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**Ref.: Evaluation Report Regulation  
1400/2002**

4 August 2008

Dear Madam,  
Dear Sir,

**Re: HT-1021 — Evaluation Report on the motor vehicle block exemption**

We welcome the opportunity given to all interested parties to submit comments in respect of the Commission Evaluation report on the operation of Regulation (EC) 1400/2002/ concerning motor vehicle distribution and servicing (hereinafter the "Report").

Our competition law team has been advising the motor vehicle sector since the creation of the initial sector-specific block exemption (Regulation 123/85). In this context we have followed with great interest the various legislative and case law developments at EC level relevant to the sector. The comments provided below are based on our past experience in the field. It is not our intention to influence the policy choices that are inherent in any further legislative step in the post-Regulation 1400/2002 era, but to confine our observations to technical issues that can be relevant to the well-functioning of the future regime.

**General framework underlying our observations**

In the final paragraph of the Overall Assessment (Title IV of the Report), the Commission concludes *"that a more flexible regime, drawing closer inspiration from the general principles applicable to vertical restraints as currently reflected in Regulation 2790 would have ensured an equivalent level of protection of competition in the market, while entailing lower compliance costs for companies and a more efficient enforcement system for competition authorities."*

Taking this conclusion into account, we will proceed in our observations on the assumption that as of 2010 the motor vehicle sector will be subject to the same block exemption regime that will govern vertical agreements in all other sectors. As the content of such future legislation is still under review, we will assume for present purposes that Commission Regulation (EC) No. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices<sup>1</sup> (hereinafter also the “General Block Exemption” or “GBE”) would continue to serve as the relevant legal framework.

Against that background, we will highlight certain aspects of our experience with the application of Regulation 1400/2002 (hereinafter also the “Automotive Block Exemption” or “ABE”) and possible difficulties to obtain the same results under the GBE.

### **Market share thresholds for exemption do not necessarily imply legal certainty**

The general market share limit in the ABE for exclusive and selective distribution systems is 30%. A higher limit (40%) is set for quantitative selective distribution to the extent that it concerns the sale of motor vehicles. There is no market share limitation for qualitative selective distribution systems.

The GBE contains a single market share limit of 30%. This limit applies irrespective of the distribution formula that is chosen and irrespective of the nature of the products or services concerned.

The switch from the ABE to the GBE would on account of the differences in the market share limits have a number of legal and practical consequences, the most important of which are the following :

- Vehicle manufacturers that now apply a quantitative selective distribution system for car distribution and that have a market share in the 30%-40% range, will lose the benefit of the block exemption.
- The Commission has taken the view that most, if not all manufacturers have a market share in excess of 30% in respect of after-sales services. As qualitative selective distribution is subject to the 30% limit in the GBE (the definition included in Article 1(d) does not make a distinction between qualitative or quantitative selective distribution),

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<sup>1</sup> OJ 1999 L 336/21.

manufacturers are not able to benefit from the GBE in respect of the organization of their after-sales network.

More generally, the central role played by one or more market share limits implies the need to define the relevant market (both from a product/service and a geographic perspective). Given the extensive experience of the Commission with the motor vehicle sector (various block exemptions, cases based on Articles 81 and 82 EC, extensive merger control practice), it is difficult to justify that the issue of market definition continues to be left open. The legal certainty that is created by means of a block exemption suffers tremendously from the fact that on the critical issue of market definition no concrete guidance is available. In the interest of legal certainty, it should be possible for the Commission to propose a particular market definition on which undertakings can rely. The Commission could still reserve the right in individual cases to move away from that definition, but for block exemption purposes the proposed approach would stand.

In short, given the extensive experience of the Commission with regard to the motor vehicle sector, the choice for an economics-based block exemption (that relies critically on one or more market share limits) implies in our view a certain responsibility to provide a sufficient degree of concrete guidance as to the market definition that can be relied on. The lack of clarity in this respect is perceived as one of the major deficiencies of the current regime.

### **Definition of selective distribution system**

The definition of a selective distribution system under the ABE differs from that contained in the GBE:

Article 1(1)(f) of the ABE reads as follows (emphasis added):

'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorised distributors or independent repairers, without prejudice to the ability to sell spare parts to independent repairers or the obligation to provide independent operators with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures

Article 1(d) GBE reads as follows (emphasis added):

d) 'Selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors;

The relevant definitions pose a number of fundamental problems, including the following:

- In practice, motor vehicle sales companies (typically the national importers) do not sell services to the authorized repairers that are subsequently resold by such repairers. At best the authorized repairers purchase parts, tooling, training and the like from the sales companies, but not any repair services. The future definitions should therefore be clarified to remove any ambiguity as to whether the present format of authorized repairers is conceptually covered by the block exemption. This is particularly so as certain commentators are now defending the thesis that this would not be the case.
- The ABE expressly requires that the authorized distributors and repairers are allowed to resell spare parts to unauthorized workshops. This is not consistent with the concept of selectivity. The Report (p.7, title D, third paragraph) seems to advance a possible solution for this issue, by suggesting that independent repair shops should be qualified as end users, rather than as unauthorized distributors. If this is the solution that will be adopted in the future, it is highly advisable that it is spelled out clearly (e.g. in the recitals or an accompanying notice). The explicit inclusion in the ABE of a specific hardcore provision addressing this issue, could otherwise in the future result in an argument a contrario that supplies to unauthorized workshops are no longer possible at the risk of undermining the selective character of the network.

### **Mandatory qualitative selective distribution system for aftersales services**

Car manufacturers "*almost without exception*"<sup>2</sup> have adopted qualitative selective distribution for their networks of authorised repairers. This is due to the specific market share calculation methodology laid down in Article 8(1)(c) of the ABE, in combination with the market share limits for exemption laid down in Article 3(1) of the ABE.

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<sup>2</sup> See, Staff Working Document No. 2, title 2.3.2.

It has been suggested that the market share calculation for after-sales purposes in the ABE does not materially differ from that contained in the GBE. This implies that a shift from the ABE to the GBE would still require the use of qualitative selective distribution (if the benefit of the block exemption is to be enjoyed). This suggestion is in our view technically incorrect.

Under the GBE only the “*market sales value of the contract goods or services and other goods or services sold by the supplier*” is taken into account (Article 9(1) GBE). Hence, the sales value of the members of the network that are vertically integrated with the supplier are included, but (different from the ABE) the sales value of independent authorized repairers (i.e. repairers that are not part of the same group as the supplier) are not part of the market share calculation.

The GBE calculation could well bring the market share of the supplier below the 30% limit and allow quantitative selective distribution for aftersales services. From an economic perspective, it does not seem inadequate to allow quantitative selective distribution also in respect of networks of authorized repairers. The particular advantages of a quantitative selective distribution system cited in the Report<sup>3</sup> in relation to sales of new vehicles (greater control over the geographic organization of the networks, bringing about economies of scale, reducing transaction costs and avoiding uneven brand representation) seem to apply just as well to networks of independent repairers.

These observations call for (i) the clarification of the exact calculation basis for the market shares that are relevant for aftersales purposes and (ii) in case the ABE (as opposed to the GBE) approach is followed, a proper economic justification as to why quantitative selectivity is inappropriate in respect of the aftersales business.

### **Access to technical information and training**

Access to technical information (Article 4.2 ABE) is one of the essential tools granted to independent repairers in order to allow them to compete with authorised repairers and hence to increase competition. The Report (p.7) seems to conclude that even in the absence of the ABE, the other legislation that is in place would have the same effect

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<sup>3</sup> Report, p. 5 under Title III.B

Clearly, Regulation 715/2007<sup>4</sup> has a more reduced scope of application (e.g. it only covers new models and it does not include access to training). It remains to be seen whether independent repairers can invoke the direct effect of the Regulation. In addition, reliance on Articles 81 and/or 82 EC for purposes of enforcing access rights will undoubtedly be more difficult than is presently the case (where the risk of losing the block exemption may provide a stronger incentive to comply and places the independent repairers in a stronger bargaining position).

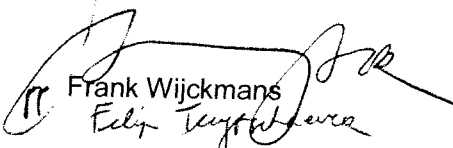
### **Multibranding**

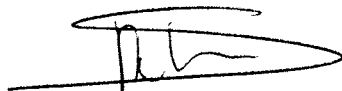
The Report (p. 5 Section III.A) concludes that *"It therefore appears that the sector-specific rules on multi-branding have not been fully effective and that the limits to the ability of vehicle manufacturers to impose direct or indirect noncompete obligations on their dealers set out in Regulation 2790/1999 could have ensured an equivalent level of protection of competition in the market."*

One of the major (but less obvious) differences in our practical experience between the non-competition regimes of the ABE and the GBE pertains to the creation of bonus systems. The GBE has left considerable commercial freedom to the suppliers and their network members to establish quantity-based bonus systems. The ABE (on account of the 30% rule included in Article 5.1(a) in combination with the definition of a "non-compete obligation" in Article 1.1(b)) has caused considerable legal uncertainty as to the compatibility with the block exemption of various quantity-based bonus schemes that had been in use in the sector for many years. The application of the GBE approach (as opposed to the ABE approach) would put an end to said legal uncertainty.

If the Commission would deem it useful that we expand on any of the aforesaid issues, we will obviously be pleased to do so.

Sincerely yours,

  
Frank Wijckmans  
Edip Teyfeli

  
Sofie De Keer

<sup>4</sup> Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ L 171/1.