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AUTOMOTIVE INDUSTRIES OF THE EUROPEAN UNION AND TURKEY IN THE FRAMEWORK OF COMPETITION LAW

MA Thesis

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ABSTRACT

The purpose of this study is to examine the competition law of the chosen sector, namely automobile industry of the European Union and Turkey in a comparative manner.

In the first section of this study, the competition laws of the European Union and of Turkey, in order to understand the mechanisms of these laws and related articles will be examined. In that section, after providing the information on the legal structure of EU's competition law, within the framework of the Customs Union Decisions a brief information about the Turkey's competition law will be examined.

In the second and third section of this study, the structural features of the Turkish automobile industry and the automobile industry in Europe will be analysed. Briefly, the abolised Regulations No: 123/ 85 and 1475/95 regarding the motor vehicles in EU.

Following that, in the last part of the study, it will end with a focus on the competition law automobile industry relations by examining block exemption regulations in the European Union and Turkey. The study consists of the analysis of important change which eventuated through Regulation No 1400/2002 in evolutionary process from past to present. This analysis requires to study the problems which Commission came across in former arrangements, the reasons of such a change in its approach, the principles which was given up and adopted, the arrangements made in this respect and their effects on sector. A study in this respect also bears great importance with respect to Turkey because Competition Authority applies a group exemption parallel to former arrangements in EU with respect to motor vehicle distribution from 1998 to present. Competition Authority lastly adopted a Block Exemption Communique No 2005/4 which includes arrangement very parallel to Regulation No 1400/2002 in EU, in respect with advancement in EU.

ÖZET

Bu çalışmanın amacı, Avrupa Birliği ve Türkiye'de otomotiv sektöründeki rekabet düzenlemelerini karşılaştırmalı olarak incelemektir.

Çalışmanın birinci bölümünde, rekabet hukukunun sistemini ve alakalı mevzuatı anlayabilmek için Avrupa Birliği ve Türkiye'deki rekabet hukukunun sistemi incelenecektir. Bu bölümde, Avrupa Birliğindeki rekabet hukukunun yasal yapısı hakkında genel olarak bilgi verildikten sonra, Gümrük Birliği çerçevesinde, Türkiye'deki rekabet hukukunun yapısı hakkında bilgi verilecektir.

İkinci ve üçüncü bölümlerde, Avrupa'daki ve Türkiyedeki otomotiv sektörünün yapısının özelliği incelenecektir. Avrupa Birliğinde, motorlu taşıtlar ile ilgili yürürlükten kaldırılmış 123/85 ve 1475/95 sayılı Tüzükler ile, Türkiye'deki 1998/3 sayılı Tebliğden kısaca bahsedilecektir.

Bunu takip eden son bölümde, grup muafiyetlerini inceleyerek, Avrupa Birliği ve Türkiye'deki rekabet hukuku ve otomotiv sektörü arasındaki ilişki üzerinde odaklanılacaktır. Bu çalışma, geçmişten günümüze evrim süreci içerisinde, 1400/2002 sayılı Tüzük'le gerçekleşen önemli değişikliklerin analizini oluşturmaktadır. Bu analiz, Komisyon'un eski düzenlemelerinde karşılaştığı sorunlar, yaklaşımındaki değişikliğin gerekçeleri, vazgeçtiği ve benimsediği prensipler, bu doğrultuda getirdiği düzenlemeler ve bunların sektörde yaratacağı etkiler üzerinde durmayı gerektirmektedir. Bu yöndeki bir çalışma, Türkiye açısından da büyük önem taşımaktadır; çünkü Rekabet Kurulu, 1998 yılından bugüne, motorlu taşıt dağıtımı konusunda AB'deki geçmiş düzenlemelere paralel bir grup muafiyeti tebliği uygulamaktadır. Rekabet Kurumu, Avrupa Birliğindeki gelişmeler ışığında, 1400/2002 sayılı Avrupa Birliğindeki Tüzüğe paralel, son olarak, Motorlu Taşıtlar Sektöründeki Dikey Anlaşmalar ve Uyumlu Eylemlere İlişkin Grup Muafiyeti Tebliği No: 2005/4 yayınlamıştır.

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LIST OF ABBREVATIONS

Art.	Article
ACEA	European Automobile Manufacturers Association
BEUC	The European Consumers'Organization
CFI	European Court of First Instance
CC	UK Competition Commission
CMLR	Common Market Law Reports
CUD	Customs Union Decision
DG	Directorate General
EB	Explanatory Brochure
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECN	European Competition Network
ECSC	European Coal and Steel Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
IKA	Institut für Kraftfahrwesen Aachen
OJ	Official Journal of the European Union
OJL	Official Journal of the European Communities. L, Legislation
p.	Page
Reg.	Regulation
Sec.	Section
v.	Versus
Vol.	Volume

I. INTRODUCTION

Automobiles have long been recognized as a necessity of modern life to promote mobility as a vector of urban and rural development and of economic progress. Acquiring an automobile is one of the largest and most important purchases that many consumers will ever make.[1] As an automobile is probably the most complex consumer product of all as well as being the most expensive purchase that many consumers ever made, these unique characteristics have been put forward by motor manufacturers as justifying special rules on the distribution of cars.

The present study examines the most important fields in motor vehicle sector with respect to competitive dynamics; "distribution". It is being reached to consumer through many players of different quality taking place in both maintenance-repair services and spare parts of product.

The block exemptions related with the automobile sector is the result of balancing the interests of the manufacturers, who have technical and safety related reasons for the selection and supervision of their dealers, the dealers interest to avoid excessive dependence on the manufacturers, the interest of competitors who wish to have reasonable access to the network and the interest of consumers to make purchases and have repairs of servicing of motor vehicle done whenever the best price and quality is to be found in the Community. In this context, the present study concentrates on the various block exemptions related with the automobile sector as well.

[1] Gerard Damien, 'Regulated Competition in the Automobile Distribution Sector: A Comparative Analysis of the Car Distribution System in the US and EU', ECLR, 2003, Issue 10, Sweet & Maxwell Limited (and Contributors), 2003, p. 518.

II. COMPETITION LAW IN THE EUROPEAN UNION AND TURKEY

2.1 General Information about the Competition Law of the European Union

Competition policy is one of the most important and basic policies of the European Union. This policy is being shaped since the beginning of European unification in the earliest Treaties, i.e. the European Coal and Steel Community (ECSC) Treaty of 1951 creating the European Coal and Steel Community as well as the Rome Treaty establishing the European Economic Community (1957).[2]

The objectives of the European Union are stated in Article 2 of the EC Treaty[3]. According to this article, the Community shall have 'an accelerated raising living standards' and 'a continuous and balanced expansion of economic activity' to be achieved through the establishment of a common market, unimpeded by national boundaries.[4] Also, article 3 (1) (g) EC provides that one of the activities intended to help the achievement of the aims of the Community is 'the establishment of a system ensuring that competition in the internal market is not distorted'.[5]

In general, in a perfectly competitive market, there are no barriers to entry end exit, where buyers and sellers of homogeneous products are plentiful, and where competitors have similar and very small market shares and there is total transparency. However, this type of market is impossible to find in practice and in European Union as well. But the abolition of

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[2]Johann Eekhoff, Competition Policy in Europe, Berlin, Heidelberg, SpringerVerlag, 2004, p. 31. (In the Messina report of 1956 which proceeded the signature of the Rome Treaty in 1957, it is stated that '*Competition rules are necessary for the following reasons: to avoid double pricing producing the same effects as tariffs, to avoid dumping harming sound economic production, and to avoid the replacement of market allocations by market partitioning').*

[3] EC Treaty Art. 2: '*The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the Standard of living and closer relations between the States belonging to it'.*

[4] Albors Albertina –Llorens, EC Competition Law and Policy, USA and Canada, Willan Publishing, 2002, p.1

[5] Ibid, p.1.

national governmental restrictions such as customs barriers and quotas between Member States would deliver few benefits if these restrictions on competition are to be placed by cartels and other anti-competitive practices.[6]. In such markets, the undertakings are inclined to collude to fix price, those in a dominant position misuse their market strength and mergers lead to excessive concentrations of economic power.

In this framework, the need for European competition rules was recognized by the framers of the EC Treaty. The integration motivation of the EC competition law has an important impact on the Commission's decisions. The existence of the market integration explains much of the Commission's hostility towards agreements or business practices which prevent or hinder cross-border trade.

2.1.1 Article 81 of EC Treaty

The purpose of Article 81 is to preclude restrictive agreements between independent market operators, whether 'horizontal' or 'vertical'. This article prohibits, as incompatible with the common market, 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.[7]

Restriction of competition can result not only from horizontal agreements (between competitors) but also from vertical agreements (between operators that are situated at different levels of production or distribution) which are likely to lead to a foreclosure of the market.

[6] Simon Bishop / Mike Walker, The Economics of EC Competition Law, Concepts, Application and Measurement, London, Dublin, Hong Kong , Sweet & Maxwell, 1999, p.1.

[7] Art. 81 (1) gives a non-exhaustive list of prohibited restrictions, such as directly or indirectly fixing purchase or selling prices or any other trading conditions; limiting or controlling of production, markets, technical developments, or investment; sharing of markets or sources of supply; applying of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage etc.

Agreements and decisions within the meaning of Article 81 (1) shall be automatically void. The nullity sanction is applied by the courts of the Member States according to Article 81 (2). An agreement, decision or practice which comes under the scope of Article 81 (1) and which is not exempted pursuant to Article 81 (3) can be prohibited by a decision of the Commission or the competent national authority and a fine can be imposed by them.

a. The Meaning of 'Undertaking'

The term 'undertaking' is not defined in the Treaty. In the absence of a legislative definition the Commission, the ECJ has interpreted the term 'undertaking'.

The ECJ stated that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.[8] Examples of undertakings for the purposes of EC competition law include limited companies, partnerships, trade associations, agricultural co-operatives, sole traders and state companies etc. engaged in all economic sectors.[9]

Companies belonging to the same group and having the status and subsidiary may have distinct legal personalities. However, if the subsidiary 'enjoys no economic independence or the subsidiary has no real freedom to determine its course of action, for the purpose of Article 81, they are not treated as a single economic entity. Agreements between these companies were not caught by Article 81 (1) as an agreement between undertakings did not exist.[10]

[8] See Case C–41/90, Höfner and Esler v. Macroton GmbH (1991) ECR I–1979, (1993) 4 CMLR 306.
[9] Lasok D, Law and Institutions of the European Union, London, Butterworths Publications, 2001, p.567.
[10] Alison Jones / Brenda Sufrin, Text, Cases and Materials EC Competition Law, Second Edition, Oxford New York, Oxford University Press, 2004, p. 123.

b. The Meaning of 'Agreement' and ' Decision by Associations of Undertakings' and 'Concerted Practices'

Agreement and Unilateral Conduct

An agreement requires the consent of at least two economically independent undertakings.

The form in which an agreement is concluded is irrelevant. The existence of an agreement can be deduced from correspondence or from a circular letter[11] which has been tacitly accepted by the addressees. A 'gentlemen's agreement' is likewise an agreement within the meaning of Article 81 if parties have implemented it in connection with a binding agreement existing between them. Oral agreements between manufacturers and their distributors can also infringe Article 81.

It is clear that the word 'agreement' catches terms and conditions even if imposed by one party on another. If the terms are accepted, the fact that one of the parties was unwilling to accept them does not prevent the agreement from being formed. For example, in BMW case, an agreement was found to have been concluded which incorporated export bans imposed on reluctant BMW dealers.[12] In some of such cases, manufacturers sent their distributors exhorting them not to export. These requests were not part of the distribution contract and the parties argued they were unilateral requests. However, it was held that these tactics constitute export bans that are part of the agreement between manufacturers and distributors and which are tacitly accepted by the distributor continuing to buy goods from the manufacturer.[13]

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[11] Case 32/78: BMW Belgium v. Commission (1979) ECR 2429, (1980)1 CMLR 360. The illegality of such kind of agreements is demonstrated by the facts of BMW Belgium v. Commission case. In this case, an attempt was made by BMW's subsidiary in Belgium to discourage car dealers there from selling cars to other member states. BMW dealers in Belgium received a circular from BMW Belgium urging them not to engage in such sales. They were asked to behave parallel to this policy by signing and returning a copy of the circular. It was made clear that this was not a contractual document, but nonetheless the Court held that it was an Agreement under Art. 81 (1).

[12] Case 32/78, BMW v. Commission (1979) ECR 2435, (1980) 1 CMLR 370.

[13] Damian Chalmers / Christos Hadjiemmanuil / Giorgio Monti / Adam Tomkins, European Union Law, UK, Cambridge University Press, 2006, p.1996.

The Commission has reserved fines for the principal beneficiaries of the activity prohibited by Article 81 (1). However, it may therefore decline to impose a fine on a party that has acted unwillingly against its own economic interest, or under duress.[14] The Commission is aware of the pressure that producers or suppliers may apply over their dealers/ distributors.

In Ford case[15], the ECJ regarded the Ford's sending a circular to its German dealers that it would no longer accept their orders for right-hand-drive-cars as an agreement and fall within Article 81 (1).

In all these cases, the ECJ accepted that unilateral conduct could be read into an agreement even though, in the export ban cases at least, it clearly did not operate to the dealer's advantage. Although the Commission may look favorably on the dealer, when deciding whether to impose fines on a party to a contract which has been persuaded to act against its own economic interests, the finding that the 'unilateral conduct' forms part of the agreement clearly characterizes the distributor as a party to the contract that has committed breach of Article 81 (1).

The question of whether the Commission had been correct to characterize unilateral acts as an integral part of an agreement was raised. A distinction had to be drawn between cases in which genuinely unilateral measures had been adopted (without express or implied participation of another) and those in which the unilateral character of the measure was merely apparent, receiving at least the tacit acquiescence of the dealers.[16]

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[14] See, Volkswagen (1998) OJ 124/60, (1998) 5 CMLR 33, on appeal Case T–62/98; Volkswagen AG. v. Commission (2000) 5 CMLR 853, the appeal to the ECJ was dismissed; Case C–338/00 P, Volkswagen AG. v. Commission (2004) 4 CMLR 351.

[15] Cases 228 and 229/82, Ford Werke AG and Ford of Europe Inc v. Commission (1984) ECR 1129, (1984) 1 CMRL 649. In this case, Ford had stopped supplying right-hand drive cars to its German dealers in order to prevent those distributors from exporting the cars into the UK, where its car prices were higher. Ford AG notified the German Ford dealers by a circular dated 27 April 1982 that with effect from 1 may it would no longer accept their orders for right-hand drive cars and that as from that date all such cars would have to be purchased either from a Ford dealer established in the United Kingdom of from a subsidiary of Ford Britain.

[16] Jones / Sufrin, p. 13.

In General Motors and Opel case[17] the Court recalled 'in the absence of agreements between undertakings, a unilateral act by one undertaking without the express or tacit participation of another does not fall within Article 81 (1)'.

Decision by Associations of Undertakings

The concept of 'decisions by associations of undertaking' refers, primarily, to a decision that has been taken by an organ of an association with legal personality or even a de facto association and which has been considered as binding by its members. This concept includes recommendations by an association to its members, even if they are not binding, provided compliance with these recommendations has an appreciable effect on competition.[18]

Concerted Practices

The European court defined the concept of concerted practices in Dyestuffs case[19] as 'a form of co-ordination between undertakings which, without having reached a stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition'. [20]

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[17] Case T–368/00 General Motors Nederland BV and Opel Nederland BV v. Commission, 21.0ct.2003 para; 58–78–79. In this case, Opel Nederland, which is the sole company for the sale, import, export, and wholesale trade in Opel vehicles and spare parts in the Netherlands, concluded dealership agreements with about 150 authorized dealers. The Commission discovered a system that systematically restricted supply and bonuses, together with a direct prohibition on exports to final consumers and Opel dealers in other Member States. It categorized the infringement as very serious, having regard to the important position of the Opel brand on the Netherlands market and on the markets of other Member States where the sale prices of Opel vehicles were significantly higher than in the Netherlands. The Commission had found that Opel Nederland had informed dealers identified as exporters that delivery volumes would be limited and that the decision was thus implemented. The Court, however, did not find sufficiently precise or coherent proof in the contested decision that the measure in question was communicated to the dealers or that the measure had entered into the field of contractual relations. As a result of this the amount of the fine imposed was reduced.

[18] Floris O.W Vogelaar / Jules Stuyck / Bart L.P. van Reeken, Competition Law in the EU its Member States and Switzerland, The Netherlands, Kluwer Law International, W.E.J. Tjeenk Willink, Law of Business and Finance, Volume 2-1, 2000, p. 25.

[19] Case 48/69 ICI v. Commission (1972) ECR 619, (1972) CMLR 557.

[20] Valentine Korah, Cases & Materials EC Competition Law, Second Edition Oxford-Portland Oregon, USA, Hart Publishing, 2001, p. 276. In this case, ICI was among a number of businesses producing dyestuffs in Italy. It was the first to impose a price increase, but other producers of similar products, accounting for more than 80 per cent of the market, shortly followed it. A similar pattern of price increases had taken place among the ten major dyestuffs producers that dominated the dyestuffs in the Community. The Commission concluded from the circumstances that there had been a concerted practice between the undertakings and imposed fines.

c. The 'De Minimis' Doctrine

Article 81 applies only to agreements which have an appreciable impact on intra-Community trade and on competition. Agreements which are not capable of significantly affecting trade between Member States are not caught by Article 81. The ECJ has clarified that this provision is not applicable where the impact of the agreement on intra-community trade or on competition is not appreciable.

In the Notice on agreements of minor importance[21] the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition i.e. what is "de minimis" and is thus not prohibited by Article 81 (1).[22] Also, the Notice defines in a clear and consistent way the hardcore restrictions, i.e. those restrictions, such as price fixing and market sharing, which are normally always prohibited irrespective of the market shares of the companies concerned. Hardcore restrictions can not benefit from the De Minimis Notice.[23]

2.1.2 Vertical Agreements

The creation of a single market is one of the main objectives of the European Union's competition policy. The single market represents an opportunity for EU firms to enter new markets that may have been previously closed to them because of government barriers. This penetration of new markets takes time and investment is risky. The process is often facilitated

[21] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81 (1) of the Treaty establishing the European Community (De Minimis), Official Journal C 368, 22.12.2001.
[22] Paragraph 7 of the Notice states that the Commission holds the view that agreements between competitors do not appreciably restrict competition where the aggregate market share held by the parties to the agreement does not exceed 10 per cent and that agreements between undertakings which are not competitors do not appreciably restrict competition if the market share held by each of the parties to the agreement does not exceed 15 percent.
[23] Josephine Steiner / Lorna Woods, Textbook on EC Law, 8th Edition, Oxford New York, Oxford University Press, 2003, p. 417.

by agreements between the producers who want to break into a new market with a local distributor.[24]

Firstly, a supplier who wishes to retain maximum control distribution may take charge of it itself; this may be referred as vertical integration.[25] This may be appealing to a supplier with considerable resources seeking to sell a highly complex product or to a supplier seeking to sell a high volume of low-margin products.[26] This has become more popular since the internet has taken off as a mode of distribution. Car buyers are becoming addicted to using the large range of independent sites for information on products, locating dealers or dependent used car sellers and many other things.[27]

Secondly, the manufacturer may also control distribution by delegating the task to the third party.[28] Car producers may organize the distribution through a dense network of authorized dealers whose function is to resell the products to the final consumer. For this purpose, car producers appoint one supplier for each Member State, the so-called importer, which is directly owned by the manufacturer. The importer's task is to conclude individual distribution agreements with dealers located in the Member States where he operates. The appointed dealer carries out the retail distribution to the final consumer. However, in their home country the carmakers conclude agreements with appointed dealers directly themselves.

Thirdly, the manufacturer may also control distribution by the services of commercial agent to find customers.[29] The Commission draws a dividing line between 'genuine' and 'non-genuine' agency agreements. Genuine agency agreements, those where the agent bears

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[24] Green Paper on Vertical Restraints in EU Competition Policy, COM (96) 721 final, January 1997, CMRL 519.
[25] Richard Whish, Competition Law, Fifth Ed. New York, Oxford University Press Inc., 2003, p. 583
[26] Jones and Sufrin, p. 597.
[27] http://www.skiptoninformationgroup.com/Pages/PR.GMAP%20European%20Car%20Distribution%202002.pdf retrieved on 04.05.1006. HWB International Limited, GMAP Consulting; GMAP European Car Distribution Handbook, 2002.
[28] Jones / Sufrin, p. 596.
[29] Agency agreements are common in the motor vehicle sector. As the "agency" agreements in motor vehicle distribution is not regarded as restricting the competition in respect with Art. 81 in case the parties make a real agency relation, they are not included into the scope of Regulation. Between the 12th and 20th paragraphs of Guidelines on Vertical Restraints OJ L 291, 13.10.2000 p 1, the elements of real agency relations are defined. In "Peugeot" (OJ L 66/1, 1992) and "Peugeot v Commission" (C–322/93 I ECR 2727 1994) Resolutions of Commission, a detailed discussion in respect with agency relation in motor vehicle distribution is included.

insignificant or no financial and commercial risk[30] in respect of the contract concluded or negotiated on behalf of its principal and in respect of market-specific investments for that field of activity, are not prohibited under Article 81 (1) and do not fall within the scope of the Regulation. Non genuine agency agreements, on the other hand, do fall within the scope of the Regulation.

Despite these contractual bindings and huge efforts of the car producers to maintain and develop an integrated distribution strategy and to exercise absolute control over their network, car dealers themselves act independently and form several legal and economic entities. As a result of this structure which separates the functions of production and sales, the distribution model used by the car manufacturers for the distribution of passenger cars throughout them cannot be considered as a typical form of absolute vertical integration in the downstream market of car sales, but characterizes the distribution model as formed so-called vertical agreements.

Vertical agreements are defined in Article 2 (1) of the Block Exemption Regulation No 2790/1999 [31] as "agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

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[30] Henty Paul, 'Agency Agreements- What are the Risks? The CFI's Judgment in DaimlerChrysler AG v Commission' ECLR, 2006, Volume 27, Issue 3, p.103. In Mercedes Benz ((2002) OJ L 257/1, (2003) 4 CMLR 95), the Commission had to consider the application of Art. 81 to restrictions of competition, namely restrictions on the export of new Mercedes-Benz vehicles, agreed by a supplier with 'agents'. The Commission accepted that restrictions in agreements concluded with independent commercial agents would not be considered as restrictions of competition within the meaning of Art. 81 (1) but rejected the view that the relevant agreements were genuine agency agreements. DaimlerChrysler constitutes obstacles to parallel trade. The undertaking instructed the members of its German distribution network for Mercedes passenger cars, half of which are agents, not to sell cars outside their respective territory in the form of circular letters. In addition, DaimlerChrysler instructed its distributors to oblige foreign consumers to pay a deposit of 15% to DaimlerChrysler when ordering a car in Germany. This was not the case for German consumers, even though they might present the same "risk" of, for instance, being unknown to the seller, ordering a car with particular specifications, or living far away. The application of Art. 81 to the restrictions agreed between DaimlerChrysler and its German agents results from the fact that these agents have to bear a considerable commercial risk linked to their activity. From the point of view of EC competition law, they must therefore be treated as dealers.

[31] Commission Regulation (EC) No 2790/1999 Of 22 December 1999 on the Application of Art. 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices.

There are three main elements in this definition:

- the agreement or concerted practice is between two or more undertakings. Vertical agreements with final consumers not operating as an undertaking are not covered.
- the agreement or concerted practice is between undertakings each operating, for the purposes of the agreement, at a different level of the production or distribution chain. This means for instance that one undertaking produces a raw material which the other undertaking uses as an input, or that the first is a manufacturer, the second a wholesaler and the third a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain;
- the agreements or concerted practices relate to the conditions under which the parties to the agreement, the supplier and the buyer, "may purchase, sell or resell certain goods or services". This reflects the purpose of the Block Exemption Regulation to cover purchase and distribution agreements. For the application of the Block Exemption Regulation both the goods or services supplied by the supplier and the resulting goods or services are considered to be contract goods or services. Vertical agreements relating to all final and intermediate goods and services are covered.[32]

Vertical agreements concluded between suppliers and independent distributors operating in different levels of the supply chains generally contain restraints on the conduct or commercial freedom of one or more of the parties. Vertical restraints have been of particular importance to the European Union's and international[33] competition policy.

[32] The only exception is the automobile sector.

[33] Green Paper on Vertical Restraints in Competition Policy, COM (96) 721, (1997) 4 CMLR 519. Executive Summary; pr. 4. '*As the world's largest trading block, the European Union is committed to the development of open and fair international trade. Just as vertical restraints can either promote or hinder the creation of a real single market, they can be either beneficial or detrimental to international trade. The Union's policy in this area is therefore of wider international importance. Our experience may be useful for analyzing market access impediments in third countries'.*

Because of their strong links to market integration they can be either negative or positive. The negative effects on the market that may result from vertical restraints which EC Competition law aims to prevent are as follows:[34]

- foreclosure of other suppliers or other buyers by raising barriers to entry;
- reduction of inter-brand competition between the companies operating on a market, including facilitation of collusion amongst suppliers or buyers; by collusion is meant both explicit collusion and tacit collusion (conscious parallel behavior);
- reduction of inter-brand competition between distributors of the same brand;
- limitations on the freedom of consumers to purchase goods or services in a Member State they may choose such negative effects may result from various vertical restraints. Agreements which are different in form may have the same substantive impact on competition. To analyze these possible negative effects, it is appropriate to divide vertical restraints into four groups: a single branding group, limited distribution group, a resale price maintenance[35] group and a market partitioning group. The vertical restraints within each group have largely similar negative effects on competition.[36]

Nonetheless, vertical restraints often have positive effects, notably by promoting non-price competition and improving quality of services, especially when a company that does not retain significant market power tries to increase its profits by optimizing its manufacturing or distribution processes.[37]

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[34] Guidelines on Vertical Restraints, pr. 103.
[35] A number of Art. 81 infringement actions have been brought against car manufacturers in respect to restraints imposed in vertical agreements, particularly restraints seeking to impose direct or indirect export bans or to achieve resale price maintenance, see, Volkswagen (1998) OJ L124/60, (1998) 5 CMLR 33, on appeal Case T–62/98, Volkswagen AG v. Commission (2000) ECR II–2707, (2000) 5 CMLR 853, the appeal to the ECJ was dismissed, see Case C–338/00 P, Volkswagen AG v. Commission (2004) 4 CMLR 351, Opel Nederland (2001) OJ L59/1, finally annulled and fine reduced on appeal, Case T- 368/00, General Motors Nederland BV and Opel Nederland BV v. Commission, 21 Oct.2003, VW-Passat (2001) OJ L262/14, (2001) 5 CMLR 1309, annulled on appeal, Case T–208/01, Volkswagen AG v. Commission (2004) 4 CMLR 727, and Mercedes- Benz (2002) OJ L 257/1, (2003) 4 CMLR 95, on appeal Case T–325/01, Daimler Chrysler v. Commission.
[36] Guidelines on Vertical Restraints, pr. 104.
[37] Guidelines on Vertical Restraints, pr. 115.

Vertical restraints are seen to be generally less harmful than horizontal restraints. The main reason for treating a vertical restraint more leniently than a horizontal restraint lies in the fact that the latter may concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships the product of the one is the input for the other. This means that the exercise of market power by either the upstream or downstream company would normally hurt the demand for the product of the other. The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other.[38]

In general, the assessment of a vertical restraint involves the following four steps;

- The companies involved need to define the relevant market in order to establish the market share of the supplier or the buyer, depending on the agreement. In order to calculate the market share, the relevant product market and the relevant geographic market are taken into account.
- If the relevant market share does not exceed the 30% threshold, the vertical agreement is covered by the Block Exemption Regulation, subject to the conditions set out in Regulation No 2790/1999.
- If the relevant market share is above the threshold, it is necessary to assess whether the vertical agreement distorts competition. The following factors to be taken into consideration are: the market position of the supplier, competitors and the buyer, entry barriers, the nature of the product, etc.
- If the vertical agreement falls within Article 81 (1), it is necessary to examine whether it fulfills the conditions for exemption. In that case, the vertical agreement must contribute to improving production or distortion or to promoting technical or economic progress and must allow consumers a fair share of those benefits. At the same time, the vertical agreement must not impose on the companies concerned

[38] Guidelines on Vertical Restraints, pr; 100.

restraints which are not indispensable to the attainment of those benefits or to eliminate competition.

a. Exclusive Distribution

An exclusive distribution agreement is one whereby one party (the supplier) agrees to sell certain goods (the contract goods) within a certain territory (the contract territory) only to the other party (the distributor), who agrees to resell them in his own name and on his own behalf. Often, the distributor undertakes, in return, to purchase the contract goods only from the supplier. Where several suppliers agree among each other to use the same exclusive distributors, the agreement is said to be a collective exclusive distribution agreement.

Some distribution agreements impose on the distributor the obligation not to sell the contract goods to customers not established in his territory (export ban). The agreement is then said to be 'closed'; it provides for 'absolute territorial protection' by preventing 'parallel trade'. Sometimes, instead of completely banning export, the supplier makes parallel trade more difficult or less profitable by imposing measures of equivalent effect such as:[39] providing that in case of export the distributor will pay a compensatory commission to the distributor responsible for the territory where the customer is established, providing that the price payable by the distributor will be higher if the distributor exports the goods, making the payment of certain discounts to the distributor subject to the proof that the goods are used in the contract territory, refusing to provide warranty service where the goods were not acquired directly from the territorially competent distributor or obliging the distributor to sell only to customers who intend to use the goods in their own business etc.

b. Selective Distribution

In the most general form of selective distribution system, a supplier appoints retailers who may resell its products to end-users without restraints. The supplier normally supplies only its approved retailers and may undertake not to sell to non-approved retailers or to the

[39] Vogelaar / Stuyck / Reeken, p. 36.

general public. Before the supplier appoints a retailer, it usually requires to be convinced that the potential retailer can satisfy its standards in such areas as management skills, technical expertise, financial resources and quality of premises (depending on the nature of the product).[40]

The difference from exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on selection criteria linked in the first place to the nature of the product. Another difference from exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorized distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products. The possible competition risks are a reduction in intra-brand competition and especially in cases of cumulative effect, foreclosure of a certain type or types of distributor and facilitation of collusion between suppliers or buyers.[41]

2.1.3 Article 82

Article 82 prohibits undertakings from committing an abuse of a dominant position held within a substantial part of the common market where that abuse has an effect on trade between Member States.

The question whether an undertaking is dominant requires the market on which the undertaking is alleged to be dominant to be defined. The undertaking's position on the market must then be assessed. It is not an offence to hold a dominant position, but some behavior which may be competitive, or at least neutral, from a competition perspective when

[40] http://www.competition-commission.org.uk/rep_pub/reports/2000/ retrieved on 05.06.2005. UK Competition Commission's report: New Cars: A report on the supply of new motor cars within the UK, CM 4660, 10.04.2000.
[41] Guidelines on Vertical Restraints, p. 103.

engaged in by an undertaking which does not have market power may have serious effects on competition and be prohibited when engaged in by a dominant undertaking.

2.1.4 Article 81 (3)

Article 81 (3) sets out four criteria all of which must be satisfied if the agreement benefits from it. The exception rule applies for as long as the four conditions are met. It ceases to apply when that is no longer the case.

The first two criteria of Article 81 (3) are positive. The second two are negative.

- the agreement must lead to an improvement in the production or distribution of goods or the promotion of technical[42] or economic progress;
- allowing consumers a fair share of the resulting benefit;
- indispensable restrictions;
- the agreement must not afford the parties the possibility of substantially eliminating competition.

An agreement drafted to fall within the terms of a block exemption of course benefits from automatically being exempted from the Article 81 (1) prohibition.[43] Pursuant to Article 81 (3), the provisions of Article 81 (1) may be declared inapplicable for individual agreements or a category of agreements, decisions and concerted practices which fulfill the following four conditions stated above.

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[42] Lars Kyolbye, 'The New Commission Guidelines on the Application of Article 81 (3): An Economic Approach to Article 81', ECLR, 2004, Volume 25, Issue 9, p. 571. BMW Belgium NV and Belgian BMW Dealers (1978) OJ L46/33, (1978) 2 CMLR 126. The production of a product which increases safety for a consumer may constitute a technical improvement. Also, in Ford/Volkswagen, 23 December 1992, [1993] OJ L20/14, [1993] 5 CMLR 617, the Commission held that the parties' creation of a joint venture company to develop and produce multi-purpose vehicle ('MPV') in Portugal would improve the production of goods and promote technical development. It would rationalize product development and manufacturing and establish a new and modern manufacturing plant which would be using the latest production technology.

[43] Jones / Sufrin, p. 654.

a. The EC Policy of Granting Block Exemptions

A number of Community regulations grant exemption to categories of agreements. Over the years the Commission has adopted a number of block exemptions which have applied to vertical, horizontal, technology transfer, and other particular agreements.

The Vertical Regulation No 2790/1999[44] replaced three block exemptions which applied to three different categories, (exclusive distribution agreements,[45] exclusive purchasing agreements[46], franchising agreements[47]) since 1 June 2000. It exists alongside the motor vehicle distribution block exemption, Regulation No 1400/2002.

In the motor vehicle sector, since 1984, the European Commission has enacted specific block exemption regulations[48] applicable to vertical agreements. These sector-specific block exemptions define the conditions under which the Commission considers that vertical agreements between manufacturers and distributors are compatible with Art. 81 (3) of the EC Treaty.[49]

Until the adoption of Regulation No 2790/1999, the Regulations tended to adopt the following format; a specification of the category of agreements covered, a list of restrictions which it is permissible for the agreement to contain (white list), and a list of prohibited restrictions (black list).[50] Regulation No 1475/95 was one of the block exemptions that was adopted in that way. The new block exemptions, adopted since 1999, have sought to move away from this format, in an attempt to prevent the severe straitjacking and limitations on the parties' autonomy which resulted from the previous formula. Regulation No 1400/2002 is

[44] Guidelines, par. 21–70 deal with the application of the block exemption Regulation.
[45] Reg. 1983/83 (1988) OJ L173/1.
[46] Reg. 1984/83 (1983) OJ L173/7.
[47] Reg. 4087/88 (1988) OJ L359/46.
[48] Commission Regulation (EEC) No 123/1985 of December 1984 on the application of Art. 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L15, 18.01.1985.
Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Art. 81 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 145, 29.06.1995.
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, OJ L 203, 1.08.2002 .
[49] Damien, p. 522.
[50] Jones / Sufrin, p. 248.

also based on the philosophy behind Regulation No 2790/1999 as regards the abandonment of authorized 'white' clauses in favor of an approach consisting in excluding hardcore restrictions of competition from exemption.[51]

The borderline between the Regulation No 1400/2002 and Regulation No 2790/1999 can be drawn as, article 2 (5) of Regulation No 2790/1999 on vertical agreements declares that it does not apply to vertical agreements whose subject matter falls within the scope of any other block exemption regulation. It follows that Regulation No 2790/1999 does not apply to vertical agreements that concern new block vehicles, repair and maintenance services for motor vehicles and spare parts for motor vehicles, as defined in the Regulation.[52]

In this context, agreements falling within the ambit of one of the block exemptions are automatically exempt from the Article 81 (1) prohibition and the national courts are free to apply the terms of the block exemption and determine whether or not the agreement infringes Article 81 (1) and where, it does, whether it individually meets the Article 81 (3) criteria.

2.1.5 Council Regulation (EC) No 1/2003[53]

With the adaptation Regulation No 1/2003 the EU Member States agreed to undertake a fundamental reform of the enforcement rules, as a truly 'Copernican' revolution, concerning anti-competitive agreements and abuse of a dominant position as prohibited by Article 81 and 82 EC.[54]

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[51] http://ec.europa.eu/comm/competition/annual_reports/2002/en.pdf retrieved on 2.12.2005. XXXII and Report on Competition Policy–2002 SEC(2003) 467 FINAL, p. 51.
[52] Explanatory Brochure for 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 p.16.
[53] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (Text with EEA relevance) Official Journal L 001, 04.01.2003 P.0001–0025.
[54] Eekhoff, p. 50.

Regulation No 1/2003 makes provision for withdrawal of all block exemptions both by the Commission and by the competent authorities of the Member States.[55] Commission can withdraw the benefit of any Commission block exemption when 'it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty'.

Before the adoption of Regulation No 1/2003, the commission had the right either to perform the negative clearance of the agreements and applications stated to it or to grant the right of individual exemptions within the scope of the article of 81 (3). This central structure, which secures the monotonous implementation of competition culture within the community, became no more functional and effective in the preceding period and it had to be revised in consideration of additional burden created by the latest expansion wave. In fact, this administrational burden made it difficult for the Commission to follow up the cartel investigations and breaches of dominant position in time and effectively. This resulted in the failure of Commission to perform its designated primary duty.[56]

The direct effect of the legal exception system established by the Regulation is to increase the responsibility of undertakings since, given that they are no longer subject to a prior-notification requirement, they will have to ensure in good faith that agreements do not affect competition and do not infringe the Community rules in this area. However, in order to avoid any abuse, the competition authorities in Europe-including the Commission- and the national courts will themselves assume greater responsibility in ensuring that the rules on competition are complied with, while coordinating their respective activities.[57]

While the Regulation No 17/62[58] was in force, the competition authorities of member countries were in the second position in the implementation of competition rules of EU.[59] The

[55] The former highly centralized system of competition law enforcement provided for by Regulation 17/62 was replaced by a system of legal exception in which Member States and undertakings take more responsibility for enforcement.
[56] İ. Yılmaz Aslan / Erol Katırcıoğlu / Fevzi Toksoy / Ali Ilıcak / Şahin Ardıyok / Fırat Bilgel, Otomotiv Sektöründe Rekabet Hukuku ve Politikaları, Bursa, Ekin Kitapevi, 2005, p. 48.
[57] Ibid, p. 48.
[58] EEC Regulation 17 of 13th March 1962 [1962] OJ 13/204 [1959–62] OJ Special Edition 87.
[59] Reg. No 17/62 Art. 9 (3).

competition authorities of the member countries were entitled in the implementation of 81 (1) and 81 (2) articles of the Agreement; however, they were not entitled in the implementation of 81 (3) article as long as the proceeding is not commenced by the Commission. Owing to the new Regulation No 1/2003, the competition authorities of the member countries have been directly included into the process.[60] Together, the national competition authorities and the Commission form a network of public authorities that act in the public interest and cooperate closely in order to protect competition. The network is called the 'European Competition Network' (ECN).[61]

Regarding the cooperation, it is adopted that competition authority of each member country is entitled for the breaches within their own borders. In most cases, the authority receiving a complaint or starting an *ex officio* procedure will remain in charge of the case.[62] Cases may be handled by one or more national competition authorities acting in parallel or by the Commission.[63]

2.2 General Information about the Competition Law of the Turkey

Turkey-European Communities relations are deep rooted in every sense including economic, military, and cultural. The relations neither contain symmetry nor continuity and they faced several radical changes within the years. Turkey's position in international economy and political structure is reshaped according to the changes in Europe.

Liberalization of the foreign trade and the investments created new tension in the international arena including Europe. The application for full membership can be considered as a result of these developments. Regardless of the final result of application, Turkey's

[60] Damian / Christos / Giorgio / Adam, p. 972.
[61] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 49.
[62] Multiple enforcement may cause problems such as duplication, conflicting decisions, national bias, forum shopping. See the detail in Wils P.J. Wouter, The Optimal Enforcement of EC Antitrust Law, The Hague/ London/ New York, Kluwer Law International, 2002, p. 144–148.
[63] Commission Notice on Cooperation within the Network of Competition Authorities (OJ C 101 of 27.04.2004)

economic relations with the Union changed positively during the years. It is important to remember that Turkey is under the responsibility of Customs Union Decision and has the duty of this agreement in economic sense.[64]

The Customs Union is one of the cornerstones of Turkey's relationship of association with the European Community, which dates back to the 1960s. With the decision signed at the Turkey-EC Association Council meeting on March 6, 1995, Turkey completed the transitional phase in its integration with the EC as foreseen in the Ankara Agreement[65] and additional protocols, and it entered into the final phase. After a transitory stage of 22 years, during which essential measures were put into the force about trade liberalization and greater reliance on market forces, parties decided that conditions had been fulfilled for the establishment of the Customs Union and it started to function as of January 1, 1996.[66]

Customs Union Decision did not only affect the trade between Turkey and European Communities but also the legislative system of Turkey. In the field of the adaptation of Turkish legislation to the competition policy of the EC, a great degree of progress has been achieved with the entry into force of laws on protection of competition and protection of consumers, as well as decree laws on patents, copyrights, trademarks and industrial designs.[67] In this context, Turkey adopted other arrangements for harmonization to the Community's Common Commercial Policy including common rules on imports and exports, inward and outward procession, standardization of foreign trade, and administration of quantitative restrictions.

With Article 167, the 1982 Turkish Constitution, attributed to the government the duty and the responsibility to take 'for money, credit, capital, product and service markets, measures providing and improving healthy and regular procedures, to prevent monopolization and cartelization created as result of activity or agreement in the markets'.[68]

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[64] İ. Yılmaz Aslan, Rekabet Hukuku Bakımından Dikey Anlaşmalar, Bursa, Ekin Kitapevi, 2004, p. 183.
[65] Agreement Establishing an Association Between the European Economic Community and Turkey (signed at Ankara, 12 September 1963).
[66] Gert Verhellen, M.C.J. / Tunay Köksal, Türkiye'nin Avrupa Birliği'ne Katılım Süreci Avrupa Birliği'nin Rekabet Politikası ve Türkiye'nin Uyumu, İstanbul, İktisadi Kalkınma Vakfı Yayınları, 2002, p. 63.
[67] Pelin Güven, Rekabet Hukuku, Ankara, Yetkin Yayınları, 2005, p. 36.
[68] İ. Yılmaz Aslan, Rekabet Hukuku, Genişletilmiş 2. Bası, Bursa, Ekin Kitapevi, 2001, p. 17.

Taking into account the responsibilities stemming from the Customs Union, the Turkish Parliament approved The Act on the Protection of Competition No: 4054 on 13 December 1994. The purpose of the Act is to establish a system ensuring the necessary regulation, supervision and prevention of abuse of dominant positions by undertakings, agreements, decisions, and shared practices, which have as their object or effect, the prevention, restriction or distortion of competition.[69]

The Act applies to operations regarding the measures, decisions, regulations and supervision for the protection of competition concerning those agreements, decisions and shared practices which have as their object or effect the prevention, distortion or restriction of competition amongst any undertakings which either operate in, or may affect markets for goods and services within the territory of Turkey; the abuse of dominant power in the market and all kinds of operations and conduct deemed to create a merger or acquisition by which competition in the market would be significantly impeded.[70]

2.2.1 The Act on the Protection of Competition No: 4054

An important feature of the Customs Union Decision (CUD) is the enactment of the Law. Part two of the CUD presents the competition rules of the Customs Union. Under Article 30, it is stated that acts restricting, preventing or distorting competition are prohibited for the proper functioning of the Customs Union. Article 31 declares a prohibition of abuse of a dominant position in the territories of the Community and/or Turkey. The CUD declares EC Competition law as the primary source for the interpretation of the Law, and Article 33 of the CUD states that 'any practice contrary to Article 30, 31 and 32 shall be assessed on the basis of criteria arising from the application of the rules of Article 85, 86 and 92 of the Treaty of Rome and its secondary legislation. According to Article 37 paragraph 1 'with a view to

[69] www.rekabet.gov.tr/word/ekanun.doc retrieved on 12.03.2005. Rekabetin Korunması Hakkında Kanun Kanun No: 4054 - RG 13.12.94 22140.
[70] Ibid, Sec. 1, Art. 2.

achieving the economic integration sought by the Customs Union, they shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively'. Paragraph 2 states that 'to comply with the obligations of paragraph one, Turkey shall, before the entry into force of Customs Union, adopt a law which shall prohibit behaviors of undertakings under the conditions laid down in Articles 85 and 86 of the EC Treaty. It shall also ensure that, within one year after the entry into force of the Customs Union, the principles contained in block exemption regulations in force in the Community, as well as in the case law developed by the EC authorities, shall be applied in Turkey'. Paragraph 3 of Article 37 declares 'The Community and Turkey shall communicate to each other all amendments to their laws concerning restrictive practices by undertakings. They shall also inform each other of the cases when these laws have been applied'.[71]

As stated in Article 1, the purpose of the law is to regulate the markets for goods and services so that free trading, free access to the market and functioning of effective competition would be ensured. The purpose of the legal restrictions set forth by the competition rules is to protect competition in the market.

Article 2 governs the scope of the Law, that it applies to the operations as regards measures, decisions, regulation and supervision for the protection of competition concerning the agreements, decisions and concerted practices which have as their object or effect prevention, distortion or restriction of competition amongst any undertakings which either in or may affect markets for goods and services within the territory of Turkey, and the abuse of dominant position in the market, and all kinds of operations and conduct which are deemed to create a merger and acquisition by which competition in the market would significantly be impeded. According to this Article, the Law shall be applied to all kinds of entity including state-owned enterprises.[72]

Regardless of the place or domicile, no matter where the undertaking concerned operates or is established, either in Turkey or abroad, so long as the agreement, decision or concerted

[71] Aslan, 2001, p. 22.
[72] Anık, G., 'Competition Rules of Turkey' European Competition Law Review Vol.19, Issue 5, 1997, p. 132.

practice or the abuse of dominant position, or the merger and acquisition impairs competition in the market for goods and services within the territory of Turkey, the transactions and/or behavior performed by those undertakings will be within the scope of the law.

a. Article 4 of the Act on the Protection of Competition No: 4054

Under the Article 4 of the Act No: 4054, directly or indirectly fixing sales or purchase prices or other trading conditions of goods and services, sharing markets or controlling production or distribution or eliminating or preventing new comers to the market or applying dissimilar conditions to equivalent transactions are some examples of the prohibited situations.

For the purposes of the article, the term agreement is used to refer to all kinds of compromise or accord to which the parties feel bound, even if these do not meet the conditions for validity as regards the Civil Law. It is not important whether the agreement is written or oral. Even if the existence of an agreement between the parties cannot be established, direct or indirect relations between the undertakings that replace their own independent activities and ensure a coordination and practical cooperation are prohibited if they lead to the same result. Thus, it is intended to prevent the undertakings from legitimizing acts limiting competition via fraud against law. Most of the time, in order to deal with their common problems, undertakings form associations among themselves that may or may not have a legal personality. These associations can take decisions that serve to generate more earnings for their members by preventing competition between the members. Such decisions are also against the competition system and are prohibited.[73]

Not all agreements are under the scope of the Act No: 4054. Agreements made between competitors who are not related with competition and the agreements which do not have appreciable effect on competition (De Minimis rule) are outside of the scope of the Article.[74]

[73] http://www.rekabet.gov.tr/word/egroundforarticles.doc retrieved on 11.12.2005, The Act No 4054. Grounds for the Articles. Art. 4.

[74] http://www.rekabet.gov.tr/word/sempozyum/panelsorulari.doc retrieved on 02.04.2006. The 'de minimis' rule is not applicable in Turkish Competition Law as there has been no article regulating it in the Act on the Protection of Competition No: 4054, yet.

Article 4 of the Act No: 4054 is different from Article 81(1) of the Treaty. Article 4 differs from the Article 81(1) with the provision of '…possible impact…'" on restriction of competition, which cannot be found in Article 81(1).[75]

b. Article 5 of the Act on the Protection of Competition No: 4054

In certain circumstances, some restrictive practices, which are within the scope of Article 4 of the Act No 4054, may have beneficial effects and be exempted from the implementation of prohibition. If the agreement, decision or concerted practice concerned satisfies certain requirements stated in Article 5, then the Competition Board may declare the provisions of Article 4 inapplicable to that agreement, concerted practice or decision. Exemptions can be in the form of individual or block exemptions.

As in Article 81 (3), article 5 requires two positive and two negative conditions for an individual or block exemption. In case these positive effects are not reflected on the consumer and stay as firm profits, the exemption will not be implemented. The fact that the consumer receives a just share of the benefit created also reveals the social side of the competition law. Also, where less limitation on competition can be sufficient to achieve these beneficial effects, the agreements will not be granted exemption. Only those competition limitations which are necessary and compulsory for achieving the beneficial effect will be granted exemption. It is such that, with these limitations, competition must not be eliminated in a significant part of the relevant product market.

Exemption decisions will be made for certain periods and these decisions will be renewable if the specified conditions exist. Thus, the Board will be given the opportunity to monitor the changes that may emerge or the developments that may cause a restriction in competition within the relevant market, after the exemption decision has been taken.

Also, the chance to be granted a block exemption by a communiqué of the Competition Board is given to the groups of agreements which carry the conditions listed in the First

[75] Aslan, p. 122.

paragraph. Thus, both a legal certainty is secured for these agreements and the beneficial effects of these agreements are brought into the economy.[76]

[76] http://www.rekabet.gov.tr/word/egroundforarticles.doc The Act No 4054. Grounds for the Articles. Art. 5.

III. THE AUTOMOBILE INDUSTRY IN THE EUROPEAN UNION

Verheugen highlighted the importance of the automotive sector as *"a pillar of the European economy"* and a key towards achieving the Commission's overarching objectives of *"long-term prosperity in Europe, and in particular the restoration of sustainable and dynamic growth and jobs"*.[77]

The automotive industry[78] is a key industry in the European economy[79] characterized by having few vehicle manufacturing firms and a substantial number of independent suppliers to which about 2/3 of the production is outsourced. The output includes cars, light trucks and vans, buses and coaches, medium and heavy trucks, motorcycles and agricultural and forestry tractors.

Furthermore, the EU is the largest automotive production region (34%) in the world and the industry comprises 7, 5 % of the manufacturing sector in the Union. EU produces every third car in the world. Direct employment by the automotive industry stands at about 2 million employees, while the total employment effect (direct and indirect) is estimated to be about 10 million.[80]

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[77] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/480&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 09.06.2006.

[78] The automotive industry has for a long time seen mergers and acquisitions. Currently the main EU car industry is composed of DaimlerChrysler, Volkswagen (VW), BMW, Ford Europe, General Motors (GM) Europe, Renault, PSA (Peugeot-Citroën), Fiat and Porsche. In addition there are a number of small manufacturers. Some Japanese manufacturers also have significant production facilities in the EU. The EU truck industry buses and coaches sector has seen a similar consolidation. Europe now sees Volvo, Scania, Iveco, DaimlerChrysler, MAN and Daf.

[79] The automotive industry occupies a central role in the industrial economy influencing technical development of other industries.
http://ec.europa.eu/comm/competition/car_sector/distribution/eval_reg_1475_95/report/hearing/blum.pdf retrieved on 02.06.2006.

[80] http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/11&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 05.06.1006.

3.1 Abolished Block Exemption Regulations No 123/85 and No 1475/95

In the period until 2002 when the Regulation No 1400/2002 which is the last block exemption regulation on vertical agreements in the sector of motor vehicles was issued, exemption regime of this sector applied by Commission had experienced many changes. The important phases in this process are BMW decision[81] in 1974, Regulation No 123/85 and Regulation No 1475/95.

Before June 30th, 1985 when there was no block exemption regulation on the sector of motor vehicles, the first exemption decision for distribution of motor vehicles and after-sale services taken by the Commission is BMW Decision. This decision was a turning point for the sector. Manufacturers were thought to form their distribution systems in accordance with this decision; however things did not go in this way. Most of the automobile manufacturers have continued to submit their agreements to the Commission for having personal exemption. Notwithstanding a submission requirement for agreements which are in compliance with the conditions specified in accordance with the principles adopted in BMW decision, the Commission decided to issue a block exemption regulation of which these companies could automatically make use in order not to deal with so many individual exemption applications and in order to create a guiding and secure environment for motor vehicle sector.[82]

These unique characteristics of the motor car have been put forward by motor manufacturers as justifying special rules on the distribution of cars in BMW case. The importance of the Commission's decision is shown by the fact that some two and a half pages are devoted to it in the Fourth Annual Report.[83] The most notable feature of the exemption granted is that it permits a restriction on the number of dealers allowed in Germany, again a quantitative, not a qualitative criterion.[84]

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[81] OJ L 29, 3.2.1975.
[82] Uğur, Gazioğlu, Motorlu Taşıtlar Sektöründe Rekabet: Dağıtım ve AB Düzenlemeleri, Rekabet Kurumu Uzmanlık Tezi Serisi No: 65, p. 2.
[83] (1975) 1 CMLR D, 44,56.
[84] D.G. Goyder, EC Competition Law, Fourth Edition, New York, Oxford EC Law Library, 2003, p.203.

The Commission justified its decision by saying that 'motor vehicles, being products of limited life, high cost and complex technology require regular maintenance by specially equipped garages or service depots because their use can be dangerous to life, health and property and can have a harmful effect on the environment'. In this context, some of the vertical limitations which are banned for other products are allowed in distribution of motor vehicles; however a firmer exemption regime is applied for some points compared to other products.[85]

It described the required co-operation between BMW and its dealers as going beyond the mere marketing of products and involving co-operation which not only promoted economic process and the distribution of the vehicles but also gave benefits to consumers in the form of improved service. The Commission felt that this close co-operation and specialization by the dealers would not be possible if BMW were required to admit to the system, without limit of numbers, any dealer required merely show that he had adequate premises, staff, and other qualitative attributes.

Regulation No 123/85

The first official draft of a block exemption Regulation No 123/ 85 for car distribution was published in June 1983. The Commission also issued a notice concerning the Regulation (EEC) No 123/85[86] of 12th December 1984. It remained in force for a period of ten years from July 1st 1985 to June 30th 1995 in order to cover distribution and service agreements of motor vehicles.

Regulation No 123/85 based principally upon the Commission's BMW decision and a number of other Commission proceedings. Regulation No 123/85 met strong opposition from the motor industry. Amongst their complaints were that it sought to bring about an artificial realignment of vehicle prices within the EC, sought to interfere without justification in the detailed relationship between manufacturer and dealer, and failed to provide sufficient legal certainty for both.

[85] Gazioğlu, p. 13.
[86] OJ 1985 C17/4.

Regulation No 123/85 provided exemption for selective and exclusive distribution and service agreements considering that some limitations on distributors and authorized dealers are indispensable in order for distribution of motor vehicles and after-sale services to be efficiently executed. Regulation No 123/85 envisaged that the supplier could limit the number of authorized dealers and services through a qualitative, selective and exclusive distribution system. Authorized dealers of the suppliers were entitled to establish minimum standards for commercial equipment of the office, technical hardware, training of the personnel, advertisement, storage and delivery of vehicles and maintenance and repair services in order for functions of the motor vehicles to be executed in a safe way.[87] The manufacturer would agree to appoint other dealers in the allotted territory during the period of contract. Considerable concern, especially by consumers' organizations, had been expressed about difficulties placed in way of purchasers desiring to make parallel imports of vehicles[88] from Member States where cars could be purchased more cheaply and the draft contains clauses designed to give some protection to consumer.[89] Thus, consumers are entitled to have servicing or repairs done under a manufacturer's warranty anywhere in the Common Market, and entitled to order cars to the specifications required at the place where they are to be registered from a dealer in another Member State, provided that the manufacturer or his importer sells the relevant model through the official distribution network at both places. Spare parts supplied by third parties, matching the quality of those supplied by the manufacturer, could also be purchased by dealers in the official network without breach of their agreement with the manufacturer.

Another assumption on which the Regulation No 123/85 is based is that brand exclusivity will enable authorized dealers and distributors to focus on goods supplied by the

[87] Reg. (EEC) 123/85, Art. 4 (1) (1).

[88] Judgment of the Court of 17 September 1985. - Ford v. Commission. Competition - Distribution systems. - Joined cases 25 and 26/84. pr. 46 ' A*s the Commission rightly contends , the Commission is not obliged to carry out a detailed examination of all the advantages and disadvantages likely to flow from a selective distribution system when it has good reason to believe that a manufacturer has used such a system to prevent parallel imports and thus artificially to partition the common market . Moreover, the contested decision does consider what advantages and disadvantages may result from the main dealer agreement'.*

[89] The Commission was concerned by various surveys and the intervention of BEUC indicating that the prices of vehicles were very different in each Member States and has taken various steps to prevent brand owners from making parallel trade more difficult. On the complaint of Eco System, it adopted an interim measure against Peugeot, the appeal against which has recently been rejected by the Court of First Instance. Peugeot v. E.C. Commission Case T–9/92 (1993) ECR II 493: (1995) 5 CMLR 696.

manufacturer and distribution of vehicles and after-sale services will be properly executed.[90] In this context, unless objective reasons are established by authorized dealers for sale of products by one or more than one brand, non-competition obligations which prevent the sale of vehicles by other manufacturers are under the coverage of exemption. [91]

Regulation No 123/85 is aimed at protecting economic independency of authorized dealers against their suppliers. In this way, it is banned that supplier could impose obligations for the authorized dealers to apply minimum resale price.[92] Besides, supplier, unless the valid reasons are available, is banned to change the agreed region of the authorized dealer or assign new authorized dealers within this region. Also dealers were now entitled to a minimum period of four years' appointment in order that they would not be over dependent on the manufacturer or importer.

Regulation No 123/85 enables the manufacturers to compel their authorized dealers to provide after-sale services through the view that sale of motor vehicles and provision of maintenance and repair services could prove more effective if they are provided together.[93] In this way, manufacturers relate two different commercial activities in the agreements they conclude with their authorized dealers.

Regulation No 1475/95

As the 1995 expiration date for Regulation No 123/85 approached, the Commission was determined that its replacement would not be so greatly in favour of the motor manufacturers and would allow greater competition between dealers, as well as more independence for them from their suppliers. It was also regarded as important by the Commission that:

- Independent spare part manufacturers and distributors should have easier access to the various markets, notably outlets provided by the authorized dealers;

[90] OJ C221, O7/08/2001 P. 0138–0149. Opinion of the Economic and Social Committee on the 'Evaluation Report on motor-vehicle distribution and sales and after-sales service in accordance with Regulation (EC) No 1475/95 (Additional opinion to the opinion on the XXIXth Report on competition policy).
[91] Reg. (EEC) No: 123/85; Recital parg. 7.
[92] Reg. (EEC) No 123/85; Art. 6 (2).
[93] Reg. (EEC) No 123/85; Art. 4 (1) (1) (e) .

- The position of customers should be improved in accordance with the principles underlying the internal market and that,
- The dividing line between agreements within and without the framework of the block exemption should be clearer.[94]

Following the experiences of Commission on execution of the previous Regulation and after discussions made with the affected parties, on June 28th 1995, Regulation No 1475/95 replaced Regulation No 123/85 and it has been used by nearly all of the motor vehicle distribution networks within EU.

In Regulation No 1475/95, basic principles adopted in Regulation No 123/85 such as selective and exclusive distribution system remained the same; additions were made in order to strengthen the positions of consumers and authorized dealers as a result of similar targets.

The fact that distribution of motor vehicles, spare parts and after-sale services are mutually executed was established as a condition in order for the agreements to make use of block exemption; in this way a legal connection was established between sale and after-sale services.[95]

The restrictions imposed on the dealer by the manufacturer had to some degree limited,[96] thus the dealer is now granted the right to sell the cars of other manufacturer provided this is done on separate premises and under separate management in such a way that no confusion between the marks is possible, maintenance and repair of vehicles of different marks can be performed in the same workshop.[97]

Moreover, the dealer is entitled to sell cars outside his allotted territory provided that he does not employ personal solicitation or direct mail: he may advertise through television or other media and trade magazines or newspapers which circulate outside his allotted area.

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[94] Goyder, p. 205.
[95] Reg. No 1475/95; Art. 5 (1) (1) (a).
[96] Serdar Nart, Avrupa Birliği ve Türk Hukukunda Motorlu Araçların Dağıtımında Rekabetin Korunması, Dokuz Eylül Üniversitesi, Sosyal Bilimler Enstitüsü, Özel Hukuk Anabilim Dalı, Yüksek Lisans Tezi, 2002, p. 91.
[97] Reg. No 1475/95; Art. 3 (1) (3).

The 'black' list of anti-competitive clauses has been extended;[98] these now include provisions banning clauses in the agreement which:

- seek to apply the agreement to products or services outside the scope of the Regulation;
- impose other restrictions on competition not expressly exempted;
- allow the supplier to appoint other undertakings to carry out distribution or service functions within the distributor's territory;
- restrict the dealer's freedom to determine prices or discounts for the cars he sells;
- restrict final consumers, intermediaries, or distributors from obtaining goods or servicing from any undertaking belonging to the network, e.g., repairs under guarantee;
- seek to impose a minimum duration for the fixed-term agreements of less than five years (if there is a period of notice of termination this must be at least two years unless special circumstances apply).

The Regulation No 1475/95 also contained better protection for the rights of independent suppliers of spare parts, a major consideration for the Commission during the negotiation of the new Regulation. Dealers must be entitled to use spare parts sourced from third parties who match the quality of official suppliers' products, and such third party suppliers are entitled to place their trade mark or logo on the products.[99] Moreover, the motor manufacturers must supply to all independent repairers[100] the technical information necessary for them to carry out repairs or maintenance on cars, essential for many of the new electronic controls in modern vehicles. An exception is provided if the information covers intellectual property rights or is substantial secret know-how, but even in this last case it must not be refused 'improperly'.[101]

Regulations which will provide more guarantee and economic independence for authorized dealers in terms of their relations with suppliers were established; minimum agreement period was increased from four years to five years in distribution agreements

[98] Reg. No 1475/95; Art. 6.
[99] Reg. No 1475/95; Art. 6 (1) (11).
[100] It includes various categories of operator, from independent garage owners to specialist service centers (e.g. body shops, electronic fitters), through chains active especially in standardized repairs and servicing.
[101] Reg. No 1475/95; Art. 6 (1) (12).

concluded on a term basis; as for the agreements concluded for an unspecified period, minimum period for notification of termination was increased up to two years.[102]

After extensive consultation and hard-fought negotiations, the final form of the Regulation adopted as No 1475/95 has increased to some degree the independence of dealers, but failed again to provide a truly effective mechanism or sanction to ensure reasonable uniformity of car prices across the community.[103]

[102] Reg. No 1475/95; Art. 5 (2) (2) and (3).
[103] Goyder; p; 206.

IV. THE AUTOMOBILE INDUSTRY IN TURKEY

Turkey lies between Europe and Asia and this geographic situation gives the Turkish automotive industry an important strategic advantage and automotive companies from Italy, Germany, France, Japan, USA and S. Korea have important investments. They have export capacity and especially in crisis periods, this capacity helped them to survive the crisis with less financial loss. In Turkey production costs are lower, compared to developed EC countries.[104]

Turkish automotive sector began as an assembly industry in 1950s.[105] The sector remained domestically oriented and unable to achieve economies of scale comparable to world standards right up until Turkey's ascension to the Customs Union with the European Union.[106]

In the 1960s, the first steps were taken towards establishing an automotive industry with the aim of 'import substitution', and ever since it has been closely integrated with the EU automotive industry. First products were tractors and commercial transportation vehicles in 1960s. Passenger car production started in 1970s.[107] The sector had gained dynamism since 1984, with diminished import restrictions and new foreign investments (GM, Toyota and Peugeot). The resulting competition had increased the concern of the sector with productivity increase, quality improvement and product diversity which had been important motives for new technologies, investment and increase of capacity.[108]

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[104] http://www.wbr.co.uk/autoturkey/turkey.pdf, retrieved on 02.12.2005. 'About The Turkish Automotive Industry'.

[105] Today there are 19 companies in production of which 5 are automobile producers and 14 are commercial vehicle producers. In this industry most of the companies have foreign partners and they produce for both domestic and international markets.

[106] Leyla Tunç Yeltin, Gümrük Birliği Çerçevesinde Avrupa Birliği ve Türkiye'de Otomotiv Sektörü, İstanbul, İktisadi Kalkınma Vakfı Yayınları, 1999, p.1

[107] http://www.deik.org.tr retrieved on 05.07.2006, Dış Ekonomik İlişkiler Kurulu, 'Turkish Automotive and Components Sector' October 2002.

[108] Lale Duruiz, Nurhan Yentürk, Facing the Challenge, Turkish Automobile, Steel and Clothing Industries' Responses to the Post-Fordist Restructuring, İstanbul, Turkish Social Science Association, 1988, p. 68.

Starting from the early 90s automotive industry in Turkey, developed rapidly as a result of the foreign trade liberation. The main determinant for this development is the reduced taxes on imports which accelerated the entrance of the import cars. As a result, industry which was protected by high taxes for years, opened to international competition.[109] The Customs Union with the EU in 1996 brought new conditions as well as intensified competition in the sector.

The sector has gone through fundamental changes and significant initiatives in 1990s. Facing a boom in domestic demand in 1992 and 1993, automotive industry initiated rapid expansion plans and engaged in various investments. Being one of the most affected sectors in 1994 crisis, recession has badly affected the sector, which continued until 1996. The sector recovered in 1997 and revealed an upswing in 1997 and in the first half of 1998. It again has begun to decline in 1999 as a result of the effect of both Far Eastern and Asian crisis. The delayed demand of 1998 and 1999 and also the future demand due to consumer expectations were realized in 2000. 2001 crisis depressed the production down to the 1990 level. The sector recorded a recognizable increase in exports in an effort to manage the twin crisis in late 2000 and 2001.

Customs Union process requires technical harmonization and every single technical detail causes another discussion. With the Customs Union Decision, the custom duties imposed on the new motor vehicles, which have European origin, are abolished. However, to protect the Turkish automotive sector on some products, Turkey got some extra time for the harmonization process.

Especially following the Customs Union with the EU, the industry has started to have conflicts with the governments which think that automobile manufacturers have been enjoying abnormally high profits at the expense of the customers who are forced to buy lower quality cars with high prices. The industry is, in other words, seen as a typical example of an infant industry that cannot grow up, and need to be ‘put in order’ and ‘disciplined’.

[109] Yeltin, p. 47.

In the framework of the Customs Union with the European Communities, Turkish automobile industry faced some structural changes also. Besides the production of Japanese and South Korean firms with Turkish partners, Turkish automotive sector could be considered as fully integrated with the European Union since the major firms operating in Turkey are all European firms and/or European affiliates of multinational concerns.[110] Foreign investment in the industry affects the firms positively in respect to technology transfer, employment and acquiring qualified workers. The biggest share of the foreign investment after the customs union which is for the automobile industry shows the development level of the industry.

4.1 Communiqué on Group Exemption Regarding Distribution and Servicing Agreements in Relation to Motor Vehicles Communiqué No 1998/3[111]

According to the responsibilities of Turkey based on the 39th article of Customs Union Decision, to comply with the competition rules of the European Union related to the automotive sector, Communiqué No 1998/3 is enacted. It is the translation of Regulation (EC) No 1475/95. Amendments were envisaged in the notification periods for annulment in the Communiqué No 1998/3, and the Communiqué concerning an Amendment to the Block Exemption Communiqué on Motor Vehicle Distribution and Servicing Agreements No 2000/3 entered into force.[112]

The selective distribution agreements related to the resale of the motor vehicles with the firms in Turkey were subject to the competition law and the amendments of this law.

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[110] Yeltin, p. 50

[111] http://www.rekabet.gov.tr/word/tebligeng10.doc 2000/3 sayılı Rekabet Kurulu Tebliği ile Değişik Motorlu Taşıtlar Dağıtım ve Servis Anlaşmalarına İlişkin Grup Muafiyeti Tebliği , Tebliğ No : 1998/3 RG 01.04.1998–23304.

[112] http://www.rekabet.gov.tr/word/tebligeng18.doc,Communiqué 1998/3 Sayılı Motorlu Taşıtlar Dağıtım ve Servis Anlaşmalarına İlişkin Grup Muafiyeti Tebliğinde Değişiklik Yapılmasına İlişkin TebliğTebliğ No : 2000/3 RG 04.10.2000- 24190.

Additionally, these agreements, according to their effects on trade between Turkey and European Union, were subject to the Union's competition law.

This Communiqué aims to establish several adjustments to stimulate competition in the car sector, to improve the functioning of a distribution and to balance the diverse interests.

These adjustments aim in particular to:

- give dealers, the great majority of whom are small and middle sized enterprises greater commercial independence vis-a vis manufacturers;
- give independent spare part manufacturers and distributors easier access to the various markets, notably the outlets provided by the car manufacturers' networks;
- improve the position of consumers in accordance with the principles underlying the free market;
- clarify the dividing line between acceptable and unacceptable agreements and behaviors.

4.1.1 The First Breach Case: Renault Case[113]

The first breach case was Renault case.[114] Claimants in this Renault case are bonnet manufacturers from Bursa who manufacture low quality bonnet parts which are suitable for Renault automobiles. After Renault requested that manufacturers cease their production through unfair competition cases it filed against manufacturers, manufacturers submitted their complaints to Renault Inc. together with all the information they could find against Renault.

Those are the clauses because of which fine imposed on Renault.

[113] Ref. : 00–42/453–247 Date: 02.11.2002 date Boztekin /Renault Mais case.
[114] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 106–111.

- Fixing the prices of spare parts sold and used for repair by MAIS.

'MAIS determined and executed resale prices of the spare parts in accordance with directives which were considered as inseparable parts of Authorized Merchandise Agreement (Article 35) and Authorized Workshop Agreement (9th Article),[115] *and no evidence was submitted stating that notices which indicated that there should be no reduction more than 10% over retail sale price of MAIS on resale sale prices of spare parts used in repair services and those who were in breach of this application shall be punished were not abolished; and repair invoices which were attached in the annexes of MAIS defences and taken from the authorized retailers indicated that the application which stated that recommended price shall be complied with and there shall be no reduction more than 10% continued in the same way'.* [116]

- banning the authorized retailers to sell their products to public institutions and organizations in special sales.

'In accordance with Article 35 of Authorized Merchandise Agreement, as for the fleet sales pursuant to 'Directive of Special Sales Unit' which was accepted as an inseparable part of this agreement and abolished by MAIS on 20.03.2000, It was determined that authorized retailers were banned to sell their products to public institutions and organizations.[117]

- determining maximum reduction rates applied by authorized retailers[118],

That Directive of Special Sales Unit envisages that MAIS determines reduction rates in fleet sales of authorized retailers.

- determining from which authorized retailers these customers could purchase goods,
- continuation of these applications following the notification.

It is concluded from this case that Competition Authority considers determination of prices and reductions and abolition of freedoms of retailers in special sales as a considerable breach and also considers other breaches under the scope of exemption following amendments.

[115] Renault Case 2 (a).
[116] Renault Case 2 (b).
[117] Renault Case 2 (d).
[118] Renault Case 2 (d).

4.1.2 Doğuş Case[119]

Turkish Competition Authority conducted another investigation on motor vehicles for Doğuş group.[120] An investigation was carried out for a complaint which included a claim that Act on Protection of Competition No 4054 was breached because of the fact that Doğuş Automotive Service and Trade Inc. and Doğuş Automotive Holding Inc. determined resale prices, reduction rates and sales conditions in fleet sales for Volkswagen (VW) cars which were launched in automobiles and light commercial vehicles market.

Competition Authority decided that Doğuş automotive group determined resale prices of VW vehicles and that addition of "recommendation" phrase into the price tariffs did not cease this application and that some punitive sanctions were applied through determination of profit margins for authorized retailers in accordance with the price determined by Doğuş Automotive (indirect price determination), periodical control over prices and invoices of the vehicles sold, that Doğuş Automotive warned authorized retailers in the event that price tariffs were not complied with, execution of price tariffs, reduction of retailer profit margin which was determined as an amount in %, reduction of premiers given to sales representatives and authorized retailers.[121]

It was also concluded that reduction rates of retailers in fleet sales would be determined by Doğuş Automotive. According to evidence obtained during investigation, Doğuş Automotive issued a sales circular for determination of resale conditions and reduction rates of authorized retailers in fleet sales. In this circular, it is envisaged how much reduction rate (percentage) this retailer will apply for fleet sales and other sales. In the resolution, it was envisaged that price competition between retailers was eliminated through circulars on fleet sales conditions and punishment was conducted on the retailers which depart from this procedure (through reduction in the income of the authorized retailer).

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[119] Doğuş Case, Ref.: 01-47/483-120 Date: 05.10.2001.
[120] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 111.
[121] Ibid, p. 112.

Competition Authority also determined that Doğuş kept a territorial protection and prevented passive sales through very efficient punishments and supervisions.

Doğuş Automotive, which is Turkey Distributor of Volkswagen branded cars and Genpar Automotive, which is importer of spare parts and accessories of the above-stated vehicles, were in breach of the Act No 4054 by jointly determining retail sales prices and conditions of spare parts and accessories within this product market through applications set out in the retailer agreements concluded with authorized retailers and supervising these applications through AS/400 System and periodical visits made by their own personnel and using additional profit margin as a criterion.

4.1.3 Peugeot Case[122]

The last investigation which was conducted in this sector and concluded by Competition Authority was about Peugeot. This investigation was conducted in accordance with the first subparagraph of the 40th article of the Act No 4054 as Peugeot Automotive Inc. (POAŞ) and Peugeot Automotive Marketing Inc. (POPAŞ) did not amend their Authorized Merchandise Agreements which were against the Communiqué 1998/3.

In this resolution, agreements were investigated in accordance with the Act No 4054 and Communiqué No 1998/3 and it was envisaged that distribution agreements of motor vehicles could have provisions which could limit competition because of the vertical restraints they contain, however it was also envisaged that they shall be considered under the scope of exemption as set out in the 5th article of the Act as the ones in the sector of motor vehicles had effects which could increase efficiency and quality in the event that they could have some conditions as in other vertical agreements. Besides, in this resolution, it was stated that Competition Authority shall be notified and individual exemption shall be granted for

[122] Peugeot Case Ref: 04–82/1168–294 Date: 27.12.2004.

agreements which include competition limitations under the scope of the 4th article of the Act No 4054, but which can not make use of exemption provided by the Announcement.

Competition Authority carried the following resolutions in accordance with the investigation conducted that Authorized Merchandise Agreements concluded with the authorized retailers and services by Peugeot Automotive Inc. were in breach of the 4th article, (a) and (b) subsections of the Act No. 4054. The Institution also was not notified of the agreements which were in breach of the 4th article of the Law No. 4054 and accordingly did not make use of group exemption; although the Board informed about the agreements. Agreements which were in breach of the Law were executed until March of 2000 by Peugeot Automotive Inc. and for the remaining period, the above-stated agreements were executed by Peugeot Automotive Marketing Inc. which is included in the same economic group. Although the enterprises under investigation received three separate Board resolutions, they persisted to make the above-stated breaches.

It is understood from the above-stated resolutions that Competition Authority considers the following circumstances as the most aggravating ones:

- determination of resale prices by the supplier and establishment of several control and punishment mechanisms for execution of the determined prices,
- determination of reductions to be executed by the retailers, establishment of supervision and punishment system for this and indirect price determination,
- determination of reductions to be executed by the authorized retailer in fleet sales by the supplier,
- ensuring authoritarian territorial protection by banning passive sales and establishment of several supervision and punishment systems for this purpose,
- banning the retailers from effecting sales to public institutions.

The first three breaches mean direct or indirect resale price determination. The last two breaches are related to limitation of territory and customers for which the retailer will make activities. Essentially, the supplier, through a provision to be established in the agreement, could establish a provision which indicates that the right to engage in the sales other than a

certain level is reserved as for the fleet sales. In this way, the supplier could participate in the bids with its own retailers. This is logical and requires exemption. Therefore, the supplier could try to override rival brands and convince other people to prefer its own brand by executing more reduction than that of its retailers in the bid in which they will offer with vehicles with other brands. This situation could be granted with exemption as it increases competition between brands. Essentially, such a provision forms a competition limitation in terms of the article 4. Because, this provision ensures freedom of the supplier or the retailer and it does not limit freedom of any supplier or retailer. Even if it is thought that the supplier can not compete with its retailer, and accordingly sales freedom of the retailer is limited, these provisions considerably increase competition between brands. Aim of these provisions shall be considered as increasing competition between brands rather than preventing competition between them. In this way, that the parties, at their own discretion, could amend the provisions concerning the fleet sales shall be a more suitable solution. However, the concept of fleet sales shall be defined in a more obvious and objective way.[123]

[123] Ibid, p. 120–121.

V. THE NEW BLOCK EXEMPTION REGULATION REGARDING VERTICAL AGREEMENTS AND CONCERTED PRACTICES IN THE MOTOR VEHICLES – REGULATION (EC) NO 1400/2002 AND DIFFERENCES BETWEEN BLOCK EXEMPTION COMMUNIQUÉ ON VERTICAL AGREEMENTS AND CONCERTED PRACTICES IN THE MOTOR VEHICLE SECTOR COMMUNIQUÉ NO: 2005/4

5.1 Block Exemption Communiqué No 2005/4

Despite the fact that the Communiqué No 1998/3 was a regulation aimed at the motor vehicle sector, it covered certain types of agreements concluded in the sector. Due to the fact that the Communiqué covered only those agreements where distribution and servicing existed together, the other types of agreements in the automotive sector remained outside the scope and providers were not granted another alternative by which they can enjoy block exemption as to determining the distribution system. This situation led to the fact that the efforts for structuring the distribution system flexibly remained outside the scope of block exemption, and rendered the Communiqué a regulation which did not cover new techniques of distribution.[124]

Experiences obtained from the implementation of the Communiqué No 1998/3 more than 5 years, have indicated, as is summed up above, that some regulations of the Communiqué fall short of attaining the objective for a competitive market, and some of them give rise to inconveniences as regards the practice. In the light of these establishments, it was concluded that a new regulation was needed, which[125]

- allowed providers flexibility in setting up the distribution and servicing network,
- strengthened the position of authorized sellers and services vis-à-vis the provider,

[124] http://www.rekabet.gov.tr/word/teblig27.doc , Motorlu Taşıtlar Sektöründeki Dikey Anlaşmalar ve Uyumlu Eylemlere İlişkin Grup Muafiyeti Tebliği Tebliğ No: 2005/4 RG 12.11.2005 25991, par. 5
[125] Ibid, par. 9.

- ensured that manufacturers of spare parts were involved in competition,
- cleared the way for independent repairers to constitute an alternative for consumers by means of facilitating their access to the technical information, equipment and diagnostic devices related to maintenance and repair services.

Taking into account the foregoing statements, the Competition Board decided on the issue of this Communiqué.

The scope of the Communiqué No 2005/4 was expanded.[126] It has been targeted that not only the agreements where distribution and service together but also the agreements regarding distribution or service being independent from each other are included in the scope. Thus, the agreements entered into between wholesalers and importers which do not perform after-sales service and the agreements entered with repairers not selling vehicle and manufacturers which sell spare parts to suppliers are included into the scope.

Besides, being different from the Communiqué No 1998/3, it has been targeted that the authorized sellers can sell the different brand vehicles in the same showroom provided that they are sold at different sections.

Another goal among those of the Communiqué No 1998/3 is to ensure competition in after-sales services. In respect to this target, new decrees have been enacted with respect to providing the spare parts manufacturers' access to authorized sellers and furthermore, the authorized seller and services were granted with the right of using spare parts of equivalent quality and the manufacturers of spare parts were granted with the right of putting their visible brand and logos on the products they sell to manufacturers of automobile.[127]

One of the most fundamental regulations introduced by the Communiqué No 1998/3 are those regulations aimed at guaranteeing the economic independence of authorized sellers and services. As an example of the regulations in question, one may cite provisions such as

[126] Communiqué No 2005/4, Art. 2.
[127] Communiqué No 2005/4, Art. 5 (4) (k).

preventing the reseller from intervening in the resale price, ensuring that the authorized seller is able to conclude sub selling agreements within his own region in the existence of justifiable grounds, signing agreements for at least 5 years in the event of concluding them definitely, and the existence of at least two-year period for notifying an annulment in the event of concluding them indefinitely. And with a view to ensuring multi-branding, the existence of an authorized seller's right was rendered compulsory as to his ability to sell motor vehicles of another brand, provided that it was at separate places of sale, with a separate management and in the form of a separate legal entity. These obligations imposed on authorized sellers and services resulted in the fact that the multi-branding targeted by the Communiqué No 1998/3 did not take place. Therefore, both the promotion of multi-brand sales and the strengthening of minimum safeguard standards secured in favor of authorized sellers via contract were required.

By another arrangement, it has been targeted to enable the independent repairers to compete with authorized services by enacting the obligation of providing the technical information necessary for maintenance and repair of motor vehicle. [128]

These arrangements being enacted by the new Communiqué arise from the needs of sector and finally, it aims to increase the competition in automotive sector; how this will be reflected in practice and also its effects will be seen in the course of time.

5.2 Block Exemption Regulation No 1400/2002

The motor vehicle sector has had a sector specific block exemption regulation for some time. Regulation No 1475/95, the former sector-specific regulation for the motor vehicle sector, expired on 30 September 2002[129] and was replaced by Regulation No 1400/2002 of 31

[128] Communiqué No 2005/4, Art. 5 (4) (k).
[129] The Commission Reg. (EC) No 1400/2002 also has a limited life. The text will expire at 31 May 2010. This date was chosen to coincide with the expiry of Reg. No 2790/99.

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 new regulation applies Article 81(3) of the EC Treaty to certain types of motor vehicle distribution and servicing agreements. So the Commission adopted as a 'bold but balanced reform' of the competition rules for the motor vehicle sector.[130]

Criticism of Regulation No 1475/95 made it likely that Regulation No 1400/2002 differ considerably from the former block exemption Regulation No 1475/95.[131] There have been many cases brought before the Community courts relating to Regulation No 1475/95 and its predecessor.[132]

The proposal of Commission for Regulation No 1400/2002 was drawn up following an extensive process of fact-finding and consultation.[133] And following this wide-ranging consultation exercise and in the light of its own experience, notably as regards the handling of some of its cases involving serious infringements of Article 81,[134] the Commission adopted a draft regulation on 5 February, which it discussed with Member States at the Advisory Committee meeting on 7 March.[135]

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[130] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1073&format=HTML&aged=0&language=EN&guiLanguage=en, retrieved on 16. 10. 2005.

[131] See e.g. BMW Belgium OJ (1978) L 46/33, (1978) 2 CMLR 126, upheld on appeal Case 32/78 BMW v. Commission (1979) ECR 2435, (1980) 1 CMLR 370; Ford Werke OJ (1983) L 327/31, (1984) 1 CMLR 596, upheld on appeal Cases 25 and 26/84 Ford Werke AG v. Commission (1985) ECR 2725, 1985 3 CMLR 528; Citroen Commission Press Release IP (88) 778, (1989) 4 CMLR 338; Peugeot OJ (1992) L 66/1, (1993) 4 CMLR 42 upheld on appeal case Peugeot v. Commission (1993) ECR II–493 and on appeal to the ECJ Case C–332/93 P (1994) ECR I–2727; VW OJ (1998) L 124/60, (1998) 5 CMLR 33, substantially upheld on appeal, Case T–62/98 Volkswagen AG v. Commission (2000) 5 CMLR 853: the case is on appeal to the ECJ, Case C–338/00;Opel OJ (2001) L 59/1, (2001) 4 CMLR 1441, on appeal Case T–368/00 Opel Nederland BV v. Commission.

[132] Case 10/86 VAG France v. Magne (1986) ECR 4071, (1988) 4 CMLR 98; Case C–70/93 BMW v. Ald (1995) ECR I–3439, (1996) 4 CMLR 478; Case C–266/93 Bundeskartellant v. Volkswagen AG (1995) ECR I–3477, (1996) 4 CMLR 505; Case C226/94 Grand Garage Albigeous (1996) ECR I–651, (1996) 4 CMLR 778; Case C–309/94 Nissan France (1996) ECR I–677, (1996) 4 CMLR 778.

[133] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/174&format=HTML&aged=0&languag EN&guiLanguage=en, retrieved on 03.11.2005.

[134] See the cases Volkswagen I (Commission decision of 28.01.1998, OJ L 124, 25.04.1999), Volkswagen II (Commission decision of 29.06.2001, OJ L 262, 2.10.2001), Opel (Commission decision of 20.09.2000, OJ L 59, 28.02.2001) and DaimlerChrysler (Commission decision of 10.10.2001, OJ L 257, 25.09.2002).

[135] Draft published in OJ C 67, 16.03.2002.

About this consultation process, in 10.04.2000, the UK Competition Commission (CC) issued a report[136] on the supply of new motor cars within the UK and also this report was the evaluation of the Regulation No 1475/95. CC, in this report, envisaged that Regulation No 1475/95 allowed many limitations which are against public interests and established that this is caused by selective and exclusive distribution system exempted by the Regulation and suggested that this system be changed.[137]

In the enacting stages, the opinions of member countries and EU parliamentary have been counseled. A consensus has been concluded in respect that a new arrangement is in fact not made after the end of this process and that the existing rules are arranged. As the arrangement of Commission is regarding certain types of agreements between undertakings, it has been naturally concluded that the rules of competitive law should play role in this arrangement and that this arrangement will solve the existing problems in the sector.[138]

In November 2000, an 'evaluation report'[139] which identified a series of problems with the current regulatory regime was adopted. The report was based on enquiries with and contributions from all categories of interested parties. The Report found that European consumers do not derive a fair share of benefits from the system that competition between dealers is not strong enough and dealers remain too dependent on car manufacturers. Consumers have also in practice found it difficult to make use of their Single Market right to take advantage of price differentials between Member States and buy their vehicle wherever the price is lowest.

In this evaluation report, decisions on black actions such as determination of resale price and prevention of passive sales and sales outside the authorized region were taken into account as well as the fact that arrangements made by the Regulation were evaluated in terms of exemption conditions; following the investigations conducted on motor vehicle manufacturers as a result of above-stated breaches, it was stated that one of the basic targets

[136] http://www.competition-commission.org.uk/rep_pub/reports/2000/ retrieved on 03.07.2006. UK Competition Commission's report: New Cars: A report on the supply of new motor cars within the UK, CM 4660,10.04.2000
[137] Gazioğlu, p. 19.
[138] http://ec.europa.eu/comm/competition/car_sector/new_ber_speaking_note.pdf retrieved on 04.03.2006.
[139] Report on the evaluation of Regulation (EC) No 1475/95 on the application of Art. 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, 15.11.2000.

of the Regulation 'protection of consumer rights within the single market' could not be achieved.

Also, a series of studies[140] were commissioned from independent consultants on key elements of the review, such as the obligation to link sales and service, the reasons for price differentials, the views of consumers on different features of current and possible future regimes, and the potential impact of various regulatory changes on all of those concerned.

5.3 The Changes of Regulation No 1400/2002 in Detail

Regulation No 1400/2002 is based on the Commission's general policy for the assessment of vertical restraints as laid down in Regulation No 2790/1999 and in the accompanying Guidelines on Vertical Restraints. Although it is based on the same non-perspective approach as Regulation No 2790/1999, Regulation No 1400/2002 introduces a stricter approach.[141] The main reason for this is that the Commission, by means of the new Regulation, aims in particular at promoting innovation of distribution formats, so far totally absent from the car sector.

Regulation No 1400/2002 is thus based on a more economic approach and on the principle that it is for the economic operators (manufacturers, dealers) to organize distribution according to their own needs. Consequently, the new Regulation is less perspective than Regulation No 1475/95, with a view to avoid the 'straitjacket effect'[142] observed in the case of Regulation No 1475/95 and to allow the development of innovative distribution formats.[143]

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[140] The Sales-Service Link, by Autopolis; Price Differentials in the EU: an Economic Analysis by Prof. Verboven and Degryse, Study of the impact of legislative scenarios about motor vehicle distribution, Andersen, and Customer Preferences for existing and potential Sales and Servicing Alternatives in Automobile Distribution, Dr. Lademann.
[141] Recital 2,7.
[142] This is an effect whereby, by exempting only one model for distribution, the Regulation encourages all suppliers to use near identical distribution systems, leading to rigidity.
[143] Jones / Sufrin, p. 677.

An important part of the Regulation focuses on practices and behavior which seriously restrict competition within the Common Market and which are detrimental to consumers. To this end, and in line with the Commission's general approach for block exemption regulations set out a list of very serious restrictions (often referred to as 'hardcore restrictions') clarifying what is not normally permitted. This list has been drawn up in order to take account of issues specific to the motor vehicle sector, in particular as regards repair and maintenance. Where these restrictions are present, not only will the agreement no longer benefit from the block exemption, but individual exemption is also unlikely. In addition to the hardcore list the new regulation imposes specific conditions on certain vertical restraints, in particular non-compete obligations and location clauses. When these specific conditions are not fulfilled, these vertical restraints are excluded from the block exemption. However, the Regulation continues to apply to the rest of a vertical agreement if the remainder of the agreement can operate independently from the non-exempted vertical restraint. The non exempted vertical restraint will need an individual assessment under Article 81.

Another important flexibility that was introduced by the Regulation No 1400/2002 is about the scope. Regulation No 1400/2002 is a block exemption regulation that is specific to the motor vehicle sector. It covers agreements concerning the distribution of new vehicles and spare parts, and distribution agreements governing the provision of repair and maintenance services by authorized repairers.[144] New Regulation whose scope was widened compared to the previous regulation covers agreements on distribution of motor vehicles, spare parts and after-sale services even if these agreements are separately concluded. Due to this scope, in every field of distribution chain from motor vehicles or spare parts manufacturers to the final consumer, all of the vertical agreements concluded for distribution of motor vehicles, maintenance and repair services and spare parts are considered under the coverage of block exemption which is specific for the sector.

The new Regulation takes account of the general policy that block exemption regulations should cover restrictive agreements only up to certain market share thresholds; in this case the threshold is generally 30%, although it is 40% for quantitative selection distribution of new

[144] Reg. No 1400/2002, Recital 3.

motor vehicles. Agreements concluded by the suppliers whose market share is under %5 shall be excluded from the group exemption as this figure will not result in a clear limitation of competition in accordance with 81(1) article of Rome Agreement on the condition that these agreements do not include firm limitations in accordance with the principles of the Commission. [145]

As regards the distribution of new motor vehicles, the Regulation is built around the following principles:[146]

- banning the combination of selective and exclusive distribution permitted by Regulation No 1475/95. To benefit from the new Regulation, manufacturers have to choose between creating selective and exclusive distribution systems when appointing their distributors.

This means that if a manufacturer chooses the system of exclusive distribution, and for example assigns its dealers exclusive geographic market areas, dealers may be prohibited from opening additional outlets in markets covered by such systems or carrying out active promotion (such as local advertising or e-mail promotions) outside their sales area, but they are entitled to make passive sales, that is to respond to unsolicited requests, in favor of any end user or independent retailer, that is internet operators. On the other hand, in a selective distribution system, cars can be sold only by dealers belonging to the network, but nobody enjoys protection from other resellers' competition by means of exclusive territories or customer groups.[147]

- reinforcing competition between dealers in different Member States (intra-brand competition) and improving market integration in particular by not exempting distribution agreements which restrict passive sales, by not exempting distribution agreements in selective distribution systems which restrict active sales, and by not exempting clauses (commonly referred to as 'location clause') prohibiting dealers in

[145] Commission Notice on agreements of minor importance, p. 13.
[146] EB Reg. No 1400/2002, Sec. 3.2.
[147] Vezzoso Simonetta, ECLR Issue 4, Sweet & Maxwell Limited (and Contributors), On the Antitrust Remedies to Promote Retail Innovation in the EU Car Sector, 2004, p. 192.

selective distribution systems from establishing additional outlets elsewhere in the Common Market.

- removing the obligation for the same firm to carry out both sales and servicing by not exempting agreements that do not allow dealers to subcontract servicing and repair to authorized repairers who belong to the authorized repair network of the brand in question and who therefore fulfill the manufacturer's quality standards.[148] The removal of the obligation to provide sales and service directly on cars sold by dealers is for the benefit of consumers.

- facilitating multi-branding by not exempting restrictions on the sale of motor vehicles of different brands by one dealer.[149] Suppliers may however impose an obligation for motor vehicles of different brands to be exhibited in different areas of the same showroom. The general feeling is that the new Regulation does take away some of the freedom enjoyed by the powerful manufacturers.[150]

- maintaining the 'availability clause' by not exempting agreements that limit a dealer's ability to sell cars with different specifications to the equivalent models within the dealer's contract range. Any consumer may thus procure a vehicle in another Member State whose specifications match those of vehicles normally sold in his country. For example, the availability clause enables British and Irish consumers to purchase right hand-drive vehicles on the Continent.[151]

When selectivity and exclusivity are both adopted together, the possibilities for cross-border trade become limited. It can then only take place directly by end-consumers, by intermediaries with a written authorization from consumers, or by dealers within the manufacturer's network. An 'Availability clause' aims to guarantee the cross-border supply.

[148] Art. 4 (1) (g).
[149] Art. 5 (1) (a) and (c).
[150] Rose Rivas and Jonathan Branton, Common Market Law Review 2003, Development in EC Competition Law in 2002: An Overview, p. 1197.
[151] Art. 4 (1) (f).

It states that dealers should be able to obtain cars with foreign specifications from their manufacturers.

- supporting the use of intermediaries or purchasing agents by consumers. These operators are an important tool to help consumers to buy vehicle in another part of the Common Market.

Regulation No 123/85 preserved the right for dealers to sell to intermediaries, as agents for individual customers; this was the subject of the Court of First Instance decision in Peugeot v. Ecosystems.[152] This decision in favor of the intermediary's right to act on behalf of customers was accompanied by a Notice[153] from the Commission limiting the number of vehicles which an individual dealer is entitled to dispose of annually in this way to 10 per cent of its total sales. The great majority of any dealer's sales still had to be made direct to individual purchases; intermediary sales could constitute only a relatively minor part of its business.[154]

The new rules' specific aim would have been promoting the access on the part of new distribution formats on the market, with the Commission having especially two potential candidates in mind that is internet operators[155] and supermarkets.[156] The activities of intermediaries acting on behalf of a consumer are no longer subject to any conditions. This is important because, such intermediaries are powerful instruments for the development of cross-border trade.[157] These would have had more of a countervailing power than dealers, and would have been in a better situation to get rebates and to pass them on to consumers.[158]

Many of the operators that advertise on the internet[159] operate as intermediaries. Internet operators not only could permit the offering to the consumers of new combinations of price

[152] Case T–9/92 (1993) ECR II–493: (1995) 5 CMLR 696.
[153] (1991) OJ C 329/20.
[154] Goyder, p. 205.
[155] Recital 15.
[156] Vezzoso, p. 192.
[157] http://ec.europa.eu/comm/competition/annual_reports/2002/en.pdf retrieved on 05.04.2006. XXXII and Report on Competition Policy–2002 SEC (2003) 467 FINAL, p. 56.
[158] http://www2.ukie.gov.pl/14powodow/kons/BEUC.pdf retrieved on 05.07.2006. BEUC, BEUC/X/017/2002 'Draft Commission Regulation (EC) on the application of Art. 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle industry, Final BEUC Reaction.
[159] Recital 15.

and services, but could contribute to price transparency allowing the consumers to seek a competitive offer beyond their local dealer. However, internet could also be seen as free-riding on other distributors who have an obligation to invest in showroom, demonstration vehicles and trained sales staff who give advice to consumers. Consumers would take advantage of all of these facilities but would then turn an internet dealer for the actual purchase of their new vehicle. Supermarket sites were also seen as able to enter the market and capture a significant share at least of the market for commodity vehicles.[160] [161]

- strengthening dealers' independence from manufacturers, both by stimulating multi-brand sales and by strengthening minimum standards of contractual protection (including retaining the existing minimum notice periods provided for in Regulation 1475/95) and by allowing them to realize the value that they have built up by giving them the freedom to sell their businesses to other dealers authorized to sell the same brand.[162]

As regards repair and maintenance of motor vehicles, Regulation No 1400/2002 is based on the same stricter approach while retaining certain elements of the previous Regulation No 1475/95, since Regulation No 2790/1999 does not contain provisions that are sufficiently adapted to repair and maintenance of motor vehicles.

Consequently, as regards repair and maintenance, Regulation No 1400/2002 pursues the following aims;

- to allow manufacturers to set selection criteria for authorized repairers, so long as these do;
- not to prevent the exercise of any of the rights enshrined in the Regulation;
- to ensure that if a supplier of new motor vehicles sets qualitative criteria for the authorized repairers belonging to its network, all operators who fulfill those criteria can join the network. This approach will enhance competition between authorized

[160] Vezzoso, p. 192.
[161] Supermarkets or other stores may always act as intermediaries for consumers, such as 'El Corte Ingles' in Spain.
[162] Art. 3 (3) and 3 (5).

repairers by making sure that operators with the necessary technical expertise can establish themselves wherever there is a business opportunity;

- to improve authorized repairers' access to spare parts which compete with parts sold by the vehicle manufacturer;
- to preserve and reinforce the competitive position of independent repairers; these currently carry out on average about 50% of all repairs on motor cars. The Regulation improves their position by reinforcing their ability to gain access to parts and technical information in line with technical advances, especially in the field of electronic devices and diagnostic equipment. The access right is also extended to training and to all types of tools since access to all four of these elements is necessary if an operator is to be able to provide after sales services. A desirable and important side effect of this wider access is to encourage improvement in independent repairers' technical skills, to the benefit of road safety and consumers in general.

5.3.1 The scope of the Regulation No 1400/2002

a. The Agreements whose Scope is 3S

The scope of the application of the Regulation No 1400/2002 is thus broader than Regulation No 1475/95 as it includes agreements, for instance, with importers or wholesalers of motor vehicles which do not provide after-sales services, with repairers who do not sell cars and with suppliers who provide spare parts to repairers.

It is important to stress that a supplier is not obliged to use separate contracts for vehicle sales and for repair and maintenance. The supplier may choose to use separate contracts for each activity, but may choose to use a single contract for dealers who are also authorized repairers. However, whether there is one contract or several, a firm carrying out both sales and repair and maintenance must be able to put an end to the contractual obligations relating

to one of those activities without having to enter into new agreement with his supplier in respect of the other activity. For example, a dealer who has an agreement covering both sales and repair, and who wishes to withdraw from new car retailing while maintaining his authorized repairer ship should be able to do so on the basis of his existing agreement.

b. Agreements Whose Subject Matter is Intellectual Property Rights

The agreements on the transfer of intellectual property rights are not within the scope of Regulation No 1400/2002.[163] However, if some conditions are fulfilled, there is an exemption to the general rule.[164]

Firstly, for Article 2 (2) (b) to apply to the IPR provisions - if they are to benefit from block exemption, there must be a vertical agreement. Article 2 (2) (b) defines this agreement relating to the conditions under which the parties may purchase, sell or resell goods or services. 'Goods or services' are naturally those that are related with the motor vehicle sector. Pure licenses such as know-how and trade mark would not be covered, since they would not be covered, since they would not relate to the conditions under which the parties purchase, sell or resell of goods.

Secondly, Article 2 (2) (b) applies only where the supplier supplies IPRs to the buyer. It does not apply where the buyer supplies IPRs to the supplier. A sub-contracting agreement, whereby one undertaking asks another to manufacture goods on its behalf, often with the use of its IPRs, would not be covered by the block exemption, since IPR is supplied by the buyer to the supplier, rather than the other way around.

Thirdly, for Article 2 (2) (b) to apply the IPR provisions must not be the 'primary' object of the agreement. The primary object must be the purchase or distribution of goods or services and the IPR provisions must serve the implementation of the vertical agreement. The IPR provisions must be directly related to the use, sale or resale of goods or services by the buyer

[163] Art. 2 (2).
[164] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p.136.

or its customers. So the agreement should be about the 'production' of contract goods and services.

All those requirements should be together in order to apply this article to the agreement.

c. Vertical Agreements[165]

The Regulation applies to vertical agreements in the motor vehicle sector at all levels of trade from the stage first supply of a new motor vehicle by its manufacturer to the final resale to end consumers and from the first supply of spare parts by their manufacturer to the provision of repair and maintenance services to end consumers. The Regulation covers vertical agreements between**:**[166]

- a manufacturer of motor vehicles or its subsidiary and independent importers or wholesalers, that are not subsidiaries of the manufacturer and that may be entrusted with the supply and management of the manufacturer's distribution and repair networking one or several Member States, even the manufacturer has incorporated import and wholesale subsidiaries in those or other Member States.[167]
- a manufacturer of motor vehicles or its subsidiary and individual members of its authorized network of distributors and repairers, including the licensing of intellectual property rights held by the manufacturer. Art. 2 (2) (b) e.g. the use of trade mark affixed in the showroom in which vehicles are sold or the disclosure of know-how for the provision of repair services of a particular brand.
- a manufacturer of motor vehicles, a main distributor and a sub-distributor or an agent in two or three-tier distribution networks. Such agreements are covered irrespective of whether the sub-distributors are selected by and contractually linked with the vehicle manufacturer or whether main distributors select and enter into contracts with sub-distributors on the basis of criteria set by the manufacturer.

[165] According to Art. 1 (c), 'vertical agreements' means agreements or concerted practices entered into by two or more undertakings, each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain.
[166] EB Reg. No 1400/2002, Sec. 4.2.2.
[167] Art. 2 (3) (a).

- a manufacturer of motor vehicles or spare parts and an association of authorized or independent dealers or repairers who jointly buy motor vehicles or spare parts, if none of the individual members of the association has a total annual turnover exceeding EUR 50 million. [168]
- a supplier of spare parts and individual members of a network of independent or authorized repairers who use these spare parts to provide repair and maintenance services.

d. Vertical Agreements Between Competing Undertakings[169]

Article 2 (3) refers to the fact that the Regulation will not apply to vertical agreements entered into between competing undertakings; this applies to agreements at any level of the market: for example, the undertakings may be competing as manufacturers, wholesalers or as retailers.

However, non-reciprocal vertical agreements between competing undertakings are permitted subject to conditions. [170]

5.3.2 Arrangements Regarding Distribution of Motor Vehicles

[168] Art. 2 (2) (a).
[169] According to Art. 1 (a) a-) 'competing undertakings' means actual or potential suppliers on the same product market; the product market includes goods or services which are regarded by the buyer as interchangeable with or substitutable for the contract goods or services, by reason of the products' characteristics, their prices and their and thier intended use.
[170] These conditions are stated in Art. 2 (3) a-) the buyer has a total annual turnover not exceeding EUR 100 million, or b-) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or c-) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services.

The Regulation will be applied about the purchase, selling or reselling of new motor vehicles, spare parts for the motor vehicles or repair and maintenance services for the motor vehicle.[171]
According to Article (1) (n) *'motor vehicle' means a self propelled vehicle intended for use on public roads and having three or more road wheels.*[172]

So it can be said that, purchase, sell or resell agreements related with the two wheels motor vehicles such as motorbikes is not subject to this Regulation. As this Regulation contains 'new' motor vehicles, the second hand motor vehicle market should not be subject to the Regulation.

a. Selective Distribution System and Exclusive Distribution System

According to the definition which is stated in the Regulation No 1400/2002 Article 1(f),[173] a selective distribution system is one in which the supplier limits the distribution of his goods to those resellers who are deemed to possess the qualifications that correspond most closely to his sales policy.[174] The supplier's motivations may be diverse: to maintain the prestige of his brand or image; to ensure the efficient and speedy distribution of perishable products; to reduce selling expenses; or to provide a high level of pre-sale and/or after-sale service.[175]

For a selective distribution system to function properly, it is often essential that each reseller admitted to the network undertakes not to resell the contract goods to unauthorized

[171] Art. 2 (1).
[172] The definition of motor vehicles is the same as under Regulation No 1475/95. Some vehicles do not fall within this definition because they are not self-propelled, like horse-drawn wagons, because they have less than three wheels, like motor bikes, or because they are not intended for use on public roads, though they may occasionally circulate on public roads, like tractors or earthmoving machines.
[173] Art. 1: 'Selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorized distributors or independent repairers, without prejudice to the ability :
- to sell spare parts to independent repairers or,
- the obligation to provide independent operates with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures.
[174] Vogelaar / Stuyck / Reeken, p. 44.
[175] Ibid, p. 44–45.

resellers. So the contract goods and services of the suppliers will only be obtained from the authorized distributors; that they will not take place in the so-called 'grey markets' or spot market. Any such distributor of vehicles other than passenger cars or light vehicles may be prevented from operating out of an additional place of business provided it does not limit the extension of its business at the authorized place of establishment. As a result, selective distributors of passengers' cars and light commercial vehicles may not be prohibited from opening secondary sales or deliver outlets anywhere in the EU. However, such outlets or repair shops may be compelled to comply with the relevant qualitative criteria that are already applicable to similar outlets located in the same geographic area.[176]

Also, in Article 1 (f) of Regulation where the selective distribution system is defined, it is stated that distributors or repairers undertake not to sell contract goods or services to unauthorized distributors or repairers, without prejudice to *the ability to sell spare parts to independent repairers*…". However, in Turkish Competition Law, in Article 3 (f) of the Communiqué No 2005/4 being equivalent of Article 1 (f) of Regulation No 1400/2002 *the right of authorized services to sell spare parts to independent undertakings* has been reserved. In Article 3 (v) of Communiqué No 2005/4, the independent undertaking has been defined as the undertakings, special services, repair device and equipment manufacturers, independent spare part manufacturers and distributors, technical information publishers, automobile clubs, undertakings that provide road assistance, undertakings that provide testing services and undertakings that provide training, which are engaged, directly or indirectly, in the maintenance and repair of vehicles.[177]

When the aforementioned articles compared, it is seen that the Communiqué differs from Regulation in 2 points:

First, while the only independent services (unauthorized) are granted with the right to sell spare parts in Regulation; under the definition of independent undertaking, this facility has been expanded in the Communiqué in a way to include know-how publishers, automobile

[176] http://www.ffw.com/publications/competition.aspx retrieved on 05.05.2006. Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, Field Fisher Waterhouse, The European Legal Alliance, August, 2002.
[177] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p.322.

clubs and undertakings providing road assistance and test service. Such expansion may harm the core of selective distribution.[178]

Secondly, while all members of selective distribution system (supplier, distributor, authorized service) are granted with the facility of spare part sale without making authorized service discrimination in the Regulation; the right of only authorized services to sell spare part to independent undertakings has been reserved in Communiqué.[179]

In an exclusive distribution system, each dealer is allocated a geographically limited sales territory or an exclusive customer group.[180] Within that exclusive territory or customer group, an exclusive dealer is able to sell new vehicles to all customers, including to unauthorized resellers (i.e. the so-called 'grey dealers', which includes supermarkets and independent repairers). Outside this territory or allocated customer group, the dealer may not be prevented from making passive sales.

Regulation No 123/85 and Regulation No 1475/95 permitted the combination of an exclusive distribution system (in which dealers are allocated a specific territory) and a selective distribution system (in which there are no assigned territories). This enabled suppliers to ensure full geographic coverage of EU territory and at the same time allowed them to exercise control over the level of quality of the network. However, this combination was identified as being the main reason for a lack of intra-brand competition and for differences in pricing in the various EU Member States.[181]

Owing to restrictions of selective and exclusive quality, the intra-brand competition in motor vehicle distribution in EU was limited to passive sales to be made in the regions of each authorized dealer. Considered with the increase in authorized dealer's usage of internet being regarded by Commission as a passive sale mechanism and also the role of agencies buying automobile in other geographic markets on behalf of consumers, these data may

[178] Ibid; p. 323.
[179] Ibid, p. 324.
[180] Only Suzuki has opted for an exclusive distribution system. (Vezzosofn;21).
[181] This refers to price differentials that go beyond the different levels of car taxation throughout the EU.

indicate that passive sales may make important contributions to intra-brand competition in motor vehicle distribution.[182] However various investigations[183] executed by Commission have indicated that the mechanism of passive sale being the only instrument of intra-brand competition has been hampered due to the manufacturers' actions against Regulation No 1475/95.

In the light of aforementioned evaluations, the Commission's result, indicating that the distribution of selective and exclusive quality hamper the intra-brand competition significantly, stated that the distribution should be implemented in a more competitive structure in next arrangements following Regulation No 1475/95.

So according to the Regulation No 1400/2002, a manufacturer may choose one of two distribution systems when entering into a dealership agreement.[184]

They may use exclusive distribution by giving the dealer a sales territory. They may use selective distribution which is the other option available whereby the manufacturer may choose dealers according to a set of criteria. According to new Regulation, while the sales to be made to unauthorized reseller may be prohibited in case selective distribution is applied, it is not possible to provide region protection for authorized dealers and to restrict active sales to be made to a region.

Thus, the Commission has given up providing exemption for the union of selective and exclusive distribution system being allowed in motor vehicle sector only in Regulation No 1400/2002 up to now; has foreseen that the suppliers should select one of the quantitative selective distribution or exclusive distribution system depending on their market shares.

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[182] Mark Furse, Competition Law of the EC and UK; Fourth Edition, Oxford, New York, 2004, p. 190.

[183] In "Volkswagen AG" resolution of 28.1.1998, Opel Nederland BV resolution of 20.9.2000 and Daimler Chrysler AG resolution of 10.10.2001, the Commission has applied great penal sanctions to three big motor vehicle supplier due to their actions hampering passive sales to be made to out-region.

[184] Suppliers have criticized the new approach on grounds that the new system will lead to inadequate territorial coverage and may lead to an accelerated and uncontrolled concentration in urban areas to the detriment of rural areas.

In the new Regulation, the Commission separates the selectivity and exclusivity and this situation is not an impediment for suppliers to adopt different distribution systems in different regions. A supplier can use exclusive distribution and selective distribution in different areas of the same Member State.[185] Regulation No 1400/2002 does not oblige a manufacturer to use the same distribution system for the whole of the territory of a Member State. This would make sense where the manufacturer's objectives differ between various Member States.

In theory, a manufacturer or importer in Member State X could have an exclusive distribution system in region X1 and a selective system in region X2. However, such a supplier would not be able to limit flows of vehicles from one area to another, in particular since the Regulation does not allow suppliers to prohibit dealers with exclusive territories from selling to independent resellers (firms that are not members of the manufacturers' network)[186]

Thus, in the example above, the manufacturer or importer could not prevent (exclusive) distributors in Region X1 from selling vehicles directly to consumers in region X2, or to independent resellers. These resellers would then of course be free to resell vehicles in Region X2, and indeed in all other areas of the EU. Moreover, (selective) distributors in Region X2 could not be prohibited from selling to independent resellers in Region X1 or indeed to any consumers in Region X1 that approached them. i.e. engaging in 'passive sales'.
Regulation No 1400/2002 contains however safeguards in order to prevent a situation where the use of parallel systems leads to a partitioning of the Single Market.

b. Distinction Between Qualitative Selective Distribution[187] and Quantitative Selective Distribution[188]

In respect with selective distribution system, the suppliers have two alternatives which are qualitative and quantitative selective distribution.

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[185] Recital 13.
[186] http://ec.europa.eu/comm/competition/car_sector/distribution/faq_en.pdf retrieved on 04.05.2006.
[187] Art. 1(h).
[188] Art. 1(g).

The qualitative selective distribution[189] is the distribution system where supplier determine qualitative criteria that may be imposed due to nature of objective and sold goods while they are choosing their authorized dealers and where they should provide their products by accepting all undertakings as "authorized dealer". The selection may be based on qualitative criteria, such as the employment of technically qualified staff, the availability of suitably equipped premises, adequate opening hours, agreement to display the contract goods separately from other goods, the maintenance of a sufficiently representative selection or sufficiently wide stock of contract goods, training requirement for sales personnel, qualification of after-sales personnel, etc.

A supplier does not necessarily have to set identical criteria for all members of the authorized repair network. A supplier must set identical quality criteria and apply them in the same manner to all repairers that are in similar situations (the principle of non-discrimination). However, a supplier may for instance require repairers in prosperous urban areas to meet different standards to those in rural areas, or may require large workshops to respect different criteria to small ones.

The quantitative selective distribution system is a sale system in which supplier may directly or directly determine the number of authorized dealer besides its qualitative criteria. It may also consist in limiting the number of resellers on the basis of the population of the territory to be served, in imposing a minimum distance between shops or in requiring that each reseller achieve a minimum turnover in the contract goods, etc.

Most suppliers will establish qualitative selective distribution systems for repair and maintenance, since the market share of their network as regards repairing and maintaining vehicles of their brands will be higher than 30%. In such a system, a supplier is free to define

[189] Ali Fuat Koç, AT Rekabet Hukukunda Seçici Dağıtım Anlaşmaları, Rekabet Kurumu Uzmanlık Tezi Serisi No: 68, 2005, p. 26. Order of the President of the Court of 23 July 1976. - Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities. — Case 26–76 R. It is stated '…that Art. 81(1) is only inapplicable if certain conditions are satisfied: i-) the characteristics or nature of the product in question necessitate a selective distribution system; ii-) the distributors are chosen by reference to objective criteria of a qualitative nature which are set out uniformly and are not used arbitrarily to discriminate against certain retailers, and iii-) the criteria set out out do not go beyond what is necessary for the product in question' . In the case of Metro, the European Court of Justice held that purely qualitative selective distribution systems in general may be compatible with EC Treaty Art. 81(1) provided that the conditions stated above are met.

the quality criteria that candidates have to fulfill in order to become members of its authorized repair network.[190]

While it is obvious that many quality criteria will indirectly limit the number of candidates capable of meeting them, true quality criteria must not directly limit the number of authorized repairers, and must not be in excess of what is required by nature of the repair and maintenance services that are the object of the contract between the supplier and the repairer.[191]

Suppliers may legitimately require authorized repairers to be in a position to perform repair and maintenance of a defined quality and within defined time limits. However, if a supplier were to lay down requirements that did not allow a dealer a degree of flexibility as to how a defined result was to be achieved, this would amount to an quantitative selection criterion not covered by the block exemption, in particular if it is unnecessarily increased the cost of providing a service.[192]

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[190] National Reports (2004) E.C.L.R N–179. Case: Agrupacion de Agentes y Servicious Oficiales Citroen (AASOC) / Citroen (Unreported, June 25,2005) (Trib Comp) ECLR 2005, 26(12), N184. Spanish Tribunal for the Defense of Competition ruled in Citroen case on whether a car manufacturer's revision of its selective distribution criteria for authorized dealerships, requiring them to be either joint stock companies or limited liability companies, constituted a restraint of competition and was discriminatory under Commission Regulation No 1400/2002. The TDC dismissed the appeal. It concluded that even if the Citroen selection criterion was not considered as purely qualitative, it would not infringe competition rules, since the company, having a market share of 11 per cent, could freely choose its distributors. TDC called the attention to the fact that, the geographical market for after-sales services of motor vehicles being national, the possibility of applying selective restrictive clauses could vary according to the market shares in each Member State.

[191] http://www.ks.dk/english/competition/national/2005/mazda/ retrieved on 03.09.2005. On 26 October 2005 the Danish Competition Council adopted a decision that Mazda Motor Denmark had abused its dominant position under section 11(1) of the Danish Competition Act and Art. 82 of the Treaty on the market for original spare parts for Mazda cars. The complainant claimed that Mazda Motor Denmark had implemented a number of measures the object of which was to put pressure on the authorized Mazda dealers and repairers to primarily or exclusively purchase Mazda spare parts from Mazda Motor Denmark. One of these measures was the demand from Mazda Motor Denmark for unhindered and unnotified access to the dealers' and repairers' spare parts store rooms. The claimants claimed that this would give Mazda Motor Denmark an opportunity to put pressure on the dealers and repairers. Mazda Motor Denmark claimed that the unhindered surprise inspections of store rooms, was a necessity if Mazda Motor Denmark was to hinder the use of counterfeit copies of original Mazda spare parts. The Competition Council concluded that Mazda Motor Denmark had abused its dominant position by demanding unhindered access without notice to store rooms; as such an access would give Mazda Motor Denmark the opportunity to ascertain how many spare parts were being supplied by competitors of Mazda. Mazda's position on the market for spare parts for Mazda cars is of such a nature that this would limit the repairers and dealers in purchasing from Mazda's competitors. The Competition Council therefore ordered Mazda Motor Denmark to give a three days' notice about their inspections, and not to demand access to the parts of the store rooms that does not contain trademarked parts, and thus no counterfeit copies.

[192] http://ec.europa.eu/comm/competition/car_sector/distribution/faq_en.pdf retrieved on 02.07.2005. For instance; a requirement to purchase or use brand-specific diagnostic equipment where equivalent generic

c. Hardcore Restrictions

Article 4 of the Regulation contains a list of 13 hardcore restrictions. These restrictions, which could be characterized as 'per se illegal', lead to the exclusion of the entire vertical agreement from the scope of the block exemption. [193]

In its enforcement of EC competition rules, the Commission considers that the individual exemption of vertical agreements containing hardcore restrictions is unlikely.

Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the any positive effects. 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.[194]

Any of the following restrictions will constitute an indirect sales restriction and will result in an agreement falling outside the safe harbour provided by the Regulation.[195]

- making distributors' remuneration or the purchase price dependent upon the destination of the vehicles or place of residence of end user,
- supplying quotas based on a sales territory other than the common market whether or not combined with sales targets

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equipment was available or a requirement for each authorized repairer to have a car wash or a requirement to use a narrowly specified technical solution for such communication would not be a true quality criterion if the dealer could achieve the same objectives by other cheaper or more flexible means.

[193] Gerard, p. 522.

[194] Recital 12.

[195] http://www.ffw.com/publications/competition.aspx retrieved on 05.08.2005. Vertical Agreements and Concerted Practices in the Motor Vehicle Sector, Field Fisher Waterhouse, The European Legal Alliance, August 2002.

- granting bonuses based upon the destination of vehicles or any form of discriminatory product supply to distributors
- failing to compel authorized repairers within the distribution network to honor warranties, perform free servicing and carry out recall work on motor vehicles of the relevant mark in the common market.

Here are some of the hardcore restrictions studied in detail:

1. Minimum or fixed resale prices [196]

The distributor or the repairer should determine the resale prices due to the needs of the market's conditions. The determination of the resale prices by the supplier would prevent not only the economic freedom of the distributors and repairers but also disturb the economic balance in the sector.[197] A whole range of justifications for the practice have been claimed. The manufacturer or supplier may argue that if prices are cut, the prestige or luxury connotations of the product may suggest to consumers that it is of less value. A related argument is that without resale price maintenance, dealers may sell popular brands at unreasonably low prices as loss leaders, even below cost (thereby in the manufacturer's view 'devaluing the brand') in order to attract to its premises customers who will then buy other goods at high prices. It is suggested that without resale price maintenance, the more aggressive retailer will drive smaller dealers out of business, depriving smaller communities of competition at the retail level and permitting the remaining dealers to raise their prices to unreasonable levels.[198]

This formulation explicitly recognizes that the imposition of maximum[199] sale prices and the recommendation[200] of prices is permitted; this however, is subject to the provision that follows, which itself must be read in conjunction with the words 'directly or indirectly' in the opening part of Article 4.

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[196] Art. 4 (1) (a).
[197] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p.161.
[198] Robert, Lane, EC Competition Law, European Law Series, UK, Longman, 2000, p. 109.
[199] The ECJ has never ruled on the imposition of maximum prices.
[200] The ECJ held in case 161/84 Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgalis (1986) RCR 353, (1986) 1 CMRL 414 that the recommendation of prices would not, in itself, infringe Art. 81 (1).

The agreement may have a direct or indirect object of resale price maintenance. A contractual restriction establishing a minimum price would be a simple example of an agreement, the direct object of which is to fix prices.[201] As an example to price maintenance through indirect means, 'fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidations, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to the observance of a certain price level' could be given.

2. Customer / Territory Restrictions [202]

The second and most interesting type of illegal restraints are those dealing with the 'territory into which, or the customer to whom, the buyer may sell the contract goods and services'. They constitute the essence of what the EU system, focused on market integration, intends to prohibit. Four exceptions are nevertheless attached to this restriction; it is indeed permissible;

- No active sales[203] permitted into exclusive territories or exclusive customer group reserved to the supplier or allocated to another distributor or repairer- but may not limit sales by customers of either,[204]

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[201] John Kallaugher / Andreas Weitbrecht, 'Developments under Article 81 and 82 EC-The Year 2004 in Review', 2005, ECLR, Volume 26, Issue 3, p.189. 3 December 2003, Judgment of the Court of First Instance in Case T–208/01, Volkswagen A.G. v Commission of the European Communities. Commission imposed a € 30.96 million fine on Volkswagen AG for retail price maintenance measures on the German Market while the Regulation No 1475/95 was still in force. This particular case against Volkswagen is based on documents that show that in 1996 and 1997, Volkswagen sent several circular letters to its German Volkswagen dealer network, urging the dealers not to sell the new VW Passat at prices considerably below the recommended resale price and/or to limit or not to grant discounts to customers. The object of Volkswagen's measures was to fix resale prices and thus to eliminate an essential element of competition for dealers: the ability to sell new cars at discounted prices. As car dealers normally Grant discounts to customers with the sale of new cars, Volkswagen's instructions can be seen as an effort to eliminate or restrict price competition by compelling the dealers to deviate from their normal commercial behavior. The measures in question, which concerned all German Volkswagen dealers, not only aimed to restrict intra-brand competition between German Volkswagen dealers, but also between Volkswagen dealers in Germany and Volkswagen dealers abroad. Leaving the quality of service aside, the ability to set their own resale prices is the most important tool available to dealers for competing with other dealers. Such measures represent severe interferences with competition and are therefore by their nature a very serious infringement of competition rules.

[202] Art. 4 (1) (b).

The first point to note here is that a restriction of active sales to another group of customers is permitted; this was not exempted under Regulation No 1400/2002. The second point is that, although a restriction of active sales to other territories or customers is permitted, there must remain the possibility of passive sales[205] to them.

Thirdly, the restriction must be on active sales into the territory or customer group 'reserved to the supplier or allocated by the supplier to another distributor or repairer'. Active sales include establishing a warehouse or distribution outlet in another's exclusive territory. It seems, therefore, that the supplier must exclusively reserve a territory or customer group to itself or allocate it to another buyer in order to be able to impose active sales ban.

As to passive selling, 'general advertising or promotion in media or on the internet' but which is a reasonable way to reach the customers in other territories or customer groups would normally be regarded as passive rather than active selling. In order not to be exempted from the block exemption, passive sales should not be prohibited.

- No sales to end users by distributor operating at the wholesale level of trade,[206]

According to the Article 1, 'end users' includes leasing companies unless the leasing contracts used provide for a transfer of ownership or an option to purchase the vehicle prior to the expiry of the contract.

The distributors operating at the wholesale level of trade will normally be economically in a better position than the distributors at the retail level of trade. So, the sale of contract

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[203] Commission Regulation EC No 2790/1999. Examples to active sales; approaching individual customers in another territory or customer group by direct e-mail, telephone, or in person; unsolicited emails sent to specific customers or customer group; unsolicited product catalogues sent to specific customers or customer groups; establishing a warehouse or distribution outlet in another territory; advertising or promotion targeted at another territory or customer group.

[204] Art. 4 (1) (b) (i).

[205] Examples to passive sales; delivery of goods or services to another territory or customer group on solicited request; general advertising in the media in a way which is reasonable to reach customers in own or non-exclusive territory or group; use of internet so long as it is not specifically targeted at customers primarily inside the territory or customer group of another.

[206] Art. 4 (1) (b) (ii).

goods to end users by the distributors at the wholesale level of trade would not have an appreciable effect on competition.

The Communiqué 2005/4 used 'ultimate user' instead of 'end user'. [207]

- No sales of vehicles and spare parts to unauthorized distributors by members of a selective distribution system in markets where selective distribution is applied.[208]

This restriction means a system where the supplier agrees to supply the contract goods and services only to distributors or repairers selected on the basis of specified criteria and those distributors agree not to sell to unauthorized distributors.

It should be noted that this definition of a selective distribution system in the Regulation is not limited by reference to the nature of the goods or services in question; nor does it specify that the criteria should be qualitative rather than quantitative. This clause should be implemented when the selective distribution is selected by the supplier.[209]

In order not to be exempted from the Regulation No 1400/2002, the restriction about the sales should only be implemented in the selective distribution systems. If exclusive distribution system is being used in other parts of the territory, those regions should not be exempted. If an authorized distributor is restricted from selling motor vehicles and spare parts to the unauthorized distributors in an exclusive distribution system, then this would not be in

[207] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 16.
[208] Art. 4 (1) (b) (iii).
[209] http://ec.europa.eu/comm/competition/annual_reports/2004_volume2/en.pdf. retrieved on 02.07.2005. Mons Commercial Court, judgment of 23.11.2004, S.P.R.L. Lust Automobiles (Lust), v DaimlerChrysler A.G. Stuttgart (DCAG) and SA DaimlerChrysler Belgium Luxemburg (DCBL). In this case, S.P.R.L. Lust, an independent reseller of Mercedes vehicles brought proceeding against DCAG and DCBL for breach of the Community competition rules. Lust accused DCBL and DCAG of restricting: (1) parallel imports, in particular by preventing Lust from obtaining supplies from foreign Mercedes dealers (2) sales through an authorized intermediary, in particular by putting pressure on the Mercedes dealer in Charleroi, to cancel orders where Lust was acting only as the agent for a final customer. As regards the restrictions on parallel imports, although sales by an authorized distributor to a non-authorized reseller were prohibited in the context of distribution contracts between DCAG's national subsidiaries and dealers or agents established in the various countries of the European Union, the Mons Commercial Court found that type of clause was authorized by the three EU regulations concerning motor vehicle distribution (Regulation No 123/85 Art. 3 (10), Regulation No 1475/95 Art. 3 (10), and Regulation No 1400/2002 Art. 4 (1) (b) (iii) and therefore that the clause was in line with Community law.

the scope of the Regulation No 1400/2002. However, the authorized distributors can be restricted in active sales to the territories in which exclusive distribution system is used.[210]

- No sales of components that are supplied for incorporation permitted to customers who could use them to manufacture competing goods [211]

According to the Article 4 (1), the buyer, whether distributor or repairer, includes an undertaking which sells goods or services on behalf of another undertaking. So, in this clause it is stated that the supplier may prevent the buyer to sell components to the customers which use them to manufacture the same type of goods as those produced by the supplier.

3. Cross Supplies Restrictions between the Members of the Selective Distribution System[212]

Restrictions of cross supplies between distributors within a selective distribution system, including distributors at different levels of trade, constitute the third hardcore restriction. Thus it is not possible to require a selected retailer to purchase solely from one source: it must be able to buy from any approved distributor.

Under the Regulation, authorized dealers in a selective distribution system may not be prevented from purchasing from other authorized dealers established anywhere in the Single Market. This will also create other alternative suppliers for the distributors in case the supplier makes problem about the supply of the contract goods.

While a dealer in a selective distribution system may be obliged to ensure that 30% of its total purchase of motor vehicles is of a given manufacturer's brands, it must be free to source (cross-supply) those vehicles from other authorized dealers or national importers. Any obligation on such a dealer to purchase 30% of its total purchases of motor vehicles directly

[210] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 166.
[211] Art. 4 (1) (b) (iv).
[212] Art. 4 (1) (c).

from a given manufacturer or national importer would therefore not be covered by the Regulation.[213]

A supplier cannot arrange for motor vehicles which are sold to be a foreign end user or sold through additional outlet to be subject to longer delivery times. Such a system would restrict (active or passive) sales to end users, and would be a serious restriction of competition.

If a supplier grants bonuses to a dealer in respect of sales of cars purchased directly from the supplier, he must also grant bonuses in respect of sales of vehicles of the same purchased from other members of the authorized network. (I.e.cross-supplied vehicles)

Suppliers must ensure that non-payment of bonuses does not amount to an indirect restriction on cross-supplies of vehicles between authorized dealers. Bonuses available to a dealer for sales to end-users should therefore also be available in respect of sales to other dealers authorized to sell vehicles of the brand in question. However, if dealer X has received a bonus in respect of sale to a dealer Y, no restriction on cross-supply will subsequently arise if dealer Y does not receive a (second) bonus in respect of a subsequent resale of the same vehicle to an end user.[214]

The Regulation does not prevent a supplier from terminating the contract of a dealer who has failed to use his best endeavors to meet an agreed sales target. However, a supplier may not terminate a dealer's contract if the dealer's failure to meet a sales target is due to an inability to obtain sufficient vehicles to satisfy demand, including demand from customers from customers outside his local area.[215]

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[213] According to Art. 1 (1) (b) of the Regulation No 1400/2002, this percentage has to be based on the buyer's total purchases of contract goods, corresponding goods and their substitutes on the relevant market. If a dealer sells, for example, both light commercial vehicles and heavy trucks, the 30% threshold has to be calculated for each of these categories of vehicles separately, since they belong to different product markets.

[214] http://ec.europa.eu/comm/competition/car_sector/distribution/faq_en.pdf retrieved on 02.03.2006.

[215] For example, if a dealer subject to a local sales target of 200 vehicles sells 180 vehicles in the local area, and 40 more to customers from elsewhere, but his supplier is subsequently unable to provide him with the full 240 vehicles needed to fulfill both his local sales target and his 'out of area' sales, that supplier may not terminate the dealer's contract for failure to meet the local sales target, since this would amount to an indirect restriction on sales, which is blacklisted under Art. 4 (1) (d) and (e) of the Regulation).

4. Active and Passive Sales Restriction to the End User by the Members of the Selective Distribution System [216]

- The restriction of active or passive sales of new passenger cars or light commercial vehicles

The restriction of active or passive sales of new passenger cars[217] or light commercial vehicles[218] to the end users by members of the selective distribution system will automatically lead to the exclusion of the entire vertical agreement from the scope of the block exemption.

However, there is the exemption to this hardcore restriction:

The exemption shall apply to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorized place of establishment. However, the application of the exemption to such a prohibition is subject to Article 5 (2) (b). [219]

The Commission wants dealers to engage in active cross-border sales by setting up secondary sales outlets or delivery points in other parts of the European Union. To stimulate this, Regulation No 1400/2002 prohibits so-called 'location clauses' that give the supplier the right to decide whether a dealer may locate its premises in a given area. However the impact of this prohibition is limited in three factors.[220]

Firstly this change concerning location clauses which is the final part of the Commission's reform of competition rules for car distribution came into force on 1 October 2002. The extra three years before the 'location clauses' lost the block exemption was aimed at following car makers and dealers time to adapt.[221] So-called 'location clauses' in contracts

[216] Art. 4 (1) (d).
[217] Art. 1 (o).
[218] Art. 1 (p).
[219] Art. 4 (1) (d).
[220] Vezzoso, p. 258.
[221] Recital 37.

between carmakers and dealers had expired as of 1 October 2005 [222]; it no longer benefits from automatic (block) exemption from the EC Treaty's prohibition on restrictive business practices (Article 81) under the Regulation No 1400/2002.[223] So, the suppliers benefited from a transition period for two years.

Secondly, this rule is for cars and light commercial vehicles.[224]

Thirdly, only clauses on secondary outlets, particularly sales outlets and delivery outlets are prohibited. The Regulation allows carmakers to require dealers to meet defined quality standards, ensuring a high quality dealership system for consumers. By requiring that secondary sales outlets[225] comply with all qualitative standards applicable to dealerships in the area where the outlet is to be opened, and by checking compliance in advance, carmakers can normally avoid the danger of unfair-riding on the investment and promotion efforts of existing dealers.

Regulation No 1400/2002 prohibits the use of such location clauses by the manufacturers whenever selective distribution is implemented (where sales are permitted only to final consumers and other authorized members of the network set up by the manufacturer, and therefore prohibited to independent operators). Regulation No 1400/2002 provides therefore that existing distributors in a selective system may not be prohibited from opening secondary sales or delivery outlets anywhere in the EU without asking the car manufacturer for permission.

This would allow consumers to benefit from an opening up of the markets, as they would be in a position to actually buy from a foreign distributor from a 'cheap' country who would have opened a sales or delivery outlet in the high priced country. If manufacturers opt

[222] Art. 12 (2).
[223] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1208&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 07.05.2006.
[224] Art. (4) (1) (e) and EB No 1400/2002, Sec. 5.3.3.
[225] A sales outlet includes the showroom and the necessary infrastructure to sell new motor vehicles. This will for example include a showroom to exhibit the new motor vehicles, the necessary offices, sales personnel and demonstration vehicles. It is up to the dealer who operates the sales outlet whether he delivers new cars at the sales outlet or delivers them elsewhere.

for quantitative selectivity, the absence of a location clause, would allow authorized dealers to set up delivery points freely across the whole internal market.[226]

A sales outlet includes the showroom and the necessary infrastructure to sell new motor vehicles, including a showroom, the necessary offices, sales personnel and demonstration vehicles.[227] Secondary sales outlets are unlikely to increase carmakers' transactional and logistical costs, as the contract in force with the dealer will continue to determine where the carmaker must deliver the cars ordered by the dealer. This means that where dealers opens a secondary sales outlet in another Member State, an additional contract with the local importer is not needed, although the carmaker can of course delegate to the local importer functions such as checking compliance with the qualitative criteria. The purchasing conditions and sales targets will remain those applicable in respect of the dealer's primary location. A Belgium dealer from the Ardennes wishing to set up a showroom on Paris Champs Elysées will have to abide by the rules set up by the manufacturer for this prime location.[228]

A delivery outlet is a place where vehicles sold elsewhere are delivered to the end consumer.[229] It may include the necessary office space, a storage facility or an area for the preparation of the cars for their delivery and necessary staff for carrying out the deliveries. A dealer must be allowed to combine a delivery outlet with a sales outlet providing he meets the relevant quality criteria for both. Under the Regulation, dealers within a selective distribution system should be allowed to actively sell new motor vehicles.[230] A dealer therefore may not be prevented from erecting advertising hoardings at a delivery point or making available brochures about vehicles or services offered by the dealership.

If a dealer in a selective distribution system decides to open an additional outlet somewhere, it will have to meet the same standards as similar sales outlets in the area where it is to be located. For example, if a dealer in a rural area decides to open additional sales premises on a main street in a large city, the supplier can oblige him to meet the same quality

[226] http://www2.ukie.gov.pl/14powodow/kons/BEUC.pdf retrieved on 05.07.2006.
[227] EB Reg. No 1400/2002, Sec. 5.3.3.
[228] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/02/174&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 03.03.2006.
[229] EB Reg. No 1400/2002, Sec. 5.3.3.
[230] Art. 4 (1) (b) and (d).

standards as regards signage and display of vehicles as existing sales premises in that area or in similar urban areas.

Once location clauses are removed from contracts with carmakers, dealers can operate outside their home territories, including across borders. This means that dealers can set up outlets wherever they see a business opportunity, for example in areas where their brand is under-represented or in countries where prices are higher. This freedom will strengthen intra-brand competition throughout Europe to the benefit of customers, and will moreover allow dealers to expand their businesses and to become more independent from their suppliers. It will also allow such dealers to become pan-European distributors of new motor vehicles. This change also paves the way for innovative forms of distribution such as multi-brand outlets. Consumers therefore stand to benefit from an improved choice of dealers.

- The restriction of active or passive sales of new motor vehicles other than passenger cars or light commercial vehicles.[231]

The restriction of the sales of motor vehicles[232] will not lead to the exclusion of the entire vertical agreement from the scope of the block exemption.

Restrictions on opening additional outlets are covered under Regulation No 1400/2002, as regards dealers in motor vehicles other than passenger cars and light commercial vehicles, i.e. medium and heavy trucks, buses and coaches. It is assumed that most of the buyers of these vehicles use such vehicles in a commercial context, and that they therefore in a better position to buy from a dealer located in another area of the Common Market and to have access to more favorable sales conditions than private consumers.

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[231] Art. 4 (1) (e).

[232] Art. 1 (n). The definition of motor vehicles is the same as under Regulation No 1475/95. Some vehicles do not fall within this definition because they are not self-propelled, like horse-drawn wagons, because they have less than three wheels, like motor-bikes, or because they are not intended for use on public roads, though they may occasionally circulate on public roads, like tractors or earthmoving machines. The Regulation does not apply, inter alia, to vehicles which are not motor vehicles, to motor vehicles which are not new, (for instance second hand car market), to loans by banks which finance the purchase of a vehicle by an end-user or to goods which are not spare parts as defined in the Regulation. (For instance because they are not necessary for the use of a motor vehicle, though they may be fitted in it, like accessories such as a tape, CD, or other accessories according to trade usage.) EB Reg. No 1400/2002; Sec. 4.2.1, fn 32.

d. Price Differentials

A large extent of international price dispersion and a low degree of parallel imports[233] indicate that there are large unexploited arbitrage opportunities to consumers (or intermediaries) and thus presumably obstacles to cross-border trade.[234]

The motor vehicle industry has for many years been criticized by consumers and others for maintaining high price differentials within the European Union. Nevertheless, these criticisms can be understood from the consumer point of view, since passenger cars are the second most expensive item used in a household. Therefore, even relatively small price differentials have a much greater economic impact on the budget of a household than price differentials for less expensive products or services. [235]

In its Notice[236] regarding Regulation No 123/85, the Commission has determined as threshold of 12% upon the recommended prices of vehicles with respect to how to interprete the mentioned decrees and has stated that the price differentials should not exceed the mentioned threshold. In Evaluation Report, it is stated that the ground for determination of threshold as 12% by Commission is the assumption that under normal conditions the demand will move to markets where the prices are lower on the price differentials of these ratios and such case will increase the parallel trade and will cause a decrease in the prices of regions where the prices are high.[237]

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[233] Judgment of the Court of First Instance (Fourth Chamber) in Case T–62/98, Volkswagen AG v Commission of the European Communities. On 28 January 1998, the Commission adopted a decision in which it found the conduct of Volkswagen, the German motor vehicle manufacturer, and its subsidiaries AUDI AG and AUTOGERMA SpA infringed the EC Treaty rules on freedom of competition in the common market. The Commission complained that Volkswagen had entered into agreements with its subsidiaries and the Italian dealers in its distribution network in order to prohibit or restrict sales in Italy to final consumers from other Member States and to authorized dealers in its distribution network in other Member States. Amongst the means employed by Volkswagen in restricting those parallel imports from Italy were the imposition of supply quotas to Italian dealers and a bonus system discouraging them from selling to non-Italian customers.

[234] http://europa.eu.int/comm/competition/car_sector/distribution/eval_reg_1475_95/studies/study01.pdf retrieved on 12.02.2006.VERBOVEN, F. 'Quantitative Study to Define the Relevant Market in the Passenger Car Sector'. 2002.

[235] Report on the evaluation of Regulation (EC) No 1475/95 on the application of Art. 85 (3) [now 81(3)] of the Treaty to certain categories of motor vehicle distribution and servicing agreements 15.11.2000 – COM (2000) 743 .

[236] Commission Notice Concerning Regulation (EEC) No 123/85 of December 1984 on the Application of Motor Vehicle Distribution and Servicing Agreements, OJ L 17, 18.1.1985.

[237] Gazioğlu, p.26.

Undoubtedly the weakest part of the Regulation No 1475/95 was also price differentials. The single market in the sale and after sale servicing of motor vehicles has been slow to develop: differing tax regimes and methods of distribution, fluctuating exchange rates, and the fact that certain Member States drive on the 'wrong side of the road' have meant that this market remains much less integrated than others.[238] However, as Monti has expressed, while it is true that a single market will put pressure on price differentials, it does not mean that the Commission's aim is price harmonization. The Commission has no mandate to act as a price regulator.[239] The only task of the Commission in terms of prices is to ensure that conditions exist on the market to allow satisfactory and undistorted competition.[240] This implies also that consumers must have the right to buy wherever within the Single Market they find it most advantageous.[241]

As required by Regulation No 1475/95, the Commission compared pre-tax prices for new cars in the European Union. This comparison is carried out twice yearly, in May and November, on the sales prices recommended by manufacturers for each EU member country.[242] The comparisons carried out for prices on 1 November 2001 and 1 May 2002 both show that no significant price convergence has taken place despite the introduction of the euro on 1 January 2002.[243] But till then, over this period, car prices have on average been rising more slowly than prices for other goods and, at the same time, have shown clear signs of

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[238] Whish, p. 642.

[239] http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/59&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 02.03.2006.

[240] OJ L 59, 28.02.2001 In the Netherlands, prices before taxes are generally substantially lower than in other Member States, such as Germany, France and the United Kingdom. The case against Opel Nederland B.V., a 100% subsidiary of General Motors Nederland B.V, began with inspections which the Commission carried out in December 1996 on the basis of information received from customers wanting to buy cars in the Netherlands at cheaper prices. These inspections, which took place at the premises of Opel Nederland B.V. and one of its Dutch Opel dealers, prove that due to high export demand from customers from other Member States, Opel Nederland B.V. had, from September 1996 onwards, developed and pursued a strategy consisting of three measures destined to restrict or to prevent dealers from selling cars to customers, including end consumers, from abroad.

[241] In the 301st paragraph of the Report on the evaluation of Regulation (EC) No 1475/95, İt is stated that in a market economy, it is not the role of a public authority such as the European Commission to analyze whether or not a particular price for a car is appropriate, nor is it the Commission's task to harmonize prices.

[242] http://ec.europa.eu/comm/competition/car_sector/price_diffs/ retrieved on 05.08.2005. See press releases IP/02/305, 25.02.2002 and IP/02/1109, 22.07.2002.

[243] http://ec.europa.eu/comm/competition/annual_reports/2004/en.pdf retrieved on 05.06.2005. XXXII and Report on Competition Policy–2002 SEC (2003) 467 FINAL, p.57.

increased convergence across the EU.[244] The Commission continues to compare the pre-tax prices of new cars in the European Union.[245]

According to Verboven,[246] price differentials is an important sign that there still exist distinct geographic markets within the single market and that arbitrage may not take place to a sufficient extent between these markets. Verboven has classified the potential impediments in-front of the cross-border trade in EU automobile market as follows:

i-) the differing national systems of type approval,
ii-) the requirement of national registration,
iii-) transportation and administration costs,
iv-) the selective and exclusive distribution system,

According to Verboven, the first obstacle can no longer be viewed to have a considerable impact, since the harmonized type approval system has been achieved in 1995. The main remaining exception is the right hand drive regulation in the U.K. The second obstacle had the effect of allowing countries to enforce their own national import quota constraints against Asian countries. This can therefore no longer be considered as a serious obstacle to cross-border trade. The third obstacle may still be viewed as a source of market segmentation, and has been documented in various studies, e.g. BEUC. The fourth obstacle to cross-border trade is the selective and exclusive distribution system.

In respect with merger of selectivity and exclusivity in motor vehicle distribution prevent intra-brand competition; Verboven has stated that the discrimination of two systems may cause

[244] http://ec.europa.eu/comm/competition/annual_reports/2004/en.pdf retrieved on 05.02.2006. European Commission Report on Competition Policy- Volume 1, p. 49.
[245] http.//www.europa.eu.int. Retrieved on 03.04.2006. Car Prices at 1.11.2005. The last reports indicate that Germany continues to be the more expensive market overall in the EU for the models surveyed. In Germany, 38 models out of 87 in the report are sold to consumers at the highest prices in the euro zone and 16 models are 20 % more expensive than in the cheapest national market within the euro zone. Within the euro zone, Finland is cheapest. Outside the euro zone, Denmark is the cheapest market in the EU with prices 5.8% below those in Finland.
[246] Verboven, p. 27.

both decrease of price discrimination in either national or international level in EU and increase of welfare level.

However, when selectivity and territorial exclusivity are not combined, the opportunities for international intra-brand competition, or cross-border trade, are not seriously affected. Suppose there is selectivity without exclusivity. While the selected dealers are then restricted from selling to independent resellers, they can set up their own branches abroad to take advantage of existing price differentials. Furthermore, the dealers can engage in active cross-border sales policies such as personalized advertising. Conversely, suppose there is exclusivity without selectivity. Although exclusive dealers cannot set up their own branches abroad, they can sell to independent resellers who may exploit the price differentials. Hence, when selectivity and exclusivity are not combined, international price differentials are constrained by the arbitrage activities of either the foreign branches of the selected dealers or the independent resellers.[247]

The main body representing the European carmakers, the ACEA, has also specifically formulated criticisms towards the new Regulation. One of the arguments was that car distribution is wrongly linked the existence of price differentials within the EU. Those differences are rather due to important variations in the rates at which cars are taxed across the EU, as well as the continuous co-existence of different currencies, which both require manufacturers to adopt their prices so as to accommodate the impact of those elements.[248]

The Commission has recognized the relevance of those critiques, while arguing on the one hand that this is certainly not 'the whole story', and on the other hand its goal is not price harmonization, but the ability for consumers to take advantage of the price differential that exists.[249]

[247] Ibid, p. 38.
[248] Gerard, p. 529.
[249] Ibid, p. 529.

e. Strengthening the Independence of the Authorized Dealers

One of the main objectives pursued by the Commission through its block exemption regulations in the motor car sector was to 'give dealers greater commercial independence vis-a-vis manufacturers' by 'safeguarding the relatively stable contractual framework in which sellers of new vehicles can engage in vigorous competition'.

The Commission considers that a strong and independent structure of authorized dealership would act more competitively and would accomplish innovations in favour of consumers. In this scope, one of the main goals of Commission's arrangements with respect to motor vehicle distribution is to protect the authorized dealers against suppliers and to ensure that the authorized dealers are able to make their economic decisions more autonomously. The reason of such case is the fact that the authorized dealers are usually small and medium size enterprises which can not protect themselves against the economic power of suppliers.

Article 3 of Regulation No 1400/2002 has therefore set out a number of provisions that the parties are to incorporate into their agreement if they wish to benefit from the exemption. These provisions are not mandatory, even though the parties, in order to avoid being confronted with Art. 81 (1) (1) and (2) of the Treaty will, in most cases, comply with the exemption requirements. Apart from the few requirements set out in Art 3, the Regulation leaves the parties unfettered to agree as they wish.

Article 3 of the Regulation sets out five general conditions which agreements must fulfill for the block exemption to apply. The first of these limits the application of the exemption to situations where certain market share thresholds are not exceeded and below which it can be safely assumed that the conditions of Article 81 (3) will in general be fulfilled. The other conditions require the inclusion of several provisions in the agreements which promote contractual stability, hence enabling distributors or repairers to compete vigorously and pass on to consumers the benefits of improved distribution.[250]

[250] EB Reg. No 1400/2002, Sec. 4.3.

The fact that whether different vertical restrictions in motor vehicle distribution benefit from exemption or not depends on the market share of supplier. This case arises how to define the relevant market with respect to the distribution of motor vehicle. In Explanatory Brochure, it is stated that the approach to relevant market in motor vehicle sector will be pursuant to the principles determined in Commission Notice Regarding Relevant Market Definition[251] and also pursuant to the former resolutions in which the definition of relevant market is made.

The relevant market depends on the factors such as the geographical homogeneity and availability of product and may differ in various cases. In new Regulation, there has been an obvious discrimination between passenger car and the light commercial vehicles whose permissible weight is up to 3.5 tonnes and which are substituting passenger cars for many customers and heavy commercial vehicles whose permissible weight is more than 3.5 tonnes and the distribution of both types of vehicle is exposed to different rules with respect to various matters.[252] The relevant product markets which are defined in various resolutions of Commission regarding motor vehicle sector indicate that motor vehicle may be separated into narrower sub-markets in direction with usage purposes and their features besides mentioned general discrimination.[253]

Consequent of SSNIP-test[254] application regarding automobile demand, the relevant markets in passenger car market may be classified into sub-compact, compact, intermediate, luxury and sports. Each of these product markets in each of the Member States analyzed thus constitute relevant markets.

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[251] Commission Notice on definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.
[252] EU Reg, Sec. 4.5.2.
[253] In its "Volvo/Scania (14.3.2000, OJ L 143, 5,2001), "Volvo/Renault (1.9.2000, OJ C 301, 21.10.2000) and General Motors/Daewoo Motors" (22.7.2002, OJ C 220, 17.9.2002) Resolutions, the Commission has determined three categories as "light trucks" whose weight is up to 5 tones, "middle trucks" whose weight is between 5 and 16 tones and "heavy trucks" whose weight is above 16 tones. Which categories the automobile market should be divided into is an unanswered question in Commission's resolutions up to now.
[254] Ioannis Kokkoris, 'The Concept of Market Definition and the SSNIP Test in the Merger Appraisal', ECLR, Issue 4 Volume 26 April 2005, p. 212. SSNIP test (Small but Significant Non-transitory Increase in Price, also known as the hypothetical monopolist test) according to which if a small (in the range of 5 per cent to 10 per cent) permanent increase in the price of a good (starting price) leads to such an increase in purchases of another good that renders the price increase unprofitable, then the two goods belong to the same market.

The agreements of authorized dealership include positive and negative motive mechanisms such as price discounts and termination in order to provide the obedience of authorized dealer. While termination is a method applied in case of repeated and long-term failure, the monetary incentives are those which are used constantly by manufacturers. The sanctions imposed by agreements are generally towards authorized dealers and no sanction is imposed on the manufacturers which are the powerful party.

Another important innovation in new Regulation with respect to provide the sovereignty of authorized dealer is the decrees which target to remove the power imbalance preventing them from utilising the rights granted for them in former Regulations. In order to enable successful authorized dealers and services to discover new business opportunities and to liberalize them by growing their businesses, the new Regulation makes it obligatory to grant the approval of supplier for takeover of authorized dealers and services belonging to same brand.

1. Transferability of Dealership Rights

Article 3 (3) of Regulation No 1400/2002 introduces another restriction on contractual freedom by requiring the supplier to allow the distribution rights to be transferred to a different distributor or repairer.[255] The Explanatory Brochure makes two specific comments on this provision:[256]

(a) the right to sell only exists in respect of a transfer to a network member of the same type, i.e. dealer to dealer, authorized repairer to authorized repairer and,
(b) the obligation to consent to a transfer of the contract to a member of the network (at the same level) also applies for a member of the network located in another Member State,

[255] ECLR, Volume 24, and Issue 6 June 2003, Automotive Sector Groups of Houthoff Buruma and Liederkerke Wolters Waelbroeck Kirkpartick. 'Flawed Reform of the Competition Rules for he European Motor Vehicle Distribution Sector p; 264.
[256] EB Reg. 1400/2002, Sec. 5.4.5.

In order to foster market integration and to allow distributors and authorized repairers to seize additional business opportunities and to expand their businesses and become more independent, Regulation No 1400/2002 provides that they have to be allowed to purchase other undertakings of the same type that sell or repair the same brand of motor vehicles. To this end, any vertical agreement between a supplier and a distributor or authorized 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 sells or repairs, respectively, the same brand of motor vehicles within the distribution system.

In order to benefit from Regulation No 1400/2002, distribution agreements for new motor vehicles have to contain a clause by which the supplier agrees to the transfer of ownership of the dealership with all of the attendant rights and obligations to another dealer within the manufacturer's network.

For example, imagine that the car manufacturer A has dealership agreements compatible with the Regulation with Dupont in Paris, and with Smith in London. Dupont and Smith are owned and run by Franco S.A and Anglo PLC respectively. If Anglo wishes to sell neither Smith to Franco, neither manufacturer A nor its importer may oppose the sale. In this example, both Franco and Anglo are considered to be 'distributors' within the meaning of the Regulation, since they are connected undertakings of Dupont and Smith.[257]

If the distribution agreement is to be covered by the Regulation, the supplier may not prevent the transfer of the dealership, provided that the dealer under notice meets all of the supplier's quality criteria.

A supplier can restrict the transfer of rights and obligations to another member of the supplier's network, if the other member does not carry out the same kind of activity as the member selling its business. The Regulation fosters competition and market integration by facilitating acquisitions of businesses by prospective acquirers who are members of the distribution or the repair network.[258] Such prospective acquirers fulfill the criteria set out by

[257] EB Reg. 1400/2002, Sec. 5.3.7.
[258] Art. 3 (3). See Recital 10 regarding transfers to 'undertakings of the same type within the distribution system'.

the supplier elsewhere and thus benefit from a presumption that they also fulfill those criteria in respect of the business operations of the selling member of the network.

2. Term and Termination of the Agreement

In Regulations No 123/85 and 1475/95, the Commission aimed to implement a financial protection enabling that the authorized dealer being in weak position can receive the equivalent of its investment of high quantity and also to protect the sovereignty of authorized dealers against the termination threat of supplier by enacting minimum notice terms for termination which is required in distribution agreements.

The current system prescribes notice periods with which a supplier must comply when seeking to terminate a dealership, the Commission concluded, as part of its investigations, that the present requirement fails to provide adequate commercial guarantees to dealers' commercial independence. As a result, the new regime imposes notice obligations upon a supplier in order to ensure that the more liberal trade expected under the Regulation will not be undermined.

Being different from the former one, in new Regulation, it has been made obligatory for supplier desiring the termination of an authorized dealer's agreement to notify the termination in detail and writing by explaining it with objective and transparent reasons.[259] [260]The mentioned decree has been enacted in order to prevent supplier from terminating the agreement of authorized dealer due to its implementation of behaviours which can not be forbidden as required by the decrees of Regulation.[261] The purpose of this requirement is to prevent suppliers from terminating an agreement for reasons that are incompatible with Art. 81(1) EC and which cannot be exempted.[262] With regard to renewals, the Commission stated in its

[259] Reg. 1400/2002, Art. 3(4).
[260] The requirement that the supplier provide 'detailed, objective and transparent reasons' for the termination of the agreement threatens to be a source of dispute. It will be up to the national courts or arbitrators to determine whether the reasons given justify the termination and to determine the appropriate remedy if they do not.
[261] Automotive Sector Groups of Houfmann, Buruma and Liedekerke Wolters Waelbroeck Kirkpartick, p. 263
[262] Konkurrencestyrelsen (Danish Competition Authority).
http://www.ks.dk/english/competition/national/2005/toyota/ on 25th May 2005. On the basis of its findings, the Danish Competition Council ordered Toyota Denmark to discontinue threatening authorized repairers with termination/annulment of the contracts, when there are no justifiable grounds for such an action, and not to press

Explanatory Brochure that 'the Regulation does not require the supplier to give reasons for not wishing to renew a fixed-term contract'. [263]

The relevant condition regarding the minimum duration of contracts and periods of notice set out in Article 3 (5) only applies to agreements between suppliers of new motor vehicles and their distributors or authorized repairers.

Article 3 (5) (a) of Regulation No 1400/2002 reaffirms the earlier requirement in Regulation No 1475/95 that contracts entered into for a definite term must have a minimum period of five years and that each party must undertake to notify the other party of its intention not to renew the agreement at least six months in advance.[264]

Article 3 (5) (b) of Regulation No 1400/2002 requires an agreement to provide that, if it has been entered into for an indefinite term, it can only be terminated after providing not less than two years' notice. The period of notice is reduced to one year if the supplier is obliged by law or by agreement to pay damages to the dealer, or if termination is justified by the necessity to reorganize all substantial part of the distribution network.[265]

A need for re-organization may arise due to the behavior of competitors or due to other economic developments, irrespective of whether these are motivated by internal decisions of a manufacturer or external influences, for example, the closure of a company employing a large workforce in a specific area. In view of the wide variety of situations which may arise, it would be unrealistic to list all the possible reasons for re-organization.[266]

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the authorized repairers in to accepting blame, liability and the payment of compensation by the use of such threats.

[263] EB Reg. No 1400/2002, Sec. 5.4.1 The Regulation itself is not clear on this point. The Dutch text, which is not-binding, requires reasons for both the notice of termination and the notice of non-renewal. The French and English texts are unclear as to whether this requirement also applies to the notice of non-renewal of fixed-term agreements. The Explanatory Brochure is not binding, but arguably carries more weight than the Dutch translation of the Regulation. Therefore, it is probably safe to assume that reasons are not required regarding the notice not to renew an agreement for a fixed term.

[264] Automotive Sector Groups of Houfmann, Buruma and Liedekerke Wolters Waelbroeck Kirkpartick, p. 262

[265] Ibid, p. 263.

[266] EB Reg. 1400/2002, Sec. 5.3.8.

The question as to whether or not it is necessary to re-organize the network is an objective one, and the fact that the supplier deems such a re-organization to be necessary does not settle the matter in case of dispute. In such a case it shall be for the national judge or arbitrator to determine the matter with reference to the circumstances.

Whether or not a 'substantial part' of the network is affected must be decided in the light of the specific organization of a manufacturer's network in each case. 'Substantial' implies both an economic and a geographical aspect, which may be limited to the network, or part of it, in a given Member State.[267]

3. Dispute Resolution

The protection of the dealers under Regulation No 1400/2002 would be useless without a system for ensuring prompt and effective enforcement of the rights afforded to the dealer.

Article 3 (6) of Regulation No 1400/2002 broadens the scope of the mandatory dispute settlement method. As required by new Regulation, no exemption is granted for the agreements including an arrangement enabling the parties of agreement to refer to third party expert or arbitrator if any dispute emerges in the issues such as whether the parties perform their contractual obligations, determination and implementation of supply obligations, stock quantities and sale targets, the conditions of multi-branding, whether the location clause enacted for dealers of motor vehicle excluding from automobile and light commercial vehicle prevents these undertaking from developing their business and whether the termination is based on reasonable reasons.

The right to refer disputes concerning the fulfillment of their contractual obligations to an independent expert or arbitrator as set out in Article 3 (6) applies to all vertical agreements falling within the scope of the Regulation.

[267] Ibid, Sec. 5.3.8.

In order to favor the quick resolution of any disputes which arise between the parties to distribution agreements, which might otherwise hamper effective competition, such agreements will only be covered by the exemption if they provide for each party to have a right of recourse to an independent expert or arbitrator. This right does not affect each part's right to make an application to a national court.

Any person accepted by both parties as being qualified to act in such capacity may be appointed as expert third party or arbitrator. The parties are free to decide, should the situation arise, whom they wish to nominate and whether they prefer to appoint one, two, three or more people to act as experts or arbitrators. However, no party may decide unilaterally who the expert or arbitrator will be. In the event of disagreement the parties must adopt the nomination procedures which are normally used in such cases, such as nomination by the president of the court, or by the president of a chamber for commerce and industry. It seems advisable that the vertical agreement should specify what kind of nomination procedure they wish to use should the situation arise.

4. Facilitation of Multi-branding

Article 5 contains a list of seven specific obligations which may not benefit from exemption under the Regulation. Where such obligations can be served from the rest of the agreement, the remaining part of the agreement continues to benefit from the block exemption. The specific conditions exclude both direct and indirect means to attain the anti-competitive outcome of such obligations.

Article 5 excludes obligations contrary to this aim from the block exemption. As regards the sale of vehicles, repair and maintenance services or spare parts, the Regulation does not cover any direct or indirect non-compete obligations.[268]

[268] Art. 5 (1) (a).

Non-compete obligations are notably those which make benefits or incentives expressly dependent on the member of the network only selling the supplier's goods or not selling, reselling or purchasing[269] goods which compete with the contract goods.

In many instances, the activity of providing repair and maintenance services for motor vehicles of one brand does not actually compete with the provision of such services for a different brand. In order to allow authorized repairers to repair vehicles of different brands, the specific condition excluding non-compete obligations is therefore complemented with another condition excluding from the block exemption any obligation limiting the ability of authorized repairers to provide such services for vehicles from competing suppliers.

The Regulation excludes direct or indirect obligations[270] which make distributors or repairers buy more than 30% of their purchases of vehicles or spare parts pertaining to the same relevant market from a single supplier. It does, however, not mean that the distributor or repairer can be required to buy the specified quantity (up to 30% of purchases) directly from the supplier. It can also buy the same goods from other sources designated by the supplier, such as any other undertaking within the distribution system. So, the authorized dealer is made independent to assume the dealership of at least 3 different brands.[271] General obligation or requirements which objectively speaking do not hamper members of a suppliers' network from purchasing 70% of their requirements of substitutable goods or services from

[269] http://www.ks.dk/english/competition/national/2005/pradan/ retrieved on 03.06.2005. The case came about after a complaint from an independent importer of original Skoda spare parts before the Danish Competition Authority. The complainant claimed, that Pradan Auto Import operated an illegal discount-system, which prevented competing suppliers of original Skoda spare part from selling to the authorised Skoda repairers. Pradan operated a discount-system, where each repairer had to achieve an individual purchase target every quarter, in order to have three different categories of discounts paid out. The purchase target was fixed on the basis of the individual repairers purchase in the previous year and Pradan's overall aggregated spare part sales. The discount system was fit to secure Pradan's dominant market share and keep possible new competitors out of the market. The discount system made it unrealistic for independent spare parts providers to compete with the authorised repairers. After the merger with Skandinavisk Motor Co. a new discount system has entered in to force, which is used for all of the four brands of cars, that the company deals with (VW, Audi, Skoda og Seat). Skandinavisk Motor Co. has throughout the proceedings of the case disputed that the discount system was illegal. It was therefore of importance to clarify the legal position. The Danish Competition Counsel decided, that the discount system operated by Pradan Auto Import constituted an abuse of a dominant position under section 11 of The Danish Competition Act, because the purpose of the system was to close of the market to the entrance of new competitors.

[270] Art. 1 (b).

[271] Considered that three supplier use the entire ratio of 30%, there is 10% remaining for the fourth supplier. Thus, it is possible for the authorized dealer to work with three suppliers.

other suppliers producing competing goods are covered by the block exemption. (Article 4(1) (b) and (c)).[272] Insofar as access to the market is not foreclosed to competing suppliers, such obligations may not raise competition problems. For instance, fidelity rebates based on a specific proportion (greater than 30%) of a buyer's purchases would be an indirect non-compete obligation, whereas a scale of reducing prices based on absolute volumes purchased and linked to economies of scale would not.

The strict decrees which are enacted in Regulation with respect to non-competition constitute one of the most important discrimination point from Regulation No 2790/1999 Regarding Vertical Agreements.[273]

The Regulation seeks to ensure access to markets and to give distributors and repairers in particular opportunities to sell and repair vehicle from different suppliers, i.e 'multi-branding'. One of the targets of Commission with respect to motor vehicle sector is 'multi-branding' which means that the authorized dealer can sell other brands in addition to the original brand for which it sells its products in the same showroom. So, manufacturers will no longer entitled to prevent dealers selling more than one brand; nor may they require dealers to display the entire range of vehicles belonging to their brand if this is an indirect way of preventing the dealer from selling another brand. Manufacturers may oblige dealers to display different brands in different areas within one showroom, provided it is not an indirect way of preventing sales of another brand.[274]

This "multi-branding" reinforces dealers' commercial independence vis-à-vis their suppliers and also enables dealers in sparsely populated areas to keep their businesses profitable. The new regulation therefore gives retailers a genuine choice as to whether they

[272] For instance; if supplier A imposed an obligation on dealer X such that 30% of the vehicles that X purchased had to be of its brands, X would have to be free to buy these vehicles from other dealers, wholesalers or importers of supplier A's brands, and would also be free to buy up to 70% of its total purchases of vehicles from suppliers of other brands. If all suppliers imposed the same 30% purchasing obligation, X would be free to take on makes from a maximum of three suppliers. X therefore, for example sell makes A1 and A2 (12) from supplier A, plus B1 from supplier B, and C1 from supplier C.

[273] In Regulation No 2790/1999 being different from Regulation No 1400/2002, the buyer's obligation to make its purchases more than 80% from the supplier is regarded as non-compete obligation and an exemption of five years can be granted to non-compete obligation.

[274] Art. 5 (1) (a).

sell more than one brand. Carmakers may only impose a requirement to display their cars in brand specific areas within the showroom.

The Regulation No 1400/2002 covers situations where the dealer decides to have brand-specific sales personnel and the supplier pays all the additional costs involved.[275] It says that *'an obligation that the **distributor** have brand-specific sales personnel for different brands of motor vehicles* constitutes *a non-compete obligation for the purposes of this Regulation unless the distributor **decides** to have brand-specific sales personnel and the supplier pays all the **additional costs** involved*'.

In Turkish Competition Law, in the Article 3 (b) of the Communiqué No 2005/4, this decree is formulated as: "*As long as the **cost** of the brand-specific sales staff the distributor employs is not covered by the provider, imposing on the distributor an obligation to employ different sales staff for vehicles of different brands means, under this Communiqué, a non-compete obligation*.". Thus, while the reimbursement of (additional) cost (such as training) exceeding actual cost (salary, insurance premium etc.) of such personnel being met by distributor in case employment of special sale personnel requested for the brand by distributor has been accepted as non-compete obligation in Regulation, the case that even any cost item of such personnel's employment is undertaken by distributor has been taken into the scope of non-compete obligation in the Communiqué.[276] [277]

The aim of the Regulation as far as multi-branding is concerned is to increase competition between brands of different suppliers.[278] At first sight, the multi-branding, which appears as an arrangement towards the increase of competition, is regarded as an arrangement which would strenghten the sovereignty of authorized dealer against supplier.

[275] Art. 1 (1) (b).
[276] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p.322.
[277] However, no reason has been specified for making a different arrangement in justification of Communiqué with respect to this matter. It is thought that such difference with respect to this case has emerged by mistake.
[278] To be covered by the Regulation, an obligation to sell the brands of a particular manufacturer may not relate to more than 30% of all the vehicles purchased and sold by the dealer- see Art. 1 (1) (b) and 5 (1) (a) of the Regulation No 1400/2002. These provisions also apply to exclusive dealer agreements.

The multi-branding has facilitator effects for entrance into market in motor vehicle sector on manufacturer level. In the stage of entrance into market in motor vehicle sector, it is important to develop an authorized dealership network by a big volume advertisement expense and strong after-sales support. Therefore, the new players in the market may be obliged to make the investments of authorized dealership by themselves in first stages.[279]

Clearly, manufacturers should generally be free to choose how their own brands relate to one another. The Regulation therefore allows them to stipulate that their brands may not be sold together in the same showroom. If a car manufacturer A produces brands A1 and A2, it may stipulate that these must be sold in separate showrooms. It may not however, stipulate that either A1 or A2 may not be sold in the same showrooms as brands of other suppliers.[280] [281]

[279] Gazioğlu, p. 35.

[280] http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/06/120&format=HTML&aged=0&language=EN&guiLanguage=fr retrieved on 05.07.2005. The Commission looked at potential obstacles to multi-brand distribution resulting from obligations imposed by carmakers to display a minimum number of their cars in the dealer's showroom. In the BMW case, the Commission investigated whether the requirements as to the minimum number of cars a dealer must display could produce effects amounting to an indirect non-compete obligation within the meaning of Regulation 1400/2002. Market data revealed however that, for the large majority of authorized BMW dealers in the countries investigated, the BMW contracts left significant free capacity for dealers to use their existing showroom to display also cars of another brand. In particular, the groups of BMW dealers that have insufficient showroom space available for other brand is largely composed of smaller BMW dealers and represent less than half of the current BMW network of dealers in Many States investigated. Commission considered that this requirement to be an indirect non-compete because showrooms below a certain size may in certain cases simply not be suitable for displaying a representative range of cars by more than one brand, without additional investment.

[281] http://www.oft.gov.uk/News/Press+releases/2004/124-04.htm retrieved on 05.08.2005. Another case related with this topic consists of the attempt of Office of Fair Trading regarding the obligation of institutional architectural appearance which Peugeot requested from its retailers in England. It has helped to clarify confusion amongst Peugeot dealers over the car manufacturer's 'Blue Box' corporate branding standard for car sales premises. Peugeot has reassured dealers that the standard is recommended but not compulsory. Under the Blue Box standard, the exterior of sales premises is clad in 'Peugeot blue'. The OFT acted following complaints from Peugeot dealers passed on by the National Franchised Dealer Association. These dealers were under the impression that the standard was compulsory. They were concerned that such distinctive Peugeot branding would discourage multi-franchising of different makes of car on the same premises, as now permitted by the new block exemption for cars. Peugeot informed the OFT that It has issued a general letter to its dealers reassuring them that the scheme is not mandatory but nevertheless highly recommended. Penny Boys, OFT Executive Director, stating that this implementation of Peugeot was to prevent multi-branding said.

5.3.3 Arrangements Regarding After-Sales Services and Spare Part Distribution

The fact that the costs of after-sales services and spare parts are equal to purchase worth of vehicle causes that the competition in these services bears importance with respect to the competition in at least motor vehicle sale. The fact that the profit margins in after sales services and spare parts are very higher compared to the margins in motor vehicle sale intensifies the significance of this matter considerably. Owing to the mentioned reasons, the Commission stresses the competition in this important field in motor vehicle sector. The fact that expected results are not accomplished despite the arrangements enacted by Regulation No 1475/95, in this respect, causes the enactment of radical innovations in Regulation No 1400/2002 with respect to after-sales services and spare parts distribution.[282]

It limits a number of hardcore restrictions and does not allow suppliers, in particular vehicle manufacturers and their importers, to restrict the right of their distributors and authorized repairers to obtain original spare parts and spare parts of matching quality from any third undertaking of their choice and to use them for the repair and maintenance of motor vehicles.[283] Nor may vehicle manufacturers restrict the right of spare part manufacturers to sell original spare parts or spare parts of matching quality to authorized or independent repairers.[284] Moreover, Regulation No 1400/2002 does not allow suppliers to restrict the right of their distributors and authorized repairers to sell spare parts to independent repairers, who use them for the repair and maintenance of motor vehicles.

First the definition of spare parts in the Regulation No 1400/2002 should be examined in detail. Many replacement products are specific to motor vehicles as defined in the Regulation and fall clearly within the definition of spare parts.[285] However, certain goods, such as lubricants, paint and generic products such as screws, nuts and bolts, may have dual –or multiple-uses. While they can be installed in or upon a motor vehicle so as to replace components of that vehicle, they may also have end uses in relation to types of vehicles not covered by the Regulation (e.g. motor bikes, tractors) or in even more diverse context.

[282] Gazioğlu, p. 38.
[283] Art. 4 (1) (k).
[284] Art. 4 (1) (j).
[285] Art. 1 (1) (s).

Therefore, such goods should only be regarded as spare parts within the meaning of Article 1(1) (s), with the result that vertical agreements for their distribution fall within the scope of the Regulation, where it is reasonably certain that they are destined for installation in or upon a motor vehicle. In practice, this will occur where the buyer's[286] activity is in the motor vehicle repair sector or in the supply of that sector.[287]

It follows from the definition in Article 1 (1) (s) that goods which are not necessary use of the motor vehicle in question, such as a radio setter a CD player, a GSM hand-free installation, a navigation system or a luggage rack, which are normally referred to as accessories, are not considered to be spare parts. However, if such goods are installed on the production line of the new vehicle and integrated with other parts or systems of the vehicle then these goods become components of that vehicle and the parts needed to repair or replace these goods are spare parts. (E.g. Hi-fi controls integrated in a car steering wheel). Air conditioning or temperature control equipment which is installed on a truck or bus or an alarm system or hi-fi system installed on a car after the vehicle has left the vehicle manufacturer's production line has therefore be considered as an accessory.[288]

Regulation No 1400/2002 is not applicable to the distribution repair and maintenance of accessories. Their distribution may come under Regulation No 2790/1999.

Regulation No 1400/2002, Article (1) (t) states that 'original *spare parts means spare parts which are of the same quality as the components used for the assembly of a motor vehicle and which are manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of components or spare parts for the motor vehicle in question*'. Whereas, in Article (1) (r) of Communiqué 2005/4, it has been mentioned about specifications and manufacturing standards imposed by provider instead of

[286] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 324.
In Art. 1/k of Regulation, the buyer has been defined as distributor or repairer, includes an undertaking which sells goods or services on behalf of another undertaking. However, in Art. 3/j of Communiqué 2500/4, buyer has been defined as the undertaking in the position of distributor or authorized service, such that the undertaking that sells goods or services on behalf of another undertaking is included. From Communiqué, it is not clearly understood why the independent services are excluded from the definition of buyer and the issue of how to position independent services with respect to the articles in which definition "buyer" is used.
[287] EB Reg. No 1400/2002, Sec. 4.2.1.
[288] EB Reg. No 1400/2002, Sec. 7.

manufacturer of motor vehicle. It is unclear that what kind of specification or manufacturing standard will be determined by motor vehicle provider which is not a manufacturer. It should be considered that the amendment of term "provider" in the Communiqué as "manufacturer of motor vehicle" would make the article more correct.[289]

According to Article (1) (t) there are three categories of 'original spare parts'.

The first category of original spare parts consists of parts which are manufactured by the vehicle manufacturer. The following rules apply to these original spare parts:[290]

- the vehicle manufacturer may require its authorized repairers to use this category of original spare parts for repairs carried out under warranty, free servicing and vehicle recall work.[291]

An authorized repairer may be obliged to carry out repairs under warranty, (replacing broken or defective parts of a vehicle), free servicing and vehicle recall work using original spare parts supplied by the vehicle supplier. Article 4 (1) (k) provides that a vehicle supplier may stipulate that parts supplied by it be used for the above types of repair work.

Outside the context of warranty work where the supplier may insist on the use of spare parts supplied by himself, it is considered a hardcore restriction if the supplier uses an obligation on the repairer to inform its customers on the use of original spare parts or of spare parts of matching quality as a means to directly or indirectly restrict the right of the authorized repairer to purchase and use such spare parts. In particular, it may not use such an obligation to create the impression in the mind of consumers that these parts are of lesser quality than original spare parts supplied by the vehicle manufacturer.

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[289] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 324.
[290] http://www.fiea.org/documents/figiefa-uk.pdf retrieved on 02.08.2005. FIGIEFA, The New Automotive Block Exemption Regulation 1400/2002/ EC, Opportunities for Independent Automotive Parts Distributors & Other Independent Aftermarket Operators.
[291] Art. 4 (1) (k).

- the vehicle manufacturer may not limit the right of its distributors to sell this category of parts, actively or passively as the case may be, on to independent repairers which use them for the repair and maintenance of motor vehicles;[292] in this respect it is irrelevant whether these repairers use them in their workshop or for the provision of roadside assistance services.

The second category of 'original spare parts' refers to parts which are supplied by spare part manufacturer to the vehicle manufacturer, who sells them on to its distributors. The following rules apply to these original spare parts:

- the spare part producer may not be restricted from placing its trade mark or logo effectively and in an easily visible manner on these parts.[293] This right also includes the right to place trademark or logo on the packaging and on any accompanying document. This means that an official repairer now has two sources, the part producer and the car manufacturer, instead of one. This increases the benefit for the part producer, the repairer and also the consumer;
- the vehicle manufacturer may also place its trademark or logo on these parts;
- the spare part producer may not be restricted from supplying these spare parts to any authorized or independent spare part distributor or any authorized or independent repairer,[294] and the authorized repairer may not be restricted from using these parts;[295]
- the vehicle manufacturer may require its authorized repairers to use this category of original spare parts for repairs carried out under warranty, free servicing and vehicle recall work.[296] This article increases benefit for the matching quality part producer, the repairer and the consumer while preserving safety;
- the vehicle manufacturer may not limit the right of its distributors to sell this category of parts, actively or passively as the case may be, on to independent repairers which use them for the repair and maintenance of motor vehicles;[297] in respect it is irrelevant

[292] Art. 4 (1) (l) (i) or 4 (1) (b) (i).
[293] Art. 4 (1) (l).
[294] Art. 4 (1) (j).
[295] Art. 4 (1) (k).
[296] Art. 4 (1) (k).
[297] Art. 4 (1) (i) or 4 (1) (b) (i).

whether these repairers use them in their workshop or for the provision of roadside assistance services.

The third category of 'original spare parts' consists of those which are not supplied to the relevant vehicle manufacturer, but which are nevertheless manufactured according to the specifications and production standards provided by it. The spare part manufacturer either supplies these parts to independent spare part distributors or directly to repairers. The following rules apply to this category of original spare parts:

- the spare part producer may not be restricted from placing its trade mark or logo effectively and in an easily visible manner on these parts. This also includes the right to place the trademark or logo on the packaging;[298]
- the spare part producer may not be restricted from supplying these spare parts to any authorized or independent spare part distributor or any authorized or independent repairer, and the authorized repairer may not be restricted from using these spare parts.

A part producer which produces spare parts based on specifications and production standards provided to it by the vehicle manufacturer has to issue a certificate confirming that the spare parts have been produced accordingly and that the parts are of the same quality as the components used for the assembly of the vehicle in question.[299] Such an affirmation by the part producer can be printed on the packaging or on a paper which accompanies the part or be published on the internet. It is for the part manufacturer to decide whether it wants to issue such a certificate itself or whether it wishes to go further and to refer to a certification carried out by an independent body such as a certification organization. Certification by an independent body is however not a requirement for parts to qualify as original spare parts.

'Original spare parts' are to be distinguished from 'matching quality spare parts'. Matching quality spare parts match the quality of the components used for the assembly of the relevant vehicle but are not produced according to the specifications and production standards provided by the vehicle manufacturer. This means that these parts are of the same or even

[298] Art. 4 (1) (l).
[299] Art. 1 (1) (t), 3rd sentence.

higher quality, but many of them for example are made of another material or be painted in another color.

If a spare part is to qualify as being of matching quality, the spare part manufacturer must be able to certify at any moment that it matches the quality of the corresponding component of the motor vehicle in question.[300] It is for the spare part manufacturer to issue such a declaration and to make it known to the user in the same as for original spare parts. Whereas, Article 3 (s) of Communiqué 2005/4 states that '*spare parts of matching quality are parts which must be certified by their manufacturer to be of matching quality with the components used in the assembly of a motor vehicle and to be compliant with the obligatory standards required by the legislation, if any.*' The definition differing from the definition in Regulation a little is not very clear.

From such definition in the Communiqué, it may be conceived that the conformity with such standards should be proved by the manufacturer of part as if there is obligatory standard with respect to such part. By granting such document from manufacturer, the claim that they are matching quality should be accepted as proved and the proof of contrary claim should be the obligation of those defending such claim.[301]

Radical innovations in Regulation No 1400/2002 with respect to after-sales services and spare parts distribution was made. The basic principles adopted in new Regulation can be classified in topics such as the discrimination of sale and after-sales services, qualitative selective distribution in after-sales services, the facilitation of competitiveness of independent undertakings and the providance of access to authorized networks by manufacturers of spare part.[302]

[300] Art. 1 (1) (u).
[301] Aslan / Katırcıoğlu / Toksoy / Ilıcak / Ardıyok / Bilgel, p. 324.
[302] Gazioğlu, p. 38.

a. Abolishment of Sales-Service Link

Another important aspect of the Regulation 1400/2002 is that the link between sales and service has been broken. The obligation that the dealer undertakes repair services was at the heart of the previous regime.

An authorized repairer is an undertaking that belongs to the network of 'official' providers of repair and maintenance services put in place by a supplier (vehicle manufacturer or its importer). The term 'authorized repairer' is a new one since under Regulation No 1475/95, both car retailing and repair and maintenance were commonly carried out within the suppliers' network by the same kind of business, commonly referred to as 'dealers'. In contrast, Regulation No 1400/2002 is based on different concept; the distribution of new motor vehicle and the provision of repair and maintenance services are no longer rigidly linked and may be carried out by separate undertakings.[303]

By claiming one of the conditions for the agreements of motor vehicle distribution to benefit from block exemption, the basic assumption lied in legal connection made with after-sale services has been defined in recital 4 of the Regulation No 1475/95 as follows:

'The 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 would also distribute spare parts on the other, particularly as, before a new vehicle is delivered to the final consumer, the undertaking within the distribution system must give it a technical inspection according to the manufacturer's specifications'.[304] However, the findings acquired by Commission in the market indicated that it should be evaluated whether the mentioned assumption is valid or not.

[303] EB Reg. No 1400/2002, Sec. 5.4.
[304] Reg 1475/95 Art. 5 (1) (a). More precisely, the exemption applied only if the dealer undertook to honour the supplier's warranties and obligations for servicing and recall work, and to provide other repair and maintenance services needed for the safe and reliable functioning of the supplier's brand of cars, irrespective of where the cars were bought.

In the report of Autopolis,[305] it is stated that the link between sales and service is an important aspect of the system by which vehicles are sold and supported in service. But it is only one aspect of the system and must be viewed in the context of the whole system, under all its aspects.

Three basic elements causing the adoption of combination of sale and after-sale services by suppliers consist of technical and economic reasons and expectations of consumers. The technical reason is the technical controls which has been specified in Regulation No 1475/95 and which should be performed before the delivery of new vehicle to customers. The economic reason is the fact the sale of new vehicle is not profitable enough for authorized dealers and thus, it is financially obligatory to perform the after-sale services which are more profitable. The reason based on customer expectation is the opinion that some part of customers want to buy their automobiles from an authorized dealer performing after-sale services.

While the renovations studies of Regulation No 1475/95 are ongoing, Autopolis whose opinion is requested by Commission has reached the following results in its detailed report about the subject: there is no connection due to natural result of competition in the market between sale and after-sale services, this is an artificial connection forced by manufacturers to the extent allowed in legal arrangements and the basic reason on which legal connection is based by Regulation has lost its validity due to certain advancements in distribution and the technical advancements in vehicles.

The 'softening' of the link between sales and services (the fact that sellers can subcontract the servicing of a car) will allow distributors to specialize, as they may choose to carry out after sales services themselves or may subcontract them to an authorized repairer. In the latter case, they will have to inform consumers of the location of the subcontractor before the sales contact is signed. To make things more transparent for consumers the manufacturer may also require the dealer to give the name and the address of an authorized repairer in question before the conclusion of the sales contract. Moreover, where the repair shop is not in

[305] Autopolis: The Natural Link Between Sales and Service, An Investigation for the Competition Directorate-General of the European Commission, November 2000.

the vicinity of the showroom, the supplier may also require the dealer to tell its customers how far the repair shop is from the showroom; however, he may only do so if he imposes a similar obligation on dealers whose own repair shop is not in the vicinity of the sales outlet.[306]

Under a sub-contract, an authorized repairer undertakes to co-operate as a sort of privileged service partner of the dealer, and to offer all types of after sales services to the dealer's customers. This includes normal repair and maintenance but also the honoring of warranties, repairs following a vehicle recall or free servicing offered by the vehicle manufacturer through the authorized repairer. [307]

As a conclusion, this clause separates the operation at the motor vehicle sector into two main groups, as 'sales' and 'after sales'. The restraints of the supplier to join those two parts together will lead to the exclusion of the agreement from the scope of block exemption.

b. Qualitative Selective Distribution in After-sale Services

The services of maintenance-repair of motor vehicle are performed by two groups which are either the undertakings taking place in distribution network of manufacturers or the independent undertakings. In order to prevent their vehicles from not utilising from guarantee scope, the consumers prefer the authorized service taking place in distribution network of manufacturers during the guarantee term for their vehicles. Upon the expiration of guarantee term, the consumers begin to receive after-sale services from independent undertakings not taking place in distribution network besides the undertakings taking place in distribution network of manufacturer. Therefore, the competition in the market of after-sale services during guarantee term mostly consists of the competition among the authorized dealers of same brand.[308]

The new Regulation, which prohibits the combination of exclusive and selective qıualities of distribution systems in the distribution of motor vehicle as in the case of after-sale services and distribution of spare part, enables exemption for only qualitative selective

[306] Reg. No 1400/2002; Art. 4 (1) (g).
[307] EB Reg. 1400/2002; Sec. 5.3.6.
[308] Gazioğlu, p. 40.

distribution in respect with maintenance- repair services and distribution of spare part in case the market share of supplier in relevant market is above 30%.[309] It is possible for supplier having a market share below 30% to adopt quantitative selective distribution or exclusive distribution system as in the case of motor vehicle distribution.

The Commission separates the market of after-sale services and distribution of spare part from the distribution of motor vehicle.[310] This case requires the calculation of suppliers' market share in respect with after-sale services and distribution of spare part. The market share of a supplier in after-sale services is calculated upon the value of service rendered by tha authorized services taking place in its distribution network. The relevant market regarding after-sale services, in a geographic market[311] is defined as maintenance-repair services performed by distribution network of brand and the services which may substitute the mentioned services in the eye of consumers.

Being different from the case in motor vehicle distribution, the authorized services of different brands in respect with after-sale services are generally of a quality which may not substitute each other. The independent repairers, which do not take place in distribution network of supplier but perform service for motor vehicles being subject of agreement, may substitute the after-sale services performed by authorized services to the various extent according the quality of service. In determining the relevant market for spare parts, it is important whether there are goods which can be really substituted.[312] While there may be many alternatives in the market in respect with parts which are not complex and which are used in repair-maintenance, alternatives may not exist for many parts special to the brand.[313]

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[309] Art. 3 (1).

[310] EB Reg. No 1400/2002, Sec. 6.2 (c). Due to reasons such as the average a useful life of automobiles is 12 years, change ownership several times and the servicing costs do not greatly influence the choice between buying automobile, it is mentioned that the market of maintenance-repair services should be separated from the motor vehicle market.

[311] According to Explanatory Brochure, for after-sale services and spare parts, as the supply for authorized dealership network by manufacturers is defined as geographic national markets as the members of authorized dealership network perform activity at national level under the similar commercial conditions.

[312] For instance products used in unsophisticated repair or maintenance operations. In the case of batteries, for instance, several alternatives present on the market may be safely fitted in a particular car model.

[313] For many brand-specific spare parts, as there may be no readily alternative sources of supply in the market, end consumers would not get their cars repaired with a different spare part. In the absence of substitutes, spare parts for a particular brand may thus be defined as a relevant product market affected by the agreement between a supplier and its authorized repair network.

In case the substituted parts do not exist, the spare parts special to a certain brand can be defined as the relevant product market that should be handled regarding the agreement signed between the supplier and authorized dealership network. [314]

The fact that the number of substituted products for after-sale services and spare part distribution is restricted in the eye of consumer causes the case that the suppliers may have higher market shares in the markets of after-sale services and spare part even if they have low market shares in the distribution of motor vehicle. In Explanatory Brochure, it is mentioned that the market shares of supplier in after-sale services and spare part distribution may exceed the threshold of 30% being envisaged in Regulation in respect with certain types of after-sale services and spare parts.[315] In this scope, it can be said that the Commission has aimed to enable the implementation of qualitative selective distribution system de facto, in respect with after-sale services and spare part.

If the market share of authorised repair network of the brand in question is above 30%, the Regulation only covers qualitative selective distribution. If the supplier wishes his distribution agreement to be covered by the Regulation, it may thus only impose qualitative criteria for its authorised repairers, and must allow all repairers which fulfill these criteria to operate as authorised repairers,[316] including authorised dealers whose contracts have been terminated but would like to continue as authorised repairers.[317]

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[314] Gazioğlu, p. 42.
[315] EB Reg. No 1400/2002, Sec. 6.2 (c).
[316] http://ec.europa.eu/comm/competition/annual_reports/2004/en.pdf European Commission Volume 2, Report on Competition Policy 2004. President of the Court of Harlem of 28 September 2004, 103753/KG ZA 04-347, plaintiff v Daewoo Motor Benelux (interlocutory proceedings). In this case Daewoo has opted for a qualitative selective distribution system which gives Daewoo the right to select its distributors in the Netherlands in accordance with its own criteria. The plaintiff claims that the regulation also obliges Daewoo to recognize all garages (repairers) which meet Daewoo's standards for authorized repairers. In the interlocutory proceeding, the central question was whether Daewoo was obliged to enter into a 'recognized repairer' contract with the plaintiff. The president took into consideration the fact that Regulation EC No 1400/2002 could not impose restrictions on suppliers with regard to the member of recognized repairers who meet the quality criteria determined by the supplier and the fact that the court cannot compel a supplier to enter into an agreement with a repairer who meets all the supplier's after sales standards, even if the supplier has opted for the system of selective distribution, pursuant to Regulation No 1400/2002, and does not meet the conditions of the group exemption with regard to authorized repairers. The president decided that such an obligation to enter into a contract cannot be derived from the passage from Regulation No 1400/2002 cited by the plaintiff nor from any other provision of the regulation. If a supplier, who has opted for a system of selective distribution, fails to comply with its obligations under the block exemption with regard to the selection of its repairers, the only effect of this is that the block exemption ceases to apply to the supplier.

c. Facilitation of Competitiveness with Independent Repairers

One of the main aims of the Regulation No 1400/2002 is to create the conditions for effective competition on the vehicle repair and maintenance markets, and to enable all operators on those markets, including independent repairers, to offer high quality services. Effective competition is in the interest of consumers and allows them to choose between alternative providers of repair and maintenance services, including those authorized by the vehicle manufacturer and those in the independent sector.

The Regulation will apply to the agreements whose subject is the repair and maintenance. Those agreements are generally being made through the supplier and the repairer.[318]

In periods following the expiration of warranty term for motor vehicles, the authorized services compete with independent repairers and "fast-repair" chains which have become widespread in recent years. The Commission considers that the effective competition in after-sale services emerged in this period when independent undertakings participated into the competition.[319]

Important part of maintenance-repair services of motor vehicle requires specialization of brand. The authorized dealers and services taking place in distribution network of manufacturers have the mentioned specialization thanks to tehcnical equipments special to brand and the technical information[320] and training provided by manufacturers. However, the

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[317] EB Reg. No 1400/2002, Sec. 5.4.1.

[318] According to Art. (1) (1) ''authorized repairer' means a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor vehicles'.
According to Art. (1) (m) 'independent repairer' means a provider of repair and maintenance services for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance. An authorized repairer within the distribution system of a given supplier shall be deemed to be an independent repairer for the purposes of this Regulation to the extent that he provides repair or maintenance services for motor vehicles in respect of which he is not a member of the respective supplier's distribution system.

[319] It is stated in the EB Regulation No 1400/2002, Sec. 5.5.2 that independent repairers provide healthy competition to the authorized repair network.

[320] There must be no discrimination between independent and authorized repairers, prompt and proportionate way, which takes account of the needs of the independent operator in question; it has also to be provided in a usable format.

specialization of brand may not be through the authorized service network only. The independent repairers, which do not take place in authorized service network but have the necessary equipment and specialization in certain brands, may also perform maintenance-repair works.

As the motor vehicles have gradually had more complicated and technologic equipments in recent years, the access of independent repairers having brand specialization to know-how required for maintenance-repair services of vehicles. Another fact being as important as the access to know-how is the technical equipment required for the maintenance and repair of vehicles. For many motor vehicle manufactured by advanced technology today, it is not possible to easily detect the technical malfunctions in vehicles and to perform the required repairs without the diagnostic devices manufactured specially for the relevant model by manufacturers. Another important matter in respect with after-sale services is the training that should be provided to technical personnel for maintenance and repair works requiring the specialization and usage of special equipment special to the brand. [321]

A supplier of motor vehicles must provide access to technical information on new vehicles and information on new vehicles and information necessary for reprogramming electronic devices to independent operators at the same time as to the authorized repairers. The latter is a qualified obligation as there is no compulsion to disclose information which would enable a third party to by-pass or disarm on-board anti-theft devices,[322] to recalibrate electronic devices or otherwise tamper with electronic devices unless protection against the above can be attained by other less restrictive means.

As being a part of the target to increase competition in the field of after-sale services, the Regulation No 1400/2002 has enacted facilitator arrangements which enable the competitiveness of independent repairers being an important alternative to authorized services in the eye of consumer. In addition to know-how, the new Regulation has made it obligatory to provide the independent repairers with diagnostic equipments including software and

[321] EB Reg. 1400/2002; Sec. 5.5.1.

[322] http://www2.ukie.gov.pl/14powodow/kons/BEUC.pdf retrieved on 05.07.2006. According to BEUC, appropriate mechanism have to be devised to allow bypassing or disarming of onboard anti-theft devices, provided this is necessary to service the vehicle.

hardwares special to brand and all other technical equipment and training required for the maintenance ando repair of vehicles under the same conditions[323] provided to authorized dealers by manufacturers. In case it is in the scope of a right of intellectual property or constitutes a know-how, it is prohibited by Regulation if restriction of access to technical information leads the misuse of dominant position in the sense specified in RA Article 82.

As arranged in former regulations, the Regulation makes it obligatory for manufacturers to allow their authorized dealers for providing independent repairers with original spare parts.

The study, which IKA carried out at the Commission's request, looks at how manufacturers have complied with the Regulation in terms of providing technical information to garages, tool manufacturers and publishers.[324]

However, Competition Commissioner Mario Monti commented 'Although car manufacturers are making technical information available to independent operators, we are still falling way short of the mark. If competition in car repair is to develop, manufacturers must really step up their efforts to make things more transparent and accessible'. He added 'with everything being done electronically nowadays, access to technical information is increasingly at the hearth of competition'.[325]

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[323] For instance, if such services are provided for authorized dealers for free, it is free; if provided for charge, it will be in exchange for price provided not to exceed what the dealers pay.

[324] http://ec.europa.eu/comm/competition/car_sector/ika/ikastudy.pdf retrieved on 04.07.2005. Ing Henning Wallentowitz, 'Final Report Do motor vehicle suppliers give independent operators effective access to all technical information as required under the EC competition rules applicable to the motor vehicle sector?' IKA Instıtut Für Kraftahrwesen Aachen, 2004. p,21. The study, which IKA carried out at the Commission's request, looks at how manufacturers have complied with the Regulation in terms of providing technical information to garages, tool manufacturers and publishers. As a consequence following the report, although it can be initially said that the Regulation No 1400/2000 has strengthened the existing situation of independent services and that the manufacturers of motor vehicle acted pursuant to the new Regulation, it is observed that this Regulation has not completely fulfilled its target as high prices and uselessness of information systems prevent the access to the information regarding technical repair. Furthermore, the unavailability of repair devices of same quality and limited facilities in the repair of electronic mediums cause that the independent repairers can not work under the competitive conditions. More importantly, it has been observed that, the regulation basically worsened the situation much more for the publishers and independent manufacturers of repair device who have seen the rectifying function for the working environment of independent services.

[325] http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1235&format=HTML&aged=0&language=EN&guiLanguage=en retrieved on 04.05.2006.

5.3.4 The Relevant Market

With regard to the market definition, the Commission follows the approach defined in its Notice[326] on this subject. It also takes into account previous decisions which have precisely defined relevant markets,[327] subject to an assessment of the changes which may have occurred since the decision and taking into account the level of trade at which the decision has defined the market.[328]

Regulation No 1400/2002 is deliberately vague on the subject of the product delineation. There is the distinction drawn in Art.8 between new motor cars, spare parts and after sales services.

a. Sale of New Motor Cars

In its BMW/Rover[329] merger decision, the Commission segmented the motor car market using a member of objective criteria; such as engine size, motor, car length, purchase price, body type and brand image. The same segmentation was also followed in Art. 81 decisions.[330]

Two factors could broaden the definition of product market. First, the Commission is not being consistent. In the Inchape/IEP decision,[331] it is held that 'whilst the different segments are important in terms of establishing product substitutability they are very much less important in relation to product distribution'. It follows that if a model range covers different market segments and is normally distributed through the same distribution system, it is not necessary to analyze distribution channels by the product market segment of the passenger car

[326] Commission Notice on the definition of the relevant market, p.5.
[327] For instance, in Commission Decision of 14.3.2000 in case No COMP/M.1672- Volvo/ Scania (OJ L 143, 29. 5. 2001, p.74), trucks were subdivided into light-duty segment (below 5 tones), medium duty segment (between 5 and 16 tones) and heavy duty segment (above 16 tones) and markets were defined as national.
[328] It follows that a definition of a relevant product and geographic market in a decision assessing say, a merger between manufacturers of a automotive components, may not always be appropriate to establish the relevant product market affected by a distribution and servicing agreement which concerns the same component used as spare part along with all the other spare parts which are necessary to provide repair services.
[329] Case IV/M. 416 BMW/ Rover.
[330] PO/ Opel Nederland BV/ General Motors Nederland BV (2001/146/ EC), September 20, 2000 (2001) O.J. L59/1, (2001)1 CMRL 1441; Case COMP /38.064/F2 DaimlerChrysler, February 15, 2001 (2001) O.J. C49/4; Volkswagen (2001/711/EC), June 29, 2001(2001) O.J. L262/14, (2001) 5 CMLR 1309.
[331] Case IV/M 182, Inchape/IEP January 21, 1992,(1992) O.J.C21/27, para. 9; (1992) 4 CMRL 81.

distributed. Secondly, the Commission must take into account the existence of chains of substitution. The UK Office of Fair Trading's report, for example, was highly influenced by that insight. It concluded that all models of motor cars were to be seen as constituting a single product market.

In Mercedes Benz case,[332] in relation to market definition in the motor vehicle sector, the decision divides the passenger car market into a number of segments based on factors such as purchase price and vehicle length, taking the view that other factors such as engine capacity, quality and brand image play a smaller role in determining the segment to which a vehicle belongs such as very small cars, small cars, medium cars, upper medium cars, executive cars, luxury cars, multi purpose vehicles and sports cars.

b. Sale of Spare Parts

Article 8 of Regulation No 1400/2002 and its Explanatory Brochure provide a separate examination of the activities of selling new motor vehicles and selling spare parts and providing repair and maintenance services. Commission admitted that a single market for motor vehicles and spare parts together may be defined.[333] It follows from two cases on Art. 82 (Hugin v Commission[334] and Pelikan/ Kyocera[335]) that two factors are relevant in order to determine whether a separate market for spare parts exist;

- The consumer must be 'locked in' to a particular supplier for spare parts; this depending on factors such as the price and life-time of the primary product, the transparency of the prices for the secondary product and the proportion of the price of the secondary product to the value of the primary one and,

[332] Mercedes-Benz, (2002) O.J. L257/1.
[333] Automotive Sector Groups of Houthoff Buruma and Liederkerke Wolters Waelbroeck Kirkpartick, p. 260.
[334] Hugin Kassaregister AB v. Commission, Case 22/78 (1979) ECR 1869. In this case the ECJ agreed with the Commission and found Hugin to be in a dominant position regarding the spare parts for its own cash machine, as it could, by relying on intellectual property law, prevent consumers from using spare parts manufactured by the other companies.
[335] Massimo, Motta, Competition Policy, Theory and Practice, USA, Cambridge University Press, 2004, p.112. Case No IV 34/330.Pelikan/ Kyocera. In this case the Commission found that Kyocera was not dominant in the market for toner cartridges for printers, since consumers took the price of cartridges into account when deciding which printer to buy.

- The consumer does not take into account the price of the spare parts when purchasing the primary products.

Despite the criticism, Hugin provides authority for the proposition that one brand of spare parts can constitute a separate product market for the purposes of Article 82. This principle has been applied and relied upon a member of cases, in particular in two cases involving the motor industry, namely Volvo[336] and Renault.[337] In these cases it was held that spare parts for cars constitute a separate market from the cars themselves. A manufacturer of a car with a low market share therefore find that it is dominant on the market for the supply of its spare parts.[338]

It is patent that automobile spare parts fulfill the first condition: motor cars are expensive, last approximately over 12 years[339] and the prices for spare parts are not transparent because the need for them is unknown at the time of purchase. With regard to the second condition, fleet owners often take into account prices of after sales services and spare parts when they buy the new motor cars. When fleet owners charge their customers a price per kilometer that combines the costs for purchase and maintenance, it could be argued that one single market that includes both motor cars and spare parts should be defined.[340] This is especially true for the small and medium segments of the market where a high share of the purchasers are fleet owners.

[336] Case 238/87, AB Volvo v. Erik Veng (1988) ECR 6211, (1989) 4 CMLR 122. The judgment in Volvo came as a considerable relief to those investing in innovation and their advisers. Independent repairers wanted to import from Italy spare parts for Volvo cars, but Volvo held a registered design in UK and was not prepared to Grant a license for a royalty. Advocate General Misco concluded that the holder of intellectual property rights is dominant over products they protect only if it is in a position to prevent the maintenance of effective competition over a considerable part of the relevant market. He added, however, that since there was no substitute parts, Volvo enjoyed a dominant position over the body parts once it began to exercise its design rights, a view slightly narrower than that in Hugin.
[337] Case 53/87, CICCRA v. Renault (1988) ECR 6039, (1990) 4 CMLR 265.
[338] Jones / Sufrin, p. 317.
[339] EB Reg. No 1400/2002, fn.201.
[340] EB Reg. No 1400/2002, fn.185.

c. Sale of After Sales Services

As referred above, the market for after-sales services should be seen as brand specific if (a) motor car owners do not view brand-specific repair services as substitutable with non-brand specific repair services, and (b) brand-specific spare parts are not substitutable with non-brand specific parts fro providing those services. In such cases, the supplier should calculate its market shares on the basis of both the value of the repair and maintenance services that the network provides and on the value of the spare parts that it sells to its network. The Commission clearly thinks both conditions (a) and (b) will always be met.

In the case of cars under warranty, independent repairers are indeed not substitutable with authorized repairers, as they cannot provide free repair under warranty. However, this difference is irrelevant for cars that are no longer under warranty. Indeed, Art. 4 (2) of Regulation No 1400/2002 provides that independent repairers must be granted access to all necessary technical information. Therefore, the Commission's market definition is too narrow.

Again, fleet owners will take all costs of maintenance, including after-sales servicing, into account when buying new vehicles. This will blur the distinction made by the Commission between the sale of after-sales services and the other two markets.[341]

5.3.5 Geographic Market

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.[342]

In determining the relevant geographic market, the following factors should be taken into account: the nature and characteristics of the products or services concerned the existence

[341] ECLR 2003,24(6), 254–267.
[342] Commission Notice on the definition of the relevant market, para.8.

of entry barriers, consumer preferences, appreciable differences in market shares held by undertakings between neighboring geographic areas and substantial price differences.

In view of the single market project and the aim of breaking barriers to trade between Member States, it is perhaps to be expected that many markets will be at least Community wide rather than national. Nevertheless, particularly in consumer product markets, the market has often been found by the Commission to be national. This has been the case where there are no legal barriers to entry and where it might not be anticipated that other barriers to entry would exist. The case law of Court indicates that the geographic market will encompass all areas in which the conditions of competition are sufficiently homogenous.[343] It is clear from the case law that legal regulation may create national markets, as in the type-approval certificate case.[344]

For motor car distribution, it follows from the BMW/Rover decision[345] that the market for distribution of new motor cars might be considered to be a national one.[346]

For spare parts, one should distinguish between intermediate products that are not recognizable in the final goods (for instance, a component to be assembled in the vehicle) and other spare parts. For the former, the market will probably be Community-wide, and for the latter, the geographical market may be defined more narrowly.

For after-sale services, the relevant market is the retail market and will probably be national or even smaller.

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[343] Jones / Sufrin, p. 326.

[344] Case 26/75, General Motors Continental NV v. Commission (1975) ECR 1367, (1976) 1 CMLR 95. In General Motors case, national regulations required conformity or type-approval certificates from importers of motor vehicles and provided that they could only be issued by the vehicle manufacturer. In this case, ECJ held that the provisions of the certificates was a separate market and not part of the motor car market.

[345] Case IV/M. 416 BMW/Rover, March 14, 1994 (1994) O.J.C 93/23; (1994) 4 CMLR.608.

[346] Commission Decision of 10 October 2001 relating to a proceeding under Art. 81 of the EC Treaty (Case COMP/ 36.264-Mercedes- Benz) In section 2.1.3.1.2 the geographic market is defined as such '*There are grounds for considering the relevant geographic market to comprise the Community. The technical barriers between Member States disappeared since the introduction of the Community certificate of conformity. Any passenger vehicle purchased in the Community can now be registered in any Member State without being resubmitted for technical checks'.*

The scope of the market was crucial in Volvo/ Scania,[347] which involved a merger between two entities active on the heavy trucks market. The parties alleged that the market was a Community or EEA market. Such a finding would have considerably diluted the parties' market shares since they did not have such a significant presence on markets outside of the four Nordic countries (Denmark, Finland, Norway and Sweden) and Ireland. The Commission concluded, however, that for these five countries the relevant geographic markets were still national in scope: the parties charged different prices and earned different profit margins in different states; technical specifications varied and in some Member States regulatory barriers existed, purchasing tended to be done on a national basis and distribution and service Networks acted as a severe barriers to entry to manufacturers who did not have a well- developed network. This conclusion seriously affected the outcome of the case since the parties had market shares of approximately 90 per cent on the Swedish market and were only significant competition there.[348]

The Regulation provides an exemption from the prohibition in Article 81(1) because the positive effects of the agreements outweigh the negative effects, the De Minimis Notice quantifies with the help of lower market share thresholds, what is not, in the Commission's view, an appreciable restriction of competition in the first place and for that reason not prohibited by Article 81(1).[349] A vertical agreement between non-competitors whose market share on the relevant market does not exceed 15% is generally considered not to have appreciable anti-competitive effects, unless the agreement contains a hardcore restriction.[350]

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[347] Case IV/M. 1672, (2001) OJ L 143/74.

[348] Jones / Sufrin, p. 924.

[349] Commission clears new Porsche distribution and after-sales service arrangements, Reference: IP/04/585 Date:03.05.2004. Porsche has modified its agreements and opened its official after-sales service network to independent repairers, who fulfill the qualitative criteria. These independent repairers may now apply to join the official network of Porsche service centers. As the market share of the Porsche network on the market for the repair of Porsche cars is above 30%, Porsche has opted for qualitative selective distribution for its network of authorized Porsche service centers. But according to the Commission's investigation, only up to about 8% of the operator active in the car business in Europe-car dealers or repairers of other makes and independent repairers would be affected by this rule. In these circumstances, the Commission does not consider the non compete obligation an appreciable restriction of competition on the market for the repair of Porsche cars. The analysis of the information available on the relevant markets for the distribution of cars showed that Porsche has market shares in all Member States of less than 5%. In line with the general 'de minimis' rules, Porsche may ask its dealers to sell other competing car brands in separate showrooms and by separate sales personnel or not to open secondary outlets even after the exemption of so called 'location clause' for dealers.

[350] Severely anti-competitive restraints, that is, those listed in Art. 4 of the Regulation (hardcore restrictions) generally constitute appreciable restrictions of competition even at low market shares.

The same is true for vertical agreements between competitors, like in situations of dual distribution[351] when their market share does not exceed 10%. Where the market is foreclosed by the application of parallel networks of similar vertical agreements by several companies, the de minimis threshold is set at 5%. For instance, a cumulative effect may arise where more than 30% of competing motor vehicles are marketed through selective distribution systems, which by their criteria prevent access to the market to categories of distributors capable of adequately selling the vehicles in question.

5.3.6 The Market Share Test

Regulation No 1400/2002 is the first block exemption in the motor vehicle sector that is based on market share.

Article 3 states that the exemption applies if the supplier's market share on the relevant market is less than 30 per cent. For the sale of new motor vehicles this threshold is increased to 40 per cent for agreements establishing quantitative distribution. There is no threshold for qualitative selective distribution.

Article 8 states that market share for the distribution of new motor vehicles should be calculated on the basis of 'volume of sales' rather than value of sales. Value remains only a subsidiary method of calculation.[352] This is a major shift away from all the other block exemptions, which provided for calculation on the basis of value.[353] The only real advantage of a volume-based threshold is that information on volume is easily available in the motor

[351] Art. 1 (1) (a) of the Regulation defines competitors as 'actual or potential suppliers on the same product market irrespective of where they supply the products. It follows from the definition those suppliers which also sell vehicles or provide services to end-users are considered as competitors of their distribution or repair network who sell the same vehicles or provide the same services.

[352] Reg. 1400/02, Art. 8(1). The general ruled that market shares are calculated on the basis of the value of sales remains applicable for the distribution of spare parts and for after-sales services.

[353] Commission Notice on definition of the relevant market (97/C372/05), Art.55; Reg. 2790/99, Reg. 2659/00, (research and development agreements) Art.6; Reg. 2658/00, Art.6 (specialization agreements).

vehicle sector because of the registration obligation, but this is not enough to justify the Commission's shift.

First market share based on volume may not reflect the real market power of the suppliers. Secondly, the volume-based thresholds set in Regulation No 1400/2002 do not take the effect of possible chains of substitution into account.[354] Thirdly there is a discrepancy between Regulation No 1400/2002 and the De Minimis Notice[355], which is based on value-based threshold. This can pose a problem because both thresholds exemptions are applicable.[356]

The market share data should be calculated by reference to the preceding year[357]. Some marginal relief for up to two years is provided where the market share rises above 30% but not beyond 35%.

[354] The existence of chains of substitution is recognized in the EB Reg. No 1400/2002, Sec. 6.2 Chains of products are considered to fall in the same product market if each link of the chain is strong enough to ensure all products in the chain are subject to a common price constraint, even if not all products are direct substitutes.
[355] De Minimis Notice (2001/C368/07), Art. 16.According to the De Minimis Notice, if the supplier's market share is below 5%, the motor vehicle distribution network will not be considered to be contrary to Art. 81(1) EC, and therefore will not be in need of exemption from Reg.1400/02.
[356] Automotive Sector Groups of Houthoff Buruma and Liederkerke Wolters Waelbroeck Kirkpartick, p. 258-259
[357] Reg. 1400/2002, Art. 9 (2) (a).

VI. THE LIKELY IMPACT OF THE NEW REGULATION

Contrary to the expected, the Regulation No 1400/2002 has enacted very radical changes. The approach of Commission adopted in new Regulation is of quality which may cause changes in dynamics of almost every field of sector and also in structure distribution systems and most importantly the structure of players being engaged in the sector. The parties which will be affected most from the enacted arrangements can be classified as manufacturers of motor vehicle, authorized dealers and services, independent repairers, manufacturers of spare parts and the consumers. After the publishing of Draft Regulation which may be regarded as same with final text in respect with basic principles, the affected parties have stated their opinions about the possible effects of envisaged arrangements. The most contrary opinions regarding the effects of new Regulation on the market have been stated by organizations representing the automobile manufacturers and consumers in EU.

With the effect of new arrangements, the manufacturers of motor vehicle whose controls in distribution networks may be weakened considerably became the party which unwelcomed the new approach of Commission most. While considering the system envisaged in Regulation No 1475/95 as the most suitable one for the distribution of motor vehicle, the European Automobile Manufacturers' Association (ACEA) has defended the continuity of former system since the start of New Regulation studies. The ACEA, defending that new arangements would decrease the quality standards and the competition would decrease in some regions contrary what is envisaged by Commission, has claimed that the new Regulation would enable big automobile distribution groups in the world to expand by taking the control of the distribution of many brands in a way damaging the businesses of small and medium size authorized dealers and thus, the fast and uncontrollable concentration of authorized dealer to emerge would cause insufficient regional inclusion.[358] According to ACEA, such case would negatively affect the intra-brand and inter-brand competition and cause the increase in prices. ACEA, defending that new arrangements would negatively affect

[358] http://www.acea.be/ACEA/position_papers.html ACEA, 'ACEA Opinion to the EU Commission on the Block Exemption Proposal', 2002.

the advancements regarding lean distribution, has claimed that the consumers in sparse-populated regions in particular would lose their local distributor and authorized services and they would travel much more distance to buy automobile and after-sale services.[359]

BEUC[360] thinks that the new Regulation would have positive effects. The BEUC, having defended that Regulation No 1475/95 had negative effects on welfare of consumer and the intrabrand and inter-brand competition in the distribution of motor vehicle from past, has stated its positive opinion in respect with competition and consumer benefit.[361]

[359] Gazioğlu, p. 49.
[360] BEUC, the European Consumers' Organization, is the representative organization of almost 40 independent national consumer organizations from countries of the EU, EEA, and other European Countries.
[361] http://www2.ukie.gov.pl/14powodow/kons/BEUC.pdf retrieved on 05.07.2006.

VII. CONCLUSION

The main aim of the study is to emphasize the important changes of the Block Exemption Regulation regarding the motor vehicle sector in detail and to understand the automobile industry in the European Union and Turkey in general.

In judging the play of competition in the motor vehicle sector, Article 81 (1) and (3) EC Treaty in European Union and Article 4 and 5 of The Act on the Protection of Competition No: 4054 in Turkey were examined in the first section of the study. As motor vehicle manufacturers distribute their products through selected dealer networks, the distribution agreements making up the networks may contain provisions which restrict competition and which may affect trade between Member States. Therefore they may fall within the scope of Article 81 (1) of the EC Treaty in European Union or Article 4 of The Act on the Protection of Competition No: 4054 in Turkey. The prohibition laid down in these articles may be declared inapplicable if the agreement as a whole brings about overall advantages which outweigh the disadvantages for competition. The exemptions for agreements related with the motor vehicle sector were granted by Block Exemption Regulations No 123/85 and then No 1475/95 and lastly by Block Exemption Regulation No 1400/2002 in European Union. For the Turkish motor vehicle sector, exemption were granted by Communiqué No 1998/3 and then by the Block Exemption Communiqué No 2005/4.

The primary issues concerning the motor vehicle sector, such as the interests of the manufacturers, who have technical and safety related reasons for the selection and supervision of their dealers; the interest of the dealers to avoid excessive dependence on the manufacturers; the interest of competitors who wish to have reasonable access to the network and the interest of consumers to make purchases and have repairs of servicing of motor vehicle done to the best price and quality were brought forward by examining all the regulations that have been enacted about the motor vehicle sector up until now both in European Union and in Turkey. In other words, the impact of the block exemptions to the

main stakeholders such as consumers, dealers, independent after-market and manufacturers were discussed throughout the study.

The latest developments on the motor vehicle sector and the latest regulations both in European Union and in Turkey were discussed in the following sections of the study. The first Commission Regulation (EEC) No 123/85 had been replaced by Commission Regulation (EC) No 1475/95 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements.As the European Commission considered that Regulation No 1475/95 was inadequate because it did not properly addressed issues relating to competition between dealers of the same brand of motor vehicles, problems with cross border sales, competition in after-sales servicing and the need to strengthen dealers' position vis-à-vis vehicle manufacturers, it decided that a new specific regulatory regime was necessary for the motor vehicle sector. So the latest Block Exemption Regulation No 1400/ 2002 had been enacted. The problems mentioned above, faced with the old regulation No 1475/95 are examined and suggestions are made how to address these problems through the analysis of the relevant Commission decisions and rulings of the European Courts.

Especially the latest Block Exemption Regulation No 1400/2002 which entered into force on 1 October 2002 was examined in detail. The last sections of the study examined the latest Block Exemption Regulation, No: 1400/2002 which had replaced the 1475/95 and which represented the biggest change in the policy of the Commission in this area. The resulting study showed clearly that the latest regulation Regulation No 1400/2002 is the most effective regulation compared to the previous regulations. As it was stressed in detail throughout the study, the objectives of Regulation No 1400/2002 as regards increasing competition for the sale of new vehicles and their spare parts and the provision of after sales services goes hand in hand with the objectives of improving the way that the internal market functions, and securing substantial advantages for consumers.

For the distribution of the motor vehicle sector, due to the separation of the exclusive and selective distribution systems and to the separation of the link between sales and after sales, and due to the arrangements regarding the location clause, the numbers of the small sized authorized distributers are decreasing. As under those circumstances, only the

distributers which are financially strong can resist, bigger automobile distribution groups begin to take over the smaller distributors and intensification of the competition in the motor vehicle market takes place. In general, intensification has an negative effect on the competition. But, by the latest arrangements the Commission aims at creating a market in which bigger automobile distribution groups which are strong enough and remain less dependant on car manufacturers exist.

As the control of the manufacturers on the authorized distributors becomes weaker due to the new arrangements in the latest Regulation and as some of the manufacturers do not want their brands displayed with the different brands in the same showroom, most of the car manufacturers will prefer to take charge of distribution themselves. BMW took over its authorized distributor in Ireland after the latest Regulation as it wished to retain maximum control over distribution.

The new Regulation also dealt with issues related to repair and maintenance and the supply of spare parts, since over the lifetime of a vehicle, the costs associated with these services were around as high as the initial purchase price of the vehicle itself. For the after-sales services and spare parts, by the arrangements in the latest regulation, authorized distributors are more likely to choose after sales service as profit marjin is much more higher in this sector. And the arrangements regarding the spare parts would lead the strengthening of spare parts manufacturers and this will lead to the decrease in the spare parts' prices.

Block Exemption Regulation solved specific competition problems, particularly as regards consumers' Single Market rights to buy a car whenever it suits them in European Union. The new Regulation also increases competition and brought benefits to European consumers. It leads to more competition between dealers, makes cross-border purchases of new vehicles significantly easier, and leads to greater price competition. Car owners have now more opportunity to choose where they have repair and maintenance carried out and what spare parts are used.

According to the responsibilities of Turkey based on the 39th Article of Customs Union Decision, to comply with the competition rules of the European Union related to the

automotive sector, Communiqué No 1998/3 and the latest Communiqué 2005/45 were enacted. The experiences of the European Union in the motor vehicle sector and the Regulations related with this sector have always been a very important model before the Competition Authority of Turkey.

Experiences which were gained from the implementation of the Communiqué No 1998/3 indicated that this Communiqué fell short of attaining the objective for a competitive market. As a result of that, a new regulation, Communiqué No 2005/4 which allowed providers flexibility in setting up the distribution and servicing network, which strengthens the position of authorized sellers and services vis-à-vis the provider, which ensured that manufacturers of spare parts were involved in competition, and which cleared the way for independent repairers to constitute an alternative for consumers by means of facilitating their access to the technical information, equipment and diagnostic devices related to maintenance and repair services had been enacted.

These arrangements being enacted by the new Block Exemption Regulation 1400/2002 EC in European Union and the new Communiqué 2005/4 in Turkey arised from the needs of sector. Due to the reflections in practice and the decisions of the European Commission and the ruling of the European Court, it can be concluded that all those new arrangements has increased the competition in automotive sector.

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