

28 October 2008

Position paper on BER 1400/2002

The Danish Federation of Small and Medium Sized Enterprises (DFSME) submits the following comments to the Commission Evaluation Report on the Operation of Regulation (EC) no 1400/2002 concerning motor vehicle distribution and servicing (hereinafter: the BER) on behalf of number of sector organisations in the areas of spare parts and auto repair. DFSME is aware that the authorised dealers are experiencing an array of problems in relation to the manufacturers. These problems will not be treated in this response, since DFSME solely represents the independent repairers, auto recyclers, and spare parts manufacturers.

1 General observation concerning the advantages of maintaining a specific block exemption regulation for the automotive sector

In the evaluation report the Commission sets the scene for not renewing the BER when it expires on May 31, 2010. DFSME does not agree with this, as we find a serious need for a separate block exemption for the automotive sector also after 2010.

DFSME does not in general advocate a regulated market but wants a market, where large and small enterprises can compete on equal terms. Apart from buying a house, the purchase of a car is the single largest investment for most consumers. Over a lifetime purchase and maintenance of cars is even likely to represent a larger expenditure than real estate. Thus it is crucial to the European consumers that the market functions optimally and leads to a high degree of competition and the lowest prices possible.

The market for cars, spare parts and servicing of motor vehicles is unusual because it is very asymmetric. On one side it consists of a limited number of global corporations with huge economic resources whereas on the other side it consists of thousands of lo-



cal, small and medium-sized enterprises with limited resources. For competition work in such an unbalanced market, it is necessary to have a set of very clear rules so that the enterprises involved know their rights and obligations.

The Commission states that fewer rules and less formalism would lead to more legal certainty for the firms in the sector. DFSME disagrees entirely with this statement. On the contrary, we are convinced that less clear rules will leave the national competition authorities more to their own interpretation of the general, vertical block exemption regulation (2790/1999) than is the case today. We have already seen plenty of examples that diverging interpretations in different Member States make it difficult for SME's, which do not have the resources to know the interpretation in each Member State in detail, to operate across borders.

In the view of DFSME Article 81 of the EC Treaty does not provide sufficient protection of competition, since relying only on Article 81 presupposes an individual interpretation in each case. Furthermore, BER 2790/1999 does not provide sufficient protection of the interests of the independent repairers or the spare parts manufacturers. In order to obtain an individual interpretation of Article 81, SME's concerned would have to contact the national competition authorities or start legal proceedings at the national courts. This demands considerable resources for the firm as well as for society and it often take years before a ruling is available. This is neither in the interest of the market nor of society.

In addition it will be daunting for most firms to initiate and conduct competition cases without having a clear definition of the interpretation of term like "a considerable restriction" of competition.

Moreover, shifting a large case load on to the national competition authorities creates a risk of divergent rulings in similar cases. Heterogeneous interpretations in each Member State create uncertainty in the market to the detriment of firms and consumers alike. Thus the Commission, were it to maintain its attitude toward the present BER, would risk achieving the opposite of what it intended.

There is, thus, a need for a sector specific regulation to ensure and promote competition in this area.

A solution where the Commission would chose to rely exclusively on Article 81 and on regulation 2790/1999 amended in order to supplement it by way of a number of specific provisions taking into account the particular circumstances of the motor vehicle sector would not be an attractive solution, since it would be much too complicated and demand too many resources for the vast majority of SME's.

Identical guidelines and uniform interpretations of such guidelines are essential when it comes to creating homogenous conditions for enterprises and avoiding uncertainty in the market. In the view of DFSME this is best achieved by renewing the existing BER 1400/2002, and make the necessary amendments in respect of those areas where the current BER has failed to deliver the intended results. In case the Commission finds it necessary to further develop specific areas or paragraphs of the BER, DFSME recommends that guidelines and statements intended to clarify potential problems with regard to interpretation of the rules of competition of the EC Treaty should be elaborated so as to supplement the BER, not replacing the BER. However, guidelines do not ensure homogenous conditions on their own. They may be helpful but will not be adequate with regard to ensuring uniform competitive conditions in the automotive sector without a sector- specific BER.

2. On the current BER

Given the fact that the Commission acknowledges that the current BER for the automotive industry has not fully delivered the expected results it seems illogical that the Commission wishes to abolish the BER for the automotive industry and maybe leave the area completely unregulated instead of identifying and improving the legislation in the areas where the BER has failed to deliver.

In the following, DFSME comments upon two specific parts of the Commission evaluation rapport.

2a Access to technical information - enabling independent repairers to compete with the manufacturers' networks of authorised repairers

The DFSME agrees with the Commission that the independent repairers are the only source of inter-brand competition on the aftermarket. This way the independent repairers provide consumers with a choice and ensure free competition on the aftermarket.

Access to technical information is of the highest importance. The general BER on vertical agreements (2790/1999) contains no provisions on the access to technical information, tools or education. Such access is of particular importance for the enterprises directly or indirectly involved in the repair and maintenance of cars.

The four Commission decisions adopted in September 2007 provide valuable guidelines that the independent sector badly needs. The decisions are based on Articles 81 (1) and 81 (3) of the EC Treaty but also rely on BER 1400/2002. The DFSME believes that it would be more difficult to reach the same decisions solely on the basis of Articles 81 (1) and 81 (3) of the Treaty. Thus the BER 1400/2002 ensures that a number of questions regarding the interpretation of the Treaty are answered in a short, concise and efficient manner. As a consequence, BER 1400/2002 is of great benefit to European consumers and independent repairers as well as to society as time and resource consuming court can be avoided to a considerable extent.

The Commission argues that from 2009, the provisions of Euro 5 and Euro 6 in accordance with Regulation 715/2007 oblige suppliers to release the types of technical information dealt with in those provisions with regard to new car models. This is good news to independent repairers and spare parts manufacturers, but DFSME wants to underline that in absence of BER 1400/2002 such precise guidelines describing the conditions under which the suppliers must release the technical information might not have been issued, since the BER 1400/2002 evidently has served as inspiration for EURO 5 and EURO 6. It is, in particular, the price and possibility of buying access to the technical information for a short period of time that is relevant here. On these grounds, i.a., the DFSME finds that a specific block exemption regulation is necessary to interpret Articles 81 (1) and 81 (3) with regard to the automotive sector.

There is an obvious problem concerning cars produced before September 1, 2009. The Commission argues that Article 4 (2) in the BER 1400/2002 ensures that cars produced before this date are covered by an obligation to release the technical information as well. Nevertheless the Commission has found it necessary to issue specific decision in this area concerning four car manufacturers on September 13, 2007. In the view of the DFSME this underlines that the Commission is aware that the BER 1400/2002 has not delivered the expected results regarding the conditions under which car manufacturers must release technical information. That fact is one of those that speak in favour of prolonging BER 1400/2002 possibly supplemented by precise guidelines so that the sup-

pliers, the repairers and other parties will be able to know exactly what the rules are with regard to the access to technical information.

Thus far access to technical information has proved particularly problematic. In some instances the national competition authorities has found it acceptable to demand from independent repairers that they pay substantial amounts to get access to the technical information of a single brand. Since the independent repairers generally repair several brands it will be economically impossible for small enterprises to pay such sums several times and thus, in practice, impossible to repair more than a single brand or a few. Independent repairers provide consumers with an alternative to the closed circuit of the car manufacturers, selected dealerships, and brand specific repairers. Such more intensive competition secures consumers the lowest prices possible. The condition for still upholding this alternative is complete and non-discriminating access to technical information, tools, and education. This underlines the need for clear and concise guidelines instead of further use of individual assessments by the national competition authorities as the Commission proposes in its evaluation.

Today access to technical information is provided mainly by a number of publishing houses that communicate the information in a form that makes it to handle and to pay for by the independent repairers who are often micro-businesses. Neither Article 81 nor the four de abovementioned decisions by the Commission from September 13, 2007 mention the access of other actors than the repairers to technical information. Since the access of the publishing houses to the technical information is not mentioned specifically, the DFSME fears that that circumstance will make it difficult for the repairers to obtain the technical information in a form they know and can handle.

2b Access to spare parts - making it easier for spare parts manufacturers to access the aftermarket

Access to the spare parts that the car owner wants, at a competitive price, is another important parameter when it comes to helping European consumers. As mentioned above, the purchase of a car is the second largest single investment for most people apart from purchasing a house. Over the life time of a car, repairs, service and spare parts comprise as large an expense as the purchasing price of the car. In the view of the DFSME the consumer must have absolute freedom to choose where and how his/her own vehicle is maintained and repaired. A wide choice of spare parts from vari-

ous suppliers and access to these spare parts is a necessary condition for equal and efficient competition.

The block exemption on motor vehicles, in Article 4(1)(j) exempts agreements that limit the possibility for spare parts manufacturers to sell to the aftermarket be it to independent or authorised repairers or to consumers. A similar protection cannot be ensured solely by applying Article 4(e) of the general vertical block exemption. Article 4(e) of the vertical block exemption regulation only prohibits agreements that prevent selling to consumers and independent repairers, but leaves it open to car manufacturers to limit the ability of spare parts manufacturers to sell to authorised repairers.

Preventing authorised repairers from being able to buy spare parts, something that would be possible were it not for Article 4(1)(j) and (k) of the block exemption, would amount to a significant reduction of competition and would compromise the access of spare parts manufacturers to the aftermarket. Leaving spare parts manufactures to only rely on Article 4(e) of the general vertical block exemption would make spare parts more expensive for authorised repairers and, as a consequence, also entail higher repair costs for consumers.

The above should be seen in connection with the increasing use of prolonged periods of warranty during which the consumer will, to a large extent, be induced to let his/her car be repaired by the authorised dealer. As a consequence, the consumer will also, more or less, be forced to accept higher repair costs, as the authorised repairer is unable to buy spare parts on the market.

In order to promote a maximum of competition and the lowest possible prices on the market a future block exemption regulation in the motor vehicle sector should also specify that the use of warranties constitute a serious reduction of free competition when such warranties, due to the way some have been seen to have been construed in practice, serve to induce the consumer to place repair of his car, maintenance or purchase of spare parts solely within the network of the car manufacturer in question. The conditions consumers have to fulfil if they want to make use of the car manufacturer's warranty tend to be so strict and formalistic that in reality they will easily preclude the possibility of consumers having their motorcars repaired outside the authorised network of the car manufacturer. As mentioned above according to the points of view of the Danish Federation of SME's the consumer should enjoy an unlimited right to chose where, how and with which spare parts the vehicle that the consumer has acquired and

paid for, should be maintained and repaired so long as the repair is made in a professionally satisfactory manner. In case repair has been undertaken, which does not conform to requirements of the warranty the loss of rights should be limited to the vehicle parts concerned and not entail a general loss of warranty for the whole of the vehicle.

In order to improve the access of spare parts manufacturers to the aftermarket the use of rebates based on the purchase of a certain quantity of authorised spare parts from the car manufacturer in connection with the purchase of new motor vehicles should be prohibited.

Moreover, there are cases where a dealer/importer of new vehicles has required that a dealer must allow for inspection by the car manufacturer or importer of the premises of the dealer in order to control if or to what extent unauthorised spare parts can be found at the premises. Such inspection should be positively prohibited in a forthcoming amended motor vehicle block exemption.

Article 4(1)(i) of the block exemption prohibits agreements that limit the ability of the manufacturers of spare parts to fix their respective logos on their products – so-called dual-branding. This important provision that facilitates the access of spare parts manufacturers to sell such products as original or authorised spare parts on the aftermarket is not covered by the general vertical block exemption, and it is not possible to consider that agreements making for such a limitation would be anti-competitive. It is important for the information to consumers that the origin of products is not hidden, and that consumers may be able to know that the main part of a car is not made by the car manufacturer, but by independent subcontractors that are able to deliver spare parts that are competitive with regard to their quality.

Furthermore, agreements that give the vehicle manufacturers a monopoly with regard to the tools of spare parts manufacturers should be prohibited in a new block exemption. Such agreements reduce the access of spare part manufacturers to the market. In case that only the general vertical block exemption would be applicable manufacturers would, to a large extent, be able to reduce the access of spare parts manufacturers to the market. Taking action against anti-competitive behaviour of the kind here mentioned would require that competition authorities or the national courts would be called upon to decide in individual cases. According to the DFSME such a situation would be unnecessarily costly and bureaucratic and de facto prevent SME's of the EU from relying on EU law since they do not have the possibility or resources to conduct protracted

and complicated court proceedings or wait for individual decisions from the national competition authorities.

Clear provisions in this area would facilitate the access of spare parts manufacturers to the aftermarket and thus be to the benefit of increased competition. Such provisions seem to belong more naturally in a separate block exemption for motor vehicles. It would thus be advisable to prolong the current block exemption with necessary and useful amendments.

Yours sincerely,

Mads Engberg