

**DISTRIBUTION AND SERVICING OF MOTOR VEHICLES IN THE
EUROPEAN UNION**

COMMISSION REGULATION (EC) NO 1400/2002 of 31 July 2002¹

**ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO
CATEGORIES OF VERTICAL AGREEMENTS AND CONCERTED
PRACTICES IN THE MOTOR VEHICLE SECTOR**

EXPLANATORY BROCHURE

European Commission – Directorate General for Competition

¹ OJ L 203, 1.8.2002, p. 30.

also available on the Internet :

http://europa.eu.int/comm/competition/car_sector/

Foreword

Motor vehicle distribution and repair are areas that are of crucial interest for the European consumer. This sector has been associated with specific competition problems – particularly as regards consumers' Single Market rights to buy a car wherever it suits them in the European Union. The new Regulation 1400/2002, which is explained in this brochure, has been designed to sort out these problems, while recognising the special features of the motor vehicle sector.

The new Regulation also deals with issues related to repair and maintenance and the supply of spare parts, since over the lifetime of a vehicle, the costs associated with these services are around as high as the initial purchase price of the vehicle itself.

The new Regulation is designed to increase competition and bring tangible benefits to European consumers. It opens the way to greater use of new distribution techniques, such as Internet sales and multi-brand dealerships. It will lead to more competition between dealers, make cross-border purchases of new vehicles significantly easier, and lead to greater price competition. Car owners will have more opportunity to choose where they have repair and maintenance carried out and what spare parts are used.

This explanatory brochure, drawn up by DG Competition, is intended as a legally non-binding guide to the Regulation. It aims at providing different categories of interested parties, in particular consumers, dealers and repairers, with guidance and information. Such information is all the more important in view of the fundamental changes which the Regulation introduces. The brochure contains separate sections for these parties, and provides answers to questions which are likely to be raised. This should make it easier for the reader to find information in accordance with his or her needs.

DG Competition will be vigilant in monitoring the implementation of this important Regulation and will not hesitate to take action, where necessary, to ensure that the competition rules are respected and that the Regulation operates to the benefit of European consumers.

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Table of Contents

1. INTRODUCTION.....	7
2. STRUCTURE OF THE BROCHURE.....	10
3. PHILOSOPHY OF REGULATION (EC) NO 1400/2002.....	11
3.1. General approach	11
3.2. Result of the new general approach as regards the distribution and servicing of motor vehicles	12
4. CONTENTS OF THE REGULATION.....	15
4.1. Definitions used in the regulation (Article 1).....	15
4.2. Scope of application of the regulation (Article 2).....	15
4.2.1. Products and services covered by the scope of the Regulation.....	16
4.2.2. Categories of agreements falling within the scope of the Regulation	18
4.3. General conditions of application (Article 3).....	21
4.3.1. Market share thresholds	21
4.3.2. General conditions on specific provisions which must be included in the agreements	24
4.4. Hardcore restrictions (Article 4)	27
4.5. Specific conditions (Article 5)	30
4.5.1. Multi-branding.....	31
4.5.2. Location of authorised distributors or repairers in selective distribution systems.....	33
4.6. Withdrawal of the benefit of the block exemption (Article 6)	34
4.7. Disapplication in a relevant market (Article 7)	35
4.8. Entry into force and transitional period (Articles 12 and 10)	36
4.9. Monitoring and evaluation report (Article 11).....	38
5. RIGHTS, OBLIGATIONS AND OPPORTUNITIES CONFERRED BY THE REGULATION.....	40
5.1. Consumers: increasing consumer choice in accordance with Single Market principles	40
5.1.1. Sales.....	40
5.1.2. After-sales servicing.....	43
5.2. Intermediaries	45
5.3. Authorised distributors of new motor vehicles (also referred to in this brochure as dealers)	46
5.3.1. Sales of new vehicles by dealers	47

5.3.1.1.	The sale of new motor vehicles to consumers using the services of an intermediary.....	50
5.3.1.2.	Sales of new vehicles to leasing companies	50
5.3.2.	The distribution of different brands of motor vehicles by the dealer (multi-branding).....	51
5.3.3.	The right to open additional sales outlets (the prohibition of a “location clause”).....	52
5.3.4.	The supply of new vehicles to the dealer	55
5.3.5.	Disputes regarding contractual matters.....	55
5.3.6.	The right for the dealer to choose whether or not to carry out repair and maintenance services	56
5.3.7.	Transferring/selling a dealership or authorised repair business	57
5.3.8.	The end of the dealer agreement	58
5.4.	Authorised repairers	60
5.4.1.	How to become an authorised repairer	61
5.4.2.	No location clause for authorised repairers.....	62
5.4.3.	Spare parts and the authorised repairer.....	62
5.4.4.	Non compete obligations for authorised repairers.....	64
5.4.5.	Transfer of the authorised repair business.....	64
5.5.	Independent operators on the after-market	64
5.5.1.	Access to technical information.....	65
5.5.2.	The relationship between independent and authorised repairers	69
6.	MARKET DEFINITION AND CALCULATION OF MARKET SHARES	70
6.1.	Principles of market definition	70
6.2.	Examples of market definition and calculation of market shares	73
7.	DISTRIBUTION OF AND ACCESS TO SPARE PARTS	78
8.	ANNEX I – REFERENCE TO THE MOST IMPORTANT DOCUMENTS CONCERNING THE COMPETITION RULES FOR MOTOR VEHICLE DISTRIBUTION IN THE EUROPEAN UNION	85
9.	ANNEX II - TEXT OF REGULATION 1400/2002.....	87

1. INTRODUCTION

In the Member States of the European Union, motor vehicle and spare part manufacturers distribute their products through networks of distributors. As far as motor vehicles are concerned, these distributors are commonly known as dealers, and will be referred to as such in this brochure. Motor vehicle manufacturers and other undertakings also operate networks of authorised repairers. Such a distribution or repair network consists of a bundle of similar agreements between the 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.

Article 81 of the EC Treaty applies to agreements that may affect trade between Member States and which prevent, restrict or distort competition. The first condition for Article 81 to apply is that the agreements in question are capable of having an appreciable effect on trade between Member States. This will usually be the case if a network extends across the whole territory of a Member State. Where the first condition is met, Article 81(1) prohibits agreements which appreciably restrict or distort competition². This may be the case if the vertical agreements not only determine the price and quantity for a specific sale and purchase transaction but contain restraints on the supplier or the buyer (hereinafter referred to as ‘vertical restraints’). Article 81(3) renders this prohibition inapplicable for those agreements which create sufficient benefits, such as improvements in efficiency, to outweigh the anti-competitive effects. Such agreements are said to be exempted under Article 81(3). Agreements can only be exempted if consumers receive a fair share of the benefits resulting from the improvements³.

² Article 81(1) provides that:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

³ Article 81(3) provides that:

- “The provisions of paragraph 1 may, however, be declared inapplicable in the case of:*
- any agreement or category of agreements between undertakings;*
 - any decision or category of decisions by associations of undertakings;*
 - any concerted practice or category of concerted practices,*

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. In principle, this requires an individual assessment. However, the Commission can also grant an exemption by regulation for whole categories of agreements. Such regulations are commonly referred to as “block exemption regulations”. For instance, the Commission has adopted a block exemption regulation for supply and distribution agreements known as Commission Regulation 2790/1999⁴. This block exemption Regulation applies in principle to vertical agreements in all sectors of industry and trade. However, where the Commission has adopted a sector specific block exemption regulation, Regulation 2790/1999 is not applicable⁵.

The motor vehicle sector has had a sector-specific block exemption regulation for some time. Commission Regulation 1475/95⁶, the former sector-specific regulation for the motor vehicle sector, expired on 30 September 2002 and was replaced by 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 sector⁷ (hereafter: “the Regulation” or “the new Regulation”).

The new Regulation will be applicable in the EU. It will also be applicable in the EEA once an EEA Joint Committee will have decided to amend Annex XIV (Competition) to the EEA Agreement⁸.

The new Regulation, which entered into force on 1 October 2002, introduces a number of substantial changes as regards the exemption of distribution agreements for new motor vehicles and spare parts. It also introduces major changes as regards the exemption of agreements for the provision of repair and maintenance services by authorised and independent repairers and other independent operators, such as on-road assistance operators, distributors of spare parts and providers of training for repairers.

The Commission has, however, a general policy to give stakeholders sufficient time to adapt to a new legal framework, and the new Regulation will therefore only become fully applicable after the end of the transition periods⁹.

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, (...)

⁴ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21).

⁵ See Article 2(5) of Regulation 2790/1999.

⁶ Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 81(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25).

⁷ OJ L 203, 1.8.2002, p. 30.

⁸ See also EEA Joint Committee Decision 46/96 of 19 July 1996 amending Annex XIV (Competition) to the EEA Agreement (OJ L 291, 14.11.1996, p. 39), according to which Regulation 1475/95 is also applicable in the EEA Member States.

This brochure is intended to serve as a guide to the Regulation for consumers¹⁰ and other operators. It is also meant to help companies to make their own assessment as to the conformity of their vertical agreements with EC competition rules. It contains technical analysis and explanation, and gives answers to questions with which manufacturers, dealers, spare part producers and distributors, authorised and independent repairers and other independent operators involved in the sale and/or repair and maintenance of motor vehicles are likely to be confronted in practice. The brochure does not, however, give a detailed commentary on each provision of the Regulation, and is not legally binding.

⁹ See below section 4.8 and Article 10 and 12 of the Regulation. Agreements which are compatible with the requirements of Regulation 1475/95 are exempted until 30.9.2003. Moreover, dealers of new motor vehicles in a selective distribution system may be prohibited until 30.9.2005 from opening additional outlets elsewhere in the European Union.

¹⁰ One of the main objectives of this brochure is to let consumers and their intermediaries know how the Regulation guarantees the freedom to buy a car anywhere in the European Union in accordance with the principles of the Single Market.

2. STRUCTURE OF THE BROCHURE

The brochure has the following structure:

Chapter 3 explains the philosophy and aims behind the Regulation, both as regards the distribution of motor vehicles and repair and maintenance services.

Chapter 4 contains an explanation of the structure of the Regulation and of certain legal aspects of each of its provisions. This may be of particular interest to lawyers and others who wish to better understand the scope and content of the various clauses of this Regulation.

Chapter 5 is particularly aimed at consumers, including their intermediaries, and at dealers in new vehicles, and repairers. It gives answers to questions which are likely to arise for each of these categories of stakeholder, in separate sections for each category. The replies to these questions may also be relevant for vehicle and spare part manufacturers and their wholesalers. Rights conferred on, for example, consumers or independent repairers, may also correspond to obligations incumbent on other operators, such as vehicle manufacturers.

Chapter 6 deals with technical issues relating to market definition.

Chapter 7 deals with spare parts distribution from a technical perspective.

Finally, a list of reference documents relevant to the new regime and the full text of the new Regulation are annexed to this brochure and are also available on DG Competition's web site¹¹.

¹¹ http://europa.eu.int/comm/competition/car_sector/

3. PHILOSOPHY OF REGULATION (EC) No 1400/2002

3.1. General approach

Regulation 1400/2002 is a block exemption regulation that is specific to the motor vehicle sector. It covers agreements concerning the distribution of new motor vehicles and spare parts, and distribution agreements governing the provision of repair and maintenance services by authorised repairers. It also deals with the issue of access to technical information for independent operators which are directly or indirectly involved in the repair or maintenance of motor vehicles, such as independent repairers, and with access to spare parts.

Regulation 1400/2002 is stricter than its predecessor, Regulation 1475/95, and than Regulation 2790/1999, with a view to remedying the competition problems identified in this sector¹².

Regulation 1400/2002 is however based on the Commission's general policy for the assessment of vertical restraints as laid down in Regulation 2790/1999 and in the accompanying Guidelines on Vertical Restraints¹³. It is thus based on a more economic approach and on the principle that it is for the economic operators (manufacturers, dealers) to organise distribution according to their own needs. Consequently, the new Regulation is less prescriptive than Commission Regulation 1475/95, with a view to avoid the "straitjacket" effect¹⁴ observed in the case of Regulation 1475/95 and to allow the development of innovative distribution formats.

The new Regulation takes account of the general policy that block exemption regulations should cover restrictive agreements only up to certain market share thresholds, in this case the threshold is generally 30%, although it is 40% for quantitative selection distribution of new motor vehicles. In addition, the new Regulation only covers agreements when certain general conditions¹⁵, for instance in relation to dispute resolution by an arbitrator, are fulfilled. An important part of the Regulation focuses on practices and behaviour which seriously restrict competition within the Common Market and which are detrimental to consumers. To this end, and in line with the Commission's general approach for block exemption regulations¹⁶ it sets out a list of very serious restrictions (often referred to as "black

¹² See the Commission's report of 15 November 2000 on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. Document COM(2000)743 final, published on the Internet under: http://europa.eu.int/comm/competition/car_sector/

¹³ Commission Notice Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1).

¹⁴ This is an effect whereby, by exempting only one model for distribution, the Regulation encourages all suppliers to use near identical distribution systems, leading to rigidity.

¹⁵ See Article 3 for general conditions.

¹⁶ Commission Regulation 2790/1999; Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000 p. 3); Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the

clauses” or “hardcore restrictions”) clarifying what is not normally permitted¹⁷. This list has been drawn up in order to remedy the drawbacks of Regulation 1475/95 and in order to take account of issues specific to the motor vehicle sector, in particular as regards repair and maintenance. Where these restrictions are present, not only will the agreement no longer benefit from the block exemption, but individual exemption is also unlikely. In addition to the hardcore list the new regulation imposes specific conditions on certain vertical restraints, in particular non-compete obligations and location clauses¹⁸. When these specific conditions are not fulfilled, these vertical restraints are excluded from the block exemption. However, the Regulation continues to apply to the rest of a vertical agreement if the remainder of the agreement can operate independently from the non-exempted vertical restraint. The non exempted vertical restraint will need an individual assessment under Article 81.

3.2. Result of the new general approach as regards the distribution and servicing of motor vehicles

Figures available show¹⁹ that the purchase price and the cost of repairing and maintaining a car each account for about 40% of the total cost of ownership²⁰. Competition on the distribution and repair and maintenance markets is therefore of equal importance to consumers, and the Regulation therefore addresses competition issues relating to both.

The evaluation report adopted by the Commission on 15 November 2000 concluded that Regulation 1475/95 did not achieve certain of its principal aims²¹. Applying the general vertical block exemption regulation (Regulation 2790/1999) would also not solve all the problems identified in the evaluation report. Although it is based on the same non-prescriptive approach as Regulation 2790/1999, Regulation 1400/2002 therefore introduces a stricter approach.

As regards the **distribution of new motor vehicles**, the Regulation is built around the following principles:

- banning the combination of selective and exclusive distribution permitted by Regulation 1475/95. To benefit from the new Regulation, manufacturers have to choose between creating selective and exclusive distribution systems when appointing their distributors;

application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000 p. 7).

¹⁷ See Article 4 for hardcore restrictions.

¹⁸ See Article 5 for specific conditions.

¹⁹ Andersen, Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned, p. 43, chapter II.2.1.B; published on the Internet: http://europa.eu.int/comm/competition/car_sector/.

²⁰ The remaining 20% being for financing, insurance and other costs.

²¹ See Commission Report on the evaluation of Regulation 1475/95.

- reinforcing competition between dealers in different Member States (intra-brand competition) and improving market integration in particular by not exempting distribution agreements which restrict passive sales, by not exempting distribution agreements in selective distribution systems which restrict active sales, and by not exempting clauses (commonly referred to as “location clauses”) prohibiting dealers in selective distribution systems from establishing additional outlets elsewhere in the Common Market²²;
- removing the obligation for the same firm to carry out both sales and servicing²³ by not exempting agreements that do not allow dealers to subcontract servicing and repair to authorised repairers who belong to the authorised repair network of the brand in question and who therefore fulfil the manufacturer’s quality standards²⁴;
- facilitating multi-branding by not exempting restrictions on the sale of motor vehicles of different brands by one dealer²⁵. Suppliers may however impose an obligation for motor vehicles of different brands to be exhibited in different areas of the same showroom;
- maintaining the “availability clause” by not exempting agreements that limit a dealer’s ability to sell cars with different specifications to the equivalent models within the dealer’s contract range. This should make it possible for a consumer to obtain vehicles from a dealer in another Member State with the specifications current in the consumer’s home Member State, for example allowing UK and Irish consumers to buy new right-hand-drive cars in mainland Europe²⁶;
- supporting the use of intermediaries or purchasing agents by consumers²⁷. These operators are an important tool to help consumers to buy a vehicle in another part of the Common Market;
- strengthening dealers’ independence from manufacturers, both by stimulating multi-brand sales and by strengthening minimum standards of contractual protection (including retaining the existing minimum notice periods provided for in Regulation 1475/95) and by allowing them to realise the value that they have built up by giving them the freedom to sell their businesses to other dealers authorised to sell the same brand²⁸.

²² After 30 September 2005. See Article 5(2)(b) and Article 12(2). With a location clause, a manufacturer obliges a dealer only to operate from a certain place of establishment, which may be an address, a town or a territory.

²³ This is commonly referred to as the sales-service link.

²⁴ Article 4(1)(g).

²⁵ Article 5(1)(a) and (c).

²⁶ Article 4(1)(f).

²⁷ Recital 14.

²⁸ Article 3(3) and 3(5).

In sum, Regulation 1400/2002 sets up a regime which should stimulate the development of innovative distribution methods and thereby enhance competition.

As regards **repair and maintenance of motor vehicles**, Regulation 1400/2002 is based on the same stricter approach while retaining certain elements of the previous Regulation 1475/95, since Regulation 2790/1999 does not contain provisions that are sufficiently adapted to repair and maintenance of motor vehicles. Given the size of consumer expenditure on repair and maintenance, it is important to ensure that they can choose between different alternatives and that all operators (dealers, authorised repairers, independent repairers including body shops, fast fit chains and service centres) can offer good quality services and thereby contribute to vehicle safety and reliability.

Consequently, as regards repair and maintenance, Regulation 1400/2002 pursues the following aims:

- to allow manufacturers to set selection criteria for authorised repairers, so long as these do not prevent the exercise of any of the rights enshrined in the Regulation;
- to ensure that if a supplier of new motor vehicles sets qualitative criteria for the authorised repairers belonging to its network, all operators who fulfil those criteria can join the network. This approach will enhance competition between authorised repairers by making sure that operators with the necessary technical expertise can establish themselves wherever there is a business opportunity;
- to improve authorised repairers' access to spare parts which compete with parts sold by the vehicle manufacturer;
- to preserve and reinforce the competitive position of independent repairers; these currently carry out on average about 50% of all repairs on motor cars²⁹. The Regulation improves their position by reinforcing their ability to gain access to spare parts and technical information in line with technical advances, especially in the field of electronic devices and diagnostic equipment. The access right is also extended to training and to all types of tools since access to all four of these elements is necessary if an operator is to be able to provide after sales services. A desirable and important side effect of this wider access is to encourage improvement in independent repairers' technical skills, to the benefit of road safety and consumers in general.

Taking all of these elements into account, Regulation 1400/2002 reinforces competition on the markets for the distribution of new motor vehicles and for the provision of after sales services.

²⁹ Andersen study, p. 254, appendix 8; Accenture, Study on the Impact of Legislative Scenarios on Motor Vehicle Distribution, September 2001, commissioned by ACEA, p. 11.

4. CONTENTS OF THE REGULATION

This chapter surveys the contents of various Articles of the Regulation and aims at illustrating certain provisions which may require interpretation. It contains an enumeration and explanation of the Articles, illustrated as much as possible with references to the recitals of the Regulation, examples and answers to questions that legal practitioners and suppliers of motor vehicles or spare parts which organise a distribution network may ask. The section also contains references to other Commission Notices which provide conceptual guidance on enforcement issues.

4.1. Definitions used in the regulation (Article 1)

Article 1 contains a list of definitions which clarify the meaning which needs to be given to certain words or expressions used in the text of other Articles of the Regulation. When relevant, the precise definition is provided below with the text of the Article(s) in which such words or expressions are used.

4.2. Scope of application of the regulation (Article 2)

Article 2

Scope

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that the provisions of Article 81(1) shall not apply to vertical agreements where they relate to the conditions under which the parties may purchase, sell or resell new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles.

The first subparagraph shall apply to the extent that such vertical agreements contain vertical restraints.

The exemption declared by this paragraph shall be known for the purposes of this Regulation as ‘the exemption’.

(...)

4.2.1. Products and services covered by the scope of the Regulation

Article 1

Definitions

1. For the purposes of this Regulation:

(...)

(n) 'Motor vehicle' means a self propelled vehicle intended for use on public roads and having three or more road wheels.

(...)

(s) 'Spare parts' means goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle, with the exception of fuel.

(...)

Question 1: Where does the borderline lie between the new Regulation 1400/2002 and Regulation 2790/1999 on vertical agreements?

Article 2(5) of Regulation 2790/1999 on vertical agreements declares that it does not apply to vertical agreements whose subject matter falls within the scope of any other block exemption regulation. It follows that Regulation 2790/1999 does not apply to vertical agreements that concern new motor vehicles, repair and maintenance services for motor vehicles and spare parts for motor vehicles, as defined in the Regulation. An agreement whose subject matter falls within the scope of application of the Regulation³⁰ but which fails to meet other requirements set out therein³¹, does not fall within the scope of application of Regulation 2790/1999.

Question 2: Does the Regulation apply to all agreements regarding vehicles and spare parts?

No. The Regulation does not apply, *inter alia*, to vehicles which are not motor vehicles³², to motor vehicles which are not new³³ to loans by banks which finance the purchase of a vehicle by an end-user or to goods which are not spare parts as defined in the Regulation³⁴.

³⁰ See Article 2, Scope.

³¹ For instance Articles 3, 4 or 5.

³² The definition of motor vehicles is the same as under Regulation 1475/95. Some vehicles do not fall within this definition because they are not self-propelled, like horse-drawn wagons, because they have less than three wheels, like motor-bikes, or because they are not intended for use on public roads, though they may occasionally circulate on public roads, like tractors or earthmoving machines.

³³ For instance the second-hand car market.

³⁴ For instance because they are not necessary for the use of a motor vehicle, though they may be fitted in it, like accessories such as a tape, CD or other accessories according to trade usage (for an explanation see below Chapter 7).

Many replacement products are specific to motor vehicles as defined in the Regulation and therefore fall clearly within the definition of spare parts in Article 1(1)(s). However, certain goods, such as lubricants, paint and generic products such as screws, nuts and bolts, may have dual - or multiple - uses. While they can be installed in or upon a motor vehicle so as to replace components of that vehicle, they may also have end uses in relation to types of vehicles not covered by the Regulation (e.g. motor bikes, tractors) or in even more diverse contexts. Therefore, such goods should only be regarded as spare parts within the meaning of Article 1(1)(s), with the result that vertical agreements for their distribution fall within the scope of the Regulation, where it is reasonably certain that they are destined for installation in or upon a motor vehicle. In practice, this will occur where the buyer's activity is in the motor vehicle repair sector or in the supply of that sector.

This would exclude from the scope of the Regulation, at one level of trade, vertical agreements whereby wholesalers purchase such products for onward distribution to a wide variety of customers and, at quite another level of trade, agreements regarding products destined for direct sale to end users, as the circumstances of final use will in both cases be far from clear. For instance, a vertical agreement between a manufacturer of screws and a do-it-yourself store does not fall within the scope of the Regulation, even though the manufacturer also supplies the same screws to a manufacturer of motor vehicles or to the motor vehicle repair sector. Nor does an agreement with a distributor of, for instance, paints or lubricants, unless his type of activity leads to reasonable certainty that such goods will be used only for installation in or upon a motor vehicle which falls under the Regulation. Such reasonable certainty does not exist for the sale of paints or lubricants for retail to filling stations, supermarkets or do-it-yourself stores. To the extent that vertical agreements relate to vehicles, goods or services not covered by the Regulation, they fall, in principle, within the scope of Regulation 2790/1999.

4.2.2. Categories of agreements falling within the scope of the Regulation

Article 1

Definitions

1. For the purposes of this Regulation:

(...)

(c) 'Vertical agreements' means agreements or concerted practices entered into by two or more undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain.

(...).

Article 2

Scope

(...)

2. The exemption shall also apply to the following categories of vertical agreements:

(a) Vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are distributors of motor vehicles or spare parts for motor vehicles or repairers and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million; vertical agreements entered into by such associations shall be covered by this Regulation without prejudice to the application of Article 81 to horizontal agreements concluded between the members of the association or decisions adopted by the association;

(b) vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption shall apply on condition that those provisions do not contain restrictions of competition relating to the contract goods or services which have the same object or effect as vertical restraints which are not exempted under this Regulation.

3. The exemption shall not apply to vertical agreements entered into between competing undertakings.

However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

(a) the buyer has a total annual turnover not exceeding EUR 100 million, or

(b) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or

(c) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

Question 3: Which types of vertical agreements are covered by the Regulation?

The Regulation applies to vertical agreements in the motor vehicle sector at all levels of trade from the stage first supply of a new motor vehicle by its manufacturer to the final resale to end consumers and from the first supply of spare parts by their manufacturer to the provision of repair and maintenance services to end consumers. The Regulation covers, inter alia, vertical agreements between:

- a manufacturer of motor vehicles or its subsidiary and independent importers or wholesalers, that are not subsidiaries of the manufacturer and that may be entrusted with the supply and management of the manufacturer's distribution and repair network

in one or several Member States, even where the manufacturer has incorporated import and wholesale subsidiaries in those or other Member States³⁵;

- a manufacturer of motor vehicles or its subsidiary and individual members of its authorised network of distributors and repairers, including the licensing of intellectual property rights held by the manufacturer³⁶;
- a manufacturer of motor vehicles, a main distributor and a sub-distributor or an agent in two or three-tier distribution networks³⁷. Such agreements are covered irrespective of whether the sub-distributors are selected by and contractually linked with the vehicle manufacturer or whether main distributors select and enter into contracts with sub-distributors on the basis of criteria set by the manufacturer³⁸;
- a manufacturer of motor vehicles or spare parts and an association of authorised or independent dealers or repairers who jointly buy motor vehicles or spare parts, if none of the individual members of the association has a total annual turnover exceeding EUR 50 million³⁹;
- a supplier of spare parts and individual members of a network of independent or authorised repairers who use these spare parts to provide repair and maintenance services.

The scope of application of the Regulation is thus broader than Regulation 1475/95 as it includes agreements, for instance, with importers or wholesalers of motor vehicles which do not provide after-sales services, with repairers who do not sell cars and with suppliers who provide spare parts to repairers.

Question 4: Do vertical agreements fall within the scope of the Regulation when the supplier also sells motor vehicles directly to end consumers in competition with its distribution network?

In general the Regulation does not apply to vertical agreements entered into between competing undertakings. However, certain vertical agreements between competitors fall within the scope of the Regulation. In particular, Article 2(3) extends the scope of the Regulation to situations of dual distribution so as to cover the various vertical agreements that a motor vehicle manufacturer that sells directly to end users may conclude with individual members of its network(s) of authorised distributors. The Regulation does not

³⁵ Article 2(3)(a) and (b).

³⁶ Article 2(2)(b), e.g. the use of the trade-mark affixed in the showroom in which vehicles are sold or the disclosure of know-how for the provision of repair services of a particular brand.

³⁷ Recital 3.

³⁸ The Regulation does not prevent the use of single tier distribution systems. The choice as to whether and how systems are organised lies with the manufacturer or supplier whose motor vehicles and spare parts are supplied through the network. Distribution agreements concluded by a dealer with other undertakings were also subject to the supplier's consent, pursuant to Article 3(6) of Regulation 1475/95.

³⁹ Article 2(2)(a).

set out any specific requirements as to the coexistence of manufacturer-owned outlets and those owned and run by authorised distributor's.

Question 5: Do agency agreements fall within the scope of the Regulation?

Agency agreements are common in the motor vehicle sector. The Commission draws a dividing line between “genuine” and “non-genuine” agency agreements for the purposes of EC competition law following the criteria set out in its Guidelines on Vertical Restraints, irrespective of how such agreements are categorised under national civil law⁴⁰. Genuine agency agreements, that is, those where the agent bears insignificant or no financial and commercial risk in respect of the contract concluded or negotiated on behalf of its principal and in respect of market-specific investments for that field of activity, are not prohibited under Article 81(1) and do not fall within the scope of the Regulation. Non-genuine agency agreements, on the other hand, do fall within the scope of the Regulation⁴¹.

Question 6: What are the requirements that the agreements must, in general, fulfil to comply with the Regulation and what are the consequences of this compliance?

In order for the Regulation to apply to agreements which fall within its scope of application, the general conditions set out in Article 3 must be met and clauses or stipulations between the parties must neither directly nor indirectly amount to hardcore restrictions, as enumerated in Article 4. Specific obligations which do not meet the conditions enumerated in Article 5 are not exempted, but it may be possible under national contract law to sever such obligations from the remainder of the agreement leaving the remainder to be covered by the block exemption. The use of pressure, financial incentives or disincentives, leases of commercial premises, or other measures⁴² which limit or attempt at limiting the independent behaviour of a distributor or repairer to carry out the types of pro-competitive behaviour which Articles 4 and 5 favour or which undermine the rights enshrined in Article 3 are not exempted under the Regulation. All other restraints or stipulations contained in agreements which meet these requirements may benefit from the block exemption, as Article 2 renders the prohibition laid down in Article 81(1) inapplicable in respect of such agreements.

The Regulation relieves the parties from the task of showing that in their specific economic and legal context, their agreements meet the conditions of Article 81(3). The Regulation, which is binding and directly applicable in all Member States, ensures throughout the European Union that such agreements cannot be held null and void

⁴⁰ Guidelines on Vertical Restraints, Section II.2 Agency agreements, paragraphs 12 to 20.

⁴¹ Such non-genuine agency agreements may fall under Article 81(1) and also fell under Regulation 1475/95, see also Commission Decision of 10.10.2001 – DaimlerChrysler - (case COMP/36.264 – Mercedes-Benz), OJ L 257, 25.9.2002, p. 1.

⁴² For example, if the manufacturer is a minority shareholder of one of its dealers and agrees with the other shareholders that the dealer will no longer engage in multi-branding or not open further sales or delivery outlets after 30 September 2005 this would be regarded as a disguised vertical agreement which would fall within the definition of Article (1)(1)(c) and which would not be exempted under Article 5(1)(a) or 5(2)(b).

pursuant to Article 81(2). In accordance with the principle of primacy of Community law, no measure taken in pursuance of national laws on competition by national authorities or courts should prejudice the uniform application of the Regulation throughout the Common Market.

4.3. General conditions of application (Article 3)

Article 3 of the Regulation sets out five general conditions which agreements must fulfil for the block exemption to apply. The first of these limits the application of the exemption to situations where certain market share thresholds are not exceeded and below which it can be safely assumed that the conditions of Article 81(3) will in general be fulfilled. The other conditions require the inclusion of several provisions in the agreement which promote contractual stability, hence enabling distributors or repairers to compete vigorously and pass on to consumers the benefits of improved distribution.

4.3.1. Market share thresholds

<i>Article 3</i>	
<i>General conditions</i>	
1.	Subject to paragraphs 2, 3, 4, 5, 6 and 7, the exemption shall apply on condition that the supplier's market share on the relevant market on which it sells the new motor vehicles, spare parts for motor vehicles or repair and maintenance services does not exceed 30%. However, the market share threshold for the application of the exemption shall be 40% for agreements establishing quantitative selective distribution systems for the sale of new motor vehicles. Those thresholds shall not apply to agreements establishing qualitative selective distribution systems.
2.	In the case of vertical agreements containing exclusive supply obligations, the exemption shall apply on condition that the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.
	(...)

<i>Article 1</i>	
<i>Definitions</i>	
1.	For the purposes of this Regulation: (...) (e) 'Exclusive supply obligation' means any direct or indirect obligation causing the supplier to sell the contract goods or services only to one buyer inside the common market for the purposes of a specific use or for resale. (f) '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. (g) 'Quantitative selective distribution system' means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit

their number.

- (h) ‘Qualitative selective distribution system’ means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which are only qualitative in nature, are required by the nature of the contract goods or services, are laid down uniformly for all distributors or repairers applying to join the distribution system, are not applied in a discriminatory manner, and do not directly limit the number of distributors or repairers.

(...)

As with Regulation 2790/1999, the application of the Regulation requires, in principle, a definition of the relevant product market(s) and of the relevant geographic market(s) affected by the vertical agreements (“relevant market”). Except where qualitative selective distribution is used⁴³, vertical agreements can only benefit from the block exemption when certain market share thresholds are not exceeded; generally the relevant threshold is 30%, although it is 40% for quantitative selective distribution agreements for the sale of new motor vehicles. The application of the Regulation to distribution agreements other than those providing for qualitative selective distribution thus implies firstly the definition of the relevant market(s) affected by the agreements and secondly, the calculation of market shares.

To calculate its market share, a company has to take into account its connected undertakings⁴⁴. If a company or its connected undertakings supply vehicles of different brands which belong to the same product market, it has to take them all into account when calculating its market share. If its market share exceeds the threshold, the Regulation will not cover any of the distribution agreements even if, taken individually, none of these brands exceeds those thresholds. Similarly, if the same agreement is used in different geographic areas to distribute motor vehicles or spare parts or to provide repair and maintenance services pertaining to different relevant markets and the thresholds are exceeded for some of them, the Regulation covers the agreements only on the relevant markets for which the thresholds are not exceeded.

The Guidelines on Vertical Restraints indicate the policy which the Commission follows in such cases⁴⁵. Further issues of market definition and calculation of market shares are dealt with in chapter 6.

⁴³ See definition of Article 1(1)(h).

⁴⁴ See definition of connected undertakings at Article 1(2) and section 6.2. below.

⁴⁵ Guidelines on Vertical Restraints, paragraphs 62, 68-69. More generally, for the analysis of individual cases, see paragraphs 100 to 229 and in particular paragraphs 184-198 on selective distribution.

Question 7: Can agreements in the motor vehicle sector be covered by the De Minimis Notice⁴⁶?

Yes, whereas the Regulation provides an exemption from the prohibition in Article 81(1) because the positive effects of the agreement outweigh the negative effects, the *De Minimis* Notice quantifies with the help of lower market share thresholds, what is not, in the Commission's view, an appreciable restriction of competition in the first place and for that reason not prohibited by Article 81(1). A vertical agreement between non-competitors whose market share on the relevant market does not exceed 15% is generally considered not to have appreciable anti-competitive effects, unless the agreement contains a hardcore restriction⁴⁷. The same is true for vertical agreements between competitors, like in situations of dual distribution⁴⁸ when their market share does not exceed 10%. Where the market is foreclosed by the application of parallel networks of similar vertical agreements by several companies, the "*de minimis*" threshold is set at 5%. For instance, a cumulative effect may arise where more than 30% of competing motor vehicles are marketed through selective distribution systems, which by their criteria prevent access to the market to categories of distributors capable of adequately selling the vehicles in question⁴⁹. Cumulative effects also arise if non-compete obligations on distributors or repairers foreclose access to the market to certain suppliers. These "*de-minimis*" thresholds are important in relation to the conditions as contained in articles 3 and 5 of the Regulation. These conditions do not apply to agreements below the "*de minimis*" thresholds.

In practice, on the basis of the information available, "*de minimis*" market share thresholds are very likely to be exceeded in the case of agreements entered into by a motor vehicle manufacturer and its authorised repair network as regards the provision of brand-specific spare parts, repair and maintenance services⁵⁰.

⁴⁶ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001, p.13.

⁴⁷ Severely anti-competitive restraints, that is, those listed in Article 4 of the Regulation (hardcore restrictions) generally constitute appreciable restrictions of competition even at low market shares; see Recital 12.

⁴⁸ Article 1(a) of the Regulation defines competitors as "actual or potential suppliers on the same product market" irrespective of where they supply the products. It follows from the definition that suppliers which also sell vehicles or provide services to end-users are considered as competitors of their distribution or repair network who sell the same vehicles or provide the same services.

⁴⁹ Article 1(1)(f), (g) and (h). See also the Commission's report on the evaluation of Regulation 1475/95, paragraphs 20 and 82, and Guidelines on Vertical Restraints, paragraphs 82 and 104 to 114.

⁵⁰ See below Chapter 6 on market definition.

4.3.2. General conditions on specific provisions which must be included in the agreements

Article 3

General conditions

(...)

3. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that the supplier agrees to the transfer of the rights and obligations resulting from the vertical agreement to another distributor or repairer within the distribution system and chosen by the former distributor or repairer.
4. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.
5. The exemption shall apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer provides
 - (a) that the agreement is concluded for a period of at least five years; in this case each party has to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement;
 - (b) or that the agreement is concluded for an indefinite period; in this case the period of notice for regular termination of the agreement has to be at least two years for both parties; this period is reduced to at least one year where:
 - (i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or
 - (ii) the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.
6. The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate *inter alia* to any of the following:
 - (a) supply obligations;
 - (b) the setting or attainment of sales targets;
 - (c) the implementation of stock requirements;
 - (d) the implementation of an obligation to provide or use demonstration vehicles;
 - (e) the conditions for the sale of different brands;
 - (f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business; or
 - (g) the issue whether the termination of an agreement is justified by the reasons given in the notice.

The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.

(...)

The four other general conditions of Article 3 of the Regulation aim at safeguarding a relatively stable contractual framework in which sellers of new vehicles or providers of repair services can engage in vigorous competition. The Regulation requires that there be

a right to transfer a dealership or authorised repair business together with all related rights and obligations to another member of the brand network⁵¹, an obligation to give reasons for contract termination⁵², a right of referral of contract disputes to an arbitrator⁵³ and a minimum duration for i) fixed-term contracts ii) periods of notice for non-renewal or termination of the contract⁵⁴. The obligation to give reasons for contract termination and the ability to transfer rights and obligations were not provided for by Regulation 1475/95.

Question 8: Can an individual exemption be granted in respect of an agreement which does not meet the general conditions of the Regulation as to contractual protection?

If a vertical agreement in this sector is caught by Article 81(1)⁵⁵, and the Regulation does not apply, the parties can only avoid the agreement being null and void pursuant to Article 81(2) by meeting the requirements for an individual exemption pursuant to Article 81(3). When the Regulation does not apply, it is the entire combination of restrictive provisions in the agreement which needs to be taken into account in respect of the application of Article 81.

The introduction of the general conditions on contractual protection is part of the specific, stricter rules devised by the Commission for this sector compared to other economic sectors. This is based on the Commission's experience that a stable contractual framework allows for the benefits of distribution and for cost savings to be passed on to consumers⁵⁶. Therefore, a party which applies for an individual exemption should show why, in its specific case, the absence of relevant provisions on contractual protection in its vertical agreements helps to attain or does not obstruct the attainment of the positive effects referred to in Article 81(3).

Question 9: Do all vertical agreements falling within the scope of the Regulation need to comply with all the conditions which relate to contractual matters to be able to benefit from the block exemption?

The right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator as set out in Article 3(6) applies to all vertical agreements falling within the scope of the Regulation. The conditions on contractual protection set out in Article 3(3) and (4) apply to restrictive agreements to which distributors or repairers are a party. The relevant general condition regarding the minimum duration of contracts and periods of notice set out in Article 3(5) only applies to agreements between suppliers of new motor vehicles and their distributors or authorised repairers.

⁵¹ Article 3(3).

⁵² Article 3(4).

⁵³ Article 3(6).

⁵⁴ Article 3(5).

⁵⁵ See above, question 7.

⁵⁶ Recitals 1 and 4.

Question 10: Can a supplier restrict the transfer of rights and obligations to another member of the supplier's network, if the other member does not carry out the same kind of activity as the member selling its business?

Yes. The Regulation fosters competition and market integration by facilitating acquisitions of businesses by prospective acquirers who are members of the distribution or the repair network⁵⁷. Such prospective acquirers fulfil the criteria set out by the supplier elsewhere and thus benefit from a presumption that they also fulfil those criteria in respect of the business operations of the selling member of the network. For instance, differences as to selection or sales criteria between network members who carry out the same kind of activity, even in other Member States, cannot be used to prevent transfers of rights and obligations. However, there may be no such presumption if the activities of the acquirer and the seller, such as selling new motor vehicles and repairing them, differ completely. The Regulation therefore does not stop suppliers from preventing transfers in such cases.

⁵⁷ Article 3(3). See Recital 10 regarding transfers to “undertakings of the same type ... within the distribution system”.

4.4. Hardcore restrictions (Article 4)

Article 4

Hardcore restrictions

(Hardcore restrictions concerning the sale of new motor vehicles, repair and maintenance services or spare parts)

1. The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
 - (a) the restriction of the distributor's or repairer's ability to determine its sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
 - (b) the restriction of the territory into which, or of the customers to whom, the distributor or repairer may sell the contract goods or services; however, the exemption shall apply to:
 - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor or repairer, where such a restriction does not limit sales by the customers of the distributor or repairer,
 - (ii) the restriction of sales to end users by a distributor operating at the wholesale level of trade,
 - (iii) the restriction of sales of new motor vehicles and spare parts to unauthorised distributors by the members of a selective distribution system in markets where selective distribution is applied, subject to the provisions of point (i),
 - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
 - (c) the restriction of cross-supplies between distributors or repairers within a selective distribution system, including between distributors or repairers operating at different levels of trade;
 - (d) the restriction of active or passive sales of new passenger cars or light commercial vehicles, spare parts for any motor vehicle or repair and maintenance services for any motor vehicle to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used. The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5(2)(b);
 - (e) the restriction of active or passive sales of new motor vehicles other than passenger cars or light commercial vehicles to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used, without prejudice to the ability of the supplier to prohibit a member of that system from operating out of an unauthorised place of establishment;
- (Hardcore restrictions only concerning the sale of new motor vehicles)*
- (f) the restriction of the distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range;
 - (g) the restriction of the distributor's ability to subcontract the provision of repair and maintenance services to authorised repairers, without prejudice to the ability of the supplier to require the distributor to give end users the name and address of the authorised repairer or repairers in question before the conclusion of a sales contract and, if any of these authorised repairers is not in the vicinity of the sales outlet, to also tell end users how far the repair shop or repair shops in question are from the sales outlet; however, such obligations may only be imposed provided that similar obligations are

imposed on distributors whose repair shop is not on the same premises as their sales outlet;

(Hardcore restrictions only concerning the sale of repair and maintenance services and of spare parts)

- (h) the restriction of the authorised repairer's ability to limit its activities to the provision of repair and maintenance services and the distribution of spare parts;
 - (i) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use these parts for the repair and maintenance of a motor vehicle;
 - (j) the restriction agreed between a supplier of original spare parts or spare parts of matching quality, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods or services to authorised or independent distributors or to authorised or independent repairers or end users;
 - (k) the restriction of a distributor's or authorised repairer's ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work;
 - (l) the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components which limits the latter's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.
2. The exemption shall not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures.

Such access must include in particular the unrestricted use of the electronic control and diagnostic systems of a motor vehicle, the programming of these systems in accordance with the supplier's standard procedures, the repair and training instructions and the information required for the use of diagnostic and servicing tools and equipment.

Access must be given to independent operators in a non-discriminatory, prompt and proportionate way, and the information must be provided in a usable form. If the relevant item is covered by an intellectual property right or constitutes know-how, access shall not be withheld in any abusive manner.

For the purposes of this paragraph 'independent operator' shall mean undertakings which are directly or indirectly involved in the repair and maintenance of motor vehicles, in particular independent repairers, manufacturers of repair equipment or tools, independent distributors of spare parts, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers.

Article 4 of the Regulation contains a list of 13 severely anti-competitive restraints (hardcore restrictions). The presence of one or more of these restraints in an agreement would automatically lead to the benefit of the block exemption being lost in respect of the entire agreement, and not only the vertical restraint concerned. In its enforcement of EC

competition rules, the Commission considers that the individual exemption of vertical agreements containing hardcore restrictions is unlikely⁵⁸.

Question 11: Can the same hardcore restriction be arrived at in different ways?

To avoid circumvention, the Regulation defines hardcore restraints as provisions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object of restricting a certain ability⁵⁹, or a certain type of sale⁶⁰. This broad definition indicates that each of the hardcore restrictions can be brought about through one or more indirect means, and that in practice this may result in an anti-competitive outcome similar to that resulting from the express inclusion of the restriction in question in the written contract. Hardcore restrictions may of course take the form of outright prohibitions, but may also consist of limitations, financial disincentives, pressures or obstacles to certain activities or transactions. Recitals 12 to 26 set out some of many possible examples of agreements or practices which may indirectly constitute hardcore restrictions for the purposes of the Regulation⁶¹.

For instance, several provisions or practices listed in Recitals 16 and 17 may constitute hardcore restrictions by indirectly restricting active or passive sales of a distributor.

(...)

WHEREAS:

(...)

(16) Limits placed by suppliers on their distributors' sales to any end user in other Member States, for instance where distributor remuneration or the purchase price is made dependent on the destination of the vehicles or on the place of residence of the end users, amount to an indirect restriction on sales. Other examples of indirect restrictions on sales include supply quotas based on a sales territory other than the common market, whether or not these are combined with sales targets. Bonus systems based on the destination of the vehicles or any form of discriminatory product supply to distributors, whether in the case of product shortage or otherwise, also amount to an indirect restriction on sales.

(...)

(17) Vertical agreements that do not oblige the motor vehicle distributors and repairers within a supplier's distribution system to honour warranties, perform free servicing and carry out recall work in respect of motor vehicles sold by the manufacturer in question anywhere in the common market amount to an indirect restriction of sales. Furthermore, in order to allow sales by motor vehicle distributors to end users throughout the common market, this Regulation does not cover distribution agreements which do not require the repairers within the supplier's system to carry out repair and maintenance services for the contract goods and corresponding goods wherever these goods are sold in the common market.

(...)

⁵⁸ Guidelines on Vertical Restraints, paragraph 46.

⁵⁹ Article 4(1)(a), (f), (g), (h), (j), (k) and (l).

⁶⁰ Article 4(1)(b), (c), (d), (e), and (i).

⁶¹ See also examples given in question 6.

Question 12: What are active and passive sales?

“Active sales” means actively approaching individual customers by for instance direct mail or visits, through advertisement in media, or by other promotions not normally available or in circulation at the authorised place of establishment of a dealer or repairer⁶²; or by establishing a delivery point, warehouse or sales or delivery outlet at another place of establishment to facilitate dealings with customers or their intermediaries.

“Passive sales” means responding to unsolicited requests from customers or their duly authorised intermediaries including delivery of motor vehicles or spare parts to such customers or intermediaries. General advertising or promotions in media which are normally available or in circulation at the authorised place of establishment of the dealer or repairer or on the Internet are passive sales methods.

4.5. Specific conditions (Article 5)

<i>Article 5</i>	
<i>Specific conditions</i>	
1.	As regards the sale of new motor vehicles, repair and maintenance services or spare parts, the exemption shall not apply to any of the following obligations contained in vertical agreements: <ul style="list-style-type: none">(a) any direct or indirect non-compete obligation;(b) any direct or indirect obligation limiting the ability of an authorised repairer to provide repair and maintenance services for vehicles from competing suppliers;(c) any direct or indirect obligation causing the members of a distribution system not to sell motor vehicles or spare parts of particular competing suppliers or not to provide repair and maintenance services for motor vehicles of particular competing suppliers;(d) any direct or indirect obligation causing the distributor or authorised repairer, after termination of the agreement, not to manufacture, purchase, sell or resell motor vehicles or not to provide repair or maintenance services.
2.	As regards the sale of new motor vehicles, the exemption shall not apply to any of the following obligations contained in vertical agreements: <ul style="list-style-type: none">(a) any direct or indirect obligation causing the retailer not to sell leasing services relating to contract goods or corresponding goods;(b) any direct or indirect obligation on any distributor of passenger cars or light commercial vehicles within a selective distribution system, which limits its ability to establish additional sales or delivery outlets at other locations within the common market where selective distribution is applied.
3.	As regards repair and maintenance services or the sale of spare parts, the exemption shall not apply to any direct or indirect obligation as to the place of establishment of an authorised repairer where selective distribution is applied.

Article 5 contains a list of seven specific obligations which may not benefit from exemption under the Regulation. Where such obligations can be severed from the rest of

⁶² In a distribution system based on territorial exclusivity the place of establishment is deemed to be his exclusive territory.

the agreement, the remaining part of the agreement continues to benefit from the block exemption. The specific conditions exclude both direct and indirect means to attain the anti-competitive outcome of such obligations.

4.5.1. Multi-branding.

The Regulation seeks to ensure access to markets and to give distributors and repairers in particular opportunities to sell and repair vehicles from different suppliers, i.e. “multi-branding”. Article 5 excludes obligations contrary to this aim from the block exemption. As regards the sale of vehicles, repair and maintenance services or spare parts, the Regulation does not cover any direct or indirect non-compete obligations. In many instances, the activity of providing repair and maintenance services for motor vehicles of one brand does not actually compete with the provision of such services for a different brand. In order to allow authorised repairers to repair vehicles of different brands, the specific condition excluding non-compete obligations is therefore complemented with another condition excluding from the block exemption any obligation limiting the ability of authorised repairers to provide such services for vehicles from competing suppliers⁶³.

Article 1

Definitions

1. For the purposes of this Regulation:

(...)

- (b) ‘Non-compete obligation’ means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 30% of the buyer’s total purchases of the contract goods, corresponding goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year. An obligation that the distributor sell motor vehicles from other suppliers in separate areas of the showroom in order to avoid confusion between the makes does not constitute a non-compete obligation for the purposes of this Regulation. An obligation that the distributor have brand-specific sales personnel for different brands of motor vehicles constitutes a non-compete obligation for the purposes of this Regulation, unless the distributor decides to have brand-specific sales personnel and the supplier pays all the additional costs involved. (...)

Non-compete obligations are notably those which make benefits or incentives expressly dependent on the member of the network only selling the supplier’s goods or not selling goods which compete with the contract goods.

The Regulation excludes direct or indirect obligations which make distributors or repairers buy more than 30% of their purchases of vehicles or spare parts pertaining to the same relevant market from a single supplier. It does, however, not mean that the distributor or repairer can be required to buy the specified quantity (up to 30% of purchases) directly

⁶³ Article 5(1)(a) and (b).

from the supplier. It can also buy the same goods from other sources designated by the supplier, such as any other undertaking within the distribution system. General obligations or requirements which objectively speaking do not hamper members of a suppliers' network from purchasing 70% of their requirements of substitutable goods or services from other suppliers producing competing goods are covered by the block exemption⁶⁴. Insofar as access to the market is not foreclosed to competing suppliers, such obligations may not raise competition problems. For instance, fidelity rebates based on a specific proportion (greater than 30%) of a buyer's purchases would be an indirect non-compete obligation, whereas a scale of reducing prices based on absolute volumes purchased and linked to economies of scale would not. Disputes as to whether direct or indirect non-compete obligations hamper the sale of different brands in specific cases may be referred to an independent third party or arbitrator⁶⁵.

Question 13: Does the maximum 30% limit on annual purchases prevent buyers from purchasing the goods only from one supplier?

No. The non-compete obligation relates to the freedom of the dealer or repairer to purchase and resell competing products. The Regulation only provides that the block exemption does not apply to direct or indirect obligations that induce or oblige the distributor to purchase more than 30% of his requirements of a particular type of product from one supplier. The 30% limit on direct or indirect non-compete obligations should thus enable those network members who wish to do so, to buy and sell goods from at least three different competing suppliers. This does not prevent the exemption from applying if the distributor or repairer freely chooses to sell goods from a single supplier.

Question 14: May a supplier impose specific conditions for the sale of its motor vehicles by a multi-brand distributor?

The block exemption no longer covers obligations as to sales of competing motor vehicles which were allowed under Regulation 1475/95, such as having separate sales premises and management for each brand, or selling each brand through a distinct legal entity⁶⁶. The Regulation nonetheless covers requirements to sell vehicles of different brands in separate areas of a single showroom. It also covers situations where the dealer decides to have brand-specific sales personnel and the supplier pays all the additional costs involved⁶⁷. The Regulation does not, however, cover the provision of any advantage in excess of the actual costs incurred in having such personnel. The Regulation also covers an obligation to display the full range of motor vehicles in the showroom provided that such an obligation does not prevent the display or sale of motor vehicles from other suppliers or render the display or sale of such vehicles unreasonably difficult⁶⁸.

⁶⁴ Article 4(1)(b) and (c).

⁶⁵ Article 3(6)(e).

⁶⁶ Article 3(3) of Regulation 1475/95.

⁶⁷ Article 1(1)(b).

⁶⁸ Recital 27.

Question 15: Does the Regulation cover non-compete obligations agreed to by the buyer in return for the supplier making trade loans to the buyer or investing directly in the buyer's business premises or equipment?

Unlike Regulation 2790/1999⁶⁹, the Regulation neither covers non-compete obligations of certain duration nor makes any exception regarding goods being sold or services being provided in premises and land owned or leased by the supplier. Partial investments in such premises or equipment or financing used by the supplier to hinder the sale of competing brands or products are not covered either. However, trade loans for the purchase of lubricants, for instance, which can be repaid at any moment and which do not directly or indirectly hinder the buyer from selling competing goods are not non-compete obligations.

4.5.2. Location of authorised distributors or repairers in selective distribution systems

The Regulation does not cover any restriction on the freedom of an authorised repairer to locate its workshops in the area of the Common Market where selective distribution, whether quantitative or qualitative is applied⁷⁰. Moreover, as of 1 October 2005, the Regulation will no longer cover any restriction on any authorised distributor of passenger cars or light commercial vehicles freely establishing additional sales or delivery outlets in the area of the Common Market where selective distribution, whether quantitative or qualitative, is applied. The use of location clauses in agreements for the distribution of such vehicles will thus be incompatible with the Regulation.

<p><i>Article 1</i></p> <p><i>Definitions</i></p>
<p>1. For the purposes of this Regulation:</p> <p>(...)</p> <p>(o) 'Passenger car' means a motor vehicle intended for the carriage of passengers and comprising no more than eight seats in addition to the driver's seat.</p> <p>(p) 'Light commercial vehicle' means a motor vehicle intended for the transport of goods or passengers with a maximum mass not exceeding 3.5 tonnes; if a certain light commercial vehicle is also sold in a version with a maximum mass above 3.5 tonnes, all versions of that vehicle are considered to be light commercial vehicles. (...)</p>

Question 16: For the distribution of which type of vehicles are location clauses still allowed under the Regulation?

The freedom to establish additional outlets concerns the sale through a selective distribution network of passenger cars and light commercial vehicles with a maximum mass below 3.5 tonnes. If distributors of commercial vehicles in selective distribution systems sell models of light commercial vehicles which exist in versions both below and above a maximum mass of 3.5 tonnes, location clauses for these models, are also not

⁶⁹ Articles 5(a) and 1(1)(b).

⁷⁰ Article 5(3). See also definitions of selective distribution in Article 1(1)(f), (g) and (h).

covered by the Regulation. Location clauses restricting the establishment of additional outlets for other motor vehicles such as trucks and buses are however allowed⁷¹.

Question 17: Can obligations contrary to the specific conditions of the Regulation meet the conditions for an individual exemption?

The specific conditions set out in the Regulation are more numerous and stricter than the corresponding provisions in Regulation 2790/1999 or those in the previous block exemption regulations in the motor vehicle sector, Regulations 1475/95 and 123/85⁷². In order to ensure that the requirements of Article 81(3) are met, the specific conditions set out in Article 5 exclude several obligations which are or were exempted under these other regulations. By placing vertical agreements in the motor vehicle sector under a more demanding legal framework, the Regulation indicates that obligations contrary to Article 5 may raise serious competition concerns that can only be assessed in an individual examination. Companies are encouraged to do their own assessment and may find guidance for this in the Commission Guidelines on Vertical Restraints, which indicate the policy which the Commission follows in the assessment of individual cases⁷³.

4.6. Withdrawal of the benefit of the block exemption (Article 6)

Article 6

Withdrawal of the benefit of the Regulation

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that vertical agreements to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular:
 - (a) where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers, or
 - (b) where competition is restricted on a market where one supplier is not exposed to effective competition from other suppliers, or
 - (c) where prices or conditions of supply for contract goods or for corresponding goods differ substantially between geographic markets, or
 - (d) where discriminatory prices or sales conditions are applied within a geographic market.
2. Where in any particular case vertical agreements to which the exemption applies have effects incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the relevant authority of that Member State may withdraw the benefit of application of this Regulation in respect of that territory, under the same conditions as those provided in paragraph 1.

⁷¹ Articles 4(1)(d) and 5 (2) (b) for passenger cars and light commercial vehicles and Article 4(1)(e) for other motor vehicles.

⁷² See Recitals 1 to 4.

⁷³ Guidelines on Vertical Restraints, section VI. Enforcement Policy in Individual Cases.

The Commission, and in certain cases the competition authority of a Member State, may withdraw the benefit of the exemption in respect of individual agreements if it finds that due to specific circumstances the conditions for exemption set out in Article 81(3) are not met.

Question 18: In which circumstances may the Commission withdraw the Regulation?

Article 6 contains a non-exhaustive list of circumstances in which the Commission may decide to use its prerogative to withdraw the benefit of the block exemption from specific vertical agreements. These give an indication to suppliers and distributors about what circumstances or behaviour might lead the Commission to withdraw the block exemption. However, the precise levels at which, for instance, restricted access to or effective competition on a relevant market may lead to one or more of the four cumulative conditions of Article 81(3) not being met can only be established on a case by case basis. The Commission's Guidelines on Vertical Restraints provide indications of procedure and substance about withdrawal by the Commission and the Member States⁷⁴.

4.7. Disapplication in a relevant market (Article 7)

Article 7

Non-application of the Regulation

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.
2. A regulation pursuant to paragraph 1 shall not become applicable earlier than one year following its adoption.

Question 19: In which circumstances may the Regulation be disapplied on a relevant market?

Where there is a cumulative effect, the Regulation enables, but does not oblige, the Commission to disapply the block exemption in respect of specific vertical restraints. The fact that parallel networks of similar vertical restraints cover more than 50% of a relevant market need not in itself trigger disapplication of the Regulation. Nor will the Regulation necessarily be disapplied in respect of entire vertical agreements. The Regulation may also be disapplied in respect of specific restrictions or stipulations.

For instance, if more than 50% of suppliers on a relevant market were to set the exact total number of distributors by operating quantitative selective distribution systems clearly aimed at preventing categories of distributors capable of adequately selling the vehicles in question from having access to the market, this might result in less intra- and inter-brand competition, and lead to higher prices for consumers. Disapplication of the Regulation with regard to restrictions limiting the number of distributors may be in the interest of consumers. If the block exemption were only disapplied in respect of this quantitative

⁷⁴ Guidelines on Vertical Restraints, section IV, paragraphs 71 to 79.

criterion, this would mean that the exemption still applied to selective distribution and to quantitative selection criteria, such as minimum sales obligations, which limit the number of distributors by less direct means.

As under the Regulation 2790/1999, the disapplication requires the adoption of a specific regulation disapplying the block exemption from the vertical restraints in question. The Commission's Guidelines on Vertical Restraints provide indications of procedure and substance about the disapplication⁷⁵. However, any such specific regulation disapplying the Regulation may not become applicable earlier than one year following its adoption⁷⁶.

4.8. Entry into force and transitional period (Articles 12 and 10)

Article 12

Entry into force and expiry

3. This Regulation shall enter into force on 1 October 2002.
4. Article 5(2)(b) shall apply from 1 October 2005.
5. This Regulation shall expire on 31 May 2010.

Article 10

Transitional period

The prohibition laid down in Article 81(1) shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force on 30 September 2002 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 1475/95.

The Regulation applies between 1 October 2002 and 31 May 2010. New agreements entering into force from 1 October 2002 will have to be compatible with the new Regulation for the benefit of the block exemption to apply. However, in order to allow all operators time to adapt existing vertical agreements which are compatible with Regulation 1475/95 and which are still in force after the exemption provided for in Regulation 1475/95 expires on 30 September 2002, such agreements benefit from a transitional period until 30 September 2003, during which time the new Regulation exempts them from the prohibition laid down in Article 81(1)⁷⁷. If such agreements subsist on 1 October 2003 and conflict with the application of the Regulation, Article 10 no longer exempts them from the prohibition laid down in Article 81(1). In practice, these agreements and all their relevant provisions must conform to the requirements of the Regulation as of 1 October 2003 if they are to benefit from the block exemption.

⁷⁵ Guidelines on Vertical Restraints, section IV, paragraphs 80 to 89.

⁷⁶ Instead of the six months provided for in Regulation 2790/1999.

⁷⁷ See section 5.3.8.

Question 20: How can termination of contracts which comply with Regulation 1475/95 be effected during the transitional period?

Regulation 1475/95 only applied provided, among other things, that the period of notice given to dealers was at least two years or, in case of compensation or reorganisation of the whole or a substantial part of the network, at least one year. In the event of disagreement, disputes were to be referred to an expert third party or arbitrator or to a competent court to rule in conformity with national law⁷⁸. The expiry of Regulation 1475/95 on 30 September 2002 and its replacement by a new Regulation does not in itself imply that there should be a reorganisation of the network. After the entry into force of the Regulation, a vehicle manufacturer may nonetheless decide to substantially reorganise its network⁷⁹. To comply with Regulation 1475/95 and thus, to benefit from the transitional period, notices of regular contract termination should thus be given two years in advance unless a reorganisation is decided upon or if there is an obligation to pay compensation.

Question 21: During the transitional period, is there any conflict between rights conferred by agreements complying with the Regulation and rights conferred by agreements complying with Regulation 1475/95, having particular regard to the innovations introduced by the Regulation?

No. The automatic protection which the transitional period allows should ensure that, before 1 October 2003 the Regulation does not call into question rights or obligations which existed on 30 September 2002. Until 30 September 2003, the prohibition laid down in Article 81(1) does not apply to “old agreements” which meet two cumulative conditions, namely that their relevant express provisions i) are in force on 30 September 2002 and ii) satisfy the conditions for exemption provided for in Regulation 1475/95.

Question 22: May the rights of a dealer over a certain territory call into question the appointment of a candidate authorised repairer for one brand during the transition period?

Only in certain circumstances. For instance, a repairer may wish, as of 19 December 2002, to be appointed as authorised repairer of a particular brand in a particular territory in respect of which the supplier applies qualitative selective distribution, and may wish the supplier to supply him with spare parts for that brand. If an agreement which was in force on 30 September 2002 and remains in force on 19 December 2002 expressly stipulates that only one dealer within the distribution system will be supplied with spare parts of that particular brand for the territory in question⁸⁰, the repairer cannot possibly argue that such a stipulation infringes Article 81 until 1 October 2003.

⁷⁸ Article 5(2)(2) and (3) of Regulation 1475/95.

⁷⁹ See section 5.3.8.

⁸⁰ See Article 5(3) of the new Regulation and Article 1 of Regulation 1475/95.

Question 23: Can dealers be prevented from taking on additional brands during the transition period?

Only in certain circumstances. For instance, on 1 January 2003, a distributor of brand A may wish to sell new motor vehicles of another brand B at his current and sole sales premises, in which he sells new motor vehicles of brand A. If his agreement with manufacturer A which was in force on 30 September 2002 and remains in force on 1 January 2003 expressly prevents him from selling a different brand within the same premises⁸¹, the distributor cannot possibly argue that such a stipulation infringes Article 81 until 1 October 2003. However, manufacturer A cannot object to the use of the same sales premises unless the old agreement contains express provisions to that effect.

Question 24: Does the fact that additional products, such as lubricants, and additional agreements, such as those entered into by part wholesalers, have been brought within the scope of the Regulation cause conflicts during the transition period with the regime formerly applied to such products and agreements under Regulation 2790/1999?

No. Agreements in respect of products or services which were not formerly within the scope of Regulation 1475/95 and which meet the conditions for exemption set out in block exemption Regulation 2790/1999 will not in normal circumstances constitute a priority for Commission enforcement of the new Regulation during the transitional period set out in Article 10. It is likely that such agreements could, during that period, benefit from individual exemption. After the end of the transitional period on 30 September 2003, their situation will be identical to those of products and agreements which fell under Regulation 1475/95 (see above).

4.9. Monitoring and evaluation report (Article 11)

Article 11

Monitoring and evaluation report

1. The Commission shall monitor the operation of this Regulation on a regular basis, with particular regard to its effects on:
 - (a) competition in motor vehicle retailing and in after sales servicing in the common market or relevant parts of it,
 - (b) the structure and level of concentration of motor vehicle distribution and any resulting effects on competition.
2. The Commission shall draw up a report on this Regulation not later than 31 May 2008 having regard in particular to the conditions set out in Article 81(3).

The Commission will monitor the operation of the Regulation on a regular basis, with particular regard to its effects on competition in motor vehicle retailing and in after sales

⁸¹ See Article 5(1)(a) and Article 1(1)(b) of the new Regulation and Article 3(3) of Regulation 1475/95.

servicing in the Common Market or relevant parts of it⁸². This will include regular monitoring of price differentials within the Single Market and, if need be, specific inquiries in the circumstances mentioned at Articles 6 and 7 of the Regulation. This will also include monitoring the effects of this Regulation on the structure and level of concentration of motor vehicle distribution and any resulting effects on competition. In the context of the future decentralised application of Article 81, it can be expected that this monitoring will be carried out in close co-operation with national competition authorities.

As with Regulation 1475/95, the Commission will carry out an evaluation of the operation of the Regulation before it expires, and will draw up a report not later than 31 May 2008.

⁸² See Recital 38.

5. RIGHTS, OBLIGATIONS AND OPPORTUNITIES CONFERRED BY THE REGULATION

This chapter looks at the Regulation in a “question and answer” format from the perspective of various types of interested party, including consumers. Where possible, the issues discussed are cross-referenced to the other parts of this brochure, where a more technical explanation is given.

5.1. Consumers: increasing consumer choice in accordance with Single Market principles

The need to increase the benefits that distribution systems bring to the consumer is at the heart of Commission policy for the motor vehicle sector. By injecting greater competition into vehicle sales, servicing and repair, and the sale of spare parts, Regulation 1400/2002 promotes consumer choice.

Although the Regulation is not aimed at bringing about price harmonisation, it contains a number of measures to make it easier for consumers to exercise their Single Market right to take advantage of price differentials between the various Member States and buy their vehicle where it suits them. In particular, most restrictions on consumers’ use of intermediaries will no longer be covered by the block exemption. Furthermore, by promoting active sales and the opening of additional outlets, and by clarifying the position on Internet use, the new rules make it easier for dealers to sell to consumers wherever they wish within the Single Market. The availability clause, which under the previous Regulation 1475/95 allowed consumers to buy a car with their home country specification in another Member State, including right-hand drive cars in mainland Europe, has also been carried forward into the new rules. The availability clause provided for in Article 4(1)(f) of Regulation 1400/2002 covers all motor vehicles, including light commercial vehicles which are sold anywhere in the Common Market.

By only exempting agreements that oblige authorised repairers to repair vehicles sold by any dealer in the distribution system, the Regulation ensures that a consumer can take his vehicle to any authorised repairer anywhere in the European Union to be repaired and serviced. The Regulation also contains measures which aim to ensure that consumers continue to be able to get their cars repaired and serviced by independent repairers, and that safety and environmental protection will be maintained.

Many of these measures are dealt with in other sections of this brochure, since they have a more direct impact on other classes of operator. Listed below are a series of questions and issues of more direct interest to the consumer.

5.1.1. Sales

Question 25: Is a consumer free to buy a vehicle wherever he/she considers it to be most advantageous in the Single Market?

The consumer’s freedom to buy anywhere in the Single Market is one of the fundamental achievements of the European Union, and the Regulation reinforces the right to buy a

motor vehicle in another Member State. A manufacturer, importer, or area distributor may never restrict a dealer from selling to any consumer who contacts him directly, through an intermediary, or via the Internet. If a supplier were to instruct a dealer not to sell to consumers from other Member States, sought to deter him from doing so or imposed any restrictions on sales to such consumers, this would be a serious restriction of competition, which would mean that the supplier's distribution agreements would not be covered by the block exemption. In recent years, the Commission has detected several infringements of EC competition rules which involved restrictions on sales to foreign consumers and has fined the undertakings involved⁸³.

Question 26: Can a dealer in another Member State refuse to sell a consumer a car?

Business sense would normally lead a dealer to sell as many cars as possible, as the more he sells the greater his profits. However, a dealer (referred to in the Regulation as a distributor), like a retailer of other goods, may refuse to sell to any consumer, so long as he decides on his own initiative and not on instructions from the supplier. If however the supplier⁸⁴ were to instruct its dealers not to sell to consumers from other Member States or sought to deter them from doing so⁸⁵, this would be a serious restriction of competition, and most probably a breach of Article 81 of the EC Treaty.

Question 27: Should a consumer who orders a vehicle from a dealer in another Member State have to wait a longer time for his order to be fulfilled?

Normally, delays should be no longer than for a similarly specified vehicle in the local version. If it were to be shown that a supplier had caused deliveries of vehicles to its dealers for sale to foreign customers to suffer unduly long delays, with the object of discouraging those customers from buying in another Member State, this would be a serious restriction of competition. If, for example, a Danish consumer orders a left-hand-drive car of a given model with tinted windows, 16 valve engine and a sunroof from an Irish dealership, delays in fulfilling such an order⁸⁶ should be comparable to those experienced by an Irish consumer ordering a right-hand-drive car of that model with tinted windows, 16 valve engine and a sunroof from the same dealership. Any additional delivery time must be justifiable.

Question 28: Can a supplier make a consumer from another Member State wait before supplying a certificate of conformity?

No. Suppliers must systematically make available the full certificate of conformity documentation to the dealer at the time the vehicle is delivered to the consumer or to his intermediary. If this is not done, the consumer will not be able to register the vehicle for

⁸³ Commission decisions imposing fines on Volkswagen (1998 and 2001), Opel (2000) and DaimlerChrysler (2001). See annex I for exact references of these decisions.

⁸⁴ I.e. the manufacturer, importer, or area distributor.

⁸⁵ For instance, by restricting their supplies of vehicles.

⁸⁶ See Article 4(1)(f).

use within another Member State. This may amount to an indirect restriction on sales, and a serious restriction of competition⁸⁷.

Question 29: Can a dealer in a selective distribution system make his customers sign an undertaking/other document to the effect that the vehicle will not be resold for commercial gain while new?

It is legitimate for a supplier operating a selective distribution system to prevent sales to resellers who are not members of that system. However, the consumer is free to sell the motor vehicle at any time provided he is not a disguised independent reseller. If a dealer, acting on instructions from his supplier, were to take measures to prevent a purchaser from reselling a vehicle for reasons other than commercial gain⁸⁸, or to prevent a purchaser from re-selling a vehicle once it was no longer new, this would be an indirect restriction on sales.

Question 30: What if a dealer tells a consumer who tries to buy his car in another Member State, or tells an intermediary acting for a consumer, that he cannot order the model in question with the specifications current in the consumer's home country, or that he cannot obtain a price quotation for such a vehicle?

Suppliers must provide dealers with motor vehicles built to specifications current in other Member States⁸⁹. If a supplier were not to do so, this would amount to a serious restriction of competition and a breach of the consumer's Single Market rights. However, a supplier can refuse to supply such a vehicle if the dealer does not normally sell the local variant of the model in question: in other words, if the vehicle does not correspond to a vehicle within the dealer's contract range⁹⁰.

For example, a Dutch dealer of brand A should be able to order a right-hand-drive car of model X for a UK consumer unless

- 1) the Dutch dealer does not normally sell cars of model X, and
- 2) cars of model X are not normally made in a right-hand-drive version.

If the dealer sells the model in question, he must be able to obtain a price quotation for versions of that model with specifications current in other Member States. If he cannot obtain such a price quotation promptly, this could amount to a serious restriction on competition by the supplier.

⁸⁷ Article 4(1)(b), (d) and (e).

⁸⁸ For example, because the consumer's personal circumstances have changed since he placed the order and he now needs a larger car.

⁸⁹ See Article 4(1)(f).

⁹⁰ For example, because the model in question has not yet been launched in the Member State where the dealer is established.

Question 31: Can the dealer charge a right-hand-drive supplement or another similar kind of surcharge?

Surcharges, such as right-hand-drive supplements, which take account of differences in vehicle specification between Member States, and reflect differences in the cost of production or distribution, are not in themselves restrictive of competition. However, the level of surcharge must be objectively justifiable, particularly with regard to the real additional cost of producing or delivering the vehicle. There is no rule of thumb for calculating what an objectively justified level of surcharge in any given case might be, since amongst other things, the additional cost of producing or delivering the vehicle in question will vary depending on the model.

Question 32: What if the dealer says that he has been told not to grant discounts on a certain model?

Dealers must be free to sell vehicles below the supplier's recommended price⁹¹. Manufacturers cannot fix actual selling prices or minimum prices. If a supplier were to restrict a dealer's ability to grant discounts, this would be a serious restriction of competition⁹², which would mean that the supplier's distribution agreements would not be covered by the block exemption.

Question 33: Can a supplier set up a special scheme in a Member State, under which consumers get a rebate if they register the car in that country, but consumers who register their vehicles in other Member States don't qualify for the rebate?

No. This scheme amounts to a restriction on sales to consumers from another Member State and is a serious restriction of competition and would mean that the supplier's distribution agreements would not be covered by the block exemption⁹³.

5.1.2. After-sales servicing

Question 34: Does a consumer have to take his vehicle back to the dealer he bought it from to have warranty work/servicing done?

No. For the Regulation to apply the consumer should be able to take the vehicle to any authorised repairer within the supplier's network anywhere in the EU. The Regulation⁹⁴ only exempts agreements with authorised repairers when the supplier imposes an obligation on all its authorised repairers to repair all vehicles of the brand in question, to honour warranties, perform free servicing and carry out recall work irrespective of where

⁹¹ Or indeed above it, provided that the supplier has not set a maximum price. See Article 4(1)(a).

⁹² See Commission Decision of 29.6.2001 in case COMP/36.693 – Volkswagen, OJ L 262, 2.10.2001, p. 14, see also *Press Release - IP/01/760 - 30.05.2001*. The decision imposed a fine for this infringement.

⁹³ See Article 4(1)(b) and (c).

⁹⁴ Article 4(1)(b), first sentence, and (d) and Recital 17.

the car was bought. If the authorised repairer is not able to service a car which is not sold in his Member State, he will be in a position to liaise with the supplier or another authorised repairer in another Member State. The consumer does not have to re-register the warranty in his home Member State in order to have warranty repairs done. The warranty period starts with the delivery of a car by the authorised dealer. If a manufacturer, importer, dealer, repairer or another company within the network were to impede consumers from availing themselves of the manufacturer's EU-wide warranty, this would mean that one of the basic conditions for the exemption to apply to the agreements in question would not be met.

Question 35: What if a consumer's car has a problem, covered by warranty, that his local authorised repairer cannot fix?

In these circumstances, the consumer may have to take the vehicle back to the dealership where it was purchased, just as he would for any other product⁹⁵. Alternatively, if he bought the car through an intermediary (see section 5.2) he may give the intermediary a mandate to take the vehicle back to the dealer he bought it from.

Question 36: What if the authorised dealer from whom a consumer buys his car does not service vehicles, the vehicle develops a fault during the warranty period, and the repairer to whom the dealer has sub-contracted servicing can't repair it?

The consumer can take the vehicle back to the place he bought it from, just as he would with any other consumer goods. The dealer who sold the vehicle will then either have to arrange for repairs to be carried out, or give the consumer a replacement vehicle, although the consumer's rights to this will depend on national contract law and the terms of the contract of sale⁹⁶.

Question 37: If a consumer has his vehicle repaired or maintained by an independent repairer during the warranty period, can the manufacturer refuse to honour the warranty?

If the consumer has his vehicle repaired or maintained by an independent repairer during the manufacturer's warranty period the warranty may be lost if the work carried out is faulty. However, a general obligation to have the car maintained or repaired only within the authorised network during such a period would deprive consumers of their right to choose to have their vehicle maintained or repaired by an independent repairer and it would, especially in the case of "extended warranties", prevent such repairers from competing effectively with the authorised network.

⁹⁵ This problem is governed by national contract law, and not by EC competition rules.

⁹⁶ See Recital 17.

Question 38: What can a consumer do if he thinks he has been the victim of restrictive behaviour?

He can complain to the European Commission or to a national competition authority⁹⁷. He may also be able to bring a claim for damages in a national court. The ability to bring such an action may, however, depend on national procedural rules, and the consumer should therefore take legal advice before bringing a claim.

Since not all problems that consumers encounter buying a vehicle in other Member States stem from a breach of competition rules, the Commission has published a list of contact points (“hot-lines”) for most manufacturers on its web site in order to encourage the resolution of disputes of various types and deal with other types of problems relating to the purchase of vehicles⁹⁸.

5.2. Intermediaries

An intermediary or purchase agent is a person or an undertaking which purchases a new motor vehicle on behalf of the consumer without being a member of the distribution network. Intermediaries are to be distinguished from independent resellers, who purchase a vehicle for resale and do not operate for the account of a named consumer. They are also to be distinguished from sales agents, who find customers for one or more dealers. Suppliers can only oblige their dealers to make sure that an intermediary has a prior valid authorisation⁹⁹ from the consumer to purchase and/or collect a specified vehicle. The only limitation on an intermediary’s activities permitted in an agreement covered by Regulation 1400/2002 is therefore the need to show a valid mandate from an individual consumer. The mandate must give the consumer’s name and address and must be signed and dated. It is up to the consumer to determine how specific the mandate is as regards the vehicle¹⁰⁰. No further requirements may be imposed if an intermediary is involved in the purchase of a new motor vehicle. The Commission has abolished its two notices¹⁰¹ which dealt with the activity of intermediaries.

⁹⁷ A list of these is available at http://europa.eu.int/comm/competition/national_authorities/

⁹⁸ At http://europa.eu.int/comm/competition/car_sector/

⁹⁹ This may be a written or electronically signed authorisation. See Recital 14.

¹⁰⁰ For instance, the mandate could relate to a class of vehicle, a given model or be more detailed.

¹⁰¹ Commission Notice concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ C 17, 18.1.1985, p. 4, and the Information from the Commission – Clarification of the activities of motor vehicle intermediaries, OJ C 329, 18.12.1991, p. 20. Based on these notices, intermediaries could be requested, for example, not have their office within the same premises as a supermarket. Another element hampering their activities was that a car dealer could be requested not to sell more than 10% of the new vehicles through a given intermediary.

Question 39: Can the dealer ask an intermediary to provide photocopies of his customers' identity cards or other documentation¹⁰², in addition to the signed mandate?

Yes, in certain circumstances. It should be borne in mind that within a selective distribution system a dealer may not sell new¹⁰³ motor vehicles to independent resellers. Therefore a dealer may, if he feels it necessary, ask an intermediary for evidence of the buyer's identity so as to prevent sales to independent resellers.

Although a dealer may, of his own volition, decide to ask his customers for further documentation, if a supplier instructs a dealer to systematically ask for such documentation, this would not be covered by the Regulation.

5.3. Authorised distributors of new motor vehicles (also referred to in this brochure as dealers)

Dealers play a key role as regards the development of the Single Market for new motor vehicles. A strong and independent dealer sector is more likely to engage in pro-competitive behaviour and to be more innovative, to the benefit of consumers. Regulation 1400/2002 therefore gives dealers more freedom to run their businesses as they see fit. The new Regulation has in particular considerably reduced the opportunities for manufacturers and their importers to impose measures on their dealers which are not indispensable for the distribution of new motor vehicles or for the provision of repair and maintenance services.

Unlike the previous motor vehicle block exemption, Regulation 1475/95, Regulation 1400/2002 only provides coverage if:

- the vehicle manufacturer or its importer does not oblige dealers to carry out repair and maintenance or to distribute spare parts themselves. Dealers should be free to subcontract repair and maintenance to authorised repairers belonging to the network of the same brand;
- dealers can take on additional brands;
- manufacturers or importers do not limit supplies of new vehicles to their dealers if such behaviour restricts their dealers' ability to sell vehicles to particular consumers within the European Union;
- dealers in a selective distribution system may sell actively and passively to any end consumer and after 1st October 2005 may open additional sales or delivery outlets for the distribution of new passenger cars and light commercial vehicles wherever selective distribution is used;

¹⁰² Such as a passport or other documentation proving the consumer's identity (utility bill etc.).

¹⁰³ Whether a vehicle is still new has to be decided on the basis of trade usage. For a buyer a vehicle is no longer new once it has been registered and driven on the road by another consumer. In contrast, a vehicle which has been registered by a dealer for one day without having been used is still new.

- Dealers within an exclusive distribution system are entirely free to sell actively within their territory and in territories which are not subject to exclusive distribution and passively into other distributors' exclusive territories.

5.3.1. Sales of new vehicles by dealers

Regulation 1400/2002 aims to give dealers more opportunities to supply new motor vehicles to all consumers, whether these are local, national or from another Member State. Direct restrictions on sales, active or passive as the case may be, are not covered by the Regulation¹⁰⁴.

Under the new Regulation, any distribution system, be it selective or exclusive, has to be organised in such a way that all categories of consumer can purchase new vehicles from any dealer even if they purchase a large number of vehicles¹⁰⁵.

Question 40: Does the Regulation cover restrictions on active and passive sales by dealers?

Dealers within a selective distribution system must be able to sell actively to any end user resident in an area within the European Union where selective distribution is used. Suppliers are however allowed to impose an obligation on the dealer not to sell new vehicles to independent resellers in areas where selective distribution is used. If the supplier uses exclusive distribution in certain areas of the European Union, the dealers within the selective distribution system must be allowed to sell passively to end users within those areas¹⁰⁶.

If a supplier sets up an exclusive distribution system, its dealers must be free to sell actively within their exclusive territory or to their exclusive customer group. As regards all other buyers within an exclusive distribution system, be they end users or resellers of new motor vehicles, they may be able to supply them passively. If the supplier uses selective distribution in certain other areas of the European Union, the dealers within the exclusive distribution system must be allowed to sell actively to end users and unauthorised distributors within those areas¹⁰⁷.

Question 41: How does the new Regulation ensure that a dealer can sell new vehicles to any consumer, including local consumers, consumers from other areas of the same Member State and those from another Member State?

The supply of new motor vehicles has to be organised in such a way that a dealer can supply all consumers who wish to buy from him. The manufacturer should honour orders

¹⁰⁴ See Recital 16.

¹⁰⁵ For example a rent-a-car company or another fleet operator such as a leasing company normally buys large quantities of cars from a single supplier.

¹⁰⁶ See Recital 13. For a definition of active and passive sales, see above question 12.

¹⁰⁷ Article 4(1) 1st part of the sentence and Guidelines on Vertical Restraints, paragraph 52.

for new motor vehicles for supply to consumers from other areas of the Common Market in the same way as for sales to local consumers, in particular as regards pricing and delivery times. Under the new Regulation manufacturers will therefore have to put in place ordering and delivery systems which comply with this requirement. To this end they may for example put in place an ordering system based on the “first come first served” principle. A distribution system which is based on supply quotas relating to a sales territory smaller than the Common Market amounts to an indirect restriction on sales and is not exempted by the Regulation¹⁰⁸.

The Regulation does not oblige manufacturers to put in place a distribution system which ensures that delivery times are the same throughout the Common Market. They must however ensure that dealers are in a position to supply new vehicles under the same conditions to their local, national customers and to customers from other Member States.

It may happen that a supplier is forced to limit product supply to its dealers in certain circumstances, for example where there is a strike or where overall demand is higher than product output. In such circumstances the supplier may not allocate vehicles to its dealers in such a way as to discriminate between dealers who sell many vehicles to consumers from other Member States and those who do not. For example, imagine a situation where dealer A sells fifty vehicles a month, mainly to consumers in the town where he is established. Whereas dealer B also sells fifty vehicles a month, he sells twenty-five of them to consumers in his home town, and twenty-five to consumers from another Member State. If one month there are production difficulties, and the supplier is forced to reduce the number of vehicles it delivers by forty percent, it must supply thirty vehicles to dealer A and the same number to dealer B.

In order to avoid any discrimination between local sales and sales to buyers located in other areas of the Common Market, bonus systems or other kinds of financial or non-financial incentives may not be based on the buyers’ place of residence or establishment, or on the place where the vehicle is to be registered, but must take account of all sales.

Question 42: Should the way in which new vehicles are supplied to a dealer differ according to whether the supplier operates a selective distribution system or another kind of distribution system, such as one based on territorial exclusivity?

The above principles apply whatever distribution system is put in place by the supplier, since it is paramount for the operation of the Single Market that a dealer can sell new vehicles to all consumers without regard to the residence or place of establishment of the buyer of a new motor vehicle. This applies irrespective of whether the dealer is entitled to engage in active sales, or only in passive sales to certain customer groups or territories.

Question 43: Can a supplier agree with its dealer on sales targets which the dealer has to endeavour to achieve within a certain territory?

The new Regulation allows a supplier to agree with its dealer on sales targets based on a given geographic area which may be smaller than the Common Market. However, such agreed sales targets may not be used to limit deliveries of new motor vehicles to

¹⁰⁸ See Recital 16.

dealers¹⁰⁹. Nor may product allocation, dealer remuneration or bonus schemes be based on whether or not a vehicle is sold within the agreed geographic area since such measures would indirectly restrict the dealer's right to sell passively to all consumers within the Common Market.

Question 44: Is a dealer free to advertise on the Internet and to sell new vehicles over the Internet?

A dealership web site is a passive selling¹¹⁰ tool and the dealer may use it for advertising and for carrying out transactions, and this use may not be restricted under the Regulation. Nor may the dealer be restricted under the Regulation in his use of the Internet or of e-mail instead of more traditional methods, such as normal mail or fax, to conclude sales contracts¹¹¹.

A dealer must also be free to make agreements with Internet referral sites, which put consumers in contact with the dealer who is able to supply a vehicle. A vehicle manufacturer may require the dealer using the Internet to comply with the qualitative requirements regarding the promotion of the relevant brand of motor vehicles over the Internet. A supplier may also require an Internet referral site to which a dealer out-sources its advertising to comply with its quality requirements. Such sites, which may promote the sales of new motor vehicles of one or more brands, may also refer consumers who wish to purchase a new vehicle to one of the dealers which is connected to the referral site.

Question 45: Is a dealer free to use e-mail or personalised letters to contact potential customers?

Using e-mail or personalised letters to actively market vehicles and services to end users throughout the Common Market is an active selling method. Under the Regulation¹¹² suppliers may not restrict dealers in selective distribution systems from making use of such methods. Dealers in exclusive distribution systems must be free to actively contact customers exclusively allocated to them, and may not be restricted from responding to unsolicited requests from customers even if these are allocated exclusively to other dealers. For example, in an exclusive distribution system in which a territory is allocated to each dealer, the supplier can prohibit the marketing of new vehicles via e-mail or personalised letters to customers located in another dealer's exclusive sales territory. Such dealers can engage in such active sales methods in other areas, where selective distribution applies.

¹⁰⁹ See Recital 16.

¹¹⁰ See Recital 15 and Article 4(1)(e), also Guidelines on Vertical Restraints, paragraph 51.

¹¹¹ See Recital 15.

¹¹² See Article 4(1)(d) and 4(1)(e).

5.3.1.1. The sale of new motor vehicles to consumers using the services of an intermediary

Questions relating to the supply of new motor vehicles to end users who have given an authorisation to an intermediary are dealt with in section 5.2.

5.3.1.2. Sales of new vehicles to leasing companies

The Regulation does not cover obligations restricting a dealer's ability to sell leasing services¹¹³. This includes leasing by the dealer himself, through a leasing company connected with the dealer, or as an agent of a leasing company of his choice.

Question 46: Is a dealer entitled to sell new motor vehicles to leasing companies?

Yes, supplying new vehicles to leasing companies is a legitimate part of a dealer's activities, as leasing companies are normally considered to be end users¹¹⁴.

However, a supplier using selective distribution may prevent dealers from supplying contract goods to leasing companies when there is a verifiable risk that the leasing company will resell these motor vehicles while they are new. Article 1(1)(w) makes it clear that leasing contracts which involve a transfer of ownership or a purchase option prior to the expiry of the contract and which would allow the lessee to purchase the vehicle from the leasing company at any moment, including while the vehicle is still new, would in reality turn the leasing company into an independent reseller.

Question 47: Can a supplier operating a selective distribution system oblige a leasing company to whom a dealer sells a new vehicle to sign an undertaking to the effect that it will not re-sell the vehicle while it is new for commercial gain?

It is legitimate for a supplier operating a selective distribution system to take appropriate measures to ensure that its dealers do not sell new motor vehicles to resellers who are not members of that system. It may therefore ask the dealers to take appropriate measures to prevent purchasers from re-selling vehicles while they are new. In order to prevent a leasing company from reselling a motor vehicle while it is new the dealer may request the leasing company to sign a declaration that it will not resell the cars when new.

Question 48: Can a supplier require a dealer to obtain and provide it with copies of each leasing agreement before the dealer sells a vehicle to a leasing company?

No. This would amount to an indirect restriction on sales and a serious restriction of competition¹¹⁵. Moreover, it would allow the dealer and the supplier to get information on the terms and conditions of the leasing contract and the identity of the lessee. However, a

¹¹³ See Recital 30 and Article 5(2)(a).

¹¹⁴ See Article 1(1)(w).

¹¹⁵ Article 4(1)(b).

supplier can require a dealer to check, before selling the first time to a particular leasing company, the general conditions applied by the leasing company so as to avoid sales to an unauthorised reseller.

Question 49: Can a leasing company buy new cars from a dealer for whom it has not yet found lessees?

Yes, and the supplier cannot refuse to honour the relevant orders even if the leasing company uses the new vehicles to build a stock.¹¹⁶ Any requirement on a leasing company to name a customer before purchase would constitute an indirect restriction on sales and would be a serious restriction of competition¹¹⁷.

5.3.2. The distribution of different brands of motor vehicles by the dealer (multi-branding)

Regulation 1400/2002 simplifies the conditions which a supplier may impose on dealers who want to take on one or more additional brands (sometimes referred to as “multi-branding”). A supplier that wants its agreements to be exempted under the Regulation must allow any dealer to sell vehicles from competing suppliers. The only restriction that it may impose is an obligation on the dealer to exhibit the models of other suppliers in separate areas of the same showroom. In addition, if the dealer decides to employ brand specific sales personnel and the supplier agrees to it and pays all the additional costs involved, this will be covered by the Regulation.

The supplier may impose on such dealers all the quality criteria it imposes on mono-brand dealers, including that relating to showroom decoration and training of sales personnel. However, if the dealer’s showroom is not large enough to allow the display of all the vehicles or to use all the decoration which a mono-brand dealer has normally to exhibit or use, then the supplier must moderate this obligation in an appropriate way as regards the space needed to exhibit such vehicles, in order to allow the dealer to also display vehicles of the other manufacturer in its existing showroom¹¹⁸. Whether these conditions are fulfilled in a specific case is a question of fact. Agreements must provide for the parties to have the right to refer any disputes on this subject to an independent expert or arbitrator or to a national court¹¹⁹.

¹¹⁶ See Commission Decision 10.10.2001 – DaimlerChrysler – (case COMP/36.264 – Mercedes-Benz), paragraphs 176 and 201 et seq.

¹¹⁷ See Article 4(1)(b).

¹¹⁸ See Recital 27.

¹¹⁹ Article 3(6).

Question 50: May a dealer receive higher margins or a bonus if he only sells the vehicles from one supplier?

No. Such measures would amount to an indirect restriction of a dealer's right to sell competing brands and would not be covered by the Regulation¹²⁰. Equivalent margins or bonuses therefore have to be made available to all dealers, irrespective of whether they sell motor vehicles from only one supplier or from several.

Question 51: What degree of separation may a supplier require as regards the display of different brands in the same showroom?

The Regulation allows suppliers to oblige dealers to exhibit vehicles of their brands in brand-specific areas of the same showroom. Any obligation for further separation, such as the installation of a wall or a curtain or an obligation to leave a distance between displays of vehicles from different brands that was so large that it made display of other brands impossible (for example, because the showroom was too small) or unreasonably difficult (for example, because the supplier required its vehicles to be exhibited alongside the windows of the showroom) would not be covered by the Regulation.

Question 52: Can a supplier oblige a dealer to have brand-specific features in his showroom?

A supplier may oblige all his dealers to have decoration that promotes the brand image, provided that this does not restrict the sale of other brands. For example, a supplier could oblige all his dealers to install a luxury carpet in that part of the showroom used to display his brands or to erect brand-related signage that could be seen from the street. He could also oblige the dealer to only display his vehicles in a high quality building. A supplier could not, however, require the dealer who wanted to take on an additional brand to have a separate customer entrance for each brand. Nor could he, for example, require a dealer who also sold the brands of competing suppliers to modify the whole of the inside or outside of the showroom in a way that was brand-related.

5.3.3. The right to open additional sales outlets (the prohibition of a "location clause")

After 1 October 2005, Regulation 1400/2002¹²¹ does not cover obligations preventing dealers of passenger cars and light commercial vehicles within selective distribution systems from opening additional sales or delivery outlets in other areas of the Common Market where selective distribution is applied. This allows dealers to exploit new business opportunities by establishing a physical presence close to potential customers further away from their initial outlet, including customers in other Member States. This freedom will strengthen intra-brand competition throughout Europe to the benefit of consumers, and will moreover allow dealers to expand their businesses and to become more independent

¹²⁰ See Article 5(1)(a) and Article 1(1)(b).

¹²¹ See Article 5(2)(b) and Article 12(2).

from their suppliers. It will also allow such dealers to become pan-European distributors of new motor vehicles.

Restrictions on opening additional outlets are, however, covered under Regulation 1400/2002, as regards dealers in motor vehicles other than passenger cars and light commercial vehicles, i.e. medium and heavy trucks, buses and coaches¹²². It is assumed that most of the buyers of these vehicles use such vehicles in a commercial context, and that they are therefore in a better position to buy from a dealer located in another area of the Common Market and to have access to more favourable sales conditions than private consumers.

The Regulation allows suppliers to prohibit dealers within exclusive distribution systems from opening additional outlets in markets covered by such systems. However, since such dealers can sell new vehicles to all customers, including unauthorised resellers, throughout the Common Market, it is assumed that these resellers will organise arbitrage between the different markets and seize additional business opportunities which arise in other areas of the Common Market.

Question 53: What sort of outlets may a dealer acting within a selective distribution system covered by the Regulation open after 1 October 2005?

After 1 October 2005, a dealer acting within a selective distribution system covered by the Regulation may open additional sales outlets or delivery outlets in other areas of the Common Market where the supplier uses selective distribution.

A sales outlet includes the showroom and the necessary infrastructure to sell new motor vehicles. This will for example include a showroom to exhibit the new motor vehicles, the necessary offices, sales personnel and demonstration vehicles. It is up to the dealer who operates the sales outlet whether he delivers new cars at the sales outlet or delivers them elsewhere.

A delivery outlet is a place where vehicles sold elsewhere are handed over (delivered) to the end consumer. It may include the necessary office space, a storage facility or an area for the preparation of the cars for their delivery and the necessary staff for carrying out the deliveries. A dealer must be allowed to combine a delivery outlet with a sales outlet providing he meets the relevant quality criteria for both. Under the Regulation dealers within a selective distribution system should be allowed to actively sell new motor vehicles¹²³. A dealer may therefore not be prevented from erecting advertising hoardings at a delivery point or making available brochures about vehicles or services offered by the dealership.

¹²² See also reply to question 16.

¹²³ Article 4(1)(b) and (d).

Question 54: If a dealer in a selective distribution system decides to open an additional outlet elsewhere, what standards will the new outlet have to meet?

It will have to meet the same standards as similar sales outlets in the area where it is to be located. For example, if a dealer in a rural area decides to open additional sales premises on a main street in a large city, the supplier can oblige him to meet the same quality standards as regards signage and display of vehicles as existing sales premises in that area or in similar urban areas.

If a dealer in one area finds it expedient to open a delivery point in another area, that delivery point will have to meet the quality standards as other delivery points in that area or in similar areas¹²⁴. However, a supplier may not, for example, require a delivery point to have the same staffing levels as a showroom, since this would represent an indirect restriction on active sales and would be an indirect means of reintroducing a location clause.

Question 55: Can a dealer in a selective distribution system close the initial outlet, in respect of which he is authorised by the supplier, and set up another outlet elsewhere?

Not without the approval of the supplier, which will continue to be able to agree with the dealer where his initial outlet is located. Suppliers of new motor vehicles can thus ensure that their networks cover all geographic areas within the Common Market.

Question 56: If a dealer in a selective distribution system wants to open an additional sales or delivery outlet, does he have to obtain the supplier's consent, and will he have to enter into a further distribution agreement with the supplier in respect of that outlet?

In order to be covered by the Regulation a dealer operating within a selective distribution system should be allowed to open additional outlets without having to ask the supplier's permission. It will therefore not be necessary to enter into any additional agreement. The supplier may however require the additional outlet to comply with the quality standards applicable to the outlets of the same type in the same geographic area.

Question 57: From where can the dealer source the vehicles he sells in the additional sales outlet?

The dealer may source the vehicles for his additional outlet from the same supplier(s) that supply vehicles to his initial (main) outlet. In addition, he will be free to source vehicles from any other dealer or wholesaler of the brand in question, anywhere in the Common Market.

This supplier will have to make the necessary arrangements to ensure that a dealer can buy sufficient quantities of new motor vehicles to satisfy both the demand at his initial (main) outlet and any additional outlet(s). Any supply restriction would amount to an indirect restriction of the dealer's right to open additional outlets in other areas of the Common Market. This would also be the case if wholesale prices or other financial incentives were

¹²⁴ See Recital 29 at the end.

made to depend on whether the vehicle was sold through the dealer's initial (main) outlet or through its additional outlet.

5.3.4. *The supply of new vehicles to the dealer*

Question 58: Can a dealer in a selective distribution system be prevented from obtaining vehicles from another authorised dealer of the same brand established in the same or another Member State?

No. Under the Regulation, authorised dealers in a selective distribution system may not be prevented from purchasing from other authorised dealers established anywhere in the Single Market¹²⁵.

Question 59: Can a supplier arrange for motor vehicles which are due to be sold to a foreign end user or sold through an additional outlet to be subject to longer delivery times?

Such a system would restrict (active or passive) sales to end users, and would be a serious restriction of competition.

5.3.5. *Disputes regarding contractual matters*

In order to favour the quick resolution of any disputes which arise between the parties to distribution agreements, which might otherwise hamper effective competition, such agreements will only be covered by the exemption if they provide for each party to have a right of recourse to an independent expert or arbitrator. This right does not affect each party's right to make an application to a national court¹²⁶.

Question 60: In what circumstances does the Regulation provide for disputes between a supplier and a dealer to be referred to an expert third party or an arbitrator?

The Regulation stipulates that any vertical agreement has to provide for each of the parties to have the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert, such as a mediator, or to an arbitrator. Such disputes may relate *inter alia* to supply obligations, the setting and attainment of stock requirements or agreed sales targets, the implementation of an obligation to provide or use demonstration vehicles, the conditions for the sale of different brands (multi-branding), the issue as to whether a prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business¹²⁷ or where notice is given to

¹²⁵ Article 4(1)(c).

¹²⁶ See Recital 11 and Article 3(6).

¹²⁷ See Recital 18.

terminate an agreement, in particular the issue whether the termination of an agreement is justified by the reasons given in the notice¹²⁸.

Question 61: Who can act as an expert third party or an arbitrator and how should an expert third party or arbitrator be nominated?

Any person accepted by both parties as being qualified to act in such a capacity may be appointed as expert third party or arbitrator. The parties are free to decide, should the situation arise, whom they wish to nominate and whether they prefer to appoint one, two, three or more people to act as expert(s) or arbitrator(s). However, no party may decide unilaterally who the expert or arbitrator will be. In the event of disagreement the parties must adopt the nomination procedures which are normally used in such cases, such as nomination by the president of a court, or by the president of a chamber for commerce and industry. It seems advisable that the vertical agreement should specify what kind of nomination procedure they wish to use should the situation arise.

5.3.6. The right for the dealer to choose whether or not to carry out repair and maintenance services

Unlike Regulation 1475/95¹²⁹ the new Regulation does not allow manufacturers to oblige their dealers to offer repair and maintenance services. It therefore allows dealers to specialise in vehicle distribution, which might be a particularly attractive option for those dealers who wish to sell new vehicles from different manufacturers.

If a dealer decides not to carry out repair and maintenance himself, the supplier may require him to subcontract these services to an authorised repairer belonging to the same brand network¹³⁰. To make things more transparent for consumers the manufacturer may also require the dealer to give the name and address of the authorised repairer in question before the conclusion of the sales contract. Moreover, where the repair shop is not in the vicinity of the showroom, the supplier may also require the dealer to tell its customers how far the repair shop is from the showroom; however, he may only do so if he imposes a similar obligation on dealers whose own repair shop is not in the vicinity of the sales outlet.

Under a sub-contract, an authorised repairer undertakes to co-operate as a sort of privileged service partner of the dealer, and to offer all types of after sales services to the dealer's customers. This includes normal repair and maintenance but also the honouring of warranties, repairs following a vehicle recall or free servicing offered by the vehicle manufacturer through the authorised repairer¹³¹.

¹²⁸ See Recital 11 and Article 3(6).

¹²⁹ See in particular Article 4(1)(1) and (6) and Article 5(1)(1)(a) and (b).

¹³⁰ Article 4(1)(g).

¹³¹ See Recital 17.

Question 62: Can an authorised dealer of a given brand be prevented under the Regulation from also being an independent repairer of that brand?

No. However, as an independent repairer, he may not have the same benefits as an authorised repairer. Most notably, he may have no right to remuneration from the supplier for repairs carried out under warranty. In addition, he may have to sub-contract the provision of repair and maintenance under warranty for the new vehicles he sells to an authorised repairer within the manufacturer's network.

5.3.7. Transferring/selling a dealership or authorised repair business

In order to foster market integration and to allow distributors and authorised repairers to seize additional business opportunities and to expand their businesses and become more independent, Regulation 1400/2002 provides that they have to be allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles. To this end, any vertical agreement between a supplier and a distributor or authorised repairer has to provide for the latter to have the right to transfer all of its rights and obligations to any other undertaking of its choice of the same type that sells or repairs, respectively, the same brand of motor vehicles within the distribution system¹³².

Question 63: Can a supplier prevent a dealer from selling his dealership to another dealer within the same manufacturer's network?

In order to benefit from Regulation 1400/2002 distribution agreements for new motor vehicles have to contain a clause by which the supplier agrees to the transfer of ownership of the dealership with all of the attendant rights and obligations to another dealer within the manufacturer's network¹³³.

For example, imagine that the car manufacturer A has dealership agreements compatible with the Regulation with Dupont in Paris, and with Smith in London. Dupont and Smith are owned and run by Franco S.A. and Anglo Plc respectively. If Anglo wishes to sell Smith¹³⁴ to Franco, neither manufacturer A nor its importer may oppose the sale¹³⁵. In this example, both Franco and Anglo are considered to be "distributors" within the meaning of the Regulation, since they are connected undertakings of Dupont and Smith.

¹³² Recital 10 and Article 3(3).

¹³³ Including dealers authorised by the manufacturer in other Member States of the EU.

¹³⁴ It is irrelevant whether Smith is a limited company, of which a controlling part of the share capital is transferred, or whether it operates under a simpler legal form, and is sold as a business, together with all assets, rights and obligations.

¹³⁵ For example by invoking a contractual clause such as a "change of ownership" clause, which would otherwise permit the supplier to veto any such transfer of ownership.

Question 64: Can a supplier prevent a dealer from selling his dealership to another dealer who is under notice of termination?

If the distribution agreement is to be covered by the Regulation, the supplier may not prevent the transfer of the dealership, provided that the dealer under notice meets all of the supplier's quality criteria.

Question 65: Can a supplier whose distribution agreement is covered by the Regulation prevent a dealer who is under notice of termination from transferring his dealership to another dealer?

No. The Regulation does not cover such a restriction. However, this transfer will not alter the fact that the dealership agreement which is transferred will end once the notice period expires. The dealer will therefore only get an additional dealership for a limited period of time until the end of the notice period.

Question 66: Under the Regulation, can a dealer be prevented from transferring his dealership to an authorised repairer?

Yes. The right to sell only exists in respect of transfers to a network member of the same type, i.e. dealer to dealer, authorised repairer to authorised repairer¹³⁶.

5.3.8. The end of the dealer agreement

Question 67: Does the Regulation provide for a dealership agreement to have a minimum term?

Under the Regulation an agreement may be entered into for an indefinite period¹³⁷ or for a fixed term¹³⁸. If an agreement is for a fixed term, that term may not be shorter than five years. For the purposes of this regulation, a five-year agreement which provides for either party to have the right to bring the agreement to an end part-way through the term¹³⁹ is taken to be an agreement for a fixed term of less than five years.

Question 68: Does the Regulation provide for minimum periods of notice?

A party who does not wish to renew a fixed-term agreement must inform the other party of its intention not to renew six months prior to the end of the agreement¹⁴⁰.

¹³⁶ Article 3(3) and Recital 10.

¹³⁷ In other words, the agreement does not provide for a set termination date.

¹³⁸ Article 3(5).

¹³⁹ In the absence of failure to perform a basic obligation.

¹⁴⁰ Article 3(5)(a). The consequences of omitting to notify in this way have to be assessed under national law.

A party who wishes to bring an indefinite-term agreement to an end must normally give at least two years' notice of its intention to end the agreement. However, if a supplier is obliged by law or special agreement to pay appropriate compensation on termination of the agreement or if he wishes to terminate an agreement where it is necessary to re-organise the whole or a substantial part of its network, he must give at least one year's notice.¹⁴¹

A need for re-organisation may arise due to the behaviour of competitors or due to other economic developments, irrespective of whether these are motivated by internal decisions of a manufacturer or external influences, for example, the closure of a company employing a large workforce in a specific area. In view of the wide variety of situations which may arise, it would be unrealistic to list all the possible reasons for re-organisation.

The question as to whether or not it is necessary to re-organise the network is an objective one, and the fact that the supplier deems such a re-organisation to be necessary does not settle the matter in case of dispute. In such a case it shall be for the national judge or arbitrator to determine the matter with reference to the circumstances.

Whether or not a "substantial part" of the network is affected must be decided in the light of the specific organisation of a manufacturer's network in each case. "Substantial" implies both an economic and a geographical aspect, which may be limited to the network, or a part of it, in a given Member State.

Question 69: Are there exceptional circumstances in which a party to a vertical agreement which is compatible with the Regulation can terminate it without notice?

It is a matter for national law whether the parties to an agreement have the right to terminate it at any time without notice, where the other party fails to perform one of its basic obligations. The parties must establish whether the reason for early termination is sufficient, by common accord or, in case of disagreement, by recourse to an expert third party or an arbitrator and/or by application to the appropriate court, as provided by national law¹⁴².

Question 70: Does the Regulation oblige a supplier to give justified reasons for terminating an agreement with a dealer or authorised repairer?

In order to be covered by the Regulation a supplier who wishes to terminate a dealer agreement must give detailed, objective, and transparent reasons in writing¹⁴³. This condition was introduced in order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, sales of brands from other suppliers or subcontracting repair and maintenance.

¹⁴¹ Article 3(5)(b).

¹⁴² Article 3(6).

¹⁴³ Article 3(4).

In the event of dispute, it will be for the arbitrator or national court to decide whether the reasons given justify the termination of the dealer agreement and, amongst other things, to choose an appropriate remedy if the reasons given do not justify the termination. In coming to a decision as to whether the reasons for termination are well-founded, the arbitrator or judge may have regard to a number of elements including the dealer agreement itself, the requirements of national contract law, as well as the text of the Regulation.

The Regulation sets out a number of types of dealer behaviour that a supplier may not prohibit. If, rather than prohibiting these types of behaviour, a supplier were to seek to prevent such behaviour or bring it to an end by terminating a dealer agreement, this would amount to a serious indirect restriction of competition and would mean that the distribution agreement would no longer be covered by the exemption. The issue as to whether the supplier has chosen to terminate the agreement for the reasons given in the notice, or rather in order to bring pro-competitive behaviour to an end, is a question of fact that may be determined by the independent third party or arbitrator or national judge.

Question 72: Does a supplier have to give reasons for issuing a notice that a fixed-term contract will not be renewed?

No. The Regulation does not require the supplier to give reasons for not wishing to renew a fixed-term contract¹⁴⁴.

5.4. Authorised repairers

An authorised repairer is defined in Article 1(1)(l) of the Regulation. It is an undertaking that belongs to the network of “official” providers of repair and maintenance services put in place by a supplier (vehicle manufacturer or its importer). The term “authorised repairer” is a new one, since under Regulation 1475/95, both car retailing and repair and maintenance were commonly carried out within the suppliers’ networks by the same kind of business, commonly referred to as “dealers”. In contrast, Regulation 1400/2002 is based on a different concept: the distribution of new motor vehicle and the provision of repair and maintenance services are no longer rigidly linked and may be carried out by separate undertakings.

Regulation 1400/2002 therefore does not allow suppliers to impose an obligation on dealers to carry out repair and maintenance services¹⁴⁵. Nor does it allow a supplier to oblige its authorised repairers to distribute new motor vehicles¹⁴⁶.

¹⁴⁴ However, there may be civil law provisions in some Member States that require such reasons to be given.

¹⁴⁵ See Article 4(1)(g). See also Recital 22, which explains an important aspect of the very serious restrictions set out in Article 4(1)(g) and (h) and which explicitly states that any direct or indirect obligation or incentive which leads to the linking of sales and servicing activities or which makes the performance of one of these activities dependent on the performance of the other.

¹⁴⁶ Article 4(1)(h).

The Regulation covers a supplier's use of quantitative selective distribution or of exclusive distribution for its network of authorised repairers up to a market share of 30%¹⁴⁷. For authorised repair networks which exceed this threshold, the Regulation only covers qualitative selection of authorised repairers¹⁴⁸.

5.4.1. How to become an authorised repairer

Question 72: Has the supplier of new motor vehicles to allow a repairer to become a member of its network of authorised repairers?

In principle the supplier is free to choose the members of its network. However, if the supplier wants its agreements to be covered by the Regulation the reply to this question depends on the market share held by the supplier's network of authorised repairers in respect of repairs carried out on all motor vehicles of the brand in question. If this market share is not above 30%, the supplier can base its network of authorised repairers either on quantitative selective distribution or on exclusive distribution and may choose not to appoint particular repairers even though they meet the quality criteria for appointment.

If the market share of the authorised repair network of the brand in question is above 30%, the Regulation only covers qualitative selective distribution. If the supplier wishes his distribution agreement to be covered by the Regulation it may thus only impose qualitative criteria for its authorised repairers, and must allow all repairers which fulfil these criteria to operate as authorised repairers, including authorised dealers whose contracts have been terminated but who would like to continue as authorised repairers.

Question 73: Does the supplier have to let all interested repairers know what the criteria are if it applies qualitative selective distribution?

Yes. If the supplier were not to disclose the quality criteria, repairers would have no way of knowing how to fulfil them and would not be able to demonstrate that they met them. It seems advisable for suppliers to make these conditions available to any repairer upon request or even to make them public, for example on the Internet.

Question 74: How must a supplier whose authorised repair network is based on purely qualitative criteria apply those criteria?

A supplier which sets qualitative criteria for its network of authorised repairers has to apply the same criteria in the same manner to all repairers. This means in particular:

- As soon as a repairer meets these criteria, he has to be admitted as an authorised repairer. It is however legitimate for a supplier to check whether the repairer meets these criteria before concluding an agreement with him;

¹⁴⁷ Article 3(1) 1st subparagraph.

¹⁴⁸ Article 3(1) 3rd subparagraph.

- The criteria must be the same for authorised repairers who are dealers selling new motor vehicles of the relevant brand and those who do not. In particular, the supplier must allow all authorised repairers to honour warranties, perform free servicing and carry out recall work in respect of all motor vehicles of the brand in question sold in the Common Market¹⁴⁹.

5.4.2. No location clause for authorised repairers

Question 75: Does the Regulation cover a restriction on the ability of an authorised repairer within a selective distribution system to decide freely where to locate his repair shop or his additional outlet(s)?

No. Such a restriction is not covered by the Regulation. The authorised repairer must be free to decide on the location of his repair shop and the location of any additional outlet where he provides repair and maintenance services¹⁵⁰.

5.4.3. Spare parts and the authorised repairer

Please refer also to chapter 7 of this brochure.

Question 76: May a vehicle supplier seek to prevent an authorised repairer from sourcing original spare parts directly from the part manufacturer?

No. This would be a serious restriction of competition¹⁵¹.

Question 77: May a supplier oblige an authorised repairer to inform its customers whether he uses original spare parts or spare parts of matching quality?

Outside the context of warranty work where the supplier may insist on the use of spare parts supplied by himself, it is considered a hardcore restriction if the supplier uses an obligation on the repairer to inform its customers on the use of original spare parts or of spare parts of matching quality as a means to directly or indirectly restrict the right of the authorised repairer to purchase and use such spare parts. In particular, it may not use such an obligation to create the impression in the mind of consumers that these parts are of lesser quality than original spare parts supplied by the vehicle manufacturer.

¹⁴⁹ See Recital 17.

¹⁵⁰ Article 5(3).

¹⁵¹ See Article 4(1)(k).

Question 78: May an authorised repairer be obliged to carry out repairs under warranty, free servicing and vehicle recall work using original spare parts supplied by the vehicle supplier?

Yes. Article 4(1)(k) provides that a vehicle supplier may stipulate that parts supplied by it be used for the above types of repair¹⁵² work. However, as regards the normal repair and maintenance of a motor vehicle, which is not provided for free to the customer, (for example the 30,000 km service of a car) the vehicle supplier may not require the use of original spare parts supplied by it since this would amount to a restriction of the authorised repairers' freedom to use for such maintenance services original or matching quality spare parts from other suppliers¹⁵³.

Question 79: May a supplier oblige an authorised repairer to exclusively use spare parts of this supplier's brand?

Such arrangements, known as non-compete obligations¹⁵⁴, entered into between the authorised repairer and the vehicle supplier or between the authorised repairer and the supplier of spare parts, would not be covered by the block exemption. However, an obligation to use spare parts of a particular brand for up to 30%¹⁵⁵ of the authorised repairer's purchases of competing spare parts is not considered to be a non-compete obligation and would be covered by the Regulation¹⁵⁶ as long as the authorised repairer is free to buy these goods from the supplier or from other sources designated by the supplier, e.g. as cross-supplies from other authorised distributors or repairers¹⁵⁷.

Question 80: Does the Regulation cover an agreement where a vehicle supplier obliges an authorised repairer to keep spare parts for vehicles of different brands in different areas of the repair shop?

No. This would be an indirect restriction on an authorised repairer's right to repair vehicles of other brands. Such a restriction is not covered by the Regulation¹⁵⁸. A supplier could, however, oblige an authorised repairer to keep an orderly system for storing spare parts.

¹⁵² Repair under warranty means replacing broken or defective parts of a vehicle.

¹⁵³ See Article 4(1)(k).

¹⁵⁴ See Articles 1(1)(b) and 5(1)(a).

¹⁵⁵ Calculated on the basis of the value of its purchases of competing goods in the preceding calendar year.

¹⁵⁶ See Article 1(1)(b).

¹⁵⁷ Article 4(1)(b) and (c).

¹⁵⁸ See Article 5(1)(b).

Question 81: May a vehicle supplier seek to prevent an authorised repairer from selling original spare parts to independent repairers?

No. This would be a serious restriction of competition¹⁵⁹.

5.4.4. Non compete obligations for authorised repairers

Question 82: Does the Regulation cover a vehicle supplier preventing authorised repairers from repairing different brands in the same workshop?

No. Such a restriction, whether direct or indirect, is not covered by the Regulation¹⁶⁰.

5.4.5. Transfer of the authorised repair business

Question 83: Has an authorised repairer the right to sell his repair shop to a dealership/distributorship?

In order to be covered by the Regulation an agreement between a supplier and a distributor or authorised repairer has to provide for the distributor or repairer to have the right to transfer all of its rights and obligations to any other undertaking *of the same type* chosen by the former distributor or repairer that sells or repairs the same brand of motor vehicles within the distribution system¹⁶¹.

An authorised repairer therefore has to be free to sell his repair business to another repairer authorised to repair the same brand¹⁶². However, a supplier does not have to allow an authorised repairer to sell its repair shop to a dealer, since a dealer is not an undertaking *of the same type*. However, if the dealer to whom the repairer wishes to sell his authorised repair business is also an authorised repairer for the brand in question, the supplier may not oppose the sale.

5.5. Independent operators on the after-market

One of the main aims of Regulation 1400/2002 is to create the conditions for effective competition on the motor vehicle repair and maintenance markets, and to enable all operators on those markets, including independent repairers, to offer high quality services. Effective competition is in the interest of consumers and allows them to choose between alternative providers of repair and maintenance services, including those authorised by the vehicle manufacturer and those in the independent sector.

¹⁵⁹ See Article 4(1)(i).

¹⁶⁰ Article 5(1)(b).

¹⁶¹ Article 3(3) and Recital 10.

¹⁶² Article 3(3).

5.5.1. Access to technical information

If competition is to be effective, all independent operators involved in repair and maintenance must have access to the same technical information, training, tools and equipment, as authorised repairers. The approach of Regulation 1400/2002¹⁶³ is wider than that of Regulation 1475/95¹⁶⁴ both as regards the operators which are entitled to have access, and the items to which access has to be given.

Access has to be given in a non-discriminatory¹⁶⁵, prompt and proportionate way, which takes account of the needs of the independent operator in question; it has also to be provided in a usable format.

It would be abusive to deny access to information covered by an intellectual property right or constituting know how in circumstances where such denial would amount to an abuse of a dominant position under Article 82.

Question 84: Who qualifies as an independent operator under the Regulation?

Article 4(2) of the Regulation gives a non-exhaustive list of those who are to be considered as “independent operators”. Broadly speaking, for the purposes of the Regulation, an independent operator is an undertaking¹⁶⁶ that is directly or indirectly involved in the repair and maintenance of motor vehicles¹⁶⁷. Independent operators directly involved in repair or maintenance include independent repairers (for example body repairers, independent garages, fast fit chains), roadside assistance operators and automobile clubs. Those who are considered to be indirectly involved in repair and maintenance include publishers of technical information, distributors of spare parts, manufacturers of repair equipment or tools and operators offering testing services or providing training for repairers since these facilitate the work of repairers.

Question 85: Who has to give access to technical information?

It is the responsibility of the supplier of new motor vehicles¹⁶⁸ to make the necessary arrangements to allow independent operators to have the required access. It is however compatible with this obligation if the supplier delegates the responsibility of providing this access to an undertaking which has been entrusted by the vehicle manufacturer with the distribution of technical information, such as a national importer of the brand in question.

¹⁶³ See Article 4(2).

¹⁶⁴ See Article 6(1)(12) of Regulation 1475/95.

¹⁶⁵ There must be no discrimination between independent and authorised repairers.

¹⁶⁶ The term “undertaking” can include an individual, a partnership, an association or a company.

¹⁶⁷ This is, for example, not the case for experts involved in the analysis of road accidents or manufacturers who wish to produce spare parts.

¹⁶⁸ See Article 4(2) 1st subparagraph.

Question 86: To what kinds of technical information should an independent operator have access?

Independent operators must have access to the same technical information as authorised repairers. This covers all information needed to carry out repair and maintenance¹⁶⁹, including that necessary to access and service electronic on-board systems, including diagnostic systems. It covers information in natural language form¹⁷⁰, as well as electronic data. If a manufacturer provides technical assistance to its authorised repairers via a telephone or Internet help line, independent operators must also be given such assistance.

Question 87: To what kinds of tools and equipment should an independent operator have access?

Independent operators must have access to the same tools as authorised repairers. This includes hand and machine tools, software and hardware tools¹⁷¹, diagnostic and other equipment required for repair and maintenance services. Where a supplier leases tools to authorised repairers, the same facility also has to be made available to independent operators.

Question 88: Does an independent operator have the right to receive training?

Independent operators have to have access to the same technical training required for repair and maintenance services as authorised repairers. This includes both on-line training and training where the mechanic or technician has to be present in person.

Question 89: Can the supplier charge for technical information, tools or training?

Yes. But the price should be no higher than that charged to authorised repairers. If the item in question is supplied free of charge to authorised repairers, it should also be supplied without charge to independent operators.

Question 90: Can a supplier charge an independent operator for a large package of information when all he needs is the information necessary to do a particular job?

No¹⁷². The price charged for information should take account of the use to which the independent operator intends to put it¹⁷³ and should not be so high as to discourage access. Even though information may usually be made available in a large package to

¹⁶⁹ The access only concerns information needed to carry out repair and maintenance activities. Access therefore does not have to be given to training relating for example to managing a repair business or running an accounting system.

¹⁷⁰ Whether printed, voice recorded, or held in electronic form.

¹⁷¹ Including hardware and software needed to interface with and re-program on-board systems.

¹⁷² Article 4(2) and Recital 26.

¹⁷³ Recital 26.

authorised repairers, independent operators must be allowed to buy smaller packages or individual items. If, for example, a repairer wishes to service a particular model, he should not have to pay for servicing-related information for the whole range. Similarly, if a “fast-fit” operator wishes to know the correct tyre pressures for the entire range of vehicles, he should not be obliged to purchase information not related to tyres.

Question 91: How quickly is an independent operator entitled to receive the information?

The information must be provided to independent operators as quickly as it is made available to authorised repairers¹⁷⁴. It is therefore not permissible for suppliers to only provide information to independent operators after they have provided it to their authorised repairers. Suppliers have to make the necessary arrangements as regards infrastructure and staff to be able to achieve this. Where information has already been provided to all authorised repairers, it must be made available on request to independent operators quickly enough to enable them to carry out a repair for a customer without undue delay. Where technical information is commonly supplied to authorised repairers via individual data links of a type not commonly used by independent operators, it must be available on request to independent operators via other rapid electronic means such as e-mail or Internet download.

Information on new models should be made available to independent operators at the same time as it is made available to authorised repairers.

Question 92: Can publishers of technical information redistribute technical information which they have received from a motor vehicle supplier?

Publishers of technical information normally collect the information from different suppliers and publish it in a standardised format which can easily be used by independent repairers, thereby simplifying access. This is in particular important for small independent operators which repair motor vehicles from different manufacturers and for which direct access to different vehicle manufacturers’ systems might be too difficult or complex.

Question 93: Under the Regulation can an independent distributor of spare parts ask a manufacturer to give him the right to resell information?

Like publishers of technical information, independent resellers of spare parts are entitled to access to technical information for their own use; in other words, to enable them to market spare parts efficiently and accurately. Without such access they would not be in a position to keep their customers, the repairers, informed as to which spare parts are needed to a particular job.

If such information were not available at the point of sale, independent repairers would have to obtain it later from the motor vehicle supplier. This would be much more time-consuming and complicated and would put independent repairers at a competitive disadvantage compared to authorised repairers, who get both parts and technical information from the same source. If a supplier were to refuse to grant independent spare

¹⁷⁴ Recital 26.

part distributors the right to resell technical information, this would prevent effective competition between independent and authorised repairers and would amount to a serious indirect restriction of competition¹⁷⁵.

Question 94: Are there any exceptional circumstances in which a supplier can refuse to grant access to technical information?

As an exception to the general rule, the Regulation specifies¹⁷⁶ that it is legitimate and proper for a supplier to withhold access to technical information which might allow a third party to bypass or disarm on-board anti-theft devices, to recalibrate electronic devices¹⁷⁷ or to tamper with devices which, for instance, limit the speed of a vehicle.

However, it is clear that many independent operators will regularly come across situations where access to this kind of information is necessary for them to carry out their tasks. Roadside assistance operators¹⁷⁸, for instance, must be allowed to do their job without undue difficulty. Information made available to the Commission shows that a large percentage of call-outs relate to consumers who are unable to start their vehicle despite having the ignition key on their person. Another frequent problem concerns consumers who have locked themselves out of their vehicle, leaving the key inside. Clearly in these circumstances it is necessary for roadside operators to be able to have the information necessary to do whatever is necessary to put the consumer back behind the wheel of his vehicle, even if the vehicle is equipped with an electronic anti-theft device. Similarly, independent repairers may also come across situations where they cannot service a vehicle without access to information of this type. One example might be where the removal of the battery or of an electronic component during routine maintenance engaged a device intended to immobilise the vehicle in case of theft.

The exception is therefore to be interpreted narrowly, and suppliers may only withhold information concerning devices of this type if no other less restrictive means exist to attain protection against theft, re-calibration or tampering. One less restrictive method might be to protect a speed limitation device through separate access codes or encryption which prevent any modification of the relevant standard hardware or software, but which allow an independent repairer to install software updates in the course of repair and maintenance work.

As far as anti-theft protection is concerned, it is clear that information could be made available to roadside operators and independent repairers which could only be used by someone who also had the consumer's ignition key. An alternative secure way of transmitting the information needed for maintaining or repairing a motor vehicle could also be the use of a data link compatible with the requirements of ISO DIS 15764 concerning Data Link Security or so called "pass-through-programming techniques" by

¹⁷⁵ Article 4(2) of the Regulation.

¹⁷⁶ See Recital 26.

¹⁷⁷ Commonly referred to as "chip-tuning".

¹⁷⁸ Such as automobile clubs.

which a vehicle is directly connected to the vehicle manufacturer, who carries out the reprogramming on the motor vehicle.

5.5.2. The relationship between independent and authorised repairers

An independent repairer, as defined in Article 1(1)(m) of the Regulation, is an independent operator that repairs and maintains vehicles of a given brand without having been appointed by the manufacturer of the brand in question. Independent repairers provide healthy competition to the authorised repair network. A repairer may act as an independent repairer in respect of some brands and as an authorised repairer in respect of others. An independent repairer may also be an authorised distributor (i.e. a “dealer”) in respect of one or more brands of new motor vehicle.

6. MARKET DEFINITION AND CALCULATION OF MARKET SHARES

6.1. Principles of market definition

The correct delineation of a relevant market raises questions of fact and may evolve over time, amongst other things as a result of the new opportunities which the Regulation opens up. Vertical agreements in the motor vehicle sector relate to numerous and very different products. As a consequence, despite the fact that the Regulation is sector-specific, it does not fix the product and geographic boundaries of the markets to which it applies. With regard to market definition, the Commission follows the approach defined in its Notice on this subject¹⁷⁹. It also takes into account previous decisions which have precisely defined relevant markets¹⁸⁰, subject to an assessment of the changes which may have occurred since the decision and taking into account the level of trade at which the decision has defined the market¹⁸¹. The Commission Guidelines on Vertical Restraints also clarify specific issues which may arise in respect of vertical agreements¹⁸².

Several principles set out in these notices, which may serve as a guide for the way that markets are to be defined under the Regulation, are illustrated below. This illustration is provided for convenience of the reader and neither supersedes these notices nor prejudices how the Commission would define markets in a specific case.

- (1) The Regulation prescribes that product substitutability for the purposes of market definition is to be assessed from the perspective of the buyer¹⁸³. So does the market definition Notice, which places emphasis on demand substitution in response to small but lasting price increases, among other factors. The assessment of demand substitution entails a determination of the range of products or geographic areas which are viewed as substitutes by the buyer and an assessment as to the extent to which demand would react to small and lasting price increases of, say, 5-10%¹⁸⁴.

¹⁷⁹ Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p.5.

¹⁸⁰ For instance, in Commission Decision of 14.3.2000 in case No COMP/M.1672 – Volvo/Scania (OJ L 143, 29.5.2001, p. 74), trucks were subdivided into the light-duty segment (below 5 tonnes), medium duty segment (between 5 and 16 tonnes) and heavy duty segment (above 16 tonnes) and markets were defined as national. The list of decisions adopted by the Commission in application of EC competition rules can be consulted at: http://europa.eu.int/comm/competition/index_en.html

¹⁸¹ It follows that a definition of a relevant product and geographic market in a decision assessing say, a merger between manufacturers of automotive components, may not always be appropriate to establish the relevant product market affected by a distribution and servicing agreement which concerns the same component used at spare part along with all the other spare parts which are necessary to provide repair services.

¹⁸² Guidelines on Vertical Restraints, section V, paragraphs 88 to 99.

¹⁸³ Article 8(1)(a), (b) and (c).

¹⁸⁴ Small but not transitory increase in selling prices, “SSNIP test”. The Commission Notice privileges demand substitutability over supply substitutability for the purposes of market definition.

- (2) In line with the distinction which the Regulation operates, as a general rule, one should separately examine the activity of selling new motor vehicles and that of selling spare parts and providing repair and maintenance services¹⁸⁵. For spare parts, the existence of actual substitutes on the market needs to be carefully assessed. In some cases there may be substitutes¹⁸⁶, in some cases not¹⁸⁷.
- (3) The level of trade at which a vertical agreement is entered into must be taken into account in order to assess substitutability and, hence, to define the market(s) affected¹⁸⁸. It cannot be excluded, for instance, that the same spare part pertains to different relevant markets depending on the stage of the production or distribution chain at which the agreement is entered into, e.g. first supply ex works, wholesaling trade or retail¹⁸⁹.
- (4) For distribution of final goods, such as motor vehicles, or provision of repair and maintenance services to end-consumers, what is substitutable from the point of view of buyers which are active as retailers, such as authorised distributors or repairers who are members of the distribution system, will normally be determined by the preferences of end-users. If different motor vehicles are not substitutable for end-users, they will be deemed not to be substitutable for distributors who retail them¹⁹⁰. However, for an intermediate product which is not recognisable in the

¹⁸⁵ Single markets which would include motor vehicles and spare parts together may be defined, taking into account, inter alia, the life-time of the motor-vehicle as well as the preferences and buying behaviour of the users, see Notice on market definition, paragraph 56. In practice, the issue to decide is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the vehicle or not. Buying behaviour may significantly differ, for instance, between buyers of trucks who purchase and operate a fleet which take into account maintenance costs at the moment of purchasing the vehicle (e.g. bundled purchase and use contracts of trucks billed on price per km) and buyers of individual vehicles.

¹⁸⁶ For instance products used in unsophisticated repair or maintenance operations. In the case of batteries, for instance, several alternatives present on the market may be safely fitted in a particular car model.

¹⁸⁷ For many brand-specific spare parts, as there may be no readily alternative sources of supply in the market, end consumers would not get their cars repaired with a different spare part. In the absence of substitutes, spare parts for a particular brand may thus be defined as a relevant product market affected by the agreement between a supplier and its authorised repair network.

¹⁸⁸ Guidelines on Vertical Restraints, paragraphs 91 to 94.

¹⁸⁹ Supply or wholesaling agreements as to components or spare parts may be entered into between parties which have all or several Member States as geographic scope of activity, hence leading to defining the geographic markets accordingly (see, for instance, Commission Decision of 25.1.2002 in case No COMP/M.2696 – TMD/MENETA/MAST, in which the Commission was of the opinion that the relevant geographic market for the production of anti-vibration shims for automotive disc brakes was at least EU-wide). Vertical agreements further downstream at the stage of distribution may affect more narrowly defined markets. The agreements immediately prior to the retailing stage may typically involve buyers for which a national or a regional delineation of the relevant market is appropriate.

¹⁹⁰ For instance, two different motor vehicles, say a light commercial vehicle and a luxury limousine will not be held to be substitutable for the buyer if they are not substitutable for the final consumer, irrespective of whether the same distributor actually buys both for resale.

final good, the preferences of end-users will not greatly determine those of the buyer, for example the vehicle manufacturer¹⁹¹.

- (5) The existence of chains of substitution between products which are not directly substitutable needs to be assessed. If no well established precedent for definition of the relevant market is available, possible chains of substitution are particularly relevant and need to be investigated for different ranges of motor vehicles¹⁹².

As regards after-sales services and spare parts, the vertical agreement between a supplier of motor vehicles and its brand network of authorised repairers often covers a bundle of contract goods, as well as service, support and licensing of intellectual property rights. This bundling, combined with sizeable brand-specific investments enables the authorised network to provide repair services for the vehicles of the brand in question. In such cases, the supplier calculates its market shares on the value of both the goods, in particular spare parts, which it supplies to its network, that is, on the market between suppliers and repairers and of the services which the network provides, that is, on the market downstream between repairers and end-users¹⁹³.

¹⁹¹ For instance, a component to be assembled in the vehicle, may lead to defining the product market according to the preferences of the vehicle manufacturer. A vertical agreement concluded between the latter and a component supplier would affect a hypothetical market of, say, “diesel fuel injection systems for light vehicles, including passenger cars and light commercial vehicles” (see, for instance, Commission Decision of 11.7.1996 in case No IV/M.768 – Lucas/Varity).

¹⁹² Notice on market definition, paragraph 57. For instance, given three categories (e.g. segments) of vehicles A, B and C, of which A is held to be substitutable with B but not with C, but B is held to be substitutable with C, the relevant product market may include vehicles from categories A, B and C altogether. Notwithstanding the absence of direct substitutability between the extremes A and C, their substitutability with their “neighbour” category B may constrain sufficiently the competitive behaviour of suppliers of A and C.

¹⁹³ Recital 7. Guidelines on Vertical Restraints, paragraph 95.

6.2. Examples of market definition and calculation of market shares

Article 8

Market share calculation

1. The market shares provided for in this Regulation shall be calculated
 - (a) for the distribution of new motor vehicles on the basis of the volume of the contract goods and corresponding goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, prices and intended use;
 - (b) for the distribution of spare parts on the basis of the value of the contract goods and other goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, prices and intended use;
 - (c) for the provision of repair and maintenance services on the basis of the value of the contract services sold by the members of the supplier's distribution network together with any other services sold by these members which are regarded as interchangeable or substitutable by the buyer, by reason of their characteristics, prices and intended use.

If the volume data required for those calculations are not available, value data may be used or vice versa. If such information is not available, estimates based on other reliable market information may be used. For the purposes of Article 3(2), the market purchase volume or the market purchase value respectively, or estimates thereof shall be used to calculate the market share.

Article 1

Definitions

(...)

2. The terms 'undertaking', 'supplier', 'buyer', 'distributor' and 'repairer' shall include their respective connected undertakings.

'Connected undertakings' are:

- (a) undertakings in which a party to the agreement, directly or indirectly:
 - (i) has the power to exercise more than half the voting rights, or
 - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or
 - (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
- (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
- (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
 - (i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or
 - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

For the purposes of application of the Regulation, the relevant market shares are those held by the supplier, except for agreements containing exclusive supply obligations¹⁹⁴, for which the market shares of the buyer are pertinent. The terms “supplier” and “buyer” within the meaning of the Regulation are not limited to the legal entity which is a party to the agreement. They also include the other connected companies which together form an undertaking within the meaning of Article 81(1). As a consequence, the calculation of market shares for the agreement entered into by one brand which is a separate legal entity should, for the purposes of the Regulation, add altogether the sales in the relevant market of the other brands which are part of the same undertaking including its connected undertakings.

The calculation of market shares can be illustrated with four typical, yet hypothetical examples. This illustration is provided for convenience of the reader and does not prejudice how the Commission would define markets in a specific case.

Example a): Calculation of market shares for a specific car model when there is a chain of substitution between candidate product markets

A supplier is concerned by the success in its home Member State of its new model of car targeted at urban consumers (segment C following, for instance, the classification used by the Commission in its twice-yearly reports on car prices or similar classifications used in industry surveys). Previous Commission decisions have not precisely defined passenger car market(s)¹⁹⁵. The group wishes to analyse whether the high market share held by this model compared to competing models which pertain to the same segment has any consequence on the coverage by the Regulation of its distribution agreements. Let us assume that as distributors purchase on a national basis, wide differences in price and market penetration exist among Member States and parallel trading is minor, the retail markets are normally deemed to be national.

The basic model of the car is sold for 15 000 Euro, but additional options may increase the price by 33%, up to 20 000 Euro, at a price level similar to the selling prices of basic models in the higher-end segment D. A market survey shows that a similar price overlap

¹⁹⁴ See definition of Article 1(e).

¹⁹⁵ Passenger cars can be subdivided according to objective factors such as horsepower, body and price into different segments. No previous Commission decision has defined precisely the relevant market for sales of passenger cars under Article 81 or under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989; corrected version OJ L 257, 21.9.1990, p. 13). Concerning mergers among car manufacturers even with the narrowest market definitions taking into account industry classification of different cars within different segments, the precise definition did not alter the assessment of the case. For the application of Article 81, the infringements at hand concerned restrictions of competition by object, appreciable under alternative market definitions, and the precise definition were left open. For mergers, see, for instance, cases M.416 BMW/Rover, M.741 Ford/Mazda, M.1204 DaimlerBenz/Chrysler, M. 1283, Volkswagen/Rolls Royce, M.1326 Toyota/Daihatsu, M.1416 Hyundai/Kia, M.1452 Ford/Volvo, M.1847 GM/Saab, M.1998 Ford/Land-Rover, M.2832 General Motors/Daewoo. None of these concentrations raised concerns under the narrowest possible market definition. For the application of Article 81, see, for instance, Volkswagen I (1998) and II (2001), Opel (2000), DaimlerChrysler (2001).

exists with the lower segment B. In such situations, a chain of substitution between the three candidate product markets may justify establishing a single relevant product market which encompasses all three segments if sufficient substitution between the segments can be established¹⁹⁶. The supplier thus calculates its market share on the basis of the number of all its car models pertaining to segments B, C, and D, supplied to its distribution network and sold in the relevant geographic market, that is, the Member State, divided by the total number of models pertaining to segments B, C, and D sold on this market.

Example b): Distribution agreements concerning retail sales of passenger cars between a vehicle manufacturer and its network of authorised distributors

A supplier of passenger cars commercialises its product range through a network of authorised distributors in the 15 Member States of the European Union, following a system of quantitative selective distribution. Such a system is covered by the Regulation if the supplier holds less than a 40% share of the relevant markets affected by the distribution agreements. Following the Commission's Guidelines on Vertical Restraints and previous decisions, retailing of cars is normally viewed as a market distinct from that of manufacturing and wholesaling¹⁹⁷. As currently seems to be the case distributors actually purchase on a national basis, wide differences in price and market penetration exist among Member States and parallel trading is minor, the retail markets are deemed to be national. The product range includes several car models, which are mainly purchased by consumers, whose individual preferences for a particular type of car determine those of the authorised distributor¹⁹⁸. The car models sold by the network are classified into segments B, C and D.

The supplier then calculates its market share(s) in the preceding calendar year for each of these three "candidate" product markets, based for instance, on public data on car registrations in each Member State. The calculation also includes retail sales made by the supplier through directly-operated sales points¹⁹⁹.

If the total sales of all the brands pertaining to the same supplier are lower than 40% in each of the candidate product markets B, C and D and for each Member State, the agreements fulfil the general condition set out in Article 3(1) of the Regulation²⁰⁰. If, in

¹⁹⁶ An example of segmentation examined by the Commission is the following: A: mini-cars (e.g. Smart), B : small cars (Fiat Punto), C: medium cars (VW Golf), D: large cars (Volvo S-70), E: executive cars (Audi A6), F : luxury cars (Mercedes Class S), S sport cars (Ferrari), M : Multi-purpose cars (or MPV-VAN, Renault Espace), J sport utility cars (including four-wheel drive, Suzuki Vitara). See cases M.416 BMW/Rover and M. 1452 Ford/Volvo. With a chain of substitution, several of these segments may be aggregated into separate product markets, so that there would be less relevant markets than segments. It is however questionable whether such a chain of substitution could be extended to cover all segments.

¹⁹⁷ Guidelines on Vertical Restraints, paragraphs 91-92. See, for instance, as regards car distribution, cases M.182 Inchape/IEP, M.1592 Toyota Motor/Toyota Denmark, M.1036 Chrysler/Distributors (BeNeLux, Germany), M.1761 Toyota Motor/Toyota France.

¹⁹⁸ See above Section 6.1, point (4).

¹⁹⁹ Article 8(2)(b).

²⁰⁰ In this example, high market shares held by a different brand under the control of the same undertaking for sport cars would be irrelevant if such cars were not included in the same relevant

one or several Member States, the threshold is exceeded on one candidate market, the issue whether a chain of substitution would lead to defining a broader product market encompassing these three candidate product markets needs to be explored.

Example c): Servicing agreements between a vehicle manufacturer and its network of authorised repairers

A manufacturer of passenger cars organises a network of authorised repairers for its brand, which are entrusted to honour its warranty. The manufacturer also supplies the network with spare parts and gives them access to supply-chain logistics, software and items which are protected by intellectual property rights. Members of the system are allowed to mention their standing as authorised repairers for that brand and to use the brand's trademark in their repair shop and adverts. Authorised repairers have to make sizeable brand-specific investments, which put them in a position to provide the entire range of repair and maintenance services for all the vehicles of the brand. As the supply to the network is organised on a national basis and network members can and do purchase at similar trading conditions on such a basis, the national market is held to be the geographic market affected by the agreement.

The provision of spare parts, repair and maintenance services is held to be distinct from the market of sale of new vehicles in question²⁰¹. Assume that market surveys indicate in this example that, although other repairers do effectively service cars of the brand in question which have a certain age or carry out unsophisticated maintenance or repair operations, e.g. exhaust, batteries, tyres, only the authorised network is able to and does actually provide servicing of most cars of the brand operated in each geographic market. If car owners do not view brand-specific repair services as substitutable with non-brand specific repair services, and if many brand-specific spare parts are not substitutable with non-brand specific parts for providing those services, the total value of the market for the authorised network is the value of the services provided for the vehicles of the brand in question in the national market the preceding calendar year, or estimates thereof²⁰².

In this situation, the supplier should calculate its market share(s) on the national market(s) both on the basis of the value of the repair and maintenance services which the network provides and on the value of the spare parts, some of which are unique to the brand, which it sells to its network²⁰³. Spare parts supplied at no profit for the purposes of honouring legal obligations of warranty are not included in the calculation. In this example it is likely that the supplier and its network's market share(s) will be above the 30%

market affected by the distribution agreements. The same would be true if the high market shares are held in other Member States which are not part of the relevant market affected by the agreement or for products which do not compete with passenger cars, whether covered by the Regulation, e.g. coaches, or not, e.g. motor-bikes.

²⁰¹ See above Section 6.1, point (4), e.g. the cars in question are mainly purchased by end-consumers, have on average a useful life of 12 years, and change ownership several times. Servicing costs do not greatly influence the choice between buying competing vehicles. See also Case M.416 BMW/Rover.

²⁰² See Section 6.1, point (2) above and Article 8(1) last sub-paragraph. Estimates of the value of the services provided may be calculated based on the park of vehicles operated in a particular area.

²⁰³ See Article 8(1), in particular, (b) and (c) and section 6.1, point (2).

threshold set out in Article 3 (1) of the Regulation, for those spare parts fitted in its product range which are not substitutable with spare parts from other brands and for those repair services provided by the authorised network which are not provided by independent repairers. This will depend on market penetration by independent suppliers of brand-specific original spare parts and parts of matching quality.

Example d): Calculation of market shares for a franchise network of independent repairers

A supplier which does not manufacture motor vehicles organises a network of repairers as an exclusive distribution system, that is, a system in which exclusive geographic areas are allotted to each repairer. It also applies qualitative standards on the provision of repair services and allows the network to use intellectual property rights and provides it with technical and commercial assistance for the operation and maintenance of a distinctive brand-image. It also supplies directly spare parts or sets out standards for parts to be used by the network in the provision of repair and maintenance services. The network provides only unsophisticated repair and maintenance services for all brands of motor vehicles. As the supply to the network is organised on a national basis and network members can and do actually purchase at similar trading conditions on such basis, the national market is held to be the geographic market affected by the agreement.

The Regulation covers the agreements implementing the network if the supplier's market share does not exceed 30% on any of the product or service markets affected. The network provides no brand-specific service and consumers have, in respect of the range of services offered by the network, the choice between alternative providers of the relevant service, e.g. car manufacturers' repair networks, other fast-fit networks, individual independent repairers. The general condition laid down in Article 3(1) of the Regulation is thus met if competitors provide 70% or more on the relevant repair and maintenance markets for all passenger cars in that Member State and if, for each category of spare parts, the value of the spare parts which the supplier sells to the network amounts to 30% or less of the purchase value of the spare parts used in such repairs on the market as a whole.

7. DISTRIBUTION OF AND ACCESS TO SPARE PARTS

Regulation 1400/2002 aims at ensuring competition in the spare part market. To this end it lists a number of hardcore restrictions and does not allow suppliers, in particular vehicle manufacturers and their importers, to restrict the right of their distributors and authorised repairers to obtain original spare parts and spare parts of matching quality from any third undertaking of their choice and to use them for the repair and maintenance of motor vehicles²⁰⁴. Nor may vehicle manufacturers restrict the right of spare part manufacturers to sell original spare parts or spare parts of matching quality to authorised or independent repairers²⁰⁵. Moreover, Regulation 1400/2002 does not allow suppliers to restrict the right of their distributors and authorised repairers to sell spare parts to independent repairers, who use them for the repair and maintenance of motor vehicles²⁰⁶.

In order to improve the conditions for effective competition, Regulation 1400/2002 introduces the new term “original spare part”²⁰⁷. These are spare parts of the same quality as the components used for the assembly of a new motor vehicle. Original spare parts can be manufactured by the vehicle manufacturer, but most are manufactured by part manufacturers based on supply agreements with the vehicle manufacturer. They are manufactured according to the specifications and production standards provided by the vehicle manufacturer and in many cases they are produced on the same production line as the components used for the assembly of the motor vehicle.

The word “provided” means that these specifications and production standards are employed by the spare part manufacturer in question with the vehicle manufacturer’s consent with a view to the incorporation of parts corresponding to those specifications and standards in its vehicles. It is however not necessary for the vehicle manufacturer to have developed these specifications and standards; these may also result from a joint development programme or may even have been developed exclusively by the component or spare part manufacturer. In the latter case the specifications and production standards are deemed to be provided to the spare part manufacturer with the vehicle manufacturer’s consent and the spare part manufacturer can use them for the production of original spare parts. It is also not necessary under Regulation 1400/2002 for the vehicle manufacturer to explicitly give permission for the part manufacturer, which produces components, to use these specifications and standards for the production and distribution of original spare parts: the fact that these standards are available to the spare part manufacturer allows it to also use them for the production of original spare parts which are not supplied to the vehicle manufacturer, but are rather sold directly to spare part distributors or repairers²⁰⁸.

²⁰⁴ Article 4(1)(k).

²⁰⁵ Article 4(1)(j).

²⁰⁶ Article 4(1)(i) clarifies this for selective distribution systems of spare parts; within an exclusive distribution system this follows from Article 4(1)(b)(i) which prevents a supplier using exclusive distribution to restrict passive sales to any type of customer.

²⁰⁷ See the definition in Article 1(1)(t).

²⁰⁸ Indeed any restriction on this ability would constitute a hardcore restraint under Article 4(1)(k).

Since in nearly all cases the same part manufacturer makes both components and spare parts for a vehicle using the same specifications and production standards, the spare parts in question are clearly “original”. However, in some specific cases manufacturers have supply agreements with part manufacturers that only manufacture and supply spare parts for a vehicle and do not manufacture its components. If these parts are made according to specifications and production standards provided by the vehicle manufacturer which are the same as those used for the production of the components, they also are “original spare parts”.

“Original spare parts” are to be distinguished from “matching quality spare parts”²⁰⁹. Matching quality parts match the quality of the components used for the assembly of the relevant vehicle but are not produced according to the specifications and production standards provided by the vehicle manufacturer. This means that these parts are of the same or even higher quality, but may for example be made of another material or be painted in another colour.

Question 95: Is an accessory a spare part?

It follows from the definition in Article 1(1)(s) that goods which are not necessary for the use of the motor vehicle in question, such as a radio set or a CD player, a GSM hands-free installation, a navigation system or a luggage rack, which are normally referred to as accessories, are not considered to be spare parts. However, if such goods are installed on the production line of the new vehicle and integrated with other parts or systems of the vehicle then these goods become components of that vehicle and the parts needed to repair or replace these goods are spare parts (e.g. Hi-fi controls integrated in a car steering wheel). Air conditioning or temperature control equipment which is installed on a truck or bus or an alarm system or hi-fi system installed on a car after the vehicle has left the vehicle manufacturer’s production line has therefore to be considered as an accessory.

Regulation 1400/2002 is not applicable to the distribution, repair and maintenance of accessories. Their distribution may come under Regulation 2790/1999.

Question 96: Are lubricants or other liquids spare parts and if so what are the consequences?

Please refer to question 2.

Question 97: What are “original spare parts”?

There are three categories of “original spare parts”.

The first category of original spare parts consists of parts which are manufactured by the vehicle manufacturer. The following rules apply to these original spare parts:

²⁰⁹ See the definition in Article 1(1)(u).

- the vehicle manufacturer may require its authorised repairers to use this category of original spare parts for repairs carried out under warranty, free servicing and vehicle recall work²¹⁰;
- the vehicle manufacturer may not limit the right of its distributors to sell this category of parts, actively or passively as the case may be, on to independent repairers which use them for the repair and maintenance of motor vehicles²¹¹; in this respect it is irrelevant whether these repairers use them in their workshop or for the provision of roadside assistance services.

The second category of “original spare parts” refers to parts which are supplied by the spare part manufacturer to the vehicle manufacturer, who sells them on to its distributors. The following rules apply to these original spare parts:

- the spare part producer may not be restricted from placing its trade mark or logo effectively and in an easily visible manner on these parts²¹². This right also includes the right to place the trademark or logo on the packaging and on any accompanying document;
- the vehicle manufacturer may also place its trademark or logo on these parts;
- the vehicle manufacturer may require its authorised repairers to use this category of original spare parts for repairs carried out under warranty, free servicing and vehicle recall work²¹³;
- the vehicle manufacturer may not limit the right of its distributors in a selective distribution system to sell this category of parts on to independent repairers which use them for the repair and maintenance of motor vehicles²¹⁴; it does not matter whether these repairers use them inside their workshop or for the provision of roadside assistance services.

The third category of “original spare parts” consists of those which are not supplied to the relevant vehicle manufacturer, but which are nevertheless manufactured according to the specifications and production standards provided by it. The spare part manufacturer either supplies these parts to independent spare part distributors or directly to repairers. The following rules apply to this category of original spare parts:

- the spare part producer may not be restricted from placing its trade mark or logo effectively and in an easily visible manner on these parts. This also includes the right to place the trademark or logo on the packaging²¹⁵;

²¹⁰ See Article 4(1)(k).

²¹¹ See Article 4(1)(i) or 4(1)(b)(i).

²¹² See Article 4(1)(l).

²¹³ See Article 4(1)(k).

²¹⁴ See Article 4(1)(i).

²¹⁵ See Article 4(1)(l).

- the spare part producer may not be restricted from supplying these spare parts to any authorised or independent spare part distributor or any authorised or independent repairer²¹⁶, and the authorised repairer may not be restricted from using these parts²¹⁷.

Question 98: May the supplier require its authorised repairers to only use original spare parts supplied by it for the normal maintenance or the repair of motor vehicles?

No. An obligation on an authorised repairer to only use original spare parts supplied to it by the vehicle manufacturer for the normal maintenance²¹⁸ or repair²¹⁹ of a motor vehicle would amount to a restriction of the repairer's liberty to use original spare parts or spare parts of matching quality sourced from other suppliers of his choice²²⁰.

Question 99: May the use of original spare parts from other sources than the supplier or of spare parts of matching quality have an impact on the vehicle manufacturer's warranty?

If a vehicle manufacturer's warranty were to require authorised or independent repairers to use original spare parts supplied by it for normal repair and maintenance during the warranty period (but not covered by the warranty), this would be a hard core restriction, as set out in Article 4(1)(k), and the manufacturer's distribution system would no longer be covered by Regulation 1400/2002.

Question 100: Are authorised repairers or spare part distributors allowed to sell spare parts, which have been supplied to them by the vehicle manufacturer, to independent repairers?

Yes. A restriction on sales of spare parts by members of a selective distribution system to independent repairers, which use them for the provision of repair and maintenance services, is a serious restriction of competition²²¹. A restriction of passive sales of spare parts for motor vehicles by members of an exclusive distribution system is also a serious restriction²²². In both cases, the manufacturer's distribution system would no longer be covered by Regulation 1400/2002.

²¹⁶ See Article 4 (1)(j).

²¹⁷ See Article 4(1)(k).

²¹⁸ For instance routine servicing.

²¹⁹ For instance after an accident.

²²⁰ See Article 4(1)(k).

²²¹ See Article 4(1)(i); Article 3(10)(b) and Article 6(1)(3) Regulation 1475/95.

²²² See Article 4(1)(b).

Question 101: How is the quality of original spare parts demonstrated?

A part producer which produces spare parts based on specifications and production standards provided to it by the vehicle manufacturer has to issue a certificate confirming that the spare parts have been produced accordingly and that the parts are of the same quality as the components used for the assembly of the vehicle in question²²³. Such an affirmation by the part producer can be printed on the packaging or on a paper which accompanies the part or be published on the Internet. It is for the part manufacturer to decide whether it wants to issue such a certificate itself or whether it wishes to go further and to refer to a certification carried out by an independent body such as a certification organisation. Certification by an independent body is however not a requirement for parts to qualify as original spare parts.

If such a declaration has been issued, it is to be presumed that these spare parts are original spare parts, and an authorised repairer may use them for the repair and maintenance. However, if the vehicle manufacturer or any third party, for example a consumer association or automobile club, could prove that a certain spare part or a certain number of spare parts belonging to the same production lot is of lesser quality or has not been manufactured according to the specifications or production standards of the vehicle manufacturer, these spare parts cannot be sold as original spare parts.

Question 102: How is the quality of matching quality spare parts demonstrated?

If a spare part is to qualify as being of matching quality, the spare part manufacturer must be able to certify at any moment that it matches the quality of the corresponding component of the motor vehicle in question²²⁴. It is for the spare part manufacturer to issue such a declaration and to make it known to the user in the same way as for original spare parts (see above). Such a certification has to be made available at any moment, that is to say not only when the part is sold, but also at a later stage, for example if the part is alleged to be faulty.

Question 103: May the vehicle manufacturer or its importer prevent its authorised repairer's from sourcing and using spare parts from the independent aftermarket which are of the same quality as its "Economy Line" spare parts?

Vehicle manufacturers themselves nowadays also sell "Economy Line" spare parts through their own distribution networks. These spare parts are made according to newly defined standards (which differ from the standards for components) for vehicles which are no longer in serial production. Such a restriction would not be covered by the Regulation because this would amount to a non-compete obligation²²⁵.

²²³ See Article 1(1)(t), 3rd sentence.

²²⁴ See Article 1(1)(u).

²²⁵ See Article 5(1)(a).

Question 104: If a vehicle manufacturer enters into an agreement with a spare part manufacturer which provides that any intellectual property rights (IPR) or know how that the spare part manufacturer has developed is to be transferred to the vehicle manufacturer, can the vehicle manufacturer use these rights to restrict the right of the spare part manufacturer to distribute the spare parts manufactured using those rights?

No. Even though the Regulation does not rule out such a transfer of rights, IPRs or know how may not be used by the supplier (vehicle manufacturer or its importer) to restrict the spare part manufacturer's right to sell the spare parts in question to authorised and independent repairers²²⁶. If the supplier were to use IPRs or know how in this way, Regulation 1400/2002 would not apply to the its distribution system.

²²⁶ Article 4(1)(j) and (k).

8. ANNEX I – REFERENCE TO THE MOST IMPORTANT DOCUMENTS CONCERNING THE COMPETITION RULES FOR MOTOR VEHICLE DISTRIBUTION IN THE EUROPEAN UNION

Some of these documents are also available on the Commission web site
http://europa.eu.int/comm/competition/car_sector

Motor vehicle block exemption regulation

- Commission Regulation (EC) No 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. *Published in the Official Journal L 203, 1.8.2002, p. 30.*

Previous regulations and notices

- 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. *Published in the Official Journal L 145, 29.6.1995, p. 25.*
- Explanatory brochure on the 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. *Published by Directorate General IV – Competition, IV/9509/95.*
- Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. *Published in the Official Journal L 15, 18.1.1985, p. 16.*
- Commission notice concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. *Published in the Official Journal C 17, 18.1.1985, p.4.*
- Information from the Commission – Clarification of the activities of motor vehicle intermediaries. *Published in the Official Journal C 329, 18.12.1991, p. 20.*

General regulation and notices on vertical restraints

- Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. *Published in the Official Journal L 336, 29.12.1999, p. 21.*
- Commission Notice – Guidelines on Vertical Restraints. *Published in the Official Journal C 291, 13.10.2000, p. 1.*
- Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis). *Published in the Official Journal C 368, 22.12.2001, p. 13.*

Studies

- Quantitative Study on the demand for new cars to define the relevant market in the passenger car sector by Frank Verboven, K.U. Leuven and C.E.P.R., *September 2002*
- Customer preferences for existing and potential sales and servicing alternatives in automotive distribution by Dr. Lademann & Partner, *December 2001*
- Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned by Andersen, *December 2001*
- Car price differentials in the European Union: An economic analysis by Hans Degryse and Frank Verboven, K.U. Leuven and C.E.P.R., *November 2000*
- The Natural Link between Sales and Service by Autopolis, *November 2000*

Recent decisions (Article 81)

- Commission Decision of 10.10.2001 against DaimlerChrysler AG. *Press release IP/01/1394 of 10.10.2001. Published in the Official Journal L 257, 25.9.2002, p. 1.*
- Commission Decision of 29.6.2001 against Volkswagen AG. *Press release IP/01/760 of 30.5.2001. Published in the Official Journal L 262, 2.10.2001, p. 14.*
- Commission Decision of 20.9.2000 against Opel Nederland BV / General Motors Nederland BV. *Press release IP/00/1028 of 20.9.2000. Published in the Official Journal L 59, 28.2.2001, p. 1.*
- Commission Decision of 28.1.1998 against Volkswagen AG. *Press release IP/98/94 of 28.1.1998. Published in the Official Journal L 124, 25.4.1998, p. 60.*

The Commission Decision of 28.1.1998 against Volkswagen AG was largely confirmed by the European Court of First Instance in its judgment of 6.7.2000 in case T-62/98, Volkswagen v Commission. *Commission Press release IP/00/725 of 6.7.2000. Court of First Instance Press release 50/00 of 6.7.2000. Published in the European Court reports 2000, p. II-02707.*

Other documents

- Commission Report on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) [now 81(3)] of the Treaty to certain categories of motor vehicle distribution and servicing agreements, *15.11.2000 – COM(2000)743 final.*
- Public hearing of 13-14 February 2002 on motor vehicle distribution – Speaking notes and presentation slides.
- Car price report, published twice a year by the Directorate General for Competition of the European Commission.

9. ANNEX II - TEXT OF REGULATION 1400/2002