

**Opinion of the European Economic and Social Committee on the 'Communication from the Commission: the Future Competition Law Framework applicable to the motor vehicle sector'**

COM(2009) 388 final

(2010/C 354/18)

Rapporteur: **Mr HERNÁNDEZ BATALLER**

On 22 July 2009 the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

*Communication from the Commission: The Future Competition Law Framework applicable to the motor vehicle sector*

COM(2009) 388 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 2 March 2010.

At its 461st plenary session, held on 17 and 18 March 2010 (meeting of 18 March), the European Economic and Social Committee adopted the following opinion by 84 votes to five with seven abstentions.

## 1. Conclusions

1.1 The EESC agrees with the Commission's analysis of the sector and of those areas which are in need of more competition. Considering the options put forward by the Commission, the EESC prefers the adoption of sector-specific provisions in the form of guidelines accompanying the general block exemption. The EESC therefore greets the proposals for a regulation and for supplementary guidelines with satisfaction. However, it emphasises that they must be read in conjunction with and as a supplement to the General Vertical Guidelines, which have not yet been presented, making independent interpretation difficult.

1.2 The EESC shares the Commission's views on the need to establish a legal framework that should lead to a positive overall impact on consumer welfare and should strengthen their protection. It would restate the approach already set out in previous opinions on competition<sup>(1)</sup>.

1.3 However, it is necessary to introduce a two-year transitional period for dealers, the overwhelming majority of whom are small- and medium-sized enterprises. For reasons of legal certainty and by virtue of the principle of legitimate expectations and proportionality, they need a reasonable period of time to recoup the investment made, to adjust better to technological developments on the market and to contribute to improved road safety.

1.4 The EESC also trusts that the new legal framework will provide all operators with legal certainty, and will not lay new obstacles for businesses, drawing on the principles of the Small

Business Act and the same competition objectives as those currently set out in Regulation 1400/2002.

1.5 The EESC considers that the Supplementary guidelines should not place any limits on single branding agreements. This would be more in keeping with the new Block Exemption Regulation.

1.6 Agreements concerning commercial vehicles (CV) could be governed by the General Regulation on categories of vertical agreements with regard to the aftermarket.

## 2. Introduction

2.1 Commission Regulation (EC) No 1400/2002 of 31 June 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector<sup>(2)</sup> laid down stricter rules than 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 in the motor vehicle sector<sup>(3)</sup>.

2.2 Commission Regulation (EC) No 1400/2002 concentrates mainly on practices and behaviour that entail serious restrictions of competition, and lays down a list of restrictions which have the effect that the Regulation cannot be applied to any part of an agreement ('hardcore restrictions') and another of restrictions that are prohibited but do not prevent the exemption established by the Regulation from applying to the rest of an agreement ('specific conditions').

<sup>(1)</sup> OJ C 228, 22.9.2009, p. 47; OJ C 175, 28.7.2009, p. 20.

<sup>(2)</sup> OJ L 203, 1.8.2002, p. 30.

<sup>(3)</sup> OJ L 336, 29.12.1999, p. 21.

2.3 The main features of Commission Regulation No 1400/2002 are as follows:

- it does not apply only to passenger cars, but also other types such as buses and lorries;
- it obliges each manufacturer to opt between a selective or an exclusive distribution system, while considering mainly two distinct types of distribution system to be exempt:
  - the *exclusive* system, provided the manufacturer assigns an exclusive territory to each distributor or repairer (or exclusive customer group). Within the assigned territory, he may not designate any other distributor. Minimum levels of quality may also be imposed on the distributors. Competition is strengthened by encouraging passive sales within the exclusive territory and, in particular, sales to resellers outside the network;
  - the *selective* system, provided the supplier undertakes to sell contractual goods or services, either directly or indirectly, only to distributors or repairers selected in accordance with specific criteria. A selective distribution system may be based on quantitative or qualitative criteria, or a combination of both;
- a single contract may not combine selective and exclusive distribution clauses. In practical terms, the so-called 'location clause' is not permitted within a selective distribution system, while it was possible to impose this clause on exclusive distributors;
- Article 8(1) of the Regulation distinguishes between three different product markets:
  - distribution of new motor vehicles: the market share is calculated on the basis of the volume of the contract goods and services 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;
  - distribution of spare parts: the market share is calculated 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;
  - repair and maintenance services: the market share is calculated 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 the products' characteristics, prices and intended use;

- in addition to the market share ceilings, Article 6(1)(c) of the Regulation considered 'prices or conditions of supply for contract goods or for corresponding goods [that] differ substantially between geographic markets' to be incompatible. In such cases, the Commission could withdraw the exemption provided by the Regulation;
- the Commission has sought to tackle obstacles to parallel trade, and Regulation 1400/2002 considers that limits placed by suppliers on sales to end users in other Member States (for example, by making the purchase price or distributor remuneration dependent on the destination of the vehicles or the place of residence of the end users) would be tantamount to an indirect restriction on sales. In addition, sales targets, product allocation or bonus systems based on a territory smaller than that of the Common Market are not allowed.

2.4 The legal framework for motor vehicles has changed in recent years, especially as a result of the adoption of Regulation (EC) of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles and on access to vehicle repair and maintenance information<sup>(4)</sup>, the provisions of which were voluntary but became mandatory in September 2009<sup>(5)</sup>. However, for a number of years the vehicle fleet will include a large number of vehicles not covered by this Regulation, constituting a significant market for independent repairers.

2.4.1 Regarding competition on the vehicle spare parts market, based on the industrial property rights held by the manufacturer and the widespread use of subcontracting agreements with suppliers of original equipment ('tooling arrangements'), it has been indicated that some spare parts remain captive in vehicle manufacturer networks.

2.4.2 For this reason, the Commission proposed, in its revised proposal for a directive on designs, the introduction of a 'repair clause'; the EESC welcomed the proposal, reaffirming<sup>(6)</sup> that 'the monopoly conferred on the owner of the design applies only to the external form of the product, not the product itself, and that 'to subject the spare parts covered by the repair clause to the design protection regime would be to establish a product monopoly on the secondary market, contrary to the fundamental nature of legal protection of designs'.

<sup>(4)</sup> OJ L 171, 29.6.2007, p. 1.

<sup>(5)</sup> OJ C 318, 23.12.2006, p. 62.

<sup>(6)</sup> See EESC opinions: OJ C 388, 31.12.1994, p. 9, OJ C 286, 17.11.2005, p. 8.

2.5 With regard to the automotive sector, the EESC has adopted an opinion on the components and downstream markets of the automotive sector (7), in which it points out that the players in the downstream market include vehicle manufacturers, their suppliers and independent or authorised market operators in services, spare parts and accessories, as well as in manufacturing, distribution and retailing, involving a network of 834 700 companies, predominantly SMEs, with a total turnover of EUR 1 107 billion and around 4,6 million workers.

### 3. Recent developments concerning Commission documents

3.1 On 21 December 2009, the Commission adopted a

- *Draft Commission Regulation on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector*, and a
- *Draft Commission Notice: Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles*.

The Commission launched a public consultation on these documents.

3.2 On 15 January 2010, the member of the Commission responsible for competition decided to forward the two documents mentioned in the point above to the European Economic and Social Committee, expressing her interest in seeking the Committee's point of view on these legislative proposals.

3.3 In consequence, in the present opinion on document COM(2009) 388 final, the rapporteur will simultaneously analyse the draft legislation indicated in point 3.1.

### 4. Summary of the Commission documents

4.1 The **Communication from the Commission** on the future competition law framework applicable to the motor vehicle sector proposes the following:

- a) As regards agreements for the sale of new motor vehicles, with effect from 31 May 2013:
- to apply the general rules of the proposed new block exemption for vertical agreements;
  - to adopt sector-specific guidelines in order to prevent the foreclosure of competing vehicle manufacturers and safeguard their access to the vehicle retailing and repair markets, to protect intra-brand competition, and to preserve the deterrent effect of Article 81;

— to keep the provisions of the Regulation that apply to agreements for motor vehicle distribution in force until 31 May 2013.

- b) As regards agreements for repair and maintenance services and/or for the supply and distribution of spare parts, with effect from 31 May 2010:

— to apply the general rules of the proposed new block exemption for vertical agreements;

— to adopt sector-specific guidelines complementing a focused block exemption regulation or a combination of the two instruments, with a view to reinforcing competition authorities' ability to respond to competition concerns in a wider and more comprehensive manner, in particular as regards (i) access to technical information (ii) access to spare parts (iii) misuse of warranties, and (iv) access to networks of authorised repairers.

#### 4.2 The draft block exemption regulation

4.2.1 These vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings, although this depends on the degree of market power of the parties to the agreement.

4.2.2 Moreover, vertical agreements containing restrictions which are likely to restrict competition and harm consumers, or which are not indispensable to the attainment of the positive effects mentioned above, should be excluded from the benefit of the block exemption.

4.2.3 The draft makes a distinction between agreements for new motor vehicle distribution ('primary market') and agreements for repair and maintenance services and spare parts distribution ('secondary market').

4.2.4 The rules of the General Regulation on vertical agreements will be applied to the 'primary market': in particular the market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in that Regulation, under which these vertical agreements may benefit from the exemption granted by the General Regulation, subject to all the conditions provided therein. This seems reasonable, since this is a market where competition exists.

4.2.5 Regarding the 'secondary market', certain specific characteristics of the motor vehicle aftermarket, linked to technological evolution and to the increasing complexity and reliability of automotive components that the vehicle manufacturers purchase from original equipment suppliers, should be taken into account.

(7) OJ C 317, 23.12.2009, p. 29.

4.2.6 The EESC agrees with the Commission that competitive conditions in the motor vehicle aftermarket have also a direct bearing on public safety, in that vehicles may be driven in an unsafe manner if they have been repaired incorrectly, as well as on public health and the environment, due to emissions of carbon dioxide and other pollutants that require regular vehicle maintenance.

4.2.7 Vertical agreements for the distribution of spare parts and for repair and maintenance services should benefit from block exemption only if, in addition to the conditions for exemption set out in the General Regulation for such agreements, they comply with stricter requirements concerning certain types of severe restrictions of competition that may limit the supply of spare parts in the automotive aftermarket, and more specifically:

- agreements that restrict the sale of spare parts by members of the selective distribution system of a vehicle manufacturer to independent repairers, which use them for the provision of repair or maintenance services;
- agreements which, although they comply with the General Regulation, nonetheless restrict the ability of a producer of spare parts to sell such parts to authorised repairers within the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users: none of this affects the application of the rules of private law liability, the ability to require the use of 'spare parts that match the quality of the components', and even agreements containing obligations on authorised repairers to use only spare parts supplied by the vehicle manufacturer for these repairs, during the warranty period;
- agreements that limit the ability of a manufacturer of components or original spare parts to place its trademark or logo on these parts effectively and in a visible manner.

#### 4.3 *The Draft Supplementary Guidelines*

4.3.1 The Guidelines set out principles for assessing under Article 101 of the TFEU issues arising in the context of vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts. These Guidelines are applied without prejudice to the applicability of the General Guidelines on vertical agreements, to which they are supplementary.

4.3.2 In interpreting these Guidelines, the Commission will also take into account the Code of Conduct put forward by the car manufacturers' associations ACEA and JAMA relating to certain good business practices that motor vehicle manufacturers are committed to apply so as to act in good faith in

the execution of their contractual obligations towards their authorised distributors and repairers.

4.3.3 The Guidelines are structured as follows:

- scope of the motor vehicle block exemption and relationship with the general vertical block exemption;
- application of the additional provisions in the motor vehicle block exemption;
- treatment of specific restraints: single branding and selective distribution.

4.3.4 An innovation is introduced concerning single branding: the beginning point of the five-year period is the start of the contractual relationship between the parties, rather than the replacement of one contractual document by another that covers the same subject matter. However, this emerges in footnote 9, and not the text, of the Guidelines. Given the importance of this change, it would be advisable to include it in the main text.

4.3.5 The Guidelines set out non-compete obligations and both their negative effects (barriers to entry or expansion by competing suppliers) and positive effects (helping to overcome the 'free-rider' problem, enhancing the brand image and reputation of the distribution network).

4.3.6 Access to technical information by independent repairers and misuse of warranties are important with regard to selective distribution.

#### 5. **Comments**

5.1 The automotive sector – passenger cars and commercial vehicles – has benefited for more than two decades, with regard to competition, from specific block exemption regulations.

5.2 In the Evaluation Report that it drew up on 31 May 2008, the Commission evaluated the impact of the block exemption on automotive sector practices. The Report was widely commented on by stakeholders, in turn giving rise to the Commission staff Impact Assessment (SEC(2009) 1052, SEC(2009) 1053): it is recommended that these documents be read in conjunction with Communication COM(2009) 388 final.

5.3 At the same time, a new general block exemption is in the process of being revised and adopted to replace, with effect from May 2010, the current Regulation (EC) No 2790/1999 of 22 December 1999. On the basis of the assumption that this Regulation will be revised, the Commission proposes:

— initially, for the motor vehicle sector, the three sub-options: (ii) application purely of the block exemption to vertical agreements (iii) adoption of sector-specific guidelines alongside the general block exemption, and (iv) adoption of a block exemption regulation, focusing on restrictions to competition in aftermarket services;

— subsequently, with the draft Regulation and Guidelines, to adopt a Regulation with sector-specific provisions accompanied by guidelines.

5.4 The purchase of a motor vehicle is, along with buying a house, the largest item in the household budget of European consumers, and also represents the clearest illustration of the significance and scale of completion of the single market. It is reckoned according to sector estimates, that of the total cost over a vehicle's lifetime, 40 % goes on the initial purchase, 40 % on maintenance and 20 % on insurance.

5.5 The essential aim of European consumers with regard to competition in the motor vehicle sector could be summed up as: choosing where to buy or where to have repairs done when needed at the best price, and enjoying greater road safety.

5.6 While it is crucial to ensure a lively, competitive market keeping abreast of technological developments and encompassing all the economic players in the automotive sector, and especially small and medium-sized enterprises, it is no less important to send reassuring signals to consumers.

5.7 The current Regulation (EC) No 1400/2002 introduced a number of such positive signals: for example, by virtue of the Regulation, warranties issued in a Member State by a manufacturer become valid, under the same conditions, in all the Member States; a consumer with a warranty booklet filled in by a dealer in another Member State no longer had to wait for the warranty to be honoured in his country of origin; and the dealer or repairer to whom a consumer gave their car could no longer levy any charge or demand additional documents.

5.8 However, difficulties have persisted concerning the resale of new vehicles to intermediaries, suppliers imposing demands on their dealers in particular in order to meet 'brand identity' requirements, the freedom to be supplied by other authorised dealers or national importers, and indirect restrictions on cross-supplies of vehicles between authorised dealers.

5.9 The Commission monitored the application of Regulation (EC) No 1400/2002 very closely, reflected in exemplary decisions such as the four adopted in 2007 that gave the sector valuable guidance in the area of access to technical information

(Case Comp/39.140-39.143, involving DaimlerChrysler, Fiat, Toyota and Opel <sup>(8)</sup>).

5.10 Eight years on from the adoption of Regulation (EC) No 1400/2002, the economic indicators confirm that the degree of competition on the relevant markets, which had determined the Commission's choice for a stricter, sector-specific block exemption, has improved appreciably.

5.11 This dynamic, complex environment for competition is marked in particular by a fall in real prices for new motor vehicles, the entry of new brands on the market, fluctuating market shares for competing brands, moderate and decreasing concentration, and more options for consumers in various comparable market segments. However, the diverse nature of national markets persists within the internal market framework, especially in the new Member States where there is a more developed second-hand and independent repairers market.

5.12 Barriers to greater competition, with clear disadvantages for consumers, principally concern access to spare parts and technical information by independent repairers. Counterfeiting and piracy of spare parts continues to cause concern in the sector, on account of low product quality in some cases, and the road safety hazard posed by such parts in others.

5.13 The Commission's proposals for the future competition law framework applicable to the motor vehicle sector are compatible with this enforcement approach and policy. The EESC therefore recalls its earlier opinions in which it expressed its support for the Commission's work regarding collective actions, either generally or on account of infringements of competition rules in particular.

## 6. Specific comments

6.1 The EESC considers that the Commission's option to propose a specific regulation and guidelines is a balanced one since it takes into account the possible economic repercussions, the impact on small- and medium-sized enterprises that account for a large part of the repair, maintenance and spare parts distribution market, as well as the possible environmental and social impact and the implications for road safety.

The EESC would emphasise the following aspects of the proposal:

**6.2 Special regime for the motor vehicle sector as a supplement to the general BER** - The EESC notes that the Supplementary Guidelines proposed by the Commission for the motor vehicle sector are to read in conjunction with and as a supplement to the General Vertical Guidelines (see point I.1.(1) of the Guidelines) which have not yet been presented, which of course jeopardises independent and individual evaluation of the former.

<sup>(8)</sup> OJ C 66, 22.3.2007, p. 18.

**6.3 Entry into force of the new regime** – the Draft Regulation provides for two arrangements for entry into force, according to the market in question. One is for immediate entry into force on 1 June 2010 for the spare parts, repairs and maintenance market, the other being to extend Regulation 1400/2002 until 31 May 2013 for the sale and resale of new vehicles.

6.3.1 Although the EESC recognises that there is currently a lower level of competition on the first of these markets, and that this should be stimulated, the existence of two separate regimes may give rise to problems since contracts between dealers and distributors often contain both elements.

6.3.2 While upholding consumer interests in the rapidly changing state of development of competition on the spare parts/repairs/maintenance market, the EESC accepts that a transitional rule could be adopted to prevent creating additional obstacles to the renegotiation of contracts between distributors and dealers in the light of the new rules.

6.3.3 The EESC urges the European Commission to enforce the new motor vehicle BER in its entirety as of 1 June 2010, while providing a phase-in period of two years for the primary market in order to adapt the existing distribution agreements to the new rules.

6.3.4 It should be remembered that manufacturers can terminate agreements with a two-year period of notice. This means that dealers who have made certain choices and corresponding investments on the basis of the current BER would be obliged to wait until June 2013 before signing a new distribution agreement, unless permission is granted for manufacturers and dealers to adjust their contracts sooner, if they deem it necessary in the light of the new rules and the possible changes in market conditions.

6.3.5 Applying the new BER to the primary market from 1 June 2010 would have the additional advantage of coinciding with the entry into force of the new BER and guidelines regarding the aftermarket.

6.3.6 Considering that the overwhelming majority of the dealers are also involved in after-sales service, it may be readily understood why the EESC is in favour of applying the new BER to the primary and secondary markets at the same time. This option will ensure simplification, flexibility and, last but not least, lower transitional costs.

#### 6.4 Single branding

According to the Guidelines (paragraph (25) and footnote 9), the manufacturers are prevented from including single branding obligations in new agreements with their existing dealers once the new BER enters into force. Considering that the overwhelming majority of the manufacturers will continue with the same distribution network in the coming years, this decision would practically abolish single branding. This restriction is not only contrary to the EESC suggestion (see point 1 above) but also in contradiction with the new general BER (28 July 2009) where no limits are foreseen to the single branding agreement.

#### 6.5 Consumer and commercial vehicles

As in the present Regulation, the Commission is putting cars and commercial vehicles (CV) on the same level even though the former are consumer goods and the latter are capital goods handled in a B-to-B environment, where the customer buys not only the vehicle but a package in which service is a fundamental aspect of the choice for maximising the use of the CV, as it is for agricultural tractors and construction equipment. Such a market difference implies that even the competition aspects are not the same for the two types of products.

6.5.1 As a matter of fact the CV sector, in both the primary and secondary markets, has not experienced any competition problems or been subject to criticism by the end users, as it is a very competitive market with a historically high market share of independent suppliers.

6.5.2 Therefore the EESC believes that the agreements concerning CVs should be governed by the general BER with respect to the aftermarket as well, as is the case for tractors and construction equipment.

#### 6.6 Supply of spare parts

6.6.1 According to Article 5(b) of the Draft Regulation ‘the exemption (...) shall not apply to (...) the restriction, agreed between a supplier of spare parts, repair tools or diagnostic and other equipment and a manufacturer of motor vehicles, of the supplier’s ability to sell these goods or services to authorised or independent distributors or to authorised or independent repairers or end users’.

6.6.2 The wording of this restriction does not appear to be in keeping with the Commission’s objective.

6.6.3 The spare parts purchasing clause in the current BER in practice prevents manufacturers from compelling purchasers to buy more than 30 % of supplies from them. As a result, the diversification of supply to networks brings about lower prices. Although manufacturers still hold more than a 30 % share

of supplies, this can be explained by the targets, bonus and reduction schemes run by the manufacturers. This situation is evidence of the competitive pressure exerted by parts producers on vehicle manufacturers.

6.6.4 However, there is no mention in the proposed Article 5(b) of any percentage beyond which distributors or repairers are not obliged to seek supplies from the manufacturer (as in the present 30 % clause).

6.6.5 What is more, it is stated that spare parts producers must be able to supply authorised repairers. However, this possibility will remain purely theoretical if manufacturers are able to impose exclusive or quasi-exclusive supply from their spare parts networks.

#### 6.7 Warranties

Lastly, the EESC highlights the Commission's position regarding motor vehicle warranties. Given the direct responsibility of the manufacturer for proper functioning and repair of defects, the Commission provides that the obligation upon repairers to make exclusive use of spare parts provided by the manufacturer during the legal warranty period constitutes an exemption. The EESC considers this position to be acceptable, but it must not lead to consumers being unable to make use of independent repairers for aspects relating to regular vehicle maintenance, as this would be likely to constitute a restriction of consumer rights to quality goods and the corresponding warranties.

Brussels, 18 March 2010.

*The President*  
*of the European Economic and Social Committee*  
Mario SEPI

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