstacles to parallel trade. The ability to buy a car in another Member State is important for consumers, in particular because cars are high-value goods, in respect of which a relatively small percentage saving can still amount to a substantial sum. The Commission has dealt with this issue in a series of cases, the most recent of which culminated in the 2005 Peugeot[24] decision.

51. The Commission's Car Price Reports show a general trend towards price convergence across the EU since 2002[25]. While the low- and mid-sized model segments still demonstrate higher differentials and a more "lumpy" trend than those for more expensive cars, this can likely be explained by the fact that consumers' search costs for such vehicles are higher as a proportion of total price. The vast majority of vehicle manufacturers produce models in these segments[26], and competition is particularly fierce, as reflected by very thin profit margins[27].

52. The current economic downturn has had a particular impact on price dispersion due to currency fluctuations and the asymmetric impact of the crisis on different Member States. As a consequence, price differentials rose significantly over 2008. This shows that volatility in price dispersion depends more on external economic factors than the specific rules of the Regulation which, as such, are not designed to promote price harmonisation across the EU but only to prevent restrictions that could hinder arbitrage by consumers. As it cannot be excluded that this increased dispersion may tempt suppliers to try to restrict exports by dealers within the EU, it is important that competition rules will continue to be enforced so as to prevent any possible hindrance to parallel trade.

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24 See press release IP/05/1227, 05/10/2005

25 The standard deviation for car prices (without taxes) between the EU-15 markets fell from 7.0% in November 2002 to 5.5% in May 2004. From 2004-2007, car price differentials in the EU-15 were broadly stable. However, in the EU-25 countries, the deviation decreased, falling from 6.9% in May 2004 to 6.4% in May 2007, thanks to price convergence in the new Member States.

26 Even Daimler and BMW are now present in the small and mid-sized car segments, thanks to the "A" and "B" Class Mercedes and to the BMW "1" series.

27 See, for instance, "Europe's car scrapping schemes are likely to backfire", Detroit News, 10 April 2009.

53. Overall, it can be concluded that the primary market is currently competitive, but in order to preserve future competition for the benefit of consumers, appropriate safeguards are to be considered when deciding on the scope of a block exemption in order to prevent possible risks of foreclosure from arising, as well as to preserve dealers' incentives to compete by granting discounts and selling to consumers from other Member States.

54. Commercial dependence on vehicle manufacturers is an important issue for many car dealers. In the context of vertical agreements, the dependence of one contractual partner on the other is not viewed as a competition problem in itself. Nonetheless, such a situation may create a problem if it makes it easier for the stronger party to pressurise the weaker party (in this instance, the dealer) to implement anti-competitive practices such as refraining from selling to foreign consumers or refusing to grant discounts to end consumers. For this reason, protecting dealers' ability to act independently on the markets was one of the objectives of Regulation 1400/2002.

55. The main factor leading to dealer dependence is the generalised use of quantitative selective distribution, which Regulation 1400/2002 exempts up to a 40% market share threshold, and which allows carmakers to reduce dealer numbers at will. Network reorganisations have significantly reduced overall dealer numbers since 2002, and the potential for increased rationalisation may increase dealers' feeling of dependence during the current crisis. However, no stakeholder, including dealer associations, questions the appropriateness of quantitative selection for distribution in the car sector.

56. The Commission therefore has to be careful to preserve Article 81's deterrent effect by ensuring that the scope of any block exemption is not so large as to enable suppliers to realise anti-competitive aims through indirect means rather than through direct restrictions such as export bans or resale price maintenance.

57. The Commission's Evaluation Report[28] has shown that competition on the markets for the repair and maintenance of motor vehicles is less intense than that on the primary market. Prices for repair jobs have risen[29], although the yearly cost of maintaining a vehicle has declined in real terms due to lengthening service intervals and greater reliability. Profit margins remain comfortable - the average operating margin of all firms engaged in vehicle repair and maintenance (including both independent and authorised repairers) within the EU-27 was 13.2% in 2004[30]

58. It should be borne in mind that these markets are brand-specific, and that by nature, competition is more limited, since the only actors are independent repairers, many of which are SMEs, and the members of the authorised repair network of the brand in question. Therefore it is particularly important to ensure that independent repairers operate on a level playing field when they compete with members of the authorised networks.

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28 See Annex 3

29 Overall, real prices for repair and maintenance services increased in the EU-25 countries by 17.8% between 1996 and 2006.

30 Eurostat: European business – Facts and figures 2007, p 278.

59. As far as inter-brand competition is concerned, it would appear that since the Regulation was adopted, the authorised networks have slowly continued to gain ground vis-à-vis independent repairers. During this period, the independent repair sector has been faced with the necessity to make rapid adjustments in terms of highly-skilled labour, training, and tools, in order to repair the increasingly technically-complex vehicles on Europe's roads. These investments have proven to be beyond the means of many smaller, less well-equipped garages. However, the independent sector has since undergone considerable consolidation that puts it in a better state to compete. Large chains of independents have emerged that are broadening the palette of services that they offer in order to meet the challenge of the authorised networks head-on.

60. The protection of competition between authorised and independent repairers implies that the latter's access to essential inputs should not be artificially restricted. In particular, the Commission watches closely to make sure that suppliers do not restrict independent operators' access to technical information and spare parts in a way that may foreclose them from the markets. Thus, in 2007, the Commission adopted four decisions against vehicle manufacturers that had failed to provide independent repairers with technical information[31]. Other practices, such as the refusal to honour warranties unless all maintenance is carried out within the authorised networks, also have the potential to marginalise and ultimately foreclose independent repairers. This potential problem may be exacerbated by lengthening warranty periods. While longer warranties undoubtedly have consumer benefits, they also have the effect of shutting independent repairers out from a sizeable slice of the overall repair market.

61. It may also be that separate markets can be defined for vehicles in the first period of ownership, which lasts for between three and four years. Certainly consumer behaviour during this period is very different, as they tend to have even routine work carried out within the authorised networks during this time. For this reason, the Commission considers it important that competition between members of those networks works efficiently to the benefit of consumers, *inter alia* by ensuring that network access remains open.

62. The main type of agreement used within the authorised networks is qualitative selective distribution. The fact that quantitative selective distribution is no longer exempted at market shares above 30% has led to a significant rebound in repairer numbers and network density. The London Economics study shows that 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[32].

63. As far as innovation is concerned, many repairers operate stand-alone repair shops (i.e. without selling new cars), and multi-branding in repair is becoming more common. However, authorised repairers tend to buy or offer competing brands of spare parts only to a limited extent. This phenomenon may be due to the fact that multiple-sourcing brings less efficiency benefits to dealers than the car

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[31] DaimlerChrysler, Fiat, Toyota and GM gave commitments to give independent repairers proper access to repair information - Press release - IP/07/1332 - 14.09.2007.

[32] London Economics: Developments (...), figure 97, p.138.

manufacturers' logistical systems, and that vehicle manufacturers may legitimately require repairers to use their own brand of parts for repairs under warranty and "free" servicing. Finally, it is notable that there are few instances of co-operation between authorised repairers, for instance, spare parts purchasing co-operatives, or common spare parts stocks. Overall, however, it would seem that the shift to qualitative selection has led to more competition within the authorised networks, in particular through the entry of stand-alone repairers. The London Economics study shows[33] that while the number of authorised repair partners in the twelve Member States under study fell from 43,000 to 40,000 from 1997 to2002, the figure had rebounded sharply to over 50,000 by 2004. The Commission's investigation has confirmed this trend, showing that the number of authorised car repair outlets increased by 9% between 2002 and 2004.

64. Like the markets for repair and maintenance, the spare parts markets are also brand-specific. Competition relies upon the availability of alternative brands of parts to those marketed by the vehicle manufacturers. These can be either made by the Original Equipment Suppliers, or by third party "matching quality" parts producers. For certain parts, known as "captive" parts, there are no alternatives available, and there is the potential that if independent repairers' access to these parts is impeded, they may be foreclosed from the repair markets.

65. There is also the potential for harmful anti-competitive practices to arise involving forced transfer of intellectual property rights in order to prevent component producers from supplying the aftermarket. However, this is not a problem that can be dealt with in the context of the present review of Regulation 1400/2002, since it relates to the conditions under which such arrangements can be considered as sub-contracting agreements, which fall outside the scope of Article 81(1). The definition of the relevant criteria to be used to distinguish sub-contracting agreements falling outside the scope of Article 81(1) from industrial supply agreements, which may fall under Article 81(1) and eventually require assessment pursuant to Article 81(3) is currently dealt with in the context of the review of Regulation 2790/1999 and the accompanying Guidelines on Vertical Restraints.

66. One other major rigidity still exists which cannot be satisfactorily removed by competition rules. Design protection for certain categories of spare parts means that independent distributors cannot offer the full range, leaving independent repairers partially dependent on their authorised competitors. The negative effects brought about by after-market design protection are the subject of an ongoing legislative procedure in view of the review of the Design Directive[34].

67. It may therefore be concluded that the protection of competition on the aftermarkets is an important policy objective. In this context, the need for adequate legal certainty should be balanced against the need to be able to effectively respond in terms of enforcement in respect of a number of critical issues.

68. Having regard to the issues examined above, many of which are discussed in greater length in the Commission's May 2008 Evaluation Report on the operation of

[33] Figure 97, page 138.

[34] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs is a European Union directive in the field of industrial design rights

Regulation 1400/2002, the Commission now has to take position regarding the most appropriate legal framework which should apply to vertical agreements for motor vehicle distribution and after-sales services following the expiry of the current block exemption.

69. To this end, the present Impact Assessment identifies the relevant objectives of competition policy for the sector (see section 3) and proposes a number of possible options which are likely to effectively achieve these objectives (see section 4). On the basis of a set of impact assessment criteria (see section 5 and Annex 5), it proceeds with comparative analysis of the costs and benefits of each option in respect of each assessment criteria (see section 6) with a view to determining the preferred option (see section 7).

3. OBJECTIVES – THE "WHAT"

70. This section recalls the general legal requirements that block exemption regulations are bound to fulfil and sets out the general and specific competition policy objectives to be pursued in the motor vehicle sector.

3.1. Legal requirements: balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs

71. Block exemptions have as their purpose the creation of a safe harbour within which firms enjoy a degree of certainty as regards the compatibility of agreements between them with Article 81(3) of the EC Treaty. The principles that rules laid down in application of Article 81(3) must respect are specified in Article 83(2)(b). When adopting such rules, the Council and, by virtue of the enabling regulation[35], the Commission, must take into account *"the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other"*. The general objective of the Commission's policy towards vertical agreements in the motor vehicle sector is therefore to allow them to benefit from a safe harbour while ensuring effective supervision of the markets and doing the maximum to simplify administration and reduce compliance costs.

3.2. The specific objectives for the motor vehicle sector

72. All block exemptions should only cover agreements that respect the requirements of Article 81(3) of the Treaty, which imposes two positive and two negative conditions. Such agreements must:

- contribute to improving the production or distribution of goods or to promoting technical or economic progress
- allow consumers a fair share of the resulting benefit, and not
- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or

35 Regulation 19/65, as amended by Regulation 1215/1999.

- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

73. The Commission's specific objectives in deciding whether to grant a block exemption for the motor vehicle sector and in what form must be based on the requirements of Article 81(3). For Regulation 1400/2002, these are summarised in the Commission's Evaluation Report, and the objectives which form the basis of the analysis in the present impact assessment are based on these. However, since the legal and factual background to the competition rules is not static, the Commission must analyse whether each of these objectives is still valid, and indeed whether new objectives should be set.

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

74. In certain circumstances, restrictions in distribution agreements may make it unduly difficult for competing vehicle manufacturers to access the EU market, and certain of the conditions for the application of Article 81(3) will not be met. The *Delimitis* judgment[36] lays down a series of criteria for finding that market access by competitors is made difficult by the widespread use of single branding agreements. In essence, in order for non-compete obligations to be regarded as restrictive of competition, it should be ascertained that in competitive markets, competitors who could otherwise enter the market cannot in fact do so due to the existence and wide coverage of this type of agreement. Given the importance of preserving the ability of competing motor vehicle manufacturers to enter the EU market and expand, it may be concluded that this specific aim of Regulation 1400/2002 remains valid.

3.2.2. Protection of competition between dealers of the same brand

75. New motor vehicles are almost entirely distributed through the vehicle manufacturers' authorised networks. There is therefore a danger that since new vehicles are distributed through dealers with near-identical business models, intra-brand competition will suffer and in markets in which inter-brand competition weakened due to further concentration, the first condition of Article 81(3) will not be met. The aim of encouraging diversity in distribution formats with a view to reinforcing intra-brand competition is as valid today as it was in 2002. In addition, the protection of price competition between dealers of the same brand should continue to be regarded as an important objective.

3.2.3. Preventing restrictions on parallel trade in motor vehicles

76. The protection of cross-border trade has enabled consumers to shop within the Single Market and take advantage of price differentials between Member States. If distribution agreements restrict parallel trade, there is therefore the risk that the conditions of Article 81(3) will not be met. This risk is as real today as it was in 2002, as the currently rising price differentials brought about by exogenous shocks may tempt vehicle manufacturers to prevent arbitrage by consumers from one market

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36 Delimitis v Henninger BräuAG. C-234/89 [1991] ECR-I, 935,.

to another. Moreover, the idea that cross-border trade restrictions may harm consumers has been confirmed by the recent *Lelos/ Glaxo*[37] judgment.

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

77. The selection standards for being admitted to the vehicle manufacturers' authorised networks are similar for all authorised repairers, which implies that the fixed and, to a lesser extent, variable costs of all authorised repairers are significantly aligned. In particular, such repairers generally have to provide a full range of repair and maintenance services, and cannot choose a more targeted scope for their activities. Independent repairers therefore provide vital competitive pressure, as their business model and their related operating costs are different. It is notable in this regard that the prices they charge tend to be substantially lower than those within the authorised networks. This situation is as real today as it was in 2002; indeed, if anything, standards are more harmonised across the networks, and the position of independent repairers has been weakened by the extension of warranty periods that exclude them from certain categories of work. It would therefore appear that the objective of enabling independent garages to better compete with authorised outlets remains valid.

3.2.5. Protecting competition within the authorised repair networks

78. Prior to 2002, Regulation 1475/95 allowed vehicle manufacturers to place quantitative limits on dealer numbers, and to refuse network entry to firms that wished to become authorised repairers without having to sell new vehicles. The number of authorised repair outlets was therefore limited to the number of authorised sales outlets, since neither activity could be carried on without the other. Regulation 1400/2002 broke this link, and by setting a market share threshold of 30% for quantitative selective distribution, prevented vehicle manufacturers from directly limiting numbers of repairers. As a result, competition within the networks rebounded strongly as numbers of authorised repairers increased. There seems to be no justification for backtracking on this objective, and the chosen means for ensuring that it is met (the 30% market share threshold) is coherent with the Commission's overall competition policy.

3.2.6. Avoiding foreclosure of spare part producers in the aftermarket

79. The aim of Regulation 1400/2002 as regards spare parts was to ensure that competing brands were available on the aftermarket. The sixth objective was therefore to promote spare parts manufacturers' access to the automotive aftermarkets. This objective is still valid, especially since large differences in price often remain between carmaker-branded parts and alternative brands.

3.2.7. Preserving the deterrent effect of Article 81

80. The Commission's seventh objective in adopting Regulation 1400/2002, and in particular the provisions of Article 3 thereof, was to ensure that dealers felt

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37 Sot. Lelos kai Sia EE et al. v. GlaxoSmithKline AEVE, C-468/06 to C-478/06

sufficiently independent from their suppliers so as to act pro-competitively on the market, even where such behaviour was against a supplier's wishes.

81. However, there is a widespread misunderstanding to the effect that the Commission's objective in adopting these provisions was to give dealers certain rights, and to place corresponding obligations on vehicle manufacturers, with a view to rebalancing their respective commercial bargaining positions.

82. As pointed out in Recital 9 of Council Regulation 1/2003, *"Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market"*. This principle implies that block exemption regulations implementing Article 81(3) are not instruments aimed at ensuring fairness in bilateral commercial relations between parties with unequal bargaining power, or at preventing abuses of economic dependence. The protection of the legitimate interests of weaker contracting parties falls instead within the remit of national laws and remains within the competence of the Member States. It is therefore important to recall that the intended purpose of Article 3 of the current Regulation was to preserve the deterrent effect of Article 81 so as to avoid the block exemption being used by manufacturers to inhibit independent pro-competitive behaviour by authorised dealers. For instance, by setting the condition that contract terminations should respect certain minimum notice periods, or by providing for an arbitration mechanism, the Regulation intended to avert the risk that manufacturers could use threats of contract termination as an indirect means for achieving an outcome which would normally be prohibited if imposed on dealers through direct explicit restrictions, such as the application of fixed resale prices, or restrictions on sales to consumers from other Member States.

83. It would therefore seem appropriate to clarify the Commission's seventh objective in order to avoid misinterpretation. For the purpose of this Impact Assessment, the seventh objective will therefore read "*preserving the deterrent effect of Article 81*".

84. Since the market developments described in Section 2 have not unveiled new practices which it would not be possible to subsume within any of the above-mentioned policy objectives, there is no reason to suggest that any other competition objective should be added, and the present exercise is therefore carried out on the basis of the seven specific objectives outlined above.

4. POLICY OPTIONS – THE "HOW"

4.1. Identification of the Policy Options to be assessed

85. The Commission approached the following analysis with the intention of identifying a broad range of feasible policy options. However, it set aside options which, on the reading of the Evaluation Report and in the light of the issues discussed in Chapter 2, would obviously worsen the drawbacks of the current regime.

86. Notwithstanding the benefits a block exemption regulation brings to the motor vehicle sector, in its Evaluation Report, the Commission has identified three major interlinked drawbacks of the current regime.

87. Firstly it has noted that the complex and highly detailed nature of the Regulation has led to widespread misunderstandings and insecurity amongst market players, in particular among SMEs, about the very nature of the block exemption. It should be recalled that, despite having deployed considerable efforts on guidance, including the publication of an explanatory brochure and a set of frequently-asked questions, the Commission has been faced, during the whole period of validity of the Regulation, with frequent requests for assistance from stakeholders, which in the main did not relate to any impact that agreements could have on the market, but rather to the interpretation of particular contractual clauses. Most of these requests were unrelated to competition issues and were generated by the detailed sector-specific provisions of the Regulation.

88. These widespread misunderstandings have also manifested themselves in the large number of complaints the Commission received since 2002, which mostly have had little to do with competition issues but rather to commercial disputes between parties, and which therefore gave no grounds for further proceedings. The vast majority of these 322 informal written and innumerable oral complaints that the Commission received revealed a degree of confusion about the detailed provisions of the sector-specific Regulation. None of the 46 formal complaints the Commission received resulted in any prohibition decision and only three informal settlements[38] were reached. In contrast, the main enforcement action taken by the Commission in this sector stemmed from *ex officio* investigations[39].

89. Although one of the purposes of a block exemption is to provide legal certainty to contracting parties, the Commission observes that in practice the Regulation may have had the opposite effect. Misunderstandings as to its legal implications are widespread, in particular among SMEs. Such confusion and lack of predictability causes extra costs of which lawyers' bills are only a part. For example, a lack of certainty may stifle entrepreneurial initiative, and cause firms to miss business opportunities and misdirect investments by choosing less efficient distribution models.

90. The lack of legal certainty of the current regime and the search for authoritative guidance also raises the risk that competition law will be interpreted in an incoherent manner across Europe. There is in particular a risk that national courts may inconsistently interpret the terms and implications of the Regulation. This risk of divergent interpretation has required the Commission to intervene as *amicus curiae* in national proceedings pursuant to Article 15(3) of Council Regulation 1/2003[40].

91. The number of requests for preliminary rulings made to the European Court of Justice (ECJ) concerning the automotive distribution sector is another indicator of the difficulties in applying the Regulation coherently in the Member States. Four out of thirteen preliminary rulings the ECJ issued from 2003 to 2007 in the antitrust field related to the interpretation of particular clauses of the Regulation regarding contract

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

[39] The four commitment decisions adopted by the Commission the 13 September 2007 in the cases *Toyota*, *Fiat*, *DaimlerChrysler* and *Opel* and the prohibition decision in the *Carglass* case of 12 November 2008.

[40] Garage Gremeau c/ Sté Daimler Court of Appeal of Paris, June 7, 2007.

termination. This represents 80% of all such rulings relating to vertical distribution agreements over the period.[41]

92. The second problem relates to the fact that the current situation risks distorting the way in which the Commission dedicates its enforcement resources, since it has been obliged to deal with the above-mentioned requests from market players related to commercial issues, rather than to genuine competition problems. It is likely that if there were no longer such widespread misconceptions about the implications of the Regulation, the Commission would be able to focus its efforts better to combat harmful anti-competitive practices.

93. Thirdly, the Evaluation Report adopted by the Commission in May 2008 showed that the primary market for new motor vehicle distribution had no specific competition problems that set it apart from other sectors, and that overly-rigid provisions designed to protect individual competitors rather than the competitive process may well have unwelcome effects. As the most pertinent example of those effects, the Report mentioned an increase in distribution costs through increased selection standards of up to 20%, which have ultimately to be borne by consumers (see Chapter 6).

94. In addition to these three shortcomings, any option needs to take into account that the automotive sector is one of those worst hit by the current economic crisis, and needs to have conditions in place that facilitate appropriate adjustment to deal with changing economic circumstances. Over-rigid rules could seriously hamper the ability of manufacturers to adjust their distribution networks.

95. In the light of these shortcomings and the current crisis, the Commission does not consider the extreme option of proposing a block exemption which, by setting additional hardcore restrictions and more detailed conditions composed to Regulation 1400/2002, would limit the parties' contractual freedom and would, as a result, inhibit innovation and diversity in retailing formats even further. Although there are competition issues that have become more pertinent over the last years (e.g. misuse of warranties to foreclose independent repairers), these new problems are specific to the aftermarket and generally result from the significant market power enjoyed by the manufacturers' networks on the relevant repair services and parts distribution markets. However, as in these instances the market share held by the parties would be significant, it would be possible to deal with such novel issues through an effects-based approach which would limit the safe harbour granted by the block exemption through appropriate market share thresholds. This approach would have the advantage of addressing potential competition concerns, while overcoming a major shortcoming inherent to any overly-detailed block exemption relying on a black-list approach. Experience has shown that attempts to regulate complex issues through hardcore provisions all too often lead to counter-strategies aimed at circumventing those provisions. Moreover, an option which reflected a policy aimed more at

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41 Three of the four concerned the issue of contract termination with one year's notice where a network was allegedly being reorganised, while the remaining case sought clarification of the meaning of Article 3(6) of the Regulation on the role of arbitration when a contract was terminated - Case C-125/05 Vulcan Silkeborg v Skandinavisk Motor, 07.09. 2006; joined cases C-376/05 and C-377/05 Brünsteiner, Hilgert v BMW, of 30 November 2006; Case C-273/06 Auto Peter Petschenig v Toyota Frey, 26.01.2007; Case C-421/05 City Motors Groep v Citroen Belux, 18.01.2007.

regulating the form of agreements than at excluding from the benefit of the exemption only those agreements harming the competitive process, would be clearly incompatible with the objective of stimulating innovation and diversity in car distribution and servicing as a means of preserving dealers' and repairers' incentives to compete (see point 3.2.2 above).

96. Finally, an approach that would widen the gap between the policy followed in the motor vehicle sector and the general policy of the Commission in the field of vertical restrains, as currently applied in all other sectors, would ultimately place economically unjustified constraints on motor vehicle manufacturers which could hamper their ability to implement the most efficient solutions for the retailing and servicing of their products, with appreciable negative effects for the competitiveness of the whole industry in the EU.

97. Nor does the Commission consider the other extreme option of letting Regulation 1400/2002 lapse without replacement while at the same time excluding the motor vehicle sector from the scope of the future general block exemption for vertical restraints. This option would seem *prima facie* undesirable given the massive benefits in terms of legal predictability offered by a block exemption in a sector with more than 120,000 vertical agreements that would otherwise have to be individually assessed by the parties pursuant to Article 81.[42] This situation could entail excessive compliance costs, a high risk of error and incoherent enforcement. As observed above, stakeholders are virtually unanimous about the continued need for a block exemption regulation (whether general or sector-specific) after 31 May 2010 when Regulation 1400/2002 expires. Only one contributor out of the 120 which participated in the public consultation exercise on the review of the Regulation wanted no block exemption regulation at all to apply to the sector.

98. Instead, the Commission has focused on four policy options which entail the adoption of a block exemption regulation covering all types of vertical agreements for motor vehicle distribution and after-sales services –with the exclusion of certain vertical agreements between competitors – and which make the benefit of the exemption dependent on certain market share threshold(s) reflecting the relative market power of the parties. This approach is in line with the Commission's competition policy in the field of vertical restraints.

99. Moreover, in all four options, the exemption would not apply to agreements containing certain hardcore restrictions (i.e. resale price maintenance, restrictions on passive sales into territories or customer groups allocated to other distributors, restrictions on active and/or passive sales to end users in markets where selective distribution is used, restrictions on the ability of original equipment suppliers to sell spare parts to independent repairers). Similarly, all four options would contain specific conditions excluding the benefit of the block exemption in respect of non-compete (single-branding) obligations of more than five years, from obligations preventing authorised distributors from selling products of particular suppliers (no-boycott rule), as well as from certain post-term non-compete obligations. These provisions originate in the case law of the European Court and are uncontested by stakeholders in the motor vehicle sector.

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42 See chapter 2.1.

100. It should also be underlined that all four options comply with the principle of subsidiary. Given the exclusive competence of the Commission in respect of the adoption of block exemption regulations; the criteria relating to the necessity and value added of the envisaged options are not discussed. Moreover, all four options fully comply with the decentralised enforcement of EU competition rules enshrined in Council Regulation 1/2003 and therefore equally comply with the principle of proportionality.

101. Beyond these similarities, however, the four options present a number of important differences.

102. **Option 1**, the baseline scenario, is the continuation of the *status quo*. Although this option would not solve the shortcomings mentioned above, it is reasonable to refer to it as the baseline scenario in order to verify whether other possible options which could overcome these shortcomings could entail different drawbacks such as to justify the conclusion that the *status quo* still represents the most cost-effective solution in the light of the full set of relevant impact assessment criteria.

103. Technically this option would require the adoption of a Commission regulation extending the period of validity of the block exemption in its current form. This Impact Assessment is based on the assumption that such a prolongation would be for a period of ten years. The Commission has taken note of the opinion of the Committee on Economic and Social Affairs of the European Parliament which asked the Commission to prolong the current Regulation 1400/2002 by only two years. A continuation for a period of two years can be seen as a variant of Option 1, for which the assessment in Chapter 6 does not change. However, there is widespread agreement among stakeholders that whatever the outcome of the reform, it should give a longer term perspective to allow for predictability and, therefore, avoid any short term solution requiring re-evaluation in only two years. Consequently, a prolongation of the current Regulation for only two years is not considered a self-standing option.

104. It should be noted that this option would be particularly strict as concerns the market for the sale of new vehicles, as it would entail the exclusion from the safe harbour of agreements that did not comply with certain additional hardcore provisions, and conditions going beyond those applicable to all other sectors (e.g. obligations restricting dealers' ability to subcontract repair services, single branding obligations shorter than five years preventing dealers to sell up to three competing brands from the same showroom, obligations limiting dealers' ability to establish additional outlets or to transfer their dealership to other dealers within the same brand network, non-respect of certain minimum contract durations and/or minimum notice periods for contract termination, or excluding and the obligation to provide for arbitration as a complementary means for solving contractual disputes).

105. As regards the aftermarket, Option 1 would grant a very wide exemption, covering qualitative selective distribution systems for the supply of spare parts and repair services irrespective of any market share threshold (i.e. even in case of monopoly) and would address possible competition concerns by means of an exhaustive list of hardcore provisions which would consider certain identified practices as *per se* restrictive of competition and therefore excluded from the safe harbour. In other words, all qualitative selective systems affecting competition in the aftermarket

would be legal, except a limited number of practices coming within a "black list" (e.g. practices restricting access by independent repairers to technical information, restrictions on OES' ability to sell spare parts to authorised repairers, restrictions on authorised repairers' ability to sell parts to independent repairers, obligations imposed by vehicle manufacturers on authorised repairers to sell new vehicles in addition to carrying out after-market services).

Option 2 envisages letting the sector-specific regime lapse, leaving the motor vehicle sector to be covered by the general rules applicable to vertical restraints in all other sectors as currently laid down in Regulation 2790/1999. That regulation expires at the same time as Regulation 1400/2002 and is also under review.

106. The current draft[43] of the successor regulation proposed by DG Comp is to a large extent a continuation of the existing Regulation 2790/1999. It is based on principles which are rooted in case law of the European Court, which have not been contested by stakeholders during the review process. While the current draft keeps all five restrictions by object as before, it introduces a number of improvements to Regulation 2790/1999, including a 30% threshold applicable also to the market share of the buyer, as well as specific guidance for e-commerce.

107. With regard to e-commerce, the draft Guidelines accompanying the revised Regulation 2790 seek to refine the distinction, in the on-line context, between "active" and "passive" sales. Sales over the Internet are mostly, but not exclusively, considered to be passive sales, the restriction of which continues to be a hardcore restriction. It is also proposed in these Guidelines that manufacturers should be allowed to require that their distributors have a "brick and mortar" presence and that they should be allowed to require their selected distributors to fulfil certain objective conditions when the latter sell on-line (e.g. lay-out of the website, deadlines for replying to customer queries) just as they are allowed to do for off-line sales.

108. By bringing the revised successor regulation and Guidelines in line with other competition policy regulations and communications adopted since 1999, in particular regarding the assessment of technology transfer agreements, the application of Article 81(3), and exclusionary conduct under Article 82, not only the supplier's market share (as is the case today) but also the buyer's market share should not exceed 30%.

109. The draft continues to treat resale price maintenance (RPM) as a restriction by object. In legal and economic circles it is currently being discussed whether RPM should be treated as a restriction by effect and, consequently, be listed as a condition rather than a hard core restriction. Classifying RPM as a condition could potentially have strong implications in the car sector which is characterized by significant rebates.

110. The improvements foreseen in the current draft, if finally adopted by the Commission, would not affect selective distribution as the backbone of car distribution in any material way. Sales of new vehicles via the Internet are of negligible volume, and the application of a market share threshold of 30% for dealers (as purchasers) would not alter distribution since the relevant market would be in

43 preliminary draft adopted by the Commission on 8 July 2009

most cases the national market. Therefore, the analysis of the impacts connected with Option 2, and by consequence with Options 3 and 4, would not substantially change if Regulation n° 2790/1999 is used as a benchmark. However, should the Commission decide to modify the current rules in a manner that would appreciably affect the impact assessment of the options concerned, it is understood that such changes would not be automatically transposed to the motor vehicle sector but will be subject to further consultations with all stakeholders. . In line with standard economic analysis, Option 2 would reflect the principle whereby vertical restraints may lead to consumer harm only in certain circumstances, in particular when inter-brand competition in the relevant market is weak, barriers to entry are high and the contracting parties enjoy a significant market power, something which is absent in today's primary market for new vehicle sales. It would therefore appear that the measures in the current regime that significantly restrict manufacturers' capacity to adapt would be likely to weaken the European motor vehicle industry's ability to adjust to changes in demand for new vehicles and cope with increasing structural overcapacities and strong inter-brand competition. This reasoning holds all the more true in a crisis situation such as the current one which could well last beyond 2010.

111. As far as dealers are concerned, the current crisis has exacerbated a situation characterised by diminishing margins on the primary market combined with increasing investment requirements. Recent years have seen manufacturers shifting brand-specific investments onto dealers, in an attempt to avoid free-riding problems and fend off threats to brand image partly brought about by provisions in the current regime such as those on multi-branding and location clauses. Dealers have claimed that some of these investment requirements were unnecessary and unproductive. In the current crisis, these costs risk becoming critical to the sustainability of dealers' businesses. Any policy choice therefore needs to ensure an alignment of dealers' and manufacturers' incentives to keep distribution costs to a minimum and to be based on a genuine partnership. All dealers, but especially the smaller dealers, would benefit from a competition regime in which manufacturers would not be forced to shift on them significant investments costs to protect their corporate identity against possible opportunistic behaviour of competitors.

112. As a result, Option 2 would imply a less rigid approach in respect of restrictions affecting the highly-competitive market for the sale of new vehicles (e.g. restrictions to multi-branding would become an issue only if manufacturers would impose non-compete obligations longer than five years that would prevent their dealers from selling a second brand from a distinct showroom, location clauses would be covered by the exemption up to 30% market share threshold, issues of contractual “fairness” would not be covered by specific additional conditions).

113. Moreover, as regards the aftermarket, Option 2 would apply a single market share threshold of 30% to all agreements, thus removing the benefit of the safe harbour from all practices that could potentially fall under Article 81(1) because of their anti-competitive effects. It should be recalled in this connection that, in the markets for spare parts distribution and/or for the supply of repair services to consumers, manufacturers’ networks generally have market shares well above this threshold. In practice this option would imply that a wider number of potentially anti-competitive practices could be scrutinized by the Commission and/or national enforcers (i.e. including practices restricting access to technical repair information by independent operators, misuses of warranty conditions by manufacturers or practices hindering

access to original and/or matching quality spare parts by all repairers). However, the approach followed pursuant to this option would not be "by object" (i.e. based on the hardcore list approach) but rather "by effect" (i.e. requiring empirical evidence of actual or potential consumer harm in each individual case).

114. In considering other options, the Commission has taken into account that, as described in Section 2 above, competition in the vehicle repair and maintenance sector is less intense. As a consequence of the current economic crisis consumers are likely to be more price-sensitive, and less likely to replace their old vehicles, which will in turn result in increased demand for repair services. Repair and maintenance services account for 40% of the total ownership costs of a vehicle, and represent an EEA-wide turnover in excess of €100 billion. There are observed barriers to effective competition on the vehicle repair side, involving access to technical information and spare parts, and the ability of independent repairers to carry out work on vehicles during manufacturers' warranty periods which are getting longer over time. Therefore, the Commission proposes two options focusing particularly on the aftermarket which give additional guidance on these competition issues.

115. **Option 3** builds on option 2, but aims at enhancing predictability by providing guidance on the application to the motor vehicle sector of the general rules in the block exemption regulation for vertical agreements by means of sector-specific Guidelines. The main issues to be dealt with in such these Guidelines would include restrictions affecting competition in the repair and spare parts distribution markets (e.g. availability of technical repair information to independent operators, misuses of warranty conditions by manufacturers, access to the authorised repair networks by newcomers fulfilling the required quality standards, access to competing brands of spare parts by all repairers), but also certain clarifications concerning the application of the general rules to the market for the sale of new vehicles (including a framework for the assessment of selective distribution above the 30% market share threshold and single branding obligations).

116. **Option 4** also builds on Option 2 but involves the adoption of a simpler and more focussed sector-specific block exemption regulation that adds to the general rules applicable to vertical restraints in all other sectors, as currently laid down in Regulation 2790/1999, hardcore provisions aimed at protecting competition on the aftermarket, in particular with regard to the essential inputs for independent repairers such access to technical information and spare parts, as currently set out in Regulation 1400/2002.

117. In essence, Options 2-4 differ from Option 1 by taking the differing conditions on the primary and after-markets into account. They provide therefore a) for a less-restrictive approach as concerns the exemption of agreements in the highly competitive market for the sale of new vehicles and b) for a narrower exemption in the after-markets through the application of a single market share threshold fixed at 30%, as opposed compared to the baseline option. The following table sets out the key differences between the four options (the Options are compared and contrasted in greater detail in Technical Annex 3).

	Option 1	Option 2	Option 3	Option 4
Market share thresholds	30% for all agreements except for quantitative selective distribution (40%) and qualitative selective distribution (100%)	30% for all types of distribution	30% for all types of distribution	30% for all types of distribution
Sale of new motor vehicles				
Resale Price Maintenance	hardcore clause	Identical provisions	Identical provisions	Identical provisions
Parallel trade	Hardcore treatment of restrictions on active and/or passive sales; Availability Clause	Identical provisions; No express provision, but direct enforcement of Art. 81	Identical provisions; No express provision, but direct enforcement of Art. 81 & explanation of case law	Identical provisions; No express provision, but direct enforcement of Art. 81
Non-compete	At least two additional brands; same showroom	exempted for five years; at least one additional brand; separate showroom	exempted for five years; at least one additional brand; separate showroom	exempted for five years; at least one additional brand; separate showroom
Post-term non-compete	No exemptions	Identical provisions	Identical provisions	Identical provisions
No-boycott rule	No exemption	Identical provisions	Identical provisions	Identical provisions
Diversity of distribution	No exemption of location clauses; Hardcore treatment of restrictions on sales-only dealers	No equivalent provisions	No equivalent provisions	No equivalent provisions
Dealer protection	Transfer of dealership; Notice periods; Motivation obligation; arbitration	No equivalent provisions; Notice periods and arbitration in binding Code of Conduct	No equivalent provisions; Notice periods and arbitration in binding Code of Conduct	No equivalent provisions; Notice periods and arbitration in binding Code of Conduct
Repair and maintenance services				
Access to authorised repair networks	Use of qualitative selection required by block exemption	Use of qualitative selection required to fall outside 81(1)	Use of qualitative selection required to fall outside 81(1)	Use of qualitative selection required to fall outside 81(1)

Specialisation in repair and maintenance	Hardcore treatment of restrictions on stand-alone authorised repairers	Not treated as hardcore, but excluded from the safe harbour (above 30% threshold)	Not treated as hardcore, but excluded from the safe harbour (above 30% threshold)	Hardcore treatment of restrictions on stand-alone authorised repairers
Access to technical information	Hardcore treatment of restrictions on access to Technical Information	No safe harbour: Direct enforcement of Art. 81	No safe harbour: Direct enforcement of Art. 81 + further guidance (reference to Reg. 715/2007 and Implementing Regulation)	Identical provisions to Option 1
Non-compete obligations on authorised repairers	No exemption of non-compete	Equivalent safeguards (above 30% threshold)	Equivalent safeguards (above 30% threshold)	Equivalent safeguards (above 30% threshold)
Other practices foreclosing independent repairers, e.g. misuse of warranties	Block exempted	Outside safe harbour; Direct enforcement of Art. 81	Outside safe harbour; Direct enforcement of Art. 81+ further guidance	Outside safe harbour; Direct enforcement of Art. 81
Distribution of Spare parts				
Sales by OES to Independent Aftermarket (IAM)	hardcore	identical provisions	identical provisions	Identical provisions
Sales by OES to authorised repairers (AR)	hardcore	No safe harbour: Direct enforcement of Art. 81	No safe harbour: Direct enforcement of Art. 81 + further guidance	Identical provisions to Option 1
Sales by AR to IAM	Hardcore	No safe harbour: Direct enforcement of Art. 81	No safe harbour: Direct enforcement of Art. 81 + further guidance	Identical provisions to Option 1
Purchases of competing parts by AR	Hardcore	No safe harbour: Direct enforcement of Art. 81	No safe harbour: Direct enforcement of Art. 81 + further guidance	Identical provisions to Option 1
Dual branding	hardcore	No safe harbour: Direct enforcement of Art. 81	No safe harbour: Direct enforcement of Art. 81 + further guidance	Identical provisions to Option 1

5. ANALYSIS OF IMPACT: IDENTIFICATION OF ASSESSMENT CRITERIA AND METHODOLOGY

118. The present Impact Assessment relies on a selected set of assessment criteria which are relevant for appraising the comparative advantages and disadvantages of each option both in relation to the specific policy objectives mentioned above in Section 3 and in view of the wider repercussions that the underlying policy approaches may have on other dimensions of an economic, social or administrative nature.

119. . In essence, a first set of criteria reflects the ability of each option to ensure effective competition in the markets for new motor vehicles distribution and after sale services in the light of the following objectives:

- *Preventing the foreclosure of competing vehicle manufacturers and safeguarding their access to the vehicle retailing and repair markets*
- *Protecting intra-brand competition*
- *Avoiding impediments to parallel trade in motor vehicles between EU countries*
- *Protecting competition between independent and authorised repairers*
- *Ensuring effective competition within the manufacturers' networks of authorised repairers*
- *Preventing foreclosure of spare parts producers in the automotive aftermarket*
- *Preserving the deterrent effect of Article 81*

120. A second set of criteria looks at wider economic impacts on the undertakings concerned and on consumers and is aimed at analysing the effects of each option on

- *Compliance costs for firm*
- *Small and medium enterprises*
- *The competitive position of European vehicle manufacturers*
- *Consumers and households*

121. A third set of criteria examine the impact of each option on public administration, including the optimisation of the use of enforcement resources and the implications for the EU budget

122. Finally, the present Report takes also into account other more general impacts encompassing employment and job quality, public safety, health and environment.

123. A more detailed discussion of the relevance of each criterion in respect of the envisaged options can be found in Technical Annex 5

As to the methodology,	**Score**

the point of reference for the purposes of this assessment is Option 1 – the "Business As Usual" scenario, which foresees the continuation of the *status quo*. Because statistics are often not available, it is not possible to provide financial data or other figures for the likely impact of each policy option. Therefore, for each option, the expected impact has been assessed in qualitative terms, with scores from minus three to plus three in respect of each criterion, the point of reference (score 0) being the baseline scenario (Option 1).**Impact (+ive or -ive)**	
High negative	-3
Moderate negative	-2
Slight negative	-1
None	0
Slight positive	1
Moderate positive	2
High positive	3

124. Each option may have a major impact in respect of a relatively unimportant criterion, and a lesser impact in respect of another criterion that has a greater overall effect. For this reason, weightings were also employed to ensure that a better comparison may be made between impacts in respect of one criterion and those in respect of another. By default, scores received in respect of each criterion will receive a normal weighting, but where impacts in respect of a given criterion risk being unduly magnified or diminished because of that criterion's relatively low or relatively high importance, those scores will be corrected through the application of a low (- 50%)

or high (+ 50%) weighting. The weighting applied to each assessment criterion is discussed in Technical Annex 5.

6. MARKET FOR THE SALE OF NEW VEHICLESMARKET FOR THE SALE OF NEW VEHICLESTHE IMPACT OF EACH POLICY OPTION AS REGARDS THE IDENTIFIED CRITERIA

125. This section sets out the Commission's assessment of the positive and negative impacts that Policy Options 2 to 4 would be likely to have if implemented, in relation to the baseline Option 1. It is based on the Competition DG's own analysis, the results of a broad consultation of stakeholders and, in particular, the findings of the Evaluation Report. It firstly looks at the economic impacts, including both those that relate to the specific aims of competition policy in this area as well as other economic impacts, such as the effects on enforcement efficiency, and impacts on firms in the sector. It then goes on to examine the impact on the Community budget and on the effective use of Community resources: in this instance, the Commission's enforcement resources. Finally, it examines the potential social and environmental impacts of each option.

6.1. Economic impacts

6.1.1. Effective protection of competition

Preventing the foreclosure of competing vehicle manufacturers and safeguarding their access to the vehicle retailing and repair markets

126. Like Option 1, Option 2 would maintain certain limits to the block exemption of single branding obligations imposed by car manufacturers on their dealers. Reflecting the conditions set out in the general regulation on vertical restraints, such obligations would be block exempted only up to a market share threshold of 30% and for a maximum of five years. Above this threshold both options would imply that non-compete agreements would be subject to a full-blown competition assessment pursuant to Article 81(1) and 81(3). This means that in order to benefit from the general block exemption, dealers must be able to effectively terminate the tie after the initial five year period, without losing their distribution contract and the brand-specific investments connected with it. It should be noted that it is common practice in the motor vehicle sector to enter into dealership agreements of either indefinite duration or, exceptionally, for renewable periods of at least 5 years. This would imply that most of the current agreements would not be covered by the block exemption if they were to contain single branding obligations.

127. The main difference between the baseline option and Option 2 would lie in the fact that, for a clause to be defined as a non-compete obligation under the latter option, the dealer should be directly or indirectly forced to buy more than 80% of its total annual requirements from the incumbent manufacturer, in contrast to the 30% ratio provided for in the benchmark option. Therefore, in order to be exempted under Option 2, agreements would normally allow the dealer to carry only one competing brand instead of two as theoretically possible under Option 1. However, this apparent reduction in dealers' commercial freedom should not be confused with the competition objective of preventing market foreclosure.

128. It should be recalled that, in accordance with the case law of the Court of Justice, single-branding obligations are not regarded as restrictions of competition by object. In particular, they may fall outside Article 81(1) when they comply with the conditions of the *de minimis* Notice.[44] This means that the exclusion of single branding from the scope of the block exemption cannot be construed as automatically granting dealers the right to sell brands of competing manufacturers irrespective of the economic context in which such obligations are applied. The market power of the parties and the characteristics of the relevant market are key factors to determine whether single branding obligations may be caught by Article 81(1) and require therefore an assessment pursuant to Article 81(3). If there are barriers to market entry, the opportunity of carrying one additional competing brand may be sufficient to safeguard effective competition by newcomers.

129. The second main difference would lie in the fact that Option 2 would not encourage a particular multi-brand format, as Option 1 does with regard to multi-branding within a single showroom. However, as the Commission's Evaluation Report shows, same-showroom multi-branding is far from being widely used by dealers and, where it is used, this is mainly due to local market factors (e.g. scarcely populated areas) rather than the block exemption, which implies that any change in the regulatory regime would not affect the use of this form of multi-branding at those locations where it makes economic sense. In practice, less than 5% of all dealers have opted for same-showroom multi-branding[45].

130. Concrete examples of niche brands or newer brands having established their position in the EU markets in recent times do not underpin the assumption the only possibility for these brands to compete relies on the penetration of existing networks. Rather, many recent new entrants have successfully established their position by setting up their own networks. In this respect it is of interest that also among newcomers such as Kia and Hyundai, there is a clear strategy not to risk brand dilution by displaying the two brands in one single showroom, but to establish brand-specific networks. It would therefore seem that the overall impact of the current Regulation on fostering entry or expansion is very limited. According to a recent study, the volume of cars sold in multi-brand showrooms is slightly above 1% of total sales in the EEA in 2007 and there is no evidence of an upward trend. [46]

131. Therefore, having regard to the fact that:

- Entry of newcomers or expansion of existing competing brands has not been fostered to any significant extent by the stricter rules set out in Regulation 1400/2002

- Competition between compete brands is fierce, as confirmed by the steep decline in real consumer prices for new vehicles and the low operating margins of both manufacturers and dealers

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44 Commission Notice on agreements of minor importance (De-minimis notice); OJ 2001 C 368, p.13

45 See "Developments in car retailing and afters-sales markets under Regulation N,. 1400/2002, by London Economics (2006), Table 48, p.67

46 See "Do we need a MVBER?" ESMT Competition Analysis, 2009, p. 69 (This study was commissioned by Daimler)

- The specific opportunities for same-showroom multi-branding have been taken up by the market only up to a very limited extent,

132. It may be concluded that Option 2, compared to the baseline option, would not increase significantly the potential risks for competing manufacturers to be foreclosed from the new vehicles distribution market. By contrast, dealer associations have reported that manufacturers responded to the perceived threat that multi-branding would damage corporate identity and brand image by increasing operating standards for their distribution networks. Some associations put the resulting increase in investment costs faced by dealers at around 20%.[47] In other words, by non-exempting single-branding obligations *ex ante*, the current Regulation contributes to inefficient distribution systems in which dealers are required to bear the burden of costly brand-specific investments. Therefore Option 2 could address an indirect shortcoming of Option 1 by removing manufacturers' incentives to increase their standards for strategic reasons without removing key safeguards against risks of market foreclosure.

133. Should, however, a real foreclosure problem arise, the most effective tool would seem to be the withdrawal mechanism foreseen in block exemption regulations, including both Regulation 1400/2002 and 2790/1999. This mechanism would allow the Commission a national competition authority to withdraw the benefit of the block exemption for the whole EU or a national competition authority for its national market, thereby exposing such agreements to individual scrutiny under Articles 81(1) and (3) of the Treaty. Such an *ex post* enforcement tool would allow manufacturers and dealers to better align their incentives to invest and preventing the risk that free-riding problems would lead to inefficient transactions impacting on dealers' profitability and, ultimately, negatively affecting consumers' interest.

134. Hence, the negative impact connected to the different treatment of non-compete obligations under Option 2, if any, would in practice only be slight.

135. Option 3 would essentially have the same outcome as Option 2, since guidance would not change the definition of non–compete obligations.

136. Option 4 would not contain any specific rule on non-compete obligations and would therefore have the same impact as Option 2. Therefore, the negative impact connected to the different treatment of non-compete obligations under Options 3 and 4, if any, would in practice only be slight.

Protecting intra-brand competition

137. Option 2 would reduce the market share threshold for quantitative selective distribution from 40% to 30%. In those Member States where the incumbent manufacturer would have a market share exceeding 30%, there could be two possible consequences. Firstly, since there is no presumption of illegality outside the safe harbour created by the block exemption, the manufacturer could demonstrate that the efficiency enhancing effects resulting from quantitative selective distribution do outweigh its possible anticompetitive effects. Secondly, in those rare cases where

[47] See Report, p.14

such market share threshold would be trespassed, a car manufacturer could opt for a distribution system based on purely qualitative selection criteria as this type of distribution would be, in accordance with a well established case law of the ECJ, not restrictive of competition and therefore not caught by Article 81(1).

138. Hence, Option 2 would have a slightly positive impact compared to the baseline scenario as regards the promotion of innovation and diversity of distribution systems, particularly in those Member States where, due to the high market shares of the incumbent manufacturer, the protection of intra-brand competition could be an economically sound policy objective.

139. Furthermore, Option 2 would not exclude "location clauses" from the scope of the block exemption. However, as shown in the Commission's Evaluation Report, the result of the non-exemption of the location clause was that car manufacturers reacted by increasing the level of their selection standards in order to prevent possible free-riding risks which could have been associated with an uncontrolled opening of additional sales outlets. While such a strategic move seems correlated with the entry into force of the stricter conditions provided for in Regulation 1400/2002, it should be recalled that such conditions appeared justified in 2002 due to the fear that a decline in the degree of inter-brand competition would have required sector-specific measures for stimulating intra-brand competition.

140. By contrast, as pointed out in Chapter 5 above, all indicators confirm that competition between manufacturers has significantly increased in recent years as a result of the combined effect of structural overcapacities, new market entries, technological innovation and progressive globalisation of manufacturing activities. In such a context, the current regulatory constraints have driven manufacturers to choose sub-optimal solutions for the organisation and management of their dealer networks, which has contributed, overall, to raise distribution costs. In this respect, certain dealers associations have indicated that the costs associated with the introduction of more demanding selection standards in 2002 may be estimated at 20% of the total distribution costs. Distribution costs account for about 30% of the total cost of a new car.[48]

141. In addition to these drawbacks, it should also be observed that only few dealers have, so far, taken the advantage of opening additional outlets. The figures available suggest that such a population of dealers represents only 1% of all dealers EU-wide.

142. It follows from the foregoing that, by remedying the above mentioned drawbacks, Option 2 could have at least a slight positive impact on the costs of distribution since, faced with less regulatory constraints, car manufacturers would set their selection standards at a level which minimise overall distribution costs for their products. Furthermore, Option 2 would not have any significant negative impact on intra-brand competition given the very low take-up by dealers of the business opportunities associated with the exclusion of location clauses from the block exemption. Therefore, Option 2 would have overall a slightly positive impact compared to the base line option.

48 "Do we need a Motor Vehicle Block Exemption?", Report by ESMT, 2009

143. Option 3 would have the same impact as option 2, in that the guidelines would have no influence on the determination of the level of the market share threshold for exemption or the treatment of location clauses.

144. Option 4 would also have the same impact as options 2 and 3, since the "mini-Regulation" would not contain any specific rule on the above mentioned aspects.

Avoiding impediments to parallel trade in motor vehicles between EU countries

145. Under any of the options presented in this Impact Assessment, the Commission will always be able to protect parallel trade effectively and efficiently, as all the four scenarios are based on the same basic material rules. It should also be recalled that since the repeal of the Notice on Intermediaries in 2002 there is no longer any limit as to the volumes of sales that dealers may achieve with intermediaries acting on behalf of final consumers. The only noticeable difference between Options 1 and 3, on the one hand, and Options 2 and 4 on the other, is the absence in the latter two options of a clarifying rule or guidance in respect of the assessment of the "availability clauses".

146. In the light of the above, Option 2 would have only a slight negative impact as regards cross-border trade in motor vehicles, since the availability clause would no longer be expressly referred to as an hardcore in the block exemption, and dealers and intermediaries would have to rely solely on case-law, which they might be ill-equipped to interpret.

147. Option 3 would remove this negative impact, by clarifying in Guidelines that, in line with the *Ford Werke*[49] case law, an agreement between a car manufacturer and its dealers restricting the latter's' ability to obtain vehicles with foreign specifications would amount to an indirect restriction on active and/or passive sales which would imply the loss of the benefit of the block exemption. This option would therefore score at the neutrality point.

148. Option 4 would have the same slight negative impact as option 2, since the "availability clause" would not be carried over into the mini-block exemption.

Protecting competition between independent and authorised repairers

149. It has been argued that if the general regime were to apply to the motor vehicle sector, there would be less protection for independent repairers, since the sector-specific hard core restrictions in Article 4 of the block exemption that relate to the aftermarket would not be carried forward. This argument has, in particular, been made as regards Article 4(2) of the Regulation, which relates to the provision of technical repair information to independent operators.

150. Three points should be made as regards this issue. Firstly, the Commission can only oblige vehicle manufacturers to provide technical information on the basis of Article 81 or Article 82 of the Treaty. The function of Article 4(2) of the Regulation is not to

[49] Judgment of 28 February 1984, joined cases 228 and 229/82 Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission ECR (1984) 1129.

prohibit the withholding of technical information or to give independent operators rights to it; rather, it purpose within the framework of Regulation 1400/2002 is to claw back the benefit of the block exemption covering the agreements between a vehicle manufacturer and its authorised repairers if the former fails to make such information available to all repairers. The reason is that insufficient access to such an essential input by independent repairers would strengthen the negative effects of selective distribution due to the ensuing foreclosure risks which could seriously reduce the level of competition in the relevant car repair markets. As such, Article 4(2) is necessary because the Regulation covers qualitative selective distribution agreements entered into between repairers and carmakers up to 100% market share.

151. In contrast, by lowering the threshold for exemption of qualitative selective distribution from 100% to 30%, Option 2 would have the effect of removing the exemption from the vast majority of authorised repair agreements, since in the vast majority of cases, the authorised networks generally have very high shares on the (brand-specific) aftermarkets[50]. Vehicle manufacturers would then have to rely on the standard principles of EU competition law which recognises that a purely qualitative selective distribution system is not in general incompatible with Art. 81 (1). This would, in one fell swoop, make the aftermarket provisions in Article 4 redundant. Moreover, Option 2 could make it easier for competition authorities to enforce, and for firms to rely on Article 81 in problematic cases. This holds true in particular with regard to Recital 26 of Regulation 1400/2002 which introduced an exception by enabling vehicle manufacturers to withhold technical information related to security issues. While responding to a justified concern, Recital 26 has been used by vehicle manufacturers in a rather unscrupulous manner and has obliged the Commission to carry out complex technical analysis in order to determine whether the block exemption could apply in concrete cases. The deterrent effect of Article 81 was reduced in such cases, as the burden of proving that the block exemption was not applicable remained with the Commission.

152. Also, it should not be forgotten that the vehicle park will progressively become subject to Regulation 715/2007, which provides that vehicle manufacturers have to disseminate all technical information relating to models launched after 2009, so the remedy for possible refusals to provide technical information will increasingly lie with regulatory measures rather than competition law.

153. A second issue relating to the aftermarket concerns warranties granted by the vehicle manufacturer. Warranties are beneficial to consumers who can obtain free repair services for vehicle faults. However, the increasing use of extended warranties with durations of five years and longer can also have a negative effect on consumers when they are granted on condition that the ordinary maintenance works during the warranty period (but not covered by the warranty) are carried out by a member of the authorised network. As qualitative distribution agreements are exempted up to 100% market share under Option 1, the Commission could act against such practices that strengthen the foreclosure effects of authorised repairer agreements, only by means

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50 Such agreements would only be able to benefit from the exemption if the market share of the authorised network was unusually low This might, for instance, be the case if the Commission were to find that there was no separate aftermarket for the vehicles in question, so that the relevant market share would be that on the market for the sale of new vehicles

of a withdrawal of the benefit of the block exemption as currently provided in Article 8 of Regulation 1400/2002. In such a case, however, not only the Commission would have the burden of proving both that Article 81(1) applies and that the conditions of Article 81(3) are not fulfilled, but any possible sanction could not cover past behaviour, depriving therefore the rules of their deterrent effect.

154. In the light of the foregoing, Option 2 is likely to highly improve the competitive landscape in the aftermarket by strengthening the competitive position of independent repairers compared to the baseline scenario. At the same time, however, the lack of express provisions may lead to legal uncertainty which could somewhat reduce such a positive impact. As a result, Option 2 is likely to have a slight positive impact compared to the baseline option.

155. Option 3 would remove the lack of clarity associated with option 2 by including guidance explaining the circumstances in which a refusal to grant full and non-discriminatory access to technical information to independent operators, or a misuse of the warranties as a means to prevent consumers from getting ordinary maintenance works from independent repairers would bring qualitative selective agreements within the scope of Article 81. The overall positive impact of Option 3 would therefore be high.

156. Option 4 would also have a positive impact relative to the baseline scenario, since, like Option 2, it would limit the benefit of the block exemption up to a 30% market share thresholds for all vertical agreements. Unlike Option 2, however, it would also carry Article 4(2) of the current block exemption into a new "mini-Regulation". Although, as noted above, this would have no legal effect in most cases, since the repair agreements in question could not benefit from the block exemption in any event due to the high market shares of the authorised repairer networks, the carrying over of Article 4(2) would have the advantage of improving visibility. The disadvantage, however, would be that that also Recital 26 would be carried over, with the connected drawback pointed out above. Moreover, the risks associated with possible misuses of warranties would entirely rely on the self-assessment by the parties concerned. On balance, Option 4 would therefore have only a moderate positive impact.

Ensuring effective competition within the manufacturers' networks of authorised repairers

157. Option 2 would have little or no impact compared to the baseline scenario as regards competition within the authorised repair networks. Under the baseline scenario, agreements which placed quantitative limits on repairer numbers would not benefit from the block exemption, because the authorised networks generally have market shares above the 30% threshold. The onus would therefore be on a manufacturer that wished to impose such limits to justify its system on the basis of Article 81(3) of the Treaty. Therefore, under both options, all firms that met qualitative criteria would in most cases be able to join the networks.

158. However, compared to the baseline scenario, Option 2 would not contain any specific hardcore provision clarifying that restrictions excluding repair-only outlets from the authorised networks do not benefit from the block exemption. This could

lead to a serious incertitude in the market as the removal of such provision could be wrongly interpreted as a signal that competition authorities would no longer pursue this type of agreements. As a result, is it likely that Option 2 could have a slight negative impact

159. Option 3 would reduce the drawbacks linked to such a possible error by explaining, in future guidelines, that restrictions excluding repair-only outlets from the authorised repairer networks would imply the application of a selection criterion which could hardly be regarded as objectively justified by the nature of the contract services. As a result, such agreements would be likely to fall under Article 81(1) and unlikely to be covered by the safe harbour of the block exception in view of the fact that parties market shares on the relevant aftermarket would be generally well above 30%. Following this reasoning, it is possible to conclude that Option 3 would have the same impact as the baseline scenario, i.e. it would score at the neutrality point.

160. The same goes for Option 4 (the mini-Regulation), since this option would carry over the same hardcore provision as Option 1.

Preventing foreclosure of spare parts produces in aftermarket

161. It has been argued that applying the general rules as contained in Option 2 would make it more difficult for component manufacturers to reach the aftermarket. However, all options do not differ significantly with regard to sales of spare parts by original equipment suppliers to independent repair shops, or with regard to sales of matching quality parts to authorised repairers by third parties producers. With respect to the latter, it should be recalled that vehicles manufacturers' share on the relevant spare parts markets are likely to be well above 30%, which implies that non-compete obligations imposed on authorised repairers would not be block exempted under any of the options under examination.

162. Option 2, however, would have an impact on spare parts producers' access to authorised repairers, in that it is unlikely that a future general block exemption would contain specific hardcore provisions concerning

- 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,
- The double branding of component supplied by OES

163. However, as pointed out in Chapter 4 above, under Option 2 these specific practices would not be presumed as legal. As the vehicle manufacturers' market shares in the brand-specific aftermarket usually exceed the 30% threshold, the legal consequence for agreements containing such restrictions would be that they would fall outside the safe harbour and be subject to individual assessment. Given that competition in the automotive aftermarket crucially depends on the effective competitive interaction between suppliers of spare parts as well as between the manufacturers' authorised retailers and independent distributors of parts, it is highly likely that an effect-based analysis of the practices at issue would lead to the conclusion that they could infringe Article 81 should they lead to anti-competitive foreclosures effects. Hence, while

differing in terms of analytical approach, both Options 2 and 1 would ensure an appropriate level of protection of competition in all cases where there is an actual or potential risk of consumer harm.

164. The main disadvantage of Option 2 compared to the baseline scenario, would be that the removal of such provision could be wrongly interpreted as a signal that competition authorities would no longer pursue this type of agreements. This could lead to a serious incertitude in the market and risks of errors by firms in their self assessment. As a result, is it likely that Option 2 could have a moderate negative impact.

165. Option 3 would reduce such drawbacks by explaining, in future guidelines, the conditions in which, and the relevant analytical factors whereby the restrictions at issue would infringe Article 81, bearing in mind that they would not in general benefit from the safe harbour of the block exception in view of the fact that parties market shares on the relevant aftermarket would be in most cases well above 30%. Given the complexity of defining the relevant market in the highly differentiated spare parts supply sector, such an exercise might entail some risks of error for all firms concerned compared to the simpler, though less economically sound approach followed under Option 1. Following this reasoning, it is possible to conclude that Option 3 would have a slight negative impact compared to the baseline scenario.

166. Option 4, on the other hand, would imply no change compared to the baseline scenario, i.e. it would score at the neutrality point.

Preserving the deterrent effect of Article 81

167. As outlined above, it seems unlikely that dealer protection measures have had any observable impact on the level of protection of competition. Instead, by making it more difficult for vehicle manufacturers to adjust their distribution networks to changing economic conditions, Option 1 may have negative effects on the competitiveness of the whole industry. This holds even more true in the current economic climate, in which the ability to swiftly reorganise the network is vital for the European automotive industry to maintain and improve its competitiveness in the longer term.

168. There are a number of arguments for concluding that protecting dealer independence through provisions aimed at regulating particular contractual clauses in the context of a block exemption is no longer an effective or valid means to achieve this objective.

169. Firstly, as pointed out in the Commission's Evaluation Report, there is no evidence that these provisions have had the intended deterrent effect. To the contrary, the Regulation may have had negative effects, by making it more difficult for vehicle manufacturers to adjust their networks to changing economic conditions in which the ability to swiftly reorganise the network is vital for the European automotive industry to maintain and improve its competitiveness in the longer term.

170. Secondly, dealers would have no effective remedy if their contractual partner refused to issue a contract containing the supposedly protective provisions. This is because these provisions create neither rights for dealers nor obligations on vehicle manufacturers but merely remove the benefit of the block exemption without

implying that the contracts at issue would automatically infringe Article 81(1). Thirdly, it would seem difficult for the Commission to include contractual protection measures in any future competition law framework, now that the boundary between national contract and commercial laws on the one hand and EU competition law on the other has been clarified in the context of Regulation 1/2003. During negotiations on that Regulation, the Commission stated that it wished "to align itself to the Council's view that "Articles 81 and 82 of the Treaty have as their objective the protection of competition on the market".[51] Provisions that predominantly pursue another objective are normally found in national contracts laws.

171. In contrast, by lowering the threshold for exemption of quantitative selection, Option 2 would make it more difficult for manufacturers with high market shares to exclude dealers from their networks, since they would only be able to do so on the grounds that quality standards had not been met, or that a dealer was in fundamental breach of contract. Moreover, paragraph 49 of the Guidelines on Vertical Restraints makes it plain that *"the hardcore restriction set out in Article 4(b) of Regulation 2790/1999 may also be the result of indirect measures aimed at inducing the distributor not to sell to (such) customers, such as refusal or reduction of bonuses or discounts, refusal to supply, reduction of supplied volumes or limitation of supplied volumes to the demand within the allocated territory or customer group, threat of contract termination or profit pass-over obligations"*[52]. It therefore excludes agreements from the exemption if the supplier uses any one of a wide spread of indirect measures to try to negatively influence a dealer's pro-competitive entrepreneurial behaviour. This hard core approach focussing on actual behaviour rather than an attempt to rebalance contractual bargaining positions would be a more effective deterrent to measures of this type. Option 2 would therefore be likely to have a slight positive impact as regards the preservation of the deterrent effect of Article 81 of the Treaty.

172. In Option3, guidance would be given to the effect that in the absence of clear evidence to the contrary, if a supplier adhered to fair and transparent commercial practices in its overall relationships with its dealers, it would be likely to be more difficult to demonstrate that it had put covert pressure on its dealers to refrain from pro-competitive practices such as granting discounts and engaging in parallel trade. Option 3 would therefore add to the advantages of Option 2, and would have a moderate positive impact.

173. Option 4 would have the same slight positive impact as Option 2.

Effective protection of competition: comparing options 2-4 to the benchmark Option 1 (BAU)

174. The impact that each option has in respect of each criterion is now combined with the weightings allocated in section 5 in order to produce a scoreboard and assess how each option scores relative to the benchmark scenario.

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[51] See recital 9 of Regulation 1/2003, first sentence

[52] This paragraph is carried over almost unchanged into the current draft of the revised Guidelines.

Option 2

	Score	Weighting	Overall impact
Preventing the foreclosure of competing vehicle manufacturers and safeguarding their market access	-1	1	-1
Protecting intra-brand competition	+1	1	+1
Avoiding impediments to parallel trade in motor vehicles between EU countries	-1	1	-1
The protection of competition between independent and authorised repairers	+1	1.5	+1.5
Ensuring effective competition within the manufacturers' networks of authorised repairers	-1	1.5	-1.5
Ensuring effective competition in the markets for spare parts	-2	1.5	-3
Preserving the deterrent effect of Article 81	+1	0.5	+0.5

Option 3

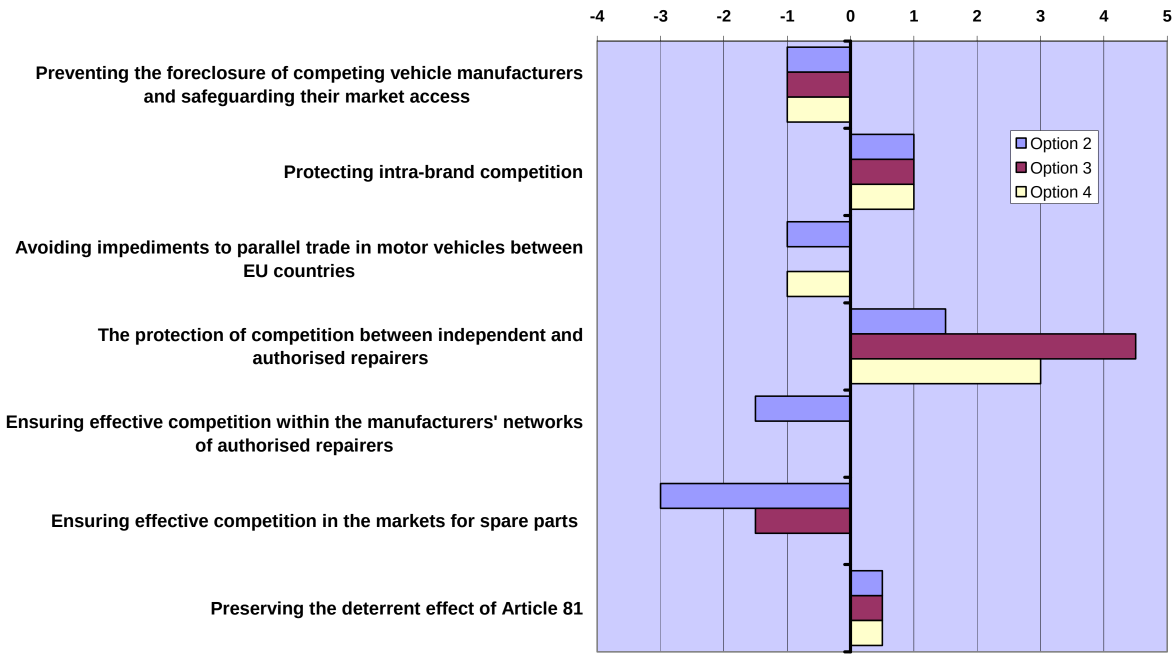
	Score	Weighting	Overall impact
Preventing the foreclosure of competing vehicle manufacturers and safeguarding their market access	-1	1	-1
Protecting intra-brand competition	+1	1	+1
Avoiding impediments to parallel trade in motor vehicles between EU countries	0	1	0
The protection of competition between independent and authorised repairers	+3	1.5	+4.5
Ensuring effective competition within the manufacturers' networks of authorised repairers	0	1.5	0
Ensuring effective competition in the markets for spare parts	-1	1.5	-1.5
Preserving the deterrent effect of Article 81	+2	0.5	+1

Option 4

	Score	Weighting	Overall impact
Preventing the foreclosure of competing vehicle	-1	1	-1

manufacturers and safeguarding their market access			
Protecting intra-brand competition	+1	1	+1
Avoiding impediments to parallel trade in motor vehicles between EU countries	-1	1	-1
The protection of competition between independent and authorised repairers	+2	1.5	+3
Ensuring effective competition within the manufacturers' networks of authorised repairers	0	1.5	0
Ensuring effective competition in the markets for spare parts	0	1.5	0
Preserving the deterrent effect of Article 81	+1	0.5	+0.5

175. The chart below allows the reader to assess how options 2-4 perform both against the benchmark option, and against each other, taking into account both the scores that each receives in respect of each criterion, and any weighting variation.



176. The chart shows that Option 3 and 4 are clear overall winners, with Option 3 having a slight advantage.

6.1.2. Other economic impacts

Reducing compliance costs borne by firms

177. As pointed out in the Commission Evaluation Report of May 2008, the complex and highly detailed nature of the Regulation has led to widespread misunderstandings and insecurity amongst market players, in particular among SMEs, about the very nature

of the block exemption. It should be recalled that, despite having deployed considerable efforts on guidance, including the publication of an explanatory brochure and a set of frequently-asked questions, the Commission has been faced, during the whole period of validity of the Regulation, with frequent requests for assistance from stakeholders, which in the main did not relate to any impact that agreements could have on the market, but rather to the interpretation of particular contractual clauses. Most of these requests were unrelated to competition issues and were generated by the detailed sector-specific provisions of the Regulation.

178. Although one of the purposes of a block exemption is to provide legal certainty to contracting parties, the Commission observes that in practice the Regulation may have had the opposite effect. Such lack of predictability causes extra costs, particular for SMEs, of which lawyers' bills are only a part. Moreover, a lack of certainty may stifle entrepreneurial initiative, and cause firms to miss business opportunities and misdirect investments by choosing less efficient distribution models.

179. By bringing distribution and repair agreements in the motor vehicle sector under the same regime as all other vertical agreements, **Option 2** will considerably improve on the degree of uniformity, which will be likely to reduce compliance costs

180. Option 2 would also be likely to substantially reduce the comparatively high error costs incurred by firms for two reasons. Firstly, the general rules are far simpler than those in Regulation 1400/2002, reducing the risk that firms will incur unnecessary costs by under- or over-complying with the rules. Secondly, firms, lawyers, courts and competition authorities could more readily draw parallels with the application of the general rules to other sectors, thereby reducing the risk of over or under-enforcement. It should, however, also be examined whether lowering the threshold for exemption to a uniform 30% might have any impact on compliance costs.

181. On the market for the sale of new vehicles, Option 2 would lower the threshold from 40% to 30%. At EU level, no manufacturer has a market share near this level. The smallest market that any geographic market definition could conceivably consider would be national. There are a few instances where car manufacturers' authorised sales networks have market shares of above 30% in their home Member States, and the same can be said in certain countries in Central Europe. However, in almost all cases the market shares in question overstep the 30% threshold by less than 5%, and this will not normally pose competition problems. Any impact on compliance costs will therefore be slight.

182. On the markets for repair and maintenance services, Option 2 would lower the exemption threshold for qualitative selective distribution agreements from 100% to 30%. Under the benchmark Option 1, these firms currently have to assess whether their agreements meet the test laid down in the Metro II[53] and Galec[54] cases. This test is carried over into Article 1(h) of Regulation 1400/2002 and aims at establishing the applicability of the block exemption. In other words, under Option 1, parties will

53 Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities. - Competition - Selective distribution system. - Case 75/84. European Court reports 1986 Page 3021.

54 Groupement d'achat Edouard Leclerc v Commission of the European Communities. Case T-19/92. European Court reports 1996 Page II-01851

apply the test to assess whether their agreement is qualitative in nature, and can therefore benefit from the 100% threshold for exemption. If the agreement fails the test, the parties will then have to assess whether it can benefit from the exception described in Article 81(3) of the Treaty on a case-by-case basis. Under Option 2, the position will be equivalent in terms of compliance costs. In the vast majority of cases, the authorised repair networks have market shares far above the 30% exemption threshold. As with Option 1, the firms in question would therefore have to apply the Metro II/ Galec test, but in this case their self-assessment will be directed at establishing whether their agreements fell outside Article 81(1). As with Option 1, if an agreement fails the test, the parties will then have to assess whether it can benefit from the exception described in Article 81(3) of the Treaty. Option 2 would therefore have no different impact to the benchmark.

183. As far as litigation costs are concerned, Option 2 would not affect operators' ability to access cost-effective dispute resolution procedures, in particular because the arbitration mechanism in Regulation 1400/2002 could be carried over into a Code of Conduct and would be included in all future dealer agreements. However, litigation costs tend to be higher where the rules in question are more complex and less clear. In this respect, Option 2 should lead to a small decrease in litigation costs across the sector related to disputes between dealers or repairers on the one hand and vehicle manufacturers on the other.

184. Overall, Option 2 will therefore have no impact as regards the costs to be borne by firms

185. Compliance costs under **Option 3** will be slightly improved by giving guidance, in particular as to the circumstances under which an authorised repair agreement will not be caught by Article 81(1) of the Treaty. This option will also be likely to further reduce error costs, by giving firms guidance as to where the boundaries of the safe harbour lay. The increased clarity afforded by Option 3 should also lead to a further decrease in litigation costs across the sector related to disputes between dealers or repairers on the one hand and vehicle manufacturers on the other. Overall, therefore, Option 3 can be expected to have a slight moderate positive impact as regards the costs borne by firms.

186. **Option 4** is likely to have a beneficial effect as regards compliance costs, in particular as the over-complex provisions regarding the market for the sale of new vehicles will not be carried over. The impact as far as the need for self-assessment and litigation costs are concerned will be the same as in Option 2. Overall, this option is therefore likely to have no impact compared to the benchmark.

Particular impact on SMEs

187. The Evaluation Report adopted by the Commission in May 2008 showed that the market for the sale of new vehicles had no specific competition problems that set it apart from other sectors, and that overly-rigid provisions designed to protect individual competitors rather than the competitive process may well have unwelcome effects. The Evaluation Report revealed that vehicle manufacturers responded to the adoption of Regulation 1400/2002 by raising the level of standards applicable to car dealers, the majority of which being SMEs. In the case of Spain, this has led to an

increase of the costs by dealers of 20%.[55] A recent survey in Great Britain came to the conclusion that dealers are "crippled by overbearing manufacturer standards."[56]

188. The current crisis has exacerbated a situation characterised by diminishing margins on the market for the sale of new vehicles combined with overbearing standards implying increasing investment requirements imposed by the manufacturers, which had a particular severe impact on SMEs. Recent years have seen manufacturers shifting brand-specific investments onto dealers, in an attempt to fend off threats to brand image partly brought about by provisions in the current regime such as those on multi-branding and location clauses. Dealers have claimed that some of these investment requirements were unnecessary and unproductive. In the current crisis, these costs risk becoming critical to the sustainability of the dealers' business models. Any policy choice therefore needs to ensure an alignment of dealers' and manufacturers' common interest to keep distribution costs to a minimum and to be based on a genuine partnership.

189. It is therefore likely that under **Option 2**, vehicle manufacturers would feel it less necessary to increase standards in the future, slowing the rate of increase in investment requirements. The overall effect of Option 2 as regards investment requirements is therefore likely to be at least slightly positive.

190. Some commentators, in particular dealers' associations, have argued that not carrying over Article 3 of Regulation 1400/2002, as Option 2 would imply, would reduce the contractual bargaining position of SMEs towards their suppliers, in that they will not feel so able to negotiate better conditions for fear of seeing their contracts terminated on short notice and without reasons being given. Three points should be made here. Firstly, today's dealers are required to make high levels of investments that will not be amortised over the two-year notice period provided for in Article 3 of the Regulation. The level of contractual protection provided for in the Regulation is therefore unlikely to be sufficient to encourage them to engage in pro-competitive behaviour "disapproved" by the vehicle manufacturer. Secondly, as noted in the Evaluation Report, the Commission investigation revealed not one example of the obligation to give reasons being used to unmask a situation in which a dealer had been terminated for engaging in such activity. The alleged protection enjoyed by dealers would therefore seem to be largely illusory. In that respect it is of interest that despite the perceived protection granted by the current provision, 35% of all Italian dealers participating in the 2009 survey stated that they are considering leaving the business, up from 7% in 2006.[57]

191. The third point to be made is that the notice periods, the obligation to give reasons for contract terminations and the protection of investments made in good faith by a contracting party are issues that are dealt with under national contracts laws, so that dealers could still be able to bring cases of unfair treatment before national courts on the basis of the relevant provisions of national law. Moreover, it should be recalled that car manufacturers do not seem hostile to the idea to continue to commit to basic

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55 See Report, p.14

56 Dealer network crippled by overbearing manufacturer standards finds NFDA survey. In: RMI-EYE, December/January 2006/7.

57 Dealer stat: Obiettivo performance 2009, page 12.

principles of fair behaviour in their commercial relations with dealers, as is shown by Code of Conduct to which ACEA and JAMA have both subscribed. It would therefore appear that Option 2 is unlikely to have any real impact on the contractual bargaining power of SMEs.

192. On a more general note, having regard to the current economic crisis affecting the automotive sector, Option 2 would also be likely to bring additional benefits to SMEs in the medium term. By introducing artificial rigidities, the existing regime prevents manufacturers from tailoring their networks to changing market circumstances. These rigidities would have the effect of increasing distribution costs, and reducing the profitability of the stronger dealers, thereby affecting their ability to invest and take advantage of the post crisis situation. Option 2 would therefore likely have the effect of enabling the most efficient SMEs in the sector to emerge from the crisis more rapidly and in better economic shape.

193. As far as aftermarket operators are concerned, a consequence of the current economic crisis is that consumers are likely to be more price-sensitive, and less likely to replace their old vehicles, which will in turn result in increased demand for repair services. However, in contrast to the highly competitive market for the sale of new vehicles, competition in the vehicle repair and maintenance sector is less intense due the brand-specific nature of the relevant aftermarket. This requires attention to be given to possible practices distorting competition both between authorised and independent repairers and within the authorised networks set up by vehicle manufacturers. There are observed barriers to effective competition on the vehicle repair side, involving access to essential inputs such as technical information and spare parts, and the ability of independent repairers to carry out work on vehicles during manufacturers' warranty periods which are getting longer over time.

194. Certain commentators believe that if Article 4(2) of the Regulation were not carried over into a future regime as Option 2 would imply, this could have negative consequences for the provision of technical information. The main effect would be on independent repairers which are predominantly SMEs. However, this appears to result from a misinterpretation of the function of Article 4, which is not to prohibit behaviour, but rather to claw back the exemption from agreements in certain circumstances, as explained above in Section 6.1.1. If, on the other hand, Option 2 were to apply to the motor vehicle sector, there would be nothing to claw back, since the market shares of the authorised networks on the repair markets almost always exceed the 30% threshold for exemption, meaning that there would be no need for a provision similar to Article 4(2). As is ultimately currently the case, a failure to grant access to technical information would be dealt with on the basis of Articles 81 and 82 of the Treaty directly. The only possible negative effect attributable to Option 2 is therefore likely to result from a possible lack of clarity, rather than from any legal change.

195. As already noted, Option 2 may also have a negative impact on the ability of authorised repairers to source alternative brands of spare parts, since original equipment suppliers may be prohibited from selling to the authorised networks. However, as has been noted in the evaluation report, the percentage of parts that the average authorised repairer sources from alternative suppliers is low. Overall, therefore, any negative impact that Option 2 could have as regards access to essential inputs would only be slight.

196. It could be argued that the provision allowing dealers to sell their businesses to other firms within the same authorised network promotes entrepreneurism, in that businessmen will be more willing to build up a business if they know that they can get a good price for it should they decide to sell. However, in reality, it seems unlikely that Article 3(3) would allow a dealer to get much value for a business sold against its supplier's wishes, since if the supplier were not satisfied with the purchaser, it could simply immediately issue a termination notice. In these circumstances, all that the purchaser would inherit would be a two-year contract to sell and repair vehicles under the brand in question – something which he would be unlikely to pay much for. Under these circumstances, it seems difficult to argue that in not carrying over Article 3, Option 2 would have more than a slight negative impact on the promotion of entrepreneurism.

197. In view of the fact that neither contractual bargaining power nor the promotion of entrepreneurism are significantly affected by any of the options, it seems difficult to imagine that Option 2 could affect SMEs' ability to access finance, since it will not make it more difficult to demonstrate business viability to a financial institution.

198. Overall, it seems likely that slight detrimental impacts in some areas will be offset by positive impacts elsewhere, leaving Option 2 with a net zero impact on SMEs.

199. **Option 3** will have the same impact as Option 2 as regards investment requirements, since future guidelines will not affect the treatment of multi-branding and the opening of additional sales outlets. The same goes for the bargaining position of SMEs and the promotion of entrepreneurism; guidance will have no additional impact on notice periods, reasons for contract termination, or the ability of a dealer to sell his business to another dealer of his choice. Similarly, Option 3 will have no impact as regards access to finance. On the other hand, some additional positive impact may come about as regards access to essential inputs, in that guidance could reduce the number of instances where a vehicle manufacturer mistakenly withholds technical information. Similarly, Option 3 would address new issues which seem to greatly affect the viability of independent repairers (the vast majority of which are SMEs), such as the misuse of warranties by car manufacturers aimed at strengthening the market position of authorised repairers to the detriment of SMEs operating in the independent aftermarket. Overall therefore, it seems likely that Option 3 would have a slight positive impact on SMEs.

200. With regard to access to technical information and spare parts, Option 4 will have a slight positive impact similar to Option 3. On balance, Option 4 will therefore have a slight positive impact on SMEs compared to the benchmark.

Impact on the competitive position of European vehicle manufacturers

201. **Option 2** would be likely to have two effects as regards the competitive position of European vehicle manufacturers when compared to the benchmark. Firstly, by providing for a more flexible regime, vehicle manufacturers will enjoy greater freedom as to how they draft their distribution and repair agreements within the safe harbour of the block exemption. Any impact assessment needs to take into account that the automotive sector is badly hit by the current economic crisis, and clearly needs to make adjustments to underpin its competitiveness. Over-rigid rules could serious hamper the ability of manufacturers to adjust their distribution networks.

With respect to the very competitive market for new vehicle sales, the Evaluation Report found that measures intended to give dealers contractual protection may have introduced disproportionate rigidities. These rigidities are likely to weaken the European motor vehicle industry's ability to adjust to changes in demand and cope with increasing structural overcapacities and strong inter-brand competition. This reasoning holds all the more true in a crisis situation such as the current one which could well last beyond 2010. Secondly, by providing for a more flexible regime for distribution and repair on the EU manufacturers' home markets, it would be likely to increase such manufacturers' ability to compete abroad. At the same time, as observed above; the introduction of more flexible rules in the field of multi-branding would not raise entry barriers for newcomers, including competitors from Asian countries; having regard inter alia; having regard to the strategic choice made by Korean manufacturers not to sell their brands in the same showroom (Kia/Hyundai). It follows that the overall impact of Option 2 on competitiveness would be positive but moderate.

202. **Option 3** and **Option 4** would be likely to also have a moderate positive impact on competitiveness, as future guidelines or a more focused Regulation would not contain any additional provision in this area.

Impact on consumers and households

203. Statistics point to a trend of decreasing real retail prices for passenger cars during the last decade (see paragraph **Error! Reference source not found.**). This trend has recently steepened due not only to a reduction in list prices but also to a special promotions intended to dispose of excess stocks. Consumers are benefitting by an overall decrease in prices, which is due to technological development, globalisation, production overcapacity and other factors which are independent of the motor vehicle block exemption. On the other hand, on the aftermarket, which represents 40% of total consumer expenditure on motor vehicles, prices for individual repair jobs have risen in real terms, partially compensated by increased reliability of modern cars and lengthening service intervals.

204. With regard to the market for the sale of new vehicles, **Option 2** would be likely to have a negligible impact on the choice of vehicles available to consumers, in particular because also under Option 2 single-branding obligations would be exempted for only a limited period of time. Therefore, under Option 2 there would be no substantial negative impact on access to the EU market by competing manufacturers. A recent study by ESMT came to the conclusion that the upper bound of cars sold due to the provisions on multi-branding in the Regulation 1400/2002 was 1% of the total volume of cars sold in the EU in 2008.[58] In addition, given the high value of a car for the average household and the effort put into the search for the best buy by consumers, the gain in terms of lesser search cost due to in-store multi-branding seems to be negligible. This is even more the case since the development of the Internet as an effective marketing tool has increased the opportunity for consumers and intermediaries to compare prices of vehicles without incurring any significant search costs. Although the improved flexibility available to suppliers and a lessening of the upward pressure on standards is likely to reduce distribution costs,

[58] "Do we need a Motor Vehicle Block Exemption?" Study by ESMT, 2009, p. 1

this impact will be small, since the Evaluation Report underlines that competition on the market for the sale of new vehicles is already fierce.

205. As far as aftermarket is concerned, a consequence of the current economic crisis is that consumers are likely to be more price-sensitive, and less likely to replace their old vehicles, which will in turn result in increased demand for repair services. Option 2 is likely to have a moderate positive impact on the choice of repairers available to the average consumer, since it will make it easier for the Commission to examine practices on the aftermarket that risk foreclosing independent repairers. This potential positive impact would be tempered, however, by the lack of clarity as regards the scope of manufacturers' obligation to grant access to technical information on pre-2009 models, which might reduce its availability and lead to a lower overall quality of repair services.

206. There is however one minor negative point associated with Option 2 as far as consumers are concerned. As Option 2 would contain no sector-specific hardcore relating to the aftermarket, the choice of spare parts available to those consumers who visit authorised repairers may be reduced, since vehicle manufacturers would be able to oblige the latter not to buy parts from OES directly. In particular, they would be able to do so when their market share on the relevant spare parts market would be below 30%. As this will be very rarely the case, Option 2 would be likely to have only a slight negative impact in this respect. Therefore, taking into account these advantages and disadvantages, Option 2 would on balance score at the neutrality point.

207. The drawbacks inherent to Option 2 would be reduced by **Option 3**, in particular because guidance would provide improved legal certainty as regards issues such as the provision of technical information. Therefore, compared to the baseline scenario, Option 3 would have a slight positive impact

208. **Option 4** would have the same small positive impact as Option 2 as regards the market for the sale of new vehicles. With regard to the aftermarket Option 4 would improve on Option 1 by applying a general threshold of 30% and would entirely remedy the shortcomings of Option 2 by maintaining the current hardcore provisions concerning the distribution of spare parts. On balance, therefore, this option would be likely to have a moderate positive impact as far as consumers are concerned.

Other economic impacts: comparing options 2-4 to the benchmark Option 1 (BAU)

209. The impact that each option has in respect of each criterion is now combined with the weightings allocated in section 5 in order to produce a scoreboard and assess how each successive option scores relative to the benchmark scenario.

Option 2

	Score	**Weighting**	**Overall impact**
Reducing compliance costs for firms	0+1	1	0+1

Particular impact on SMEs	0	1.5	0
Impact on competitiveness for carmakers	+2	1.5	+3
Impact on consumers and households	0	1.5	0

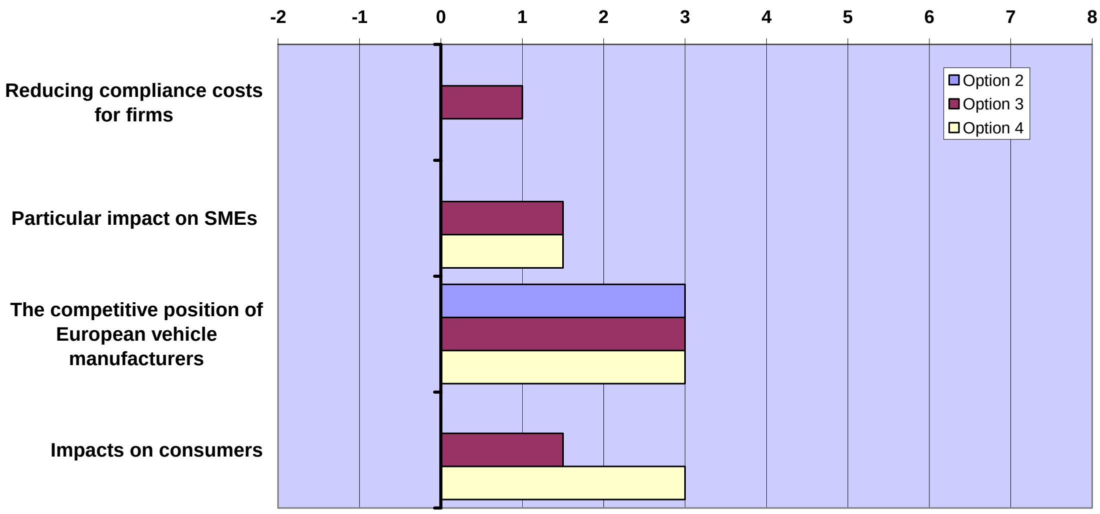
Option 3

	Score	Weighting	Overall impact
Reducing compliance costs for firms	+12	1	+12
Particular impact on SMEs	+1	1.5	+1.5
Impact on competitiveness for carmakers	+2	1.5	+3
Impact on consumers and households	+1	1.5	+1.5

Option 4

	Score	Weighting	Overall impact
Reducing compliance costs for firms	+02	1	+02
Particular impact on SMEs	+1	1.5	+1.5
Impact on competitiveness for carmakers	+2	1.5	+3
Impact on consumers and households	+2	1.5	+3

210. The chart below allows the reader to assess how options 2-4 perform both against the benchmark option, and against each other, taking into account both the scores that each receives in respect of each criterion, and any weighting variation.



211. The chart shows that although all options compare favourably with the status quo as regards other economic impacts, Option 3 and 4 are clear overall winners.

6.2. Impact on public administration

Enabling competition authorities to make better use of enforcement resources

212. As pointed out in the Commission Evaluation Report of May 2008, the current situation risks distorting the way in which the Commission dedicates its enforcement resources, since it has been obliged to invest considerable resources to deal with the complaints and requests from market players related to commercial issues, rather than genuine competition problems. The Commission received since 2002 a large number of complaints, which mostly have had little to do with competition issues, and which therefore gave no grounds for further proceedings. The vast majority of these 322 informal written and innumerable oral complaints that the Commission received revealed a degree of confusion about the detailed provisions of the sector-specific Regulation. None of the 46 formal complaints the Commission received resulted in any prohibition decision and only three informal settlements[59] were reached. In contrast, the main enforcement action taken by the Commission in this sector stemmed from *ex officio* investigations[60]. It is likely that if there were no longer such widespread misconceptions about the implications of the Regulation, the Commission would be able to focus its efforts better to combat harmful anti-competitive practices.

213. Moreover, the current regime appears to raise the risk that competition law will be interpreted in an incoherent manner across Europe, and there is in particular a risk that national courts may inconsistently interpret the terms and implications of the Regulation. This risk of divergent interpretation has required the Commission to devote resources for acting as *amicus curiae* in national proceedings pursuant to Article 15(3) of Council Regulation 1/2003[61].

214. Lastly, the Commission was involved in a large number of requests for preliminary rulings made to the European Court of Justice (ECJ) concerning the automotive distribution sector which is another indicator of the difficulties in applying the Regulation coherently in the Member States. Four out of thirteen preliminary rulings the ECJ issued from 2003 to 2007 in the antitrust field related to the interpretation of particular clauses of the Regulation regarding contract termination. This represents 80% of all such rulings relating to vertical distribution agreements over the period.[62]

215. Option 2 would be likely to have a moderate positive impact on the use of enforcement resources. As noted above, the baseline option has provoked a

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

60 The four commitment decisions adopted by the Commission the 13 September 2007 in the cases *Toyota*, *Fiat*, *DaimlerChrysler* and *Opel* and the prohibition decision in the *Carglass* case of 12 November 2008.

61 Garage Gremeau c/ Sté Daimler Court of Appeal of Paris, June 7, 2007.

62 Three of the four concerned the issue of contract termination with one year's notice where a network was allegedly being reorganised, while the remaining case sought clarification of the meaning of Article 3(6) of the Regulation on the role of arbitration when a contract was terminated - Case C-125/05 Vulcan Silkeborg v Skandinavisk Motor, 07.09. 2006; joined cases C-376/05 and C-377/05 Brünsteiner, Hilgert v BMW, of 30 November 2006; Case C-273/06 Auto Peter Petschenig v Toyota Frey, 26.01.2007; Case C-421/05 City Motors Groep v Citroen Belux, 18.01.2007.

considerable waste of resources that is not matched in other sectors. If these resources were re-dedicated to the prosecution of serious breaches of the competition rules in this sector or in others, considerable consumer benefit might be expected to accrue. This is best illustrated by the Commission Decision concerning a cartel in the car glass sector where fines of almost € 1.4 billion were imposed on four makers of car glass.[63]

216. Option 3 would be likely to have an even better (i.e. high positive) impact in this regard than option 2, since it would be likely to avoid needless confusion as to how certain issues specific to the motor vehicle sector would be dealt with under the general rules.

217. Option 4 would be likely to compare positively to the baseline option as it would enable the Commission to focus its enforcement activities on the more problematic issues arising in the aftermarket. However, certain actions, for instance those involving a claim that technical information could be withheld on safety and security grounds, would be as complex as they are under Regulation 1400/2002. This Option would therefore have a moderate positive impact.

Impact on the Community budget

218. Options 2-4 would all be likely to have no impact on the Community budget. Although they would be likely to free-up enforcement resources for the most serious breaches of competition law, which are normally sanctioned with heavy fines. However, these fines would be used to reduce Member States' contributions rather than going into the Community budget.

Impact on public administration: comparing options 2-4 to the benchmark Option 1 (BAU)

Option 2

	Score	**Weighting**	**Overall impact**
Efficient use of resources	+2	1.5	+3
Impact on the Community budget	+01	0.5	+00.5

Option 3

	Score	**Weighting**	**Overall impact**
Efficient use of resources	+3	1.5	+4.5
Impact on the Community budget	+01	0.5	+00.5

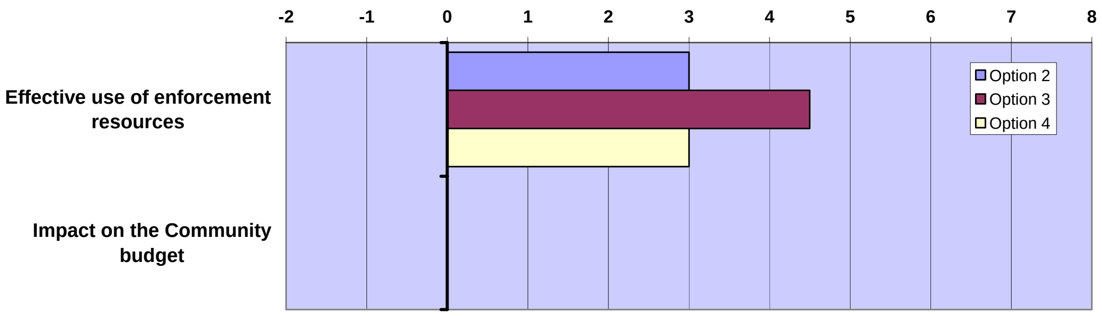
63 Commission Decision of 12 November 2008

Option 4

	Score	Weighting	Overall impact
Efficient use of resources	+2	1.5	+3
Impact on the Community budget	+01	0.5	+00.5

Impact on public administration: how options 2-4 compare to each other

219. The chart below allows the reader to assess how options 2-4 perform both against the benchmark option, and against each other, taking into account both the scores that each receives in respect of each criterion, and any weighting variation.



220. The chart shows that although all options compare favourably with the status quo as regards other economic impacts, Option 3 is a clear overall winner.

6.3. Social and environmental impacts

Employment and job quality

221. Motor vehicle dealers and repairers employ a total of 2.8 million people across the EU[64] - more than the 2.2 million employed in the manufacture of motor vehicles and components[65].

222. All options would continue to exempt quantitative selective distribution, and car manufacturers would therefore be free to determine the number of dealerships in a given territory under each option. This would indirectly affect the number of jobs, since there seems to be a vague link between the number of dealers and the number of jobs in the dealer sector, as for instance in the German market where both the number of dealerships and the number of employees went down between 1997 and 2007. On the other hand, by lowering the threshold for the exemption of quantitative selection, Option 2 to 4 may make it easier for prospective new distributors to be

64 CECRA press release, 31 July 2008.
65 Source, ACEA website.

admitted to the networks in those Member States where car manufacturers enjoy high market shares. This new approach could, in theory, lead to an increase in the numbers of dealers in these Member States, and a corresponding increase in employment.

223. As regards the repair sector, Options 2 to 4 would lead to an appreciable improvement in the level of enforcement regarding practises which could foreclose independent repairers and cause therefore job losses in the independent aftermarket. Hence, in theory, it could be expected that such options could contribute to preserve employment levels in this sector slightly better than the baseline option. However, given the very tenuous link between the envisaged changes in the relevant competition law framework, on the one hand, and possible variations in the number of employees in the motor vehicle sales and after-sales service sectors, on the other hand, it seems reasonable to consider that none of the options would have any measurable impact on employment.

224. None of the options will have any measurable impact on job quality, in particular because access to training will be the same for all options.

Therefore, Options 2 to 4 will score at the neutrality point as regards impact on employment and job quality.

Public safety

225. A lack of clarity in the rules governing the grant of technical information under Option 2 could also conceivably have a slight negative impact on public safety, in that vehicles might be driven in an unsafe manner if they have been repaired incorrectly due to a lack of technical information. However, this is likely to be counterbalanced by the fact that enforcement will be made easier, because carmakers' agreements with their authorised repairers will no longer be covered by the block exemption. On balance, therefore, Option 2 will have no significant impact on public safety.

226. The lack of clarity mentioned in the previous paragraph would be removed under Option 3, leaving a slight positive impact on safety.

227. Option 4 would also remove the lack of clarity, by carrying over Article 4(2) of Regulation 1400/2002 into a mini-Regulation. Given that by applying a general threshold of 30% and market shares of vehicle manufacturers' usually in excess of 30% enforcement would be the same as in Option 3. There would be, therefore, a slight positive overall impact compared to the baseline option.

The environment and public health

228. A lack of clarity in the rules governing the grant of technical information under Option 2 could also conceivably have a slight negative impact on the emission of greenhouse gases and other pollutants, in that a lack of technical information might lead vehicles to be less than optimally tuned. On the other hand, Option 2 would reduce the risk of misuse of the exception for safety and security-related technical information set out in recital 26 of the current regulation, which has in the past

caused problems, because carmakers have used this exception to withhold information on basic maintenance functions. In addition, enforcement will be made easier, because carmakers' agreements with their authorised repairers will no longer be covered by the block exemption. On balance, therefore, Option 2 will be likely to have no significant impact on the environment and public health.

229. Any potential lack of clarity as to technical information provision would be removed under Option 3, improving the positive impact to a slight level.

230. Like option 3, Option 4 would give clarity as to technical information provision. Although the problems that the Commission has encountered with recital 26 would remain, there would be, on balance, a slight positive overall impact as compared to the baseline option.

Social and environmental impacts: comparing options 2-4 to the benchmark Option 1 (BAU)

Option 2

	Score	Weighting	Overall impact
Employment and job quality	0	1	0
Public safety	0	1	0
The environment and public health	0	1	0

Option 3

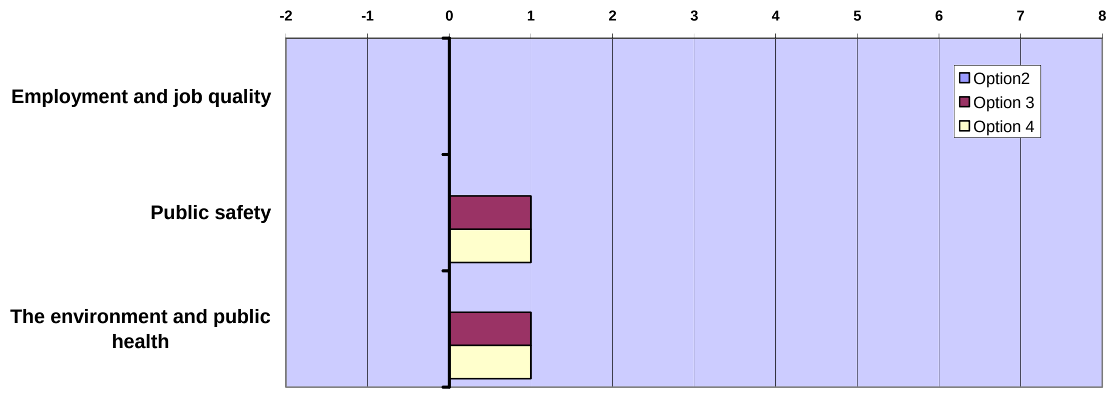
	Score	Weighting	Overall impact
Employment and job quality	0	1	0
Public safety	+1	1	+1
The environment and public health	+1	1	+1

Option 4

	Score	Weighting	Overall impact
Employment and job quality	0	1	0
Public safety	+1	1	+1
The environment and public health	+1	1	+1

Social and environmental impacts: how options 2-4 compare to each other

231. The chart below allows the reader to assess how options 2-4 perform both against the benchmark option, and against each other, taking into account both the scores that each receives in respect of each criterion, and any weighting variation.



232. The chart shows that Options 3 and Options 4 compare favourably with the status quo as regards social and environmental impacts, while Option 2 would have no effect.

7. Comparison of the Options

233. Based on the impacts analysed above, the following conclusions can be drawn on the strengths and weaknesses of the individual Policy Options as to their ability to achieve effectively and efficiently the policy objectives set out above in Section 3, their ability to take account of and properly respond to the other economic, social and environmental consequences singled out in section 5.

Policy Option 1

234. Policy Option 1 implies the adoption of a new block exemption along identical lines to Regulation 1400/2002. According to the Commission's Evaluation Report, although the Regulation has had some positive impacts compared to its predecessor, most of these improvements can be put down to the alignment of the sector-specific regime to the principles of the Commission's general policy for vertical restraints. In contrast, many of the detailed sector-specific elements of the current regulation have been ineffective, or in some cases, have had undesirable effects.

Policy Option 2

235. Policy Option 2 provides for vertical agreements in the motor vehicle sector to be subject to the same general principles as vertical agreements in other sectors: in other words, to be subject to the block exemption regime that emerges from the ongoing review of Regulation 2790/1999, without any sector-specific provisions.

236. The general regime contains a range of provisions that address the most common restraints to be found in vertical agreements, including absolute territorial protection and resale price maintenance. The exemption is available subject to agreements not exceeding a single market share threshold of 30%.

237. In essence, the analysis set out in section 6 above tends to show that although Option 2 would in many respects be an improvement on the benchmark, and therefore scores higher in the Impact Assessment, it also has a number of disadvantages compared to options 3 or 4.

238. The main advantages of Option 2 lie in its simplicity and clarity, which brings advantages in terms of legal certainty for contracting parties, and a reduction in misdirected enforcement resources. Moreover, the market share threshold of 30% would make the vast majority of authorised repair agreements subject to the more rigorous test concerning the applicability of Article 81(1) pursuant to the established case law in the field of selective distribution., This would make it easier to act against anti-competitive practices on the aftermarket, to the benefit of independent operators and consumers.

239. The analysis in Section 6 above nonetheless shows that Option 2 would also have a few disadvantages, in that it contains no specific reference to certain issues that have been problematic on the motor vehicle aftermarkets, in particular access by independent operators to the technical information held by vehicle manufacturers and the members of their authorised networks.

Policy Option 3

240. Policy option 3 is aimed at addressing the few weaknesses of Option 2 by providing for sector-specific clarifications in the Commission's Guidelines to be given, in particular as regards the aftermarket.

241. Section 6 above finds that Option 3 scores higher than all other options, in the main because it has the same advantages as Option 2, but would also provide operators with additional clarity as regards issues particular to the motor vehicle sector. In addition, it would allow the Commission to properly direct its enforcement resources to competition restrictions that have the most deleterious impact on consumers.

Policy Option 4

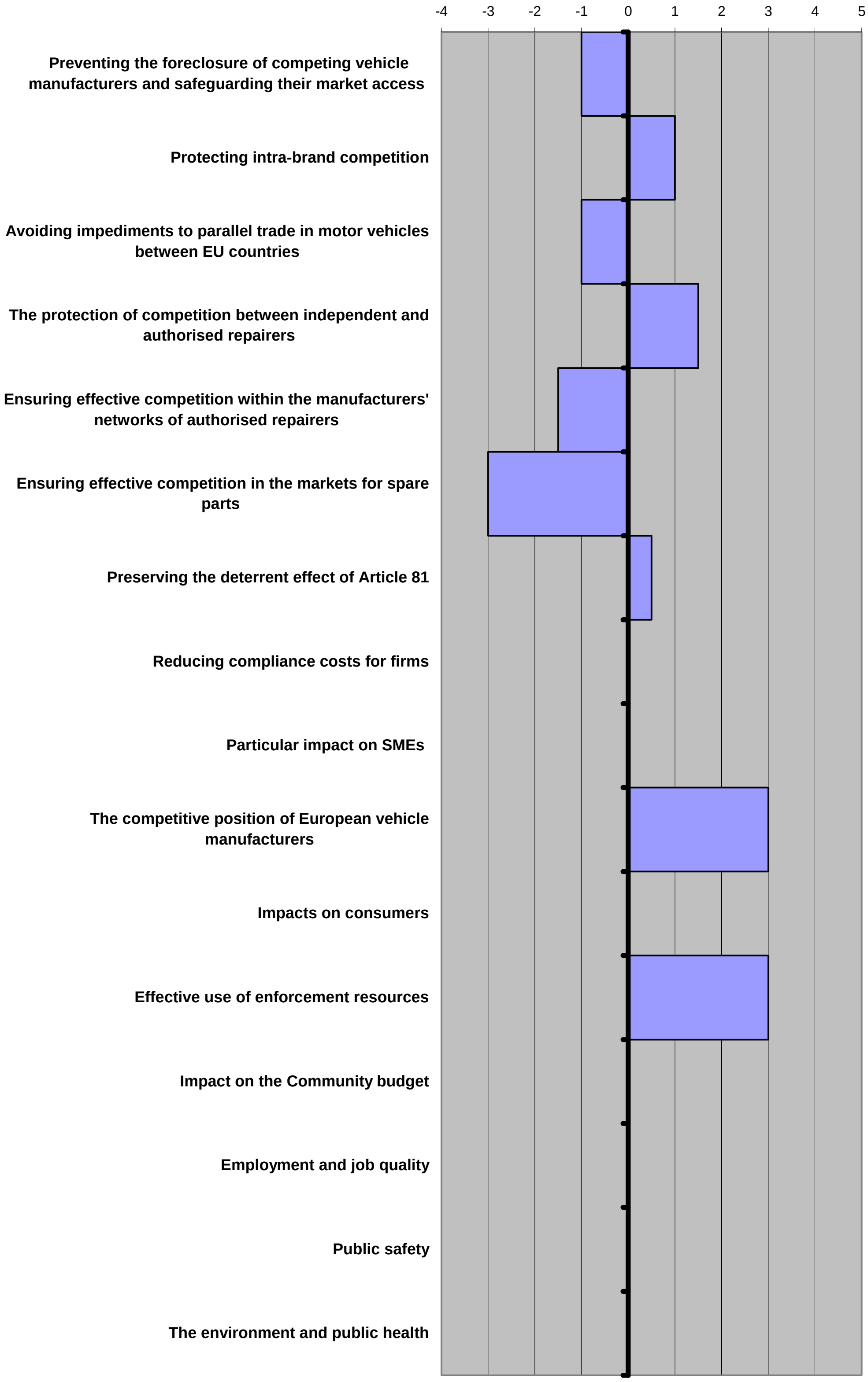
242. Policy option 4 is also aimed at addressing the few weaknesses of Option 2, but through a more focussed sector-specific block exemption, rather than through additional guidance.

243. Option 4 scores higher than all options apart from Option 3. Its main strong points are its clarity, and the use lower market share thresholds, while its main weaknesses lie in the fact that it carries over recital 26 of the current regulation, which has allowed carmakers to withhold certain technical information, and that it leaves certain practices, such as abusive warranty conditions, entirely to self-assessment by contracting parties.

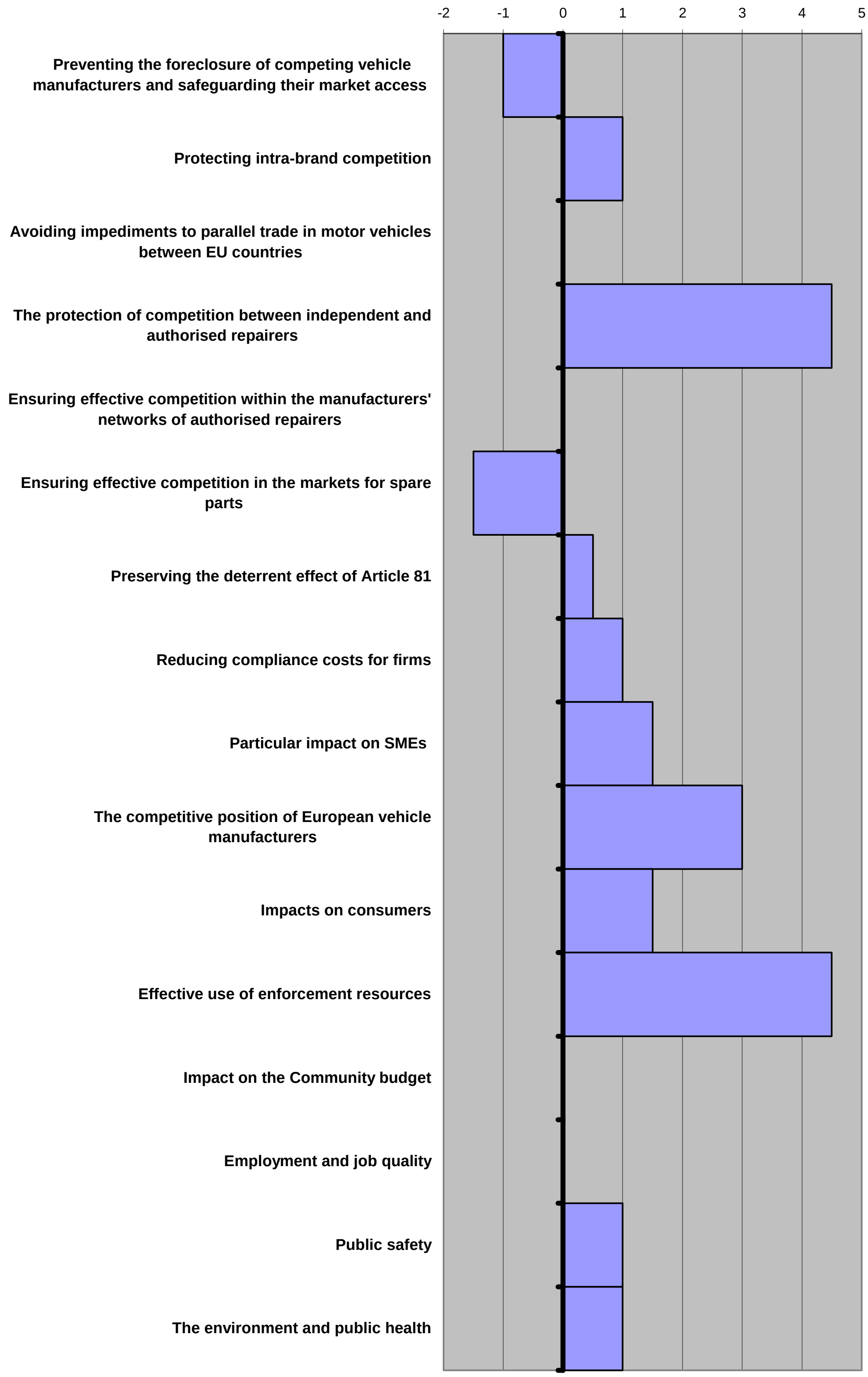
Summary of impacts of each option

244. The following charts show, option by option, the predicted impacts of each of the chosen criteria by reference to the benchmark Option 1.

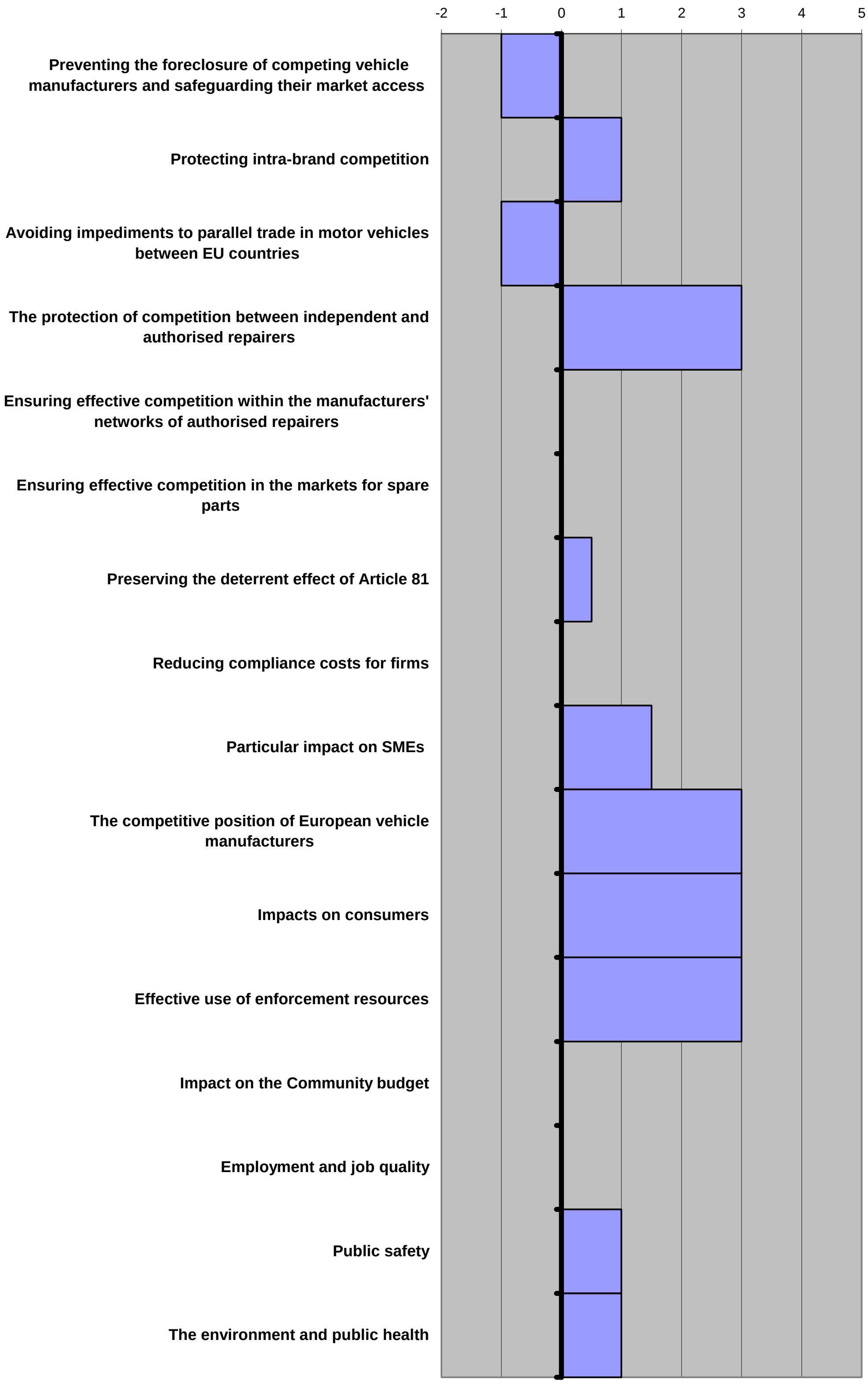
Summary of impacts of Option 2



Summary of impacts of Option 3



Summary of impacts of Option 4



The preferred option

245. This comparison of the various Policy Options and the characteristics of the underlying specific measures shows that Option 2 scored slightly better than the baseline scenario of renewing the current Regulation 1400/2002 by 10 years. Policy Option 3 has the greatest potential for achieving the objectives identified, and appears to be the Policy Option best able to meet the general objective of balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs. It also best meets the sector-specific objectives set out in the Assessment, and has the most favourable impact as regards the ensemble of the other impact criteria. However, Option 4 comes quite close to Option 3 in terms of overall scoring; and it is therefore not possible to state definitively that Option 3 would have a better impact than Option 4. Nonetheless, either option would have, on balance, positive implications for competition and ultimately for consumers.

8. MONITORING AND EVALUATION

246. The research and consultation exercise that led to adoption of the Communication was very extensive. An external study, an Evaluation Report, public consultations and a series of other consultations with stakeholders at Member State and Community levels, including public authorities and prominent practitioners from the private sector, have contributed greatly to the analysis and evaluation of the relevant issues to date.

247. Following publication of the Communication, the Commission will continue the consultation process with private and institutional stakeholders and with expert practitioners. On this basis the Commission will then draft the Guidelines.

248. The Commission will also actively engage in the continued institutional dialogue with the European Parliament and the European Economic and Social Committee, both of which commented on the Commission's Evaluation Report and made recommendations for further action.

249. The Commission will continue to monitor the operation of this Regulation based on market information from stakeholders. At this stage, a considerable number of conferences, seminars and other discussions are already scheduled for the period after publication of the Communication. These will provide the Commission with opportunities to receive feedback from, and exchange views with, representatives from industry, consumer associations, law firms and economic consultants, but also representatives of Member States' governments, competition authorities and judiciary. When selecting the events in which they participate, the Commission departments will pay particular attention to achieving the widest possible spread in terms of groups of stakeholders and experts and of geographical coverage.

TECHNICAL ANNEXES