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Recent Changes in the Regulation of Motor Vehicle Distribution in Europe – Questioning the Logic of Sector-Specific Rules for the Car Industry

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A new block exemption regulation for motor vehicle distribution agreements was adopted in May 2010. Regulation 461/2010 extends the application of Regulation 1400/2002 – the first 'new style' block exemption for the car sector – for three years regarding the distribution of new motor vehicles. After that period, the sector will finally fall within the scope of the general block exemption for vertical agreements - Regulation 330/2010. At the same time, Regulation 461/2010 contains a list of hardcore restrictions applicable to the car aftermarket. It is accompanied by a set of sector-specific supplementary guidelines. As Regulation 1400/2002 is progressively replaced, the momentum calls for an assessment of its achievements and the merits of the changes envisaged. The Commission appears to finally acknowledge that the maintenance of specific rules for the car sector is of questionable necessity, and opts to gradually include the sector in the general block exemption regulation for vertical agreements. Such a welcome change should doubtlessly bring coherence to an exemption system divided by the existence of a specific car industry regime for the past fifteen years. Unfortunately, a closer look at the modifications rapidly mitigates the initial enthusiasm, particularly since the Commission has opted to maintain specific rules for the aftermarket, and has delayed the inclusion of the sector in the general regime for vertical agreements. Whilst it is too early to assess the merits of the forthcoming amendments, this paper questions the practical effectiveness of the Commission's most recent reform, and argues that a precious opportunity to unify the curious divide between distribution agreements in the car sector and all other industries may have – yet again – been squandered.

INTRODUCTION

Only seven years after the entry into force of Regulation 1400/2002,[1] the first 'new-style' block exemption for the distribution of motor vehicles, a new reform of the sector specific rules has just been completed. Regulation 461/2010 has been introduced,[2] along with a set of Supplementary Guidelines on Vertical Restraints in Agreements for the Sale and Repair of Motor Vehicles and for the Distribution of

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1 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 [2002] OJ L203/30-41.

2 Commission Regulation (EU) No. 461/2010 of 27 May 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 [2010] OJ L129/52-57.

Spare Parts for Motor Vehicles (hereinafter the 'Supplementary Guidelines').[3] The new Regulation contains a list of hardcore restrictions applicable to the motor vehicle aftermarket – repair, maintenance and the sale of spare parts – which came into force on 1 June 2010. It also extends the application of the provisions of Regulation 1400/2002 relating to distribution agreements and concerted practices of new motor vehicles until June 2013. After that date, the exemption of such contracts will be regulated by the general regime for vertical agreements, the newly adopted Regulation 330/2010.[4]

These sector-specific rules lay down the conditions to be met by vertical agreements in the car industry in order to be block exempted from the prohibition of Article 101(1) TFEU by virtue of Article 101(3) TFEU.[5] Back in 2002, the introduction of Regulation 1400/2002 was the result of a long-awaited reform that brought the specific rules for the sector in line with the general regime for vertical agreements, which had itself been reformed two years earlier with Regulation 2790/99.[6] At the time, the abolition of the previous rigid system raised great expectations among academics and stakeholders. The changes were principally aimed, on the one hand, at balancing the relationship between manufacturers and dealers, and on the other, they attempted to introduce a methodological economic assessment to determine the validity of agreements. To achieve the former, among other novelties, Internet operators and supermarket sales were given ground to flourish with the removal of the obligation on dealers to offer repair and aftersales services. In addition, to further enhance the bargaining power of dealers, Articles 3(3), 3(5) and 3(6) of Regulation 1400/2002 focused on the duration and termination of dealerships. As regards the latter, and very much in line with the general regime for vertical agreements, economic analysis was introduced in the shape of market share thresholds below which agreements were exempted, provided no hardcore restrictions are present.

Regulation 1400/2002 and Regulation 2790/99 expired on 31 May 2010. As new rules come into force, the momentum calls for an assessment of the merits of the regime that has just been replaced in order to assess the adequacy of the latest reforms. The purpose of this paper is to determine whether the practical shortcomings of the existing block exemption have been adequately addressed. Importantly, the Commission has finally opted for extending the application of the general rules for vertical agreements to the industry. Such a welcome change would doubtlessly bring coherence to an exemption system divided by the existence of a specific regime for the car industry for

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3 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 [2010] OJ C138/16-27.

4 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 [2010] OJ L102/1-7.

5 When agreements do not qualify for an exemption under Regulation 461/2010 or 1400/2002, they may still be exempted when they meet the conditions laid down in Article 101(3) TFEU.

6 Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article [101](3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, [1999] OJ L336/29.

fifteen years.[7] Unfortunately, a closer look at the new rules somewhat mitigates the initial enthusiasm; the Commission has maintained specific rules alongside the general regime in the shape of guidelines and a new block exemption with specific hardcore restrictions for the car aftermarket. Furthermore, the inclusion of the sector in the general regime for vertical agreements is delayed, as the life of parts of Regulation 1400/2002 is to be extended for three years. This study also places the changes in context, as they come at a time of financial instability and coincide with a profound crisis in the automobile industry. In addition, the 'umbrella' block exemption for vertical agreements in all other sectors of the economy has also been reformed. Regulation 330/2010 was announced in July 2009, along with new Guidelines on Vertical Restraints. Given that in three years the primary car market will be governed by these general rules, the amendments need to be scrutinised in order to determine how they will affect the car sector.

While it is too early to assess the merits of the changes, it is argued that they are somewhat timid, and thus a golden opportunity to introduce vital reforms may be squandered. An analysis of the previous rules reveals that two issues would have required particular attention. Firstly, economic analysis as envisaged in Regulation 1400/2002 may be excessively rigid. Unfortunately, the new rules seem to overlook this aspect; moreover, the new regulation for vertical agreements proposes to take into consideration the market share of the buyer, which would lead to enhanced inflexibility. Secondly, the puzzling obligation to introduce certain contractual clauses as a condition for exemption is to survive for at least another three years as the lifespam of the current rules has been prolonged. Furthermore, the need of these special provisions for the car aftermarket may be questioned, since the peculiarities of the sector can hardly serve to justify a differentiated regime. It is necessary to establish whether the problems identified by the Commission are truly exclusive to the car industry. If this is not the case, it seems absurd to disrupt the coherence and unity of the system. Underlying this proposition is a query as to the logic of establishing an excessively detailed exemption system. While Article 101(3) TFEU requires complex economic analysis, and block exemptions attempt to provide legal certainty for firms, it would appear that the problems may be derived from an overuse of this Treaty provision in the first place. In this sense, limiting the excessively broad scope of the prohibition contained in Article 101(1) TFEU would reduce the need to resort to the exemption system and lead to a more straightforward regime.

In order to adequately analyse these issues, this study is structured in four parts. Part One describes the context of the present reform by examining the crisis of the European car industry, its origins and its consequences. Part Two explains the competition law implications of distribution agreements in the car sector in an attempt to understand why a sound regulation is of crucial importance. Part Three carries out

[7] In her Ph.D., the author questioned the rationale behind the specific rules. See S Marco Colino, 'Towards a Sound Economic Analysis in EC Competition Law? The New Regulatory Framework for Motor Vehicle Distribution Agreements in the EU' (2007) PhD thesis, European University Institute, Florence

an assessment of Regulation 1400/2002, and Part Four analyses the lines of the most recent reform and attempts to make suggestions for change.

1. THE CHALLENGES FOR COMPETITION LAW OF AN INDUSTRY IN CRISIS

If your time to you is worth savin'
Then you better start swimmin'
Or you'll sink like a stone,
For the times they are a-changin'[8]

As the reform of the car distribution rules is implemented, and borrowing Bob Dylan's words, the car industry appears to be sinking like a stone as it is immersed in what experts have referred to as its most acute crisis to date. Car sales in some countries may have rocketed in recent months, but these isolated rises in demand are consequential to government stimuli to purchase new motor vehicles. Germany, the US and the UK are some of the nations that have experienced such increases. Car sales in Germany rose by 27 per cent in the early months of 2009 as a result of an incentive to encourage consumers to upgrade their vehicles.[9] In the US, a similar scheme known as the Car Allowance Rebate System (CARS) had a similar impact in August 2009. Sales of Ford vehicles amounted to 181,826 (an 11 per cent increase on the previous month and 17.2 per cent on the previous year), while GM sold 246,479 cars and trucks (30 per cent more than the previous month, but still less than in August 2008).[10] As for the UK, in October 2009 new car sales experienced a 31 per cent growth on the previous year as a result of the British government's scrappage campaign, which has been in place since May 2009 and which awards £2,000 to owners of motor vehicles over 10 years old for trading their old car for a new one.[11]

Looking beyond these initiatives, the broader picture reflects a very different reality. For several years, the big European and American manufacturers have been experiencing a significant and increasing drop in sales. By way of example, in October 2008 new car sales in Europe fell by 14.5 per cent.[12] The industry's troubles are principally the consequence of long-running overcapacity. As early as 2000, statistics reflected that European carmakers were producing about 6 million more cars than

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8 An extract from Bob Dylan's classic song 'The Times They are a'Changin" (1964), from the album that bears the same name.

9 However, when the entire year is considered German manufacturers still experienced an overall drop in sales and exports in 2009. See J Kollewe, 'German Car Scrappage Scheme Extended to Meet Demand' (7 April 2009) *The Guardian*, at http://www.guardian.co.uk/business/2009/apr/07/automotive-industry-germany-scrappage.

10 See A Frear, 'US Car Sales Soar During Cash for Dunkers' (1 September 2009), *The Times Online*, at http://business.timesonline.co.uk/tol/business/markets/united_states/article6817689.ece.

11 See J Kollewe, 'Scrappage Scheme Boost Continues as New Car Sales Up 31% on Last Year' (5 November 2009), *The Guardian,* at http://www.guardian.co.uk/business/2009/nov/05/uk-car-sales-30-percent-up-october.

12 'EU Warns Against Car Subsidy Race', *BBC News* (London, 21 November 2008), at http://news.bbc.co.uk/1/hi/business/7742407.stm.

could be sold.[13] The figures should have set off alarm bells among producers, who ought to have been enticed to outrun their competitors by seeking ways in which to increase efficiency. However, the facts reflect a very different reaction. There has been a clamour for decades among experts that the European industry's productivity and capacity to innovate are considerably below that of competitors. Consumer preferences have evolved over the years in favour of smaller, environmentally friendly cars, yet manufacturers in Europe and the US seem to remain loyal to their classic products. Furthermore, a new generation of carmakers, mainly from China and India, is exerting fierce competition. The newcomers are expected to be the main beneficiaries of the anticipated growth in demand for automobiles as a consequence of the motorisation of the 'Asian dragons'.[14] As a result, the ghost of overcapacity still haunts Europe's manufacturers.

In this context, the recent global economic crisis could not have come at a worst moment for the industry, and the downturn may well claim some casualties among the most affected manufacturers. National governments have rushed to the rescue of this crucial sector of the economy to avoid the catastrophic consequences of the collapse of the industry. In the United States, Detroit's 'Big Three'– General Motors, Ford and Chrysler – have seen regular decreases in profits for years, and in November 2008 GM announced annual losses of four billion dollars.[15] The sector turned to the government for help, and president Barack Obama promised subsidies[16] and incentives for purchasing vehicles.[17] The aid however is subject to strict conditions in an attempt to force manufacturers to finally adopt a long-term regeneration plan.[18] Europe's manufacturers are in a similar position, although there have been mixed feelings about subsidies to the industry. Former Commissioner Kroes insisted that a 'subsidy race' must be avoided, as financial aid will not solve the industry's woes unless the funds are adequately managed.[19] Jaguar Land Rover[20] said in December 2008 that the crisis of the

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[13] 'Analysis: Europe's Car Industry' *BBC News* (London, 12 May 2000) at http://news.bbc.co.uk/1/hi/business/746306.stm.

[14] 'Extinction of the Predator', *The Economist* (London, 10 September 2005) p. 63.

[15] TL Friedman, 'While Detroit Slept' (9 December 2008) *New York Times*, at http://www.nytimes.com/2008/12/10/opinion/10friedman.html.

[16] W Johnson, 'Obama Backs £33bn Loans for Car Industry' (12 November 2008), *The Independent*, at http://www.independent.co.uk/news/world/americas/obama-backs-pound33bn-loans-for-car-industry-1014893.html.

[17] Such as the Car Allowance Rebate System (CARS), which has had very positive results. See A Frear, 'US Car Sales Soar During Cash for Dunkers' (1 September 2009), *The Times Online*, at http://business.timesonline.co.uk/tol/business/markets/united_states/article6817689.ece.

[18] 'Obama Vows Aid for Car Indstry' (7 December 2008) *BBC News*, at http://news.bbc.co.uk/1/hi/world/americas/us_elections_2008/7770129.stm.

[19] 'EU Warns Against Car Subsidy Race', *BBC News* (London, 21 November 2008), at http://news.bbc.co.uk/1/hi/business/7742407.stm.

[20] The Midlands company was purchased in June 2008 by the Indian manufacturer Tata.

sector in the UK is a 'national emergency',[21] and as a result the British government has promised an investment of 70 million pounds. German manufacturers are also affected, yet the German government has adopted a more sceptical attitude towards subsidies. Very much in line with former Commissioner Kroes, Chancellor Merkel has stated that '[t]he future of the auto industry cannot, in the long run, rely on a state subsidy',[22] while the Finance Minister justified this position arguing that the government could not account for the mistakes of manufacturers.[23] Instead of direct subsidies, the government opted to offer an incentive scheme to compel consumers to purchase new fuel-efficient cars this year, which proved to be very successful and is bound to serve as an example to follow in other countries.[24]

The caution exercised by governments when subsidising the industry can be better understood by examining the questionable decision-making of the sector in the past. In the last decades, consumers' preferences have evolved, and yet car manufacturers in the EU and the US have not reacted adequately and timely to the new reality. Statistics reflect a growth in the preference for compact vehicles. They are not only less expensive, but also better suited for contemporary lifestyle. The proliferation of big cities progressively transformed the purpose given to this utility. Cars are no longer simply a means to travel or to transport goods; they are also used for moving within urban areas where distances are shorter and parking is at a premium. Small passenger cars are more appropriate for such commutes. In addition, the volatility of the price of crude oil has led to alarming price swings – in the summer of 2008, the price of a barrel was almost $150, and only a few months later it dropped to below $40.[25] This unpredictability, coupled with growing concerns for the environmental problems derived from carbon dioxide emissions, has driven consumers towards vehicles powered by other fuels. As a consequence, hybrid cars have become increasingly popular. In such an evolving environment, it would seem wise for manufacturers to adapt to the new circumstances. While Japanese manufacturers would appear to have reacted to the changing times, carmakers in Europe and the US chose to avoid thorough reforms. Instead, they opted for short-term solutions that would prove unsustainable in the long run. In particular, alliances and mergers between brands

[21] G Ruddick, 'Jaguar Land Rover Claims Car Industry Crisis is 'National Emergency' for UK', (18 December 2008) *The Telegraph*.

[22] See 'Merkel Warns on US Auto Subsidies' (20 January 2009), *Reuters*, at http://www.reuters.com/article/GCA-autos/idUSTRE50J2M920090120.

[23] 'German Finance Minister Rules Out Auto Industry Bail (16 November 2008) *APF*, at http://www.google.com/hostednews/afp/article/ALeqM5ji8I_Lbl4p-Oifa3mNqDbINNITGQ.

[24] J Kollewe, 'German Car Scrappage Scheme Extended to Meet Demand' (7 April 2009) *The Guardian*, at http://www.guardian.co.uk/business/2009/apr/07/automotive-industry-germany-scrappage.

[25] A Wolker, 'Crude Oil's Rollercoaster Prices' (7 August 2009), *BBC News*, online at http://news.bbc.co.uk/1/hi/business/8144533.stm.

proliferated as a way out of the crisis.[26] However, time has shown that such quick fix solutions were hasty remedies that could not endure the test of time.[27]

As a result, it is obvious that the overwhelming responsibility for the industry's crisis rests upon the manufacturers themselves. European companies, threatened by the competition posed by Asian and American carmakers, have opted for superfluous solutions with immediate survival effects without confronting more complex and costly – yet essential – reforms.[28] Consequently, the reaction of European manufacturers to the threat posed by competitors has had a snowball effect, and despite masking immediate problems, in the long run it has only served to aggravate the serious operational issues of a stagnant industry. As a way out of the nadir, manufacturers now look towards national governments in yet another attempt to squander vital refurbishment. Governments are understandably cautious about subsidising inefficient industries; such a policy could lead to a distortion of competition. However, it is clear that the industry is an essential pillar of the economy for the Old Continent, and that in order to have the strength to swim for the shore manufacturers may need governments to provide them with a buoy to cling to. It is for this reason that, in comparison with other industries, Member States tend to be more willing to intervene and prevent the collapse of car manufacturers.

In such a context, it is essential that governments carefully consider the most adequate means to provide the necessary aid. While direct subsidies to the industry may raise certain competition concerns, incentive schemes that encourage consumers to purchase new motor vehicles on the one hand while putting pressure on manufacturers to innovate and adopt environmentally-friendly technologies on the other, doubtlessly seems like the most reasonable option. The measures adopted in Germany and the US are designed very much along these lines and are worthy of praise. It is nonetheless regrettable that sometimes the subsidies given to car purchasers are based upon the condition that they trade an old car for a new one, as is the case in the UK. Although the benefits of removing old cars from circulation are obvious, such an incentive does not benefit those who do not own a car (nor those who have a motor vehicle that is less than 10 years old). Furthermore, it is unfortunate that the aid is not linked to the purchase of ecologically friendly cars. There is no encouragement for customers to replace old gas-guzzlers for cars that use alternative fuels, nor is the industry

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[26] 'Extinction of the Predator', *The Economist* (London, 10 September 2005) 71-73.

[27] *Ibid.* By way of example, the alliance formed in 1998 when Chrysler was purchased by Daimler-Benz proved unsuccessful, and disappeared only nine years later when the investment fund Cerberus Capital Management purchased 80 per cent of Chrysler. See A Clark, 'Chrysler - How a Great Car Firm Crashed', *The Guardian* (1 May 2009), online at http://www.guardian.co.uk/business/2009/may/01/chrysler-bankruptcy-car-industry-us. The author has previously studied the consequences of mergers and alliances in the car industry. See S Marco Colino, 'On the Road to Perdition? The Future of the European Car Industry and its Implications for EC Competition Policy' (2007) 28 *Northwestern Journal of International Law & Business* 1, 35-88.

[28] Kenworthy, Macaulay and Rogers have noted that such behaviour is typical of firms who face strong competition and are forced to focus on immediate concerns in order to survive. See L Kenworthy, S Macaulay and J Rogers '"The More Things Change...": Business Litigation and Governance in the American Automobile Industry' (1996) 21 *Law and Social Inquiry* 3, 631-678, at 633.

encouraged to engage in the production of hybrids and other eco-friendly vehicles. The persistence of overcapacity almost inevitably implies that not all the current brands will survive the crisis. Measures that relieve those manufacturers who demonstrate greater efficiency and capability to adapt to new demands should not threaten the competitive process, but rather ought to provide essential means to overcome an unprecedented crisis without interfering with competition. It is therefore obvious that the role of government is to provide the support to find a way out of a difficult situation, and encouraging the necessary reforms remains decisive.

2. THE IMPACT OF CAR DISTRIBUTION AGREEMENTS ON COMPETITION

In addition to the problems of the industry, manufacturers have had to cope with the added pressure of complying with costly and complex European rules. A raft of secondary legislation harmonising product standards is in place, and EU competition law rules place further obligations on the sector. Non-compliance with the Treaty's antitrust provisions has often led to the imposition of fines on some of Europe's leading manufacturers. Some examples are the fine of almost €50 million imposed on Peugeot in 2005 for obstructing exports,[29] and the investigation of the practices of BMW and General Motors for breach of the rules imposed by Regulation 1400/2002 that culminated with reforms of the distribution contracts under scrutiny.[30] It is clear that under no circumstances should competition policy should be influenced by the interests of the sector; this mistake of the past has led to important inconsistencies in the regulation of the industry.[31] Nonetheless, at times it would appear that disproportionate concerns for market integration and sectoral interests may have sometimes had a negative impact on the European rules, and led to the imposition of strict and unnecessary conditions on the industry that do not always purport clear benefits for the competitive process.[32] Assessing the appropriateness of pursuing integration through competition has been the object of lengthy discussions and is beyond the scope of this paper; this section merely outlines the concerns for competition raised by distribution agreements in the car sector and how the Commission and the European Courts addressed these issues before Regulation 1400/2002.

2.1. Franchises and market segmentation

Franchise agreements are the preferred distribution method for brand new motor vehicles. Through these franchises, manufacturers appoint specialised dealers in each

[29] Commission Decision of 5 October 2005, *Automobiles Peugeot SA and Peugeot Nederland NV*, OJ 2005, L173/20.

[30] See the following press releases: 'Competition: Commission Welcomes Changes to General Motors' Distribution and Servicing Agreements', IP/06/303, and 'Competition: Commission Welcomes Changes to BMW's Distribution and Servicing Agreements', IP/06.302 (13 March 2006)

[31] By way of example, the previous block exemption, Regulation 1475/95, introduced exemption requirements of questionable effects on competition. See section 2.2 below.

[32] See, *inter alia*, R Wesseling, *The Modernization of EC Antitrust Law* (Oxford and Portland, Hart, 2000).

territory, and the result is a network of selected retailers who represent the manufacturer and take care of sales in the specific area assigned to them. This would seem an efficient and legitimate manner of channelling motor vehicle distributions across Europe. Industry representatives have long claimed that there are multiple reasons that justify the use of franchising in the distribution of cars. Through a franchise contract, for instance, the manufacturer can exert considerable control over the process of distribution. Moreover, a limited number of dealers is usually the most efficient means of entering a market and servicing the product. Franchised dealers have the capacity to build and maintain a strong retail organisation. According to manufacturers, the nature of the relationship is of mutual dependence, as each party has substantial interest in the other's conduct.[33] It is also argued that there are important benefits for consumers, since efficient delivery should translate into lower prices and qualified dealers ought to provide a better customer service.

Despite these benefits, some of the restrictions that can be imposed in franchise agreements have led to competition concerns for the European legislator. This is particularly so when the agreements establish selective and exclusive distribution (SED) systems, which are frequent in Europe.[34] SED systems may lead to market segmentation, as each territory is allotted to one or a select few distributors, becoming impenetrable not only for those outside the distribution system, but also to authorised dealers from other regions. Exclusive rights may have the effect of dividing the EU along national lines again – thus fragmenting the single market. This would also serve to allow price discrimination between the different allotted territories. The Commission has led a vehement fight against car price differentials – in its view, a clear sign of a lack of market integration – and therefore looks towards territorial protection with mistrust.[35] To add to these woes, franchises have been criticised for their one-sidedness. They have often been defined as contracts of adhesion enacted overwhelmingly in favour of manufacturers.[36] Carmakers have used franchising as a means to gain maximum control over the management of the dealers' business, which has affected the Commission's tolerance towards this common distribution technique.

2.2. The concerns for EU competition law – the early days

As a consequence of the possible problems of exclusive and selective distribution for the single market and competition, the Commission carefully monitors agreements

[33] P Davis, 'Retrieving Corporate Policy: Managing Minority Dissent' (2005) 5 *Corporate Governance* 64.

[34] For a thorough analysis of each of these types of distribution systems, see M Mendelsohn and S Rose, *Guide to EC Block Exemption ofr Vertical Agreements* (The Hague, Kluwer Law International 2002) 115.

[35] For a critical view of the Commission's position on car price differentials, see S Marco Colino, 'On the Road to Perdition? The Future of the European Car Industry and its Implications for EC Competition Policy' (2007) 28 *Northwestern Journal of International Law & Business* 1, 35-88.

[36] For a criticism of this abusive character of franchises, see C Joerges, 'Relational Contract Theory in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles in the Assessment of Contract Relations Between Automobile Manufacturers and their Dealers in Germany' (1985) *Wisconsin Law Review* 3

between dealers and manufacturers. The car sector is no exception. Already in the 1970s, franchise agreements for the distribution of motor vehicles were expressly declared to fall within the prohibition of Article 101(1). In *BMW*,[37] the CJEU emphasised the problems derived from the cumulative effects of such agreements. Essentially, if distribution in the entire industry operates following SED schemes, this will lead to market compartmentalisation.[38] The inclusion of these agreements in the realms of Article 101(1) TFEU did not go down well with producers, who defend their distribution systems invoking the free-rider argument. They allege that the technological complexity inherent to motor vehicles requires appointing dealers with a high degree of expertise. These skilled dealers must somehow be protected from the competition posed by less qualified traders who may be able to sell at lower prices, as they do not necessarily comply with the same obligations and expenditure in, *inter alia,* pre- and aftersales services, promotion and brand image protection.

The Commission and the European Courts have acknowledged the potential benefits of these distribution techniques, and as such these agreements were often able to avoid the nullity sanction on the basis of 101(3) TFEU – mainly on consumer protection grounds.[39] In order to avoid the burden of notification imposed by the now defunct Regulation 17/62,[40] the Commission adopted Regulation 123/85, a specific block exemption regulation for distribution agreements of new motor vehicles.[41] As with all block exemptions, when the conditions laid down in the regulation were met, contracts were automatically exempted and the parties did not need to notify the Commission. These rules were reformed in 1995 following pressure from car manufacturers and their representatives to increase their freedom to establish selective and exclusive distribution schemes. The reforms came in the shape of Regulation 1475/95, which virtually imposed SED systems for the distribution of motor vehicles. Only these kinds of distribution were exempted by this sector-specific Regulation.[42] The amendments introduced received harsh criticisms for being overwhelmingly protective of manufacturers. Experts also claimed that the rules led to higher prices and restrictions in consumer choices. In addition, dealers were inexplicably obliged to carry out repair

[37] *BMW Belgium NC and Belgian BMW Dealers* [1978] OJ L46/33. This case is in line with the *Pronuptia* ruling on franchising, case 161/84, [1986] ECR 353, [1986]. See also a later *BMW* case, *BMW AG v. ALD Autoleasing D GmbH* [1955] ECR I-3439.

[38] A Tongue, 'Understanding 1400/02 – What It Is and What It Means' (2003) Research Report 01/03, International Car Distribution Programme Ltd., 8.

[39] *BMW* OJ 1975, L29/1. In fact, the first ever BER was drawn along the lines set out in the Commission BMW exemption decision. Also, *SABA* OJ 1976, L28/19 (for electronic devices) and *Campari* OJ 1978, L70/69.

[40] Council Regulation (EEC) No. 17 of 6 February 1962, First Regulation Implementing Articles 85 and 86 of the Treaty OJ 1962, 13/204/62.

[41] Commission Regulation (EEC) No. 123/85 of 12 December 1984 on the Application of Article 85(3) of the EEC Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, OJ 1985, L15/16.

[42] Commission Regulation (EC) No. 1475/95 of 28 June 1995 on the Application of Article 85(3) to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, OJ 1995, L145/25.

and maintenance services to enter into the manufacturers' network, and wholesalers outside the approved distribution system could be prevented from accessing original spare parts. Such overwhelmingly detailed provisions de facto greatly limited competition in these secondary markets.[43] Such detrimental rules could hardly be justified in the context of the protection of competition afforded by Article 101 TFEU – the legal basis for their adoption.[44]

3. A LOOK BACK AT THE LIFE OF REGULATION 1400/2002

In an attempt to heed the concerns of Regulation 1475/95 and coinciding with a new trend of reform of EU competition law addressed mainly at enhancing economic analysis, Regulation 1400/2002 entered into force on 1 October 2002. The exemption applied to all levels of motor vehicle trade,[45] service-only agreements and even goods which are not specific to motor vehicles when 'it is reasonably certain that they are destined for installation in or upon a motor vehicle'.[46] The regulation allowed any kind of distribution system and not just SED models, thus opening the door to innovation in distribution. As a result, most kinds of vertical agreements in the car sector could qualify for an exemption, provided that three conditions were met: first of all, the stipulated market shares could not be exceeded; secondly, they should not contain any hardcore restrictions; and thirdly, they ought to comply with the contractual requirements imposed by the Regulation. Each of these conditions deserves particular attention.

3.1. Market share thresholds and economic analysis

Regulation 1400/2002 followed the example set by Regulation 2790/99 – and virtually all the new-style block exemptions[47] – by establishing market share thresholds as parameters for economic assessment. Contracts could benefit from the block exemption provided that the market share of the supplier did not exceed 30 per cent. Exceptionally, in exclusive supply agreements it was be the buyer's market share that was considered, given that access to supplies may be limited. The threshold was identical to that established in the general block exemption for vertical agreements with two exceptions. Firstly, selective distribution that utilised quantitative criteria enjoyed a

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[43] Global Antitrust Weekly, NERA Consulting Economists, National Economic Research Associates, Inc., 30 November-6 December 2001.

[44] For a more detailed analysis of the previous sector-specific regulations, see S Marco Colino, *Vertical Agreements and Competititon Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 112-115.

[45] Article 2 (1) of Regulation 1400/2002.

[46] A Kmiecik, 'Analysis of Regulation 1400/2002: The New Block Exemption for the Motor Vehicle Sector' (2002) IBC Conference Proceedings, *Advanced Course on Competition Law*, Informa, Brussels.

[47] A similar stance is followed in other recent block exemptions, such as Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements, OJ 2000, L304/3, or Commission Regulation 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements, OJ 2000, L304/7.

higher threshold of 40 per cent. Secondly, purely qualitative selective distribution could be exempted irrespective of the market share of the parties.

The market share threshold system introduced an economic analysis which was inexistent in the previous block exemptions. However, as the author has previously argued it would appear that the establishment of these thresholds results in an excessively rigid method of determining the validity of agreements.[48] In addition, the determination of the percentage of market share held by a manufacturer is dependant upon the complex definition of the relevant (product and geographic) market; this process allows scope for interpretation and is thus embedded in ambiguity. Defining the relevant market is a task not only for the Commission, but also for national authorities and courts. As a result, the homogeneity of interpretation and the effectiveness of the economic analysis may be endangered given the practical difficulties to confidently determine market shares. Despite these criticisms, no better criterion has been suggested in order to measure the economic impact of distribution agreements. As long as the interpretation of the scope of the prohibition of 101(1) TFEU remains broad, market share caps will play a significant role. Until a better solution is found, it would seem wise to stretch the scope of the exemption to all distribution agreements in the car sector provided that the pertinent market shares do not exceed 40 per cent. Such a modification would not solve all the problems related to the modus operandi of market share thresholds. It would nonetheless imply that all distribution systems would be subject to the same cap, which would grant greater coherence to the procedure. Furthermore, while the car market is currently not highly concentrated, if – as predicted – there are indeed casualties following the current crisis, the resulting market structure may be different. The surviving producers could have increased market shares in the different segments of the market for motor vehicles. Given that distribution agreements have been proven to purport overwhelmingly beneficial effects, the sensible option would seem to be a lenient market share threshold. This would allow a larger number of agreements to benefit from the scope of the block exemption.

3.2. Prohibited restrictions of competition

In addition to the market share thresholds, Articles 4 and 5 contained a list of restrictions that were forbidden regardless of market shares. The constraints described in Article 4 would prevent the application of the block exemption to the whole accord they are contained in, while those in Article 5 would not be exemptible in themselves but will not preclude the validity of the remainder of the contract. Accordingly, these provisions are respectively referred to as the black and grey lists of Regulation 1400/2002.

Article 4 was divided into three parts: 'hardcore restrictions concerning the sale of new motor vehicles, repair and maintenance services or spare parts', 'hardcore restrictions

[48] S Marco Colino, *Vertical Agreements and Competititon Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 100-104.

only concerning the sale of new motor vehicles' and 'hardcore restrictions only concerning the sale of repair and maintenance services and of spare parts'. The first kind of provisions were virtually identical to those contained in Regulation 2790/99. Article 4(1)(a) forbids minimum resale price maintenance, which will therefore only be exemptible using Article 101(3) TFEU. Other price restraints such as maximum resale price maintenance or price recommendations are not considered to be hardcore restrictions, and will not prevent the application of the block exemption. Some kinds of territorial restrictions however receive a harsher treatment. Article 4(1)(b) precludes manufacturers from imposing resale restrictions on dealers regarding the territory in which or the customers to whom they sell. There are some exceptions to this general rule. For instance, in an attempt to protect dealers from free riders it is possible to forbid active sales in selective distribution systems.[49]

The second kind of hardcore restrictions – those relating specifically to the primary car market – encompassed some important changes. For the exemption to apply, dealers had to be able to subcontract repair and maintenance work to authorised workshops.[50] Such a provision not only broke the link between sales and aftersales for once and for all; it also opened up new possibilities of independent repairers, whose access to technical information, diagnostics and other equipment and tools was further facilitated with the list of hardcore restrictions that refer to the repair services and the sale of spare parts – the third type of black clauses. Among these was also a requirement that independent spare parts manufacturers be able to supply any resellers of their choice, including authorised distributors.[51] They could also display their brand logo on the parts supplied by them. These last two types of hardcore restraints were peculiar to the specific block exemption. Regulation 2790/99 would in theory have allowed restricting the sale of spare parts produced by independent manufacturers within an authorised distribution network, and therefore this restriction was one of the peculiarities of the specific regime.

The grey list contained in Article 5 covered non-compete obligations and location clauses.[52] As regards non-compete obligations, it is worth noting that the definition given in the sector-specific block exemption differed from that of Regulation 2790/99. Article 1(b) of Regulation 1400/2002 defined these as an 'obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any […] obligation on the buyer to purchase from the supplier […] more than 30 % of the buyer's total purchases of the contract goods'. However, under the former general block exemption for vertical agreements the

49 Article 4(1)(b)(i) of Regulation 1400/2002. Such sales are only exemptible when they are not to end users and they are not imposed on sub-dealers appointed by the authorised dealer. See Article 4(1)(d) of Regulation 1400/2002.

50 Article 4(1)(g) of Regulation 1400/2002.

51 Article 4(1)(j) of Regulation 1400/2002.

52 A Kmiecik, 'Analysis of Regulation 1400/2002: The New Block Exemption for the Motor Vehicle Sector' (2002) IBC Conference Proceedings*, Advanced Course on Competition Law*, Informa, 59, fn 108.

percentage of goods that must be purchased from the supplier for a non-compete obligation to exist is as high as 80 per cent. As a consequence, under Regulation 2790/99 requirements to purchase less than 80 per cent of the buyer's stock from the supplier could be imposed without time limitations, as they were not considered non-compete obligations. Importantly, Regulation 1400/2002 expressly referred to non-compete obligations not only in the primary market, but also in the repair and maintenance and spare parts markets. Such impositions were prohibited when they surpassed the 30 per cent cap.[53] The explanation for the exceptionally low percentage and hence the limited tolerance towards these kinds of obligations in this sector is somewhat unclear, and this particularly harsh treatment appears difficult to justify. The other kind of clauses included in this grey list were location clauses. Article 5(2)(b) prohibited obligations on dealers of a selective distribution system not to open sales or delivery outlets anywhere in the internal market where selective distribution was employed. The rationale of prohibiting such limitations was undeniably linked to the protection of parallel imports in an attempt to diminish price differentials across the EU.[54]

3.3. Balancing the dealer-manufacturer relationship

It is widely recognised that Regulation 1475/95 afforded an excessive consideration of the interests of manufacturers, which further deteriorated the position of dealers in the vertical relationship. Regulation 1400/2002 attempted to correct this imbalance in several ways. To begin with, as explained above, dealers could no longer be required to perform aftersales and repair services.[55] In addition to the rupture of the tie between sales and aftersales, the rules introduced a clear attempt to promote multibranding – the possibility of dealers to sell more than one brand of motor vehicles – which was inexplicably restricted in earlier block exemptions. The recognition of multibranding has had limited practical consequences, and the overwhelming majority of concessionaries still deal exclusively with one brand. The reason for the restricted influence of Regulation 1400/2002 in this respect is that it is still possible to require dealers to have separate showrooms for the different brands. This would require large, costly premises which hamper the flourishing of multibrand dealers.

There are other ways in which the former Regulation demonstrated concerns for the disadvantaged situation of dealers. Articles 3(3) to 3(6) introduced certain contractual requirements for the application of the block exemption. Firstly, according to Article 3(3) dealers should be allowed to assign their agreements to other authorised distributors or repairers. Secondly, Article 3(4) imposed restrictions on the right of suppliers to terminate dealership contracts. Thirdly, Article 3(5) established a minimum duration of five years for agreements in order to fall within the scope of the exemption,

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[53] This includes the obligation of the dealer to sell or repair the manufacturer's brand only (Article 5(1)(c)), even after the expiration of the agreement (Article 5(1)(d)).

[54] On parallel imports, see M Lutz, 'Pricing in Segmented Markets, Arbitrage Barriers, and the Law of One Price: Evidence from the European Car Market' (2004) 12 *Review of International Economics* 3, 456-475.

[55] See section 3.2 above.

as well as a 6 months' notification period for non-renewal. This period was increased to two years if the agreement was indefinite.[56] Fourthly, Article 3(6) implied a u-turn with respect to the previous block exemption, under which arbitration was disallowed. This provision imposed an obligation to include contractual clauses contemplating the right to resort to arbitration as a means of dispute resolution, and included a non-exhaustive list of disagreements that may be decided via arbitration.

This attempt to protect dealers through competition law was rather unique and of questionable legitimacy from the point of view of Article 101 TFEU. The above clauses appeared to introduce requirements that are more characteristic of contract law than competition law regimes. However, and despite various harmonising initiatives with limited success, contract law is still principally a matter reserved for national legislators. After reading the Treaty's competition law provisions, which act as the necessary legal basis for all secondary antitrust legislation, it is unclear that the Commission has been granted the competence to legislate on such issues. Therefore, as the author has previously argued, the inclusion of these requirements in Regulation 1400/2002 appeared to be incoherent and unjustified from the point of view of the pursuit of the protection of competition, which is the objective of Articles 101 to 109 of the TFEU. As a result, there may have been an extralimitation of the Commission's legislative powers,[57] as well as an unjustified defiance of the boundaries between competition and regulation.[58]

4. IS A SPECIFIC REGIME FOR THE CAR SECTOR NECESSARY? PRIORITIES OF THE CURRENT RULES AND FUTURE OUTLOOK

Last year, the Commission deliberated upon the influence of Regulation 1400/2002 on motor vehicle distribution. The reflection, somewhat forced by the imminent expiration of Regulation 1400/2002, led to the adoption of a Communication and an Impact Assessment Report in July 2009.[59] In its findings, the Commission admitted that no major problems exist in the primary car market for the sale of new vehicles. This was the first time that the Commission acknowledged that there is no longer a reason for the maintenance of a specific regime. However, some special rules for secondary markets (aftersales, repair and spare parts) are still deemed necessary given the

56 Exceptionally, a one-year notice is allowed when either the supplier 'is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement' or 'the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.'

57 S Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford, Hart 2009).

58 On the distinction between competition and regulation, see M Motta, *Competition Law: Theory and Practice* (Cambridge, Cambridge University Press 2004) xviii-xix.

59 Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector (22 July 2009) Brussels COM(2009) 388 final; and Commission Staff Working Document Accompanying the Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector: Impact Assessment (22 July 2009) SEC(2009) 1052.

perseverance of problems. The merits of the new legislation (both Regulation 461/2010 and the Supplementary Guidelines) are studied in the present section.

Alongside the reform of the specific rules for the car industry, the Commission recently undertook a review of the general rules for distribution agreements, which culminated in the adoption of Regulation 330/2010.[60] The institution expressed its conviction that the rules laid down in the general block exemption for vertical agreements are working adequately, and accordingly only introduced minor reforms in its new block exemption and guidelines on vertical restraints. In June 2013, when the rules for the car industry are harmonised with those for other distribution contracts, agreements in the motor vehicle sector will fall within the scope of the new Regulation for vertical agreements. Consequently, these changes too require closer attention.

4.1. Regulation 461/2010 and the Supplementary Guidelines: a disguised *status quo*?

Unfortunately, one cannot help but feel that the reforms to the specific rules for the exemption of car distribution agreements have squandered a valuable opportunity to tackle the existing regulatory inconsistencies. In fact, a close look at the reform shows that in practice very little will change in the short term. Yes, the Commission does show some awareness of the problems of the previous block exemptions. It has noted that the new rules ought not to 'impose regulatory constraints which might increase distribution costs and are not justified by the objective of protecting competition on the market';[61] it has even admitted that the previous rules were 'clearly overly complicated and restrictive and have had the indirect effect of driving up distribution costs'.[62] This promising acknowledgement however has not filtered into the regulatory adjustments.

In the Impact Assessment Reform published in July 2009 (hereinafter the Report), four different legislative options were considered as possibilities for replacing Regulation 1400/2002. The first two options outlined two opposed radical possibilities: keeping the specific rules (option 1) or doing away with them and extending the application of the general exemption for vertical agreements to the car sector (option 2). By contrast, the other two alternatives were somewhere in between the extremes, and advocated for the removal of the special regulation whilst retaining specific guidelines (option 3) or a new block exemption (option 4). The survival of specificities is, the Commission argued, a tactic to address the problems related to the aftersales and repair market and the reduced competition in the sale of spare parts. The Commission expressed its preference for the third option, but did not reject option 4 - leaving the door open for a new block exemption. This is justified, according to the institution, by the need to

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[60] Press Release, 'Antitrust: Commission Launches Public Consultation on Review of Competition Rules for Distribution Sector' (28th July 2009) Brussels IP/09/1197.

[61] Press Release, 'Antitrust: Commission Proposes Future Competition Law Regime for Motor vehicle Sector' (22th July 2009) IP/09/1168.

[62] Press Release, 'Antitrust: Commission Adopts Revised Competition Rules for Motor Vehicle Distribution and Repair (27th May 2010) IP/10/619.

control clauses that may lead to market foreclosure or the imposition of prices by the manufacturer. In addition, territorial protection that may pose a threat to cross-border sales and market integration also needs to be closely monitored. With the disappearance of Regulation 1400/2002, the Commission claimed, specific rules would also be needed to fill the lacuna left by the disappearance of the regulation of independent operators' access to technical information, access to spare parts and access to the network of authorised repairers.[63]

The resulting legislation is a rather complex hybrid of the legislative scenarios outlined in the Report. A block exemption has been adopted (option 4); however, it merely extends the lifespam of Regulation 1400/2002 for another three years in respect of distribution agreements in the primary market for motor vehicles (option 1), when they will finally fall within the ambit of the general block exemption for vertical agreements (option 2). Agreements in secondary markets are governed by Regulation 330/2010 since 1 June 2010, but the block exemption contains a list of additional sector-specific hardcore restrictions. Importantly, Supplementary Guidelines accompany Regulation 461/2010 (option 3); the Commission emphasises their *supplementary* character, as they complement the general Guidelines on Vertical Restraints that apply to all vertical agreements.[64] They play an essential role in the assessment of the application of Article 101 TFEU to contracts in this sector.

The implications of the inclusion of motor vehicle distribution agreements in the scope of the general block exemption in the medium term are discussed in the next subsection. As for the specific exemption rules for agreements in the aftermarket, Article 6 of Regulation 461/2010 contains three specific hardcore restrictions. First of all, selective distributors may not be prevented from selling spare parts to independent repairers that use these in the repair of motor vehicles. Secondly, suppliers of spare parts, repair tools or diagnostic or other equipment ought to be allowed to sell to authorised or independent distributors, as well as to authorised or independent repairers and end users. Finally, the ability of a supplier of components to place its trade mark or logo on its products 'effectively and in an easily visible manner' is protected by the new Regulation. As a result, it appears that the reason for the specific rules is affording additional protection to independent repairers and spare parts suppliers vis-à-vis manufacturers. Their position is further strengthened by the Supplementary Guidelines. Selective distribution, still predominant in the car industry, may be caught by Article 101 TFEU if it limits access to technical information by independent repairers, if they are arbitrarily excluded from legal and/or extended warranties or if they are prevented from entering the distribution network by applying non-qualitative criteria.[65]

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[63] Commission Staff Working Document Accompanying the Communication from the Commission – The Future Competition Law Framework Applicable to the Motor Vehicle Sector – Impact Assessment Report, (COM(2009) 388 final) 21.

[64] Commission Notice, Guidelines on Vertical Restraints [2010] OJ C130/1.

[65] Supplementary Guidelines, para. 60.

What the Commission fails to explain is how these issues make the car market different from other markets. In fact, a look at other sectors reveals the occurrence of similar problems. Attempts to reduce cross-border sales and parallel imports can be found in pharmaceutical products, cosmetics, electronic goods or even spirits, yet these sectors do not have specific block exemptions.[66] Furthermore, restrictions in the secondary markets, such as the ones the Commission identifies in repair and maintenance services or the sale of spare parts, are not uncommon outside the car sector. By way of example, tying clauses which force buyers to purchase secondary goods in order to obtain supplies of a product are frequent, for instance, in the sale of printers (where the buyer may be forced to purchase ink cartridges from the supplier), nail guns (that can be linked to the purchase of the nails they need) or packaging machines (where the purchase of carton may be imposed).[67] Even the well-known *Microsoft* case addressed, *inter alia*, the legality of the company's tying of its Windows Media Player to its Windows Operating System.[68] Such practices are deemed illegal by Article 102(d) TFEU when the supplier holds a dominant position. In a similar way, when car manufacturers force their dealers to purchase a minimum quantity of spare parts from them, this would be deemed unlawful if market power is involved. Yet car producers' contractual clauses referring to spare parts must additionally comply with the restrictions imposed by the sector-specific rules that remain in place.

The Commission's intention would appear to be increasing legal certainty for the parties. The application of Article 101(3) TFEU requires a complex evaluation of the benefits and disadvantages of specific vertical restraints, and sectoral rules should assist the parties and their legal representatives in understanding the kinds of restrictions that may result in their agreements being considered unlawful. While this is a noble pursuit, enacting rules to address every possible specific scenario in each industry is clearly an impossible task, and any system that attempts to do so will unavoidably be incomprehensive. In this context, the existence of specific rules is even more difficult to justify, as they challenge the unity, coherence and comprehensiveness of the entire exemption system under Article 101(3) TFEU. Rather, it would seem more appropriate to combat uncertainty by reinterpreting Article 101(1) TFEU and limiting the scope of the prohibition, while at the same time aiming for exemption rules that apply to all

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[66] See for instance the famous Distillers decision condemning a dual pricing system for Johnny Walker whisky. Commission Decision of 20th December 1977, *Distillers Company Limited* OJ 1978, L50/16, upheld by the CJEU in case C-30/78 *Distillers Company Limited v. Commission of the European Communities* [1980] ECR 2229. For a criticism of this decision, see V Korah, 'Goodbye, Red Label: Condemnation of Dual Pricing by Distillers' (1978) 2 *European Law Review* 62-71. In this context, the recent CJEU judgement in *GlaxoSmithKline* is of crucial importance, as it finally challenges the presumption that double pricing schemes and export bans are anticompetitive by object under Article 101(1) TFEU. See case C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] nyr.

[67] Two of the leading cases are *Hilti* and *Tetra Pak*, relating respectively to nail guns and packaging machines. See case T- 30/89 *Hilti v Commission* [1991] ECR II-1439, confirmed by case C-53/92 P *Hilti v Commission* [1994] ECR I-667; and case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, confirmed by case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

[68] Case T-201/04, *Microsoft Corp v Commission* [2004] ECR II-4463.

sectors of the economy. As such, the amendment of the rules affecting the distribution contracts in the motor vehicle industry and the simultaneous transformation of the general regime for vertical agreements should have been considered one general process of reform and should have led to a single set of rules. One new reformed block exemption for vertical agreements which also covered the car sector would have been the most desirable outcome; any specificities worthy of particular attention could have been addressed in the set of detailed guidelines for vertical restraints that accompany the regulation.

In this light, the desire to retain specific guidelines or even a block exemption for the lingering problems of the sector seems somewhat disappointing. The changes , at first sight, remove some of the sector-specific rules for motor vehicle distribution agreements. In practice, some of the specific clauses of Articles 4 and 5 of Regulation 1400/2002 have been simply relocated rather than removed. Given that they were virtually the only substantive difference of the exclusive regime, the minimal effects of the alleged 'reform' are evident. Even more disappointingly, a further constraint is placed in the practical outcome of the modifications as the inclusion of the car sector in the general block exemption of vertical agreements is delayed in time. Accordingly, the resulting reform is a series of minor amendments that bear almost exclusively structural consequences, with minimal alterations of substantive rules – some of which will not take place for three years. It is obvious that not enough has changed in the Commission's mindset, and most of the problems pointed at in the previous section are likely to persist.

4.2. Consequences of application of the general block exemption for vertical agreements to the car sector

In three years' time, when Regulation 330/2010 is applied to motor vehicle distribution, two significant modifications will be introduced – one more desirable than the other. The most welcome change is undoubtedly the abolition of the 'white list' of Articles 3(3) to (6) of Regulation 1400/2002 for once and for all. Already back in 1999, Regulation 2790/99 removed all requirements relating to clauses that must be included in agreements in order to benefit from the application of the block exemption, and new Regulation 330/2010 has maintained this feature. The Commission seems to finally give in to the idea that, although the position of dealers may be strengthened through competition law in a number of ways, tampering with contractual protection clauses is outside the realms of antitrust. Furthermore, the general block exemption for vertical agreements does not contain clauses protecting multibranding – which, as seen above, should not have important practical consequences as dealers do not tend to deal with more than one brand. It may also enable manufacturers to force dealers to offer some repair and maintenance services, as the list of hardcore restrictions is more flexible than that of the specific block exemption.

Importantly, the new Guidelines on Vertical Restraints introduce some – albeit limited – flexibility in the interpretation of the hardcore restrictions of the block exemption. This crucial change may, for the first time, lead to a more tolerant stance towards minimum resale price maintenance and absolute territorial protection distribution agreements in the motor vehicle industry, previously treated as illegal *per se*. Section 4 provides some examples of situations in which hardcore restrictions may be necessary and therefore not illegal. For instance, vertical price-fixing may be allowed, *inter alia*, for short promotions in 'a franchise system or similar distribution system applying a uniform distribution format or a coordinated short term low price campaign' (which does not rule out selective distribution).[69] Another relevant example is the possibility of restricting passive sales outside the allotted territory for up to two years to allow distributors of new products to recover their investments.[70]

Despite this laudable progress, some shortcomings still remain. In 2013, when Regulation 1400/2010 is completely abolished, there will be changes to the market share thresholds established by the previous regulations. Just like Regulation 2790/99, the new block exemption establishes a 30 per cent threshold for all kinds of distribution techniques. The author's suggestion of increasing the general market share cap to 40 per cent was therefore not taken onboard, and the Commission has expressed its satisfaction that 'competition authorities [may] investigate a wider number of potentially anti-competitive practices'.[71] Additionally, losing the specific block exemption means that selective distribution will be deprived of the privileged treatment it has under Regulation 1400/2002 – the 40 per cent cap for quantitative selective distribution and the acceptance of qualitative selective distribution regardless of the market share of the supplier. Even more unfortunate is the fact that the new general block exemption imposes a novel obligation to examine the market share of both contracting parties in an attempt to take into consideration the growing power of buyers (mainly consequential to the emergence of new powerful dealers such as superstores and Internet operators). Much against the author's proposals to simplify economic analysis and to overcome the problems derived from the rigidity of market share thresholds, the resulting system is bound to notoriously reduce the scope of the exemption – precisely at a time when most legal systems are leaning towards increasingly tolerant stances on vertical agreements given their benefits.[72] This may be a major step back in relation to the reforms introduced by Regulations 2790/99 and 1400/2002.

CONCLUDING REMARKS

In the path towards the reform of the block exemption regime for motor vehicle distribution agreements, the Commission has found itself having to juggle a series of

69 Guidelines on Vertical Restraints, para 225.

70 Guidelines on Vertical Restraints, paras 60-62.

71 Commission Staff Working Document Accompanying the Communication from the Commission, The Future Competition Law Framework Applicable to the Motor Vehicle Sector: Impact Assessment (22 July 2009) SEC(2009) 1052, para 17. This aspect is discussed by the author in S Marco Colino, *Vertical Agreements and Competititon Law: A Comparative Study of the EU and US Regimes* (Oxford and Portland, Hart 2009) 127-8.

72 In the US, all vertical (price and non-price) restraints are currently analysed under the rule of reason, ever since Leegin declared that minimum resale price maintenance should not be considered *per se* illegal. See *Leegin Creative Leather Prods. v. PSKS, Inc.,* 127 US 2705 (2007).

outstanding priorities and conflicting interests. There is an imminent need to ensure that competition is protected and enhanced and that, at the same time, dealers and consumers are afforded adequate protection. It is also paramount that the law does not impose unnecessary constraints on car manufacturers at a moment when the industry is immersed in an acute crisis; yet the trap of taking specific interests into consideration in the enactment of competition law rules is to be avoided at all costs. The key to the survival of Europe's established manufacturers lies in the hands of the industry and its capacity to introduce the necessary reforms to enhance its competitiveness. The crisis of the sector calls for government intervention, which may in some stances be very useful. Any aid must however be carefully rationalised; direct subsidies could lead to distortions of competition and will not solve any problems if the money is not adequately invested. Instead, incentives given to consumers for purchasing new cars are proving very successful, and are particularly desirable when linked to the purchase of eco-friendly cars, thus forcing the industry to engage in the production of such vehicles. These measures must nonetheless be seen as transitory solutions and ought not to substitute the necessary refurbishment of the sector.

The Commission's modifications to the exemption system constitute an important step towards the instauration of a coherent and unified regime for vertical agreements; however, one cannot help but feel that the result is somewhat deflating. The promising intention to remove the specific rules for the motor vehicle distribution agreements is undermined by the subsequent introduction of a new block exemption and special guidelines to confront the remaining problems in the markets for repair, aftersales and spare parts. The quest for legal certainty thus appears to be leading to the adoption of an excessively detailed exemption regime in order to clarify the application of Article 101(3) TFEU. However, part of the problem lies in that the complex analysis of this provision is applied far too frequently given the excessively broad interpretation of Article 101(1) TFEU. The European Courts – particularly the CJEU – have manifested an awareness of this problem, and an attempt to limit the scope of the prohibition can be perceived in recent judgements. This would appear to be a more desirable solution. In the light of the Commission's disappointing inactivity in this direction, the role of the CJEU in the reinterpretation of Article 101(1) TFEU may prove crucial for future reforms.

Until that happens, the system remains frustratingly fragmented with the persistent division between specific and general rules for exemption. Regulation 1400/2002 is going into 'extra time' for no less than three years and, contrary to what was originally stipulated, will not disappear until 2013. Even then it is the Commission's preference that specific rules remain, questioning the extent to which the changes under discussion go beyond mere appearance. The reasons why the specificities of the car sector could not simply have been addressed in the general guidelines on vertical restraints remain unconvincing. Furthermore, although the eventual extension of the new block exemption regulation for vertical agreements to the car sector should finally lead to the removal of the inconsistencies of the 'white list' approach, as well as a more tolerant stance towards resale price maintenance and absolute territorial protection, the stricter market share threshold system provided for in the proposed legislation is noticeably disheartening. Until 2013, cynics will be justified in arguing that the 2010 'reform' of the exemption system for vertical agreements could be appropriately labelled 'much ado about nothing'.