

# Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade<sup>1</sup>

*Decision of the Competition Commission of 21 October 2002*

The Swiss Competition Commission issues the Notice below in consideration of the following grounds:

- Pursuant to Art. 6 of the Cartel Act (SR 251), the Competition Commission may prescribe, by way of general notices, the conditions under which particular types of competition agreements may as a rule be justified on the grounds of economic efficiency within the meaning of Art. 5 (2) LCart. If required by a need for more legal certainty, in an analogous application of Art. 6 of the Cartel Act, the Commission may also announce, by way of general notices, other principles for the application of the law.
- This communication refers to the EC Commission Regulation 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, which came into force for the EEA on 1 October 2002 (here referred to as the Block Exemption Regulation). It takes account of the economic and legal conditions applicable in Switzerland. The Competition Commission thereby wishes to prevent price fixing and isolation of the Swiss market as well as to encourage internal market competition. It also wishes thereby to stimulate competition on the customer services market.
- This Notice comes into effect on 1 November 2002. It replaces the decision of the Competition Commission issued on 20 January 1997 regarding exclusive distribution contracts in the motor vehicle industry (RPW 1997/1, page 55 and RPW 1997/2, page 178).
- The (general) notice regarding the competition law treatment of vertical agreements of 18 February 2002 applies to vertical agreements in the motor vehicle trade insofar as this Notice does not make any provision.
- This Notice does not bind the Appeals Commission for Competition Matters nor the Swiss Federal Supreme Court in the interpretation of competition law provisions.

## **A. Definitions**

### **Art. 1 Motor Vehicles**

<sup>1</sup> Motor vehicles are self-propelled vehicles with at least three wheels that are intended for traffic on public roads.

<sup>2</sup> Motor vehicles within the meaning of this Notice are in particular:

- a) Passenger cars intended for the carriage of persons and with not more than eight seats in addition to the driver's seat.

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<sup>1</sup> Diese Übersetzung wurde von Herrn Dr. iur. Alessandro Celli und Frau Nicola Benz zur Verfügung gestellt.

- b) Light commercial vehicles intended for the carriage of goods or persons and with a maximum weight not exceeding 3.5 tons.
- c) Lorries intended for the carriage of goods and with a maximum weight exceeding 3.5 tons.
- d) Buses intended for the carriage of persons.

**Art. 2** Motor Vehicle Supplier

Motor vehicle supplier means the manufacturer or importer of motor vehicles.

**Art. 3** Distribution Systems

<sup>1</sup> Distribution systems mean selective and exclusive distribution systems.

<sup>2</sup> Selective distribution systems are distribution systems in which the motor vehicle supplier commits himself to sell the contract goods or services directly or indirectly only to dealers or repairers who have been chosen on the basis of particular characteristics and in which these dealers or repairers commit themselves not to sell the relevant good or services to unauthorised dealers or independent repairers. This applies without prejudice to the possibility for sales of spare parts to independent repairers and the duty to make available to independent operators all required technical information, diagnostic and other equipment and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures.

<sup>3</sup> Exclusive distribution systems are distribution systems for which each of the authorised dealers is allocated its own sales territory by the motor vehicle supplier.

**Art. 4** Active Sales

The possibility of active sales exists when a member of a distribution system is entitled to approach the end user directly for the sale or marketing of his motor vehicles.

**Art. 5** Restrictions

Restrictions within the meaning of this Notice are in particular:

- a) Agreements between motor vehicle suppliers and dealers which restrict the sale of motor vehicles by dealers to end users in that, for example, the remuneration of the dealer or the sales price are made dependent on the place where the vehicle is ordered or the place of residence of the end user.
- b) Agreements between motor vehicle suppliers and dealers which restrict the sale by dealers to end users in that, for example, a premium related to the place where the motor vehicle is ordered or any other form of discriminatory product delivery to dealers is agreed upon.
- c) Agreements between motor vehicle suppliers and dealers that do not oblige authorised repairers within a motor vehicle supplier distribution system to perform work under warranty, free servicing and vehicle recall work in respect of every motor vehicle sold in Switzerland or in the EEA bearing the relevant trademark.

#### **Art. 6** Authorised Repairer

An authorised repairer is a provider of repair and maintenance services for motor vehicles who belongs to a distribution system set up by the motor vehicle supplier.

#### **Art. 7** Independent Repairer

<sup>1</sup> An independent repairer is a provider of repair and maintenance services for motor vehicles who does not belong to a distribution system set up by the motor vehicle supplier whose motor vehicles he repairs or maintains.

<sup>2</sup> Independent repairers within the meaning of this Notice include authorised repairers within the distribution system of a motor vehicle supplier who carry out repair and maintenance services for motor vehicles of other suppliers to whose distribution system they do not belong.

#### **Art. 8** Spare Parts

Spare parts are goods that are installed in or on a motor vehicle to replace a component of that vehicle. This also includes goods such as lubricants which are necessary for the use of the motor vehicle (when these are used for maintenance or repair services) with the exception of fuel.

#### **Art. 9** Original Spare Parts

<sup>1</sup> Original spare parts are components which are of the same quality as the components used for the assembly of a new motor vehicle, provided these are manufactured to the specifications and production requirements given by the motor vehicle manufacturer for the manufacture of components or spare parts for the relevant motor vehicle.

<sup>2</sup> Original spare parts also include spare parts which are manufactured on the same production line as the components.

<sup>3</sup> It is assumed unless the contrary is proved that spare parts are original spare parts when the manufacturer certifies that these parts are of the same quality as the components used for the manufacture of the relevant vehicle and that they have been manufactured to the specifications and production requirements of the motor vehicle manufacturer.

#### **Art. 10** Spare Parts of Matching Quality

When at any time a manufacturer of spare parts can evidence that the spare parts manufactured by him are of the same quality as those used for the assembly of a motor vehicle, these spare parts are considered to be of matching quality.

### **B. Rules**

#### **Art. 11** Basic Principle

In principle the Competition Commission regards distribution agreements as material restrictions of competition within the meaning of Art. 5 (1) LCart which cannot be justified on grounds of economic efficiency, if they have as their subject matter one of the clauses set out in Art. 12 - 15.

## **Art. 12** Price Fixing

The following clauses are as a rule material restrictions of competition and not justified:

Restriction of the possibilities for dealers or repairers to set sales prices themselves; the motor vehicle supplier may however set maximum prices or price recommendations, insofar as these do not amount to a fixed or minimum sales price as a result of pressure from or the guarantee of incentives from one of the contract parties.

## **Art. 13** Sale in the Context of an Exclusive Distribution System

The following clauses are as a rule material restrictions of competition and not justified:

- a) Restrictions on the possibility for end users in Switzerland or independent sellers in Switzerland to order motor vehicles without any restriction from an authorised dealer in Switzerland or a dealer who is active in the EEA.
- b) Restriction of the sale of motor vehicles by members of an exclusive distribution system in Switzerland to end users in the EEA and to independent sellers in the EEA.
- c) Restriction of active and passive sales of motor vehicles by members of an exclusive distribution system to end users or unauthorised dealers who are located in markets where a selective distribution system is applied.

## **Art. 14** Sales in the Context of a Selective Distribution System

The following clauses are as a rule material restrictions of competition and not justified:

- a) Restriction of the possibility for end users in Switzerland, members of a selective distribution system in Switzerland or sellers in Switzerland who are commissioned by an end user in Switzerland to order motor vehicles without restriction from an authorised dealer in Switzerland or a dealer active in the EEA.
- b) Restrictions on the sale of motor vehicles by members of a selective distribution system in Switzerland to end users in the EEA, authorised dealers in the EEA and sellers who are commissioned by an end user in the EEA.
- c) Restriction of active sales of motor vehicles, spare parts for all types of motor vehicle or repair and maintenance services to end users resident in Switzerland or in the EEA by members of a selective distribution system in Switzerland or by members of a selective distribution system in the EEA who are active on the retail level of trade.
- d) Restriction of the possibility for members of a selective distribution system to carry out active sales of passenger vehicles or light commercial vehicles through additional sales or delivery points in Switzerland or in the EEA where selective distribution is applied.
- e) Restriction of passive sales by members of a selective distribution system to end users or unauthorised dealers who are located in a market for which exclusive territories have been allocated.

## **Art. 15** Customer Service

<sup>1</sup> The following clauses are as a rule material restrictions of competition and not justified:

- a) Restriction of the right of an authorised repairer to limit its activities to the provision of repair and maintenance services and the distribution of spare parts.
- b) Restriction of the possibility for dealers to subcontract the provision of repair and maintenance services to authorised repairers; the motor vehicle supplier can however require that the dealer gives end users the name and address of the authorised repairer or repairers before conclusion of the sales contract and, if one of the authorised repairers is not in the vicinity of the point of sale, to inform the end user how far away the repairer or repairers in question are located from the point of sale.
- c) Restriction on the sale of motor vehicle spare parts by members of a selective distribution system to independent repairers in Switzerland or repairers active in the EEA which use these parts for the repair and maintenance of motor vehicles.
- d) Restriction of the possibility for a supplier of original spare parts or spare parts of matching quality, repair tools or diagnostic or other equipment to sell these goods to authorised or independent dealers in Switzerland or in the EEA and to authorised or independent repairers active in Switzerland or in the EEA or to end users.
- e) Restriction of the possibility for a dealer or an authorised repairer to obtain original spare parts or spare parts of matching quality from a third party of its choice in Switzerland or in the EEA and to use these for the repair or maintenance of motor vehicles; the right of the supplier of new motor vehicles to require the use of original spare parts supplied by the vehicle manufacturer for work carried out under warranty, free servicing or vehicle recall work is unaffected.
- f) A refusal of motor vehicle suppliers to provide independent operators with access to any technical information, diagnostic or other equipment, tools including any relevant software or training required for the repair and maintenance of its motor vehicles, or for the implementation of environmental protection measures.

<sup>2</sup> Access under paragraph 1 f) must include in particular the unrestricted use of the electronic control and diagnostic systems of a motor vehicle<sup>2</sup>, the programming of these systems in accordance with the motor vehicle supplier's standard procedures, the repair and maintenance instructions and the information required for the use of diagnostic and servicing tools and other equipment. This access must be given promptly to independent operators in a non-discriminating and proportionate way. The information must be useable. The access to objects that are covered or protected by an intellectual property right or constitute know-how must not be refused in an abusive way.

## **Art. 16** Distribution of Several Brands

The following clauses are as a rule a material restriction of competition and not justified:

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<sup>2</sup> A motor vehicle supplier is however entitled to withhold technical information that could allow third parties to circumvent or turn off in-built anti-theft devices, to reset electronic systems or to manipulate for example speed limiting devices, provided such protection against circumvention, elimination, resetting or manipulating such devices cannot be achieved through other less restrictive means.

Direct or indirect obligations<sup>3</sup> that require the members of a distribution system not to sell motor vehicles or spare parts from competing motor vehicle suppliers nor to provide repair and maintenance services for motor vehicles from competing motor vehicle suppliers.

#### **Art. 17** Termination of Contract

Provisions regarding termination of contracts are as rule material restrictions of competition and not justified if the termination is not reasoned in writing and if the following modalities of termination are not respected:

- a) Contract duration of at least five years; obligation on the contracting parties to notify the fact that it will not be extended more than six months in advance.
- b) For contracts with an indefinite term, a notice period of at least two years.
- c) For contracts with an indefinite term, a shortened notice period of at least one year provided
  - i) the motor vehicle supplier is obliged by legal provisions or by special agreement to pay appropriate compensation on termination of the contract, or
  - ii) where it is necessary for the motor vehicle supplier to terminate the contract in order to restructure the entire distribution network or at least a substantial part thereof.

#### **Art. 18** Transition Provisions

<sup>1</sup> This Notice enters into force on 1 November 2002.

<sup>2</sup> Existing distribution agreements in the motor vehicle trade are to be brought into line with this Notice prior to 1 January 2005.

<sup>3</sup> Art. 14 d) applies from 1 October 2005.

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<sup>3</sup> This applies in particular to obligations on dealers to organise distribution of each individual mark through a separate independent legal person, to sell motor vehicles from other motor vehicle suppliers in different exhibition areas and to appoint specific sales personnel for different motor vehicle brands. An obligation on dealers to sell motor vehicles from other motor vehicle suppliers in a particular area of the exhibition space, to avoid confusion between the brands, will not be regarded as a material restriction on competition by the Competition Commission.