



The Eurocouncil of the Fédération Internationale de l'Automobile
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FUTURE COMPETITION LAW FRAMEWORK APPLICABLE TO THE AUTOMOTIVE SECTOR

FIA EUROCOUNCIL COMMENTS ON THE PROPOSED BLOCK EXEMPTION REGULATION AND GUIDELINES

Executive Summary

The FIA and its member automobile clubs see the proposed mini BER plus guidelines plus prolongation of MVBER 1400/2002 for the primary market as progress. Following the Commission's 2008 evaluation sector specific regulation for the automotive sector was not envisaged. Moreover, we welcome the Commission's efforts to address problems in the proposed instruments, previously not addressed or in need of updating. In this paper FIA sets out its concerns:

- The potential for confusion of applying three instruments to the automotive sector
- The need for greater legal certainty and precise clarification of the binding nature of the supplementary guidelines
- The appropriateness of treating the primary and aftermarket differently
- Inclusion in the mini BER of definitions of independent operators (including recognition that this group includes automobile clubs) and technical information
- Inclusion in the mini BER of access to technical information and misuse of warranties
- Inclusion of withholding access to technical information and misuse of warranties in the hardcore restrictions of the mini BER

FIA automobile clubs call for a competitive automotive sector which will provide consumers with choice and affordable motoring. Automobile clubs make an important contribution to the market and competition. To ensure an efficient and competitive market place robust and future proof rules are needed

The Eurocouncil of the Fédération Internationale de l'Automobile (FIA) is the leading organisation for mobile consumers in the European Union. Our members, national automobile clubs serve and represent the interests of some 35 million European citizens, who own approximately 20% of passengers' cars in Europe. Mobile consumers broadly rely on personal vehicles for their mobility. Their cars represent on average, the second biggest household expense in terms of purchase and maintenance. It is to the automobile clubs, that mobile consumers turn to daily with their full range of queries on where and how to purchase their vehicles.

The aim of the automobile clubs' roadside breakdown assistance and rescue services is "Go not tow", namely to get members' vehicles (irrespective of the brand) back on the road to their destination as efficiently and affordably as possible. Effective roadside repair is cheaper for consumers than towing costs plus repair costs. Automobile clubs'



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roadside assistance patrols, often referred to as the 4th emergency service, answer to in excess of 10 million rescue calls each year. In most cases, cars are put back on the road to complete their journeys on the day of the breakdown. Comprehensive access to technical information at reasonable cost as well as spare parts is crucial for our clubs if they are to go on providing consumers with quality service.

Via this longstanding experience and valuable expertise of motoring issues, FIA clubs are well placed to bring the consumers' voice into this debate. Our comments in this consultation on the Commission's proposals for the future regulation of competition in the automotive sector stem from our aim to defend their interests.

The FIA Eurocouncil welcomes the opportunity to comment on the Commission's proposed instruments intended to replace the Motor Vehicle Block Exemption Regulation 1400/2002 (MVBER 1400/2002) post 31 May 2010, namely, a draft Motor vehicle BER (the so-called mini BER) dealing only with specific problems identified in the automotive after market related to spare parts issue, the supplementary guidelines and the three-year prolongation until 2013 of MVBER 1400/2002 rules applying to the new-vehicle sales market followed by the subsequent application of the vertical restraints BER to this sector. While appreciating the Commission's efforts to address more effectively certain shortcomings of the MVBER 1400/2002 and achieve a better balance of market power between vehicle manufacturers and independent operators, the FIA Eurocouncil would like to express its concerns about the new proposals and suggest that some aspects be given additional attention and review in order to ensure robust provisions capable of assuring future competition in the automotive sector.

1. General Remarks

Since the outset of this debate, FIA automobile clubs have called for robust sector specific regulation that builds on and improves the current regime in the automotive sector. In our view European Competition policy must safeguard consumers' access to safe clean and affordable mobility. We note and welcome that in the course of this debate, the European Commission has come to recognize the role of automobiles club in representing the interests of mobile consumers. Moreover, we welcome the Commission's recognition of the on-going need for sector specific regulation. We also welcome the recognised on-going need for hard core restrictions in the new "mini BER" to maintain a balance of power. Following its evaluation in 2008 such sector specific Regulation was not considered necessary. Thus, positive progress has been made.

FIA automobile clubs, however, have concerns that the replacement of the MVBER 1400/2002 with three instruments intended to regulate the primary automotive market (new vehicle sales) and the automotive after markets differently will not effectively resolve all recognised outstanding issues. Furthermore we fear that the application of multiple instruments may have various negative effects. They may cause confusion for those who may wish to apply them – consumers, businesses - in terms of determining their binding or non-binding nature – in particular the supplementary guidelines. Much will depend on the ensuing case law – another challenge for small businesses and individuals due to the required investment of time and money to bring a case and then win it. We also fear a loss of legal certainty for consumers both in terms of the purchases and maintenance of their vehicles as a result.

We have understood that the mini BER will be aligned with the Vertical Restraints BER (VRBER) with regard to the market share threshold - set at 30%. This 30% threshold is



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a cornerstone in establishing the proposed new regime. As the VRBER is also under review and subject to change, it must be clear that for the automotive sector in all cases a 30% market share threshold will remain and cannot be increased in line with any possible increase in the VRBER. Clarity is also required about how to determine “what is the relevant market?”

Furthermore, we would call for the following:

- That the instruments proposed offer greater clarity and preciseness, especially the supplementary guidelines – it must be crystal clear to what extent they are legally binding and that they will be enforced by all relevant bodies starting with the European Commission.
- That additional definitions be introduced (in particular for ‘independent operators’ and ‘technical information’)
- That for the sake of legal certainty, a number of key issues also be brought into the mini BER and even included as well defined hard core restrictions in particular, restrictions on access to technical information (e.g. at unreasonable cost or in unwieldy packages) and the misuse of warranties.

2. Comments on proposals for the primary market

We find that regulating the primary and aftermarkets differently creates an artificial separation that we believe is inappropriate and does not adequately take into account current developments.

The current system of first purchasing a car and then having agreements about after-sales repairs and servicing is evolving. Increasing numbers of manufacturers are retreating from this structure and are turning to models where consumers buy the use of a car rather than the car itself e.g. leasing schemes. In such arrangements, customers effectively receive a comprehensive service, as all possible costs (incl. repairs, servicing, insurance etc.) are already included in the monthly fee. It is not clear how such trends will be accommodated in the current proposals

Though MVBER 1400/2002 is prolonged till 2013 for the primary market, subsequent application of the general vertical restraints BER will lead to the loss of dealer protection (article 3 MVBER). As a result, consolidation of the authorised dealer networks is expected as well as the end of provisions¹facilitating multi-branding in car sales showrooms.

An inevitable thinning of the dealer network and as a result less competition will have adverse comfort and convenience effects on consumers not to mention possible cost increases. In most instances, consumers will have to travel further to visit authorised garages at least for warranty claims and repairs.

FIA has consistently supported multi-branding options as they are good for consumer choice. Henceforth dealers will be deterred from entering this activity due to the expiry of the MVBER in 2013 and the rules of the VRBER that actively prevent multi-branding. A dealer will be obliged to sell up to 80% of a manufacturer's products for at least five years. The Commission's assessment that multi-branding has not worked was based on research conducted at a very early stage of implementation. The Commission is urged to revisit this assessment with a view to retaining multi-branding post 2013. At the very least the investments of dealers in multi-branding should be safeguarded.

¹ The 30% non-compete clause



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3. The after sales sector

The Commission's decision to opt for a new sector specific **mini-BER** (Block exemption regulation) is welcomed. FIA automobile clubs appreciate that the supplementary guidelines treat issues that were either not satisfactorily addressed previously or are clearly in need of updating, for example, access to recall-information and service-announcements for independent repairers, access to the OBD and ECU as well as the corresponding software.

Three issues are addressed in the mini MVBBER: the freedom of authorised repairers to supply independent repairers with spare parts (including the so-called captive parts), the OE parts suppliers' freedom to double-brand their products and their freedom to supply the independent aftermarket operators and authorised repairers with their products as well as the sale of repair and diagnostics equipment and tools.

These are important aftermarket issues however in the interest of giving affordable legal certainty to all operators in the aftermarkets for spare parts and repairs we would ask additionally for inclusion of unrestricted access to technical information and misuse of warranties to be included in the hard core restrictions. In disputes with vehicle manufacturers who often hold the dominant market power, clearly defined hard core restrictions explicit what is not allowed without costly legal battles. The automobile clubs believe it to be a fundamental shortcoming that access to technical information and misuse of warranties are only dealt with in the draft-guidelines instead of in the mini BER. This must be changed!

Automobile clubs must be recognized as independent operators

Furthermore, some important definitions are missing and could usefully be included – namely what is *technical information* and replacement of the term independent repairer with *independent operator*. The definition of the *independent operator* should include the automobile clubs, which are not currently included among the parties identified as having a legitimate right of access to technical information. At present, the automobile clubs' road patrols are not specifically mentioned in the definition of independent repairer (neither in the regulation nor in the guidelines). Therefore we would urge you to refer only to independent operators instead of independent repairers and include in the definition of independent operator the automobile clubs and the road patrols. This omission must be corrected if the automobile clubs are to provide the roadside services so many European consumers rely on. Like all the independent operators, the automobile clubs play a key role in the effective competition in the repairs market place. Thus this should be acknowledged.

Access to technical information

Access to technical information for independent operators must be given in a non discriminatory, prompt and proportionate manner, in formats that are usable at reasonable cost. Regarding repair and maintenance information, FIA automobile clubs welcome incorporation in to the guidelines of references to the Euro 5 provisions outlining what is to be considered repair and maintenance information. As the Commission's proposals will also cover other vehicles besides passenger cars (e.g. heavy duty vehicles) a reference to the technical implementing Regulation that will accompany the Euro VI Regulation on access to technical information would also be useful. It should also be clarified that such information should be available for all vehicles even those that predate the adoption of the regulations in question.



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As already stressed the guidelines provided should offer clarity and precision and at all costs avoid confusion by creating doubts. For this reason, the test to be applied to determine whether technical information is being improperly (supplementary guidelines para. 55) withheld requires attention. Each test criterion should be applicable in a stand-alone manner and not collectively. The last criterion in our view is redundant as the same is asked in the second test criterion.

Automobile clubs have no choice in the vehicles they are called out to repair or where their roadside assistance is required. The repairs given may be only temporary, sufficient to allow a member to finish their journey. Thus, for the automobile clubs reference to examples of the types of technical information would be useful. References to body repair procedures, temporary repair procedures, service schedules and electronic service history, unequivocal vehicle and parts identification by VIN and product features and training materials would be a boon in facilitating the important services provided by the automobile clubs.

Warranties

From the outset of this debate, the automobile clubs have stressed the consumers' need for robust provisions tackling the issue of warranties and their misuse. In practice, Vehicle manufacturers tended to tie consumers via their authorised garage networks, making it compulsory for them to get all repairs and maintenance work – including that beyond the scope of the given guarantee - done in the authorised garages for excessively long periods.

We welcome the Commission's awareness that such practices are not only detrimental for consumers but could ultimately lead to foreclosures in the independent repairs market. Clarification of what should be regarded as attempts to misuse warranties in order to reserve repairs for the vehicle manufacturers' repair network could be usefully included in these guidelines and be included as hardcore restriction in article 5 of the proposed mini BER. As already stated, there is a trend towards selling mobility products rather than simply vehicles to consumers. Here we would also ask that any additional services offered to the consumer conditional upon an exclusive relationship with the vehicle manufacturer's repair and maintenance repair network should also be considered with in the framework of misuse of warranties.

Conclusion

In commenting on the Commission's proposals for the future regulation of competition in the automotive sector, the FIA automobile clubs call for guarantees that consumers interests will be central to the decisions made and that these provisions will be sufficiently robust and future proof to provide all market players with the legal certainty they need for the market to function correctly. Rules which are open to at least 27 different national interpretations must be avoided at all costs.

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Annexes

AFCAR's amendments for the access to technical information (only for the Commission)

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