

ACEA response to the Commission evaluation report on the operation of Regulation EC 1400/2002 concerning motor vehicle distribution and servicing

This is the response of the European Automobile Manufacturers Association (ACEA) to the European Commission's report on the operation of Regulation EC 1400/2002 concerning motor vehicle distribution and servicing that was published on 28 May 2008.

ACEA represents the common interests of 15 major European manufacturers of passenger cars, vans, trucks and buses at European level. Its members are BMW, DAF Trucks, Daimler, FIAT, Ford of Europe, General Motors Europe, Jaguar Land Rover, MAN, Porsche, PSA Peugeot Citroën, Renault, Scania, Toyota Motor Europe, Volkswagen and Volvo.

I - Executive summary

ACEA considers that the Commission's evaluation report on the operation of the automotive Block Exemption Regulation (BER) 1400/2002 makes a sound economic analysis of the evolution of competition in the automotive sector and the role that the BER has played in this evolution. In particular, we agree that competition on the markets for motor vehicle distribution and servicing has intensified and the functioning of the internal market in the automotive sector has improved considerably in recent years. We therefore share the Commission's view that there are at present no real indications of market failure or actual or potential consumer harm in the automotive sector that would distinguish motor vehicles from other economic sectors.

Whereas we accept that the automotive BER has made a positive contribution to the development of competition in our sector, we agree with the Commission that this stems not so much from the sector-specific provisions of the Regulation as from the general rules of competition law, particularly those applicable to selective distribution. We also feel that the automotive BER has certain shortcomings in that it is very complex, contains concepts such as additional sales outlets and service subcontracting that have proven to be economically unattractive, prescribes a particular type of multi-branding that does not necessarily correspond to market realities and fails to recognise the differences between passenger cars and commercial vehicles.

ACEA believes that in combination with existing type-approval rules concerning spare parts and access to repair and maintenance information, the application of the vertical restraints BER would produce similar results in terms of competition and consumer benefit as the current automotive BER whilst having the advantage of being simpler, more flexible and more focussed on real competition issues. Separately, a code of good practice could address contractual issues relating to alternative dispute resolution and minimum notice periods.

We therefore concur with the Commission that the best option for the future would be the application to the automotive sector of a more flexible regime that draws closer inspiration from the general principles applicable to vertical restraints.

II - Detailed observations

The report makes a sound economic analysis

ACEA considers that the Commission's evaluation report makes a sound analysis of the evolution of competition in the automotive sector and the role that BER has played in this evolution.

In particular, we agree fully with the Commission that competition on the markets for motor vehicle distribution and servicing has intensified and the functioning of the internal market in the automotive sector has improved considerably in recent years.

The signs of this intense and effective competition are everywhere. With respect to motor vehicle sales, we note that car prices are falling in real terms, the market concentration between manufacturers has decreased, the market is fragmented and manufacturers' market shares are volatile, new players have entered the market successfully, all manufacturers are continuously expanding their product range, product life cycles are shortening and as a result, profits in the industry and its distribution channels are under intense pressure.

The aftermarket also shows clear signs of dynamism and diversification. The number of authorised repairers has increased, independent repairers have created larger and more competitive groups, and some manufacturers have established soft franchises aimed mainly at older cars. Despite increases in labour costs and higher investments in equipment and training, consumers' annual expenditure on vehicle maintenance is declining in real terms due to the greater reliability of today's vehicles and extended service intervals. In the parts market, prices have remained stable whereas original equipment suppliers and independent parts manufacturers have maintained their market share and continue competing effectively with vehicle manufacturers.

Developments regarding the functioning of the internal market have been equally positive. Price differences have narrowed significantly and now stand at very low levels, with an average standard price deviation of around 4% for the Euro-zone and around 6% for the EU-27. This is all the more remarkable if one considers the distorting effect on prices of various sales and registration taxes that exist in many Member States. At the same time, reports and complaints about difficulties with cross-border sales have all but disappeared.

For us, it is obvious that consumers benefit from this fierce competition in that they have access to a wide product offer and a dense network of highly qualified service providers at very competitive prices.

We therefore agree with the Commission's conclusion that there are at present no real indications of market failure or actual or potential consumer harm in the automotive sector that would set us apart from other economic sectors. In our view, this is an important difference with the perceived situation at the time of the previous BER review in 2000-2, when it was argued that the competition issues arising in the automotive industry were so specific that they warranted the adoption of a more stringent and specific legal regime for our sector. To the extent that some specific

automotive issues would remain today, we believe that they could be addressed in an adequate manner in other legal instruments or through self-regulation.

The automotive BER has contributed to more intense competition but also has its shortcomings

Positive contribution

ACEA endorses the Commission's assessment that the current BER has made a positive contribution to the development of competition in the automotive sector.

In particular, we believe that one of its effects has been to increase the level of professionalism in the networks of authorised distributors and repairers as vehicle manufacturers and their sales and service partners have made significant efforts to establish, apply and monitor compliance with relevant and effective selection standards for the operation of the selective distribution system that nearly all of them have chosen to use. In our view, this had led to better and more uniform brand representation and customer service. We also consider that the use of selective distribution systems by almost all vehicle manufacturers has contributed significantly to maintaining and strengthening effective inter-brand competition. Similarly, we feel that the BER has stimulated competition in the aftermarket.

Nevertheless, we agree with the Commission that this effect stems not so much from the provisions in the BER that are specific to the automotive sector as from general rules of competition law, in particular those applicable to selective distribution.

Shortcomings

Moreover, we find that the current automotive BER has a number of shortcomings.

First of all, it is very complex and detailed since it tries to cover a wide range of very specific issues related to motor vehicle distribution and servicing. Despite all this detail, it has not provided real legal certainty and the Commission has found it necessary on several occasions to clarify the meaning of certain provisions through various means such as explanatory brochures, press releases, question-and-answer documents and commitment procedures.

In addition, it contains a number of concepts and provisions that have proven to be economically unattractive. For example, very few dealers have decided to specialise in sales and subcontract repair and maintenance services to a third party simply because it is not interesting commercially to outsource that part of the business that is the more profitable and moreover indispensable for maintaining ongoing customer contact and continuous revenue streams. Similarly, very few of them have opened additional sales or delivery outlets because the economic viability of these outlets is questionable when there are (too) many sales outlets already and the increasing price convergence makes it uninteresting to open outlets in other countries.

Moreover, the provisions regarding multi-branding are too prescriptive in that they promote one particular type of multi-branding that does not necessarily correspond to market realities. Experience shows that the sale within the same showroom of

competing brands from different manufacturers that the BER tries to promote is used only in circumstances where this makes economic sense, i.e. mostly by low volume manufacturers in low volume markets, by smaller dealerships that lack funds to make the required investments, and in sparsely populated areas. In other cases, multi-brand dealers generally sell their vehicles from separate showrooms since they consider brand differentiation to be a key driver of competition and commercial success.

These examples demonstrate very clearly that the changes that have occurred in motor vehicle distribution and servicing in recent years are market driven rather than the result of European legislation. In our view, the role of a BER should therefore be to establish a legal framework that supports and stimulates these market developments rather than to set detailed rules about how the automotive industry should be organised at various levels of the distribution chain.

Last but definitely not least, the current automotive BER does not reflect the differences between passenger cars and commercial vehicles. Whereas passenger cars are consumer goods that are purchased mostly by individuals and used for private transport, commercial vehicles are capital goods that are sold to professional buyers in a business-to-business environment where customers typically buy a package in which the service element is dominant due to the need for maximising the uptime of the vehicle. From this perspective, commercial vehicles have more in common with agricultural tractors and construction equipment than with passenger cars. The existence of such product and market differences between passenger cars and commercial vehicles also implies that the competition concerns are not necessarily the same for both types of products. ACEA therefore submits that the differences between passenger cars and commercial vehicles must be duly taken into account should the Commission decide to maintain specific rules for the automotive sector beyond 2010.

The vertical restraints BER would produce similar results

ACEA believes that in combination with type-approval legislation, the vertical restraints BER would produce similar results in terms of competition and consumer benefit as the current automotive BER whilst having the advantage of being simpler, more flexible and more focussed on real competition issues. Separately, a code of good practice could address contractual issues relating to alternative dispute resolution and minimum notice periods.

The vertical restraints BER

It is difficult to pass a definitive judgment regarding the vertical restraints BER since it is also being reviewed and may undergo changes during this process.

As it stands presently, however, the vertical restraints BER does not seem to differ fundamentally from the current automotive BER in most of its substantive provisions. One important exception to this is that it provides for an exemption from the general rules of competition law only when the market share of the contracting parties is 30% or less whereas the automotive BER permits certain restrictions of competition, notably quantitative selective distribution of motor vehicles, up to a market share of 40%. Considering the beneficial effects of quantitative selective distribution that are described in the evaluation report, maintaining this higher threshold would appear

appropriate in our view should the Commission consider applying the vertical restraints BER to the automotive sector.

Type-approval legislation

We believe that certain issues relating to spare parts and access to repair and maintenance information that are specific to the automotive sector and not covered by the vertical restraints BER can be addressed in an adequate manner in type-approval legislation.

For example, the type-approval framework Directive 2007/46 now contains a definition of “original parts” that is identical to that laid down in the automotive BER. This would appear to take away the need for maintaining this provision in the next BER.

Similarly, the right for third parties to access vehicle manufacturers’ repair and maintenance information is now regulated in great detail in the Euro 5 exhaust emissions Regulation for passenger cars (Regulation 715/2007). In some areas, the requirements of this Regulation go beyond those of the BER in that they oblige manufacturers to make the information available in a standardised format (the OASIS format, soon to be turned into a CEN/ISO standard) and do not permit them to withhold information in order to prevent the by-passing of anti-theft devices, the recalibration of electronic devices or the tampering with speed limiting devices. When it comes to enforcement, Regulation 715/2007 should be at least as effective as the BER since it provides for ex-ante control, obliging manufacturers to demonstrate the availability of their repair information as a condition for obtaining type-approval and requiring national authorities to establish a complaints procedure and lay down effective sanctions for non-compliance. The Commission has proposed similar measures for heavy commercial vehicles as part of the Euro VI legislation. The Council of Ministers and the European Parliament are expected to adopt this proposal before the expiry of the current BER.

Whereas the abovementioned type-approval legislation covers neither pre-Euro 5 passenger cars nor pre-Euro VI commercial vehicles, vehicle manufacturers already make repair and maintenance information for these vehicles available in accordance with the current BER and the Commission’s decisions in the commitment procedures involving four manufacturers. In any event, and regardless of what the next legal framework will provide on this point, the Commission will still be able to use its competition law powers to rectify the failure by any manufacturer to disclose repair and maintenance information to third parties in the future. Then, as now, such enforcement action would have to be taken on the basis of Articles 81 and/or 82 EC.

Having regard to the highly technical nature of this matter, we believe it is actually more appropriate to regulate access to repair and maintenance information comprehensively in type-approval legislation rather than to have numerous and potentially inconsistent or contradictory requirements in various legal instruments.

Code of good practice

As regards contractual issues, we note that the evaluation report judges the provisions contained currently in article 3 of the automotive BER to be ineffective and/or irrelevant for competition purposes and therefore suggests that any future regime should not contain such provisions.

We understand that this is a matter of concern for the members of manufacturers' authorised distributor and repairer networks. Our member companies recognise this concern and are willing to address it. As vehicle manufacturers, they need distributors and repairers who are willing to engage themselves on a long-term basis and who have the trust and confidence to continue investing in the brand(s) they represent.

Whereas we agree in substance with the Commission that such provisions concern matters of contract law rather than competition law, we consider that some of these provisions relate to good business practices that vehicle manufacturers are willing to continue applying in their contractual relations with their authorised distributors and repairers even in the absence of any legal obligation.

This is why the members of ACEA commit themselves in the attached code of good practice to maintaining in their agreements with authorised distributors and repairers provisions reflecting the content of articles 3(5) and 3(6) of the current automotive BER relating to dispute resolution by independent experts or arbitrators and notice periods. In essence, this would give each contracting party the right to refer contractual disputes to an independent expert or arbitrator. It would also ensure that agreements would be terminated only in combination with a minimum period of notice. This period would be two years for the regular termination of an agreement of indefinite duration and six months for the decision not to renew an agreement of definite duration.

Finally, we feel that the vertical restraints Regulation is simpler than the current automotive BER. Like other EC competition law instruments, it contains only some basic rules and principles that are accompanied by a set of guidelines that explain how these should be understood and applied in specific circumstances. Also, it is more focussed on real competition issues and does not address matters that are or can be regulated more adequately elsewhere. Finally, it is more flexible in that it seeks to achieve effective competition to the benefit of consumers by stimulating market developments whereas the automotive BER in some cases tries to prescribe the use of specific concepts regardless of whether these correspond to market realities.

Conclusion

On the basis of the above, we concur with the Commission that the best option for the future would be the application to the automotive sector of a more flexible regime that draws closer inspiration from the general principles applicable to vertical restraints.

Code of good practice regarding certain aspects of vertical agreements in the motor vehicle sector

Whereas Commission Regulation (EC) 1400/2002 on the application of article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector currently contains provisions relating to the settlement of contractual disputes via an arbitrator or independent expert and minimum periods of notice for the termination or non-renewal of agreements relating to the purchase, sale or resale of new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles.

Whereas the European Commission proposes to discontinue these provisions when this Regulation expires on 31 May 2010 since it considers, amongst other things, that they concern matters of national contract law rather than competition law.

Whereas these provisions relate to certain good business practices that motor vehicle manufacturers and their authorised distributors and repairers can continue to apply in their contractual relations even in the absence of any legal obligation.

Whereas motor vehicle manufacturers are committed to acting in good faith in the execution of their contractual obligations towards their authorised distributors and repairers.

The members of the European Automobile Manufacturers Association (ACEA)* agree to applying the following good business practices in good faith and in compliance with national laws governing their contractual relations in parallel to and for the duration of the regulatory framework that will govern vertical agreements in the motor vehicle sector following the expiry of Regulation (EC) 1400/2002 insofar as this framework does not contain any provisions to this effect:

1. Alternative dispute resolution

Each of the parties to the agreement shall have the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator.

This right shall be without prejudice to each party's right to make an application to a national court.

2. Minimum periods of notice

When the agreement is concluded for an indefinite period, parties shall give each other at least two years' notice in case of a regular termination. This period shall be reduced to at least one year where the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement or where he terminates the agreement because it is necessary to re-organise the whole or a substantial part of the network.

When the agreement is concluded for a definite period, parties shall give each other at least six months' notice of their intention not to renew the agreement.

The members of ACEA adhere to this code of good practice and commit themselves to including the principles set out in this code in the agreements with their authorised distributors and repairers relating to the purchase, sale or resale of new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles.

(*)ACEA members are BMW, DAF Trucks, Daimler, FIAT, Ford of Europe, General Motors Europe, Jaguar Land Rover, MAN, Porsche, PSA Peugeot Citroën, Renault, Scania, Toyota Motor Europe, Volkswagen and Volvo.