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I. INTRODUCTION

On May 27, 2010 the Commission adopted Regulation (EU) No. 461/2010 "on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector."[2] In so doing, it extended the life of Reg. 1400/ 2002[3] which was due to expire on May 31, 2010, until May 31, 2013 with regards to vertical agreements relating to the conditions under which the parties may purchase, sell or resell new motor vehicles (primary market). Additionally, article 101 (3) of the Treaty, Reg. 461/2010 exempted, from the application of article 101(1), vertical agreements relating to the conditions under which parties may purchase, sell, or resell spare parts for motor vehicles or provide repair and maintenance services for motor vehicles, (the aftermarket) which fulfill the requirements for an exemption under Regulation (EU) No. 330/2010[4] on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the VBER), and also do not contain any of the hardcore clauses listed in Article 5 of Reg. 461/2010.

In short, the Commission extended the life of and did not, at least until 2013, reform that part of Reg. 1400/2002 relating to the primary market. Indeed, it has kept the regime unchanged despite admitting that it did not work as intended in crucial areas and had little, if any, beneficial effect on competition. With regard to the primary market, reform has been postponed at least until June 2013. On the other hand Reg. 461/2010 carried over and added the essential provisions of Reg. 1400/2002 referring specifically to the aftermarket to the new VBER. In reality however, the effect of Reg. 461/2010 is to remove the benefits of automatic exemption under art.101 (3) for the agreements between vehicle manufacturers and their networks of authorized repairers and spare parts dealers. In as much as it deals with the aftermarket, this removal of exemption benefits does not bring about as substantive changes to existing structures as those developed under the previous Reg. 1400/2002.

The wrongs perpetrated on the primary market by the previous Reg. 1400/02 have not been corrected in the short term, although there are no reasons for delay. Chronic pathologies and distortions in the aftermarket are not dealt with, and systemic difficulties in the proper application of competition rules to the sector as a whole are not dealt with sufficiently.

Indeed, in contrast to the rush caused in 2002 when the now defunct Reg. 1400/2002 was adopted as well as during its annual transition period and the robust pro-competitive assertions of the Commission, Reg. 461/2010 was adopted without any fanfare and has received

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[2] OJ L 129/52, 28.5.2010.

[3] OJ L 203/30, 1.8.2002.

[4] OJ L 102/1, 23.4.2010

only little industry attention. Notably, partly because of delayed impact on the primary market, and in contrast to 2002/2003, motor vehicle' manufacturers have not proceeded with wholesale changes to their downstream distribution and service contracts.

It is not possible to deal extensively with the new regime in this article. Our emphasis is on whether certain unintended consequences of Reg. 1400/02 have been remedied for the short term in the primary market and whether certain structural problems of the aftermarket have been adequately dealt with.

II. THE PRIMARY MARKET: THE LAW OF UNINTENDED CONSEQUENCES.

As noted, Reg. 461/2010 extends Reg. 1400/02 up to June 2013 for new car sales. However, the Commission's own Staff Working Paper, published in July 2009 and which contained its Impact Assessment of Reg. 1400/02,[5] as well as earlier documents, were clear that there has been an improvement in inter-brand competition; indeed, competition between manufacturers is intense, but for reasons such as technological innovation that are unrelated to Reg. 1400/02. The various reports also clearly accept that the basic pillars on which Reg. 1400/02 was founded were misconceived and brought about unintended and harmful effects. By extending Reg. 1400/02 for another three years the Commission continues the validity of a number of crucial provisions that have proven ineffective and indeed cost inducing.

A. Multibranding

Under Reg. 1400/02, for a manufacturer to enjoy the benefits of exemption, its contracts must allow its dealers to sell at least three different brands in the same showroom. Multi-branding has drawn significant criticism both from reports commissioned by the EU Commission, such as the Impact Assessment cited above, and independent analysts.[6]

It is now generally accepted that multi-branding does not work. Research has shown that multi-brand outlets are scarce in urban centers where the cost of land is significant, making the cost of space appropriate for multi-brand showrooms prohibitive. In conjunction with the economic downturn affecting sales of new cars this situation has no chance of improvement. Indeed, even where multi-branding occurs through multiple outlets, the costs of sustaining separate showrooms, with no shared costs to be spread over multiple brands, also tends to be prohibitive. Studies show that multi-branding has had mild success in remote areas but also has had the unintended consequence that retailer power could grow disproportionally where one retailer combined many brands and grew to a position of economic power over the consumers in the area. Whatever the benefits of internet sales, they are more common in used cars, where buyer expectations are lower, than in the new car sales. Consequently, geographical remoteness increases the potential of retailer power in the new car sales market.

Additionally, car manufacturers, although obliged to allow multi-branding, tended to discourage dealers by adopting dealer specifications that increased the cost of carrying additional brands. The Commission had stated that specifications should be adapted to accommodate dealers who wished to carry additional brands and, indeed, in some cases intervened to bring specifications down to acceptable levels. However, there is a good market rationale for raising the

[5] http://ec.europa.eu/competition/sectors/motor_vehicles/block_exemption.html.

[6] RBB Economics, Brief 34, April 2010 and D. Ridyard, The Commission's Motor Vehicle Sector Review: An Economic Appraisal, Presentation at IBC MVBER Conference, 25 November 2009.

levels and keeping them consistent throughout the network, namely dealing with free-rider problems where dealers take advantage of other dealers' retail investments.

Finally, one aim of multi- branding is to avoid foreclosure of networks to new entrants by manufacturers. Again, studies have shown that new entrants have chosen to position their brands primarily through single- brand outlets, rather than placing them in existing show rooms of other brands and that this marketing strategy has been successful. Indeed, one wonders whether the concern of foreclosure is realistic; every manufacturer would seem to want to make his brand or model stand out, especially where there is intense multi-brand competition. Korean brands provide a case study. Now that competition is intensifying with new brands from the East, especially China, which are backed by significant funding, foreclosure would not seem to be a concern. Rather, the wisdom, or gut feel of the incumbent manufacturers to prefer single-branding for marketing purposes should be understood for what it is, i.e. the most effective marketing strategy in a market where brands matter.

A final comment on multi-branding: From June 2013 onwards new car sales will be regulated by Reg. 330/2010 which allows single branding for a period of 5 years; thereafter, the downstream dealer may be obliged to purchase up to 80 percent of his requirements from the manufacturer. How will the contracts read? If a contract were amended or a new dealer contract entered into today it is submitted that it would read something along these lines:

> During the period from entry into force of this agreement up to and including May 31, 2013 the Dealer shall purchase from Manufacturer/Importer or from any other designated enterprise at least 30 percent of its purchases of Contract Motor Vehicles… During the period from June 1, 2013 to 31 May 2018 the Dealer shall not sell any products competing with Contract Motor Vehicles. From June 1, 2018 and for the duration of this Agreement, Dealer shall purchase at least 80 percent of its total purchases of the Contract Motor Vehicles and their substitutes from the Manufacturer or a designated undertaking.

It is highly improbable that any dealer will invest in multi-branding, only to have to turn to single branding for 5 years and thereafter have rights to only limited multi branding. In all probability, single branding will rule and dealers will agree to extend their single-branding obligations after expiry of the initial 5-year single-branding term.

B. Additional Sales Outlets

Much of the same reasoning applies to additional sales outlets. Initially conceived as a means to open up new markets and increase intra-brand competition (lowering prices where demand exceeds supply), the research indicates limited application and unintended consequences. Quantitative selective distribution primarily aims at restricting the number of dealers. By putting a maximum level on the number of dealers and assigning primary sales areas, manufacturers aim to approximate the results of exclusive distribution and avoid free riding.

In order to avoid facing additional outlets, which undermine the quantitative nature of selective distribution systems and thus geographical control over demand, manufacturers tended to apply uniform specifications that would make primary and additional outlets equally expensive to maintain. This led to maintaining high prices and added injury (outlays of capital to maintain specifications) without reducing high prices, which were necessary to maintain the financial viability of the additional outlet. In fact, additional outlets were not an appropriate means to control the (high) prices charged by a local dealer. Rather, inter-brand competition from other

manufacturers brought prices down, since the fight for market share between brands was more intense than the aim of sharing a high rent charged to the consumer.

Similar contractual inconsistencies as outlined above with regards to multi-branding also apply to additional outlets. On June 1, 2013 manufacturers can prohibit additional outlets and the "location clause" restriction will be restored. Manufacturers are currently, however, obliged to allow dealers to open additional outlets up to June 1, 2013, but thereafter this can be prohibited. This makes no sense; no dealer will incur the capital outlay in the knowledge that in three years he will not be allowed to operate the additional outlet.

C. Contractual Incursions

On the positive side, a number of quasi-contractual requirements of Reg. 1400/02 will be abolished, namely the minimum 2-year regular termination notice period and the requirement for detailed, objective, and transparent grounds for termination. In this author's opinion, these requirements were inappropriate incursions by antitrust law into contract law. Indeed, some commentators claimed that the effect of the requirement to name termination grounds rendered all terminations for cause and abolished the concept of termination for convenience. These requirements are absent from Reg. 330/2010. Hence, as of June 1, 2013, there will not be a requirement to enjoy the benefits of the safe harbor provided by that Regulation.

The intent of these provisions was and is to increase dealer independence from the manufacturer and to ensure that termination did not occur as a result of dealer's pro-competitive activities. Most European legal systems already provide for notions of " abusive termination," "untimely terminations," "appropriate termination notices in view of the circumstances of each case," or prohibit unnecessarily short periods of termination where circumstances of "economic dependency" prevail. As such, setting a minimum termination notice period was unnecessary and indeed, in most cases, the 2-year minimum duration presented an unnecessary burden. Nevertheless, again for the short term, these provisions remain in force and in the face of the current difficulties faced by the motor vehicle industry are impediments to its effective re-structuring.

Where so much "flexibility" has been introduced in many markets (especially in the labor market) to allow for re-structuring, imposing a minimum 2-year notice period to terminate a dealer does not seem conducive to re-structuring efforts. Their abolishment is welcome. But the situation is not as clear as that. The Guidelines issued by the Commission state that:

> Adhering to a Code of Conduct is one means of achieving greater transparency…such codes may inter alia provide for notice periods for contract termination, which may be determined in function of the contract duration…If a supplier incorporates such a Code of Conduct into its agreements with distributors…makes it publicly available and complies with its provisions, this will be regarded as a relevant factor for assessing the supplier's conduct in individual cases.

The implication is clear. ACEA, the manufacturer's association, has developed such a Code of Conduct. To the extent that ACEA members include the Code's provisions in their contracts, naturally these provisions become binding *inter parte*. Codes of Conduct, though a peculiar species, take on a life of their own since they tend to gravitate from soft-law to hard-law if uniformly and consistently applied through time. Codes create expectations of conduct, set standards for conduct, and can develop into custom, becoming a source of national and, indeed, transnational law.

Sales through intermediaries remain a point of confusion between antitrust and contract law. An intermediary is a purchase agent appointed by the consumer to purchase a defined type of vehicle. Manufacturers and dealers are obliged to sell to intermediaries acting on behalf of a named consumer. The intention of this requirement is to promote arbitrage and prevent geographical market segmentation.

However, determining who is an intermediary and who is a reseller is often a point of conflict and confusion. A clear premise is where the intermediary purchases a good in the name and on behalf of the consumer, and is paid a commission by the consumer. Clearly, a purchase agent/intermediary cannot also receive a commission from the seller since this is a clear conflict with the duty or care he owes to his principal unless, of course, the principal allows such a double commission. If the seller pays him a commission, he is also a sales agent.

Under Reg. 1400/02 a supplier can prevent a dealer from appointing sales agents to sell vehicles on behalf of the dealer. The qualities of purchase- and sales- agents cannot normally co-exist in the same intermediary. In competition law, though, the actual function of an intermediary is important, not his legal classification. Hence, in theory, an intermediary can purchase in his own name (albeit on behalf of a consumer) but cannot hold on to vehicle for an unreasonable period of time without rendering himself a reseller. In contract law, especially in legal systems where indirect or undisclosed agency is not recognized, agents cannot purchase in their own name. Commissionaires' do purchase in their own name but the agency relationship with the principal is hidden from the seller to whom the commissionaire is a normal buyer.

Should commissionaires' be dealt with as intermediaries, despite their ostensible buyer status? As of June 1st 2013, there will be no legislative provision dealing with this since the only legislative tool specifically regulating intermediaries is Reg. 1400/02. To add to the confusion, the Guidelines,[7] which are not law, consider intermediaries as "end-users," clearly without any foundation.

III. THE AFTER-MARKET

As of June 1, 2010, agreements for the distribution of spare parts and for the provision of repair and maintenance services can benefit from the exemption provided in Reg. 330/2010 if they fulfill the requirements of that Regulation and do not contain any of the hardcore provisions listed in Article 5 of Regulation 461/2010. Reg. 330/2010 provides a safe harbor for various conditions, especially if the market shares of supplier and distributor do not exceed 30 percent of the relevant market. If they do, there is no presumption of illegality, but the parties should proceed with a self-assessment of the possible anticompetitive effects of any restrictions included in their agreement. Given that the Commission seems to employ a brand-specific relevant market definition, and the general assumption is that authorized repairers are assessed having shares typically between 45-60 percent of total repair markets and 90 percent of the new vehicle repairs, it is generally assumed that agreements relating to the aftermarket do not benefit from the safe harbor provided by Reg. 330/2010 and shall need to continue employing purely qualitative selective distribution systems.

A. The Split Between Sales and After-Sales

One of the innovations of Reg. 1400/02 was the introduction of a clear division between the primary market and the after-market. A new car dealer could not be obliged to service

[7] Commission Notice OJ C 138/16, 28.5.2010.

vehicles and could sub-contract the service obligation to another authorized work shop within the manufacturer's network of authorized repairers. This "split" has been ineffective. Indeed, in a market where manufacturers are not making money on car sales and consumers are moving to small cars, the option not to service vehicles is clearly useless.

As of June 1, 2013 manufacturers will be entitled to oblige dealers to perform repairs. This is because Reg. 330/2010 does not include any related prohibition; hence the obligation, as a requirement, will be subject to the normal rules applying to criteria applied in selective distribution systems. The only requirement in Reg. 330/2010 is that the criteria of a selective distribution system be "specified." Case law, and the Guidelines to Reg. 330/2010, suggest that the criteria must be more than merely "specified," but also be objective and "required by the nature of the product," i.e. the motor vehicle brand in question. Whether or not this should be a case-by-case assessment or whether all motor vehicles qualify is open to interpretation.

Currently, a stand-alone authorized repairer cannot be obliged to sell vehicles made by the manufacturer who owns the repairer network to which he belongs. In the future, under the same rationale stated above, and on condition that such an obligation is specified and required by the nature of the product, such a requirement could be imposed.

A similar issue arises with spare parts distribution and repair and maintenance services. Some manufacturers developed stand-alone spare parts distribution networks and did not insist that spare part distribution be effected solely through their authorized repair network. Others took the opposite view and insisted that spare parts distribution should occur solely through their authorized repair network. Although a case can be made that an authorized repairer can be obliged to operate as a spare parts distributor based on a prima facie argument that the nature of the service (repair and maintenance) requires it, the opposite is not so clear.

Indeed the question is whether an obligation to repair vehicles within the manufacturer's network is a valid quality requirement for a spare parts distributor. According to the Commission, under Reg. 1400/02 there is nothing in the nature of a spare part that requires it to be sold exclusively by firms that are authorized to repair vehicles of the make in question and such an obligation therefore amounts to a requirement that may not be exempted in the content of a qualitative selective distribution system. The issue remains unresolved under Reg. 461/2010.

B. Hardcore Restrictions

Reg. 461/2010 describes certain hardcore clauses that prevent application of article 101 (3) of the Treaty in any event:

- Sales of spare parts by members of a selective distribution system to independent repairers who use those parts for repairs and maintenance cannot be restricted. This implies that sales to independent repairers who stock parts to act as resellers can be restricted.
- Suppliers of spare parts, repair tools, diagnostic, and other equipment cannot be restricted by the manufacturer of a motor vehicle from selling to authorized or independent distributors or to authorized or independent repairers.
- A supplier of components used for the initial assembly of motor vehicles cannot be restricted from placing his trademark or logo effectively and in an easily visible manner on the components or spare parts.

The existence of these hard-core restrictions prevents application of art. 101 (3) of the Treaty to after-market agreements and if they do exist self–assessment shall be negative. They are added to the hard-core restrictions of Reg. 330/2010.

IV. CLOSING REMARKS

A new element arising from the application of Reg. 330/2010 refers to the permissible restrictions on members of a selective distribution system.

Under Reg. 1400/02 members of a selective distribution system could be prevented from selling to unauthorized resellers who were not members of the selective distribution system. Under Reg. 330/2010, "selective distribution system" means a system where the supplier sells only to distributors selected on the basis of specified criteria where these distributors undertake not to sell to unauthorized distributors "within the territory reserved by the supplier to operate that system." Apparently, members of a selective distribution system can now sell to unauthorized resellers in regions where the supplier has not applied this system.

The new regime, despite its generally liberalizing effect, unfortunately carries over some of the defects of the old regulations and does not resolve some of the long standing difficulties in applying competition rules to the motor vehicle sector.

One such area is pricing. Although price-fixing is a hard-core restriction prohibiting application of art. 101 (3) of the Treaty, the Guidelines to Reg. 330/2010 are commendable in that they dilute the absolute prohibition against price-fixing by recognizing some circumstances where the manufacturer can impose prices of motor vehicles. One such case is when a new model is introduced and, in order to preserve brand distinctiveness, the supplier imposes a price tag for a brief period of time, generally not to exceed six weeks.

In the after-market, though, it is submitted that rules allowing price-fixing should also be reconsidered. The motor vehicle after-markets frequently suffer from price distortions. Economists recognize that information asymmetries commonly exist, in that the consumers rarely know or are in a position to evaluate which spare parts are used and what actual work needs to be done on their motor vehicles. Information asymmetries commonly result in "double marginalization" where repairers charge well over the competitive price. Indeed the new regime attempts to indirectly address pricing concerns through increased competition by independent repairers and strengthening the access capabilities of spare parts manufacturers.

This, however, is only part of the solution and is intended to put price pressures on manufacturer's parts rather than address double marginalization, while leaving the pricing of other spare parts unaffected. An argument could be made that short-term price-fixing campaigns can be permitted in the aftermarket. But to the extent that there is an obvious bias in favor of independent repairers and spare parts manufacturers, it is rather unlikely that such promotions will be seen with a sympathetic eye by the regulators who would be inclined to see harm in such practices rather than attempts to educate consumers against the evils of double marginalization. Additional guidance by the regulators on such topics would be welcome.

Another area where confusion and uncertainty continues is market definition. The general trend in the Commission's thinking remains that motor vehicles and aftermarkets are separate markets. As was the case with Reg. 1400/02, the Commission seems to allow for alternative thinking on the subject, but remains in favor of its older market perceptions. The Commission indicates however that:

> in some circumstances, a system market which includes motor vehicles and spare parts together may be defined, taking into account inter alia, the life-time of the motor vehicle as well as the preferences and buying behavior of the users…One important factor is whether a significant portion of the buyers make their choices taking into account the life-time costs of the motor vehicle or not.

The Commission Guidelines provides the example of trucks and fleet purchases. It is submitted that "ordinary" vehicles could also be viewed from this perspective, and that especially in today's circumstances consumers more often than not reach their decision which motor vehicle to purchase based on lifetime costs. Indications of this trend may be found in the publication of such information in trade magazines and on the internet, as well as the extended warranties that manufacturers, importers and dealers commonly offer to make their vehicles more appealing. This evidence indicates that the trend is real and corresponds to an actual need.

In particular with regards to motor vehicles, market shares are usually approximated through categorizations or segments based on the degree of substitutability by reasons of price, product characteristics, and intended use. Demand substitutability is measured by use of the SSNIP test. Although the Commission seems to adhere to the existence of five product markets, some issues remain, especially with regard to chains of substitution.

With regard to the aftermarket, the Commission's Guidelines to Reg. 461/2010 state that:

> in most cases, there is likely to be a brand specific after-market, in particular because the majority of buyers are private individuals or small- and medium–size enterprises that purchase motor vehicles and aftermarket services separately and do not have systematic access to data permitting them to assess the overall costs of motor vehicle ownership in advance.

It is submitted that this argument, if it has any credibility given the arguments advanced above, supports only the contention that the primary- and after-sales markets are separate and not that the aftermarket is brand specific.

Brand specificity is a potentially misleading notion. With regards to spare parts it is generally taken to mean that the market is the genuine spare part market for a specific motor vehicle brand. Rather, it is submitted, the appropriate definition is "spare-parts, genuine or not, considered equivalent by the consumers by reasons of price, product characteristics, and intended use." From such a perspective, each spare part for an intended use (e.g. spark plugs) is a separate market comprising of genuine spark plugs manufactured for car brand X, spark plugs manufactured for other car brands but which can be used on cars X, OEM/OES spark plugs, and equivalent spark plugs by other manufacturers, all of which can be used on a brand X motor vehicle. Generalizations often confuse the issue and, depending on the parts, render market shares larger than what they are in reality. The task is indeed daunting.

Similarly, the relevant market for the repair and maintenance services is that for the vehicles of a specific brand. The Commission's position seems unchanged. However arguments can be put forward that this market is not limited to authorized repairers and should include independent workshops capable of performing repairs and maintenance of a given brand. In view of the Commission's attempts since 2002 to strengthen the position of independents and increase their access to technical information, there seems no reason to exclude independents from such an assessment.

In summary, it is clear that the motor vehicle market is moving gradually to a more liberal framework that will be complete in June 2013. The issues, however, have not been resolved.