



Sunday 7<sup>th</sup> February 2010

Dear Sir or Madam,

**RE: FSB response to consultation on the Future Competition Law Framework applicable to the 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.

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.

At the beginning of this whole process the FSB set out that success would be a regulatory framework that was **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.

While the FSB recognises that in proposing a sector-specific block exemption with guidelines that the Commission has come a long way and has done much to address the legitimate concerns of the independent aftermarket, the FSB would like the Commission to consider the following:

1. The proposed sector-specific block exemption and guidelines need to be **robust, clear, transparent** and **enforceable**, not only for the independent aftermarket, but also for the vehicle manufacturers and authorised dealers. It is vital that everybody is aware of their obligations and what the consequences are should they breach their obligations.
2. The proposed sector-specific block exemption and guidelines should set out in detail a complaints procedure for the independent aftermarket. It should also set out what the punishments are for those vehicle manufacturers who fail to uphold their obligations under the new sector-specific block exemption and guidelines.
3. Between now and the publication of the final version of the sector-specific block-exemption and guidelines the FSB would like the Commission to consider the publication of a questions and answer document to help those with no background in law or European politics to gain a greater understanding of their rights and obligations under the new block exemption and guidelines. We would like such a document to be launched at the same time as the block exemption and guidelines.

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



**Federation of Small Businesses**  
*The UK's Leading Business Organisation*



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**FSB response  
to consultation  
on the Future  
Competition  
Law  
Framework  
applicable to  
the Motor  
Vehicle sector**

**February 2010**



## **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<sup>1</sup>. 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<sup>2</sup>
- 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<sup>3</sup>

## **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 will be replaced by a sector-specific block exemption regulation. This new block exemption is intended to ensure that the independent aftermarket can obtain carmaker-branded parts, as well as to ensure that component suppliers can put their brand on component or spare parts and can continue to supply spare parts to the aftermarket. The new block exemption will

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<sup>1</sup> GIPA UK Ltd Operation Rate Trends March 2007

<sup>2</sup> Id

<sup>3</sup> RMI Independent Garages Association



also be backed up by sector-specific guidelines. These guidelines are intended to clarify various aspects affecting competition in the aftermarkets, for instance the consequences if a vehicle manufacturer refuses to honour warranties where vehicles have been repaired in independent garages.

The current MV-BER will remain in force until the MV-BER expires in May 2010. By that time, the 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. Regulation (EC) 595/2009 provides for such a system in respect of commercial vehicles put on the market as of 31 December 2012. 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 21 December 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.

In line with its Communication of 22 July 2009 on the review of the competition regime for the motor vehicle sector, the Commission found no evidence that agreements between vehicle manufacturers and dealers would continue to require different treatment as compared to agreements in any other sector. The Commission therefore proposes to apply the general competition rules from 31 May 2013, after a three-year adaptation period, granted to take account of brand-specific long-term investments made by dealers.

The general rules are currently set out in block exemption Regulation 2790/1999 on vertical agreements, which is due to expire on 31 May 2010, and which will be replaced by a new regulation. Key issues such as multi-branding, imposition of resale prices and parallel trade in the EU will be addressed in the proposed sector-specific guidelines, aimed at assisting companies in assessing the compatibility of their agreements with the competition rules.

However, the Commission's analysis found the market for repair and maintenance to be less competitive. In particular, structural factors such as the brand-specific nature of the markets and the prevalence of "captive" spare parts intrinsically limit competition. Moreover, the Commission has had to intervene to protect competition in these markets and has noted that manufacturers sometimes refuse to honour warranties when a vehicle has been repaired outside the authorised networks.

In view of the potential competition problems on the motor vehicle aftermarkets, the Commission proposes limiting the benefit of the block exemption for service and repair agreements to operators with a market share of up to 30 per cent. This would make it easier for the Commission or for national competition authorities to prevent carmakers from sheltering their repair networks against competition from independent repairers, for instance by withholding technical information.

In addition, the Commission intends to include particular provisions on the supply of spare parts in a new sector-specific block exemption regulation. These are intended to ensure that independent garages can obtain carmaker-branded parts, as well as to ensure that component suppliers can put their brand on component or spare parts and can continue to supply spare parts to the aftermarket. The Commission proposes that the sector-specific guidelines should also clarify various aspects affecting competition in the aftermarkets, for instance the consequences if a vehicle manufacturer refuses to honour warranties where vehicles have been repaired in independent repair shops.



## **The FSB position**

The FSB accepts the Commission's view that the removal of the current 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 agrees 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. Competition authorities would then be able to investigate a wider number of potentially anti-competitive practices.

The FSB is pleased that vehicle emissions regulation (Council Regulation (EC) 715/2007 and (EC) 595/2009) 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 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 vehicle manufacturers will go out of their way to try and navigate their way around the proposed sector-specific block exemption and guidelines 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/manufacture 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. Visual Identity alone 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 antitrust 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.

In responding to the September consultation, the FSB did 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 had a preference the FSB would like to have seen a synthesis of proposals three and four, namely a mini-Block Exemption backed by a Code of Conduct. We are therefore pleased to see that this approach has been adopted by the Commission. We are however concerned by the use of the term “guidelines”, 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 was a regulatory framework that was **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. The FSB is disappointed that the sector-specific block exemption and guidelines fall short of meeting this criteria in certain areas.

#### **Why is this important?**

Whatever replaces MV-BER needs to be robust. Due consideration needs to 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.

In many areas the guidelines are not robust, clear and transparent. Taking paragraph 55 as an example, it states that,

“...If it is made available to the authorised network in whatever form, it **may also** have to be made available to independent operators...”

“Whether the information in question will ultimately be used for the repair and maintenance of motor vehicles, **or rather for another purpose.**”

“Whether withholding the information will have an **appreciable** impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market.”

“Whether the item in question is **technical repair and maintenance information** or information of **another** type, such as **commercial information** which may legitimately be withheld.”



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 is concerned that the noble aspirations outlined in the guidelines 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, vehicle manufacturers could argue that all technical data and tools are “commercial information”. More importantly, who decides what is and what is not “commercial information”, who is the “honest broker” in all of this? A lack of clarity in terms of the language used also makes it difficult for small businesses to uphold their rights in a court of law.

In other areas, such as paragraphs 57 and 58, of the guidelines the Commission is, clear and transparent.

(57) The modalities for supplying technical information are also important for assessing the compatibility of authorised repair agreements with Article 101. Access must be given upon request and without undue delay, and the price charged for that information should not discourage access to it by failing to take into account the extent to which the independent operator uses it. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to authorised repairers and must not oblige independent operators to purchase more than the information necessary to carry out the work in question.

(58) The above considerations also apply to the availability of tools and training to independent operators. “Tools” in this context includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for tool.

In the September consultation, the FSB accepted that trying to pre-empt every conceivable situation would be a thankless and impossible task. The FSB said that we favoured a framework that concentrates on more generic phraseology along the lines of “fair and reasonable charges” etc, leaving it to the relevant authorities to decide where charges are NOT reasonable. We are therefore pleased to see, in paragraph 57 of the guidelines, the words “price charged for that information should not discourage access to it.” The FSB sees these guidelines as an organic document that develops with time and one that is complemented by a series of case studies that clarify some of the more opaque phrases contained in the rest of the guidelines.

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? How many even know what rights they have? Even fewer will be willing or able to take on the might of one of the major vehicle manufacturers. The FSB is therefore disappointed that no clearly defined complaints procedure is set out in either the block exemption or the guidelines. Moreover, we are concerned that neither document makes clear what the punishment is for specific breaches of the guidelines and/or block exemption.



Following on from this, the FSB would like to know how details of the sector-specific block exemption and guidelines will be communicated to all concerned. How will vehicle manufacturers be made aware of their obligations and how will the independent aftermarket be made aware of their rights?

## **Conclusion**

At the beginning of this whole process the FSB set out that success would be a regulatory framework that was **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. Have we achieved that with the Commission's proposed sector-specific block exemption and guidelines? The honest answer must be yes and no. Yes, we have a document that in parts is very good, clear and transparent. Yes, we have guidelines to strengthen the block exemption. However both documents remain bogged down in "Euro speak", remaining largely unintelligible to the average small garage owner. In too many areas the language is not robust enough, and is therefore open to interpretation creating a lawyers dream and once again providing loop holes for the vehicle manufacturers to exploit.

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 emission 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 remains under no illusions with regard to the size and strength of the vehicle manufacturers and therefore has very serious concerns with regard to those vehicles produced before 2009 and new variants manufactured after 2010 of models which existed before 2009. Based on existing practices it is highly likely that vehicle manufacturers will continue to do all they can to try and navigate their way around the new block exemption and guidelines. The FSB urges the Commission to bear this in mind when producing the final version of the new block exemption and guidelines and wherever possible to tighten up the ambiguous language and to make it clear what a vehicle manufacturer has to do and what will happen to them if they fail to comply.

The FSB does however recognise that in proposing a sector-specific block exemption with guidelines that the Commission has come a long way and has done much to address the legitimate concerns of the independent aftermarket. Between now and the publication of the final version of the block-exemption and guidelines the FSB would like the Commission to consider the publication of a questions and answer document to help those with no background in law or European politics to gain a greater understanding of their rights and obligations under the new block exemption and guidelines. We would like such a document to be launched at the same time as the block exemption and guidelines.

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## **For further information please contact**

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