

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

(Text with EEA relevance)

(2010/C 138/05)

I. INTRODUCTION

1. Purpose of the Guidelines

- (1) These Guidelines set out principles for assessing under Article 101 of the Treaty on the Functioning of the European Union ⁽¹⁾ particular 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. They accompany Commission Regulation (EU) No 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector ⁽²⁾ (hereinafter ‘the Motor Vehicle Block Exemption Regulation’) and are aimed at helping companies to make their own assessment of such agreements.
- (2) These Guidelines provide clarification on issues that are particularly relevant for the motor vehicle sector, including the interpretation of certain provisions of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ⁽³⁾ (hereinafter ‘the General Vertical Block Exemption Regulation’). They are without prejudice to the applicability of the Guidelines on Vertical Restraints ⁽⁴⁾ (hereinafter ‘the General Vertical Guidelines’) and are therefore to be read in conjunction with and as a supplement to the General Vertical Guidelines.
- (3) These Guidelines apply to both vertical agreements and concerted practices relating to the conditions under which the parties may purchase, sell or resell spare parts and/or provide repair and maintenance services for motor vehicles, and to vertical agreements and concerted practices relating to the conditions under which the parties may purchase, sell or resell new motor vehicles. As explained in Section II of these Guidelines, the latter category of agreements and concerted practices will remain subject to the relevant provisions of 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 ⁽⁵⁾ until 31 May 2013. Therefore, as regards vertical agreements and concerted practices for the purchase, sale or resale of new motor vehicles, these Guidelines will only apply as from 1 June 2013. These Guidelines do not apply to vertical agreements in sectors other than motor vehicles, and the principles set out herein may not necessarily be used to assess agreements in other sectors.
- (4) These Guidelines are without prejudice to the possible parallel application of Article 102 of the Treaty to vertical agreements in the motor vehicle sector, or to the interpretation that the Court of Justice of the European Union may give in relation to the application of Article 101 of the Treaty to such vertical agreements.
- (5) Unless otherwise stated, the analysis and arguments set out in these Guidelines apply to all levels of trade. The terms ‘supplier’ and ‘distributor’ ⁽⁶⁾ are used for all levels of trade. The General Vertical Block Exemption Regulation and the Motor Vehicle Block Exemption Regulation are collectively referred to as ‘the Block Exemption Regulations’.
- (6) The standards set forth in these Guidelines must be applied to each case having regard to the individual factual and legal circumstances. The Commission will apply ⁽⁷⁾ these Guidelines reasonably and flexibly, and having regard to the experience that it has acquired in the course of its enforcement and market monitoring activities.
- (7) The history of competition enforcement in this sector shows that certain restraints can be arrived at either as a result of explicit direct contractual obligations or through indirect obligations or indirect means which nonetheless achieve the same anti-competitive result. Suppliers wishing to influence a distributor’s competitive behaviour may, for instance, resort to threats or intimidation, warnings or penalties. They may also delay or suspend deliveries or threaten to terminate the contracts of distributors that sell to foreign consumers or fail to observe a given
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- ⁽¹⁾ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are in substance identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout these Guidelines.
- ⁽²⁾ OJ L 129, 28.5.2010, p. 52.
- ⁽³⁾ OJ L 102, 23.4.2010, p. 1.
- ⁽⁴⁾ OJ C 130, 19.5.2010, p. 1.
- ⁽⁵⁾ OJ L 203, 1.8.2002, p. 30.
- ⁽⁶⁾ Retail level distributors are commonly referred to in the sector as ‘dealers’.
- ⁽⁷⁾ Since the modernisation of the Union competition rules, the primary responsibility for such analysis lies with the parties to agreements. The Commission may however investigate the compatibility of agreements with Article 101 of the Treaty, on its own initiative or following a complaint.

price level. Transparent relationships between contracting parties would normally reduce the risk of manufacturers being held responsible for using such indirect forms of pressure aimed at achieving anticompetitive outcomes. Adhering to a Code of Conduct is one means of achieving greater transparency in commercial relationships between parties. Such codes may inter alia provide for notice periods for contract termination, which may be determined in function of the contract duration, for compensation to be given for outstanding relationship-specific investments made by the dealer in case of early termination without just cause, as well as for arbitration as an alternative mechanism for dispute resolution. If a supplier incorporates such a Code of Conduct into its agreements with distributors and repairers, makes it publicly available, and complies with its provisions, this will be regarded as a relevant factor for assessing the supplier's conduct in individual cases.

2. Structure of the Guidelines

- (8) These Guidelines are structured as follows:
- (a) Scope of the Motor Vehicle Block Exemption Regulation and relationship with the General Vertical Block Exemption Regulation (Section II)
 - (b) The application of the additional provisions in the Motor Vehicle Block Exemption Regulation (Section III)
 - (c) The assessment of specific restraints: single branding and selective distribution (Section IV)

II. SCOPE OF THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION AND RELATIONSHIP WITH THE GENERAL VERTICAL BLOCK EXEMPTION REGULATION

- (9) Pursuant to Article 4 thereof, the Motor Vehicle Block Exemption Regulation covers vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles.
- (10) Article 2 of the Motor Vehicle Block Exemption Regulation extends the application of the relevant provisions of Regulation (EC) No 1400/2002 until 31 May 2013 as far as they relate to vertical agreements for the purchase, sale or resale of new motor vehicles. Pursuant to Article 3 of the Motor Vehicle Block Exemption Regulation vertical

agreements for the purchase, sale and resale of new motor vehicles will be covered by the General Vertical Block Exemption Regulation, from 1 June 2013 ⁽¹⁾.

- (11) The distinction that the new framework makes between the markets for the sale of new motor vehicles and the motor vehicle aftermarkets reflects the differing competitive conditions on these markets.
- (12) On the basis of an in-depth market analysis set out in the Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 of 28 May 2008 ⁽²⁾ and in the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle Sector of 22 July 2009 ⁽³⁾, it appears that there are no significant competition shortcomings distinguishing the new motor vehicle distribution sector from other economic sectors and which could require the application of rules different from and stricter than those in the General Vertical Block Exemption Regulation. Consequently, the application of a market share threshold of 30 % ⁽⁴⁾, the non-exemption of certain vertical restraints and the conditions provided for in the General Vertical Block Exemption Regulation will normally ensure that vertical agreements for the distribution of new motor vehicles satisfy the conditions laid down in Article 101(3) of the Treaty without the need for any additional requirements over and above those applicable to other sectors.
- (13) However, in order to allow all operators time to adapt to the general regime, in particular in view of relationship-specific investments which have been made in the long term, the period of application of Regulation (EC) No 1400/2002 is extended by three years until 31 May 2013 with regard to those requirements that relate specifically to vertical agreements for the purchase, sale or resale of new motor vehicles. From 1 June 2010 until 31 May 2013, those provisions of Regulation (EC) No 1400/2002 which relate to both agreements for the distribution of new motor vehicles and agreements for

⁽¹⁾ The expiry of Regulation (EC) No 1400/2002 and its replacement with the new legal framework explained in these Guidelines does not of itself require that existing contracts be terminated. See for example Case C-125/05 *Vulcan Silkeborg A/S v Skandinavisk Motor Co. A/S*. [2006] ECR I-7637.

⁽²⁾ SEC(2008) 1946.

⁽³⁾ COM(2009) 388.

⁽⁴⁾ Pursuant to Article 7 of the General Vertical Block Exemption Regulation, the calculation of this market share threshold is normally based on market sales value data or, if such data are not available, on other reliable market information, including market sales volumes. In this respect, the Commission takes note of the fact that, for the distribution of new motor vehicles, market shares are currently calculated by the industry on the basis of the volume of motor vehicles sold by the supplier on the relevant market, which includes all motor vehicles that are regarded by the buyer as interchangeable or substitutable, by reason of the products' characteristics, prices and intended use.

the purchase, sale and resale of spare parts for motor vehicles and/or the provision of repair and maintenance services, will apply only in respect of the former. During that period these Guidelines will not be used for interpreting the provisions of Regulation (EC) No 1400/2002. Instead, reference should be made to the Explanatory Brochure on that Regulation ⁽¹⁾.

- (14) As regards vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles and/or provide repair and maintenance services for motor vehicles, the Motor Vehicle Block Exemption Regulation applies from 1 June 2010. This means that, in order to be exempted pursuant to Article 4 of that Regulation, those agreements not only need to fulfil the conditions for an exemption under the General Vertical Block Exemption Regulation, but must also not contain any serious restrictions of competition, commonly referred to as hardcore restrictions as listed in Article 5 of the Motor Vehicle Block Exemption Regulation.
- (15) Because of the generally brand-specific nature of the markets for repair and maintenance services and for the distribution of spare parts, competition on those markets is inherently less intense compared to that on the market for the sale of new motor vehicles. While reliability has improved and service intervals have lengthened thanks to technological improvement, this evolution is outpaced by an upward price trend for individual repair and maintenance jobs. On the spare parts markets, parts bearing the motor vehicle manufacturer's brand face competition from those supplied by the original equipment suppliers (OES) and by other parties. This maintains price pressure on those markets, which in turn maintains pressure on prices on the repair and maintenance markets, since spare parts make up a large percentage of the cost of the average repair. Moreover, repair and maintenance as a whole represent a very high proportion of total consumer expenditure on motor vehicles, which itself accounts for a significant slice of the average consumer's budget.
- (16) In order to address particular competition issues arising on the motor vehicle aftermarkets, the General Vertical Block Exemption Regulation is supplemented with three additional hardcore restrictions in the Motor Vehicle Block Exemption Regulation applying to agreements for the repair and maintenance of motor vehicles and for the supply of spare parts. Further guidance on those additional hardcore restrictions is given in Section III of these Guidelines.

⁽¹⁾ Explanatory brochure for Commission Regulation (EC) No 1400/2002 of 31 July 2002 — *Distribution and Servicing of Motor Vehicles in the European Union*.

III. THE APPLICATION OF THE ADDITIONAL PROVISIONS IN THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION

- (17) Agreements will not benefit from the block exemption if they contain hardcore restrictions. These restrictions are listed in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation. Including any such restrictions in an agreement gives rise to the presumption that the agreement falls within Article 101(1) of the Treaty. It also gives rise to the presumption that the agreement is unlikely to satisfy the conditions laid down in Article 101(3) of the Treaty, for which reason the block exemption does not apply. However, this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 101(3) of the Treaty in an individual case.
- (18) One of the Commission's objectives as regards competition policy for the motor vehicle sector is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers. The availability of such parts brings considerable benefits to consumers, especially since there are often large differences in price between parts sold or resold by a car manufacturer and alternative parts. Alternatives for parts bearing the trademark of the motor vehicle manufacturer (OEM parts) include original parts manufactured and distributed by original equipment suppliers (OES parts), while other parts matching the quality of the original components are supplied by 'matching quality' parts manufacturers.
- (19) 'Original parts or equipment' means parts or equipment which are manufactured according to the specifications and production standards provided by the motor vehicle manufacturer for the production of parts or equipment for the assembly of the motor vehicle in question. This includes parts or equipment which are manufactured on the same production line as those parts or equipment. It is presumed unless the contrary is proven, that parts constitute original parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the motor vehicle in question and have been manufactured according to the specifications and production standards of the motor vehicle (see Article 3(26) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such motor vehicles (Framework Directive) ⁽²⁾).

⁽²⁾ OJ L 263, 9.10.2007, p. 1.

(20) In order to be considered as 'matching quality', parts must be of a sufficiently high quality that their use does not endanger the reputation of the authorised network in question. As with any other selection standard, the motor vehicle manufacturer may bring evidence that a given spare part does not meet this requirement.

(21) Article 4(e) of the General Vertical Block Exemption Regulation describes it as a hardcore restriction for an agreement between a supplier of components and a buyer who incorporates those components, to prevent or restrict the supplier's ability to sell its components to end-users, independent repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods. Article 5(a), (b) and (c) of the Motor Vehicle Block Exemption Regulation lay down three additional hardcore restrictions relating to agreements for the supply of spare parts.

(22) Article 5(a) of the Motor Vehicle Block Exemption Regulation concerns the restriction of the sale of spare parts for motor vehicles by members of a selective distribution system to independent repairers. This provision is most relevant for a particular category of parts, sometimes referred to as captive parts, which may only be obtained from the motor vehicle manufacturer or from members of its authorised networks. If a supplier and a distributor agree that such parts may not be supplied to independent repairers, this agreement would be likely to foreclose such repairers from the market for repair and maintenance services and fall foul of Article 101 of the Treaty.

(23) Article 5(b) of the Motor Vehicle Block Exemption Regulation concerns any direct or indirect restriction agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods to authorised and/or independent distributors and repairers. So-called 'tooling arrangements' between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type. Reference should be made in this respect to the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty⁽¹⁾ (the Subcontracting Notice). Normally, Article 101(1) of the Treaty does not apply to an arrangement whereby a motor vehicle manufacturer provides a tool to a component manufacturer which is necessary for the production of certain components, shares in the product development costs, or contributes necessary⁽²⁾ intellectual property

rights, or know-how, and does not allow this contribution to be used for the production of parts to be sold directly in the aftermarket. On the other hand, if a motor vehicle manufacturer obliges a component supplier to transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how, the agreement at issue will not be considered to be a genuine sub-contracting arrangement. Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations.

(24) Article 5(c) of the Motor Vehicle Block Exemption Regulation relates to 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 supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts. In order to improve consumer choice, repairers and consumers should be able to identify which spare parts from alternative suppliers match a given motor vehicle, other than those bearing the car manufacturer's brand. Putting the trade mark or logo on the components and on spare parts facilitates the identification of compatible replacement parts which can be obtained from OES. By not allowing this, motor vehicle manufacturers can restrict the marketing of OES parts and limit consumers' choice in a manner that runs counter to the provisions of Article 101 of the Treaty.

IV. THE ASSESSMENT OF SPECIFIC RESTRAINTS

(25) Parties to vertical agreements in the motor vehicle sector should use these Guidelines as a supplement to and in conjunction with the General Vertical Guidelines in order to assess the compatibility of specific restraints with Article 101 of the Treaty. This section gives particular guidance as to single branding and selective distribution, which are two areas which may have particular relevance for assessing the category of agreements referred to in Section II of these Guidelines.

1. Single branding obligations

(i) *Assessment of single-branding obligations under the Block Exemption Regulations*

(26) Pursuant to Article 3 of the Motor Vehicle Block Exemption Regulation read in conjunction with Article 5(1)(a) of the General Vertical Block Exemption Regulation, a motor vehicle supplier and a distributor having a share of the relevant market that does

⁽¹⁾ OJ C 1, 3.1.1979, p. 2.

⁽²⁾ Where the motor vehicle manufacturer provides a tool, intellectual property rights (IPR) and/or know-how to a component supplier, this arrangement will not benefit from the Sub-contracting Notice if the component supplier already has this tool, IPR or know-how at its disposal, or could, under reasonable conditions obtain them, since under these circumstances the contribution would not be necessary.

not exceed 30 % may agree on a single-branding obligation that obliges the distributor to purchase motor vehicles only from the supplier or from other firms designated by the supplier, on condition that the duration of such non-compete obligations is limited to five years or less. The same principles apply to agreements between suppliers and their authorised repairers and/or spare parts distributors. A renewal beyond five years requires explicit consent of both parties, and there should be no obstacles that hinder the distributor from effectively terminating the non-compete obligation at the end of the five-year period. Non-compete obligations are not covered by the Block Exemption Regulations when their duration is indefinite or exceeds five years, although in those circumstances the Block Exemption Regulations would continue to apply to the remaining part of the vertical agreement. The same applies to non-compete obligations that are tacitly renewable beyond a period of five years. Obstacles, threats of termination, or intimations that single-branding will be re-imposed before a sufficient period has elapsed to allow either the distributor or the new supplier to amortise their sunk investments would amount to a tacit renewal of the single-branding obligation in question.

(27) Pursuant to Article 5(1)(c) of the General Vertical Block Exemption Regulation, any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers, are not covered by the exemption. Particular attention should be paid to the manner in which single branding obligations are applied to existing multi-brand distributors, in order to ensure that the obligations in question do not form part of an overall strategy aimed at eliminating competition from one or more specific suppliers, and in particular from newcomers or weaker competitors. This type of concern could arise in particular if the market share thresholds indicated in paragraph 34 of these Guidelines are exceeded and if the supplier applying this type of restraint has a position on the relevant market that enables it to contribute significantly to the overall foreclosure effect⁽¹⁾.

(28) Non-compete obligations in vertical agreements do not constitute hardcore restrictions, but depending on the market circumstances, can nonetheless have negative effects which may cause the agreements to fall under Article 101(1) of the Treaty⁽²⁾. One such harmful effect may arise if barriers to entry or expansion are raised that

foreclose competing suppliers, and harm consumers in particular by increasing the prices or limiting the choice of products, lowering their quality or reducing the level of product innovation.

(29) However, non-compete obligations may also have positive effects which may justify the application of Article 101(3) of the Treaty. They may in particular help to overcome a 'free-rider' problem, by which one supplier benefits from investments made by another. A supplier may, for instance, invest in a distributor's premises, but in doing so attract customers for a competing brand that is also sold from the same premises. The same applies to other types of investment made by the supplier which may be used by the distributor to sell motor vehicles of competing manufacturers, such as investments in training.

(30) Another positive effect of non-compete obligations in the motor vehicle sector relates to the enhancement of the brand image and reputation of the distribution network. Such restraints may help to create and maintain a brand image by imposing a certain measure of uniformity and quality standardisation on distributors, thereby increasing the attractiveness of that brand to the final consumer and increasing its sales.

(31) Article 1(d) of the General Vertical Block Exemption Regulation defines a non-compete obligation as:

'(a) 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

(b) any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market.'

(32) Apart from direct means to tie the distributor to its own brand(s), a supplier may also have recourse to indirect means having the same effect. In the motor vehicle sector, such indirect means may include qualitative standards specifically designed to discourage the distributors from selling products of competing brands⁽³⁾, bonuses made conditional on the distributor agreeing to sell exclusively one brand, target rebates or certain other requirements such as the requirement to set up a

⁽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*), OJ C 368, 22.12.2001, p. 13.

⁽²⁾ As regards the relevant factors to be taken into account to carry out the assessment of non-compete obligations under Article 101(1) of the Treaty, see the relevant section in the General Vertical Guidelines, in particular paragraphs 129 to 150.

⁽³⁾ See cases *BMW*, IP/06/302 — 13.3.2006 and *Opel* 2006, IP/06/303 — 13.3.2006.

separate legal entity for the competing brand or the obligation to display the additional competing brand in a separate showroom in a geographic location where the fulfilment of such a requirement would not be economically viable (for example sparsely populated areas).

(33) The block exemption provided for in the General Vertical Block Exemption Regulation covers all forms of direct or indirect non-compete obligations provided that the market shares of both the supplier and the distributor do not exceed 30 % and the duration of the non-compete obligation does not exceed five years. However, even in cases where individual agreements satisfy those conditions, the use of non-compete obligations may result in anti-competitive effects not outweighed by their positive effects. In the motor vehicle industry, such net anti-competitive effects could in particular result from cumulative effects leading to the foreclosure of competing brands.

(34) For the distribution of motor vehicles at the retail level, foreclosure of this type is unlikely to occur in markets where all suppliers have market shares below 30 % and where the total percentage of all motor vehicle sales that are subject to single-branding obligations on the market in question (that is to say the total tied market share) is below 40 % ⁽¹⁾. In a situation where there is one non-dominant supplier with a market share of more than 30 % of the relevant market whereas all other suppliers' market shares are below 30 %, cumulative anticompetitive effects are unlikely as long as the total tied market share does not exceed 30 %.

(35) If access to the relevant market for the sale of new motor vehicles and competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements containing single branding obligations, the benefit of the block exemption may be withdrawn by the Commission, pursuant to Article 29 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ⁽²⁾. A withdrawal decision may be addressed in particular to those suppliers that contribute in a significant manner to a cumulative foreclosure effect on the relevant market. Where that effect occurs on a national market, the National Competition Authorities of that Member State may also withdraw the benefit of the block exemption in respect of that territory.

(36) In addition, if parallel networks of agreements containing similar vertical restraints cover more than 50 % of a given

market, the Commission may adopt a Regulation declaring the block exemption inapplicable to the market in question in respect of such restraints. In particular, such a situation may arise if cumulative effects resulting from the widespread use of single-branding obligations lead to consumer harm on that market.

(37) With regard to the assessment of minimum purchasing obligations calculated on the basis of the distributor's total annual requirements, it may be justified to withdraw the benefit of the block exemption if cumulative anticompetitive effects arise even if the supplier imposes a minimum purchasing obligation that is below the 80 % limit established in Article 1(d) of the General Vertical Block Exemption Regulation. The parties need to consider whether, in the light of the relevant factual circumstances, an obligation on the distributor to ensure that a given percentage of its total purchases of motor vehicles bear the supplier's brand will prevent the distributor from taking on one or more additional competing brands. From that perspective, even a minimum purchasing requirement set at a level lower than 80 % of total annual purchases will amount to a single-branding obligation if it obliges a distributor wishing to take up a new brand of its choice from a competing manufacturer to purchase so many motor vehicles of the brand that it currently sells that the distributor's business is made economically unsustainable ⁽³⁾. Such a minimum purchasing obligation will also amount to a single branding obligation if it forces a competing supplier to split its envisaged sales volume in a given territory over several distributors, leading to duplication of investments and a fragmented sales presence.

(ii) *Assessment of single-branding obligations outside the scope of the Block Exemption Regulations*

(38) Parties may also be called upon to assess the compatibility with the competition rules of single-branding obligations in respect of agreements that do not qualify for block exemption because the parties' market shares exceed 30 % or the duration of the agreement exceeds five years. Such agreements will therefore be subject to individual scrutiny in order to ascertain whether they are caught by Article 101(1) of the Treaty and if so, whether efficiencies offsetting any possible anti-competitive effect can be demonstrated. If that is the case, they may be able to benefit from the exception laid down in Article 101(3) of the Treaty. For assessment in an individual case the general principles set out in Section VI.2.1 of the General Vertical Guidelines will apply.

⁽³⁾ For instance, if a dealer purchases 100 cars of brand A in a year to meet demand, and wishes to buy 100 cars of brand B, an 80 % minimum purchasing obligation as regards brand A would imply that the following year, the dealer would have to buy 160 brand A cars. Given that penetration rates are likely to be relatively stable, this would likely leave the dealer with a large unsold stock of brand A. It would therefore be forced to dramatically reduce its purchases of brand B in order to avoid such a situation. Depending on the specific circumstances of the case, such a practice can be viewed as a single-branding obligation.

⁽¹⁾ See General Vertical Guidelines at paragraph 141.

⁽²⁾ OJ L 1, 4.1.2003, p. 1.

(39) In particular, agreements entered into between a motor vehicle manufacturer or its importer, on the one hand, and spare parts distributors and/or authorised repairers, on the other, will fall outside the Block Exemption Regulations when the market shares held by the parties exceed the 30 % threshold, which is likely to be the case for most such agreements. Single-branding obligations that will need to be assessed in such circumstances include all types of restriction that directly or indirectly limit authorised distributors' or repairers' ability to obtain original or matching quality spare parts from third parties. However, an obligation on an authorised repairer to use original spare parts supplied by the motor vehicle manufacturer for repairs carried out under warranty, free servicing and motor vehicle recall work would not be considered to be a single-branding obligation, but rather an objectively justified requirement.

(40) Single-branding obligations in agreements for the distribution of new motor vehicles will also need to be individually assessed where their duration exceeds five years or/and where the market share of the supplier exceeds 30 %, which may be the case for certain suppliers in some Member States. In such circumstances, the parties should have regard not only to the supplier's and buyer's market share, but also to the total tied market share taking into account the thresholds indicated in paragraph 34. Above those thresholds, individual cases will be assessed in accordance with the general principles set out in Section VI.2.1 of the General Vertical Guidelines.

(41) Outside the scope of the Block Exemption Regulations, the assessment of minimum purchasing obligations calculated on the basis of the distributor's total annual requirements will take into account all the relevant factual circumstances. In particular, a minimum purchasing requirement set at a level lower than 80 % of total annual purchases will amount to a single-branding obligation if it has the effect of preventing distributors from dealing in one or more additional competing brands.

2. Selective distribution

(42) Selective distribution is currently the predominant form of distribution in the motor vehicle sector. Its use is widespread in motor vehicle distribution, as well as for repair and maintenance and the distribution of spare parts.

(43) In purely qualitative selective distribution, distributors and repairers are only selected on the basis of objective criteria required by the nature of the product or service, such as the technical skills of sales personnel, the layout of sales

facilities, sales techniques and the type of sales service to be provided by the distributor⁽¹⁾. The application of such criteria does not put a direct limit on the number of distributors or repairers admitted to the supplier's network. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) of the Treaty for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Second, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Third, the criteria laid down must not go beyond what is necessary.

(44) Whereas qualitative selective distribution involves the selection of distributors or repairers only on the basis of objective criteria required by the nature of the product or service, quantitative selection adds further criteria for selection that more directly limit the potential number of distributors or repairers either by directly fixing their number, or for instance, requiring a minimum level of sales. Networks based on quantitative criteria are generally held to be more restrictive than those that rely on qualitative selection alone, and are accordingly more likely to be caught by Article 101(1) of the Treaty.

(45) If selective distribution agreements are caught by Article 101(1) of the Treaty, the parties will need to assess whether their agreements can benefit from the Block Exemption Regulations, or individually, from the exception in Article 101(3) of the Treaty.

(i) *The assessment of selective distribution under the Block Exemption Regulations*

(46) The Block Exemption Regulations exempt selective distribution agreements, irrespective of whether quantitative or purely qualitative selection criteria are used, so long as the parties' market shares do not exceed 30 %. However, that exemption is conditional on the agreements not containing any of the hardcore restrictions set out

⁽¹⁾ It should be recalled however that, in accordance with the established case law of the European Courts, purely qualitative selective distribution systems may nevertheless restrict competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different way of competing. This situation will generally not arise on the markets for the sale of new motor vehicles, on which leasing and other similar arrangements are a valid alternative to outright purchase of a motor vehicle, nor in the markets for repair and maintenance, as long as independent repairers provide consumers with an alternative channel for the upkeep of their motor vehicles. See for example Case T-88/92 *Groupeement d'achat Édouard Leclerc v Commission* [1996] ECR II-1961.

in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation, or any of the excluded restrictions described in Article 5 of the General Vertical Block Exemption Regulation.

(47) Three of the hardcore restrictions in the General Vertical Block Exemption Regulation relate specifically to selective distribution. Article 4(b) describes as hardcore the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, except the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is operated. Article 4(c) describes as hardcore agreements restricting active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment, while Article 4(d) relates to the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade. Those three hardcore restrictions have special relevance for motor vehicle distribution.

(48) The internal market has enabled consumers to purchase motor vehicles in other Member States and take advantage of price differentials between them, and the Commission views the protection of parallel trade in this sector as an important competition objective. The consumer's ability to buy goods in other Member States is especially important as far as motor vehicles are concerned, given the high value of the goods and the direct benefits in the form of lower prices accruing to consumers buying motor vehicles elsewhere in the Union. The Commission is therefore concerned that distribution agreements should not restrict parallel trade, since this cannot be expected to satisfy the conditions laid down in Article 101(3) of the Treaty ⁽¹⁾.

(49) The Commission has brought several cases against motor vehicle manufacturers for impeding such trade, and its decisions have been largely confirmed by the European

⁽¹⁾ The notion that cross-border trade restrictions may harm consumers has been confirmed by the Court in Case C-551/03 P, *General Motors*, [2006] ECR I-3173, paragraphs 67 and 68; Case C-338/00 P, *Volkswagen/Commission*, [2003] ECR I-9189, paragraphs 44 and 49, and Case T-450/05, *Peugeot/Commission*, judgment of 9 July 2009, not yet reported, paragraphs 46-49.

Courts ⁽²⁾. This experience shows that restrictions on parallel trade may take a number of forms. A supplier may, for instance, put pressure on distributors, threaten them with contract termination, fail to pay bonuses, refuse to honour warranties on motor vehicles imported by a consumer or cross-supplied between distributors established in different Member States, or make a distributor wait significantly longer for delivery of an identical motor vehicle when the consumer in question is resident in another Member State.

(50) One particular example of indirect restrictions on parallel trade arises when a distributor is unable to obtain new motor vehicles with the appropriate specifications needed for cross-border sales. In those specific circumstances, the benefit of the block exemption may depend on whether a supplier provides its distributors with motor vehicles with specifications identical to those sold in other Member States for sale to consumers from those countries (the so-called 'availability clause') ⁽³⁾.

(51) For the purposes of the application of the Block Exemption Regulations, and in particular as regards the application of Article 4(c) of the General Vertical Block Exemption Regulation, the notion of 'end users' includes leasing companies. This means in particular that distributors in selective distribution systems may not be prevented from selling new motor vehicles to leasing companies of their choice. However, a supplier using selective distribution may prevent its distributors from selling new motor vehicles to leasing companies when there is a verifiable risk that those companies will resell them while still new. A supplier can therefore require a dealer to check, before selling to a particular company, the general leasing conditions applied so as to verify that the company in question is indeed a leasing company rather than an unauthorised reseller. However, an obligation on a dealer to provide its supplier with copies of each leasing agreement before the dealer sells a motor vehicle to a leasing company could amount to an indirect restriction on sales.

(52) The notion of 'end users' also encompasses consumers who purchase through an intermediary. An intermediary is a person or an undertaking which purchases a new motor vehicle on behalf of a named consumer without being a member of the distribution network. Those operators perform an important role in the

⁽²⁾ Commission Decision 98/273/EC of 28 January 1998 in Case IV/35.733 — *VW*, Commission Decision 2001/146/EC of 20 September 2000 in Case COMP/36.653 — *Opel*, OJ L 59, 28.2.2001, p. 1, Commission Decision 2002/758/EC of 10 October 2001 in Case COMP/36.264 — *Mercedes-Benz*, OJ L 257, 25.9.2002, p. 1, Commission Decision 2006/431/EC of 5 October 2005 in Cases F-2/36.623/36.820/37.275 — *SEP et autres/Peugeot SA*.

⁽³⁾ Joined Cases 25 and 26/84 *Ford-Werke AG and Ford of Europe Inc. v Commission of the European Communities*, [1985] ECR 2725.

motor vehicle sector, in particular by facilitating consumers' purchases of motor vehicles in other Member States. Evidence of intermediary status should as a rule be established by a valid mandate including the name and address of the consumer obtained prior to the transaction. The use of the Internet as a means to attract customers in relation to a given range of motor vehicles and collect electronic mandates from them does not affect intermediary status. Intermediaries are to be distinguished from independent resellers, which purchase motor vehicles for resale and do not operate on behalf of named consumers. Independent resellers are not to be considered as end users for the purposes of the Block Exemption Regulations.

(ii) *The assessment of selective distribution outside the scope of the Block Exemption Regulations*

- (53) As paragraph 175 of the General Vertical Guidelines explains, the possible competition risks brought about by selective distribution are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and facilitation of collusion between suppliers or buyers.
- (54) To assess the possible anti-competitive effects of selective distribution under Article 101(1) of the Treaty, a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. As pointed out in paragraph 43, qualitative selective distribution is normally not caught by Article 101(1) of the Treaty.
- (55) The fact that a network of agreements does not benefit from the block exemption because the market share of one or more of the parties is above the 30 % threshold for exemption does not imply that such agreements are illegal. Instead, the parties to such agreements need to subject them to an individual analysis to check whether they fall under Article 101(1) of the Treaty and, if so, whether they may nonetheless benefit from the exception in Article 101(3) of the Treaty.
- (56) As regards the specificities of new motor vehicle distribution, quantitative selective distribution will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40 %. However, the parties to such agreements should bear in mind that the presence of particular selection standards could have an effect on whether their agreements satisfy the conditions laid down in Article 101(3) of the Treaty. For instance, although the use of location clauses in selective distribution agreements for new motor vehicles, that is to say agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment, will usually bring efficiency benefits in the form of more efficient logistics and predictable network coverage, those benefits may be outweighed by disadvantages if the market share of the supplier is very high, and in those circumstances such clauses might not be able to benefit from the exception in Article 101(3) of the Treaty.
- (57) Individual assessment of selective distribution for authorised repairers also raises specific issues. Insofar as a market exists⁽¹⁾ for repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific. On that market, the main source of competition results from the competitive interaction between independent repairers and authorised repairers of the brand in question.
- (58) Independent repairers in particular provide vital competitive pressure, as their business models and their related operating costs are different from those in the authorised networks. Moreover, unlike authorised repairers, which to a large extent use car manufacturer-branded parts, independent garages generally have greater recourse to other brands, thereby allowing a motor vehicle owner to choose between competing parts. In addition, given that a large majority of repairs for newer motor vehicles are currently carried out in authorised repair shops, it is important that competition between authorised repairers remains effective, which may only be the case if access to the networks remains open for new entrants.
- (59) The new legal framework makes it easier for the Commission and National Competition Authorities to protect competition between independent garages and authorised repairers, as well as between the members of each authorised repairer network. In particular, the reduction in the market share threshold for exemption of qualitative selective distribution from 100 % to 30 % broadens the scope for competition authorities to act.
- (60) When assessing the competitive impact of vertical agreements on the motor vehicle aftermarkets, the parties should therefore be aware of the Commission's determination to preserve competition both between the members of authorised repair networks and between those members and independent repairers. To this end, particular attention should be paid to three specific types of

⁽¹⁾ In some circumstances, a system market which includes 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 Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, paragraph 56. One important factor is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the motor vehicle or not. For instance, buying behaviour may significantly differ between buyers of trucks who purchase and operate a fleet, and who take into account maintenance costs at the moment of purchasing the motor vehicle and buyers of individual motor vehicles. Another relevant factor is the existence and relative position of part suppliers, repairers and/or parts distributors operating in the aftermarket independently from motor vehicle manufacturers. In most cases, there is likely to be a brand-specific aftermarket, in particular because the majority of buyers are private individuals or small and medium-size enterprises that purchase motor vehicles and aftermarket services separately and do not have systematic access to data permitting them to assess the overall costs of motor vehicle ownership in advance.

conduct which may restrict such competition, namely preventing access of independent repairers to technical information, misusing the legal and/or extended warranties to exclude independent repairers, or making access to authorised repairer networks conditional upon non-qualitative criteria.

- (61) Although the following three subsections refer specifically to selective distribution, the same anti-competitive foreclosure effects could stem from other types of vertical agreements that limit, directly or indirectly, the number of service partners contractually linked to a motor vehicle manufacturer.

Access to technical information by independent operators

- (62) Although purely qualitative selective distribution is in general considered to fall outside Article 101(1) of the Treaty for lack of anti-competitive effects⁽¹⁾, qualitative selective distribution agreements concluded with authorised repairers and/or parts distributors may be caught by Article 101(1) of the Treaty if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, for instance by failing to release technical repair and maintenance information to them. In that context, the notion of independent operators includes independent repairers, spare parts manufacturers and distributors, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers.
- (63) Suppliers provide their authorised repairers with the full scope of technical information needed to perform repair and maintenance work on motor vehicles of their brands and are often the only companies able to provide repairers with all of the technical information that they need on the brands in question. In such circumstances, if the supplier fails to provide independent operators with appropriate access to its brand-specific technical repair and maintenance information, possible negative effects stemming from its agreements with authorised repairers and/or parts distributors could be strengthened, and cause the agreements to fall within Article 101(1) of the Treaty.
- (64) Moreover, a lack of access to necessary technical information could cause the market position of independent operators to decline, leading to consumer harm,

⁽¹⁾ As pointed out in paragraph 54 above, this will generally be the case on the markets for repair and maintenance as long as independent repairers provide consumers with an alternative channel for the upkeep of their motor vehicles.

in terms of a significant reduction in choice of spare parts, higher prices for repair and maintenance services, a reduction in choice of repair outlets and potential safety problems. In those circumstances, the efficiencies that might normally be expected to result from the authorised repair and parts distribution agreements would not be such as to offset these anti-competitive effects, and the agreements in question would consequently fail to satisfy the conditions laid down in Article 101(3) of the Treaty.

- (65) Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information⁽²⁾ as well as Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information⁽³⁾ provide for a system for disseminating repair and maintenance information in respect of passenger cars put on the market from 1 September 2009. Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro 6) and on access to vehicle repair and maintenance information⁽⁴⁾ and the ensuing implementing measures provide for such a system in respect of commercial vehicles put on the market from 1 January 2013. The Commission will take those Regulations into account when assessing cases of suspected withholding of technical repair and maintenance information concerning motor vehicles marketed before those dates. When considering whether withholding a particular item of information may lead the agreements at issue to be caught by Article 101(1) of the Treaty, a number of factors should be considered, including:

- (a) whether the item in question is technical information, or information of another type, such as commercial information⁽⁵⁾, which may legitimately be withheld;

⁽²⁾ OJ L 171, 29.6.2007, p. 1.

⁽³⁾ OJ L 199, 28.7.2008, p. 1.

⁽⁴⁾ OJ L 188, 18.7.2009, p. 1.

⁽⁵⁾ Commercial information can be thought of as information that is used for carrying on a repair and maintenance business but is not needed to repair or maintain motor vehicles. Examples include billing software, or information on the hourly tariffs practiced within the authorised network.

- (b) whether withholding the technical information in question will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market;
- (c) whether the technical information in question is made available to members of the relevant authorised repair network; if it is made available to the authorised network in whatever form, it should also be made available to independent operators on a non-discriminatory basis;
- (d) whether the technical information in question will ultimately ⁽¹⁾ be used for the repair and maintenance of motor vehicles, or rather for another purpose ⁽²⁾, such as for the manufacturing of spare parts or tools.
- (66) Technological progress implies that the notion of technical information is fluid. Currently, particular examples of technical information include software, fault codes and other parameters, together with updates, which are required to work on electronic control units with a view to introducing or restoring settings recommended by the supplier, motor vehicle identification numbers or any other motor vehicle identification methods, parts catalogues, repair and maintenance procedures, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network. The part code and any other information necessary to identify the correct car manufacturer-branded spare part to fit a given individual motor vehicle (that is to say the part that the car manufacturer would generally supply to the members of its authorised repair networks to repair the motor vehicle in question) also constitute technical information ⁽³⁾. The lists of items set out in Article 6(2) of Regulation (EC) No 715/2007 and Regulation (EC) No 595/2009 should also be used as a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty.
- (67) The way in which technical information is supplied is also important for assessing the compatibility of authorised repair agreements with Article 101 of the Treaty. Access should be given upon request and without undue delay, the information should be provided in a usable form, and the price charged should not discourage access to it by failing to take into account the extent to which the independent operator uses the information. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to its authorised repairers and should not oblige independent operators to purchase more than the information necessary to carry out the work in question. Article 101 of the Treaty does not, however, oblige a supplier to provide technical information in a standardised format or through a defined technical system, such as the CEN/ISO standard and the OASIS format as provided for by Regulation (EC) No 715/2007 and Commission Regulation (EC) No 295/2009 of 18 March 2009 concerning the classification of certain goods in the Combined Nomenclature ⁽⁴⁾.
- (68) The above considerations also apply to the availability of tools and training to independent operators. 'Tools' in this context includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.
- #### Misuse of warranties
- (69) Qualitative selective distribution agreements may also be caught by Article 101(1) of the Treaty if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks. The same applies to warranty conditions which require the use of the manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms. It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty. However, if a supplier legitimately refuses to honour a warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of a repairer to carry out a particular repair or maintenance operation in the correct manner or to the use of poor quality spare parts, this will have no bearing on the compatibility of the supplier's repair agreements with the competition rules.
- ⁽¹⁾ Such as information supplied to publishers for resupply to motor vehicle repairers.
- ⁽²⁾ Information used for fitting a spare part to or using a tool on a motor vehicle should be considered as being used for repair and maintenance, while information on the design, production process or the materials used for manufacturing a spare part should not be considered to fall within this category, and may therefore be withheld.
- ⁽³⁾ The independent operator should not have to purchase the spare part in question to be able to obtain this information.
- ⁽⁴⁾ OJ L 95, 9.4.2009, p. 7.

Access to authorised repairer networks

- (70) Competition between authorised and independent repairers is not the only form of competition that needs to be taken into account when analysing the compatibility of authorised repair agreements with Article 101 of the Treaty. Parties should also assess the degree to which authorised repairers within the relevant network are able to compete with one another. One of the main factors driving this competition relates to the conditions of access to the network established under the standard authorised repairer agreements. In view of the generally strong market position of networks of authorised repairers, their particular importance for owners of newer motor vehicles, and the fact that consumers are not prepared to travel long distances to have their cars repaired, the Commission considers it important that access to the authorised repair networks should generally remain open to all firms that meet defined quality criteria. Submitting applicants to quantitative selection is likely to cause the agreement to fall within Article 101(1) of the Treaty.
- (71) A particular case arises when agreements oblige authorised repairers to also sell new motor vehicles. Such agreements

are likely to be caught by Article 101(1) of the Treaty, since the obligation in question is not required by the nature of the contract services. Moreover, for an established brand, agreements containing such an obligation would not normally be able to benefit from the exception in Article 101(3) of the Treaty, since the impact would be to severely restrict access to the authorised repair network, thereby reducing competition without bringing corresponding benefits to consumers. However, in certain cases, a supplier wishing to launch a brand on a particular geographic market might initially find it difficult to attract distributors willing to make the necessary investment unless they could be sure that they would not face competition from 'stand-alone' authorised repairers that sought to free-ride on these initial investments. In those circumstances, contractually linking the two activities for a limited period of time would have a pro-competitive effect on the motor vehicle sales market by allowing a new brand to launch, and would have no effect on the potential brand-specific repair market, which would in any event not exist if the motor vehicles could not be sold. The agreements in question would therefore be unlikely to be caught by Article 101(1) of the Treaty.
