

**INTERVENTION AND THE INTERNAL MARKET:
CONTEMPORARY EUROPEAN COMPETITION INITIATIVES
CONCERNING DISTRIBUTION IN THE MARKET FOR NEW CARS**

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“Motor vehicle distribution and repair are areas that are of crucial interest for the European consumer. This sector has been associated with specific competition problems—particularly as regards consumers’ Single Market rights to buy a car wherever it suits them in the European Union.”

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Director-General for Competition

A. INTRODUCTION

The supply and distribution of new cars within the EU presents significant competition- and trade-related challenges for the development of the internal market. These challenges result, inter alia, from differing national tax regimes, technical consumer requirements specific to the national market in question and entrenched methods of distribution—not to mention fluctuating exchange rates between the Euro and other European currencies. While not all completely unique to the supply or distribution of motor vehicles, these difficulties are pronounced enough in this particular industry to warrant its individual consideration and treatment. Moreover, the automobile industry as a whole is of enormous importance, not only in economic terms but also in the context of providing significant welfare gains to consumers.¹ Various initiatives in recent years, both within the EC Member States and at EC level, have therefore attempted to address the problems encountered with the internal market for motor vehicles. Chief among these initiatives, in particular as regards methods of distribution, are the UK Supply of New Cars Order

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¹ The year 2006 alone, for example, saw over 14 million newly registered passenger cars in the EU; see www.acea.be (the website of the European Automobile Manufacturers’ Association (ACEA)).

2000² and the revised European Community Motor Vehicles Block Exemption of July 2002.³

This article concentrates on the developments at EC level⁴ so as to ascertain the extent of their consumer-related effects—and, if possible, whether they have secured improvements in consumer welfare.⁵ We have highlighted in previous articles the basic approach of the EC authorities to the concept of consumer benefit/detriment in competition law;⁶ this article, by contrast, aims to focus on consumer-related intervention in a particular market, namely the market for new cars. It attempts to analyse critically the EC initiative in this area and to identify, if possible, whether consumer benefits were indeed achieved as expected. It is hoped that this analysis will add to the debate concerning the desirability of the current block exemption regime for motor vehicles.

This article is divided into seven substantive sections. Section B provides a very brief description of EU motor vehicle distribution and highlights in the process its typical types of vertical agreements. Section C describes the general EC approach to vertical distribution agreements so as to provide context for the more specific examination concerning the exemption of vertical agreements in the motor vehicle industry. Section D offers an overview of the relevant EC (competition law) decisional practice and jurisprudence specific to the market for new motor vehicles. Section E outlines the Commission block exemption regime for the distribution of motor vehicles within the EC as it stood at the beginning of the new millennium. Section F highlights the main problems associated with the operation of the former block exemption regime, including those identified by the UK authorities. Section G details the latest competition initiative concerning the distribution of motor vehicles that was undertaken by the Commission, namely the 2002 Motor Vehicle Block Exemption. Finally, in

² Competition: The Supply of New Cars Order 2000, SI 2000/2088 (hereafter “the Supply Order”).

³ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Art 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L 203, 30–41.

⁴ This article will consider only the developments that have impacted on the operation of distribution agreements in the motor vehicle industry. It will not, for example, examine other aspects of this particular industry that may influence EU parallel trade, such as (the less recent) developments in vehicle registration. On this issue see generally C Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (Oxford, Hart Publishing, 2007), 321.

⁵ In this context “consumer welfare” should be taken to mean both price and non-price benefits secured by consumers in a particular market, and not simply the overall wealth of the nation. Cf R Bork, *The Antitrust Paradox* (New York, Free Press, 1978), 90.

⁶ See P Marsden and P Whelan, ““Consumer Detriment” and its Application in EC and UK Competition Law” (2006) 27 *European Competition Law Review* 569; M Hutchings and P Whelan, “Consumer Interest in Competition Law Cases” (2006) 16 *Consumer Policy Review* 180; and P Marsden and P Whelan, “The ‘Consumer Welfare’ Standard as a Form of Substantive Protection for Consumers under European Competition Law” in A Ezrachi and U Bernitz (eds), *Own Labels, Branded Goods and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press, 2008, forthcoming).

Section H, a critical analysis is carried out concerning the latest EC development. While both the substance and nature of the initiative are considered, the analysis is confined to its “competition” provisions. Observations on its apparent impact on consumer welfare in the internal market for new cars are also offered in this final section.

B. DISTRIBUTION AND THE EU AUTOMOBILE INDUSTRY

This section attempts to provide a very brief description of the system of motor vehicle distribution as it exists in the European Union; it highlights the typical types of vertical agreements and provides context for the descriptions and analyses that follow.

1. Structure of European Distribution

The EU market for new cars as a whole is segmented into national sub-markets, of which each tends to be characterised by a national leading brand.⁷ Significant transportation costs exist between these sub-markets, and, for the UK and a minority of other jurisdictions, there is the additional cost of ensuring right-hand-drive specifications.⁸ Within each sub-market new motor vehicles can be supplied to consumers by manufacturers in a number of different ways: they may reach them directly through subsidiaries or agents, or indirectly through dealers.⁹ That said, car manufacturers generally do not distribute their cars to consumers directly; rather, distribution is effected through the use of networks of authorised dealers entrusted with the function of selling to consumers.¹⁰ Manufacturers will appoint a supplier (the “importer”) for each national market. The importer will be under the direct ownership of the manufacturer, and is essentially its representative in the Member State; it delivers the cars to dealers, who then sell them on to consumers or, less frequently, to sub-dealers (who then supply to final consumers). The appointed importer concludes individual distribution agreements with dealers located in their Member State.¹¹ As car manufacturers

⁷ See Department of Trade and Industry (DTI), “The Benefits from Competition: Some Illustrative UK Cases”, DTI Economics Paper No 9 (Norwich, CCP, July 2004), 63.

⁸ *Ibid.*

⁹ See generally European Commission, Report on the Evaluation of Regulation (EC) No 1475/95, 15 November 2000 COM(2000) 743, pt 4. See also International Car Distribution Programme, “Multi-Franchising”, Research Paper No 1/98.

¹⁰ However, manufacturers often reserve certain customer groups for direct selling without the involvement of a dealer, such as leasing or rental companies; see the EC Evaluation Report, *ibid.*, para 86. These groups are invariably granted high rebates that are greater than those granted to dealers for individual orders: *ibid.*

¹¹ *Ibid.*, para 83.

have generally established their distribution networks using the same principles,¹² the European market for new cars has traditionally been characterised by a cumulative effect ensuring that distribution networks are organised along almost identical lines.¹³ As will be explained below, significant limitations on the design of legitimate distribution options have relatively recently been introduced as a result of the actions of the European Commission; the exact designs of European distribution systems for new cars have therefore changed considerably since the early years of the new millennium.

2. Typical Distribution Agreements

Vertical distribution agreements may take many different forms. Two common types of vertical agreement that are relevant when considering the EU market for new cars are selective distribution agreements and exclusive distribution agreements. With a selective distribution agreement a supplier appoints retailers—usually after consideration of their management skills, technical expertise, financial resources and quality of premises—who may resell its products to end users without restraint.¹⁴ Selective distribution almost invariably produces a closed network of trading outlets as the supplier normally supplies only its approved retailers and may undertake not to sell to non-approved retailers or to the general public.¹⁵ Exclusive distribution agreements, by contrast, may involve the supplier agreeing to sell a product to only one particular distributor in a specified territory—with perhaps the supplier preventing or controlling the retailer's sales to resellers or to customers who do not reside in its territory—and/or the distributor agreeing to sell only the branded product of the supplier (manufacturer).¹⁶ These different types of distribution agreements can be combined to form a selective and exclusive distribution regime, itself something that was a common characteristic of the European automobile industry.¹⁷

¹² Which in the past generally meant the use of selective and exclusive distribution; see below. See also, the EC Evaluation Report, *supra* n 9, para 82.

¹³ *Ibid.*, paras 20 and 82.

¹⁴ Competition Commission, “New Cars: A Report on the Supply of New Motor Cars within the UK”, 10 April 2000, available at http://www.competition-commission.org.uk/rep_pub/reports/2000/439cars.htm#full (accessed on 30 November 2008), 168.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 189.

¹⁷ As will be explained, this combination no longer benefits from a block exemption, and so has been abandoned. See Section G below.

C. EC REGULATION OF VERTICAL DISTRIBUTION AGREEMENTS

This section contains a brief description of the relevant Treaty competition provisions and secondary legislation; the conflict between the objectives of market integration and undistorted competition as regards vertical restraints; and the consequences of Treaty violation in this area.

1. Treaty Provisions

The main EC Treaty competition provision that applies to vertical distribution agreements is Article 81 EC.¹⁸ This article prohibits agreements between undertakings that may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market. Such agreements are automatically void by virtue of Article 81(2) EC;¹⁹ however, provided that the conditions of Article 81(3) EC are fulfilled—essentially when the economic benefits of an agreement outweigh its anti-competitive effects—agreements may be exempted from the operation of this article. As a result of the process of modernising the enforcement of EC competition law, Article 81(3) EC is now directly effective in each and every Member State; consequently, the relevant national authorities and courts are now capable of applying Article 81(3) to vertical distribution agreements upon which they are required to rule.²⁰ That said, the Commission is still capable of declaring Article 81(1) inapplicable to individual agreements or categories of agreements (through the use of so-called “block exemptions”) so long as the conditions of Article 81(3) are fulfilled.

Article 82 EC, concerning abuse of a dominant position, may also be relevant in the competition analysis of a vertical distribution agreement. This would be the case, for example, where one of the parties to the agreement holds a position of dominance on the market to which the agreement applies.²¹ These cases are, however, relatively scarce in comparison to those under Article 81 EC.²²

¹⁸ Throughout this article the terms “Article 81 EC” and “Article 82 EC” are used in place of ex-Article 85 and ex-Article 86 when necessary.

¹⁹ On this see below, under “Penalties for Breach”.

²⁰ See Recital 4 and Art 1(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

²¹ See, eg Case 226/84 *BL v Commission* [1986] ECR 3263, [1987] 1 CMLR 185; and Case 26/75, *General Motors Continental NV v Commission* [1975] ECR 1367, [1976] 1 CMLR 95.

²² Consequently, and due to the obvious spatial limitations, a detailed examination of the use of Art 82 EC in relation to vertical distribution agreements is outside the scope of this article. Furthermore, due to the fact that, unlike Art 81, Art 82 EC does not permit the use of individual or block exemptions, and given that a large portion of this paper will concentrate on those block exemptions, Art 82 EC will be of limited application in this article’s main substantive analysis.

2. Distribution Agreements and Article 81(1) EC

While the supply and distribution of new cars is subject to a different regime concerning the application, through specific block exemptions, of Article 81(3) EC, than that which applies to selective and exclusive distribution agreements in general, these agreements are not subject to a special appraisal under Article 81(1) EC.²³ According to the current approach of the Community Courts, selective distribution systems are compatible with Article 81(1) EC if: (i) the product in question merits a form of selective distribution; (ii) resellers are chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion; (iii) the system in question aims to achieve a result which enhances competition and thus counterbalances the restriction of competition inherent in selective distribution systems; and (iv) the criteria laid down go no further than what is necessary.²⁴ Exclusive distribution agreements, while perhaps more problematic due to more pronounced market integration concerns,²⁵ are generally dealt with in the context of Article 81(3) EC.²⁶ Some cases on the application of Article 81(1) EC to motor vehicle distribution are dealt with below.

3. Distribution Agreements and Article 81(3) EC

Article 81(3) EC provides vertical agreements with the possibility of an exemption from the application of Article 81(1) EC. For an exemption to exist the agreement must: (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) allow consumers a fair share of the resulting benefit; (iii) not impose on the undertakings concerned

²³ They likewise benefit from the *de minimis* Notice: Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] OJ C 368/07. Accordingly, a distribution agreement between non-competitors is considered to be of “minor importance” if the combined market share held by the parties to it does not exceed 15% of the relevant market share. An agreement between competitors, eg a dual distribution agreement, is of “minor importance” when their market share does not exceed 10%: *ibid*.

²⁴ See generally Case 26/76 *Metro SB-Großmärkte GmbH and Co KG v Commission* [1977] ECR 1875, [1978] 2 CMLR 1; Case 31/80 *L'Oréal* [1980] ECR 3777; Case 99/79 *Lancôme* [1980] ECR 2511; Case T-19/91, *Vichy* [1992] ECR II-415; *Yves Saint Laurent Parfums* [1992] OJ L12/24; *Givenchy* [1992] OJ L236/11; *Ivoclar* [1985] OJ L369/1; Case 210/81 *Demo-Studio Schmidt* [1983] ECR 3045; Case 107/82 *AEG/Telefunken* [1983] ECR 3151; and Case T-88/92 *Groupement d'Achat Édouard Leclerc v European Commission* [1996] ECR II-1961, [1997] 4 CMLR 995.

²⁵ See, eg Cases 56/64 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, [1966] CMLR 418; and Case 56/65 *Société La Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 234, [1966] CMLR 357.

²⁶ See M Gambardella and F M Salerno, “Vertical Agreements: Was the Commission’s Response Adequate? On the Commission’s Ability to Reform Long Standing Policies” in G Amato and CD Ehlermann (eds), *EC Competition Law: A Critical Assessment* (Oxford, Hart Publishing, 2007), 188: “selective distribution provides the only example of enforcement of competition law towards vertical agreements outside of Article 81(3)”.

restrictions which are not indispensable to the attainment of these objectives; and (iv) not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question: Article 81(3) EC. The Council of Ministers has regularly adopted regulations that empower the Commission to adopt so-called “block exemption regulations”; the Commission can thereby apply Article 81(3) EC by a Regulation to certain categories of agreements, decisions by associations of undertakings and concerted practices.²⁷ While these block exemptions do indeed provide a degree of legal certainty to market players, their benefits can be removed by either the Commission or the national competition authorities (NCAs), if circumstances so require.²⁸ An agreement that does not satisfy the conditions of a block exemption may nonetheless still be capable of fulfilling the conditions of Article 81(3) EC, and may thus benefit from an individual exemption on that basis. It should also be noted that block exemptions do not affect the application of Article 82 EC to a given exempted practice.²⁹

A particularly important regulation adopted by the Commission in the context of distribution agreements is the Block Exemption Regulation on Vertical Agreements and Concerted Practices of December 1999.³⁰ In brief, this regulation provides a presumption of legality for those vertical agreements, whether for the sale of goods or the supply of services, where a 30% market share threshold is not exceeded by the supplier.³¹ In line with a more flexible and tolerant approach to vertical restraints, no prescriptive “white list” of legitimate agreements is detailed in the Verticals Regulation; rather, all vertical agreements within its scope³² and not containing illegitimate clauses are exempt provided that the market share threshold is not exceeded. As for illegitimate clauses, certain provisions contained in a vertical agreement will prevent the block

²⁷ See Recital 10 of Reg 1/2003, *supra* n 20.

²⁸ See Recital 10 and Art 29 of Reg 1/2003, *ibid*.

²⁹ Case T-51/89 *TetraPak Rausing SA v Commission* [1990] ECR II-309, [1991] CMLR 334. This point is expressly made in Recital 35 of the 2002 Motor Vehicle Block Exemption.

³⁰ 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 [1999] OJ, L 336/21, 29 December 1999 (hereafter “the Verticals Regulation”). The Commission also published non-binding guidelines on how the Verticals Regulation should be applied: Commission Guidelines on Vertical Restraints [2000] OJ, 2000/C 291/01 (hereafter “the Vertical Guidelines”).

³¹ See generally Art 3 of the Verticals Regulation, *ibid*; V Korah and D O’Sullivan, *Distribution Agreements under the EC Competition Rules* (Oxford, Hart Publishing, 2002); J Goyder, *EU Distribution Law* (Oxford, Hart Publishing, 2005); and D Cowan and J Nazerali, “Unlocking EU Vertical Agreement Rules—Has the European Commission Found the Right Keys?”, Practical Law Company Practice Brief, 2 May 2000, available at <http://competition.practicallaw.com/8-101-1800> (accessed on 30 November 2008). For a good overview and critique of the Verticals Regulation, see R Subiotto and F Amato, “The Reform of the European Competition Policy Concerning Vertical Restraints” (2001) 69 *Antitrust Law Journal* 147.

³² On the definition of “vertical agreement”, see Verticals Regulation, *supra* n 30, Art 2(1).

exemption from being applied to the agreement as a whole;³³ other obligations contained therein, while not benefiting from the exemption, will not prevent the regulation from applying to the remainder of the agreement.³⁴ While the Verticals Regulation does not apply to the distribution of motor vehicles,³⁵ it nonetheless introduces a number of points that may inform or guide later discussion of the Motor Vehicle Block Exemption.³⁶

4. EC Common Market Policies and Vertical Restraints

The political and economic objectives of improving and developing further market integration of the EU Member States have strong ramifications for the application of competition law in Europe, in stark contrast to other jurisdictions. Unlike the US Sherman Act 1890, for example, the European competition (antitrust) provisions were designed in part, and consequently used by the European Courts,³⁷ to further the objective of creating a single trading market within the European (Economic) Community.³⁸ The goal of market integration can, however, lead to outcomes in conflict with those resulting from a purely competition-orientated analysis; at its most extreme, an approach to competition law that takes account of market integration policies dictates the invalidation of practices that, while economically beneficial in the sense that their pro-competitive effects outweigh their anti-competitive effects, nonetheless compartmentalise the common market.³⁹

Competition policy in Europe is an important pillar of the internal market objective, on the basis that the EC Treaty drafters realised that business practices must not be allowed to re-segment trade along national lines. As markets become liberalised due to the removal of public restraints on trade, it is likely that some

³³ See Verticals Regulation, *supra* n 30, Art 4 (the so-called “black list”).

³⁴ Art 5 of the Verticals Regulation, *ibid*.

³⁵ Instead, while the general Verticals Regulation exists alongside the more specific Motor Vehicle Block Exemption, it does not apply to those agreements covered by the more specific regulation: Art 2(5) of the Verticals Regulation, *ibid*.

³⁶ On this see Section H below.

³⁷ See, eg Cases 56/64 and 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, [1966] CMLR 418. See also the decision of the European Commission in *Nintendo* [2003] OJ L255/33, particularly para 338.

³⁸ Presumably by 1890 US inter-state trade was already so highly developed as not to warrant market integration considerations as part of their antitrust policy. For a comparative analysis of the different US and EC approaches to the regulation of distribution in the motor vehicle industry, see D Gerard, “‘Regulated Competition’ in the Automobile Distribution Sector: A Comparative Analysis of the Car Distribution System in the US and the EU” (2003) 24 *European Competition Law Review* 518.

³⁹ On the potential conflict between market integration and undistorted competition, see D Deacon, “Vertical Restraints under EU Competition Law: New Directions” [1995] *Fordham Corporate Law Institute* 307, para 8. As there is no clear hierarchy between these objectives, priorities are generally selected on a case-by-case basis: R Wesseling, *The Modernisation of EC Antitrust Law* (Oxford, Hart Publishing, 2000), 49.

companies might try to evade such increased “foreign” competition through private “protection” by virtue of horizontal or vertical restraints. In the EC, competition law would attempt to prevent this from occurring; as stated by Wesseling:

“The antitrust law provisions were inserted into the Treaty in view of their role in the process of market integration. The antitrust rules were no more than the private counter part to the rules enshrined in Articles 28–30 EC . . . The framers of the Treaty wanted to preclude private undertakings replacing the prohibited public obstacles to inter-state trade.”⁴⁰

As a result, and in order to thwart efforts to create or maintain private obstacles to trade in a European context, the European Commission, since the very founding of the EEC in 1957, has enforced a very strict policy against such anti-competitive practices where they may affect trade between Member States. As explained briefly above, in the EU vertical distribution restraints are generally viewed as violating Article 81(1) of the Treaty—particularly if they involve territorial protection and restrict parallel imports between Member States—and are only permissible if they satisfy the relatively rigid conditions for exemption set out in Article 81(3) EC.⁴¹ In contrast, in the US, Canada and Mexico, control of the distribution channel through vertical restraints is viewed under the competition law rules as more likely to be efficient, and thus is reviewed using a rule-of-reason approach, which weighs both the pro- and anti-competitive effects of the arrangement. In these jurisdictions an economic effects-based approach is applied to such restraints, despite the fact that one of their effects can be to partition markets. With the introduction of the North American Free Trade Agreement (NAFTA), the governments of the US, Canada and Mexico committed to facilitating trade and investment among their economies. Nevertheless, this commitment did not extend to their competition authorities viewing vertical restraints any more harshly than they did previously.⁴² In other words, NAFTA’s trade-related motive has no ramifications for the substantive application of the competition laws of the signatories. In short, then, in the EU, in contrast to the North American jurisdictions, the impact of market integration on competition policy is considerable: in the US, Canada and Mexico, vertical restraints are presumptively legal, even when practiced by dominant firms, whereas in the EU they are generally presumptively violative of policies designed to enhance cross-border trade, and indeed are usually void *ab initio*, unless they fall within an express exemption.

⁴⁰ Wesseling, *ibid.*, 48.

⁴¹ Not all vertical agreements infringe Art 81(1) EC. See the second paragraph of the Section C.2 above. See generally Goyder, *supra* n 31, particularly ch 3.

⁴² For the specific competition provisions of the trade agreement, see ch XV of the North American Free Trade Agreement, available at <http://tech.mit.edu/Bulletins/nafta.html> (accessed on 30 November 2008).

5. Penalties for Breach

The penalties for breach of the European competition law rules include: nullity, the imposition of fines and/or periodic payments, and damages actions before the national courts.⁴³ Although both the Commission and the NCAs are responsible for enforcing EC competition law,⁴⁴ only the Commission practice is considered, as this provides sufficient illustration.

Nullity: Article 81(2) renders automatically void those clauses in the vertical agreements that are in breach of Article 81(1).⁴⁵ The consequences of partial invalidity depend on the rules applicable under national law.⁴⁶ In the UK, if the prohibited clauses cannot be severed from the agreement, the agreement as a whole will be rendered void.⁴⁷

Fines and/or periodic payments: The Commission may impose administrative fines, and periodic penalties where appropriate,⁴⁸ on undertakings that have intentionally or negligently infringed the competition law rules.⁴⁹ It enjoys a wide discretion when imposing these fines.⁵⁰ Regard must be had, however, as to the gravity and duration of the violation.⁵¹ Further, the Commission cannot impose a fine exceeding 10% of the undertaking's total turnover in the preceding business year.⁵² The fine is calculated as a percentage of the value of sales of the undertaking on the affected market, with increases and decreases for aggravating

⁴³ There are, of course, no criminal sanctions at EC level. While in theory individual criminal sanctions for a breach of the competition rules through vertical distribution agreements exist in at least one Member State (namely, Ireland), it is current policy only to pursue a criminal case against an individual accused of hard-core infringements, eg horizontal price-fixing, bid-rigging. Interestingly, on 9 February 2007 a (suspended) prison sentence was handed down for antitrust activity in Ireland; the unlawful antitrust conduct related to a cartel in the Irish motor car industry: http://www.efc.ie/legal_updates/legal_updates/articles/eu_comp_reg/prison_sentence_cartel_activities.html (accessed on 30 November 2008).

⁴⁴ See Art 3 of Reg 1/2003, *supra* n 20.

⁴⁵ A literal reading of Art 81(2) EC would ensure that the agreement as a whole is rendered void; however, the European Court of Justice (ECJ) has interpreted this Treaty provision as only requiring that the offending clause be rendered void: Case 56/65 *Société La Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 234, [1966] CMLR 357.

⁴⁶ Case 319/82 *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH & Co KG* [1983] ECR 4173.

⁴⁷ See the case *Chemidus Wavin v Société pour la Transformation* [1978] 3 CMLR, 519 (Saskatchewan Court of Appeal).

⁴⁸ See Art 24 of Reg 1/2003, *supra* n 20.

⁴⁹ See Art 23 of Reg 1/2003, *ibid*; and European Commission, *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* (Brussels, 2006), 2006/C 210/02.

⁵⁰ See Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, para 172.

⁵¹ Art 23(3) of Reg 1/2003, *supra* n 20.

⁵² *Ibid*, Art 23(2). With an association of undertakings, the upper limit is equal to 10% of the sum of the total turnover of each member active on the affected market.

and mitigating factors.⁵³ Fines for concluding anti-competitive distribution agreements can be quite severe, as indeed evidenced by some of the Commission decisions concerning the motor vehicle industry.⁵⁴

Damages: Private actions for damages before the national courts are also possible for alleged breaches of the competition law rules.⁵⁵ Unlike its US counterpart, European competition law does not presently depend to any significant degree on private litigants for its enforcement function and is therefore mostly enforced by competition agencies, subject to review by the courts. Nonetheless, given the obvious expense encountered in purchasing a new car, not to mention the increasing awareness of (UK) consumers concerning the role of competition law, it is not inconceivable that, assuming the existence of an arguable antitrust claim, consumer organisations would be open to bringing a class or representative action concerning competition infringements in the motor vehicle market, provided that the requisite legal procedures were in place in the Member State in question.⁵⁶ Given the current enthusiasm at EC level for private enforcement actions, it is submitted that it may only be a matter of time before such claims make their way before the national courts.

D. EC DECISIONAL PRACTICE AND JURISPRUDENCE CONCERNING DISTRIBUTION IN THE MARKET FOR NEW CARS

There have been a number of competition law decisions and judgments at EC level relating specifically to the regime for motor vehicle distribution. While the exact particulars of the applicable block exemption regime have been modified over the years, the vast majority of these European decisions and judgments are still relevant today—particularly in terms of understanding the EC authorities' attitude towards the partitioning of the internal market for new cars. Some of

⁵³ See generally the Fining Guidelines, *supra* n 49.

⁵⁴ See, eg *SEP and others/Automobiles Peugeot SA*, Commission Decision of 5 October 2005, C(2005) 3683 final (the Commission imposed a €49.5 million fine on Peugeot); Case IV/35.733 *Volkswagen*, Commission Decision 98/273 of 28 January 1998 [1998] OJ L124/60 (the Commission fined Volkswagen ECU 102 million; the CFI subsequently reduced the fine to ECU 90 million); COMP/36.653 *Opel* [2001] OJ L59/1 (the Commission fined General Motors and Opel Nederland €43 million; the CFI subsequently reduced the fine to €35.475 million); Decision 2002/758 *Mercedes-Benz* [2002] OJ L257/1 (the Commission fined DaimlerChrysler €71.825 million; CFI substantially reduced the fine to €R9.8 million).

⁵⁵ See Case C-453/99, *Courage v Crehan* [2001] ECR I-6297; and Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.

⁵⁶ Indeed, in the past consumer organisations have shown a willingness to engage with competition law issues/cases when expensive consumer goods, such as cars, are at stake; see, eg Cases 228/82 and 229/82 *Ford Werke v Commission* [1984] ECR 1129, [1984] 1 CMLR 649, where the consumer organisation BEUC intervened on behalf of consumers.

the more important cases will therefore be briefly considered. Two major themes concerning this decisional practice/jurisprudence are developed: the relationship between consumer specifications and parallel imports; and the potential conflict between protective measures and the partitioning of the internal market.

1. Consumer Specifications in the Common Market for New Cars

Motorists in the UK, Ireland, Cyprus and Malta drive on the left-hand side of the road with right-hand-drive cars; the rest of the EU drive on the right with, for the most part, left-hand-drive vehicles. This particular consumer specification⁵⁷ has obvious implications for parallel imports, the development of the internal market for cars and ultimately the consumer, and has consequently been addressed in two important Community cases. In the case *Ford*,⁵⁸ the Commission found that a refusal by Ford Werke Aktiengesellschaft to supply right-hand-drive cars to its dealers in Germany constituted a violation of Article 81(1) EC that could not be exempted under Article 81(3) EC. Ford had notified its German dealers that, in the light of the increasing demand from British consumers for right-hand-drive cars, supplies of such vehicles would no longer be forthcoming. The Commission, while accepting that the actions of Ford were unilateral, nonetheless interpreted Article 81(3) EC as not providing for an exemption for the distribution agreement(s) underlying the relationship(s) between the manufacturer and its dealers where such (unilateral) behaviour had a substantially equivalent effect to a ban on exports. The European Court of Justice (ECJ), by contrast, held that the refusal to supply was not a unilateral act, but rather resulted from the main dealer agreement concluded between Ford and its dealers, and that, consequently, the Commission was permitted to consider the refusal of the manufacturer to supply in its application of Article 81(3) EC to the Ford distribution system.⁵⁹ As a result, the Commission decision—*viz* that the distribution agreement in question, in particular the aspects that seek to curb parallel imports, restricts competition and affects trade between Member States within the meaning of Article 81(1) EC and does not display enough redeeming benefits in terms of the conditions laid down in Article 81(3) EC to warrant an exemption—was ultimately upheld, and Ford was therefore ordered to bring the above-mentioned infringement to an end immediately.⁶⁰

⁵⁷ The term “consumer specification” is used as, with the apparent exception of Slovakia, both left- and right-hand-drive cars can be legally registered in every Member State of the EU. See also the Vienna Convention on Road Traffic 1968, signed in Vienna on 8 November 1968.

⁵⁸ Cases 25/84 and 26/84 *Ford Werke and Ford of Europe v Commission* [1985] ECR 2725.

⁵⁹ It must be stated, however, that the Commission may not decide that unilateral conduct by a manufacturer, in the context of its contractual relations with its dealers, in reality forms the basis of an agreement that is restrictive of competition unless it can establish the express or implied acquiescence by the retailers in the attitude adopted by the manufacturer; see generally Case T-208/01 *Volkswagen AG v Commission* [2003] ECR II-5141 (hereafter “*Volkswagen II*”), para 36.

⁶⁰ See the (upheld) decision of the Commission in *Ford* [1983] OJ L327/31.

The *Ford* case was followed a number of years later by the decision of the European Commission in *Peugeot-Talbot*.⁶¹ In the latter case, the Commission was again required to rule on the applicability of Article 81(3) EC to a given selective distribution agreement and to the actions of the manufacturer under that agreement that were aimed at reducing parallel imports of right-hand-drive cars in both the Netherlands and Belgium.⁶² The Commission held that the restriction on sales of right-hand-drive cars was a restrictive measure within the scope of Article 81(1) EC that could not be granted an exemption by virtue of Article 81(3) EC. A fine was not imposed in this case, due in part to the uncertainty that existed prior to the resolution of the *Ford* case concerning the use of protective measures in the context of selective and exclusive distribution agreements.⁶³ In view of the decisional practice of the Commission, itself reinforced by the reasoning of the ECJ in *Ford*, a rather strict approach to distribution agreements and refusals of the manufacturer to supply left/right-hand-side cars to the respective EC national dealers—and of course their consequential partitioning of national territories—has been established: automobile distribution agreements cannot legitimately prevent consumers from obtaining right-hand-drive cars from left-hand-side-driving Member States, and vice versa, irrespective of the fact that the restrictive conduct in question is aimed at the protection of the integrity of the underlying distribution system.⁶⁴

2. Protection of Distribution versus Partitioning of the Internal Market

Cases at EC level have also addressed the question of whether or, more importantly, to what extent manufacturers can legitimately protect the operation of their exclusive and selective distribution systems.⁶⁵ An example in chief is the case of *Volkswagen I*,⁶⁶ where, amongst other things, the legitimacy of the use of a

⁶¹ *Peugeot-Talbot* [1986] OJ L295/19.

⁶² The measures taken to reduce sales were not uniform between the Netherlands and Belgium. In the Netherlands, the manufacturer had informed its dealers that any sales of right-hand-drive cars would be through the British dealer network; in Belgium, by contrast, sales were still possible, although at a relatively elevated price.

⁶³ *Peugeot-Talbot*, *supra* n 61, para 47.

⁶⁴ All of the specific block exemptions for motor vehicles have recognised this rule in an increasingly stricter manner. See Art 5(1)(2)(d) and Art 10(4) of Commission Regulation (EEC) 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [1985] OJ L 15; Art 5(1)(2)(d) and Art 8(3) of 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 [1995] OJ L 145; and Recital 20 of Reg 1400/2002, *supra* n 3.

⁶⁵ The principles established in these cases on exclusive and selective distribution are still relevant today, despite the fact that the concurrent use of such systems is no longer permissible under the 2002 Motor Vehicle Block Exemption.

⁶⁶ Decision 98/277 *Volkswagen I* [1998] OJ L124/60; Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707; Case C-338/00P *Volkswagen v Commission* [2003] ECR I-918 (hereafter “*Volkswagen F*”).

system involving bonuses dependent on the location of the buyer was at issue. According to the facts of the case, the manufacturer, Volkswagen, would pay a bonus of a maximum of 3% of sales, but only if the dealer's sales outside of his contract territory—in this case Italy—did not exceed 15%. It was argued that such a scheme was permitted within the framework of the relevant block exemption as a protective measure aimed at ensuring the integrity of the exclusive and selective distribution system in question. This argument was not accepted by the Commission, but was ultimately upheld on appeal by both the Court of First Instance (CFI) and the ECJ. For the EC authorities, the block exemption regime provided sufficient protection for the operation of the distribution system, *viz* restrictions on sales by dealers to independent resellers,⁶⁷ and that protection could not be legitimately extended to practices which contribute to the partitioning of the market for new cars by preventing sales to final consumers, authorised dealers and genuine intermediaries.⁶⁸ Accordingly, the 15% rule established by the distribution agreement in question was deemed to be incompatible with Article 81(1) EC inasmuch as: (i) it was liable to induce Italian authorised dealers to sell at least 85% of their available vehicles within their contract territory; (ii) it restricted opportunities for end users and dealers in other Member States to purchase vehicles in Italy; and (iii) it had the objective of securing a degree of territorial protection and, consequently, partitioning of the market.⁶⁹ Other practices aimed at reducing parallel imports between Italy and other Member States, namely Germany and Austria, were also found by the Commission to have been committed by VW; these included threats to withdraw concessions if dealers sold to purchasers located outside of Italy, and recommendations to dealers not to inform foreign clients of the real reason for their refusal to supply. In light of these facts, Volkswagen and its subsidiary, Audi, were fined just under ECU 100 million—a fine, it is submitted, of a significant enough magnitude as to underline the seriousness of the Commission's approach in cases involving restrictive (protective) measures that lead to the partitioning of the internal market.⁷⁰ At the time of imposition the fine was one of the highest imposed on a single company for breach of the EC antitrust law rules.

Volkswagen I is not the only case where the Commission and the Community Courts have held that protection resulting in the partitioning of the internal

⁶⁷ It should be noted that although the block exemption regime *permits* certain protective measures being included in motor vehicle distribution agreements, it does not actually *restrict*, *prohibit* or *punish* parallel importers that have acted contrary to the aims of the distribution agreements. See Case C-226/94 *Grand Garage Albigeoisis v Garage Massol* [1996] ECR I-651; Case C-309/94 *Nissan France v Dupasquier* [1996] ECR I-677; Case C-128/95 *Fontaine v Aqueducs Automobiles* [1997] ECR I-967; and Case C-41/96 *VAG-Händlerbeirat v STD-Consult* [1997] ECR I-3123.

⁶⁸ See also the judgment in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439, para 37.

⁶⁹ See paras 45 *et seq* of the ECJ judgment.

⁷⁰ The Commission, in fact, originally imposed a fine of ECU 102 million; this was subsequently reduced to ECU 90 million by the CFI: *Volkswagen I*, *supra* n 66.

market is inconsistent with the granting of a block exemption. In *Opel*,⁷¹ for example, the Commission fined both General Motors and its subsidiary, Opel Nederland, over €40 million for concluding agreements with Opel dealers in the Netherlands which were aimed at restricting or prohibiting export sales of Opel vehicles to end users and to Opel dealers located in other Member States. It found that its strategy to restrict parallel imports consisted of: (i) a restrictive supply policy that limited supplies on the basis of existing sales targets with respect to sales to both final consumers and other Opel dealers; (ii) a restrictive bonus policy which excluded export sales to final consumers from retail bonus campaigns; and (iii) an indiscriminate direct export ban relating to sales to final consumers and to other Opel dealers—all of which are (non-exemptible) restrictive practices within the scope of Article 81(1) EC. The CFI partially annulled this decision on the basis that one aspect of Opel's strategy, namely, the restriction of supply, did not amount to an agreement within the scope of Article 81(1) due to the fact that it had not been communicated to dealers; its judgment was subsequently upheld by the ECJ. Therefore the actual fine imposed, after reduction by the CFI, was €35.475 million.

In a later case, *DaimlerChrysler*,⁷² the Commission held that, by concluding agreements with its agents and dealers in Germany, Belgium and Spain aimed at limiting parallel trade and restricting competition in the leasing and retail sale of Mercedes Benz cars, DaimlerChrysler had infringed Article 81 EC. The practices that were condemned included the sending of circulars requesting dealers to sell only to customers in their own contract territory and the imposition of obligations on certain customers to put down deposits in order to ensure that the car would not be exported to other EC countries. This decision too was partially overturned by the CFI; the Court found that the relationship between DaimlerChrysler and its agents was based on a genuine agency agreement.⁷³ Only agreements between two or more independent undertakings are within the scope of Article 81(1). Genuine agency agreements—where the principal and agent are so closely integrated that they are to be regarded as part of the same economic unit, and where the agent bears no, or merely insignificant, financial or commercial risks in relation to the contracts concluded and/or negotiated on behalf of the principal—are not caught by the prohibition of Article 81.⁷⁴ As genuine agency agreements, the agreements concluded between DaimlerChrysler and its agents were therefore not subject to examination under Article 81(1) EC. A reduced fine of €9.8 million was,

⁷¹ Decision 2001/146 *Opel* [2001] OJ L59/1; Case T-368/00 *General Motors Netherland and Opel Netherland v Commission* [2003] ECR II-4491; Case C-551/03 P, *General Motors v Commission* [2006] ECR I-3173 (hereafter "*Opel*").

⁷² Decision 2002/796 *Mercedes-Benz* [2002] OJ L258/36; Case T-325/01, *DaimlerChrysler v Commission* [2005] ECR II-3319.

⁷³ On agency and distribution agreements, see generally Goyder, *supra* n 31, ch 6.

⁷⁴ See, eg paras 85 to 88 of the CFI judgment in *DaimlerChrysler*, *supra* n 72.

however, imposed as DaimlerChrysler had participated in a price-fixing agreement with its Belgian dealers.

Finally, in *Peugeot*⁷⁵ the Commission imposed a €49.5 million fine on Automobile Peugeot SA and its wholly owned importer, Peugeot Nederland NV, for violating Article 81 EC in their implementation of a two-part strategy which had the objective of preventing Dutch Peugeot dealers from exporting cars for sale to consumers in other countries within the EC. The strategy apparently involved the following two non-exemptible practices: (i) ensuring that the final destination of the vehicle would determine at least part of the remuneration of the Dutch dealers, by, for example, not paying performance bonuses for cars sold to foreign purchasers; and (ii) pressurising dealers who had significantly developed their export efforts by, for example, making threats that future supplies would be reduced. The appeal of this case is currently pending before the CFI.

In sum, then, according to the decisional practice of the Commission and the jurisprudence of the Courts, illegitimate non-exemptible protective practices include, among other things: the termination of a dealer contract as a result of that dealer selling to consumers from other Member States who act for themselves or through a foreign intermediary appointed by them; the restriction of a dealer's freedom to purchase new vehicles from authorised dealers located in other Member States; the withholding of discounts if a dealer sold to a consumer or intermediary from another Member State; the sending of circulars requesting dealers to sell only to customers in their own contract territory; and the imposition of obligations on certain customers to put down deposits so as to ensure that the vehicle will not be exported to other Member States.⁷⁶

E. FIN DE SIÈCLE REGULATION OF THE MOTOR VEHICLE INDUSTRY AND EC BLOCK EXEMPTIONS

Prior to the current motor vehicle block exemption entering into force on 1 October 2002, the automobile industry was regulated by Regulation 123/85⁷⁷

⁷⁵ Decision 2006/431 *Automobiles Peugeot and Peugeot Nederland* [2006] OJ L173/20; Case T-450/05 *Automobiles Peugeot and Peugeot Nederland v Commission* (pending).

⁷⁶ None of this is to say that the Community Courts have not (partially or fully) overturned Commission decisions in this area, including those decisions where these types of practices have been alleged, or indeed deemed proven by the Commission. On occasion they have, in fact, done so; however, this has been due to the fact that a given practice did not form part of an agreement as argued by the Commission, and not because the practice itself is benign as far as its anticompetitive effects are concerned; see, eg the rulings of the CFI in *Opel*, *supra* n 71, *DaimlerChrysler*, *supra* n 72, and *Volkswagen II*, *supra* n 59. In the cases mentioned, if the practice at issue in the appeal would have formed part of the agreement, it would no doubt have been deemed unlawful by the Courts and would not have been subject to an exemption under Art 81(3) EC

⁷⁷ Reg 123/85, *supra* n 64.

(from 1 July 1985 to 30 June 1995) and Regulation 1475/95⁷⁸ (from 1 October 1995 to 30 September 2002). This section outlines the fundamentals of the EC block exemption regime for the motor vehicles market as it stood at the beginning of the new millennium, thereby paving the way for the later section on more recent EC developments.

1. Block Exemptions and the Car Industry

The single market for motor cars has traditionally been less integrated than other European markets.⁷⁹ A major cause of this situation is the fact that for the most part European car manufacturers have been allowed to partition—through the use of (selective and/or exclusive) distribution agreements—the respective EC national markets for cars by preventing the sale of new vehicles from low- to high-priced countries. While the distribution and supply of new cars is of course subject to the antitrust rules contained in Articles 81 and 82 EC,⁸⁰ vertical agreements regulating such conduct are not subject to the general block exemption regime contained in the Verticals Regulation. Rather, since the early 1980s motor vehicle distribution has been subject to a different legislative regime, at least as far as the granting of block exemptions is concerned.

The first specific block exemption for the motor vehicle industry was adopted in 1985: Regulation 123/85. This regulation subjected the motor vehicle industry to a different (favourable) regime than that applying to other, more general distribution agreements, on the basis that, due to the technologically complex nature of automobiles and to the fact that they require regular expert maintenance and repair, automobile distribution justifies the imposition by manufacturers of restrictive contractual terms that would have been unacceptable in other product markets.⁸¹ In adopting this particular piece of legislation the Commission also expressly acknowledged that the use of vertical distribution agreements between automobile manufacturers and their authorised dealers, whether of a selective or exclusive nature, were inherently capable of generating economic efficiencies that bring benefits to consumers, and that therefore these agreements should, under certain circumstances, be granted exemptions from the competition law rules.⁸² The Commission had, in fact, previously acknowledged that vertical distribution agreements in the automobile industry were capable of meeting the conditions of Article 81(3) EC and, in the absence of any applicable block exemption, had in the process granted

⁷⁸ Reg 1475/95, *supra* n 64.

⁷⁹ See P Holmes and A Smith, *Trade, Competition and Industrial Policy: Conflicts of Aims and Instruments in the Car Sector* (Brighton, University of Sussex European Institute, 1995), 3–9.

⁸⁰ Indeed, there have been a number of important Community antitrust decisions and judgments in this area, as detailed above.

⁸¹ Goyder, *supra* n 31, 130.

⁸² See Recital 4 of Reg 123/85, *supra* n 64.

individual exemptions for legitimate agreements.⁸³ In the mid-1970s it was hoped that future distribution agreements in the motor vehicle industry would mimic those for which it had previously granted exemptions; in the event, individual manufacturers continued to notify their own agreements, leading in the process to “a mass of individual notifications” that sought (resource-consuming) individual exemptions.⁸⁴ It was in the light of this problem, and in order to provide more guidance and legal security in the motor vehicle industry, that the Commission decided to employ a block exemption regulation in this area; hence the adoption of Regulation 123/85. In 1995, after realising that the most important objectives of Regulation 123/85, *viz* the opening up of national markets and the establishment of flexible and efficient distribution systems,⁸⁵ were not attained to the desired degree, the Commission reformed the original exemption regime for motor vehicles with the adoption of Regulation 1475/95.⁸⁶

2. Adoption of Regulation 1475/95

Regulation 1475/95 provided a block exemption for agreements concerning the distribution of motor vehicles which are new, are intended for use on public roads and have three or more road wheels; it applies to agreements between a manufacturer and a dealer.⁸⁷ The regulation provided that the combination in the motor vehicle industry of both selective and exclusive distribution systems would be exempt from the application of Article 81(1).⁸⁸ A number of both “black list” clauses and “black list” provisions, which respectively affect the operation of the block exemption in different ways, were also set out in detail in the regulation.⁸⁹

⁸³ See in particular Decision 75/73 *Bayerische Motoren Werke* [1975] OJ L29/1.

⁸⁴ See European Commission, *Fourth Report on Competition Policy* (Brussels, 1974), point 86; and the EC Evaluation Report, *supra* n 9, para 28.

⁸⁵ See Recitals 4 and 25 of Reg 123/85, *supra* n 64, which are reflected in Recitals 4, 7 and 30 of Reg 1475/95, *supra* n 64. With the latter regulation, a further objective was explicitly added: increasing consumer choice in accordance with the principles of the common market; see Recital 26 of Reg 1475/95, *supra* n 64.

⁸⁶ See D Schwartz, “The New Regulation on Motor Vehicle Distribution” [1995] 1(6) *EC Competition Policy Newsletter*, available at http://ec.europa.eu/comm/competition/speeches/text/sp1996_039_en.html (accessed on 30 November 2008). On the change from Reg 123/85 to Reg 1475/95, see PJ Groves, “Whatevershebringswesing: DG Comp Rebukes the Car Industry” (1995) 16 *European Competition Law Review* 98.

⁸⁷ Art 1 of Reg 1475/95, *supra* n 64. Used vehicles were therefore outside the scope of the block exemption; distribution agreements involving used cars could nonetheless benefit from a block exemption under the Verticals Regulation.

⁸⁸ See in particular Art 3 of Reg 1475/95, *supra* n 64.

⁸⁹ See Art 6 of Reg 1475/95, *supra* n 64. Black list clauses rendered the regulation inapplicable and thus removed the benefit it intended to confer; black list provisions, by contrast, led to the automatic loss of an exemption, but only if they were committed systematically or repeatedly. On the general scope of Reg 1475/95, *supra* n 64, see European Commission, “Distribution of

According to Regulation 1475/95, on pain of losing the exemption, the manufacturer had to allow the dealers it supplies to sell competing brands of motor vehicle.⁹⁰ The manufacturer could, however, oblige the seller to have a separate sales premises, under separate management, in the form of a distinct legal entity, and in a manner which avoids confusion between makes.⁹¹ Therefore, efforts by the manufacturer to create “one brand” dealerships, for example through the use of rebate systems which provide higher rebates to a dealer maintaining an exclusive dealership, would have been considered as a restriction of competition not expressly exempted by the regulation, and would have led to an automatic loss of the benefit of the block exemption.⁹²

Dealers could not be obliged to purchase only from the manufacturer.⁹³ Conversely, however, an obligation on the manufacturer neither to sell contract goods to final consumers nor to provide them with servicing for contract goods in the contract territory was exempt by the regulation.⁹⁴ Authorised dealers could not be prevented from purchasing from, or selling to, other authorised dealers within the European Community; they could, however, be legitimately prevented, by the manufacturer, from selling to a reseller who was not part of the authorised distribution system.⁹⁵ This system also applies in the US; however, unlike the US, sales to final customers in different Member States or, where applicable, to commissioned intermediaries and to other members of the distribution network could not be prohibited or otherwise prevented or impeded.⁹⁶ According to the Commission, this meant in particular that export transactions with such customers could not be restricted in any way.⁹⁷

In order to benefit from the exemption provided by Regulation 1475/95, manufacturers had to oblige dealers to also offer after-sales services.⁹⁸ According

Motor Vehicles: Explanatory Brochure on Commission Regulation 1475/95 of 29 June 1995”, available at http://ec.europa.eu/comm/competition/sectors/motor_vehicles/legislation/legislation_archive.html, 4–11 (accessed on 30 November 2008).

⁹⁰ See Art 3(3) and Recital 7 of Reg 1475/95, *supra* n 64.

⁹¹ *Ibid.*

⁹² See European Commission, *supra* n 89, 14.

⁹³ Such an obligation would in fact have been a black list clause under Art 6(1)(3) of Reg 1475/95, *supra* n 64.

⁹⁴ Art 2 of Reg 1475/95, *ibid.*

⁹⁵ Art 3(10)(a) of Reg 1475/95, *ibid.* It is worth noting that this provision also existed under Reg 123/85. According to Art 10(12) of Reg 1475/95, resale shall include “all leasing contracts which provide for a transfer of ownership or an option to purchase prior to the expiry of the contract”. This approach to leasing is consistent with the ECJ judgment in Case C-70/93 *Bayerische Motorenwerke v ALD Auto-Leasing D* [1995] ECR I-3439, particularly para 29.

⁹⁶ On intermediaries, see Art 3(11) of both Reg 123/85, *supra* n 64, and Reg 1475/95, *ibid.*; essentially distributors could be legitimately prevented from supplying an intermediary unless that intermediary has prior written authority on behalf of a consumer to purchase a specified motor vehicle or, where it is taken away by him, to collect it. See also Case C-322/93 *Automobiles Peugeot v Commission* [1994] ECR I-2727.

⁹⁷ See, eg *Mercedes-Benz*, *supra* n 54, para 200.

⁹⁸ Reg 1475/95, *supra* n 64, Art 5(1)(1)(a).

to the prevailing philosophy at the time, “[t]he linking of servicing and distribution must be regarded as more efficient than a separation between a distribution organization for new vehicles on the one hand and a servicing organization which could also distribute spare parts on the other”.⁹⁹

Agreements could be concluded for definite or indefinite periods.¹⁰⁰ If chosen, a definite period must have been of at least five years’ duration.¹⁰¹ Unlike the current situation following the adoption of Verticals Regulation in 1999,¹⁰² manufacturers of automobiles could decide whether their agreements should be considered under Regulation 1475/95 (and previously Regulation 123/85)¹⁰³ or under the more general block exemptions then pertaining to exclusive distribution or purchasing agreements.¹⁰⁴ Under Regulation 1475/95 the Commission expressly reserved the right to withdraw the benefit of the block exemption if circumstances so required.¹⁰⁵

F. CRITICISM OF THE MOTOR VEHICLE BLOCK EXEMPTION REGIME UNDER REGULATION 1475/95

The former block exemption regime that was established with Regulation 1475/95 suffered from a number of serious operational problems. The following brief pertinent comments are offered on the operation in practice of this regime; they relate to legal uncertainty, distribution methods, the internal market and the defects that led to the 2002 reform. The specific criticisms of the UK authorities as regards Regulation 1475/95 are also highlighted.

1. Legal Uncertainty

The block exemption regulations in and of themselves, in particular Regulation 1475/95, are considerably difficult to read; this is essentially due to their very

⁹⁹ *Ibid*, Recital 4. This recital was also included in Reg 123/85, *supra* n 64, Recital 4.

¹⁰⁰ See Art 5 of Reg 1475/95, *supra* n 64.

¹⁰¹ *Ibid*.

¹⁰² See Art 2(5) of the Verticals Regulation, *supra* n 30.

¹⁰³ See Recitals 24 and 29, and Art 6(3) of Reg 123/85, *supra* n 64; and Recitals 23 and 34, and Art 6(1)(4) of Reg 1475/95, *supra* n 64.

¹⁰⁴ Namely, Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements [1983] OJ EEC L 173/1, corrected by [2003] OJ L 281/24; and Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the Application of Article 85(3) of the Treaty to Categories of Exclusive Purchasing Agreements [1983] OJ EEC L 173/5, corrected by [1983] OJ L 281/24.

¹⁰⁵ See Art 8 of Reg 1475/95, *supra* n 64. For example, it could withdraw the benefit of the block exemption where “prices or conditions of supply for contract goods or for corresponding goods are continually being applied which differ substantially as between Member States, such substantial differences being chiefly due to obligations exempted by [Regulation 1475/95]”: *ibid*, Art 8(2).

detailed provisions, not all of which relate to competition concerns.¹⁰⁶ Consequently, an inevitable degree of legal uncertainty was evident under the former legislative regime.¹⁰⁷ This uncertainty may have impacted on not only the consistency of European Commission practice in this area, but also on the behaviour of those active in the automobile industry, namely manufacturers and dealers. Despite the relevant published Commission decisions, notices and reports, and the detailed decisions of the CFI and the ECJ that have all attempted to shed light on the regime, the motor vehicle industry has apparently had to learn to live with this deficiency in legal certainty.¹⁰⁸

2. Distribution Methods and the Internal Market

In its first block exemption regulation for the motor vehicle industry, Regulation 123/85, the Commission essentially accepted as exemptible the concurrent use of selective distribution and territorial protection and the linking of sales with servicing.¹⁰⁹ Although this approach was also adopted in Regulation 1475/95,¹¹⁰ the permitted degree of exclusive territorial protection was weakened by allowing more active sales, for example through advertising outside of the contract territory, if not personalised mailing.¹¹¹ This change as regards territorial protection reflected a concern for the internal market and the protection of (theoretical) parallel imports; internal market concerns were also behind Commission threats to withdraw the benefit of the block exemption.¹¹² The word “theoretical” is used as, in the final analysis and despite its insistence on the importance of parallel trade,¹¹³ Regulation 1475/95 nonetheless provided a framework within which manufacturers were capable of significantly restricting parallel imports. Not only were entrenched methods of distribution expressly permitted, but strict rules were applied to intermediaries, for example the requirement for written

¹⁰⁶ W Van Overbeek, “Regulation 1475/95 Relating to the Exclusive/Selective Distribution of Motor Vehicles” (1996) 7 *International Company and Commercial Law Review* 185, 196.

¹⁰⁷ For example it was unclear how the existence or non-existence of a “commercial purpose” could be established in relation to Art 6(1)(7) of Reg 1475/95, *supra* n 64; see *ibid*, 188.

¹⁰⁸ *Ibid*, 196.

¹⁰⁹ See, eg the 1985 Commission Notice on Regulation 123/85 [1985] OJ C17/4: “the Commission recognizes that exclusive and selective distribution in this industry is in principle compatible with [Article 81(3)] of the Treaty”.

¹¹⁰ Reg 1475/95, *supra* n 64, Recital 4 expressly recognised the “indispensable necessity” of combining selective and exclusive distribution in the automobile industry.

¹¹¹ See Recital 9 and Art 3(8)(b) of Reg 1475/95, *supra* n 64. See also J Ratcliff, “Major Events and Policy Issues in EC Competition Law 2001–2002: Part 2” (2003) 14(3) *International Company and Commercial Law Review* 87, 107. Cf Art 4(c) of the Verticals Regulation, *supra* n 30, where a combination of selective and exclusive distribution is only permitted under the condition that both active and passive sales outside an allocated territory are allowed.

¹¹² These threats to withdraw the benefit of the regulation where particular manufacturers’ conduct was suspected of being inconsistent with the common market were not, however, carried out by the Commission.

¹¹³ See, eg Recital 26 of Reg 1475/95, *supra* n 64.

authorisation from consumers.¹¹⁴ According to Stothers, the scope for parallel importing was significantly restricted even by action that fell within the spirit of Regulation 1475/95, a fact compounded by the “flurry of complaints” to the Commission from various parallel importers and intermediaries.¹¹⁵ Post-2000 EC reform of the block exemption regime would later revisit this area and reconsider whether, in particular, the concurrent use of both selectivity and exclusivity is compatible with the development of an internal market for cars.¹¹⁶

3. Design Defects

The exemption regime for distribution agreements in the motor vehicle sector suffered from a number of serious design defects which, according to the Commission, ensured the following: (i) the failure to provide consumers the benefits obtained due to operation of the regime; (ii) the failure to significantly improve competition between dealers (who remain too dependent on motor vehicle manufacturers); and (iii) the failure of consumers in practice to take advantage of price differentials in different Member States.¹¹⁷ In the words of the Commission:

“Although Regulation (EC) No 1475/95 tried to underpin the right of consumers to purchase a new motor vehicle in another Member State, in practice manufacturers were able to limit parallel trade to a level which avoided the need for them to even-out prices even between Member States with low tax levels.”¹¹⁸

Some have even argued that the regulation itself was the “major barrier to competition” in this market, as it provided manufacturers the freedom to impose selective and exclusive vertical restraints on franchised dealers.¹¹⁹ The final years of the twentieth century saw an EC level block exemption regime for motor vehicles that was based on the assumptions that, first, selective and exclusive

¹¹⁴ Intermediaries are, however, allowed to act in a professional capacity and are not precluded from charging fees for their services. See European Commission, “Sixteenth Annual Report on Competition Policy” (Brussels, 1986), point 3; European Commission Notice: Clarification of the Activities of Motor Vehicle Intermediaries [1991] OJ C329/20; Case T-9/92 *Automobiles Peugeot v Commission* [1993] ECR II-493; and *Automobiles Peugeot*, *supra* n 96.

¹¹⁵ See Stothers, *supra* n 4, 229. These complaints led to a number of unsuccessful challenges before the Community Courts, including: Cases T-189/95, 39/96 and 123/96 *SGA v Commission* [1999] ECR II-3587; Case C-39/00P *SGA v Commission* [2000] ECR I-11201; Cases T-9/96 and 211/96 *Européenne Automobile v Commission* [1999] ECR II-3639; Case T-26/99 *Trabisco v Commission* [2001] ECR II-633; Cases T-190/95 and 45/96 *Sodima v Commission* [1999] ECR II-3617; Case C-44/00P *Sodima v Commission* [2000] ECR II-655; Case T-115/99 *SEP v Commission* [2001] ECR II-691.

¹¹⁶ See Section G below.

¹¹⁷ See the EC Evaluation Report, *supra* n 9. See also “Motor Vehicle Sector Competition Rules Reformed” (2002) 105 *EU Focus* 2, 2.

¹¹⁸ Explanatory note to the draft of the 2002 Motor Vehicle Block Exemption [2002] OJ C67/13, Point 16. For the draft of the 2002 Motor Vehicle Block Exemption itself, see [2002] OJ C67/2.

¹¹⁹ DTI (2004), *supra* n 7, 63.

distribution agreements in this sector of the economy allow for the existence of effective intra-brand and inter-brand competition, and secondly, consumers are capable of securing a sizable share of the benefits resulting from such effective competition.¹²⁰ As the regulation itself stated:

“the conditions necessary for effective competition [concerning motor vehicles], including competition in trade between Member States, may be taken to exist at present, so that European consumers may be considered in general to take an equitable share in the benefit from the operation of such competition.”¹²¹

The EC report which evaluated the operation of Regulation 1475/95 considered whether these assumptions were still valid, and whether change was therefore required to the exemption regime then applicable within the EC.¹²² The report found, *inter alia*, that the regime failed to provide consumers with an equitable share of the resultant benefits obtained due to its operation, and that, due to their excessively dependent relationships with manufacturers, dealers did not compete effectively among themselves in the market.¹²³ More specifically, even within the limits set by Regulation 1475/95, intra-brand competition was not believed to have been facilitated by the instruments which were apparently available to dealers, such as the granting of discounts and other benefits to customers, the provision of quality after-sales services and the offering of favourable terms on trade-in vehicles.¹²⁴ In fact, the Commission found that discounting was the most important instrument used to ensure competition between dealers, and that the margin and bonus policies applied by manufacturers usually ensured that dealers had little room to compete in this regard.¹²⁵ Indeed, as the margins granted to dealers by the manufacturer did not differentiate between large and small operators, and therefore did not allow for higher volume-related discounts, large dealers were not able to exert their countervailing bargaining power; they could not therefore compete with other dealers of the same brand through price discounting.¹²⁶ Intra-brand competition between dealers in different Member States was also found to be unduly limited.¹²⁷ The

¹²⁰ The EC Evaluation Report, *supra* n 9, para 178.

¹²¹ Reg 1475/95, *supra* n 64, Recital 30.

¹²² See the EC Evaluation Report, *supra* n 9, particularly ch 6. This report was part of a wider consultation process on Reg 1475/95 which was carried out between 2000 and 2001 in the knowledge that Reg 1475/95 was due to expire in 2002. For the resultant studies see http://ec.europa.eu/comm/competition/car_sector/distribution (accessed on 30 November 2008).

¹²³ See also Explanatory Note to the Draft of the 2002 Motor Vehicle Block Exemption [2002] OJ C67/13, Point 16.

¹²⁴ See the EC Evaluation Report, *supra* n 9, paras 181 *et seq.*

¹²⁵ *Ibid.*

¹²⁶ See European Consumers' Association (BEUC), “Draft Commission Regulation (EC) on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices in the Motor Vehicle Industry: Final BEUC Reaction”, document BEUC/X/017/2002, 17 April 2002, available at www.beuc.eu, 4.

¹²⁷ See the EC Evaluation Report, *supra* n 9, paras 185 *et seq.*

viability of intra-brand competition in this sense depends on, among other things, the existence of substantial price differentials between Member States.¹²⁸ These price differentials are determined by both market and non-market operators; in the case of the former, restrictions on personalised advertising outside the contract territory and bans on selling to resellers not belonging to the network undermine (beneficial) price differentials, both practices expressly permitted under Regulation 1475/95. Due to the prescriptive nature of Regulation 1475/95—in that it only exempted one particular model of distribution, and therefore encouraged the use of near-identical systems across the industry—the market for motor cars was subject to a cumulative (or straitjacket) effect as regards the problematic distributional practices identified. This cumulative effect was expressly acknowledged by the Commission in its Evaluation Report;¹²⁹ the Commission, however, was not directly at fault in this regard as only prescriptive Commission block exemptions—in other words, those containing lists of legitimate (as opposed to solely illegitimate) agreements—were possible under the legislative framework that was then in force, namely Council Regulation 19/65.¹³⁰ According to some scholars at least, the apparent straitjacket effect of Regulation 1475/95 was one of the recurring themes in the process that led to the adoption of Regulation 1400/2002.¹³¹ Indeed, for Tsoraklidis, the straitjacket effect of the former regulation was of such power that “all current motor vehicle distribution systems are modelled on Regulation 1475/95, thereby impeding the development of innovative distribution systems”.¹³² It is for these main reasons, and others,¹³³ that the European

¹²⁸ Price transparency is also important; this has been facilitated to a degree by the European Commission’s regular reports on prices and by the introduction of the Euro: *ibid.*

¹²⁹ The EC Evaluation Report, *supra* n 9, paras 20 and 82.

¹³⁰ Regulation (EEC) No 19/65 of 2 March 1965 on the Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices [1965] OJ Spec Ed 36/533. Reg 19/65 was eventually amended in June 1999 by Reg 1215/99, paving the way for the less prescriptive measures such as the Verticals Regulation and the 2002 Motor Vehicle Block Exemption: Council Regulation (EC) No 1215/99 of 10 June 1999 Amending Regulation 19/65/EEC on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements and Concerted Practices [1999] OJ L148/1.

¹³¹ See F Wijckmans, F Tuytschaever and A Vanderelst, *Vertical Agreements in EC Competition Law* (Oxford University Press, 2006), 307. Indeed, for Lopez, Reg 1400/2002 was adopted so as to “free ... the sector from the straightjacket effect associated with the previous rules”: M Lopez, “New Explanatory Brochure on Commission Block Exemption Regulation No 1400/2002 on the Motor Vehicle Sector: Bringing Competition Rules Closer to Consumers and Market Operators” (2003) 1 *EC Competition Policy Newsletter* 59.

¹³² L Tsoraklidis, “Towards a New Motor Vehicle Block Exemption—Commission Proposal for Motor Vehicle Distribution, Adopted on 5 February 2002” (2002) 2 *EC Competition Policy Newsletter* 31.

¹³³ For example, motor car distribution agreements were at the centre of important competition law cases at this time, as detailed above. For some, these cases underlined the fact that Reg 1475/95 was not working and that a substantial overhaul of the (exemption) system was required; see, eg Practical Law Company, “EC Motor Vehicles Block Exemption”, available at <http://competition.practicallaw.com/2-107-4602#a548793#a548793> (accessed on 30 November 2008), 4.

Commission eventually decided that real legislative change was required in this area.¹³⁴

4. Pressure from the UK

In 1998, due to significant concern expressed by consumers and those who represent them as to the relative high level of retail prices for new cars, a preliminary investigation into various aspects of the supply of new cars was undertaken by the Director General of Fair Trading (DGFT). As a result of this investigation the Office of Fair Trading obtained relevant supply information from both manufacturers and dealers and carried out a statistical survey of the discounts given by the dealers to their customers. According to the Director General, the investigation revealed that the market for new cars was not working as well as it should be and that competition was distorted due to a power imbalance between the manufacturers and their dealers.¹³⁵ The identified imbalance in power ensured the manufacturers' continued refusal to provide volume discounts to dealers, thereby reducing the dealers' ability to improve retail prices; dealers were also the subject of various other practices that were aimed at keeping the manufacturers' influence over prices at a maximum.¹³⁶ There was also evidence that recommended retail prices (RRPs) were being used by both manufacturers and dealers to conceal the true selling price of the cars.¹³⁷ As a result of these findings, and in exercising his powers under sections 47(1), 49(1) and 50(1) of the Fair Trading Act 1973,¹³⁸ the DGFT made a monopoly reference to the Mergers and Monopolies Commission¹³⁹ regarding the supply of new motor cars in the UK by manufacturers and importers.¹⁴⁰ This reference

¹³⁴ On this movement towards change, see generally K Middleton, "The Legal Framework for Motor Vehicle Distribution—A New Model" (2001) 22 *European Competition Law Review* 3.

¹³⁵ OFT Press Release No 8/99, 17 March 1999.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ In essence, these provisions empowered the DGFT to refer to the Mergers and Monopolies Commission a market in which he believes that a monopoly situation exists. It was then up to the MMC to decide whether a monopoly exists in the market referred to and to propose further action to be taken so as to solve the market failure represented by such a monopoly. See generally pts I and IV of the Fair Trading Act 1973 (FTA). This regime was replaced by the market investigation reference regime which was introduced by the Enterprise Act 2002. On the later regime, see generally P Marsden and P Whelan, "When Markets Are Failing (Part I)" (2007) 6(1) *Competition Law Insight* 6; and P Marsden and P Whelan, "When Markets Are Failing (Part II)" (2007) 6(2) *Competition Law Insight* 6.

¹³⁹ The MMC is now known as "the Competition Commission"; any further references in this article to the latter body should also be taken to refer to the MMC

¹⁴⁰ For a full text version of the reference, see Annex 1, para 1, of the CC Report, *supra* n 14. The MMC investigated this market between 1990 and 1991; see Mergers and Monopolies Commission, "New Motor Cars: A Report on the Supply of New Motor Cars within the United Kingdom" (HMSO, 1992), Cm 1808; and the CC Report, *supra* n 14, paras 3.2–3.8. As there were many changes affecting the supply of new cars in the UK since the earlier inquiry, a second inquiry was deemed necessary; see the CC Report, *supra* n 14, paras 1.2 and 2.3.

requested the Competition Commission to report on whether (i) there was a monopoly situation in the supply of new motor cars in the UK by manufacturers and importers and, if so, (ii) by virtue of which provisions of the FTA and in favour of what persons the monopoly situation existed.¹⁴¹

In 2000 the UK Competition Commission found that a complex monopoly situation existed in the market for new cars, due mainly to distributional practices of the supplier, many of which were exempted by the operation of Regulation 1475/95. For the Competition Commission the widespread nature of a number of different problematic practices led to the establishment of a complex monopoly situation in the market for new cars.¹⁴² It found, among other things, that suppliers used both selective and exclusive distribution arrangements—a practice deemed to be legitimate by virtue of Regulation 1475/95—in order to segment the market and to propose preferential discounts to fleet customers.¹⁴³ The identified monopoly was found to sustain a higher level of prices for new automobiles sold in the UK to private customers than what would have been the case under a more competitive market situation. In terms of precise figures, the Competition Commission was of the considered opinion that prices were on average almost 10% higher than they should be, itself a figure not insubstantial in terms of the alleged consumer detriment suffered.¹⁴⁴ The Competition Commission found that the level of detriment suffered by consumers in this market was such that it ensured that any (efficiency-related) advantages resulting from the employment of the identified problematic practices were outweighed by their disadvantages.¹⁴⁵ According to the UK authority, “substantial changes” were required in order to remedy the adverse effects encountered due to the problematic practices.¹⁴⁶ These changes translate to a fundamental overhaul of Regulation 1475/95. Specifically, the Competition

¹⁴¹ The FTA 1973 provided for two types of monopoly situations: (i) a scale monopoly; and (ii) a complex monopoly. See generally paras 2.31 and 2.34 of the CC Report, *supra* n 14. A scale monopoly refers to a situation where one person/company or members of one interconnected group of companies has at least one-quarter of the total supply of goods of any description: see ss 6, 7 and 8 of the FTA 1973. By contrast, a complex monopoly situation exists when at least one-quarter of the total supply in the UK is supplied by members of one group consisting of two or more persons, not being interconnected companies, who, whether voluntarily or not and whether by agreement or not, so conduct their respective affairs as in any way to restrict competition in connection with the production or supply of goods of that description; see s 11 of the FTA 1973.

¹⁴² For a full list of the identified problematic problems, see Annex I below.

¹⁴³ The CC Report, *supra* n 14, para 1.8.

¹⁴⁴ See the CC Report, *supra* n 14, para 2.374. This figure confirmed KPMG's estimate that in comparison to other (Benelux) countries UK prices were 10% too high: see World Market Research Centre: www.worldmarketsanalysis.com/InFocus2002/articles/automotive_blockexempt.html (accessed on 30 November 2008); DTI (2004), *supra* n 7, 65.

¹⁴⁵ The CC Report, *supra* n 14, para 1.18.

¹⁴⁶ *Ibid*, para 1.19. Unsurprisingly, perhaps, suppliers generally did not believe that any action was required by the UK authorities as, according to them at least, the practices under investigation did not operate against the public interest: *ibid*, para 2.393.

Commission felt that, in order for the effects of the complex monopoly to be removed, *inter alia*: (i) suppliers should be prohibited from refusing to supply on normal commercial terms any party wishing to retail the suppliers' cars; (ii) retailers should not be restricted in their ability to resell suppliers' cars to other retailers; and (iii) suppliers should not be allowed to establish exclusive territories. According to the Competition Commission, about half of the problematic practices that it identified as running counter to the public interest were expressly permitted due to the block exemption regulation. With regard to those practices, one would have to either unilaterally withdraw the benefit of the block exemption in individual (UK) cases; adopt a decision prohibiting "exempted" behaviour; or change the block exemption or allow it to expire.¹⁴⁷ While, according to the Competition Commission, the identified practices were not in the public interest, it would be up to the Secretary of State to decide what exact course of action would be adopted, taking into consideration both its assessment of the new cars market and the current state of EC law.¹⁴⁸ The Commission did, however, state that action should be taken immediately to remedy the adverse effects identified.¹⁴⁹ It is for this reason perhaps that the Competition Commission also recommended possible remedies not already subject to the block exemption regime. These could be employed if the Secretary of State decided not to unilaterally withdraw the benefit of Regulation 1475/95 or if he decided not to prohibit actions that were expressly exempt by such a block exemption.¹⁵⁰ They are therefore not without importance, and include the following: prohibiting suppliers from discriminating by price between fleet customers and those dealers that wish to purchase a stock of new cars outright; prohibiting suppliers from discriminating on the terms upon which vehicles are supplied to contract hire companies, depending on whether the end-customers are fleet or private customers; prohibiting suppliers from dictating the prices at which cars can be advertised by dealers; prohibiting suppliers from obliging dealers to pre-register cars; and requiring suppliers to provide information about the supply of cars that they themselves have pre-registered.¹⁵¹ While the Competition Commission recommended that the Secretary of State draw up an order implementing the above measures, it left it for the latter to decide on the legality of any measure to be adopted.¹⁵² The Secretary of State eventually drafted and adopted an order implementing these measures: the UK Supply of New Cars Order 2000. For the UK authority, such measures, while not a substitute for the substantial changes recommended—that is, abolition of the

¹⁴⁷ See the CC Report, *supra* n 14, paras 1.20 and 2.394–2.449.

¹⁴⁸ *Ibid*, paras 1.20, 2.397, 2.398, 2.446 and 2.448.

¹⁴⁹ *Ibid*, para 1.20.

¹⁵⁰ See *ibid*, para 2.450.

¹⁵¹ See *ibid*, paras 1.21 and 2.480.

¹⁵² See, eg para 2.480.

selective and exclusive distribution (SED) system—might nonetheless go some way to remedying the adverse effects, and in a more timely manner.¹⁵³ This Order, in also detailing a prohibition on restrictions on parallel trade, also restated existing EC law in an attempt to remind operators in the market of the strict regime in place concerning such practices.¹⁵⁴ Such (re)educative efforts could perhaps be interpreted as an attempt to be seen to be doing something at the height of the “Rip-Off Britain” campaign.¹⁵⁵ In any case, the changes inherent in the Supply Order, as well as the provisions on import restrictions, would soon be overshadowed by the modifications of the European block exemption regime that were implemented in 2002.

G. MODIFICATION OF THE EC REGULATORY FRAMEWORK FOR THE DISTRIBUTION OF NEW CARS

After an elaborate process involving rigorous evaluation, consultation and drafting—not to mention consideration of the conclusions of the UK Competition Commission—the new block exemption, Regulation 1400/2002, was finally adopted in July 2002; it came into force that October.¹⁵⁶ Like Regulation 1475/95, the new block exemption applies to agreements between manufacturers and dealers concerning the distribution of motor vehicles which are new, are intended for use on public roads and have three or more road wheels.¹⁵⁷ As a legislative measure designed to overcome the problems associated with the former regulation, the new block exemption provided a less prescriptive approach to distribution agreements in the motor sector and introduced a number of stricter provisions,¹⁵⁸ in particular those concerning practices perceived as being detrimental to the maintenance and development of parallel trade activities.

¹⁵³ See *ibid*, paras 1.21, 1.22 and 2.450.

¹⁵⁴ See the UK Supply of New Cars Order, ss 12 and 13.

¹⁵⁵ On this, see <http://www.rip-off.co.uk/> (accessed on 30 November 2008).

¹⁵⁶ Reg 1400/2002, *supra* n 3. Certain transition periods were provided, however, so as to smooth out the difficulties inherent in changing to the new regime; these have all since passed. See *ibid*, Arts 5(2)(b), 10 and 12(10).

¹⁵⁷ Arts 1(n) and 2(1) of Reg 1400/2002, *supra* n 3. Distribution agreements involving used cars may, however, benefit from a block exemption under the Verticals Regulation.

¹⁵⁸ See, eg European Commission, “Distribution and Servicing of Motor Vehicles in the European Union: Explanatory Brochure on Commission Regulation 1400/2002 of 31 July 2002” (hereafter “EC Explanatory Brochure”), 11. It was this need for a stricter regime for the exemption of agreements relating to motor vehicles that also led the Commission to decide that the motor vehicle sector should not be subject to the general block regulation that applies to vertical distribution agreements, Reg 2790/99. See Recitals 2 and 7 of Reg 1400/2002, *supra* n 3. On this choice see also Section H below.

1. Aims of the 2002 Block Exemption

The primary aims of the 2002 block exemption as regards the distribution of new motor vehicles are: to foster the development of new distribution techniques; to increase (intra-brand) competition between dealers; to ensure cross-border sales of cars can be achieved more easily; and to improve price-competitiveness in the market for new automobiles.¹⁵⁹ According to the Commission in its Evaluation Report, “there is currently reason to believe that effective inter-brand competition exists in the European Union”;¹⁶⁰ therefore no specific measures were adopted in Regulation 1400/2002 that were aimed at increasing this form of competition.¹⁶¹ In order to achieve the above-identified aims, the Commission focused on increasing market integration and increasing dealer independence vis-à-vis manufacturers.¹⁶² By reforming the block exemption regime in this manner, the Commission displayed inter alia its desire to uphold and strengthen the right of European consumers to purchase a new motor vehicle in another Member State, a right that it expressly conceded it had not adequately protected with Regulation 1475/95.¹⁶³ In the context of British interests, the new exemption regime, by aiming to increase competition and cross-border sales, was expected to lower prices for UK consumers.¹⁶⁴

2. Philosophy and General Scheme of the 2002 Block Exemption

The 2002 block exemption for motor vehicles is based on the new, modernised philosophy of the European Commission concerning the treatment of vertical agreements, as typified by the Verticals Regulation, Regulation 2790/99.¹⁶⁵ As was detailed above, the Verticals Regulation and its accompanying Guidelines on Vertical Restraints reflect a preference both for an economics-based assessment of vertical agreements aimed at rooting out the most detrimental restraints in terms of consumer welfare and for a less prescriptive model of distribution.¹⁶⁶

¹⁵⁹ See, eg EC Explanatory Brochure, *supra* n 158, 3.

¹⁶⁰ The EC Evaluation Report, *supra* n 9, 73.

¹⁶¹ Consequently, the introduction of “multi-branding” can be seen as a measure to increase dealer independence, and thus intra-brand, rather than inter-brand, competition: Wijckmans *et al*, *supra* n 131, 308.

¹⁶² Gerard notes this focus: Gerard, *supra* n 38, 527.

¹⁶³ See, eg the explanatory note to the draft of the 2002 Motor Vehicle Block Exemption [2002] OJ C67/13, Point 16. On the failure of Reg 1475/95, see, eg C Bellamy and G Child, *European Community Law of Competition* (London, Sweet & Maxwell, 2001), para 7.108; and J Goyder, *EC Competition Law* (Oxford University Press, 2004), 206.

¹⁶⁴ See Department of Trade and Industry (DTI), “Block Exemptions for Cars: Quick Facts”, available at <http://www.dti.gov.uk/consumers/fact-sheets/page38070.html> (accessed on 30 November 2008), Question 5. The European Commission was of course well aware of the conclusions of the UK Competition Commission in its 2000 report, and was therefore presumably sympathetic to the failings of the internal market as regards British consumers.

¹⁶⁵ Tsoraklidis, *supra* n 132, 31.

¹⁶⁶ See, eg EC Explanatory Brochure, *supra* n 158, para 3.1.

On its face at least,¹⁶⁷ and despite a number of significant departures, Regulation 1400/2002 is in keeping with both of these preferences, as well as the methods that are employed by the Commission in order to achieve them. First, in line with modern economic thinking, the block exemption acknowledges that the likelihood that any efficiency-enhancing effects resulting from a vertical distribution agreement will outweigh any consequent anti-competitive effects depends on the degree of market power held by the undertakings concerned.¹⁶⁸ As with Regulation 2790/99, and unlike any previous block exemption for motor cars, thresholds of market share are fixed in order to reflect this market power.¹⁶⁹ Secondly, the motor vehicle block exemption, through the use of enumerated “black clauses” in Article 4, ensures that enforcement focus is placed on agreements that are serious in their anti-competitive (economic) effects and which are on the whole detrimental to consumers. Finally, the 2002 block exemption, like the Verticals Regulation, does not prescribe a rigid model of distribution that must be employed in order to benefit from the exemption; rather, a wide range of choices are granted to undertakings.¹⁷⁰ More specifically, although car manufacturers can no longer operate an SED system, they are allowed to choose whether to maintain a (qualitative/quantitative) selective distribution system or an exclusive distribution system.¹⁷¹ Indeed, as long as the basic conditions of the regulation are met, any form of distribution system is allowed, provided, of course, that the “black clauses” are not employed.¹⁷² So, although the 2002 block exemption for motor vehicles is undeniably stricter than its predecessor,¹⁷³ it is nonetheless more flexible, at least in theory.¹⁷⁴

¹⁶⁷ More detailed analysis of these claims is offered in Section H below.

¹⁶⁸ Reg 1400/2002, *supra* n 3, Recital 6.

¹⁶⁹ See Reg 1400/2002, *supra* n 3, Recitals 7 and 8, and Arts 3(1), 3(2), 3(7) and 8.

¹⁷⁰ See European Commission, Press Release, IP/02/1073, 17 July 2002; and EU Focus, “Motor Vehicle Sector Competition Rules Reformed” (2002) 105 *EU Focus* 2, 2. However, some authors have questioned whether Reg 1400/2002 is indeed less prescriptive than Reg 1475/95. One group in particular has argued that (i) when the Commission refers to improvements in choice of distribution it in effect means the simple choice between exclusive and selective distribution; and (ii) radical alternative distribution methods are not encouraged or seen as being beneficial: Wijckmans *et al*, *supra* n 131, 308. These points will be addressed below.

¹⁷¹ The genuineness of this choice, given commercial and economic reality, is questionable; see below.

¹⁷² It should be noted that this choice does not extend to after-sales services and parts distribution, where a qualitative selective distribution system is mandated: Wijckmans *et al*, *supra* n 131, paras 11.70–11.72.

¹⁷³ See Annex II below.

¹⁷⁴ See European Commission, Press Release, IP/02/1073, 17 July 2002. See also EU Focus, *supra* n 170, 2; and Tsoraklidis, *supra* n 132, 32. Flexibility can also be found in the fact that the block exemption also applies to pure sales agreements and pure servicing agreements; however, this is not expected to cause a major change in the market as many manufacturers already operated designed service points: Wijckmans *et al*, *supra* n 131, 309–310; and H Gambs, “The First Case of Application of the New Motor Vehicle Block Exemption Regulation: Audi’s Authorised Repairers” (2003) 2 *EC Competition Policy Newsletter* 53, 54.

Regulation 1400/2002 not only acknowledges and implements the Commission's modernised policy as regards vertical restraints, it also follows closely the general scheme of the more general Verticals Regulation in its attempt to do so. As already stated, market share thresholds are used in both the specific and general block exemptions to represent presumptions on the degree of market power of operators in the market. Furthermore, like the Verticals Regulation, Regulation 1400/2002 also employs a "black list" of clauses the use of which places the agreement as a whole outside the scope of the block exemption (Article 4), but not necessarily outside the scope of Article 81(3). Finally, the 2002 block exemption details a list of provisions that, while they themselves are outside the scope of the block exemption, do not render the block exemption inapplicable to the remaining vertical restraints in an agreement (the "specific conditions" of Article 5).

3. Substance of the 2002 Block Exemption

The main provisions of this block exemption that are relevant for present purposes should now be explained; the general conditions, the hard-core restrictions and the general conditions are detailed in turn.¹⁷⁵

General conditions: Article 3 of Regulation 1400/2002 provides five general conditions that must be fulfilled in order for the block exemption to apply. The first of these conditions ensures that the block exemption only applies to situations where given market share thresholds are not exceeded;¹⁷⁶ below these thresholds it can be safely assumed that the requirements of Article 81(3) EC are, more often than not, fulfilled.¹⁷⁷ The applicable market share threshold is determined by the particular distribution system employed.¹⁷⁸ First, no market share thresholds apply to agreements establishing solely qualitative selective distribution systems. Secondly, a market share threshold of 40% applies to agreements that establish quantitative selective distribution systems. Thirdly, a market share threshold of 30% applies to agreements that establish all other types of distribution system, including exclusive distributions systems. The market share threshold usually refers to the market share of the supplier.¹⁷⁹ However, in the

¹⁷⁵ For a systematic article-by-article treatment of Reg 1400/2002, see FJ Säcker, G Hirsch and F Montag (eds), *Competition Law: European Community Practice and Procedure* (London, Sweet & Maxwell, 2008), 792.

¹⁷⁶ It should be noted that the market share thresholds of the so-called *de minimis* Notice (*supra* n 23) of the Commission are also applicable to motor vehicle distribution agreements; see EC Explanatory Brochure, *supra* n 158, 23. However, if an agreement is within the scope of the *de minimis* Notice it will not be in violation of Art 81(1) EC, and so will not need the benefit of an individual or block exemption.

¹⁷⁷ EC Explanatory Brochure, *supra* n 158, 21.

¹⁷⁸ Art 3(1) of Reg 1400/2002, *supra* n 3. See Art 8 of this regulation for the complex rules used to calculate the market share.

¹⁷⁹ *Ibid.*

case of vertical agreements containing exclusive supply obligations, the threshold relates to the market share held by the buyer on the relevant market on which it purchases the contract goods or services.¹⁸⁰ The remainder of the conditions relate to specific provisions that must be included in a motor vehicle distribution agreement in order for it to benefit from the block exemption. These conditions, of which there are four, are aimed at safeguarding a relatively stable contractual framework in which sellers of new vehicles can engage in vigorous competition.¹⁸¹ First, the distribution agreement must provide a right to transfer a dealership together with all related rights and obligations to another distributor within the brand network.¹⁸² Secondly, a supplier who intends to give notice of termination of an agreement is obliged to give his notice in writing and to give detailed, objective and transparent reasons for the termination.¹⁸³ Thirdly, fixed-term contracts are subject to a minimum duration of five years; minimum notice periods for the termination of both fixed-term and indefinite contracts are also provided.¹⁸⁴ Finally, an agreement must provide for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator.¹⁸⁵

Hard-core restrictions (“black list” clauses): Article 4 of Regulation 1400/2002 details 13 different hard-core restrictions that automatically result in the loss of the benefit of the block exemption for the vertical agreement as a whole. Hard-core restrictions, as laid out in Article 4(1), are defined as those that, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object of restricting a certain ability or a certain type of sale.¹⁸⁶ These “black list” clauses include: provisions relating to price-fixing or resale price maintenance; provisions restricting the territory into which, or the customers to whom, a distributor or repairer may sell the contract goods or services;¹⁸⁷ provisions restricting cross-supplies between distributors within a

¹⁸⁰ *Ibid*, Art 3(2).

¹⁸¹ EC Explanatory Brochure, *supra* n 158, 24.

¹⁸² Art 3(3) of Reg 1400/2002, *supra* n 3.

¹⁸³ *Ibid*, Art 3(4).

¹⁸⁴ *Ibid*, Art 3(5).

¹⁸⁵ *Ibid*, Art 3(6).

¹⁸⁶ See also Recitals 12–26 of Reg 1400/2002, *supra* n 3, for examples of indirect hard-core restraints within the scope of Art 4.

¹⁸⁷ There are four exceptions to this particular restriction; see Art 4(1)(b) of Reg 1400/2002, *supra* n 3. Two of these situations should be noted for present purposes: (i) if a supplier has decided to utilise exclusive distribution, he may impose restrictions on active sales into the exclusive territory and/or exclusive customer group (on the condition that such restrictions do not limit sales by customers of the dealer); however, dealers must still be able to make active or passive sales to any final consumer or unauthorised dealer located in markets subject to selective distribution; and (ii) if a supplier has decided to utilise selective distribution, he can restrict dealers from selling new automobiles to unauthorised distributors located in markets where selective distribution is operated (on the condition that such restrictions do not limit sales by customers of the dealer).

selective distribution system; provisions restricting authorised dealers operating at the retail level within a selective distribution system from making active or passive sales of new automobiles to final consumers; and provisions restricting the distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range. The European Commission has previously stated that hard-core restrictions, although capable of being assessed under Article 81(3), are nonetheless unlikely to benefit from an individual exemption.¹⁸⁸

Specific conditions: Article 5 of Regulation 1400/2002 provides that certain restrictions as regards the sale of a new motor vehicle do not benefit from a block exemption. These include: any direct or indirect non-compete obligation; any direct or indirect obligation causing the members of a distribution system not to sell motor vehicles of particular competing suppliers ("multi-branding"); any direct or indirect obligation causing the distributor, after termination of the agreement, not to manufacture, purchase, sell or resell motor vehicles or not to provide repair or maintenance services; any direct or indirect obligation causing the retailer not to sell leasing services relating to contract goods or corresponding goods; and 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 (the so-called "location clause").¹⁸⁹

One can make a number of brief statements to summarise the relevant substance of the block exemption.¹⁹⁰ First, manufacturers may choose to use either selective or exclusive distribution agreements; they cannot combine the use of both.¹⁹¹ If they use selective distribution, manufacturers have the choice between using quantitative criteria or a mixture of both quantitative and qualitative criteria. If the latter is chosen, the manufacturer cannot limit the number of dealers; dealers meeting the criteria must be allowed to become a member of the network. With all types of selective distribution agreements, the manufacturer is permitted to require dealers to sell only to final consumers and other authorised dealers. Selective distribution agreements which restrict passive sales to any end user or unauthorised distributor located in markets where exclusive territories have been allocated are not exempt; neither are those selective distribution agreements which restrict passive sales to customer groups which have been allocated exclusively to other distributors. With exclusive

¹⁸⁸ The Vertical Guidelines, *supra* n 30, para 46.

¹⁸⁹ The prohibition on location clauses only came into effect in October 2005; see Art 12(2) of Reg 1400/2002, *supra* n 3.

¹⁹⁰ See Annex II below.

¹⁹¹ See, eg Recital 13 of Reg 1400/2002, *supra* n 3.

distribution agreements, dealers can sell to unauthorised operators. Active sales into an exclusive territory can be prohibited, though active and passive sales to any end user or unauthorised distributor located in markets where selective distribution is used cannot. Secondly, location clauses, as defined above, have been abolished. Thirdly, the scope for restriction of multi-branding has been severely restricted.¹⁹² Fourthly, restrictions on intermediaries have been abolished; now, manufacturers can only demand the production of a valid mandate from an end consumer.¹⁹³ Fifthly, unlike under Regulation 1475/95, dealers are no longer under an obligation to provide both sales and servicing; rather, they are free to choose one or the other of these activities, if they so wish.¹⁹⁴

Pursuant to Article 7(1) of Regulation No 19/65/EEC, the Commission may withdraw the benefit of Regulation 1400/2002 where it finds in any particular case that vertical agreements within its scope have effects which are incompatible with the conditions of Article 81(3), including where: (i) 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 (ii) prices or conditions of supply for contract goods or for corresponding goods “differ substantially” between geographic markets.¹⁹⁵ Furthermore, 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 exemption in respect of that territory.¹⁹⁶

The Commission is entrusted with the task of monitoring the operation of Regulation 1400/2002 on an ongoing basis.¹⁹⁷ It has to pay particular regard to the effects of the regulation on competition in motor vehicle retailing and in after-sales servicing in the common market or relevant parts thereof, and the structure and level of concentration of motor vehicle distribution and any resulting effects on competition.¹⁹⁸ The Commission was charged with drawing up a report in this regard no later than 31 May 2008.¹⁹⁹

¹⁹² Manufacturers can only impose an obligation on the dealer to maintain a brand specific area of his/her showroom: Recital 27 of Reg 1400/2002, *supra* n 3.

¹⁹³ See, eg Recital 14.

¹⁹⁴ See, eg Recital 22.

¹⁹⁵ *Ibid*, Art 6(1).

¹⁹⁶ *Ibid*, Art 6(2).

¹⁹⁷ *Ibid*, Art 11(1).

¹⁹⁸ *Ibid*.

¹⁹⁹ *Ibid*, Art 11(2). This report (Commission Evaluation Report on the Operation of Regulation No 1400/2002 concerning Motor Vehicle Distribution and Servicing) was duly published on 31 March 2008; see http://ec.europa.eu/comm/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf (accessed on 30 November 2008).

H. ANALYSIS OF THE MOST RECENT EC COMPETITION INITIATIVE IN THE INTERNAL MARKET FOR NEW CARS

This section analyses the most recent EC competition-inspired initiative concerning distribution in the internal market for new cars, namely Regulation 1400/2002; the connection between this regulation and other initiatives such as the Verticals Regulation and Modernisation is also commented on when relevant. It should be noted at the outset that the analysis in this section is not concerned with the non-competition aspects of the block exemption; it focuses solely on the “competition” provisions of the regulation. The analysis is divided in terms of the nature, the substance and the effect of the legislative measure employed.

1. Nature of the Legislative Instrument

The employment of a block exemption, as opposed to an alternative (hard/soft) legislative measure, in order to secure change in European motor vehicle distribution is analysed in this sub-section. Comments are offered in turn on the use of a block exemption per se, the use of a block exemption which is specific to the car industry and, finally, the use of a “modernised” block exemption.

(a) *Use of a Block Exemption Per Se*

Ever since the birth of the EC competition enforcement regime in the 1960s, the Commission, with powers granted to it by the Council, has regularly adopted block exemption regulations. As explained above, these regulations declare the prohibition in Article 81(1) to be inapplicable for certain categories of agreements; they create a rebuttable presumption that certain categories of agreements therein defined fulfil the conditions of Article 81(3).²⁰⁰ According to Wils, these regulations ensure a certain degree of cost-saving on the part of the enforcement authorities:

“for any category of agreements (i) which are very frequently concluded in business practice, (ii) for which a full individual assessment would in the overwhelming majority of cases lead to the conclusion that the conditions of Article 81(3) are fulfilled, and (iii) which can be sufficiently clearly defined, the cost saving, including the reduction of risk, at the level of self-assessment by the undertakings when concluding these agreements as well as at the level of ex post litigation is likely to outweigh the cost of adopting the block exemption regulation.”²⁰¹

In the period preceding the adoption of Regulation 1/2003, block exemption regulations were of enormous benefit, not only to the business community, in

²⁰⁰ See Wijckmans *et al*, *supra* n 131, 12.

²⁰¹ W Wils, *Principles of European Antitrust Enforcement* (Oxford, Hart Publishing, 2005), para 72.

that they provided a degree of legal certainty concerning their transactions, but also to the Commission itself, as they eased the administrative burden it was under at that time due to the centralised, notification-based administrative system then in existence at EC level: they reduced the workload of the Commission concerning the adoption of negative clearance decisions or the sending of “comfort letters” for agreements coming within the scope of Article 81(3).²⁰² Following the adoption of the Modernisation Regulation—and its resultant creation of a decentralised regime without mandatory EC-level notifications and with automatic exemptions—questions have arisen as to the proper role of block exemption regulations, and indeed as to whether they should be used at all in the EC context.²⁰³ This debate is important for those considering the operation of the Motor Vehicle Block Exemption 2002. First, the latest block exemption for the motor industry was adopted not long before Regulation 1/2003, and obviously underlines the fact that the Commission still believes that block exemption regulations have an important, albeit modified, role to play in European competition enforcement. Secondly, the use of future block exemption regulations in the motor vehicle industry may be affected if the Commission is swayed by those advocating the abolition of these particular types of regulations, something that, given its current thinking, seems very unlikely.

At its most extreme, the debate on the use of block exemptions has produced an argument that questions in principle the use of block exemption regulations. The argument runs as follows: (i) the original idea for the use of block exemption regulations was inspired by the desire to avoid unnecessary, and therefore burdensome, notifications; (ii) the notification system at EC level no longer exists; and (iii) there is no longer a need for an EC-level block exemption. This argument is complemented by the principle that a decentralised enforcement system should be subject to less rather than more pressure from above;²⁰⁴ in other words, that the Commission, when not exercising its own powers of investigation and adjudication in relation to a given agreement, should provide guidance to both enforcement authorities and undertakings as opposed to orders.²⁰⁵ Following this view, a principled approach to enforcement as dictated by modernisation would require the end of block exemptions. However, this argument neglects to consider the point that the objectives of legislation may change over time. Indeed, it is true that block exemptions were adopted to stem as best they could the flow of innocuous notifications that were coming before

²⁰² See PJ Slot and A Johnston, *An Introduction to Competition Law* (Oxford, Hart Publishing, 2006), 63.

²⁰³ See Goyder, *supra* n 31, 194.

²⁰⁴ See *ibid.* Perhaps one can further weaken the argument for block exemptions by highlighting the fact that in any case block exemptions are not “compulsory” for national competition authorities in that they can be revoked; see, eg Recital 10 of Reg 1/2003, *supra* n 20.

²⁰⁵ Cp Art 3(2) of Reg 1/2003, *ibid.*

the Commission, and that this flow has now stopped. However, to conclude that *for that reason alone* one should abolish all block exemptions—whatever their content—is going too far; it would be a case of throwing the proverbial baby out with his sullied bathwater. The block exemption as a concept still has a role to play, modified as it may be due to modernisation; the rationale behind a block exemption may have changed as a result of the abolition of the notification system, but the general usefulness of block exemptions, particularly as regards the process of self-assessment facing companies, should not be overlooked.²⁰⁶ The Commission itself expressly endorsed this view in its White Paper on Modernisation.²⁰⁷ For the Commission, the use of block exemption regulations in a directly applicable exemption regime helps ensure consistency and uniformity in the application of the competition rules.²⁰⁸ Importantly too, particularly for the motor vehicle industry, they can also be used to provide more robust safeguards aimed at remedying industry-specific problems, a point to which we now turn.

(b) Use of a Car-Industry-Specific Block Exemption

Had the European Commission failed to provide a specific block exemption for new cars in September 2002, distribution agreements in the motor vehicle industry would have automatically fallen within the more general block exemption provided by the Verticals Regulation. This regulation would not have contained sufficient safeguards to remedy the problems identified in the Evaluation Report,²⁰⁹ problems that are particularly concerning due to the complex and expensive nature of motor vehicles.²¹⁰ More specifically, the Verticals Regulation, by allowing both the combination of selective and exclusive distribution²¹¹ and the use of location clauses, not to mention restrictions on multi-branding, would have permitted the continuation of the (anticompetitive) system in place under Regulation 123/85 and Regulation 1475/95. In brief, effective safeguards countering the “cumulative effect” of motor vehicle distri-

²⁰⁶ See Wijckmans *et al*, *supra* n 131, 23.

²⁰⁷ European Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (Commission Programme No 99/027), approved on 28 April 1999, available at http://ec.europa.eu/comm/competition/antitrust/wp_modern_en.pdf (accessed on 30 November 2008), paras 84–85.

²⁰⁸ *Ibid.*

²⁰⁹ European Commission, “The Commission Regulation for a New Motor Vehicle Block Exemption—Questions and Answers—Background Information on Press Release IP/02/1073”, 17 July 2002, MEMO/02/174.

²¹⁰ See Goyder, *supra* n 163, 203; and S Vezzoso, “On the Antitrust Remedies to Promote Retail Innovation in the EU Car Sector” (2004) 25(4) *European Competition Law Review* 190, 191.

²¹¹ Under the Verticals Regulation this combination is only allowed provided that active and passive sales outside of an allocated territory are not prohibited: Reg 2790/99, Art 4(c).

bution agreements would not have been provided.²¹² The Commission thus adopted Regulation 1400/2002.

Commentary on the choice of a car-industry-specific block exemption inevitably centres on the appropriateness of the actual substance of the regulation as compared to its more general counterpart; analysis of its peculiarities, for example the separation of selective and exclusive distribution, is therefore offered in the sub-section on substance below. It is noted here, however, that in a world with other increasingly sophisticated technological products, the Commission may well need to demonstrate that the motor vehicle sector should continue to merit special treatment with its own special block exemption. If the Commission cannot do so, and if the sector is in fact no different in its essential nature from other distribution chains, then motor vehicle distribution should come within the general regime of the Verticals Regulation. Alternatively, if motor vehicle distribution eventually comes within the Verticals Regulation and there are still unique aspects to motor vehicle distribution, then it is submitted that the Verticals Regulation either be amended to take account of these aspects or at least be complemented with cars-specific guidance as to how the provisions should be interpreted concerning the complex relationship between a car manufacturer and its dealers. If such an approach were to be adopted, it would be hard to argue that it should not apply to other goods of a similar nature, resulting in a potential proliferation of annexes to the guidelines. Such an outcome may not be optimal either. That said, there is a strong argument that automobile manufacturers and dealers would benefit significantly from the legal certainty that specific and detailed guidance provides. It is apparent from decisional practice and jurisprudence that these parties are generally compliant with competition law. Given the obviously complex nature of the good involved, it may be prudent to provide official guidance, if only to ensure that manufacturers and dealers have a reference point upon which they can construct their respective contractual arrangements.

(c) *Use of a “Modernised” Block Exemption*

The modernisation agenda not only extended to decentralisation and the abolition of the notification system, it also involved the pursuit of a more economics-based approach to competition law, and particularly one aimed at maximising consumer welfare.²¹³ It was against this background that the Commission adopted its most recent block exemption regulations, including the latest motor vehicle block exemption. The Commission’s “modernised”

²¹² *Ibid.*, 3. The necessity of a specific block exemption for the cars industry has not been universally accepted. Some authors believe that the Verticals Regulation itself provides a suitable framework for exemption in that particular market; see, eg Middleton, *supra* n 134.

²¹³ See, eg V Korah, *An Introductory Guide to EC Competition Law and Practice* (Oxford, Hart Publishing, 2007), 465 *et seq.*

approach to competition law enforcement in this respect is epitomised by the adoption of the Verticals Regulation in December 1999.²¹⁴ Regulation 1400/2002, while providing for a specific regime for car distribution, attempted to emulate the approach of the earlier regulation, and should be understood in this context. In consequence, a number of brief yet important comparative points can be made in addition to those established above.

First, the Motor Vehicles Block Exemption was drafted with the scheme (and therefore the underlying economics-based philosophy) of the Verticals Regulation in mind, in that it contains a market share cap and a list of prohibited hard-core restrictions.²¹⁵ The inclusion of the market share cap in the block exemption represents an attempt by the Commission to acknowledge that vertical restraints are not anticompetitive in the absence of market power. Prior to the adoption of the Verticals Regulation, and with previous regulations such as Regulations 123/85 and 1475/95, no market share thresholds were included in block exemptions, and as a result undertakings with market power could benefit from them; agreements that were capable of distorting competition were being exempted under the block exemptions as a result of form-based prescriptions.²¹⁶ Requiring an absence of market power in order to be granted an exemption was therefore central to a new, more market-based analysis of commercial behaviour. With the block exemption a low market share is used as a proxy for low market power. To the extent that it recognises that market power is central to the analysis of anticompetitive effect, the block exemption reflects modern economic thinking.²¹⁷ Indeed, by focusing on market power, the competition authority can distinguish “more clearly between innocuous and seriously anticompetitive behaviour”.²¹⁸ The choice of an expressed quantity of market share to represent that market power, however, is not by definition an individual economic assessment; rather, it represents a policy choice of the Commission, and should be so understood. In other words, while the Commission accepts market power (determined above all according to economic

²¹⁴ While adopted a number of years before Reg 1/2003, the Verticals Regulation was revolutionary in its philosophy and scheme, and therefore forms a significant part of what we have termed the “Modernisation agenda”. See generally A Riley, “Vertical Restraints: A Revolution?” (1998) 19 *European Competition Law Review* 483.

²¹⁵ See A Jones and B Sufirin, *EC Competition Law: Text, Cases, and Materials* (Oxford University Press, 2004), 677.

²¹⁶ See Wijckmans *et al*, *supra* n 131, 24–25. See also European Commission, Green Paper on Vertical Restraints in Community Competition Policy, COM(96)721 final, 22 January 1997. Conversely, firms without market power were not benefiting from the block exemption unless they fitted their distribution agreements within the prescribed form.

²¹⁷ See, eg A Schaub, “Continued Focus on Reform: Recent Developments in EC Competition Policy” in B Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law 2001* (Fordham Corporate Law Institute, 2002), 31: “[t]he market power approach is more flexible and more in line with reality”.

²¹⁸ P Nicolaides, “An Essay on Economics and the Competition Law of the European Community” (2000) 27 *Legal Issues of Economic Integration* 7, 9.

principles) as a determinative element of the anticompetitive effect of a vertical distribution agreement, it has nonetheless accepted a small market share (ie a form-based, policy construct) as indicative of the absence of market power—itsself an (arguably reasonable) choice reflecting understanding of the relatively innocuous character of agreements concluded by undertakings with such a small market share. This is true as much for the Verticals Regulation as for Regulation 1400/2002. Market shares, then, act as a filter and avoid the need for a more complex economic assessment (by both the Commission and the undertakings concerned), thereby avoiding wasteful use of scarce (legal/economic) resources. There are, however, additional, more serious conceptual problems with the use of market shares in block exemptions. Product and geographic markets may be difficult to define, making assessment of market share levels a more complex matter.²¹⁹ Added to that is the fact that market shares may change over time. With increasing market shares, perhaps due to the success of the distribution agreement in question, undertakings may be continually assessing whether they are in compliance with the conditions of a block exemption; this may lead to regular competition audits and increased costs for business.²²⁰ Admittedly, however, this point may be less of an issue with motor vehicle distribution, with its traditionally stable market shares, than with other markets, such as those characterised by rapidly changing, innovative products. As competition between dealers increases, itself an objective of the latest block exemption for cars, market shares will become less stable. The use of “black lists”, by contrast, poses fewer problems: by detailing conduct outside of the regulation, rather than within its scope, both the Verticals Regulation and Regulation 1400/2002 provide a more flexible, less prescriptive approach (at least in theory)²²¹ than those that preceded them, thereby avoiding the “strait-jacket” effect of days past. That said, people have questioned whether the choice between selective and exclusive distribution is indeed a genuine one, a substantive point that will be considered below.

Secondly, the Verticals Regulation represents an attempt by the Commission to reconcile the potentially conflicting goals of EC competition policy, namely the goals of undistorted competition and market integration; the Verticals Regulation is therefore of comparative interest in that it endeavours to reduce the tension that these conflicting goals inevitably lead to, a tension that is inherent in the development of the internal market for new cars.²²² It is submitted that the Motor Vehicle Block Exemption, as a far stricter measure

²²³ On the difficulty of defining a market (and therefore establishing market shares), see Jones and Sufirin, *supra* n 215, 48–70 and 298 *et seq.*

²²⁴ See Riley, *supra* n 214, 490.

²²⁵ See the discussion on selective and exclusive distribution below.

²²² On these conflicting policy goals see *supra* C.4, “EC Common Market Policies and Vertical Restraints”.

than its more general counterpart, reflects as a consequence the more pronounced anxiety concerning the (failed) integration of this market as regards other, better functioning EC-wide markets covered by the general block exemption.²²³

Thirdly, with the Verticals Regulation the Commission explicitly recognised that vertical agreements are theoretically capable of improving economic efficiency in production or distribution and, as mentioned, that the likelihood of a net efficiency-enhancing result depends on the degree of market power of the parties.²²⁴ By recognising the economic benefits of general vertical arrangements, and in the process adopting a more economically sound analysis of their respective benefits and drawbacks,²²⁵ the Commission has committed itself to a more realistic approach to vertical agreements.²²⁶ This approach, like modern economic thinking, rejects the view that vertical restraints are per se illegal; on the contrary, it accepts that the impact of the vertical restraints on competition and efficiency depends to a large degree on the market context and barriers to entry.²²⁷ Furthermore, this new approach is also intended to improve consumer welfare throughout the EU.²²⁸ With the publication of the later 2002 block exemption, this commitment to a more economic-based approach, and to one which brings tangible benefits to consumers, has been expanded to include motor vehicle distribution agreements.²²⁹ It should be noted that efficiency arguments were of course also behind the old motor vehicle block exemptions; this is evident in Recital 4 of Regulation 123/85 and Regulation 1475/95. The point, however, is that the Commission, with the Verticals Regulation, recognised that a more economically realistic approach in relation to efficiencies than thereto employed was required. This economics-based approach would ultimately engender a number of (exemption-related) substantive rules that are specific to the car industry.

²²³ One sees this concern most obviously with the 2002 Motor Vehicle Block Exemption in the prohibition on the concurrent use of both selectivity and exclusivity distribution methods, a substantive element of Reg 1400/2002 that is analysed in detail below.

²²⁴ See Recitals 6 and 7 of the Verticals Regulation, *supra* n 30.

²²⁵ See, eg the Vertical Guidelines, *supra* n 30, Recital 7, and para 102.

²²⁶ This commitment to a more economically realistic approach has been followed through in a number of decisions. For example: *Spring* [2000] OJ L195/49, [2000] 5 CMLR 948, *Whitbread* [1999] OJ L88/26, [1999] 5 CMLR 118, and *Bass* [1999] OJ L186/1, [1999] 5 CMLR 782. These decisions have been upheld when appealed; see, eg Case T-131/99, *Shaw v Commission* [2002] ECR II-2023, [2002] 5 CMLR 81; and Case T-231/99, *Joynton v Commission* [2002] ECR II-2085, [2002] 5 CMLR 123.

²²⁷ Riley, *supra* n 214, 485–6.

²²⁸ See, eg the Vertical Guidelines, *supra* n 30, Recital 7 and para 102. See also M Monti, “The New Legal Framework for Car Distribution”, speech, 9th Annual European Automotive Conference: Car Retailing at a Crossroads, Brussels, 6 February 2003, Document SPEECH/03/59.

²²⁹ See Recitals 5 and 6 of the Motor Vehicle Block Exemption of 2002; and EC Explanatory Brochure, *supra* n 158, 11 *et seq.* See also the EC Evaluation Report, *supra* n 9.

2. Substance of the Legislative Instrument

This sub-section analyses the substance of the 2002 Motor Vehicle Block Exemption, and in particular whether it is theoretically capable of delivering the benefits to consumers that it was designed to do. The analysis focuses on the regulation's separation of selective and exclusive distribution, and its de facto insistence on the use of selective distribution. It is in this context that analysis of the other initiatives designed to increase (inter- and/or intra-brand) competition in the market is undertaken.

(a) Separation of Selective and Exclusive Distribution

Prior to 2002, the Commission believed that, for reasons relating to capacity and efficiency, the number of specialised dealers and repairers should be limited by automobile manufacturers; by doing so, manufacturers would provide uniform high standards for their complex products across the common market. According to the Commission:

“The exclusive and selective distribution clauses can be regarded as indispensable measures of rationalization in the motor vehicle industry, because motor vehicles are consumer durables which at both regular and irregular intervals require expert maintenance and repair, not always in the same place. Motor vehicle manufacturers cooperate with the selected dealers and repairers in order to provide specialized servicing for the product. On grounds of capacity and efficiency alone, such a form of cooperation cannot be extended to an unlimited number of dealers and repairers.”²³⁰

The Evaluation Report highlighted that the vast majority of manufacturers limited the number of their dealers operating in the same territory and employed other quantitative selective criteria, including dealer sales targets.²³¹ Restrictions on active sales into allocated territories and on sales to independent resellers were also observed.²³² As a result, dealers were not actively competing with one another; in other words, intra-brand competition was being undermined.²³³ The adoption of Regulation 1400/2002, a measure designed to increase intra-brand competition, therefore saw the prohibition of the combination of selective and exclusive distribution.²³⁴

²³⁰ Recital 4 of Reg 123/85, *supra* n 64, and Reg 1475/95, *supra* n 64.

²³¹ The Evaluation Report, para 14.

²³² *Ibid*, paras 16 and 179.

²³³ As explained above, other factors, such as the discounting system imposed by manufacturers, also contributed to the lack of intra-brand competition.

²³⁴ For the exact rules relating to the use of these distribution systems, see Section G.3.

(b) *The “Option” of Selectivity*

It is reasonable to assume that, when presented with the choice between selective and exclusive distribution, car manufacturers will opt for the former, as it enables them to exercise a measure of control over their well-established distribution channels. Manufacturers have invested significant amounts of money in order to establish and maintain these networks, and have an interest in upholding and improving the reputation of their brands and attracting customers; qualitative requirements imposed on dealers help to achieve these aims. Such requirements, however, cannot be imposed on dealers by manufacturers when exclusive distribution is chosen; the problem of “free-riding” would also dampen significantly the enthusiasm of dealers concerning the (voluntary) investment that is necessary to meet such qualitative aspirations. Given this commercial and economic reality, it is reasonable to state that this apparent choice presented to the manufacturers is not a genuine one.²³⁵ Indeed, prior to the entry into force of Regulation 1400/2002, commentators close to the automobile industry predicted the inevitable use of selective distribution.²³⁶ It is no surprise, then, that to date almost all manufacturers have decided to use this model.²³⁷ In consequence, the attribution of exclusive territories to dealers is no longer a noteworthy characteristic of the European car market.²³⁸ Some have even commented that, by deliberately opting for such a specific distribution model, the Commission in adopting Regulation 1400/2002 has come very close to regulating the sector.²³⁹

(c) *Problems with Selectivity*

Naturally enough, by effectively imposing selective distribution on car manufacturers, Regulation 1400/2002 has engendered a cumulative effect in the car industry,²⁴⁰ something it apparently desired to avoid with its “less prescriptive” approach. The widespread use of selective distribution has in all likelihood had a

²³⁵ See Automotive Sector Groups of HB and LWVK, “Flawed Reform of the Competition Rules for the European Motor Vehicle Distribution Sector” (2003) 24 *European Competition Law Review* 254.

²³⁶ See “October 1 Raises More Big Questions”, *Automotive Management*, 16 August 2002, 23.

²³⁷ London Economics, “Developments in Car Retailing and After-Sales Markets under Regulation No 1400/2002: Volume I, Final Report to EC DG Competition”, June 2006, xx. Suzuki seems to be the only one that has chosen the exclusive option: *ibid.* This move apparently surprised analysts at the time (see “DC Gets Selective While Suzuki Stays Exclusive”, *Automobile Management Online*, 16 October 2002, www.am-online.com), but can be explained in part on the basis that Suzuki dealers often distribute one or more brands, allowing Suzuki to rely indirectly on the qualitative requirements imposed by other manufacturers (see Wijckmans *et al*, *supra* n 131, 310–11, footnote 13).

²³⁸ London Economics, *ibid.*, xx.

²³⁹ Wijckmans *et al*, *supra* n 131, 310–11.

²⁴⁰ A “cumulative effect” occurs when a high percentage of products are distributed using distribution networks which have very similar or near-identical features which are restrictive of competition.

negative effect on *intra-brand* competition and may lead to the foreclosure of efficient distributors wishing to supply a particular manufacturer's automobile, as acknowledged by Community law: "when a majority of the main suppliers apply selective distribution there will be a significant loss of *intra-brand* competition and possible foreclosure of certain types of distributors as well as an increased risk of collusion between those major suppliers".²⁴¹

Furthermore, given the "closed character" of selective distribution, with its restrictions on sales to non-authorized dealers, the risk of foreclosing more efficient operators from the market is greater than with exclusive distribution.²⁴² In other words, selective distribution, when subject to a cumulative effect, is more likely to have a negative effect on *intra-brand* competition than the exclusive variety. But *intra-brand* competition is not the only type of competition that affects levels of consumer welfare. Indeed, *inter-brand* competition also has to be considered in order to determine the full effect of a given conduct on welfare in a market. A given conduct may have different effects on these different dimensions of competition: while *intra-brand* competition may suffer, *inter-brand* competition may remain unaffected. The strength of *inter-brand* competition may even be sufficient enough to outweigh the loss of *intra-brand* competition inherent in a selective distribution arrangement; it may well be capable of securing the relevant benefits for consumers, despite the negative effect on *intra-brand* competition.²⁴³ Selective distribution, then, when subject to a cumulative effect and a resultant reduction of *intra-brand* competition, may nonetheless be rendered innocuous in terms of effect on consumer welfare. What is required is one or more of the following: (i) a sufficiently high degree of *inter-brand* competition that already exists in the market that can of itself neutralise the potential significance of a reduction in *intra-brand* competition; (ii) a proportionate increase (eg through other legislative initiatives) of *inter-brand* competition; and/or (iii) a proportionate increase (eg through other legislative initiatives) of *intra-brand* competition.

(d) Attempts to Increase Inter- and Intra-brand Competition

The argument so far runs as follows: (i) due to the preference of manufacturers for selective distribution, a cumulative effect as regards distribution methods is present in the market for new cars; (ii) this cumulative effect reduces *intra-brand* competition and may foreclose efficient competitors; (iii) sufficient *inter-brand* competition may outweigh the reduction in *intra-brand* competition; and (iv) other initiatives to increase *intra-brand* (or indeed *inter-brand*) competition may also be relevant. Given the *de facto* imposition of selective distribution resulting

²⁴¹ The Vertical Guidelines, *supra* n 30, para 188 (emphasis added).

²⁴² *Ibid.*

²⁴³ *Ibid.*

from Regulation 1400/2002, and thus that regulation's potential to foreclose efficient competitors, two questions remain to be considered: (i) what has the Commission done to increase inter-brand competition to combat any resulting fall in intra-brand competition; and (ii) what has the Commission done to increase intra-brand competition to compensate for the loss of intra-brand competition that is inherent when selective distribution displays cumulative effects?

Inter-brand competition: According to the Commission, the 2002 Motor Vehicle Block Exemption did not intend to directly improve inter-brand competition in the market for new cars.²⁴⁴ Indeed, its focus appears to be on improving intra-brand competition.²⁴⁵ The Evaluation Report states that “there is currently reason to believe that effective inter-brand competition exists in the European Union”.²⁴⁶ It is submitted that this statement should not be read as a confirmation by the Commission that a sufficiently high degree of inter-brand competition already exists that can *of itself and without more* neutralise the potential significance of a reduction in intra-brand competition occasioned due to the cumulative effect of selective distribution. (If it were otherwise, no further (legislative) action by the Commission would be required in order to secure the maximisation of consumer welfare.) Rather, it should be interpreted as: (i) a confirmation that a high degree of inter-brand competition exists in this market (albeit one that is not of itself sufficient to neutralise the reduction in intra-brand competition); and (ii) a choice by the Commission to focus on increasing intra-brand competition and not inter-brand competition in order to offset the loss of intra-brand competition due to the encouragement of selective distribution. Consequently, no specific measures were adopted in Regulation 1400/2002 that aimed directly at increasing inter-brand competition. This claim is not inconsistent with the fact that restrictions on “multi-branding” were abolished by the regulation, despite the fact that multi-branding may lead to an increase in inter-brand competition. In fact, this modification can be interpreted reasonably as a measure to increase dealer independence, and thus intra-brand competition.²⁴⁷ If, as argued, the Commission did indeed decide to meet any reductions in intra-brand competition due to cumulative effects (of selective distribution) with other measures designed to increase intra-brand (as opposed to inter-brand) competition, the analysis should focus on these measures.

Intra-brand competition: One of the main objectives of Regulation 1400/2002 was the improvement of intra-brand competition;²⁴⁸ the encouragement of this form

²⁴⁴ See, eg EC Explanatory Brochure, *supra* n 158, 3.

²⁴⁵ *Ibid.*

²⁴⁶ The EC Evaluation Report, *supra* n 9, 73.

²⁴⁷ Wijckmans *et al*, *supra* n 131, 308.

²⁴⁸ See, eg EC Explanatory Brochure, *supra* n 158, 3.

of competition is of central importance in the analysis of the theoretical benefit of Regulation 1400/2002. As argued above, the separation of selective and exclusive distribution (and the “mandatory” use of selectivity) was met by other measures aimed at increasing intra-brand competition, for example the easing of restrictions on intermediaries, the abolition of location clauses and the encouragement of independent resellers. It is submitted that some of these measures, while useful, nonetheless suffer from a number of drawbacks which call into question their effectiveness, and consequently the potential beneficial effect of the regulation as a whole. The easing of restrictions on intermediaries is welcome in that intermediaries may now establish a privileged relationship with a dealer and thereby gain higher discounts by concentrating their orders. This potentially results in lower prices for consumers. It should also be remembered that the use of the internet may also help keep costs down for these intermediaries. That said, it is often the case that very narrow margins are obtained by dealers; margin similarity across the industry is also present. Dealers may therefore be unable to provide intermediaries with sufficient discounts to establish a competitive advantage in the market. If this is the case, intermediaries may find that they are unable to compete effectively in the market. (One should not forget, however, the role that the applicable tax regime can play in incentivising the actions of intermediaries.) Margin similarity may also undermine the effect of the abolition of location clauses: additional discounts (ie higher margins) would not necessarily be secured by the opening of an additional outlet, and may effectively disincentivise the dealer from taking on such a task. The position of independent resellers is also not as strong as it would first appear. Indeed, attempts to take advantage of price differences across different markets by independent resellers, while possible under the block exemption, require a manufacturer to impose selectivity in one jurisdiction and exclusivity in another, something that is unlikely to occur for the reasons given above.

(e) Exclusivity

As stated above, the attribution of exclusive territories to dealers is no longer a noteworthy characteristic of the European car market. For completeness, however, and as it is not completely irrelevant, given its use by Suzuki, exclusive distribution should also be considered, albeit in less detail. Under the 2002 Block Exemption manufacturers can choose between exclusive and selective distribution. If an exclusive distribution agreement is concluded, dealers can sell to unauthorised operators. Active sales into an exclusive territory can be prohibited, but active and passive sales to any end user or unauthorised distributor located in markets where selective distribution is used cannot. On the face of it, this option allows resellers to engage in parallel trade and exploit price differentials across Member States, which in turn helps to stimulate intra-brand competition and promote free market integration. For distributors, however, such opportunities to

engage in parallel importing are not welcome, due to the problem of “free-riding”. In particular, distributors will be less inclined to invest in a particular brand (resulting, in effect, in a reduction in intra-brand competition), as independent resellers may benefit from their efforts without having made any investment themselves. Likewise, if investment were to be made it would not be as extensive as otherwise would have been the case in the absence of a free-riding problem. For example, distributors would engage in less brand promotion and provide less detailed or attentive sales advice, leading to reductions in the quality of the services offered. Manufacturers are not unaware of this problem. Indeed, such is the problem with free-riding and exclusivity that manufacturers, if forced to choose exclusivity, would in the long term tend to integrate vertically.²⁴⁹ Exclusivity, then, suffers from substantial drawbacks.

3. Effect of the Initiative

This final sub-section offers observations on the apparent impact of the EC initiative on consumer welfare in the internal market for new cars. The concept of competition law and consumer welfare is explained first, before observations on actual observable effects are provided. Finally, the Commission’s understanding of the effects of the initiative is detailed.

(a) *Effect in Context*

Industrial economists, competition lawyers and policy makers regularly attempt to underline the benefits that an efficient competition law regime can secure for consumers.²⁵⁰ Indeed, it is increasingly difficult to find a recent speech or policy statement that emanates from DG Competition that does not mention the important role that competition law can play for the improvement of consumer welfare within a particular jurisdiction or that does not highlight the need for a pro-consumer competition policy that ensures lower prices, better quality goods and services, or improved access to innovative and quality products for European consumers. Such are the benefits that competition law can ensure for consumers that an efficient competition law regime is generally considered to be a necessity if one wishes to maximise consumer welfare: without it, a healthy, competition-driven economy capable of delivering tangible gains to consumers will always be at risk of being undermined by the activities of cartelists and dominant, abusive companies. The Commission often states that competition policy and any analysis that is undertaken under the competition law rules should promote a consumer welfare standard:

²⁴⁹ See, eg ACEA, “ACEA Opinion to the EU Commission on the Block Exemption Proposal”, 16 April 2002, available at <http://www.acea.be> (accessed on 30 November 2008), 14.

²⁵⁰ See generally, Hutchings and Whelan, *supra* n 6; Marsden and Whelan (2006), *supra* n 6; and Marsden and Whelan (2008), *supra* n 6.

“Consumer welfare is now well established as the standard the [European] Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.”²⁵¹

Given the abundance of such statements at EC level, it would not be an exaggeration to state that the position of the consumer in competition law has never been stronger. While for the most part this focus on the consumer welfare standard has been materialising over the last number of years, it was clearly evident in the articulated rationale behind the EC initiative on distribution in the market for new cars: for the European Commission, the revised Motor Vehicle Block Exemption would ensure that tangible benefits are secured by consumers through improved price competition, lower prices, better quality goods/services and an improved choice of dealers.²⁵² In other words, the results that the Commission wished to achieve with their initiatives were consumer-oriented, and emphasised above all the importance and necessity of reductions in prices in this market.

(b) Effect in Practice

For a long time now, prices and price transparency as regards new cars in the EU have concerned the national and European competition authorities, in particular the European Commission. As far back as 1992, and following a complaint by the European Consumers Organisation (BEUC), the Commission published a report on price differentials.²⁵³ As a direct result of this initiative, and on the express request of the Commission, the manufacturers agreed to provide the Commission with their recommended retail prices in each Member State every six months.²⁵⁴ This started a new trend at EC level: from May 1993 onwards, the Commission would publish price surveys on a six-monthly basis.²⁵⁵ The aim of the Commission in publishing these surveys was not to secure price uniformity, but rather to help enable consumers to take advantage of the price differentials that then existed between Member States—in other words, to enable them to buy a new car cheaper abroad.²⁵⁶ Nonetheless, this data has enabled one to

²⁵¹ N. Kroes, EC Commissioner for Competition, “European Competition Policy—Delivering Better Markets and Better Choices”, speech, European Consumer and Competition Day, London, 15 September 2005, available at http://ec.europa.eu/comm/competition/index_en.html (accessed on 30 November 2008), 2.

²⁵² See EC Explanatory Brochure, *supra* n 158; and European Commission, Press Release, IP/05/1208, 30 September 2005.

²⁵³ See European Commission, Press Release IP/92/355.

²⁵⁴ See European Commission, Press Release IP/92/1042.

²⁵⁵ See http://ec.europa.eu/comm/competition/sectors/motor_vehicles/prices/archive.html (accessed on 30 November 2008).

²⁵⁶ The same is true of the Motor Vehicle Block Exemption; see Monti, *supra* n 228, 3.

compare prices across the different Member States and thereby see whether relative prices are falling or not over time (for present purposes, since the adoption of the new Motor Vehicle Block Exemption).

By using the figures for the average standard deviation in prices between Member States contained in this data, one can conclude that prices for new motor vehicles in the EU in general converged at a moderate yet steady pace for a number of years after 2002, before remaining relatively stable. In May 2002 the figure was 10.6%;²⁵⁷ by May 2007 it was at 4.4% for those countries in the Eurozone and 6.5% for the EU-27.²⁵⁸ In comparison, the figure was regularly in excess of 20% between the first year of the survey and the beginning of the new millennium.²⁵⁹ Indeed, the Commission warned in 2000 that price differentials could be as high as 65% within Europe.²⁶⁰ In May 2007, and despite the fact that price dispersion remained largely unchanged during the first six months of that year, the data on standard deviation pointed to a historically very low level of price dispersion.²⁶¹

It is difficult, if not impossible, to pinpoint the exact cause(s) of this convergence in price, as one cannot easily identify “one single, clear cut event, or legislation” that is responsible for the injection of competition into the market.²⁶² That said, the introduction of the Competition Commission’s report of 2000 and the adoption of the UK Supply Order in September of that year, as well as, of course, the entry into force of the new motor vehicle block exemption, provide us with a number of different reference points for our inquiry. According to a report commissioned by the UK Department of Trade and Industry, the intervention of the UK Competition Commission may have achieved its purpose of reducing prices in the UK by 10%.²⁶³ This conclusion is based on two observable facts: (i) that all of the modifications due to the new block exemption would not be implemented until the Autumn of 2005, in particular the abolition of location clauses; and (ii) that from 2001 onwards, ie after the Supply Order (in particular its prohibition on price discrimination between fleet customers and dealers) had time to take effect but before the block exemption would begin to bite, prices had already begun their average annual descent of 1–2%.²⁶⁴ One could also add to this argument the fact that, since October 2005, price convergence has remained constant and prices have not been subject to a significant drop downwards. In 2005, for example, the average standard

²⁵⁷ European Commission, Press Release IP/03/290.

²⁵⁸ European Commission, “Cars Report: Main Highlights”, 1 May 2007, available at http://ec.europa.eu/comm/competition/sectors/motor_vehicles/prices/archive.html (accessed on 30 November 2008).

²⁵⁹ The EC Evaluation Report, *supra* n 9, para 308.

²⁶⁰ *Ibid.*

²⁶¹ European Commission, “Cars Report: Main Highlights”, *supra* n 258, 1.

²⁶² DTI (2004), *supra* n 7, 63.

²⁶³ *Ibid.*, 65.

²⁶⁴ *Ibid.*

deviation in price for the whole of the EU was 6.3%, while in 2006 and 2007 it was 6.4 and 6.5% respectively.²⁶⁵ The intervention by the UK authority, however, is far from the only explanation for the post-2000 price convergence. And it is difficult, if not impossible, to separate the effects of that initiative from those due to other factors/initiatives. In particular, pre-emptive moves by manufacturers, inspired by the pending EC-level policy changes, are very likely to have played their role.²⁶⁶ Recently outlawed practices not protected by the three-year transition period of the block exemption may also have had an impact. One could perhaps add that in recent years there has been an increase in consumer-oriented websites that aim to educate buyers on how to purchase cheaper automobiles abroad.²⁶⁷ By educating the automobile consumer in this manner, these websites arguably help to “Europeanise” the car market and push it towards a certain degree of price uniformity.²⁶⁸ None of this, of course, is to rule out the potential impact of the decisional practice of (and the substantial fines imposed by) the Commission concerning violations of Article 81(1) concerning the internal market for cars, as detailed above.²⁶⁹ It should be noted too that other factors besides manufacturer choice may affect price variation within the EU at any given time, such as currency fluctuation,²⁷⁰ taxation, discounting practices and parallel trade.²⁷¹ Furthermore, and importantly, the reductions in price, particularly in the earlier years, could also be due, at least in part, to the lifting in October 2000 of the voluntary export restraints (VERs) applicable to Japanese cars.²⁷² In any case, given these different dynamics, it is highly unlikely that the reduction in prices can be attributable solely to the Supply Order. Consequently, the effectiveness of this UK initiative is far from certain.

A number of factors then could possibly have contributed to the favourable movements in prices. What is not up for debate, however, is the fact that prices

²⁶⁵ For these data, see the relevant European Commission report, available at http://c.europa.eu/comm/competition/sectors/motor_vehicles/prices/archive.html (accessed on 30 November 2008).

²⁶⁶ This point is acknowledged by the authors of the report in question: DTI (2004), *supra* n 7, 72.

²⁶⁷ For an example, see <http://www.rac.co.uk/web/know-how/buying-selling-car/buying-advice/buying-a-car-outside-the-uk.htm> (accessed on 30 November 2008).

²⁶⁸ This point would have to contend with the fact that car markets are currently perceived as being national in geographical scope: DTI (2004), *supra* n 7, 63.

²⁶⁹ The most important of these decisions were adopted between 1998 and 2002; see Decision 98/277, *Volkswagen I* [1998] OJ L124/60; Decision 2001/146, *Opel* [2001] OJ L59/1; Decision 2002/796 *Mercedes-Benz* [2002] OJ L257/1.

²⁷⁰ According to the report sent to the DTI, the general trend in UK price changes is not due solely to currency fluctuations, as the exchange rate between the British pound and the Eurozone had by May 2003 returned to almost exactly the same value as in May 1998: DTI (2004), *supra* n 7, 70.

²⁷¹ Stothers, *supra* n 4, 236–7.

²⁷² On the link between these VERs and the former block exemptions for motor vehicles see Holmes and Smith, *supra* n 79, 18.

have indeed fallen, both in the UK and throughout the rest of the EU—an outcome that, if not the result of European Commission action, will nonetheless be welcomed by it. But price is not the only consideration when evaluating the effects of an instrument in terms of improvements in consumer welfare, particularly when a differentiated product such as a motor vehicle is in question. Non-price effects on choice, quality and innovation, for example, also need to be considered.

According to current literature, whether Regulation 1400/2002 will have (harmful) non-price effects is an issue that has yet to be decided.²⁷³ A number of interesting trends can nonetheless be observed.²⁷⁴ In terms of choice, an identifiable trend of decreasing numbers of authorised outlets and growing concentration in car distribution was already appearing immediately prior to the introduction of Regulation 1400/2002, and continued following its adoption.²⁷⁵ Indeed, while the total number of franchised sales outlets remained relatively constant from 1997 to 2000, by the beginning of the new millennium the number began to fall considerably; by 2004, there were 30% fewer franchised dealers than in 1997.²⁷⁶ Some analysts have even predicted that by 2010, and as a direct result of Regulation 1400/2002, the number of dealers will be half the 2003 level.²⁷⁷ The reduction in the number of sub-dealers has also been considerable.²⁷⁸ One can add to that the fact that the use of intermediaries, to the extent that it could be detected, has not registered an upward trend.²⁷⁹ This reduction in the number of outlets likely reflects the reaction of manufacturers to the inherent changes of Regulation 1400/2002: they appear to be moving towards more condensed distribution networks, with larger dealerships that are subject to rigorous quality requirements.²⁸⁰ According to the literature, while the geographic coverage of the distribution networks is narrowing (itself a form of limitation on choice), the new larger dealerships and dealer groups are arguably more efficient entities which offer higher levels of service, and may perhaps be able to generate gains to consumers due to significant economies of scale.²⁸¹ It is expected that this trend towards larger dealerships will facilitate further

²⁷³ See, eg DTI (2004), *supra* n 7; and London Economics, *supra* n 237, xviii.

²⁷⁴ See generally London Economics, *ibid*. It should be noted that although this report was published in 2006, the analysis carried out wherein only applied to the years 1997–2004, ie before all of the provisions of the 2002 Motor Vehicle Block Exemption came into effect: *ibid*, 2.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid*, 37. London Economics notes, however, that the speed and extend of this reduction varies across the 12 Member States under examination: *ibid*.

²⁷⁷ PricewaterhouseCoopers, “Gentleman’s Dispute or Bar Room Brawl?”, available at www.pwc.com/extweb/pwcpublishings.nsf/docid/123882FEEFED3E3A852570A700520B81 (accessed on 30 November 2008).

²⁷⁸ London Economics, *supra* n 237, 38.

²⁷⁹ *Ibid*, xix. There has, however, been a notable increase in the number of manufacturer-owned outlets in the last number of years: *ibid*, 47.

²⁸⁰ *Ibid*, 39.

²⁸¹ *Ibid*, xx.

multi-branding and the encouragement of innovation. Indeed, multi-branding is already increasingly common, resulting in lower search costs to the benefit of consumers; by contrast, the success and benefit of other retail formats represents a much more mixed picture.²⁸² Whether a given consumer will actually benefit from the actual and expected rationalisation conducted by the manufacturers may depend to a large degree on the location of that consumer, and so general references to “consumers” as uniform entities should be avoided: consumers living in rural areas could very soon end up having to travel long distances or buy from a retailer with a local monopoly; consumers living in affluent urban areas will benefit from more choice and lower prices as rationalisation of networks will encourage the development of large multi-franchise dealers with the ability to negotiate larger discounts from manufacturers and to pass on some of those savings to their customers.²⁸³ These particular consumer-specific effects have yet to be adequately documented and assessed; their exact impact, while theoretically sound, needs nonetheless to be firmly established by economic data. At the time that the above-noted assessments in the literature were conducted, the question of whether in fact any of the expected improvements in quality, choice and innovation had actually occurred still remained to be seen.²⁸⁴

(c) *The Commission’s Evaluation Report*

In May 2008, the European Commission, after over a year of fact-finding, which included questionnaires to stakeholders, studies and external statistical databases, published its own internal report evaluating the operation of Regulation 1400/2002, as required under Article 11(2) of that block exemption.²⁸⁵ It found that conditions for competition have improved over the last number of years on the markets for both new cars and repair and maintenance. In addition, it found that the current block exemption has had positive effects overall. That said, some of the provisions of Regulation 1400/2002 were believed to have been unnecessary, and perhaps even counterproductive. In particular, the higher market share threshold below which quantitative selective distribution agreements may benefit from the exemption arguably skewed manufacturers’ choice towards a uniform model of distribution. Concerning the market for the sale of new motor vehicles—which has been the main focus of this article—the Commission believes that competition between car manufacturers has become more intense and that the single market in the sector appears to be functioning better than before. However, the Commission attributes this increase in

²⁸² *Ibid.*

²⁸³ PricewaterhouseCoopers, *supra* n 277, s 1, 26.

²⁸⁴ London Economics, *supra* n 237, xviii.

²⁸⁵ Commission Evaluation Report on the Operation of Regulation No 1400/2002 concerning Motor Vehicle Distribution and Servicing, available at http://ec.europa.eu/comm/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf (accessed on 30 November 2008).

inter-brand competition mainly to factors other than the operation of Regulation 1400/2002, such as manufacturing over-capacity, technological innovation and closer integration of markets.

(d) Future Developments

While the Commission's latest report does not make proposals as to the future, it is the first step in a procedure that will decide on the regime applicable to the car sector after Regulation 1400/2002 expires on 31 May 2010.²⁸⁶ It is submitted in this regard that it is now opportune for rigorous independent economic analyses to be conducted concerning the post-2004 impact of the recent EC initiative as regards distribution in the motor vehicle industry. These analyses should examine the impact of the EC block exemption not only on retail prices of motor vehicles, but also, most importantly, on the quality of retail services and the quantity of dealers, both independent and authorised; they should, in particular, analyse the economic impacts of both the encouragement of multi-branding and the abolition of location clauses, as well as the impact of the block exemption on different types of consumers, namely urban versus rural consumers. When such analyses are made, we will be closer to understanding the true value of the competition-based initiatives undertaken in the internal market for new motor vehicles. We will also be closer to knowing the true impact of Regulation 1400/2002 on consumer welfare in Europe.

I. CONCLUSION

The single market for motor cars has traditionally been less integrated than other European markets. A major cause of this situation is the fact that, for the most part, European car manufacturers have been allowed to partition—through the use of (selective and/or exclusive) distribution agreements—the respective EC national markets for cars by preventing the sale of new vehicles from low- to high-priced countries. While the distribution and supply of new cars is of course subject to the antitrust rules contained in Articles 81 and 82 EC, vertical agreements regulating such conduct are not subject to the general block exemption regime contained in the Verticals Regulation. Rather, since the early 1980s, motor vehicle distribution has been subject to a different legislative regime, at least as far as the granting of block exemptions is concerned. After an elaborate process involving rigorous evaluation, consultation and drafting—not to mention consideration of the conclusions of the UK Competition Commission—the latest block exemption, Regulation 1400/2002, was finally adopted in July 2002.

²⁸⁶ European Commission, "Antitrust: Commission Report on Car Block Exemption Shows that Competition has Improved", Press Release, IP/08/810, Brussels, 28 May 2008, 2.

Its primary aims were to foster the development of new distribution techniques; to increase (intra-brand) competition between dealers; to ensure cross-border sales of cars can be achieved more easily; and to improve price-competitiveness in the market for new automobiles. This regulation can be criticised on a number of fronts. Most importantly, the choice between selective and exclusive distribution is not really an effective choice for manufacturers: to maintain control over the quality of their products, the overwhelming majority of manufacturers have chosen selective distribution systems. This inevitability leads to a cumulative effect concerning distribution systems, a reduction in intra-brand competition and possible foreclosure of certain types of distributors, as well as an increased risk of collusion between those major suppliers. Increases in either inter- or intra-brand competition can help neutralise this negative effect. As explained above, the attempts of the Commission to increase intra-brand competition in particular suffer from serious drawbacks. That said, competition between car manufacturers has become more intense and the single market in the sector appears to be functioning better than before. The Commission attributes this increase in inter-brand competition mainly to factors other than the operation of Regulation 1400/2002, such as manufacturing overcapacity, technological innovation and closer integration of markets. Given this context, very serious doubts can be entertained about the desirability of Regulation 1400/2002, at least concerning its “competition” features. What is required, however, is more empirical evidence. Therefore rigorous independent economic analyses should be conducted concerning the post-2004 impact of the recent EC initiative as regards distribution in the motor vehicle industry. It is submitted that, in the absence of robust evidence to the contrary, it is highly likely that a simple renewal of Regulation 1400/2002 represents a flawed project, and one that should be discontinued if consumer welfare is to be maximised in Europe. The public consultation that was conducted in this area by the Commission during the summer of 2008 was a positive development and may well convince this European institution of the desirability of such an approach. But whether that will indeed be the case remains to be seen.

Annex I: Activities Found to be Problematic by the UK Competition Commission

Exempted under the 1995 Motor Vehicle Block Exemption	Not exempted under the 1995 Motor Vehicle Block Exemption
<ul style="list-style-type: none"> • Refusing to supply new cars to resellers in the UK which are not dealers in the supplier's franchised network • Allocating exclusive territories to dealers and entering into agreements with the individual dealers not to supply new cars to any other dealer in that dealer's territory • Entering into agreements with dealers that, in either the agreement or related documents, impose on the dealer one or more of the following restrictions or obligations: <ul style="list-style-type: none"> (i) preventing the dealer from supplying the supplier's new cars to resellers which are not dealers in the supplier's franchised network; (ii) preventing the dealer from selling other suppliers' new cars from the same premises, under the same management or under the same legal entity as they sell the supplier's cars; (iii) requiring the dealer to offer servicing and repair services for the supplier's make of cars; (iv) requiring the dealer to achieve specified standards relating to presentation, facilities and other aspects of its business 	<ul style="list-style-type: none"> • Publishing RRP's • Pre-registering new cars before supplying them to dealers or purchasers • Paying bonuses and other incentives to, imposing conditions on and agreeing targets with dealers on the basis of the number of new cars supplied to dealers that are registered in a specified period

Source: CC Report.

Annex II: The 2002 Reform of the Motor Vehicle Block Exemption Regime

Before (Regulation 1475/95)	After (Regulation 1400/02)
Prescribed a single rigid distribution model for the motor vehicle sector, namely a combination of selective and exclusive distribution.	A wide number of choices left open to motor vehicle manufacturers, distributors and dealers. While manufacturers may choose an exclusive distribution system or a selective distribution system, a combination of selective and exclusive distribution is no longer possible.
Restrictions on multi-brand sales outlets permitted, including separate premises, separate legal entities and separate management.	Dealers are allowed to sell more than one brand. "Brand-specific" areas of the showroom can be required by the manufacturers.
Manufacturers are permitted to prevent dealers from developing secondary outlets.	Dealers of passenger car and light commercial vehicles within a selective distribution system are permitted to establish a secondary sales outlet or a delivery point in another part of their own Member State or in another Member State. One can prohibit dealers of medium and heavy commercial vehicles within a selective distribution system and dealers of all motor vehicles within an exclusive system from opening additional outlets.
Restrictions on intermediaries buying cars in other Member States for consumers they represent. A 10% limit on the sales to intermediaries by dealers.	Intermediaries only need to show mandate from customers. There are no limits on the number of sales to intermediaries by dealers.
Active sales outside of contract territory forbidden.	Dealers in a selective distribution system are allowed to engage in active sales in any location where a selective distribution system is used. Passive sales into exclusive distribution territories may also be made by them. Dealers in an exclusive distribution system are allowed to engage in active sales to independent resellers within their exclusive territory; they may also sell to final consumers or resellers based outside their territory if they are approached.
	Right to transfer the dealership to another distributor within the authorised distribution system.
	An extended list of black listed clauses (hard-core restrictions).

Source: Practical Law Company.