BLOCK EXEMPTION (MOTOR VEHICLES): COMMISSION REGULATION

Subject: Block exemption
Vertical agreements

Industry: Motor vehicles

Source: Commission Regulation EC/1400/2002

(Note. This Regulation came into force on 1 October, 2002. The full text is set out below. An explanation of the aims and details of the Regulation was contained in our last issue.)

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,
Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, as last amended by Regulation (EC) No 1215/1999,and in particular Article 1 thereof,
Having published a draft of this Regulation,
Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Experience acquired in the motor vehicle sector regarding the distribution of new motor vehicles, spare parts and after sales services makes it possible to define categories of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 81(3).

(2) This experience leads to the conclusion that rules stricter than those provided for by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3)of the Treaty to categories of vertical agreements and concerted practices are necessary in this sector.

(3) These stricter rules for exemption by category (the exemption) should apply to vertical agreements for the purchase or sale of new motor vehicles, vertical agreements for the purchase or sale of spare parts for motor vehicles and vertical agreements for the purchase or sale of repair and maintenance services for such vehicles where these agreements are concluded between non-competing undertakings, between certain competitors, or by certain associations of retailers or repairers. This includes vertical agreements concluded between a distributor acting at the retail level or an authorised repairer and a (sub-)distributor or repairer. This Regulation should also apply to these vertical agreements when they contain ancillary provisions on the assignment or use of

intellectual property rights. The term 'vertical agreements' should be defined accordingly to include both such agreements and the corresponding concerted practices.

(4) The benefit of the exemption should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(5) Vertical agreements falling within the categories defined in this Regulation can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(6) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power held by the undertakings concerned and therefore on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, prices or intended use.

(7) Thresholds based on market share should be fixed in order to reflect suppliers' market power. Furthermore, this sector-specific Regulation should contain stricter rules than those provided for by Regulation (EC) No 2790/1999,in particular for selective distribution. The thresholds below which it can be presumed that the advantages secured by vertical agreements outweigh their restrictive effects should vary with the characteristics of different types of vertical agreement. It can therefore be presumed that in general, vertical agreements have such advantages where the supplier concerned has a market share of up to 30%on the markets for the distribution of new motor vehicles or spare parts, or of up to 40% where quantitative selective distribution is used for the sale of new motor vehicles. As regards after sales services it can be presumed that, in general, vertical agreements by which the supplier sets criteria on how its authorized repairers have to provide repair or maintenance services for the motor vehicles of the relevant make and provides them with equipment and training for the provision of such services have such advantages where the network of authorised repairers of the supplier concerned has a market share of up to 30%. However, in the case of vertical agreements containing exclusive supply obligations, it is the market share of the buyer which is relevant for determining the overall effects of such vertical agreements on the market.

(8) Above those market share thresholds, there can be no presumption that vertical agreements falling within the scope of Article 81(1)will usually give rise to objective advantages of such a character and magnitude as to compensate for the disadvantages which they create for competition. However, such advantages can be anticipated in the case of qualitative selective distribution, irrespective of the supplier's market share.

(9)In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services, every notice of termination must clearly set out in writing the reasons, which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration.

(10) In order to foster market integration and to allow distributors or authorised repairers to seize additional business opportunities, distributors or authorised repairers have to be

allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles within the distribution system. To this end, any vertical agreement between a supplier and a distributor or authorised repairer has to provide for the latter to have the right to transfer all of its rights and obligations to any other undertaking of its choice of the same type that sell or repairs the same brand of motor vehicles within the distribution system.

(11) In order to favour the quick resolution of disputes which arise between the parties to a distribution agreement and which might otherwise hamper effective competition, agreements should only benefit from exemption if they provide for each party to have a right of recourse to an independent expert or arbitrator, in particular where notice is given to terminate an agreement.

(12) Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption.

(13) It is necessary to ensure that effective competition within the common market and between distributors located in different Member States is not restricted if a supplier uses selective distribution in some markets and other forms of distribution in others. In particular selective distribution agreements which restrict passive sales to any end user or unauthorised distributor located in markets where exclusive territories have been allocated should be excluded from the benefit of the exemption, as should those selective distribution agreements which restrict passive sales to customer groups which have been allocated exclusively to other distributors. The benefit of the exemption should also be withheld from exclusive distribution agreements if active or passive sales to any end user or unauthorised distributor located in markets where selective distribution is used are restricted.

(14) The right of any distributor to sell new motor vehicles passively or, where relevant, actively to end users should include the right to sell such vehicles to end users who have given authorisation to an intermediary or purchasing agent to purchase, take delivery of, transport or store a new motor vehicle on their behalf.

(15) The right of any distributor to sell new motor vehicles or spare parts or of any authorised repairer to sell repair and maintenance services to any end user passively or, where relevant, actively should include the right to use the Internet or Internet referral sites.

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

(17) Vertical agreements that do not oblige the authorized repairers within a supplier's distribution system to honour warranties, perform free servicing and carry out recall work in respect of any motor vehicle of the relevant make sold in the common market amount to an indirect restriction of sales and should not benefit from the exemption. This obligation is without prejudice to the right of a motor vehicle supplier to oblige a distributor to make sure as regards the new motor vehicles that he has sold that the warranties are honoured and that free servicing and recall work is carried out, either by the distributor itself or, in case of sub-contracting, by the authorised repairer(s) to whom these services have been sub-contracted. Therefore consumers should in these cases be able to turn to the distributor if the above obligations have not been properly fulfilled by the authorised repairer to whom the distributor has sub-contracted these services. Furthermore, in order to allow sales by motor vehicle distributors to end users throughout the common market, the exemption should apply only to distribution agreements which require the repairers within the supplier's network to carry out repair and maintenance services for the contract goods and corresponding goods irrespective of where these goods are sold in the common market.

(18) In markets where selective distribution is used, the exemption should apply in respect of a prohibition on a distributor from operating out of an additional place of establishment where he is a distributor of vehicles other than passenger cars or light commercial vehicles. However, this prohibition should not be exempted if it limits the expansion of the distributor's business at the authorised place of establishment by, for instance, restricting the development or acquisition of the infrastructure necessary to allow increases in sales volumes, including increases brought about by Internet sales.

(19) It would be inappropriate to exempt any vertical agreement that restricts the sale of original spare parts or spare parts of matching quality by members of the distribution system to independent repairers which use them for the provision of repair or maintenance services. Without access to such spare parts, these independent repairers would not be able to compete effectively with authorised repairers, since they could not provide consumers with good quality services which contribute to the safe and reliable functioning of motor vehicles.

(20) In order to give end users the right to purchase new motor vehicles with specifications identical to those sold in any other Member State, from any distributor selling corresponding models and established in the common market, the exemption should apply only to vertical agreements which enable a distributor to order, stock and sell any such vehicle which corresponds to a model within its contract range. Discriminatory or objectively unjustified supply conditions, in particular those regarding delivery times or prices, applied by the supplier to corresponding vehicles, are to be considered a restriction on the ability of the distributor to sell such vehicles.

(21) Motor vehicles are expensive and technically complex mobile goods which require repair and maintenance at regular and irregular intervals. However, it is not indispensable for distributors of new motor vehicles also to carry out repair and maintenance. The legitimate interests of suppliers and end users can be fully satisfied if the distributor sub-contracts these services, including the honouring of warranties, free servicing and recall work, to a repairer or to a number of repairers within the supplier's distribution system. It is nevertheless appropriate to facilitate access to repair and maintenance services. Therefore, a supplier may require distributors who have subcontracted repair and maintenance services to one or more authorised repairers to give end users the name and address of the repair shop or shops in question. If any of these authorised repairers is not established in the vicinity of the sales outlet, the supplier

may also require the distributor to tell end users how far the repair shop or shops in question are from the sales outlet. However, a supplier can only impose such obligations if he also imposes similar obligations on distributors whose own repair shop is not on the same premises as their sales outlet.

(22) Furthermore, it is not necessary, in order to provide adequately for repair and maintenance services, for authorised repairers also to sell new motor vehicles. The exemption should therefore not cover vertical agreements containing any direct or indirect obligation or incentive which leads to the linking of sales and servicing activities or which makes the performance of one of these activities dependent on the performance of the other; this is in particular the case where the remuneration of distributors or authorised repairers relating to the purchase or sale of goods or services necessary for one activity is made dependent on the purchase or sale of goods or services relating to the other activity, or where all such goods or services are indistinctly aggregated into a single remuneration or discount system.

(23) In order to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts such as original spare parts and spare parts of matching quality, the exemption should not cover vertical agreements which restrict the ability of authorised repairers within the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users to source spare parts from the manufacturer of such spare parts or from another third party of their choice. This does not affect spare part manufacturers' liability under civil law.

(24) Furthermore, in order to allow authorised and independent repairers and end users to identify the manufacturer of motor vehicle components or of spare parts and to choose between competing spare parts, the exemption should not cover agreements by which a manufacturer of motor vehicles limits the ability of a manufacturer of components or original spare parts to place its trade mark or logo on these parts effectively and in a visible manner. Moreover, in order to facilitate this choice and the sale of spare parts, which have been manufactured according to the specifications and production and quality standards provided by the vehicle manufacturer for the production of components or spare parts, it is presumed that spare parts constitute original spare parts, if the spare part producer issues a certificate that the parts are of the same quality as the components used for the assembly of a motor vehicle and have been manufactured according to these specifications and standards. Other spare parts for which the spare part producer can issue a certificate at any moment attesting that they match the quality of the components used for the assembly of a certain motor vehicle, may be sold as spare parts of matching quality.

(25) The exemption should not cover vertical agreements which restrict authorised repairers from using spare parts of matching quality for the repair or maintenance of a motor vehicle. However, in view of the vehicle manufacturers' direct contractual involvement in repairs under warranty, free servicing, and recall operations, agreements containing obligations on authorised repairers to use original spare parts supplied by the vehicle manufacturer for these repairs should be covered by the exemption.

(26) In order to protect effective competition on the market for repair and maintenance services and to prevent foreclosure of independent repairers, motor vehicle manufacturers must allow all interested independent operators to have full access to all technical information, diagnostic and other equipment, tools, including all relevant software, and training required for the repair and maintenance of motor vehicles. Independent operators who must be allowed such access include in particular independent repairers,

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. In particular, the conditions of access must not discriminate between authorised and independent operators, access must be given upon request and without undue delay, and the price charged for the information should not discourage access to it by failing to take into account the extent to which the independent operator uses it. 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 authorized repairers and must not oblige independent operators to purchase more than the information necessary to carry out the work in question. Suppliers should be obliged to give access to the technical information necessary for re-programming electronic devices in a motor vehicle. It is, however, legitimate and proper for them to withhold access to technical information which might allow a third party to bypass or disarm on-board anti-theft devices, to recalibrate electronic devices or to tamper with devices which for instance limit the speed of a motor vehicle, unless protection against theft, re-calibration or tampering can be attained by other less restrictive means. Intellectual property rights and rights regarding know-how including those which relate to the afore-mentioned devices must be exercised in a manner which avoids any type of abuse.

(27) In order to ensure access to and to prevent collusion on the relevant markets and to give distributors opportunities to sell vehicles of brands from two or more manufacturers that are not connected undertakings, certain specific conditions are attached to the exemption. To this end, the exemption should not be accorded to non-compete obligations. In particular, without prejudice to the ability of the supplier to require the distributor to display the vehicles in brand-specific areas of the show-room in order to avoid brand confusion, any prohibition on sales of competing makes should not be exempted. The same applies to an obligation to display the full range of motor vehicles if it makes the sale or display of vehicles manufactured by undertakings which are not connected impossible or unreasonably difficult. Furthermore, an obligation to have brand-specific sales personnel is considered to be an indirect non-compete obligation and therefore should not be covered by the exemption, unless the distributor decides to have brand-specific sales personnel and the supplier pays all the additional costs involved.

(28) In order to ensure that repairers are able to carry out repairs or maintenance on all motor vehicles, the exemption should not apply to any obligation limiting the ability of repairers of motor vehicles to provide repair or maintenance services for brands of competing suppliers.

(29) In addition, specific conditions are required to exclude certain restrictions, sometimes imposed in the context of a selective distribution system, from the scope of the exemption. This applies in particular to obligations which have the effect of preventing the members of a selective distribution system from selling the brands of particular competing suppliers, which could easily lead to foreclosure of certain brands. Additional conditions are necessary in order to foster intra-brand competition and market integration within the common market, to create opportunities for distributors and authorized repairers who wish to seize business opportunities outside their place of establishment, and to create conditions which allow the development of multi-brand distributors. In particular a restriction on operating out of an unauthorised place of establishment for the distribution of passenger cars and light commercial vehicles or the provision of repair and maintenance services should not be exempted. The supplier may require additional sales or delivery outlets for passenger cars and light commercial vehicles or repair shops to comply with the relevant qualitative criteria applicable for similar outlets located in the same geographic area.

(30) The exemption should not apply to restrictions limiting the ability of a distributor to sell leasing services for motor vehicles.

(31) The market share limitations, the fact that certain vertical agreements are not covered, and the conditions provided for in this Regulation, should normally ensure that the agreements to which the exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the goods or services in question.

(32) In particular cases in which agreements which would otherwise benefit from the exemption nevertheless have effects incompatible with Article 81(3), the Commission is empowered to withdraw the benefit of the exemption; this may occur in particular where the buyer has significant market power on the relevant market on which it resells the goods or provides the services or where parallel networks of vertical agreements have similar effects which significantly restrict access to a relevant market or competition thereon; such cumulative effects may for example arise in the case of selective distribution. The Commission may also withdraw the benefit of the exemption if competition is significantly restricted on a market due to the presence of a supplier with market power or if prices and conditions of supply to motor vehicle distributors differ substantially between geographic markets. It may also withdraw the benefit of the exemption if discriminatory prices or sales conditions, or unjustifiably high supplements, such as those charged for right hand drive vehicles, are applied for the supply of goods corresponding to the contract range.

(33) Regulation No 19/65/EEC empowers the national authorities of Member States to withdraw the benefit of the exemption in respect of vertical agreements having effects incompatible with the conditions laid down in Article 81(3), where such effects are felt in their territory, or in a part thereof, and where such territory has the characteristics of a distinct geographic market; the exercise of this national power of withdrawal should not prejudice the uniform application throughout the common market of the Community competition rules or the full effect of the measures adopted in implementation of those rules.

(34) In order to allow for better supervision of parallel networks of vertical agreements which have similar restrictive effects and which cover more than 50% of a given market, the Commission should be permitted to declare the exemption inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 81(1) to such agreements.

(35) The exemption should be granted without prejudice to the application of the provisions of Article 82 of the Treaty on the abuse by an undertaking of a dominant position.

(36) Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements is applicable until 30 September 2002. In order to allow all operators time to adapt vertical agreements which are compatible with that regulation and which are still in force when the exemption provided for therein expires, it is appropriate for such agreements to benefit from a transition period until 1 October 2003,during which time they should be exempted from the prohibition laid down in Article 81(1) under this Regulation.

(37) In order to allow all operators within a quantitative selective distribution system for new passenger cars and light commercial vehicles to adapt their business strategies to the non-application of the exemption to location clauses, it is appropriate to stipulate that the condition set out in Article 5(2)(b)shall enter into force on 1 October 2005.

(38) The Commission should monitor the operation of this Regulation on a regular basis, with particular regard to its effects on competition in motor vehicle retailing and in after sales servicing in the common market or relevant parts of it. This should include monitoring the effects of this Regulation on the structure and level of concentration of motor vehicle distribution and any resulting effects on competition. The Commission should also carry out an evaluation of the operation of this Regulation and draw up a report not later than 31 May 2008.

Article 1

Definitions

1. For the purposes of this Regulation:

(a) 'competing undertakings' means actual or potential suppliers on the same product market; the product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their intended use;

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

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

(d) 'vertical restraints' means restrictions of competition falling within the scope of Article 81(1),when such restrictions are contained in a vertical agreement;

(e) 'exclusive supply obligation' means any direct or indirect obligation causing the supplier to sell the contract goods or services only to one buyer inside the common market for the purposes of a specific use or for resale;

(f) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorised distributors or independent repairers, without prejudice to the ability to sell spare parts to

independent repairers or the obligation to provide independent operators with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures;

(g) 'quantitative selective distribution system' means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit their number;

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

(i) 'intellectual property rights' includes industrial property rights, copyright and neighbouring rights;

(j) 'know-how' means a package of non-patented practical information, derived from experience and testing by the supplier, which is secret, substantial and identified; in this context, 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; 'substantial' means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

(k) 'buyer', whether distributor or repairer, includes an undertaking which sells goods or services on behalf of another undertaking;

(l) 'authorised repairer' means a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;

(m) 'independent repairer' means a provider of repair and maintenance services for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance. An authorised repairer within the distribution system of a given supplier shall be deemed to be an independent repairer for the purposes of this Regulation to the extent that he provides repair or maintenance services for motor vehicles in respect of which he is not a member of the respective supplier's distribution system;

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

(o) 'passenger car' means a motor vehicle intended for the carriage of passengers and comprising no more than eight seats in addition to the driver's seat;

(p) 'light commercial vehicle' means a motor vehicle intended for the transport of goods or passengers with a maximum mass not exceeding 3.5 tonnes; if a certain light commercial vehicle is also sold in a version with a maximum mass above 3.5 tonnes, all versions of that vehicle are considered to be light commercial vehicles;

(q) the 'contract range' means all the different models of motor vehicles available for purchase by the distributor from the supplier;

(r) a 'motor vehicle which corresponds to a model within the contract range' means a vehicle which is the subject of a distribution agreement with another undertaking within the distribution system set up by the manufacturer or with his consent and which is:
—manufactured or assembled in volume by the manufacturer, and
—identical as to body style, drive-line, chassis, and type of motor to a vehicle within the contract range;

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

(t) 'original spare parts' means spare parts which are of the same quality as the components used for the assembly of a motor vehicle and which are manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of components or spare parts for the motor vehicle in question. This includes spare parts which are manufactured on the same production line as these components. It is presumed, unless the contrary is proven, that parts constitute original spare parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer;

(u) 'spare parts of matching quality' means exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question;

(v) 'undertakings within the distribution system' means the manufacturer and undertakings which are entrusted by the manufacturer or with the manufacturer's consent with the distribution or repair or maintenance of contract goods or corresponding goods;

(w) 'end user' includes leasing companies unless the leasing contracts used provide for a transfer of ownership or an option to purchase the vehicle prior to the expiry of the contract.

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

'Connected undertakings' are:

(a) undertakings in which a party to the agreement, directly or indirectly:

(i) has the power to exercise more than half the voting rights, or

(ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);

(c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);

(d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);

(e) undertakings in which the rights or the powers listed in (a) are jointly held by:

(i) parties to the agreement or their respective connected undertakings referred to in (a) to (d), or

(ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.

Article 2

Scope

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

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

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

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

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

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

3. The exemption shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and:

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

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

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

Article 3

General conditions

1. Subject to paragraphs 2,3,4,5,6 and 7,the exemption shall apply on condition that the supplier's market share on the relevant market on which it sells the new motor vehicles, spare parts for motor vehicles or repair and maintenance services does not exceed 30%. However, the market share threshold for the application of the exemption shall be 40% for agreements establishing quantitative selective distribution systems for the sale of new motor vehicles. Those thresholds shall not apply to agreements establishing qualitative selective distribution systems.

2. In the case of vertical agreements containing exclusive supply obligations, the exemption shall apply on condition that the market share held by the buyer does not exceed 30%of the relevant market on which it purchases the contract goods or services.

3. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that the supplier agrees to the transfer of the rights and obligations resulting from the vertical agreement to another distributor or repairer within the distribution system and chosen by the former distributor or repairer.

4. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.

5. The exemption shall apply on condition that the vertical agreement concluded by the supplier of new motor vehicles with a distributor or authorised repairer provides

(a) that the agreement is concluded for a period of at least five years; in this case each party has to undertake to give the other party at least six months' prior notice of its intention not to renew the agreement;

(b) or that the agreement is concluded for an indefinite period; in this case the period of notice for regular termination of the agreement has to be at least two years for both parties; this period is reduced to at least one year where:

(i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement,or

(ii) the supplier terminates the agreement where it is necessary to re-organise the whole or a substantial part of the network.

6. The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia , to any of the following:

(a) supply obligations;

(b) the setting or attainment of sales targets;

(c) the implementation of stock requirements;

(d) the implementation of an obligation to provide or use demonstration vehicles;

(e) the conditions for the sale of different brands;

(f) the issue whether the prohibition to operate out of an unauthorised place of establishment limits the ability of the distributor of motor vehicles other than passenger cars or light commercial vehicles to expand its business, or

(g) the issue whether the termination of an agreement is justified by the reasons given in the notice.

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

7. For the purposes of this Article, the market share held by the undertakings referred to in Article 1(2)(e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 1(2)(a).

Article 4

Hardcore restrictions

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

1. The exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the distributor's or repairer's ability to determine its sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the distributor or repairer may sell the contract goods or services; however, the exemption shall apply to:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another distributor or repairer, where such a restriction does not limit sales by the customers of the distributor or repairer;

(ii) the restriction of sales to end users by a distributor operating at the wholesale level of trade;

(iii) the restriction of sales of new motor vehicles and spare parts to unauthorised distributors by the members of a selective distribution system in markets where selective distribution is applied, subject to the provisions of point (i);

(iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of cross-supplies between distributors or repairers within a selective distribution system, including between distributors or repairers operating at different levels of trade;

(d) the restriction of active or passive sales of new passenger cars or light commercial vehicles, spare parts for any motor vehicle or repair and maintenance services for any motor vehicle to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used. The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5(2)(b);

(e) the restriction of active or passive sales of new motor vehicles other than passenger cars or light commercial vehicles to end users by members of a selective distribution system operating at the retail level of trade in markets where selective distribution is used, without prejudice to the ability of the supplier to prohibit a member of that system from operating out of an unauthorised place of establishment;

(Hardcore restrictions only concerning the sale of new motor vehicles)

(f) the restriction of the distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range;

(g) the restriction of the distributor 's ability to subcontract the provision of repair and maintenance services to authorized repairers, without prejudice to the ability of the supplier to require the distributor to give end users the name and address of the authorised repairer or repairers in question before the conclusion of a sales contract and, if any of these authorised repairers is not in the vicinity of the sales outlet, also to tell end users how far the repair shop or repair shops in question are from the sales outlet; however, such obligations may only be imposed provided that similar obligations are imposed on distributors whose repair shop is not on the same premises as their sales outlet;

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

(h) the restriction of the authorised repairer's ability to limit its activities to the provision of repair and maintenance services and the distribution of spare parts;

(i) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use these parts for the repair and maintenance of a motor vehicle;

(j) the restriction agreed between a supplier of original spare parts or spare parts of matching quality, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods or services to authorised or independent distributors or to authorised or independent repairers or end users;

(k) the restriction of a distributor's or authorised repairer's ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work;

(l) the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components which limits the latter's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

2. The exemption shall not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures. Such access must include in particular the unrestricted use of the electronic control and diagnostic systems of a motor vehicle, the programming of these systems in accordance with the supplier's standard procedures, the repair and training instructions and the information required for the use of diagnostic and servicing tools and equipment. Access must be given to independent operators in a non-discriminatory, prompt and proportionate way, and the information must be provided in a usable form. If the relevant item is covered by an intellectual property right or constitutes know-how, access shall not be withheld in any abusive manner.

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

Article 5

Specific conditions

1. As regards the sale of new motor vehicles, repair and maintenance services or spare parts, the exemption shall not apply to any of the following obligations contained in vertical agreements:

(a) any direct or indirect non-compete obligation;

(b) any direct or indirect obligation limiting the ability of an authorised repairer to provide repair and maintenance services for vehicles from competing suppliers;

(c) any direct or indirect obligation causing the members of a distribution system not to sell motor vehicles or spare parts of particular competing suppliers or not to provide repair and maintenance services for motor vehicles of particular competing suppliers;

(d) any direct or indirect obligation causing the distributor or authorised repairer, after termination of the agreement, not to manufacture, purchase, sell or resell motor vehicles or not to provide repair or maintenance services.

2. As regards the sale of new motor vehicles, the exemption shall not apply to any of the following obligations contained in vertical agreements:

(a) any direct or indirect obligation causing the retailer not to sell leasing services relating to contract goods or corresponding goods;

(b) any direct or indirect obligation on any distributor of passenger cars or light commercial vehicles within a selective distribution system, which limits its ability to establish additional sales or delivery outlets at other locations within the common market where selective distribution is applied.

3. As regards repair and maintenance services or the sale of spare parts, the exemption shall not apply to any direct or indirect obligation as to the place of establishment of an authorised repairer where selective distribution is applied.

Article 6

Withdrawal of the benefit of the Regulation

1. The Commission may withdraw the benefit of this Regulation, pursuant to Article 7(1) of Regulation No 19/65/EEC, where it finds in any particular case that vertical agreements to which this Regulation applies nevertheless have effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular:

(a) where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers, or

(b) where competition is restricted on a market where one supplier is not exposed to effective competition from other suppliers, or

(c) where prices or conditions of supply for contract goods or for corresponding goods differ substantially between geographic markets, or

(d) where discriminatory prices or sales conditions are applied within a geographic market.

2. Where in any particular case vertical agreements to which the exemption applies have effects incompatible with the conditions laid down in Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the relevant authority of that Member State may withdraw

the benefit of application of this Regulation in respect of that territory, under the same conditions as those provided in paragraph 1.

Article 7

Non-application of the Regulation

1. Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

2. A regulation pursuant to paragraph 1 shall not become applicable earlier than one year following its adoption.

Article 8

Market share calculation

1. The market shares provided for in this Regulation shall be calculated

(a) for the distribution of new motor vehicles on the basis of the volume of the contract goods and corresponding goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, prices and intended use;

(b) for the distribution of spare parts on the basis of the value of the contract goods and other goods sold by the supplier, together with any other goods sold by the supplier which are regarded as interchangeable or substitutable by the buyer, by reason of the products' characteristics, prices and intended use;

(c) for the provision of repair and maintenance services on the basis of the value of the contract services sold by the members of the supplier 's distribution network together with any other services sold by these members which are regarded as interchangeable or substitutable by the buyer, by reason of their characteristics, prices and intended use.

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

2. For the purposes of applying the market share thresholds of 30% and 40% provided for in this Regulation the following rules shall apply:

(a) the market share shall be calculated on the basis of data relating to the preceding calendar year;

(b) the market share shall include any goods or services supplied to integrated distributors for the purposes of sale;

(c) if the market share is initially not more than 30% or 40% respectively but subsequently rises above that level without exceeding 35% or 45% respectively, the exemption shall

continue to apply for a period of two consecutive calendar years following the year in which the market share threshold of 30% or 40% respectively was first exceeded;

(d) if the market share is initially not more than 30% or 40% respectively but subsequently rises above 35% or 45% respectively, the exemption shall continue to apply for one calendar year following the year in which the level of 30% or 40% respectively was first exceeded;

(e) the benefit of points (c)and (d) may not be combined so as to exceed a period of two calendar years.

Article 9

Turnover calculation

1. For the purposes of calculating total annual turnover figures referred to in Article 2(2)(a) and 2(3)(a) respectively, the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together. For this purpose, no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

2. The exemption shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%.

Article 10

Transitional period

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

Article 11

Monitoring and evaluation report

1. The Commission shall monitor the operation of this Regulation on a regular basis, with particular regard to its effects on:

(a) competition in motor vehicle retailing and in after sales servicing in the common market or relevant parts of it;

(b) the structure and level of concentration of motor vehicle distribution and any resulting effects on competition.

2. The Commission shall draw up a report on this Regulation not later than 31 May 2008 having regard in particular to the conditions set out in Article 81(3).

Article 12

Entry into force and expiry

1. This Regulation shall enter into force on 1 October 2002.

2. Article 5(2)(b) shall apply from 1 October 2005.

3. This Regulation shall expire on 31 May 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 31 July 2002.
For the Commission
Mario MONTI
Member of the Commission

State Aid: The BMW Case, Austria

The Commission has decided to initiate a detailed investigation concerning €40.25 million in aid earmarked for BMW's plant in Steyr, in the Austrian region of Oberösterreich. At this stage, the Commission has not been able to establish that the planned aid is compatible with the European framework rules for state aid to the motor vehicle industry and has asked Austria to forward any comments within one month. The main doubts of the Commission relate to the proportionality of the aid. At this stage the Commission is not convinced that the reported regional handicap (the cost difference of carrying out the project in Steyr and not in the alternative location in Landshut, Germany), and consequently the level of the planned aid, are duly justified. Austria intends to grant training aid totalling €6.86 million for a training project in the plant. The eligible cost of the training project, involving general and specific training measures, amounts to €17.9 million. At this stage, the Commission cannot exclude the possibility that Austria may have applied an excessively wide definition of general training in order to be able to grant a higher aid. The Commission also doubts whether the notified Research & Development aid for the development of new diesel engine technology, the innovation aid and environmental aid for the remainder of the investment costs are compatible with the current state aid framework for the motor vehicle industry.*

Source: Commission Statement IP/02/1407, dated 2 October 2002.

**See the Editorial Comments in this issue on page 226.*