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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.7.2009
SEC(2009) 1053 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying the

COMMUNICATION FROM THE COMMISSION

The Future Competition Law Framework applicable to the motor vehicle sector

SUMMARY OF THE IMPACT ASSESSMENT

{COM(2009) 388 final}
{SEC(2009) 1052}

EXECUTIVE SUMMARY

1. BACKGROUND

1. Motor vehicle manufacturers usually distribute and ensure the repair and maintenance of their products through authorised dealer and repairer networks, based on bundles of similar vertical agreements which may require assessment pursuant to Article 81. Block exemption regulations create safe harbours for categories of agreements that are caught by the prohibition in Article 81(1), relieving parties from the need to individually assess whether they can benefit from the exception provided for in Article 81(3). They also contribute to the coherent application of EU competition rules.

2. "WHY" – THE PROBLEM TO BE ADDRESSED

2. Motor vehicle distribution and after-sales agreements are subject to sector-specific block exemption Regulation (EC) No 1400/2002 will expire on 31 May 2010. The Commission now has to take position as to what legal framework should apply to vertical agreements in the sector after that date.
3. Almost all stakeholders agree on the continued need for a block exemption regulation, whether general or sector-specific, since this allows them to enter into agreements that they can assume to be in line with EU competition law.
4. The IA Report takes into account market developments since the current Regulation came into force, and in particular, the current crisis. It shows that conditions in the vehicle sales markets differ from those in the aftermarkets. The former are highly competitive, while there are barriers to effective competition in the latter which may work against consumers' interests. To improve the efficiency of the supply chain, the sector should benefit from a block exemption reflecting the different conditions on these to markets.

3. "WHAT"- OBJECTIVES OF COMPETITION POLICY FOR THE SECTOR

5. The general objective of the Commission's policy towards vertical agreements is to ensure effective supervision of markets, while simplifying administration and reducing firms' compliance costs, in accordance with Article 83(2)(b) of the Treaty.
6. As regards effective market supervision, the Impact Assessment Report acknowledges that the specific objectives underlying Regulation (EC) No 1400/2002 remain valid. These can be summarised as follows:
 - Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market;
 - Ensuring competition between dealers of the same brand;

- Enabling independent repairers to compete effectively with the manufacturers' networks of authorised repairers by ensuring undistorted access to technical repair information as well as to original and matching quality spare parts by all aftermarket operators;
 - Protecting competition between authorised repairers by ensuring access to the manufactures networks on the basis of qualitative standards;
 - Protecting competition on the spare parts markets by preventing restrictions inhibiting spare part producers' access to the aftermarket;
 - Preserving 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 and repairers.
7. Any policy option should only block exempt agreements which fulfil the four conditions of Article 81(3), taking into account the above-mentioned specific objectives. At the same time, the scope of the safe harbour should not be narrowed down to such an extent that administrative costs for enforcers and compliance costs for firms would be unduly increased by the need to individually assess agreements with no net anti-competitive effects.

4. POLICY OPTIONS – THE “HOW”

8. The Impact Assessment does not consider options which would either worsen the drawbacks of the current regime or would not respect Article 83(2)(b). It therefore does not assess the potential impact of a more detailed block exemption, which would inhibit diversity in retailing formats, widen the gap with its general policy in the field of vertical restraints, place unjustified constraints on carmakers, and lead to increased compliance costs for firms. Nor has it considered not having any block exemption regulation covering the motor vehicle sector. This option would seem *prima facie* undesirable given the existence of more than 120 000 vertical agreements for motor vehicle distribution and after-sales services that would otherwise have to be individually assessed by the parties.
9. 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 and which make the benefit of the exemption dependent on market share threshold(s) reflecting the parties' market power.
10. 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 to 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 would contain specific conditions excluding the benefit of the block exemption from non-compete obligations lasting more than five years, from obligations preventing authorised distributors from selling

products of particular suppliers, as well as certain post-term non-compete obligations.

11. However, the four options differ in several ways.
12. **Option 1** is the continuation of the *status quo*, and is particularly strict as concerns the primary market. It would contain sector-specific clauses removing the exemption from obligations restricting dealers' ability to subcontract repair services, single-branding obligations irrespective of their duration and preventing dealers from selling 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 network, non-respect of certain minimum contract durations and/or minimum notice periods, and the obligation to provide for arbitration.
13. Option 1 would grant a very wide exemption for the aftermarket, covering qualitative selective distribution systems irrespective of the parties' market share. All such agreements affecting competition in the aftermarket would be considered legal, unless they contained restrictions set out in 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 making authorised repairers also sell new vehicles).
14. **Option 2** envisages letting the sector-specific regime lapse, and applying the general rules applicable to vertical restraints, currently laid down in Regulation 2790/1999. While the current draft¹ of the replacement regulation keeps most of the provisions of Regulation (EC) No 2790/1999, including all five restrictions by object, it introduces a number of improvements, (including a 30% threshold also applicable to the market share of the buyer, and specific guidance for e-commerce), which would not substantially change the analysis of Option 2.
15. Option 2 would reflect the approach that 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 contracting parties enjoy significant market power. It would therefore imply a less rigid approach in respect of the highly-competitive primary market. For example, non-compete obligations would only be excluded if they lasted longer than five years and prevented dealers from selling a second brand. Any foreclosure problems could also be dealt with by withdrawing the benefit of the block exemption.
16. Location clauses would be covered by the exemption, and issues of contractual "fairness" would not be covered by additional conditions.
17. In the repair and spare parts distribution markets, manufacturers' networks generally have market shares well above Option 2's single market share threshold of 30%. This would imply that competition authorities could investigate a wider number of potentially anti-competitive practices (including practices restricting independent operators' access to technical information or original and/or matching quality spare parts). The approach would not be by "by object" (i.e. based on the hardcore list

¹ Preliminary draft adopted by the Commission on 8 July 2009

approach) but rather “by effect” (i.e. requiring empirical evidence of actual or potential consumer harm).

18. **Option 3** builds on option 2, but also provides for sector-specific Guidelines on how the general rules would apply to the sector. These would deal with restrictions affecting competition in the repair and spare parts distribution markets (e.g. availability of technical repair information to independent operators, access to the authorised repair networks, access to competing brands of spare parts), but would also give certain clarifications concerning the primary market.
19. **Option 4** also builds on Option 2 but involves the adoption of a more focussed sector-specific block exemption, which would contain all the hardcore provisions aimed at protecting aftermarket competition currently set out in Regulation 1400/2002.
20. In essence, Options 2-4 differ from Option 1 by taking the differing competitive conditions on the primary and aftermarkets into account. They therefore provide for a) a less-restrictive approach as concerns the exemption of agreements in the highly competitive primary market and b) a narrower exemption in the after-markets through a single market share threshold of 30%.

5. ANALYSIS OF IMPACT

21. Each option has been assessed against four groups of criteria. The first relates to the specific policy objectives mentioned above in section 3, and measures the options' ability to ensure effective protection of competition.
22. The second group of economic criteria ascertains each option's impact in relation to (i) firms' foreseeable compliance costs, (ii) SMEs' investment levels and access to finance, (iii) the European automotive industry's competitiveness and (iv) benefits for consumers and households.
23. The third group of criteria is designed to assess options' likely impact on public administration as regards (i) the use of enforcement resources, and (ii) consequences for the EU budget.
24. The final group reflects the potential impacts of each option on (i) employment and job quality, (ii) public safety and (iii) health and the environment.
25. The expected impact has been assessed mainly in qualitative terms, with options 2-4 scoring from minus three to plus three in respect of each criterion, the point of reference being the baseline scenario (Option 1). Weightings were also used to reflect the importance of each criterion.

6. SUMMARY OF THE ASSESSMENT OF IMPACTS

26. The main findings of the Impact Assessment Report can be summarised as follows.

6.1. Economic impacts: criteria related to the protection of effective competition

27. Options 3 and 4 would improve on Option 1 in addressing competition problems, whereas Option 2 would worsen the situation.

28. In particular, Option 1 and Option 3 score the same as regards the objective of protecting competition in the primary market for the sale of new motor vehicles, with Option 1 having a slight advantage due to its specific treatment of single-branding obligations, but lagging slightly behind as regards innovation and diversity of distribution formats. Options 2 and 4 show a weaker performance due in particular to reduced legal certainty as to how certain restrictions on parallel trade would be dealt with.

29. Both Option 3 and 4 would improve the current level of protection of competition on the aftermarkets, by enabling more focused enforcement in respect of certain practices risking the foreclosure of independent repairers (e.g. misuse of warranties by vehicle manufacturers), while offering sustained protection against practices limiting independent operators' access to technical information. Option 4 scores better than Option 3 as regards protecting competition in the spare parts markets. By contrast, Option 2 gives less legal certainty as to how the competition rules will be enforced against restrictions on access to authorised repairer networks, and on the supply of competing spare parts.

6.2. Other economic impacts

30. Options 2-4 score better than the baseline option with regard to other economic impacts, with Option 2 lagging somewhat behind Options 3-4.

31. Option 3 scores best with regard to impacts on SMEs and on firms' compliance costs. By applying the general rules, which are far simpler than those in Regulation (EC) No 1400/2002, Option 2 would reduce the risk of firms incurring unnecessary costs through under- or over-compliance. Option 3 would improve on Option 2 by giving firms guidance as to where the boundaries of the safe harbour lay, thereby decreasing error and litigation costs. Option 4 would score between Options 2 and 3, since although the over-complex primary market provisions would not be carried over, there would be a certain lack of legal certainty. Error and litigation costs would also be reduced to an extent comparable to Option 3.

32. None of the options would significantly affect the position of SMEs or the promotion of entrepreneurship. Options 3 and 4 would have a positive impact as regards access to essential inputs such as spare parts and technical information. Option 3 would address new issues which may affect SME independent repairers, such as the misuse of warranties by car manufacturers, while Option 4 scores slightly better on improving access to spare parts.

33. By providing for a more flexible regime, Options 2-4 would allow a broader range of distribution agreements to benefit from the block exemption, thus giving

manufacturers more room to adjust to changing economic circumstances, and enhancing the overall competitiveness of the EU car industry.

34. Options 2-4 would be unlikely to raise barriers to entry for competing manufacturers. In-store multi-branding would also bring negligible benefits for consumers. Options 2-4 would increase consumers' choice of repairers, since they would make it easier for the Commission to examine practices that risked foreclosing independent repairers. Option 4 would improve on Options 2 and 3 by including hardcore provisions that would allow authorised repairers to offer a choice of spare parts to consumers.

6.3. Impact on public administration

35. Options 2 to 4 score higher than the baseline option with regard to public administration, since they would enable resources to be better focussed on the most serious infringements of EU competition rules.
36. Option 3 scores highest, since guidelines would avoid confusion as to how certain issues specific to the motor vehicle sector would be dealt with under the general rules. Option 4 would also have a moderately better impact than the baseline scenario as it would enable the Commission to better focus its enforcement activities on more problematic aftermarket issues.
37. Options 2-4 would have no impact on the Community budget, since any fines arising from better enforcement would simply reduce Member States' contributions.

6.4. Social and environmental impacts

38. Options 3 and 4 would improve on the baseline scenario as regards social and economic impacts. No option would have more than a minor impact on employment, given the loose link between changes in the competition law framework, and any possible variations in the number of employees in the motor vehicle sale and after sale service sectors.
39. By facilitating access to technical information in particular, Options 3 and 4 could improve public safety and help reduce pollution.

7. THE PREFERRED OPTION

40. The Impact Assessment shows that Option 3 has the greatest potential for achieving the objectives identified, and appears to be the 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, 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. Either option would have positive implications for competition and ultimately for consumers.

8. MONITORING AND EVALUATION

41. Following the adoption of the Communication setting out the basic orientation for the future competition law regime applicable to the motor vehicle sector, the Commission will continue the consultation process with private and institutional stakeholders and with expert practitioners, and will then draft the legal framework.