The first case of application of the new motor vehicle block exemption regulation: AUDI’s authorised repairers

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Introduction

The new motor vehicle block exemption regulation (1) (BER) entered into force on 1 October 2002. A one-year transitional period until 30 September 2003 is foreseen in the BER in order to give all interested parties time to adapt their distribution agreements to the new legal framework. The first case of application of the new regulation offered the Commission the possibility to clarify two important aspects: the authorisation of repairers in the networks of vehicle manufacturers and the application of the BER during the transitional period.

During the Autumn of 2002, the Commission received a great number of informal and formal complaints concerning the question of authorisation of repairers. The informal complaints concerned several brands of vehicle manufacturers. The formal complaints were directed against four vehicle manufacturers. Most of the formal complaints concerned AUDI AG, the German car manufacturer which is part of the Volkswagen group. In the meantime, the Commission had also opened an own-initiative case concerning the question of authorisation of repairers by this manufacturer, as a ‘leading’ case. AUDI had terminated many agreements with dealers and repairers which were part of its network. Some of these agreements finished before the transitional period, others during it. Former dealers and repairers complained to the Commission about the refusal by AUDI to conclude agreements, before the end of the transitional period, with repairers who wanted to become authorised AUDI repairers and fulfilled the qualitative criteria for authorised AUDI repairers.

The authorisation of repairers

The new BER has the objective of increasing competition for both the sale of new motor vehicles and the provision of repair and maintenance services. With regard to the latter area, one of the measures enshrined in the new BER is the reorganisation of the link between the sale of new vehicles and the provision of after-sales service.

The old BER (2) declared in Article 1 that ‘subject to the conditions laid down in this Regulation, Article [81(1) of the Treaty] shall not apply to agreements … in which one contracting party agrees to supply, within a defined territory of the common market

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system, for the purpose of resale, certain new motor vehicles …, together with spare parts therefor’. Its Article 5(1)(1) also made the application of the old BER dependent on there being an obligation on the part of dealers to honour guarantees, to perform free servicing and vehicle-recall work and to carry out repair and maintenance work. These provisions established an obligatory link between the two, in principle, separate economic activities of selling new vehicles, on the one hand, and repairing and maintaining vehicles, on the other hand.

The new BER offers a distributor of new vehicles the possibility to provide after-sales service itself or to subcontract it to authorised repairers of the brand (see Article 4(1)(g) of the new BER). In many cases the distributor will continue to exercise both activities, i.e. it will at the same time sell new vehicles as distributor and repair and maintain vehicles as authorised repairer. However, under the BER it is also possible for an operator to be a member of the distribution network of a vehicle manufacturer and only repair and maintain motor vehicles as well as distribute spare parts, if the supplier combines the two activities. (See Article 4(1)(h) of the new BER.) The BER introduces the authorised repairer as a new type of operator meaning a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor


vehicles (see Article 1(1)(l) of the BER). The supplier is in general the vehicle manufacturer or its importers.

In order to ensure the provision of repair and maintenance services for the cars of the respective brand, some vehicle manufacturers like AUDI have in the past, already before the new BER, concluded agreements with authorised repairers who only provide after-sales service. This network of authorised repairers exists beside the network of authorised dealers of the respective brand, who sell new cars and at the same time provide the after-sales service.

As far as market definition in such a case is concerned, the relevant product market is likely to be the market for repair and maintenance services for the vehicles of a specific brand. As the supply of the network with spare parts, supply-chain logistics, software and IPR-protected items is organised on a national basis and network members can and do purchase at similar trading conditions on such a basis, the national market is held to be the geographic market affected by the agreements concerning after-sales service (1). In the case of AUDI, the services in question are currently provided, as mentioned, by authorised AUDI repairers who are either at the same time also AUDI dealers, i.e. distributing new AUDI cars and offering after-sales service, or pure authorised AUDI repairers who are not distributing new vehicles but only offer after-sales service. In addition, independent repairers also supply these services. Under these circumstances and based on the information available on the market shares of authorised repairers and of AUDI, on the one hand, and the independent repairers, on the other, it turns out that the market share of the AUDI network on the market for after-sales service for AUDI cars is above the 30% threshold specified in Article 3(1) of the BER (2).

Consequently, a supplier has to establish a qualitative selective distribution system in order to be covered by the BER. In such a system, the supplier uses criteria for the selection of distributors or repairers which are only qualitative in nature, are required by the nature of the contract goods or services, are laid down uniformly for all distributors or repairers applying to join the distribution system, are not applied in a discriminatory manner, and do not directly limit the number of distributors or repairers (see Article 1(1)(h) of the BER). It results from the non-discriminatory application of such a distribution system that undertakings which fulfil the qualitative criteria must be able to enter the network of the manufacturer.

The transitional period

In the AUDI case, it had to be examined whether the manufacturer had to establish such a qualitative distribution system already before the end of the transitional period.

Article 10 of the BER states that the prohibition laid down in Article 81(1) of the EC Treaty shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force on 30 September 2002 which do not satisfy the conditions for exemption provided for in the new BER but which satisfy the conditions for exemption provided for in the old BER.

In order to take advantage of the transitional period, the agreements of a manufacturer have to satisfy two conditions: first, they must already have been in force on 30 September 2002 and second, they must satisfy the conditions for exemption provided for in the old BER.

The agreements between AUDI and its authorised repairers which relate purely to after-sales service could not benefit from the transitional period. Such agreements were not covered by the old BER as they do not provide for the obligatory link between the sale of new vehicles and the servicing of vehicles, the existence of which was one of the conditions for the application of the old block exemption.

In this respect, four further comments are justified: First, a right of an authorised repairer to sell vehicles, beside its repair and maintenance activity, is not sufficient to establish the obligatory link between sales of new vehicles and after-sales service (3).

Second, if the authorised repairers of a brand are also obliged to sell new vehicles, but do so only as genuine agents of the manufacturer (or one of its distributors), this would not be covered by the transitional period. The conclusion of vertical agreements for the distribution of repair and maintenance services and parts, allied to a genuine agency relationship for vehicle sales, does not

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(1) See also section 6.2 of the Explanatory Brochure on Regulation No 1400/2002 published by the Directorate-General for Competition.

(2) See Andersen, Study on the impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned, p. 254, appendix 8.

(3) See also Commission Press Release IP/97/740 of 4 August 1997.
come within the terms of Article 1 of the old BER as the relationship does not involve the supply of cars for resale.

Third, the old BER was based on a combination of selective and exclusive distribution. Territorial exclusivity had to be attributed to one or a specified number of undertakings (see its Article 1 described above). If the authorised repairer does not have a veto power with regard to the appointment of additional authorised repairers or, indeed, other dealers, in the defined territory, the agreement does not attribute exclusivity with regard to neither the sale of new vehicles nor the provision of after-sales services. The manufacturer could not be hindered by the authorised repairer to conclude an agreement with another undertaking within the same territory. Consequently, such agreements do not fulfil the criteria of exclusivity contained in Article 1 of the old BER, fall outside its scope and are for this reason not eligible for the application of the transitional period pursuant to Article 10 of the new BER.

Finally, a manufacturer that has to establish a system of qualitative selective distribution with regard to its after-sales service cannot argue that the authorisation of a repairer would infringe the territorial exclusivity of a dealer whose distribution agreement benefits from the transitional period. This ‘civil law defence’ is not acceptable to justify an infringement of the EC competition rules. It is a question of national contract law whether the manufacturer might have to adapt the dealer agreement as a consequence of the establishment of the qualitative selective distribution system for after-sales service (1).

In the case at question, AUDI agreed to apply a system of qualitative selective distribution with regard to its after-sales service in order to benefit from the new block exemption. This means that AUDI will only use qualitative criteria for the selection of authorised repairers, and will conclude servicing agreements with repairers that satisfy the criteria set by AUDI already before the end of the transitional period. Moreover, AUDI must not apply these criteria in a discriminatory manner.

This solution permits former AUDI dealers or repairers that meet the relevant criteria to be reinstated and remain active in the market as members of AUDI’s network. In addition, Volkswagen AG committed itself to ensure that the same policy would be followed also by all the other brands of the Volkswagen group.

**Conclusion**

One of the main objectives of the AUDI case was to provide guidance for other motor vehicle manufacturers in similar circumstances with regard to their after-sales servicing networks (2).

Any vehicle manufacturer which operates a network of service outlets and which has a market share of over 30% for the relevant repair and maintenance services will thus not be able to benefit from the transitional period provided for by the new BER with regard to its servicing agreements. Consequently, such a manufacturer must already now establish a qualitative selective distribution system for its network of authorised repairers.

In contrast, in order to benefit from the block exemption, a manufacturer with a market share of over 30% on the relevant market for after-sales service which does not operate a network of service outlets outside of its dealer network and whose dealer network complies in all respects with the old motor vehicle BER will have to apply qualitative selection in respect of after-sales service after the end of the transitional period on 30 September 2003 at the latest.

The AUDI case shows the determination of the Commission to react quickly and decisively, not least during the transitional period, in order to ensure a correct implementation of the new competition rules in the motor vehicle sector.

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(1) See also the answer to question 22 in the Explanatory Brochure on Regulation No 1400/2002. This question asks whether the rights of a dealer over a certain territory may call into question the appointment of a candidate authorised repairer for the same brand during the transitional period. It addresses a scenario where all distribution agreements of a manufacturer are covered by the transitional period and where no parallel ‘repair-only’ network exists. The candidate repairer cannot argue that such a stipulation of territorial exclusivity infringes Article 81 until the end of the transitional period on 1 October 2003. For general commentary (situation before the AUDI case), see also Roniger/Hemetsberger, KFZ-Vertrieb neu (Wien 2003), p. 209.

(2) To this end, the Commission issued Press Release IP/03/80 of 20 January 2003. In the other cases, a similar settlement could be reached in one of them and the procedure for rejecting the complaint was launched in another. A third case is still open. See also Mario Monti, The new legal framework for car distribution, speech at the Ninth Annual European Automotive Conference: Car retailing at a crossroads, Brussels, 6 February 2003.