

**JAMA Contribution to the Commission's Public Consultation
Initiated 21 December 2009 on Competition Rules for the Motor Vehicle Sector**

**(Draft Commission Block Exemption Regulation
and Draft Supplementary Guidelines)
10 February 2010**

1. Introduction

JAMA has submitted comments at each stage of the Commission's review of competition policy on vertical agreements in the motor vehicle sector. Most recently, JAMA commented on the Commission's July 2009 *Communication on The Future Competition Law Framework applicable to the motor vehicle sector*, which set out the Commission's policy recommendations in these regards. For purposes of the present public consultation, the Commission has now cast those recommendations in the form of i) a draft revised Motor Vehicle Block Exemption Regulation ("MVBBER") focusing on the supply of spare parts to the aftermarket, and ii) draft motor vehicle sector-specific "Supplementary Guidelines" on vertical restraints in agreements concerning both sale and repair of motor vehicles and distribution of spare parts. The Guidelines provide interpretation concerning application of the Commission's General Vertical Block Exemption (GVBE)¹, which will newly apply to the motor vehicle sector when the current motor vehicle block exemption Regulation 1400/2002 expires. Details of that application and related issues are addressed herein.

JAMA has expressed agreement with most elements of the Commission's new policy as reflected now in the consultation documents. JAMA maintains, however, certain important reservations. These are explained further in this submission and JAMA calls on the Commission to take these into account and amend the draft consultation documents accordingly. JAMA's overriding objective is for the next block exemption regime to be well structured and implemented such that economic recovery in this sector can proceed at maximum pace while also showing sufficient flexibility to ensure that entry and growth opportunities can be exploited fully and fairly in circumstances highly relevant to the JAMA members' market situation.

JAMA thus welcomes this additional public consultation, especially to highlight the points where JAMA believes that amendments are still needed and would serve to further promote competition and consumer benefits, in both the sales and aftersales markets.

¹ Commission Regulation 2790/1999, which will be replaced by a successor general block exemption regulation on vertical restraints as from 1 June 2010.

2. Substantive Comments

2.1 Provisions relating to new car sales

- ❖ Transition to GVBE: JAMA reiterates its view that the next block exemption regime must take into account the difficult economic conditions (i.e., decline in demand for vehicles deriving from the broader and continuing global economic uncertainties) that affect the motor vehicle industry. In no event should industry efforts to become more competitive at a global level be frustrated by unnecessary regulatory restraints. In this regard, the Commission's own conclusion that there is significant competition in the market for sales of new motor vehicles is affirmed by JAMA and JAMA welcomes the intended transition to the application of the GVBE and supplementary Guidelines specifically concerning this market.

As regards the timing of the transition to the GVBE, however, JAMA continues to be highly concerned that the significant sales market benefits intended to derive from transition to the GVBE should apply as early as possible. These rules need to enter into force simultaneously with the rules for the aftermarket and allow transition in practice as soon as new agreements can allow. In JAMA's view, the proposed three-year delay in application of the new regime only reinforces an inappropriate establishment of separate legal regimes concerning two closely linked segments of the motor vehicle distribution market, is unnecessary and is likely to lead to major complexities and legal uncertainties for the whole sector – totally contrary to the EU's own "Better Regulation" policy. Three years is far too long to bring into effect a new regime that is supposedly intended to i) bring important new flexibilities to suppliers to respond to rapidly changing economic circumstances in this market and ii) enhance the overall competitiveness of the EU car industry.²

In particular, JAMA urges the Commission to apply the GVBE to the whole of the automotive market already from 1 June 2010 and to provide for a maximum transitional period of two years for the parties to adapt their current distribution agreements to the new framework. Ideally, the parties could reach new agreements early within those two transitional years, for their mutual benefit.

- ❖ Single branding obligations: JAMA welcomes the clarification in the draft Guidelines (25 *et seq*) that a single branding obligation, regarding both new car sales and repairs by authorised repairers, can be permitted under certain time limitations. That said, the potential benefits, such as brand enhancement and avoiding free-rider problems, will be largely illusory for most of the sector due to the Commission's note³ that the obligation should apply only in the case of a new contractual relationship. Further, the obligation

² See citations to the Commission's Impact Assessment in JAMA's 25 September 2009 submissions on the Commission's *Communication on The Future Competition Law Framework applicable to the motor vehicle sector*.

³ See footnote 9 in draft Guidelines.

would generally not be relevant to the aftermarket, where the 30% market share threshold under the GVBE would typically be exceeded. At least as regards new car sales, JAMA believes greater flexibility should be allowed under the GVBE to enable broader application of the single-branding obligation including with existing authorised dealers.

- ❖ Intermediaries: The text of the draft Guidelines concerning intermediaries (46) appears to indicate that an “intermediary” is also an “end user”. While the thrust of the Guidelines in this regard is helpful (i.e., distinguishing the factual circumstances to qualify as an intermediary as opposed to an independent reseller), JAMA considers that the legal regime and its interpretation would be improved if distinct parties in the sales realm are kept distinct by definition and are referred to accordingly. It should not confuse the legal situation by trying to assimilate one to another. An intermediary is not an end-user.
- ❖ Sales/Aftersales Linkage: JAMA welcomes the Guidelines’ acknowledgment (61) that a supplier wishing to launch a brand in a particular geographic market may encounter difficulties in attracting dealers if stand-alone authorised repairers can free-ride on the new dealer’s investment. This is one of several examples⁴ of circumstances where bringing on new dealers is problematic for the same reason and which JAMA has cited as undermining the potential for network entry, growth and enhanced competition. JAMA therefore fully appreciates the clarification in the Guidelines that, in these circumstances, a contractual linkage of sales and aftersales activities could have pro-competitive effects and therefore would be unlikely to be caught by TFEU Article 101(1) if applied for a limited period of time.
- ❖ Transparency in Supplier/Dealer Relationship: JAMA notes the Guidelines’ reference to the Commission’s intention, when interpreting the market situation, to take account whether or not a JAMA or ACEA member is applying the Code of Conduct put forward by these associations and committing their members to act in good faith in the execution of their contractual obligations towards their authorised dealers and repairers. JAMA affirms that a member’s observance of the Code should indeed demonstrate that the member in question is acting in a transparent and pro-competitive manner.

2.2. Provisions on the Aftermarket

- ❖ Coherency: The draft Guidelines set out the Commission’s rationale for establishing dual legal regimes and associated different timeframes for application of the new competition rules for the motor vehicle sector. As explained previously and elsewhere herein, JAMA does not share the Commission’s views in these regards and maintains its call for application of a single block exemption regime (GVBE with supplementary sector-

⁴ Other instances are the recruitment of new dealers following a significant reorganization of the network by structural terminations or more generally when open points in the sales network need to be filled and recruitment is frustrated by the presence of too many “repairs-only” outlets managed by previously terminated poor-quality dealers.

specific Guidelines) which applies to all distribution elements of this sector (new car sales and the aftermarket) and applies these rules at the same time, as from 1 June 2010.

- ❖ Market Assessment: As regards the proposed new dual regime applying to the aftermarket (i.e., the application of the MVBER in combination with the GVBE), the draft Guidelines characterise the aftermarket as being brand-specific and having “inherently” less intense competition than the market for new car sales (16). While the stated basis for this contention is not clear and needs to be clarified, JAMA would highlight that the conclusion is inconsistent with the JAMA members’ practical experience. To the contrary, JAMA finds that there is intense competition in both the sales and aftermarket. In this same context, JAMA is also concerned about how the Commission will assess market share in the repairs/maintenance market. In JAMA’s view, this should fully take into account the services provided by independent repairers. At least outside the warranty situation, consumers will normally actively compare services and prices offered by both and choose accordingly.

2.3. Other Issues for Consideration

- ❖ Vehicle(s) of motor vehicle policy implementation: JAMA would again recall the Commission’s own Impact Assessment Report which expressed a clear and reasoned preference for implementation of all continuing motor vehicle competition policy concerns to be effected through the so-called Option 3, i.e., sector-specific provisions covering both the sales and after-markets in the form of Guidelines accompanying the new GVBE. JAMA continues to believe this option should be adopted for the excellent reasons set out in the IA Summary: “Option 3 has the greatest potential for achieving the objectives identified ... option best able to meet the general objective of balancing the effective supervision of markets against the need to simplify administration and minimise compliance costs... also best meets the sector-specific objectives, and has the most favourable impact as regards the ensemble of the other impact criteria.”⁵ While the Commission appears to have decided against the logic of its Impact Assessment, JAMA nonetheless wishes to recall at this time its own preference for Option 3 in the interest of Better Regulation for this sector.

⁵ [Commission] Summary of the Impact Assessment, para 40.

3. JAMA Conclusions

Overall, JAMA believes that competition is strong in both the sales and after-sales markets and the next block exemption regime should reflect this. Unnecessary regulatory restraints should be avoided.

The proposed application of the GVBE relating to new car sales is welcomed. It should provide important flexibility for the motor vehicle industry to respond better to the prevailing economic circumstances and to further strengthen competition in this sector. However, this new regime should be available already from 1 June 2010, not 2013, in order to provide these pro-competition benefits, for the industry and consumers, as early as possible.

As regards the proposed establishment of two separate legal regimes for the sales and after-sales markets, JAMA maintains its call for the Commission to respect the clear conclusions of its own Impact Assessment and Better Regulation principles, to bring both markets under the single coverage of the GVBE and related sector-specific Guidelines.

As regards the draft substantive provisions in the consultation documents, JAMA welcomes especially the proposed possibility for a time-limited application of a sales/after-sales linkage aimed at preventing free-riding and facilitating sales network entry, growth and enhanced competition more broadly. As regards the possibility under the GVBE to apply single-branding obligations, the new regime should allow greater flexibility to actually apply such obligations in practice, including with respect to certain existing dealer relationships. Finally, JAMA believes further consideration would be helpful with regard to assessing market shares in the repairs market.

Again, JAMA appreciates the Commission's extensive consultation of the parties interested in making the motor vehicle sector strong and competitive. JAMA members are important players in the EU market, in both production and marketing, and aim to strengthen consumer benefits and effective competition as fully as possible.

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