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COMMISSION REGULATION (EC) No 1400/2002

of 31 July 2002

on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

(OJ L 203, 1.8.2002, p. 30)

Amended by:

		Official Journal		
		No	page	date
►**A1**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

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COMMISSION REGULATION (EC) No 1400/2002

of 31 July 2002

on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices ([1]), as last amended by Regulation (EC) No 1215/1999 ([2]), and in particular Article 1 thereof,

Having published a draft of this Regulation ([3]),

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

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

(2) This experience leads to the conclusion that rules stricter than those provided for by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ([4]) are necessary in this sector.

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

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

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

(6) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power held by the undertakings concerned and therefore

([1]) OJ 36, 6.3.1965, p. 533/65.
([2]) OJ L 148, 15.6.1999, p. 1.
([3]) OJ C 67, 16.3.2002, p. 2.
([4]) OJ L 336, 29.12.1999, p. 21.

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on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable for one another, by reason of the products' characteristics, prices or intended use.

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

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

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

(10) In order to foster market integration and to allow distributors or authorised repairers to seize additional business opportunities, distributors or authorised repairers have to be allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles within the distribution system. To this end, any vertical agreement between a supplier and a distributor or authorised repairer has to provide for the latter to have the right to transfer all of its rights and obligations to any other undertaking of its choice of the same type that sell or repairs the same brand of motor vehicles within the distribution system.

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

(12) Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore

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restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption.

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

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

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

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

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

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corresponding goods irrespective of where these goods are sold in the common market.

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

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

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

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

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