II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 13 September 2007

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP/E-2/39.142 — Toyota)

(notified under document number C(2007) 4273)

(Only the English text is authentic)

(2007/831/EC)

(1) This Decision adopted pursuant to Article 9(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [1] is addressed to Toyota Motor Europe NV/SA (hereinafter Toyota) and concerns the supply of technical information for the repair of vehicles of the Toyota brand [2].

(2) Technical information consists of data, processes and instructions which are necessary to check, repair and replace defective/broken/used parts of a motor vehicle or to fix failures in any of a vehicle's systems. It includes seven main categories:

— basic parameters (documentation of all reference values and set points of the measurable values concerning the vehicle, such as torque settings, brake clearance measurements, hydraulic and pneumatic pressures),

— diagrams and descriptions of stages in repair and maintenance operations (service handbooks, technical documents such as work plans, descriptions of tools used to carry out a given repair, and diagrams such as wiring schematics or hydraulics),

— testing and diagnosis (including diagnostic fault/trouble-shooting codes, software and other information needed to diagnose faults on vehicles) — much, but not all, of this information is contained in specialised electronic tools,

— codes, software and other information needed to re-program, re-set or re-initialise the electronic control units ('ECUs') embarked on a vehicle. This category is linked to the preceding one, in that often the same electronic tools are used to diagnose the fault, and then make the necessary adjustments via the ECUs to deal with it,

— spare parts information, including parts catalogues with codes and descriptions, and vehicle identification methods (that is to say, data relating to a specific vehicle which enable a repairer to identify the individual codes for the parts fitted during vehicle assembly, and to identify the corresponding codes for compatible original replacement parts for that specific vehicle),

— special information (recall notices and notification of frequent faults),

— training materials.

[1] OJ L 1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

[2] In the following sections, the expression 'Toyota' is used to designate 'Toyota Motor Europe NV/SA' while the expression 'Toyota brand' or 'Toyota vehicle/car' is used to indicate the motor vehicles commercialised by Toyota under the Toyota brand name.

(3) In December 2006, the Commission opened proceedings, and addressed a preliminary assessment to Toyota, containing the preliminary view that Toyota's agreements with its after-sales service partners raised concerns as to their compatibility with Article 81(1) of the EC Treaty.

(4) In the Commission's preliminary assessment, Toyota seemed to have failed to release certain categories of technical repair information well after the end of the transitional period provided for in Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [1]. Moreover, at the time that the Commission's investigation was launched, Toyota had still not put in place an effective system to allow independent repairers to have access to technical repair information in an unbundled manner. Although Toyota improved the accessibility of its technical information over the course of the Commission investigation, notably by increasing the information available on its technical information website known as TechDoc website (the TI website) and by increasing model range covered by this website, the information made available to independent repairers seemed still to be incomplete.

(5) That preliminary assessment found that the relevant markets affected by the practice at issue were the market for the provision of repair and maintenance services for passenger cars, and the market for the provision of technical information to repairers. The Toyota authorised networks had very high market shares on the first of these markets, while on the second, Toyota was the only supplier able to offer all of the technical information needed by repairers of its vehicles.

(6) In essence, Toyota's service and parts distribution agreements require the members of its authorised networks to carry out a full range of brand-specific repair services, and act as spare parts wholesalers. The Commission is concerned that possible negative effects stemming from such agreements could be strengthened by Toyota's failure to provide independent repairers with appropriate access to technical information thereby foreclosing firms which would be willing and able to offer repair services through a different business model.

(7) The Commission's preliminary conclusion was that Toyota's arrangements for providing its technical information to independent repairers did not correspond to the latters' needs either as regards the *scope* of the information available or as regards its *accessibility*, and that such a practice, in combination with similar practices by other car manufacturers, could have contributed to a decline in the market position of independent repairers. In turn, this could have caused considerable consumer harm in terms of a significant reduction in choice of spare parts, higher prices for repair services, a reduction in choice of repair outlets, potential safety issues, and a lack of access to innovative repair shops.

(8) Moreover, Toyota's apparent failure to provide independent repairers with appropriate access to technical information might prevent the agreements with its after-sales service partners from benefiting from the exemption granted by Regulation (EC) No 1400/2002, since according to Article 4(2) of the Regulation, the exemption granted therein does not apply where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles. As clarified in recital 26 of the Regulation, the conditions of access must not discriminate between authorised and independent operators.

(9) Finally, the Commission came to the preliminary view that in the context of lack of access to technical repair information, the agreements between Toyota and its authorised repairers were unlikely to benefit from the provision of Article 81(3).

(10) On 22 January 2007, Toyota offered commitments to the Commission in order to meet the competition concerns addressed in the preliminary assessment.

(11) According to those commitments, the principle determining the scope of the information to be provided is that of non-discrimination between independent and authorised repairers. In this light, Toyota will ensure that all technical information, tools, equipment, software and training required for the repair and maintenance of its vehicles which is provided to authorised repairers and/or independent importers in any EU Member State by or on behalf of Toyota is also made available to independent repairers.

[1] OJ L 203, 1.8.2002, p. 30.

(12) The commitments specify that 'technical information' within the meaning of Article 4(2) of Regulation (EC) No 1400/2002 includes all information provided to authorised repairers for the repair or maintenance of Toyota vehicles. Particular examples include software, fault codes and other parameters, together with updates, which are required to work on electronic control units (ECUs) with a view to introducing or restoring settings recommended by Toyota, vehicle identification methods, parts catalogues, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network.

(13) Access to tools includes access to electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.

(14) The commitments shall bind Toyota and its connected undertakings but shall not be directly binding on independent importers of Toyota's vehicle brands, known as 'non-affiliated national marketing and sales companies' (non affiliated NMSCs). In those Member States in which Toyota distributes its vehicles via non affiliated NMSCs, Toyota has therefore agreed to make its best efforts to contractually oblige these undertakings to supply Toyota with any technical information or language versions of technical information that they have provided to authorised repairers in the Member State concerned. Toyota commits itself to place this technical information or language versions on its TI website without delay.

(15) According to recital 26 of Regulation (EC) No 1400/2002, Toyota is not obliged to provide independent repairers with technical information that would enable a third party to bypass or disarm on-board anti-theft devices and/or recalibrate [1] electronic devices, or to tamper with devices which limit a vehicle's performance. As with any exception under EU law, recital 26 is to be interpreted narrowly. The commitments note that if Toyota were to invoke this exception as a reason for withholding any technical information from independent repairers, it has committed itself to ensure that the information withheld is limited to that necessary to provide the protection described in recital 26, and that the lack of the information in question does not prevent independent repairers from carrying out operations other than those listed in recital 26, including work on devices such as engine management ECUs, airbags, seatbelt pre-tensioners, or central locking elements.

(16) Article 4(2) of Regulation (EC) No 1400/2002 provides that technical information must be made available in a way that is proportionate to independent repairers' needs. This implies both unbundling of information and pricing that takes account of the extent to which independent repairers use the information.

(17) In line with this principle, the commitments specify that Toyota will include on the TI website all technical information relating to models launched as of 1 January 1997, and will ensure that all updated technical information is on the TI website or on any successor site at all times. Moreover, Toyota will at all times ensure that the website may be easily located and provides an equivalent level of performance to the methods used for providing technical information to members of its authorised networks. When Toyota or another undertaking acting on Toyota's behalf makes a piece of technical information available to authorised repairers in a particular EU language, Toyota will ensure that this language version of the information is placed on the TI website without delay.

(18) As regards technical information concerning models launched by Toyota as of 1 January 1997 and prior to 1 January 2000, Toyota has committed itself to place it there by 31 December 2007.

(19) The commitments specify that Toyota's access fee structure for the site will be based on the cost that the authorised repairers incur for a yearly subscription to the Toyota intranet, namely EUR 2 400. However, in order to respect the proportionality requirement laid down in the Regulation, Toyota agrees to provide for a *pro rata* breakdown into monthly, weekly, daily, four-hourly, three-hourly, two-hourly and hourly time windows at a price of EUR 3 per hour, EUR 6 per two hours, EUR 9 per three hours, EUR 12 per four hours, EUR 16 per day, EUR 72 per week and EUR 240 per month. Toyota agrees to maintain this access fee structure, and not to increase fee levels above the average inflation rate within the EU during the whole currency of the commitments.

(20) Toyota's commitments are without prejudice to any current or future requirement established by Community or national law which might extend the scope of the technical information that Toyota is to provide to independent operators and/or might set out more favourable ways for such information to be provided.

(21) Toyota has committed itself to implement a specified complaint handling procedure, which may be applied to deal with any complaint issued by an independent repairer or association of independent repairers established in the European Union regarding access to technical information.

[1] I.e. to modify the original settings of an ECU in a way not recommended by Toyota.

(22) According to this procedure, following initial notification, the national marketing and sales company (NMSC) will first handle any complaint at its level, by the appointment of a complaint handler. This complaint handler will investigate the complaint, provide additional information or explanation and/or propose a solution to the complainant. If the complaint handler and the complainant fail to reach an agreement or settlement regarding the complaint, the complaint handler shall promptly refer the complaint to the helpdesk facility set up by Toyota, except if the absence of agreement or settlement is the result of a lack of responsiveness from the independent repairer or association of independent repairers. Toyota will then investigate the matter and either confirm the position of the complaint handler or propose an alternative solution. In the event that Toyota and the complainant fail to reach an agreement or settlement regarding the complaint, Toyota commits itself to accept arbitration. In any event, the complainant may request such arbitration twenty business days after the initial notification of its complaint to an NMSC.

(23) This arbitration will be governed by the respective national rules of arbitration, and the arbitral tribunal will consist of three arbitrators appointed in accordance with these rules. The place of arbitration will be in the Member State where the complainant's registered seat is located. The language of the arbitral proceedings shall be the official language at the place of arbitration. Arbitration will not prejudice any right to file an application with the competent national court.

(24) The Decision finds that, in view of the commitments, there are no longer grounds for action by the Commission. The commitments will be binding until 31 May 2010.

(25) The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 9 July 2007.