

## CHRISTIAN GENZOW SPEECH AT FACONAUTO CONFERENCE

(In Spanish)

Estimadas señoras, estimados señores:

quiero expresarles mi gran agradecimiento por tener el honor de dirigirles la palabra. Lamentablemente no domino su precioso idioma. En esto me distingo de mi hija Katharina, quien se esforzó mucho para enseñarme estas pocas palabras.

Ladies and gentlemen,

I have been asked to share some thoughts with you over a possible pan-European protection for all authorised dealers, which would appear to me to be urgently needed as a result of increasing competition and the significant decline in profits in the automotive sector.

Independently of the automotive trade, one can say with respect to all types of commerce involving makes or brands – regardless of whether we are talking about clothing, washing machines, photocopying devices or automobiles: Manufacturers operate distribution systems which obligate their authorised dealers to distribute their products in a manner stipulated by them, especially preserving a „corporate identity“. They make use of an organisation of commercial agents or authorised dealers, and in some cases a franchise system as well.

If one looks at the two biggest groups of distributors in terms of sheer numbers, namely the commercial agents and authorised dealers, it is evident that nowadays the vast majority of distribution systems are organised on the basis of authorised dealership agreements - 68% in Europe as a whole. The number of distribution systems in which pure commercial agents attend to the distribution of products is in decline and has in the meantime fallen below 20%, namely to 16%.

And this is where something surprising comes in: There is a commercial agents law in every European country and it is the same in every European country. But there are no statutory provisions for law governing authorised dealerships in Europe on a whole – with only a few exceptions (like Belgium). In other words, almost 70% of all distribution systems in Europe do not even have a national statutory basis, not to mention the fact that a European basis is entirely lacking.

I see some confused looks out there in the audience because there is of course European law and a European Block Exemption Regulation, which applies especially to all authorised automotive dealers. But: the Block Exemption Regulation is not a provision in the area of civil law, but rather in the area of anti-trust law. It is intended to protect consumers and not commerce and it is intended to protect competition and not commerce. I will come back to this point again later.

Please allow me to briefly comment on why there are uniform statutory provisions for the area of commercial agents in Europe:

The so-called dynamic era of EU policy began in the 1980s. Back then commercial agents were believed to play an important role in the growth of the Single European Market: the special commission set up proposed that a fundamental changes be made in the different statutory provisions in law governing commercial agents in European countries or, better yet, to harmonise law in this area. On the whole the Commission was of the view that the large number of laws and regulations had a very negative impact on competition and created considerable legal insecurity, thus impairing the proper functioning of the Common Market. Linked to this basic objective, the second intention of the Commission was to consolidate, improve and also harmonise the protection which already existed for commercial agents.

This gave rise to the harmonising Directive 86/653 EWC of the Council from 18th December 1989. It obligated all European countries to create essentially the same laws governing commercial agents. Many member countries first felt that their national legislative integrity was being undermined at first. In the meantime, however, the Directive has been implemented throughout Europe; the harmonisation of law governing commercial agents throughout Europe has moreover turned out to be correct and a suitable approach towards eliminating borders and barriers to free traffic in goods.

This of course begs the question: Why were statutory provisions not created at the same for the area of authorised dealers – perhaps even throughout Europe? After all, there can be no doubt that authorised dealers also account for a considerable share of the growth of the Single European Market.

Ladies and gentlemen,

My research has unfortunately not produced any hard evidence – with one exception: namely the fact that manufacturers have a considerably better lobby than commerce. Another reason why no need was seen for a harmonisation of law governing authorised dealers back when law governing commercial agents was harmonised is without a doubt the fact that, as I said, there are no statutory foundations whatsoever for laws on

authorised dealers in most European countries and, moreover, vertical agreements of this nature have long been a subject in arrangements in the area of European competition law. This applies all the more so to automotive distribution, which since 1985 is the only sector to be afforded its “own” competition rules, first of all namely the BER 1985, then the ones from 1995 and finally those from 2002.

If we take a look at the objectives of the EU Commission in this regard, we see that the block exemption regulations are aimed at compensating for restraints on competition by ensuring a positive impact on the market and benefiting consumers. Free competition and an integrated single market are the foundations and objectives pursued by the EU Commission with the block exemption regulations. Not least because of the frequent abuse of their market power by automotive manufacturers and importers, the automotive BER which has been in effect since 2002 goes considerably further in terms of its provisions compared to the so-called Vertical BER or the Umbrella BER which apply to all other sectors: the restrictions in the distribution of products – prohibition against competition, prohibition against additional sales points, etc. – have been almost completely eliminated. Only qualitative selection applies to the area of services and distribution of spare parts beginning with a market share of more than 30%, which has caused the number of service companies to grow significantly in almost all markets since the introduction of the automotive BER. Freedom of manufacturers to terminate agreements is limited: aside from a general period of two years’ notice for regular termination, reasons must be stated in writing in order to determine whether the reasons for termination violate the spirit and aim of the BER. A clear “contractual framework” has thus already been set out for automotive dealership agreements – completely in contrast to the Block Exemption Regulation, which applies to all other sectors.

But this is precisely what has been subjected to heavy criticism – of course by manufacturers and suppliers, but also by experts on competition law themselves and – at least this is my impression – by persons in the EU Commission in charge of this area at present, namely the Competition Department, which believes that an anti-trust regulation must not serve as a civil law contractual framework.

The big discussion of „what will 2010 bring?“ has already begun. How the EU Commission will decide is still a completely open question, as it will not publish its report until May 2008. But the many presentations, speeches, discussions and statements issued thus far in my opinion allow one to venture some pretty safe predictions from a legal standpoint:

1. There will also continue to be a block exemption regulation for all areas of distribution. I do not think that the Automotive BER and the Vertical BER will simply expire in 2010 without anything to replace them.

2. It is completely unresolved whether there will still be an “autonomous” automotive regulation after 2010, or whether this will become part of the general block exemption regulation. This will largely depend on the analysis which the EU Commission is carrying out on the basis of surveys (through a questionnaire) of the areas of commerce involved.
3. All of the statements made by the EU Commission suggest that the automotive BER will not continue to apply in the current form. There is in particular much to suggest that it will revert to pure competition law components for the benefit of consumers and arrangements will be eliminated which could primarily be of a civil law nature – for example protection against termination..

**This is why I believe that in 2010 will see the following: freedom of competition will remain and the little protection for dealers which exists, namely the Automobile BER, will be discarded.**

This thus raises the following question for all of you: Will a possible “lean” BER be sufficient to protect the many investments which you have to make on behalf of your manufacturers? Will it suffice to protect your employees and will it suffice to protect your enterprises and your families?

I think not. And this thus broaches the question: Is there any claim, is there a possibility for achieving protection throughout Europe on a civil law basis, for instance corresponding to the protection which a commercial agent is afforded?

We should recall here that the EU Commission in the past viewed commercial agents to be small, weak partners of the principle, who generally requires protection by statute. The question is hence whether or not this also applies equally to authorised dealers in their current form.

It is common knowledge that their hybrid nature determines the position of authorised dealers: They are formally speaking autonomous businesspersons working on their own account and thus sell the range of goods of a manufacturer at their own economic risk. On the other hand, however, they are integrated so tightly in a distribution system that in *de facto* terms they have no leeway whatsoever or only very little latitude with which to achieve economic success through their own activities. At the same time, the classic relationship between producers and commercial agents is transformed once again through the distribution of products via authorised dealers: Whereas manufacturers have traditionally borne the risk of fluctuations in sales and thus been forced to adjust production capacities and to keep adequate stocks of products, this risk is now generally passed on to dealers in the form of an authorised dealership agreement: A dealer has to agree to buy

minimum quantities of products as stipulated in the details of an agreement even before he sells products to the end customers. Moreover, the agreed-upon order lead times are spread out over time in such a manner as to allow manufacturers to make full use of their production capacities based on economic criteria so they can more easily adjust to fluctuations in the business cycle. Dealers agreeing to take minimum quantities decreases the need of manufacturers to keep stocks of products considerably; nor are dealers able to simply give products back to the manufacturers when they experience difficulties selling them. Thus authorised dealers at the same time assume an important financing function for manufacturers. This help has turned out to be of crucial importance to many manufacturers today: The economic existence of various manufacturers would hang in the balance if they had to sell products via a commercial agents system. Evidence for this can be seen in the example of Jaguar having to reverse its move towards a commercial agents system due to the excessive risk and the high losses incurred, while BMW had to give up its original plans to launch a commercial agents system in several European countries following careful analysis.

On top of all this: Manufacturers require that their authorised dealers make considerable investments. This continues to bind authorised dealers to the manufacturer, making them even more dependent on them. Because a termination of contractual relationships frequently results in the economic ruin of the authorised dealer in spite of the investments they make when there is no special protection afforded to investments made by them – such is the case in Austria – this all the more so raises the question as to whether authorised dealers and commercial agents are comparable with respect to the required civil law protection.

An analysis of all economic aspects indicates the following:

- a) **Authorised dealers have just as little latitude to achieve economic success through their own activities as commercial agents because they are completely integrated into the distribution network of the manufacturer.**
- b) **Authorised dealers are economically dependent on being supplied and supported by manufacturers, so they are no different from commercial agents in this respect, either.**
- c) **In addition to the functions performed by commercial agents, authorised dealers frequently also perform a financing function for manufacturers, whereby they are at the same time obligated to make considerable investments which turn out to be worthless in the event of contractual cooperation terminating because such are tailored to the respective manufacturer's needs.**

One can thus conclude that in view of the need of authorised dealers for protection and in view of the pan-European scope of distribution systems which are based on authorised dealership agreements, the foundations are present and there is a need to initiate harmonisation measures as recommended in the past by the special EU Commission.

However: The EU Parliament decided in 2006 to drastically reduce the scope of statutory provisions – currently consisting of more than 80,000 pages – to below 20,000 pages. One can estimate that a legislative initiative on the part of all automotive dealers for a European law governing authorised dealers will not have very great prospects of succeeding as a result. What should be done, then, when it is evident on the one hand that protection is urgently needed for dealers, but on the other hand it must be expected that the little amount of protection for dealers contained in the Block Exemption Regulation may be eliminated in 2010 and an independent European law has no prospects of being adopted at present?

Ladies and gentlemen,

I believe that this is nevertheless an approach which could be helpful:

In various European countries, for instance Greece, Austria and Germany, there are a whole host of legal provisions from law governing commercial agents which are already applied to authorised dealers. This works and it provides added protection to authorised dealers. It is thus obvious: why not expand the Commercial Agents Harmonisation Directive to cover authorised dealers? The son of my colleague from Finland, Matti Huhtamäki, came up with the idea of pan-European protection of investment in this connection by expanding Art. 17 of the Harmonisation Directive to authorised dealers so that their investments would be afforded protection. But it is apparent that if Art. 1 of this Harmonisation Directive is amended to include a definition of “authorised dealers” and it is stipulated that the harmonisation measures are also to apply to the legal and administrative provisions of the member countries setting out legal relations between authorised dealers and their respective suppliers, only the first step will have been taken.

Step two is the protection of investment: This can – as Matti Huhtamäki proposed – be done by amending Art. 17 of the Directive, under which the member countries would also ensure that authorised dealers are indemnified for all investments they have made when an authorised dealership agreement is terminated or that they are fully compensated in some other manner for the investments which the authorised dealer has made in accordance with his authorised dealership agreement and which have not yet paid for themselves.

It is an entirely different matter to insert a few words into a directive which is already in existence than to create a new law, not least given the intention of the EU Parliament to

streamline laws and regulations. For this reason this could be an initial step, and what is really amazing about it is:

When I forwarded this proposal to an audience in the presence of a member of the EU Commission, the initiative was warmly welcomed.

Ladies and gentlemen,

You can assume that protection of commerce will decline in 2010. This makes it all the more important to take the initiative here and now in order to ensure that this protection can and is provided on a basis other than the BER – and it is in this sense that your initiative will most probably be of tremendous importance.

Thank you for listening.