

Motor Vehicle Regulation. Future Competition Law Framework

**Gregory M. Pelecanos,
Senior Partner**

BALLAS, PELECANOS & ASSOCIATES

Law Offices
10 Solonos Street, Kolonaki
106 73 Athens, Greece

Tel.: +30 210 36 25 943 / Fax: +30 210 36 47 925 / E-mail: central@balpel.gr

13-14 October, 2009

UCL Vertical Restraints Conference,
London, U.K.

Faculty of Laws
UNIVERSITY COLLEGE LONDON

4-8 ENDSLEIGH GARDENS LONDON WC1H 0EG

TELEPHONE 01-387 7050

Sat. 29th

Dear Gregory,

Congratulations. You got distinction marks, and more than bare distinction marks in international economic law and our subject. You got the equivalent of a good lower second (only we don't divide students up) in intellectual ppty and a middling 2b in company. A very good result.

Sorry not to have written sooner, but got your adress only just now from Byrom. I must fly to catch the last mail until Monday. Keep in touch. If you come to London, we have a spare room, but the house is large and cold, so better to avoid Oct - March, but you're welcome even then if you bring thick jumpers. etc.

Many congratulations,

yours ever

Valencia

BALLAS, PELECANOS & ASSOCIATES

Reg. 1400/02

Objectives:

- increase dealer independence
- increase intra-brand competition in car sales
- Prevent foreclosure of car manufacturers
- encourage competition within A/R networks
- encourage competition between A/R and independent repairers
- prevent foreclosure on spare parts markets

Reg. 1400/02

Means:

- a) Art 3. Create a “safe area” / conditions for application of Reg. 1400/ Or else 81 applies
- b) Art 4. Hardcore restrictions
- c) Art 5 Obligations not benefiting from BER/ may raise competition concerns / 81.3.

Reg 1400/02. Means (cont'd):

Art 3. Create a “safe area” / conditions for application of Reg. 1400/ Or else 81 applies

Thresholds

Dealer independence :

- term and termination
- transfer of business
- independent expert

Reg. 1400/02. Means (cont'd):

Art 4. Hardcore restrictions

- sale of motor vehicles/ repair/ spare-parts
 - RPM
 - Territorial and customer restrictions
- sale of motor vehicles
 - availability clause
 - subcontracting repair and maintenance services

Reg. 1400/02. Means:

Art 4. Hardcore restrictions (cont'd)

- sale of repair and maintenance services and spare parts.
 - only workshop
 - spare parts to independents
 - no limitation on parts/ tools etc suppliers to sell to A/R's or independents etc.
 - sourcing parts from third parties
 - third party trademarks/ logo
 - technical information, training special tools

Reg. 1400/02. Means:

Art 5. Specific infringing obligations do not benefit from BER/ may raise competition concerns / 81.3 but not whole agreement in jeopardy.

- non compete and post termination obligations
- exclusion of competitors in SDS
- 30% purchase requirements/ multibranding
- leasing services
- location clause/ additional outlets

Leading up to Commission communication July 22, 2009.

- *London Economics report July 2006/ inconclusive*
- *Evaluation Report May , 2008/ BER has had overall positive effect but needs less complexity on lines of Reg 2790 :*

Leading up to Commission communication July 22, 2009.

Evaluation Report, May 2008.

- inter-brand competition in vehicles better, but largely due to factors other than the Regulation
- independent repairers getting info, more A/R's / independents standing their ground.

Leading up to Commission communication July 22, 2009.

Evaluation Report, May 2008.

But also:

- de-link sales and service unnecessary
- additional outlets and multi-branding lead to stringent specs
- intra network purchases lead to buyer power
- technical info dealt with in type approval regulations

- Comparison of Reg. 2790/99 and Reg. 1400/02

VEHICLE SALES

Subject Matter	BER 1400/02	VBER 2790/02
De-link sales and service/ subcontracting service	De-link explicit	No mention but case law suggests link possible to ensure quality and proper use
Sales through unauthorized retailers (supermarkets)	Yes, under exclusive distribution. Can be prohibited (criteria) under selective system	The same
Quantitative selection (number of dealers) under selective system	Yes, if group's share below 40%	Yes, if group's share below 30%
Combination of selectivity and exclusivity	No	Grey area. Sales to unauthorized reseller can be prohibited. Active sales in other territories are allowed. No additional sales outlets without supplier's consent.

- Comparison of Reg. 2790/99 and Reg. 1400/02

VEHICLE SALES

Subject Matter	BER 1400/02	VBER 2790/02
Multi-brand showrooms	Cannot be prohibited	Single branding allowed for 5 years
Multi-brand restriction when premises owned or leased by supplier to dealer	Not allowed	Allowed but cannot exceed period of occupancy of premises by dealer
Minimum sourcing requirements	Allowed to require that 30% of total vehicle purchases for previous year must be purchased from supplier or network	Same but 80%
Annual sales targets	Must be agreed	Supplier can set targets

- Comparison of Reg. 2790/99 and Reg. 1400/02

VEHICLE SALES

Subject Matter	BER 1400/02	VBER 2790/02
Supply of vehicles with specs current in other Member States	Yes	Not mentioned
Additional sales and delivery outlets	Yes if they meet local specs	Can be prohibited
Cross sales between dealers in selective system	Cannot be restricted	Same
Acquisitions of dealerships in same network without consent	Yes	Change of control clauses

- Comparison of Reg. 2790/99 and Reg. 1400/02

VEHICLE SALES

Subject Matter	BER 1400/02	VBER 2790/02
Supplier's direct sales	Yes	Same
Termination for convenience	Yes, 2 years notice but must be in writing and include detailed, objective and transparent reasons. Effect of shorter period is disputed	National law
Minimum period of fixed term agreements	5 years	No mention. National law
Leasing companies	Treated as end customers if no transfer of ownership clause or purchase option	No mention
Intermediaries	Dealers must be allowed to sell to intermediaries with minimum restrictions (written mandate signed by customer describing vehicle)	No mention

- Comparison of Reg. 2790/99 and Reg. 1400/02

SERVICE

De- link service- sales (service only)	AR cannot be forced to sell cars	Link possible to protect quality and proper use
Quantitative selection	No, only qualitative	Same
AR's right to source parts from OEM's	Cannot be restricted, unless for warranty, free service and recall campaigns	Supplier can require AR to buy from him
Technical information	Must be provided	No mention. But in effect Euro 5 Regulation will apply for new vehicles (2010)

- Comparison of Reg. 2790/99 and Reg. 1400/02

PARTS

Original Spares/ Matching quality	Definitions in BER	No mention
Dual branding	Manufacturer can place TM alongside that of vehicle supplier	No mention.
Cross sales	Must be allowed , but also to independent workshops for repair of vehicles	Within selective system
Minimum sourcing requirement	30% of total purchases for previous year	Same, 80%

Commission communication July 22, 2009.

“Fierce inter brand competition on new car market”

- New vehicle sales market subject to VBER as of June 1, 2013,
- Single branding not a threat. No VBER if contracts over 5 years
- Market indifferent to sales only and subcontracting and additional outlets
- Single branding for vehicles but because of 30% VBER threshold not for aftermarket
- 40% threshold for quantitative selection to be reduced to 30% and sales only and location clause acceptable
- Sector specific guidelines on single branding, foreclosure and withdrawal, 80% threshold loyalty enhancing effects, availability clause

Commission communication July 22, 2009 (cont'd).

“(Aftermarket) competition is less intense due to brand specific nature”

- Aftermarket subject to VBER as of June 1, 2010.
- 30% VBER threshold: VBER not to apply
- Focused guidelines and / or market specific mini-regulation.
- Article 81 assessments if no regulation.
- Effective competition from independent repairers (guidelines on technical info for pre-Euro 5 or Euro IV vehicles and on spare parts/ extended warranties)
- Intra brand A/R competition (guidelines on art. 81.1 application to qualitative SDS and sales-aftersales link).
- Spare part restrictions under art 81.1.

“Protecting dealer independence through
...regulating contractual clauses... no longer an
effective or valid means”

- application of art 81

Comments on a moving target (VBER under evaluation)

- 3 year extension of BER for motor vehicle sales. Why maintain separate regime for 3 years?
- De-link of sales and after-sales: Is there any economic wisdom in this given the crisis?
- RPM. The relaxation of the RPM prohibition being discussed is very useful for the motor vehicle industry where so many campaigns are on-going. Perhaps a “Dutch model” guideline ? It would be interesting if there was guidance also to pricing practices in the after- sales markets: “information asymmetries” and “double marginalization” are identified as issues. Pricing policies can be used to alleviate these problems.

Comments on a moving target (VBER under evaluation)

- Selectivity: The VBER talks only of “specified criteria”. Nature of product and service and criteria? Excessive criteria.
- Market definition: Sales and aftersales two markets or one? Is extended warranty an argument for one market? Are A/R’s and independents one market or two? What is the effect of warranty on consumer preference? Spare part markets need more guidance.
- Market structure: Share of the market covered by selective distribution normally exceeds 50% and CR5 is close to or in some national markets exceeds 50%.

Comments on a moving target (VBER under evaluation)

- Multi-branding: a turn to single-branding may have negative effects on dealer investments. Need for a transition?
- Intra network acquisitions: in certain markets have led to significant buyer power situations. Guidelines to protect suppliers?
- Additional outlets: “the combination of selective distribution with a location clause may in particular fulfill the conditions of 81.3 if the combination is indispensable to protect substantial and relationship specific investments made by the authorized dealer”. Unconditional abolition or 81.3? And what of dealer investments?

Comments on a moving target (VBER under evaluation)

- Extended warranties: concept of “misuse” needs clarification. Is foreclosure of independents and exclusion of “other than vehicle manufacturer spare parts” the only concern?
- Contract clauses: intrusion of competition law into contract law must end. Confusion arises from i) 2 year notice period, ii) “grounds” for termination, iii) conditions for 1 year “reorganization” termination.
- ACEA “code of conduct” and possible graduation from “soft law” to “hard law”.

Thank you for your attention!

Gregory Pelecanos
gregory.pelicanos@balpel.gr

BALLAS, PELECANOS & ASSOCIATES

Law Offices

10 Solonos Street, Kolonaki
106 73 Athens, Greece

Tel.: +30 210 36 25 943 / Fax: +30 210 36 47 925 / E-mail: central@balpel.gr