

UK INITIAL REACTION TO EUROPEAN COMMISSION EVALUATION REPORT IN RESPECT OF THE MOTOR VEHICLE BLOCK EXEMPTION (MVBE).

Issue

The current MVBE is due to expire in 2010. The Commission have published their evaluation report of the current MVBR which suggests removal of the block exemption and are seeking an initial reaction by 31 July 2008. It is understood a formal Commission proposal and consultation process will follow.

Summary of UK Position

- The UK supports the Commission view that the sector specific MVBE should not be renewed in 2010, on condition that;
- Provision is made in either the vertical block exemption and/or other EU Regulations, or in some cases an industry code of practice, addressing concerns over selective distribution; bundling; after-market access to information; notice of termination; non-compete restrictions; and contract range.

Argument

The current block exemption relating to certain agreements involving motor vehicles has been in place since 2002. It applies to certain categories of agreements and concerted practices concerning selective distribution, contractual arrangements between manufacturers, distributors and authorized dealerships, availability and use of technical information for the aftermarket etc. The current block exemption is due to expire on 31 May 2010. The question under discussion now is whether it should be replaced, and if so on what terms.

The Commission's evaluation report is informed by a report carried out in 2006 by "London Economics" (LE) on developments in car retailing and the after-sales markets. The LE report's focus was Europe-wide but it is sufficiently reliable to draw conclusions, although the block exemption had only been in place for 4 years at that time.

The Commission's report concluded that the current MVBE had been successful, or partially successful in some areas but ineffective in others. It suggested the market conditions now are very different to 2002 and as a consequence there is no need for a sector specific block exemption for motor vehicles which should, in line with Better Regulation principles, be removed. The report proposed that any remaining areas of concern could be addressed through the vertical block exemption (VBE) and other existing competition rules.

Given this Europe-wide focus, the UK Office of Fair Trading (OFT) have carried out their own analysis of the sector drawing on both the LE Report and their own

enforcement experience to gauge the effect of the block exemption on the UK market specifically.

The Department for Business, Enterprise and Regulatory Reform (BERR) and the OFT have jointly consulted with various stakeholders representing all areas of the sector.

The UK Position

The OFT economic analysis concurs with the Commission view that the MVBE should be removed although there are some points of detail, particularly in relation to the after-markets, that the UK Government would like to see addressed to ensure that there is no consumer detriment as a result of the proposed move to a more general, non sector specific, regulatory regime (the VBE) other Regulations and existing competition law.

We are clear that measures in the vertical block exemption should not be sector specific and must have a general benefit for inter-brand competition. Any debate on motor vehicles needs to be considered in the broader context of the reform of regulations for general vertical agreements. This may mean that the block exemption might have to remain in some reduced form, perhaps with a sunset clause, to accommodate concerns which either cannot be generalized into the VBE or do not fit elsewhere.

The following six areas of concern come with proposals which should be included in any future vertical or specific Regulation applicable to the motor vehicle sector.

i. Selective distribution

A supplier should be able to determine the primary location of a distributor in a quantitative selective system. *In order to obtain satisfactory coverage of a geographic area, authorised distributors should not be restricted from setting up additional outlets.*

In order that dealers within a network are able to expand, develop economies of scale and better bargaining power for the benefit of consumers, *a prohibition on agreements which restrict a distributor from transferring his business to another member of the network chosen by the distributor should be retained.*

To remove legal uncertainty, *prohibitions on agreements which either restrict the location of business premises or the right to transfer the business to another member of the network chosen by the distributor should be made explicitly applicable to all qualitative selective distribution networks.*

It is possible, were the MVBE to lapse entirely and the VBE apply, under the current text of the VBE guidance, that position for car distributors could significantly worsen in the UK and probably elsewhere in the EU. Paragraph 189 of the guidance suggests that, because the concentration ration of the five largest vehicle supplier

groups is much greater than 50% and nearly all use quantitative selective distribution, the conditions of article 81(3) are unlikely to be fulfilled because the market is foreclosed to price discounters and consumers have to purchase vehicles in high service/high price outlets leading to reduced inter-brand competition between the five main suppliers. An unintended consequence could therefore be the implicit prohibition of quantitative selective distribution for new car sales.

ii. Bundling

To improve competition between the independent and the authorised repair sector *the dependency of independent repairers on their authorised repairer competitors for the supply of vehicle manufacturers branded parts, particularly captive parts, should be removed. Further, parts distribution should be explicitly separated from repair and maintenance.*

Retain, in some form, the provision in the MVBR that distribution of new cars should be explicitly separated from repair and maintenance.

Discussions with stakeholders have raised significant concerns over defensive (anti-competitive) use of IP and tooling agreements in the area of parts manufacture and distribution which has not been addressed by the current MVBE. While the UK recognizes there have been no formal complaints made (see item iii. for possible reasons) this is an area which needs to be addressed.

iii. Independent aftermarket access to information

To cover vehicles pre-dating the coming into force of alternative measures for new models in 2009, *there needs to be a specific requirement for vehicle manufacturers to provide repair and recommissioning information.*

This information should be supplied in a usable standard format. Stakeholders indicate that some manufacturers, despite the MVBR, either do not supply technical information, provide incomplete information or alternatively supply reams of documentation which makes it very difficult for the requesting garage to isolate the relevant section. Further, in some cases, there appears to be an IP based restriction on how this information can be used, passed on or stored for future use.

Part of the rationale for the withdrawal of the MVBE is that the lack of cases or problems notified to the European Commission and to national competition authorities indicates the market is relatively competitive. Detailed discussion with stakeholders indicates this is not necessarily the case, particularly in the area of access to information. Businesses are reluctant, even large concerns that may have the economic resource, to bring an action against vehicle manufacturers when they must maintain a close relationship with these same manufacturers for other significant parts of their business. This is especially true of small and medium sized repair and maintenance businesses which simply do not have the resource, either economic or legal, to make a complaint that on current timeframes, might be two to three years before hearing.

Stakeholders have raised the particular concern that existing databases, to which they have access, holding vehicle manufacturers technical information will either be discontinued or allowed to lapse by not being updated. The potential consumer detriment in this particular area is large and the UK sees this as a priority issue with consequences for the longer-term repair and maintenance of the vehicle parc by independent repairers.

iv. Notice of termination

To provide some protection for dealers who behave in a pro-competitive way, *the requirement in the MVBE for a detailed notice of termination should be retained in some form.*

v. Non-compete restriction after termination

To ensure inter-brand competition is not harmed and dealers are able to switch to different vehicle suppliers without restriction, *any non-compete restriction following the termination of a dealer's contract must be prohibited.*

vi. Contract range

Provision should be made for consumers to buy either left or right-hand drive vehicles as part of the contract range in Member States where such vehicles are not supplied. *There needs to be a definition for "contract range" to ensure that distributors do not lose sight of the fact that they can continue to supply vehicles which conform to the specification of the Member State from which the goods are ordered.*

Duncan Lawson
BERR
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