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ACEA response to the Commission's draft automotive Block Exemption Regulation and guidelines

This is the response of the European Automobile Manufacturers Association (ACEA) to the European Commission's draft automotive Block Exemption Regulation that was issued on 21 December 2009. This response complements our earlier comments on the Commission's Communication of 22 July 2009 on the future competition law framework applicable to the motor vehicle sector.

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 supports the Commission's proposal to apply the rules of the new general BER to motor vehicle distribution agreements in the future. It agrees 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.

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 BER and guidelines that the Commission intends to adopt for the aftermarket. This would minimise transition costs for manufacturers and the overwhelming majority of dealers who combine motor vehicle sales and after-sales service. By contrast, the proposed three-year extension of the current automotive BER would oblige everyone in the industry to sit back and wait several years while market conditions are changing rapidly and dramatically. This is not helpful in the current times of crisis.

Moreover, ACEA believes that making the benefit of the new general BER conditional upon both parties' market shares not exceeding 30% would cause considerable legal uncertainty. Considering that there is no evidence of dealer market power causing competition issues in the automotive sector, we believe that the market share threshold should continue to refer only to the market share of the vehicle manufacturer.

As regards the aftermarket, ACEA supports the Commission's proposal to carry over a limited number of specific provisions from the current automotive BER and its accompanying explanatory brochure into a new automotive BER and guidelines insofar as this does not create any new obligations for vehicle manufacturers nor impose any new or unjustified restrictions. While broadly supporting the content of the proposed BER and guidelines, ACEA believes that the draft guidelines should be adjusted in a number of areas in order to ensure that they provide absolute clarity and do not leave room for diverging interpretations.

Furthermore, ACEA proposes that agreements concerning commercial vehicles should be governed exclusively by the general BER. Commercial vehicles have more in common with agricultural tractors and construction equipment than with passenger cars and they should therefore be treated in exactly the same way as these similar products.

II – Detailed comments

The primary market

ACEA agrees 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.

One of the main advantages of applying a less detailed, less prescriptive and more flexible legal framework such as the general BER is that it will help manufacturers and their sales and service partners to reduce costs, enhance efficiency and restore the profitability of their operations. This is particularly important in today's times of crisis.

The application of the new general BER would greatly facilitate the development of suitable solutions to handle the crisis while preserving competitive dealer networks. One specific example of this is the transfer of dealerships within the network. Under the general BER, the manufacturer would need to give its consent for such transfers while today they can occur with the sole agreement of the dealers concerned. Involving the manufacturer in these decisions would ensure that such dealership transfers were made in the best interest of the network as a whole rather than just in the best interest of one or two individual dealers or dealer groups. Without the manufacturer's involvement, there is a considerable risk that dealership transfer decisions will be made without regard for their impact on the structure and profitability of the overall network. In the worst case, they could lead to the establishment of local or regional monopolies. This would reduce intra-brand competition to the detriment of final consumers.

In this context, ACEA strongly believes that the proposal to extend the provisions of the current automotive BER for another three years is in total contradiction with the Commission's own findings. Indeed, the Commission itself recognises that the current crisis affects the automotive industry more than most other sectors and obliges it to make adjustments to its sales and service networks. It also acknowledges that where such adjustments must be made, it is important that they be made swiftly since delaying these decisions will only prolong an unhealthy situation and undermine profits. However, it then goes on to make these swift adjustments impossible by extending the provisions of the current BER for another three years. In practice, this means that the current distribution structures would be "frozen in time" until 1 June 2013, i.e. for a period of more than three years from today, and that no significant adjustments could be made before then. This is not logical. If the Commission agrees that the automotive industry is affected by the crisis as much as any other industry, if not more, then it should give it the same flexibility as any other sector in making adjustments to its sales and service networks.

In order to provide this flexibility, ACEA proposes that instead of extending the validity of the current automotive BER, the Commission should apply the new general BER 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. Considering that under the rules of the current automotive BER and the distribution agreements that have been concluded on the basis of these rules, manufacturers can terminate agreements only with a notice period

of two years, this would ensure that dealers who would have made certain investment decisions on the basis of the current rules would see their situation unchanged until 1 June 2012 unless they agreed with the vehicle manufacturer to sign a new distribution agreement before that time. This last point is important in that it would give manufacturers and their dealer networks the opportunity to conclude new distribution agreements sooner if they believe this is in their mutual interest. If no such agreement is reached, the dealers' situation would remain as it is today for another two years.

By contrast, the extension of the validity of the current automotive BER would oblige everyone in the industry to sit back and wait several years while market conditions are changing rapidly and dramatically. Under this scenario, demand for network adjustments can be expected to build up considerably in coming years and this is likely to increase rather than appease tensions between manufacturers and dealers.

Applying the general BER to the primary market as from 1 June 2010 would have the additional advantage of making its entry into force coincide with the application of the guidelines or BER that the Commission intends to adopt for the aftermarket. Considering that the overwhelming majority of motor vehicle dealers also provide after-sales service, we believe both sets of rules should start applying at the same time in order to minimise transition costs.

As regards the application of the general market share threshold of 30%, we find it very helpful that the draft guidelines specify that quantitative selective distribution will generally comply with the requirements of Article 101 (3) if the parties' market shares do not exceed 40%. We would find it equally useful if the guidelines could also make it clear 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 the market share threshold. 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 market share threshold should continue to refer only to the market share of the supplier.

As regards single branding, footnote 9 of the guidelines appears to prevent vehicle manufacturers from including single branding obligations in new agreements with their existing distributors once the rules of the general BER apply. This would make single branding virtually impossible to implement in practice considering that vehicle manufacturers are likely to maintain the majority of their existing distributors within their network in the coming years and appoint only very few new distributors. In our view, the interpretation given in footnote 9 is questionable from a legal point of view as it appears to contradict the letter of the general BER. Indeed, neither article 5 (a) of the new draft general BER issued by the Commission on 28 July 2009 nor the accompanying guidelines limit the right to impose single branding obligations to agreements with new distributors.

However, should the Commission decide to maintain this restriction, we understand that vehicle manufacturers would have the right to require their distributors to purchase up to 80% of their total vehicle purchases from them and sell vehicles purchased from other vehicle manufacturers in separate showrooms unless this is not economically viable. We would welcome it if the Commission could confirm that this understanding is correct and amend the guidelines on this point to remove any ambiguity that might exist.

Finally, we appreciate it that the guidelines specify that intermediaries buying vehicles on behalf of end consumers must have a valid mandate or request including the name and address of the consumer(s) they represent. This sets them apart from independent resellers, who purchase vehicles for resale. Nevertheless, we believe that in order to remove any ambiguity that might still exist in this respect, it would be preferable that the guidelines specify that an intermediary is a person or an undertaking which purchases a new motor vehicle in the name and on behalf of an end consumer.

The aftermarket

ACEA supports the Commission's proposal to carry over a limited number of specific provisions from the current automotive BER and its accompanying explanatory brochure into a new automotive BER and guidelines insofar as this does not create any new obligations for vehicle manufacturers nor impose any new or unjustified restrictions.

As regards access to repair and maintenance information, we accept the reference in the guidelines to the type-approval Regulations governing this matter (715/2007 and 595/2009) and in particular to the definition of "repair information" laid down in Article 6 (2) of Regulation 715/2007. On this point, we would like to point out that in order to be technically correct, the guidelines should say that these Regulations provide for a system of dissemination of repair and maintenance information in respect of new types of passenger cars and commercial vehicles that are put on the market as from the dates referred to in the guidelines.

We believe that this reference to the relevant type-approval Regulations should be as short as possible in order to avoid any kind of duplication, contradiction or potentially conflicting interpretations between the guidelines and the type-approval legislation. In this respect, we feel that the statement in the guidelines that the Commission "will take Regulations 715/2007 and 595/2009 into account" when assessing cases of suspected withholding technical repair and maintenance information concerning vehicles commercialised before the entry into force of those Regulations (paragraph 55) could have unintended and undesirable consequences.

Indeed, whereas the abovementioned Regulations cover 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 decisions made by the Commission in the commitment procedures involving four manufacturers in 2007. While we agree completely that manufacturers should continue making repair information available for these vehicles, we feel strongly that this should occur under the same conditions as today.

We believe it is important to clarify that the information relating to pre-Euro 5 passenger cars and pre-Euro VI commercial vehicles would not need to be presented in accordance with the OASIS format or the CEN/ISO standard that is under development. The adaptation of manufacturers' IT systems to this format/standard being extremely costly and complex, we believe it would be totally unreasonable to impose this requirement for all existing vehicles, many of which will disappear from the parc in the relatively near future anyway.

In our view, the basic principle that should continue to govern the availability of repair information to independent operators is that of non-discrimination. This implies that vehicle manufacturers should have no obligation to disclose repair and maintenance information to independent operators beyond what they provide to their authorised repairers.

Also, we find the distinction between technical repair and maintenance information that must be disclosed and commercial information that may be legitimately withheld insufficiently clear. We would appreciate it if the Commission could provide further clarification on this point.

A last issue that in our view should be clarified in the guidelines is that relating to minimum purchasing and stocking requirements for spare parts. Such requirements have traditionally been accepted as legitimate elements of a qualitative selective distribution system aimed at ensuring adequate customer service. It would be helpful if the guidelines could specify that such requirements would continue being permissible in the future.

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 implies that the competition concerns cannot simply be considered to be the same for both types of products. It is in fact difficult to see what consumer benefits would be the result of a renewed application of a new automotive BER to the commercial vehicle market. The sector's primary and secondary markets are not and have not been under any criticism by the final users of its products. It is therefore difficult to understand why the continued application of a renewed automotive BER is considered necessary to bring about another balance in the position of the different parties in the marketplace. This is all the more so, now the scope of the new automotive BER is planned to be restricted to the automotive replacement parts market. In the commercial vehicle industry, this market is and always has been a very competitive market with a high market share for independent suppliers, also prior to the current BER.

ACEA therefore proposes that agreements concerning commercial vehicles should be governed exclusively by the general BER, also with respect to the aftermarket.
