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Reaction to the Commission's Evaluation Report of 28 May 2008 on the operation of the Motor Vehicles Block Exemption Regulation (MVBER) (EC) No. 1400/2002

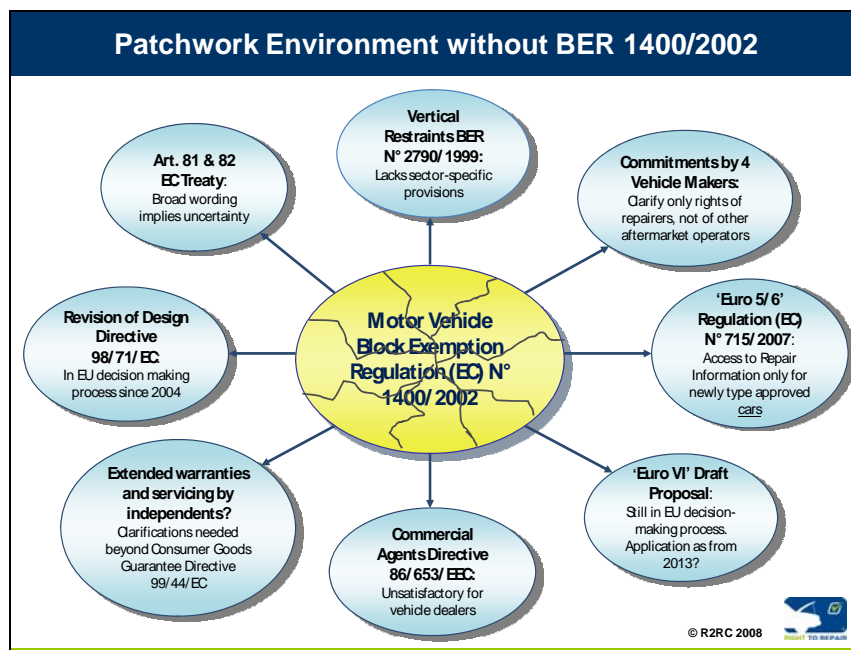
The Right to Repair Campaign (R2RC) Alliance gathers a wide range of aftermarket stakeholders and motorist representatives who have an interest in the promotion of a competitive regulatory environment for the automotive aftermarket. It is supported by authorised and independent repairers, independent parts distributors, parts suppliers, producers of diagnostic tools and garage equipment, trade groups, roadside rescue operators and motorist clubs.

1. The R2RC favours sector-specific regulation

The Commission report leaves *formally* open the question as to whether the general regime on vertical restraints may cover the motor vehicle sector in an adequate manner. It claims that several sector-specific provisions have not been effective, and that a more flexible regime would lead to an equivalent level of protection of competition.

However, there are strong indications of the intention not to extend the Motor Vehicle Block Exemption Regulation after its expiry in May 2010. Instead, there is the underlying view that other existing or forthcoming pieces of legislation should handle the distribution of new vehicles and automotive aftermarket issues (e.g. the rules currently embodied in the Vertical Restraints Regulation (EC) N° 2790/1999 or even the general competition rules of Article 81 and Art. 82 of the EC Treaty).

The R2RC considers that it would not be an example of "better regulation" if market players were left to deal with a multitude of instruments, thus creating a legal patchwork.



AIRC, CECRA, EGEA, FIA, FIGIEFA are members of the R2RC Alliance

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The R2RC does not find that a more general regime or a patchwork of legal requirements would be suitable for the automotive aftermarket for the following reasons:

a) The automotive sector - Different from other sectors

The automotive sector is different from other sectors. For other technologically complex consumer products, repair and maintenance are not as important as for motor vehicles. In the 21st century, many consumer products are no longer repaired, but simply replaced if faulty. This is not an option with motor vehicles, which require regular servicing to ensure continuous operation as well as compliance with the highest standards of environmental protection and road safety.

In its report to the European Commission, London Economics rightly refers to “the unique structure of the automotive spare parts and repair market” (London Economics Report, p. 244). This unique structure can best be addressed by a specific set of norms.

The Commission opted in favour of consecutive pieces of sector-specific legislation in 1985, 1995 and 2002, and it should do so again in 2010.

b) Benefit of sector-specific norms for SMEs

In the absence of such sector-specific norms, the automotive aftermarket players would be left with a more abstract set of rules, which can be difficult to apply in particular for small and medium-sized enterprises (SMEs).

Arguing a case in the absence of a Block Exemption Regulation with clearly defined hard-core restrictions is a very costly exercise, from which small and medium-sized enterprises are likely to shy away. Individual assessments imply a significant degree of uncertainty. They normally require economic evaluations and legal opinions, the cost of which may be excessive for small and medium-sized enterprises (SMEs). Given that vehicle manufacturers already dominate the markets for spare parts and repairs, any regulatory mechanism which makes it costly for SMEs to afford legal certainty must be avoided.

In a market of unbalanced power, legal clarity is crucial for SMEs to exert their business and to ensure a competitive automotive aftermarket market. Strengthening SMEs by providing them with a robust legal framework is therefore in compliance with the Union's SMEs policy and the Small Business Act for Europe.

c) Benefit of clear rules - also for National Competition Authorities.

The Commission report highlights the multitude of queries received after the coming into force of the Motor Vehicles Block Exemption Regulation (EC) No. 1400/2002 (the “MVBER”). The R2RC believes that even more abstract rules would lead to an even larger number of queries, thus increasing the workload of the Commission as well as national competition authorities. In the absence of clearly defined rules, national competition authorities would need to devote additional resources to providing guidance on and ensuring compliance with applicable Competition law.

d) Benefit of a block exemption regulation as a safe harbour

The MVBER applies, among other, also to the distribution of spare parts by independent operators. It provides a safe harbour by exempting certain agreements. This safe harbour is highly valued by independent operators involved in the distribution of spare parts. In the absence of such a safe harbour, the market players would be left with self-assessment under Art. 81(3) EC, a costly exercise which rarely leads to legal certainty.

2. The R2RC favours extending the aftermarket provisions of the current Regulation beyond 2010

The Commission report claims that conditions for competition in the markets for automotive retailing and servicing have improved since the MVBBER came into force. Having furthered such improvements, these rules should *not* be allowed to expire.

As examples:

(a) Aftermarket sales by suppliers of original equipment

The Commission report claims that the sector-specific rule on the supplier's ability to market parts directly to the aftermarket was not essential, as the same restriction was also treated as hardcore by Regulation (EC) No 2790/1999 (the "VRBER"). This is hardly correct. The respective hardcore restriction in the VRBER merely addresses sales to independent repairers and service providers. In other words, the VRBER would exempt an agreement by which an OEM limits the ability of a supplier to sell its products as spare parts to authorised repairers or distributors. In contrast, Art. 4 (1) (j) MVBBER ensures that sales to both independent and authorised aftermarket operators cannot be restricted. If a vehicle assembler was allowed to limit the ability of an OES to supply its products directly to any aftermarket operator, including authorised repairers, this would limit competition. In this regard, the rules embodied in the MVBBER appear more suitable for protecting competition and consumer interests than those of the VRBER.

(b) Access to technical information for aftermarket operators

Electronic data is essential for the repair or maintenance of vehicles, which are increasingly "computers on wheels". Art. 4(2) MVBBER includes a specific provision to facilitate the access to such technical information by independent operators.

The provision required enforcement action, and allowing it to expire would send the wrong message.

The Commission report refers to the decisions to declare binding the commitments offered by GM, Fiat, DaimlerChrysler and Toyota. These point out that an obligation to provide technical information rests on general principles of competition law. These decisions are helpful for independent repairers, but the commitments are only binding until 31 May 2010, and technically concern only the four manufacturers which offered them.

Besides, the decisions do not address the particular needs of those *indirectly* involved in the repair or servicing of motor vehicles, i.e. providers of roadside assistance, manufacturers of multi-brand diagnostic equipment, publishers of multi-brand databases, or parts wholesalers supplying workshops with parts and related information. The MVBBER Explanatory Brochure states that these should receive the data, and are entitled to pass it on to other independent operators. Otherwise, the creation of multi-brand products would become not feasible in practice. In the future, the rights of publishers should be delineated more clearly. OEMs should make raw data available in a format which enables independent operators to include such data in their multi-brand products.

It is true that the new 'Euro 5' Regulation (EC) No. 715/2007 also provides for an obligation on vehicle manufacturers to provide repair information *for passenger cars*. However, this requirement only applies to new cars models which are type-approved in 2009 or later. It does not apply to the vehicles already on the road today, and it does not cover heavy duty vehicles and commercial vehicles at all. Moreover, vehicle manufacturers will continue to collect and update data for vehicles not covered by the 'Euro 5' Regulation (EC) No. 715/2007, and this data should be available to independent operators.

3. The R2RC favours improvements to the current regime – Clarifications on warranty statements needed

Consumers should not be tied to a specific network of repairers or a certain brand of replacement parts. They should be free to have their vehicle serviced or repaired at the workshop, and with spare parts, of their choice. Such choice requires that information and parts required for a particular inspection or repair job are indeed available to independent operators. Any agreement restricting their ability to source what the motorist requires should be considered incompatible with EU law.

As the European Commission stated in its Explanatory Brochure on the current MVBBER, a vehicle manufacturer should not be allowed to make his warranty obligations dependent on the requirement that the vehicle being exclusively serviced in his authorised network. The Explanatory Brochure makes it clear that - for normal repair and maintenance during the warranty period - the vehicle manufacturer may not require neither the use of specific spare parts, nor the obligation that a customer must revert to an authorised workshop. In a subsequent letter to the German Repairers Association ZDK, the Commission rightly delineated that these principles apply not only to basic statutory warranties, but also to extended long-term warranties (anti-corrosion, mobility etc.).

Inherent to such requirements is the risk of total foreclosure of the respective market for parts and/or servicing.

However, in a case in which R2RC, its members and its lawyers had no part, the German Federal Court of Appeals (Bundesgerichtshof) ruled in November 2007 that a limitation in a long-term warranty was compatible with consumer protection law - the decision did however not elaborate on the compatibility with Competition law.

This is one of many examples showing that mere guidelines, which are not legally binding, might not be sufficient to ensure the uniform application of Competition law throughout the EU. Therefore, the Commission is urged to include a specific provision on this topic in a future Regulation.

4. The way ahead

Affordable mobility largely depends on the motorists' ability to have their vehicles serviced and repaired at a reasonable cost. Over the lifetime of a vehicle, a family will spend about the same amount on maintenance and repair as was spent on the purchase of the vehicle. Effective competition on each level of the automotive aftermarket is of the essence when it comes to fostering innovation and keeping mobility affordable.

In Europe's independent multi-brand automotive aftermarket, 665.000 companies, predominantly SMEs, provide competitive components and quality services. 3.5 million people are employed in component production, distribution and the servicing of vehicles. In compliance with the EU's SME policy and the Lisbon Strategy, improving the business environment for the small and medium enterprises in the automotive aftermarket clearly means maintaining a legal framework, which fosters fair and effective competition in the markets for automotive spare parts and servicing.

This can best be achieved by sector-specific rules such as those outlined above.
