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ACEA response to the draft Commission Regulation on the application of Article 81(3) EC Treaty to categories of vertical agreements and concerted practices

This is the response of the European Automobile Manufacturers Association (ACEA) to the European Commission's draft Regulation on the application of Article 81 (3) EC Treaty to categories of vertical agreements and concerted practices that was issued on 28 July 2009.

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.

ACEA welcomes the publication of the Commission's draft Regulation on the application of Article 81 (3) to categories of vertical agreements and concerted practices.

In particular, it supports the Commission's proposal to apply the rules of the new general Block Exemption Regulation ("the general BER") to the automotive sector in the future.

ACEA agrees with the Commission that competition on the motor vehicle market is as intense as, if not more intense than in other sectors and that there are no specific competition concerns in this market that would set it apart from other product markets. Therefore, we agree with the Commission that there is no longer any reason to maintain a separate, stricter and more burdensome legal regime for distribution agreements in the automotive sector. Consequently, we support the Commission's proposal to apply the rules of the new general BER to motor vehicle distribution agreements in the future.

Applying these rules will help the automotive sector in developing suitable solutions to the problems created by the current financial and economic crisis while preserving competitive dealer networks. ACEA proposes that the new general BER should apply to the automotive sector as from 1 June 2010 while providing for a transitional period of two years for adapting existing distribution agreements to the new rules. Thus, it would enter into force at the same time as the guidelines that the Commission intends to adopt for the aftermarket according to its Communication of 22 July 2009 on the future of the automotive BER. This would minimise transition costs for manufacturers and the overwhelming majority of dealers who combine motor vehicle sales and after-sales service.

As regards the aftermarket, ACEA accepts that the Commission would carry over a limited number of specific provisions from the current automotive BER and its accompanying explanatory brochure into guidelines provided this does not create any new obligations for vehicle manufacturers nor impose any new or unjustified restrictions.

Furthermore, ACEA proposes that agreements concerning commercial vehicles should be governed exclusively by the general BER. 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. Just as the general BER applies to agricultural tractors and construction equipment, we believe it should apply to commercial vehicles in full.

One important issue that in our view requires clarification is that of the 30% market share threshold that conditions the application of the general BER. Since the market share of certain vehicle manufacturers exceeds this threshold slightly in certain national markets, it would be extremely useful if the Commission could clarify under which conditions it would be safe for manufacturers to assume that the exemption would not be automatically invalidated, for example if they would want to continue applying a system of quantitative selective distribution. The Commission's impact assessment accompanying its Communication of 22 July 2009 regarding the future of the automotive BER 1400/2002 says that "in almost all cases the market shares in question overstep the 30% threshold by less than 5%, and this will not normally pose competition problems" (paragraph 181, page 47). It would be very useful to have this confirmed in the Regulation itself or in guidelines. We also assume that these market shares will continue being calculated on the basis of market sales volumes since volume data provide a more accurate picture of the competitive situation on the automotive market and are more readily available than market sales value data.

In addition, the new general BER differs from the current automotive BER and the current general BER in that it applies only where the market share of both parties, seller and buyer, does not exceed 30%. At present, there is considerable uncertainty in the automotive sector as to how the market share of the dealer should be assessed. While it is clear that no dealer holds a market share of more than 30% at EU or national level, such a situation might occur exceptionally at regional or local level. In practice, it would seem difficult for manufacturers to treat such dealers differently from other dealers in their network without undermining the effective functioning of their distribution systems. It would be equally difficult to monitor the evolution of the dealers' market share over time, for example when dealers merge or sell their business to one another. Considering that there is no evidence of dealer market power causing competition issues in the automotive sector, we believe that the 30% market share threshold should continue to refer only to the market share of the supplier.