Federation of Small Businesses
The UK's Leading Business Organisation

Friday 25th September 2009

Dear Sir or Madam,

RE: FSB response to Antitrust: Commission proposes future competition law regime for motor vehicle sector

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation. The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with 215,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58 per cent of the private sector workforce.

When deciding what replaces the current Motor Vehicle Block Exemption Regulations (MV-BER) the FSB does not wish to be prescriptive; we wish to engage in a spirit of cooperation with the Commission because on this issue the FSB is convinced that the interests of the consumer and the independent aftermarket are at one.

In so far as the FSB has a preference the FSB would like to see a synthesis of proposals three and four, namely a mini-Block Exemption backed by a Code of Conduct. The FSB does not like the "guidelines" nomenclature - as in an English speaking country "guidelines" suggests "optional" - which surely is not the message the Commission wants to send.

For the FSB, success is a regulatory framework that is **robust**, **clear**, **transparent**, but also **enforceable** and **commercially viable** for all the small businesses that make up the independent aftermarket, preserving or enhancing consumer choice.

We trust that you will find our comments helpful and that they will (?) be taken into consideration.

Yours sincerely,

Tina Sommer
Chairman of the EU and International Affairs Policy Unit
Federation of Small Businesses

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FSB response to consultation on Antitrust: Commission proposes future competition law regime for motor vehicle sector

September 2009

Introduction

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with over 215,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

The FSB represents 14,810 businesses that will directly affected by the changes the Commission is proposing to the current Motor Vehicle Block Exemption Regulations (MV-BER).

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58 per cent of the private sector workforce.

The importance of the independent aftermarket

There are 45,000 independent garages operating across the UK (predominantly small businesses) providing competitively priced components and services to consumers and businesses. These small businesses matter for a number of reasons. Independent garages provide the consumer and businesses with greater choice and flexibility as to where they have their vehicles serviced and repaired. Services and repairs carried out by independent garages are on average half the price charged by the franchised dealer[1]. Finally, and perhaps most importantly, as there are fewer franchised dealers across the UK than independent garages, independent garages tend to be local garages based at the heart of the communities they serve.

Did you know?

- In Europe's independent multi-brand automotive aftermarket, 835,000 companies (predominantly small businesses) provide competitive components and quality services
- 4.6 million people are employed in component production and distribution and the servicing of vehicles
- The hourly rate charged by independent garages in the UK is half that charged by the franchised dealers[2]
- There are 45,000 independent garages in the UK
- 47 per cent of all work on cars in the UK is carried out by independent garages
- 69 per cent of all MOT tests in the UK are undertaken by independent vehicle testing stations
- Independent garages' share of the warranty service and repair market is currently some 21 per cent[3]

The situation as it stands

Motor Vehicle Block Exemption Regulations (MV-BER) were introduced in 2002 (Motor Vehicle Block Exemption Regulation (MV-BER 1400/2002/EC)) to give the consumer the freedom to choose where they had their car maintained without negating manufacturer's warranties so long as original parts or parts of matching quality had been fitted by the repairer. To enable repairs to be made, the vehicle assembler under MV-BER should make technical information freely available to the independent market. MV-BER is due to expire in May 2010 and as things stand, MV-BER will not be renewed.

Commitments made by the Commission, legally binding car manufacturers to provide technical information about car repairs to independent garages in the EU, will remain in force until the MV-BER expires in May 2010. By that time, the

[1] GIPA UK ltd Operation Rate Trends March 2007
[2] Id
[3] RMI Independent Garages Association

vehicle emissions regulation (Council Regulation (EC) 715/2007) will have entered into force. This places an obligation upon vehicle manufacturers to provide operatives in the independent aftermarket with standardised access to all technical repair information. NOTE: new variants manufactured after 2010 of models which existed before 2009 will not be included by these regulations e.g. the new Ford Focus or Renault Clio, would be exempted as both would be seen as variants of existing models. The information obligation will thus generally apply. The rest of the obligations concerning competition should be covered by article 81 of the Treaty Establishing the European Community.

What happens after 2010 to cars produced before 2009?

On the 22nd July 2009 the Commission adopted a communication setting out the key elements of the competition regime which will apply to the motor vehicle sector after the expiry of the current MV-BER. The Commission examined in detail four options:

1. No change to the current sector-specific block exemption
2. Letting the sector-specific regime lapse, leaving the motor vehicle sector to be covered by the general block exemption regulations
3. As option 2, but with sector-specific guidelines on the application of Article 81
4. A more focussed sector-specific block exemption based on the general principles of option 2

As expected the Commission is strongly in favour of having either option three or option four adopted as a replacement for the current MV-BER.

The FSB position

The FSB accepts the Commission's view that the removal of MV-BER is good, in as much as it will expose the aftermarket to the full rigour of European anti-trust legislation, namely Article 81 (1) and Article 81 (3) of the Treaty Establishing the European Community.

The FSB agree with the Commission's analysis that addressing manufacturers' tendency to use warranty as a lever to retain the business within the authorised dealer network is clearly a thorn in the side of the independent after market - and welcomes the 30 per cent threshold.[4] Competition authorities would then be able to investigate a wider number of potentially anti-competitive practices.

Example – Warranty – Scares

Increasingly the FSB have received reports of dealers telling the customer their warranties are invalid for legitimate warranty claims where they have serviced outside the authorised network – only to capitulate where the customer challenges, and demands they confirm their position in writing. Moreover, failure of completely unrelated systems / components e.g. failure of the vehicle's electronics, are invalidated because the customer has had a none "genuine" oil filter fitted.

Example – Warranty – Extended Warranty

Manufacturers increasingly realise they cannot invalidate the first year's warranty where the customer services the vehicle outside the authorised network. However, as the warranty for years two & three are often outsourced to a third party underwriter. The manufacturers then claim the third party's underwriting criteria

[4] http://ec.europa.eu/competition/sectors/motor_vehicles/documents/communication.pdf (Page 10)

are nothing to do with them. Coincidentally the underwriters require servicing within the authorised network using "genuine" parts.

The FSB is pleased that vehicle emissions regulation (Council Regulation (EC) 715/2007) is soon coming into force as this places an obligation upon vehicle manufacturers to provide independent repairers with standardised access to all technical repair information.

Both the FSB and the Commission are generally satisfied with the primary market, but both recognise that more needs to be done to address the aftermarket. The FSB was delighted to hear the Commission conclude that whatever follows MV-BER that, "things can only get better" for the aftermarket.

The FSB does however have very serious concerns with regard to what happens after 2010 to cars produced before 2009 and new variants of models that existed in 2009, manufactured after 2010. The FSB believes, based on existing practices, that whatever the Commission introduces as a replacement to the MV-BER, that vehicle manufacturers will go out of their way to try and navigate their way around it so as to maximise their own position at the expense of the independent aftermarket.

A senior executive within one major vehicle manufacturer apparently told the Commission's lawyers they were both willing and keen to supply technical information to the independent aftermarket and furthermore claimed that their main obstacle to doing so lay within their own dealer network. The FSB believes this latter claim is disingenuous for the reasons outlined below, not least the fact that the price paid by the dealer to the importer/manufacturer is frequently significantly greater than the price paid for an identical part sourced from the independent aftermarket.

FSB members with direct personal experience of every link in the chain (manufacturer; importer/subsidiary and dealer) tell the FSB that the franchised dealers have no autonomy whatsoever. Dealer standards define absolutely every conceivable aspect of their business down to a level of detail one would not have thought possible e.g. not only the colour and size of the floor tiles but also the approved supplier. Compliance is essential as dealers are generally totally dependent on qualitative measures e.g. CSI bonuses to survive.

One FSB member who came close to taking on a dealership in 2006 was struck by the huge and extremely onerous requirements and stipulation imposed by all of the major manufacturers. Signage and visual identity for a Nissan dealership was of the order of £300,000.

The idea that the manufacturer is content to sacrifice margin and volume from one of the most lucrative aspects of the business at a time when, as we all know the profitability of selling new cars is under extremely pressure, but it being blocked by its own dealer network, is frankly, disingenuous.

Clearly, given the huge commercial pressures on manufacturers they are desperate to retain as much of the aftermarket as they possibly can within the franchised network. This is clearly demonstrated by their behaviours.

This same FSB member has seen firsthand all of the dubious business practices adopted by vehicle manufacturers to mitigate and circumvent the impact of anti-trust legislation on their businesses. The FSB member in question has worked at a senior level for three global manufacturers at head office and importer level and has extensive experience of the dealer network, both in the UK and across Europe. Arguably, these behaviours are only to be expected given the vehicle manufacturers and importers struggle to retain this highly profitable business.

Example – "Genuine" Parts

Whilst working for one of the major vehicle manufacturers one FSB member watched as parts from German

suppliers e.g. Bosch were unpacked from their Bosch boxed; repacked in the vehicle manufacturers genuine boxes; then forwarded back to Germany to their franchised dealerships at four times the price. Simultaneously this vehicle manufacturer would warn the customers how their warranties would be invalidated if they fitted non genuine parts.

Example – Pricing

Another vehicle manufacturer had catalogues for internal use for all parts and accessories in which Gross Margin (GM) was clearly stated. For some parts there was no GM. When the FSB member asked a colleague why? He was told the margins were so large the vehicle manufacturer did not want to publish them. There parts, unsurprisingly, were parts where no independent aftermarket alternative existed. In short, where the vehicle manufacturer could get away with it they would scalp.

Example – Intra-European Trade 1

One FSB member was working in Sweden for a major vehicle manufacturer at the time of Sweden's accession to the European Union in 1995. The FSB member saw firsthand how the manufacturers sought loopholes in a rearguard action to continue to divide the European member states into distinct markets.

Tricks including making it difficult for German buyers of this particular manufacturer's car to get the devices required to alter the elevation adjustment of the headlights – a requirement of the German TUV (German DVLC). This was a requirement in Germany but not in Sweden – so the vehicle manufacturer made it deliberately difficult.

Example – Intra-European Trade 2

In 2000 an FSB member was in a discussion with VAG's Head of Legal Affairs in which he claimed that it was perfectly reasonable that the lead time on the car the FSB member was trying to order from Denmark was six months as opposed to two weeks for a Dane. He also maintained it was reasonable for the FSB member to be asked to pay several thousand pounds extra for the "option" of having the steering wheel on the right hand side of the vehicle.

Previously most manufacturers simply refused to supply right hand drive vehicles – but recognising they need to supply they would use delivery and pricing for the "option" of right hand drive to discourage demand.

The FSB does not wish to be prescriptive; we wish to engage in a spirit of cooperation with the Commission because on this issue the FSB is convinced that the interests of the consumer and the independent aftermarket are at one.

In so far as the FSB has a preference the FSB would like to see a synthesis of proposals three and four, namely a mini-Block Exemption backed by a Code of Conduct. The FSB does not like the "guidelines" nomenclature - as in an English speaking country "guidelines" suggests "optional" - which surely is not the message the Commission wants to send.

For the FSB, success is a regulatory framework that is **robust, clear, transparent,** but also **enforceable** and **commercially viable** for all the small businesses that make up the independent aftermarket, preserving or enhancing consumer choice.

Why is this important?

Whatever replaces MV-BER needs to be robust. Due consideration must be given to how the new rules be communicated and to the process of enforcement. The Commission must make it clear to vehicle manufacturers what their obligations are and what penalties await them should they fail to comply.

Whatever replaces MV-BER needs to be clear and transparent, so that operatives engaged in the independent aftermarket can understand them. It is vitally important to remember that the vast majority of businesses operating in the independent aftermarket are small businesses. The people who run these businesses, on the whole, are not conversant with the workings of the European Commission, will not have law degrees, nor will they have the support staff necessary to deal with complex documentation. With this in mind, it is vital that the MV-BER replacement is written and explained in plain English. They need to be clear and transparent also, so that vehicle manufacturers have as little opportunity as possible to exploit them for their own advantage and to the detriment of the independent aftermarket.

The FSB is concerned that the noble aspirations outlined in the discussion documents might be subverted as the vehicle manufacturers seek ways to circumvent the "spirit" of the regulations in order to protect their commercial interests, for example by levying prohibitively large charges for essential technical information, training or diagnostic equipment, thereby restricting competition or exploitation of loopholes such as "security".

Example – Security – Keys 1

One FSB member stated that the boot lock of his car had stopped working, rendering the boot useless. The member in question took his car to an independent garage to have it repaired, only to be told that in the name of "security" the vehicle manufacturer does not allow the independent aftermarket to have access to the necessary tool needed to open and fix the boot. The member in question was left with no option but to have his car repaired at one of the vehicle manufacturer's franchised dealerships.

Example – Security – Keys 2

One FSB member was forced to use an authorised dealer rather than an independent garage to have a new key produced for one of their vans. This cost the member £400 as only an authorised dealer can re-programme the key.

Example – Security – Microchips

A specific high quality car has a micro-chip in the wing mirror. If the wing mirror it damaged, not an unusual event given the size of the vehicle, an independent garage is not able to fit a replacement unit as the customer is forced to return to the vehicle manufacturer to have the chip reprogrammed so it can "talk" to the main electronic control unit in the engine.

Under the current MV-BER an operative in the independent aftermarket, if they suspect foul play, can bring a complaint to the European Commission. This would usually be brought against a vehicle manufacturer for a breach of Article 81 of the Treaty Establishing the European Community. Again, it is important to stress that the vast majority of businesses operating in the independent aftermarket are small businesses. It is extremely difficult for such businesses to plan and operate in a market where the competitive advantages are perceived as being wielded by powerful competitors and where the legal remedies appear remote, uncertain and beyond the financial resources of

such businesses. For example, how many people working in the independent aftermarket are going to have a detailed knowledge of Article 81? Even fewer will be willing or able to take on the might of one of the major vehicle manufacturers. It is therefore imperative that whatever replaces MV-BER must be accompanied by a simple and clearly defined complaints procedure.

The FSB recognises that producing something that is robust, clear and transparent is a significant challenge, such are the complexities, but if we are to challenge the real world then it is important that all parties, manufacturers, suppliers, independent garages, motor factors and consumers, are clear on the rules and what to do when they feel those rules have been broken.

The FSB does however accept that trying to pre-empt every conceivable situation would be a thankless and impossible task. The FSB therefore favours a framework that concentrates on more generic phraseology along the lines "fair and reasonable charges" etc, leaving it to the arbitrators within Member States or in the Commission to decide where charges are NOT reasonable - complementing the Code of Conduct with case studies as time passes so everyone is clear what is acceptable and what is not.

Finally, whatever replaces MV-BER must be commercially viable. The FSB cannot allow a situation to arise whereby the vehicle manufacturers agree to supply the independent aftermarket with the technical data they need, but then make receiving that data commercially unviable. For example, a vehicle manufacturer may agree to supply technical data to the independent aftermarket, but they may do so in a way that would in reality prevent any independent garage from accessing it. A vehicle manufacturer may say the information is available but in order to access it an independent garage owner would need to attend a three day course and that course would cost £1,000 per day.

Conclusion

In June 2008 the Member States agreed on the Small Business Act (SBA). One of the core principles of the SBA is to "think small first". This is hugely important in the context of this consultation and the discussion surrounding what replaces the current MV-BER; it is important because as has already been stated, the over whelming majority of the 835,000 businesses that make up Europe's independent multi-brand aftermarket are small businesses.

The FSB is under no illusions with regard to the size and strength of the vehicle manufacturers lobby, but wishes to remind the Commission that the SBA requires all new legislative and administrative proposals to be subjected to an "SME test" to assess their impact on small businesses.

Many of the 835,000 businesses operating in the independent aftermarket operate on very tight margins, with the slightest drop in income putting the future of the business at risk. With this in mind, the FSB wishes to remind the Commission, that while vehicle emissions regulation (EC) 715/2007 places a legal obligation upon vehicle manufacturers to provide operatives in the independent aftermarket with standardised access to all technical repair information, it does not cover vehicles produced before 2009 and new variants manufactured after 2010 of models which existed before 2009. The FSB therefore has very serious concerns with regard to what happens after 2010 to the huge number of vehicles produced before 2009 and the new variants of models that existed in 2009, manufactured after 2010. As the FSB has stated in this response, based on existing practices it is likely that vehicle manufacturers will do everything they can to try and navigate their way around whatever the Commission introduces as a replacement to the MV-BER, so as to maximise their own position at the expense of the independent aftermarket. The FSB urges the Commission to bear this in mind when drafting the new regulations.

In February of this year Commissioner Kroes said:

"I want to give motorists a cast-iron guarantee: I will not agree to any change to the rules that will make life harder for independent repairers. Access to technical information and alternative brands of spare parts will continue to be necessary preconditions for such workshops to repair these older vehicles, so that they are driven safely, and meet vehicle emissions standards."

The FSB applauds these fine words and simply asks that whatever regulatory framework replaces MV-BER is **robust, clear, transparent,** but also **enforceable** and **commercially viable**.

For further information

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