

Block Exemptions, Behaviour and Brexit

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Block Exemptions

The first 10-year Block Exemption was granted to European vehicle manufacturers in 1985, when it became clear that their exclusive vertical agreements with their franchised dealers contravened the Treaty of Rome. It was renewed without major change in 1995 for a further seven years. Both those regulations essentially accepted the manufacturers' arguments and could almost have been written by them. But then the doubts crept in, as the manufacturers started to stretch the limits of acceptable behaviour.

In 1998, VW was heavily fined by the European Commission for trying to prevent Italian consumers from buying cars in other European countries. It collected another huge fine in 2001 for price maintenance in the German market. In the late 1990s, the UK was known as Treasure Island in the industry, which collectively kept new cars prices there outrageously high. This was punctured by a combination of the Consumers Association, the House of Commons Trade and Industry Select Committee, the media (notably the Daily Mail) and a thorough investigation by the then Monopolies and Mergers Commission. This last identified the operation of what it called a complex monopoly, i.e. tacit passive collusion. Prices duly came down. In its 8-year BER of 2002, the European Commission sought not only to redress the imbalance of power between manufacturers and their dealers but also – most crucially – to protect the independent aftermarket, so that consumers might continue to benefit from competition in service and repair, rather than being treated as captive customers by manufacturers and dealers.

In the 2010 BER, the Commission backed off the first chapter, putting new car sales agreements under the looser general Block Exemption regime. But it kept up the pressure over the aftermarket, most particularly in the matter of equitable access to technical information for the independent trade. In 2019 it launched its review of the current

MV-BER 461/2010, in order to assess its relevance, its coherence and its EU added value. Depending on its final evaluation, expected in May 2021, the European Commission will or will not consider prolonging the MV-BER after its expiry date in 2023.

My guess is that a new BER will be issued, following essentially the same principles and with a continued emphasis on technical information, given the growing complexity of vehicle electronics, advanced driver information systems and vehicle manufacturers' development of telematics-based services. As Neil Pattermore of Aftermarket On-Line put it in an article of January 2019, "although BER was revised in 2010, in practical terms, it did not change the basic problem of the ability for a small business to take legal action against a vehicle manufacturer if they did not provide access to e.g. technical information, when requested – a real 'David and Goliath' challenge.

To address this problem, the European Commission decided to put the 'access to repair and maintenance information' (RMI) into Vehicle Type Approval Regulations, where it addressed the issue by changing the legal basis – still fundamentally a competition issue that supports non-discrimination – but now based on the vehicle manufacturer having to prove that access to the RMI was possible before they can achieve whole Vehicle Type Approval." He goes on to say that the fundamental legislative issue is how to ensure safe and secure access to the vehicle and its data, to ensure that competition remains possible.

Behaviour

ACEA, the trade body of the European vehicle manufacturers, states that its member companies have adopted a code of good practice, concerning their agreements with their authorised distributors and repairers. This is part of a quid pro quo, to avoid further pressure on the part of the very powerful European regulator, which itself has to be mindful of the importance of the industry to Europe. But there leopard hasn't really changed his spots. What can happen when that equilibrium is disrupted is illustrated by the case of Australia. Car manufacturing came to an end there in 2017, so the government no longer had an industry to protect and support (which it did through

massive financial subsidies over 70 years). So did the dependence upon government of the manufacturers selling cars in Australia.

The manufacturers' voluntary agreement with the independent aftermarket sector (which supports 75-80% of the cars on the road) over the latter's access to technical information was almost immediately dishonoured by a number of manufacturers. This brought in the Australian Competition and Consumer Commission, which imposed a mandatory code of practice. The ACCC has also recently empowered dealer councils to act in concert in negotiating with manufacturers, which could significantly tilt the balance of power. GM has decided no longer to support the Holden brand, that former Australian icon, and is terminating its dealers in Australia. This has led to an inquiry by a Senate committee in Canberra into the terms offered those dealers, the scope of which has been widened to manufacturer-dealer relationships in general.

Some of the voluntary submissions to the Senate inquiry make interesting reading. Mercedes Benz of Australia is moving to an agency model, whereby it will be the retailer (in particular owning the stock of cars in its network) and pay contractors to provide selling services. A very successful Honda dealer of 50 years' standing describes how they and 30 others across the country have been arbitrarily cancelled out, again in favour of an agency system. The manufacturers remain adamant in their determination of control their retail distribution channels and financially critically dependent upon their ability to coerce customers into their dealers' (or agents') workshops.

Brexit

The UK has left the European Union and will, at best, secure a very weak trade deal with it. What does this portend for UK buyers and owners of motor vehicles? For the moment, not much. The UK Competition and Markets Authority has said that the EU Block Exemption Regulations would be retained in UK law. So it's no change until 2023. But what happens thereafter? Will the government fight for the consumer or give in to the demands of the manufacturers? Andrew Tyrie's attempt to make the Competition and Markets Authority into a strong fighter for consumers with executive powers modelled on those of DG Competition in Brussels failed. Even

with a stronger anti-trust and regulatory authority, the UK would be in a far weaker position to square off against giant global corporations than under the strong wing of Brussels.

As a further complication, are we heading for the loss of our automotive industry, an Australian-type scenario? Honda is going. Nissan has now said that its large and very competitive Sunderland plant would no longer be viable in a No-Deal scenario. How long would Toyota remain under those circumstances? The dominant and Hayek-libertarian Brexiter wing of the Conservative Party and government is viscerally opposed to regulatory interventionism – a major reason for its detestation of the very interventionist EU.

Are we now going to see a free-for-all, with the UK dropping restraints on manufacturers' behaviour? Or, at the other extreme, exclusive vertical agreements disallowed? Or a tacit paralleling of what the EU chooses to do from 2023. Which is exactly what the UK government has been bitterly resisting during the negotiations over a trade agreement. Here we see the consequences of that grand gesture without a plan, which Brexit is.