COMMISSION

COMMISSION DECISION

of 13 September 2007

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

(Case COMP/E-2/39.143 — Opel)

(notified under document number C(2007) 4277)

(Only the English text is authentic)

(2007/836/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 General Motors Europe (hereinafter GME) and concerns the supply of technical information for the repair of vehicles of the Opel and Vauxhall brands.

(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.

(3) In December 2006, the Commission opened proceedings, and addressed a preliminary assessment to GME, containing the preliminary view that GME'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, GME 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 [2]. Moreover, at the time that the Commission's investigation was launched, GME 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 GME improved the accessibility of its technical information over the course of the Commission investigation, the information made available to independent repairers seemed to be still incomplete.

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

(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 Opel/Vauxhall authorised networks had very high market shares on the first of these markets, while on the second, GME was the only supplier able to offer all of the technical information needed by repairers of its Opel/Vauxhall vehicles.

(6) In essence, GME'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 GME'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 Commissions preliminary conclusion was that GME'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, GME'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 GME and its authorised repairers were unlikely to benefit from the provision of Article 81(3).

(10) On 9 February 2007 GME 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, GME will ensure that all technical information, tools, equipment, software and training required for the repair and maintenance of its Opel/Vauxhall vehicles which is provided to authorised repairers in any EU Member State by or on behalf of GME is also made available to independent repairers.

(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 Opel/-Vauxhall authorised repairers for the repair or maintenance of Opel/Vauxhall motor 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 GME, 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) Recital 26 of the Regulation makes it plain that Article 4(2) does not require GME 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 the speed or other performance-related parameters of a motor vehicle. Nevertheless, GME commits itself to allow independent repairers unrestricted access to information of these types, provided that they obtain the relevant GME Training Certification [2]. Such certification will be issued to independent repairers without delay subject to the completion of training.

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

[2] Fees for the Training Certification will be equivalent for authorised and independent repairers and GME commits itself to keep them at the same level during the validity of the commitments. The training will comprise (i) two days instructor-based training (cost of between EUR 115 and EUR 230 per day depending upon the national market) and (ii) a one day Tech2 web-based training (cost of between EUR 30 and EUR 50 per day, again depending on the national market in question). The training will be provided by the GM Academy.

(15) If, in the future, GME were to invoke the exception in recital 26 as a reason for withholding access to certain items of technical information to independent repairers, it would be incumbent upon it to ensure that the information so withheld was limited to that necessary to provide the protection described in recital 26, and that the lack of the information in question did not prevent independent repairers from carrying out operations other than those listed in recital 26, including work on devices such as engine management ECU, airbags, seatbelt pretensioners, or central locking elements.

(16) Article 4(2) of the 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 GME will include on the TI website all technical information relating to models launched after 1996, and will ensure that all updated technical information is on the TI website or on any successor site at all times. Moreover, GME 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 Opel/Vauxhall authorised network. When GME or another undertaking acting on GMEs behalf makes a piece of technical information available to authorised repairers in a particular EU language, GME will ensure that this language version of the information is placed on the TI website without delay.

(18) As regards the Electronic Parts Catalogue, which is currently not available on the TI website GME will be deemed to comply with the commitments if it places this information on the TI website by 31 December 2007. As a short term solution, the Catalogue will be available through GME Call Centre Services, which will on demand and without delay provide independent repairers with the requested pages by fax in any of the languages in which the Catalogue is made available to authorised repairers. This service will be available for EUR 1 per page (+ 3,9 % handling fee), and local call tariffs will apply.

(19) As regards wiring diagrams, GME will place on the TI website all such that have been generated in or converted into digital format for use by its Opel/Vauxhall authorised repairers in the EU. The remaining diagrams, which relate to certain models [1] launched after 1 January 1997 and which do not exist in digital format, shall be available to independent repairers through GME Call Centre Services. Such Call Centre Services will operate in all languages required to avoid direct or indirect discrimination between independent and Opel/Vauxhall authorised repairers, taking into account the conditions at which such authorised repairers obtain access to wiring diagrams. The wiring diagrams will be provided without delay by fax in the smallest packages that the average independent repairer would need to carry out a repair job and on the same conditions as they are provided to Opel/Vauxhall authorised repairers. GME commits itself to maintain, during the validity of the commitments, the conditions currently applicable for these non-digitalised wiring diagrams.

(20) As regards access to the TI website, GME agreed to provide for a *pro rata* breakdown into hourly, daily, weekly, monthly and yearly time windows at a price of respectively EUR 4, EUR 30, EUR 100, EUR 300 and EUR 3 700. For initial access to the TI website, a one-time registration fee of EUR 15 will be charged + 3,9 % handling fee. Tech1/Tech2 SWDL (Diagnostic Tester Software Download) will be available through the annual subscription to the TI website, or by paying a stand-alone monthly subscription fee of EUR 100. GME will maintain this access fee structure, and will not increase fee levels above the average inflation rate within the EU during the whole currency of the commitments.

(21) GME'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 GME is to provide to independent operators and/or might set out more favourable ways for such information to be provided.

(22) In order to address any complaint raised by an independent repairer concerning access to technical information, GME will put in place a GME Ombudsman. Upon receipt of an independent repairer's complaint the GME Ombudsman will, within a maximum of three weeks from receiving the complete file, provide the independent repairer with a GME Response. In case a complainant does not accept the GME Response, GME will accept an arbitration mechanism for resolving disputes relating to the provision of technical information whereby each party to such a dispute may nominate one expert, who may then jointly decide on the appointment of a third. The arbitration shall take place in the Member State where the requesting partys registered seat is located. The language of the arbitration proceedings will be the official language at the place of arbitration. Arbitration will not prejudice any right to file an application with the competent national court.

[1] Of these models only two (Agila and Movano) are still in production and for both wiring diagrams relating to their variants launched from 2002 are available on the TI website. The only models for which the diagrams are available only through GME Call Centre Services (Arena and Sintra) stopped being produced in 1999 and 2001. For the remaining models, the TI website contains wiring diagrams for variants launched from 2002 (Astra-G, Frontera-B, Zafira-A) or from 2003 (Speedster).

(23) 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.

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