

Opinion of the Federal Ministry of Economics and Technology
of 27 August 2008
on the report by the European Commission of 28 May 2008
evaluating Regulation (EC) No 1400/2002
concerning motor vehicle distribution and servicing

The Federal Ministry of Economics and Technology welcomes the fact that the European Commission submitted a report on 28 May 2008 assessing *Regulation (EC) No 1400/2002 of 31 July 2002 with regard to the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector* (hereinafter referred to as “the BER”).

The Federal Ministry of Economics and Technology appreciates the opportunity to provide its opinion on the results of the report and on the European Commission’s preliminary evaluation. We expressly reserve the right to submit a further opinion after completion of the evaluation process.

In preparing its opinion, the Federal Ministry of Economics and Technology discussed with and obtained the views of the relevant associations representing the market players affected by the BER in Germany.

The Federal Ministry of Economics and Technology has arrived at the following preliminary conclusions:

1. Market developments

In principle, all respondents share the evaluations made by the European Commission with respect to the development of market structures and to the improvement of the competitive environment. In addition, the European competition authorities’ consistent monitoring of compliance with competition rules has contributed to the protection of competition.

Some of the associations' opinions refer to the fact that the "London Economics" study – which forms the basis of the European Commission's report – could take into account only the developments which took place during the relatively short period during which the BER was in

force (until 2006), whereas certain market developments may need more time to become fully effective.

The associations of retailers and repairers question whether the provisions of the applicable general *Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices* (hereinafter referred to as Vertical BER) are suitable for protecting competition on the distribution and servicing market to the same extent as does the BER. They are concerned that competition might be restricted if “only” general provisions are applicable.

The manufacturers’ associations are of the view that the European Commission’s preliminary efforts to subject the motor vehicle sector to the new Vertical BER represent a realistic alternative that could maintain the current level of competition with simpler rules. Making the general antitrust legislation more flexible could help promote competition in the motor vehicle sector.

2. Commercial independence of dealers

According to the Federal Ministry of Economics and Technology, the future regulatory framework should not weaken the degree of independence between dealers and manufacturers that has been achieved to date. New, innovative forms of distribution may possibly need more time to be created and established on the market, especially taking into account the predominantly small- and medium-sized structure of enterprises. This matter should not be decided solely by manufacturers.

For example, it seems to be a disadvantage that the currently evolving multi-brand distribution may be prevented by contract for a period of five years under the current Vertical BER or that a manufacturer may require dealers to generate at least 80 percent of their turnover – instead of the current 30 percent under the BER – exclusively from the sale of its products. A possible decline in multi-brand distribution would not be in the interest of consumers.

In order to promote competition, dealers should continue to be generally able to distribute products without offering customer support services and to set up additional branch offices across Europe.

3. Spare parts market

The Federal Ministry of Economics and Technology argues that the objectives pursued by the BER with regard to competition policy in the spare parts market should generally be maintained.

Parts manufacturers' current right to affix – in a non-discriminatory manner – their brand name to the parts that they supply to motor vehicle manufacturers is crucial for effective competition, as this facilitates the direct sourcing of spare parts from parts manufacturers. Equally important, motor vehicle manufacturers may not require their authorised outlets to source original parts exclusively from the motor vehicle manufacturer and to refrain from purchasing spare parts of matching quality from parts manufacturers.

The Federal Ministry of Economics and Technology notes that the BER grants a higher level of protection for spare parts supplies to both independent repairers and authorised outlets of motor vehicle manufacturers than does the Vertical BER. The latter does not contain any provision ensuring that original parts and spare parts of matching quality may be supplied to independent repairers.

Consumers are mainly supplied with spare parts by medium-sized enterprises, and this situation should not be adversely affected by a change in legislation.

4. Provisions under civil law

The Federal Ministry of Economics and Technology agrees with the European Commission that the BER's rules on the termination of contracts and conciliation proceedings are fundamentally matters to be dealt with under civil law. In this respect, it is legitimate to question whether such provisions should be retained in European competition legislation. Should the final evaluation lead to the conclusion that the removal of the current BER provisions under Art. 3 relating to matters of civil law does not serve to reduce competition, it could nonetheless be very helpful if they were incorporated into a balanced “Code of Good Practice” and in the contracts of operators.

5. Access to technical information including the use of control and diagnostic systems, tools, software, and technical advice

In addition to access to spare parts, it is undisputed that access to technical information, as currently regulated by Art. 4 (2) of the BER, is a key precondition for enabling independent operators to access the market. Lack of market access is often the reason that independent service operators exit the market.

While the European Commission apparently sees a general need for legislation as regards access to technical information, it does however deem this need to be sufficiently covered by *Regulation (EC) 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information*. As regards end-of-life vehicles, it takes the view that information is generally accessible.

In this context, the Federal Ministry of Economics and Technology notes that Regulation (EC) 715/2007 applies only to motor vehicles registered for the first time as of September 1, 2009. Given that technical information on end-of-life vehicles apparently requires continuous updating and adjustment, it is questionable whether Regulation (EC) 715/2007 can effectively replace the provisions under Art. 4 (2) of the BER. There would at least remain a legal gap regarding the considerable number of end-of-life vehicles registered before 2009, for which it is not defined how the access to technical information can be ensured after 2010 in the absence of any such provisions in the BER. If the issue of access to information concerns other sectors as well, the Federal Ministry of Economics and Technology proposes the consideration of a general provision within the Vertical BER on the inadmissibility of agreements and practices which restrict access to technical information.

6. Commercial vehicle market

The European Commission's report makes little mention of the commercial vehicle market. Based on the opinions available on this subject, however, it can be assumed that the criticisms made, in particular with respect to dealer protection, separation of distribution and service, and access to technical information, also apply to the commercial vehicle market.

In this sector as well, the Federal Ministry of Economics and Technology considers that the future legal framework should not have an adverse impact on the competitive environment.

7. Conclusion

While pointing out the preliminary nature of its position, the European Commission's report favours the expiry of the BER by 2010 without instituting new legislation. The Commission's reasoning is that the market structures that made the BER necessary in the past no longer exist in this form. Consequently, it is the Commission's view that the generally applicable competition rules (Art. 81 and 82 EC) and the Vertical BER will in future be sufficient. Furthermore, the objective of better regulation makes it necessary to scrutinise the need for legislation and to avoid overregulation.

The Federal Ministry of Economics and Technology has not yet taken a final view on an appropriate solution for the future.

With a view to better regulation, we generally support scrutinising rules in order to simplify them and reduce them to their essentials. However, this aim may not be seen as an end in itself.

The discussion about future rules for the motor vehicle sector should be more closely related to the review of the Vertical BER. In this regard, the presented findings should be looked at in detail. So far, we cannot confirm the impression given by the Commission's report that, in the current context, the BER's provisions are likely to be detrimental to a more competitive motor vehicle market.

If the evaluation process were to conclude that, in the interest of consumers and other market players, special rules continue to be necessary in the motor vehicle sector, the Federal Ministry of Economics and Technology would not consider it appropriate to incorporate such special rules in the Vertical BER so as to avoid setting precedence for other sectors. In this case, it would appear more appropriate to establish in a BER (which could be shorter, amended and valid for a limited period of time) those rules which are deemed necessary.

If the evaluation process were to conclude that more time and market observation are necessary to be able to assess the BER's impacts, the Federal Ministry of Economics and Technology might deem it appropriate to extend the current BER for a few years.

In the interest of consumers, any future legislation should – regardless of location – retain the objectives pursued so far by the BER in terms of competition policy and should ensure an equivalent level of protection of competition.