



The **new**
competition law
framework for
the automotive
aftermarket



FOREWORD

Following the expiry of the Block Exemption Regulation No. 1400/2002 on 31st May 2010, the European Commission has introduced a new competition law framework for the automotive sector focusing on aftermarket issues.

Applied in the market since the 1st June 2010, these new rules are enacted in four key legal instruments:

- the Automotive Block Exemption Regulation (EU) No. 461/2010
- the sector-specific Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles
- the Vertical Restraints Block Exemption Regulation (EU) No. 330/2010
- the general Guidelines on vertical agreements

These rules will apply until the 31st May 2023. They cover the trade in spare parts for and the repair and maintenance of all self propelled vehicles with more than 3 wheels (e.g. passenger cars, light commercial vehicles and heavy duty vehicles). While the new rules are particularly important to illustrate what vehicle manufacturers may or may not do, they also affect the agreements concluded between independent aftermarket operators.

The purpose of this brochure is to provide market operators with an overview of their opportunities when it comes to effective competition in the vehicle spare parts, repair and maintenance sector.

This brochure is addressed to all the actors of the aftermarket chain: independent and authorised repairers, parts suppliers and parts distributors, publisher of technical information, tools and garage equipment manufacturers, roadside rescue services as well as all the many other independent operators who contribute to the efficient repair and maintenance of motor vehicles across Europe.

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The mechanism behind the rules

Since the 1st June 2010, four key texts designed to ensure effective competition apply in the automotive aftermarket. Two of these contain sector specific rules, whereas the two others contain general rules applicable to all industry sectors:

The sector-specific rules:

- The Automotive Block Exemption Regulation (EU) No. 461/2010
- The Sector-specific Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

The generic rules:

- The Vertical Restraints Block Exemption Regulation (EU) No. 330/2010
- The general Guidelines on vertical agreements

The Block Exemption Regulations (BERs)

Block Exemption Regulations exempt an entire category of agreements (block exemption) from the normal application of competition law. Based on the prerequisite that neither the market share of the supplier, nor of the purchaser, exceed 30%, the Block Exemption Regulations confer a «safe harbour» within which companies can be certain that their agreements comply with the requirements of competition law. Of course, the beneficiaries of the exemption must

abide by specific provisions contained in the Regulations.

This is particularly true for the so called “hardcore restrictions” or “black clauses” – **these should be observed regardless of market shares, as violations can only be justified in most exceptional circumstances.**

For the automotive sector, the Block Exemption Regulations are complementary. Companies hoping to benefit from the «safe harbour» will need to comply with the requirements of the general rules on vertical restraints, as well as the sector-specific rules. This applies to agreements with vehicle manufacturers, as well as to parts distribution agreements in the aftermarket.

The general rules on vertical restraints

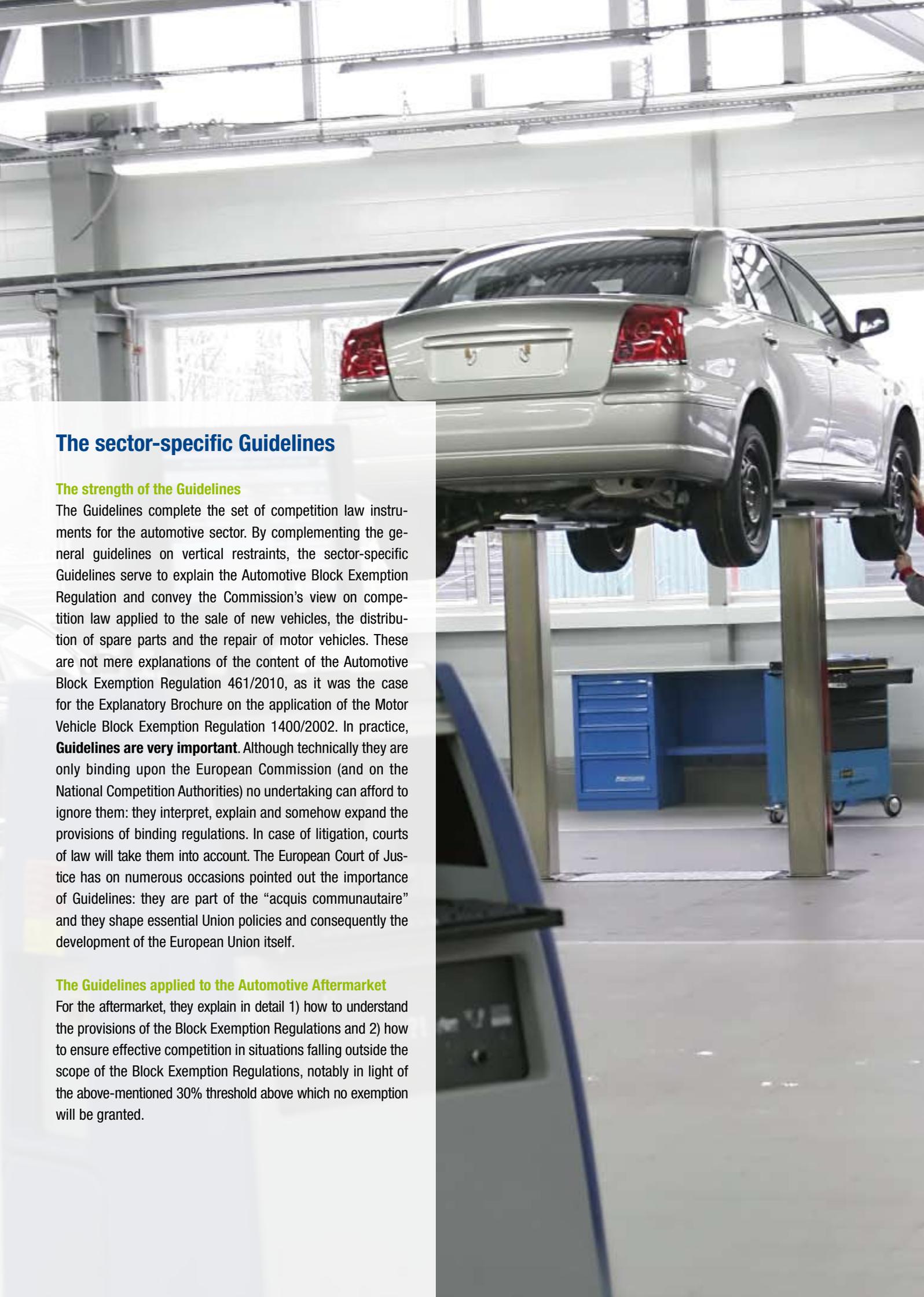
The general Vertical Restraints Block Exemption Regulation contains essential rules that need to be considered by anyone trading in goods or services. It provides for several hardcore restrictions, i.e. clauses that should be avoided in distribution agreements, as they would give rise to issues under competition law. A vehicle manufacturer selling parts to authorised repairers will need to observe these limits, as well as a parts supplier selling its products to an independent wholesaler.

Most notably, the general Vertical Restraints Block Exemption Regulation states that a supplier may not normally require its customer to resell the product at a fixed or minimum price. As a general rule (to which few exceptions apply), the customer may determine the resale price on its own, without being pressured by the supplier. The supplier may however issue non-binding recommendations.

Similarly, the general Vertical Restraints Block Exemption Regulation describes limits on customer and territory allocation, the ability of the supplier to require the distributor to operate out of an agreed place of establishment, or the right of members of a distribution system to cross-sell goods between them.

All sectors incl. automotive	Article 101 TFEU* (Former 81 EC)	
	Vertical Restraints BER N° 330/2010 & Guidelines	
Automotive sector only	Guidelines for the automotive sector	
	Automotive BER N° 461/2010	

*Treaty on the Functioning of the European Union

A silver sedan is elevated on a two-post hydraulic lift in a well-lit garage. The car is viewed from the rear three-quarter angle. The garage has large windows and overhead fluorescent lights. In the background, there are blue storage cabinets and a person's hand is visible near the rear wheel.

The sector-specific Guidelines

The strength of the Guidelines

The Guidelines complete the set of competition law instruments for the automotive sector. By complementing the general guidelines on vertical restraints, the sector-specific Guidelines serve to explain the Automotive Block Exemption Regulation and convey the Commission's view on competition law applied to the sale of new vehicles, the distribution of spare parts and the repair of motor vehicles. These are not mere explanations of the content of the Automotive Block Exemption Regulation 461/2010, as it was the case for the Explanatory Brochure on the application of the Motor Vehicle Block Exemption Regulation 1400/2002. In practice, **Guidelines are very important**. Although technically they are only binding upon the European Commission (and on the National Competition Authorities) no undertaking can afford to ignore them: they interpret, explain and somehow expand the provisions of binding regulations. In case of litigation, courts of law will take them into account. The European Court of Justice has on numerous occasions pointed out the importance of Guidelines: they are part of the "acquis communautaire" and they shape essential Union policies and consequently the development of the European Union itself.

The Guidelines applied to the Automotive Aftermarket

For the aftermarket, they explain in detail 1) how to understand the provisions of the Block Exemption Regulations and 2) how to ensure effective competition in situations falling outside the scope of the Block Exemption Regulations, notably in light of the above-mentioned 30% threshold above which no exemption will be granted.

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Trade in spare parts and equipment

original parts and parts of matching quality

Definitions

Ensuring effective competition in the markets for spare parts and equipment is the primary aim of the definitions of «original parts» and «parts of matching quality» contained in the Guidelines.

According to the wording adopted by the European Commission, “**original parts or equipment**” are parts or equipment manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of parts or equipment for the assembly of its vehicles.

This means that ‘**original parts**’, if they fulfill the above conditions, may be:

- parts produced “in-house” by the vehicle manufacturers
- parts manufactured by parts producers and which are supplied to the vehicle manufacturers for the assembly of vehicles or for distribution to the members of their authorised networks.
- parts manufactured by independent parts producers and which are supplied to the independent aftermarket, provided that they are manufactured according to the vehicle manufacturer’s specifications.

This might happen for example when a parts producer is or was manufacturing parts for a vehicle manufacturer.

These parts only bear the parts producer’s trademark.

Vehicle manufacturers supply their authorised network with their own branded spare parts although most of the time produced by original equipment suppliers.

In such cases, the spare parts producer, however, may not be hindered from placing its own trademark on the part (either exclusively or in parallel as “double branding”).

In order to be considered as being of “**matching quality**”, parts must be of a sufficiently high quality that their use does not, according to the EU Commission, “endanger the reputation of the authorised repair network”. The burden to prove that a part does not fulfil this requirement falls upon the vehicle manufacturer who must bring evidence to that effect in case it wants to discourage authorised repairers from using such parts.

Following this new definition, a part of matching quality does not refer per se to the quality of the part originally fitted into the vehicle. It may match the quality of the spare parts of a specific range supplied by the vehicle manufacturers to its authorised network, including spare parts from a vehicle manufacturer’s “economy line”.

Certification requirements

The members of the vehicle manufacturers’ authorised network have the obligation to use parts that are at least of matching quality. It is worth noting that independent repairers, as they are not members of the ‘franchised’ network, are of course not subject to such obligations. As explained above, if vehicle manufacturers want to contest the use of a specific part by the members of the authorised repair network, they have to prove that the spare part used does not fulfil the requirements of the definitions of “original part” or “part of matching quality”. Even though vehicle manufacturers bear this burden of proof, in order to facilitate sales from independent distributors to the members of the authorised networks and to avoid possible legal challenges from the vehicle manufacturers, parts suppliers are invited to issue – on demand – a (self-) certificate for the quality of their parts (e.g. in the packaging, as a separate declaration, or a notice on the Internet).





Freedom to supply spare parts and equipment to the aftermarket

The concept

Following the former Block Exemption Regulation 1400/2002, the new competition law framework confirms that **vehicle manufacturers may not hinder their original equipment suppliers from also supplying their products as spare parts to independent distributors** or directly to independent or authorised repairers.

As a direct consequence, and for logistic efficiency, independent parts distributors are of course free to supply independent and authorised repairers with the parts supplied by the parts suppliers.

To satisfy consumer demand, part producers also supply the independent aftermarket with spare parts of higher quality than the original equipment, or with parts ‘fit for purpose’ and adapted to the age of the vehicle; these should of course fulfil all legal requirements, notably those contained in the product safety and environmental legislations.

The new regime on “tooling arrangements”

In its evaluation of the functioning of the former MVBBER 1400/2002, the European Commission found that on many occasions vehicle manufacturers abused their bargaining power to restrict the ability of their original equipment manufacturers to sell the parts in the independent aftermarket, thus rendering the part de facto captive.

This was achieved by obliging the supplier to transfer the title to industrial property rights or tooling to the vehicle manufacturer. Once these had become the property of the vehicle manufacturer, the supplier found itself unable to use such tooling or industrial property rights for producing parts that otherwise could have been sold directly to the aftermarket.

In this area, the new guidelines contain important clarifications. First, the European Commission conveys that an agreement between a vehicle manufacturer and a parts supplier is normally subject to competition law. Automotive parts suppliers mostly have own expertise which is necessary to develop and manufacture components.

They are not merely “extended workbench”, which would need to rely on essential input from the vehicle manufacturer. In these cases, they are potential competitors as aftermarket parts suppliers, and the vehicle manufacturer can restrict their access to the aftermarket in exceptional circumstances only. Where a vehicle manufacturer provides a tool, or pays for it up front, the supplier may be prevented from using this tool to manufacture parts for any third parties (aftermarket or other OEM customers). In that event, the supplier will need to pay a royalty or purchase a second set of tools for IAM production.

If a vehicle manufacturer obliges its OE parts supplier to transfer the ownership of a tool, intellectual property rights, or know-how back to it, or if the vehicle manufacturer bears only an insignificant part of the product development costs, or does not contribute any necessary tools¹, intellectual property rights, or know-how, the agreement at stake will not be considered to be a genuine sub-contracting arrangement. As consequence the vehicle manufacturer will not be allowed to forbid its parts suppliers to sell parts directly in the aftermarket.

Freedom to purchase parts and equipment

Independent repairers

As they do not depend on vehicle manufacturers, **independent repairers are free to purchase and to use any parts or equipment for the repair and maintenance of vehicles**, as long as these fulfil the legal requirements, notably those contained in the product safety and environmental legislations. Independent repairers may source “original parts”, “parts of matching quality” as well as other quality parts from independent parts producers and independent parts distributors.

Authorised repairers

In practice, authorised repairers usually source spare parts from the vehicle manufacturers with whom they have an agreement. Nevertheless, in order to stimulate competition in the spare

¹ The Guidelines clearly state that where the vehicle manufacturer provide a tool, IPR or know-how to a supplier, this arrangement will not benefit from the Sub-contracting Notice if the supplier already has this tool, IPR or know-how at its disposal, or could reasonably obtain them, since under these circumstances the contribution would not be necessary.

parts market, **the new legislative framework continues to provide for the possibility of authorised repairers to source “original parts” or “parts of matching quality” from parts suppliers or independent parts distributors.**

This freedom may however be subject to an obligation to source a minimum quantity of spare parts from the vehicle manufacturer. **This obligation is nonetheless limited.** As pointed out by the European Commission, in most cases vehicle manufacturers will enjoy such a position in the market that **this minimum sourcing requirement should be as low as not to endanger competition in the market.** In the past, the Motor Vehicle Block Exemption Regulation 1400/2002 provided that vehicle manufacturers could require their authorised repairers to source at least 30% of their requirements in spare parts for vehicles of the respective brand from the vehicle manufacturer or its authorised network.

This threshold does not exist anymore in the new legal texts. One general principle of competition law still remains though: the higher the market share of the vehicle manufacturer in the market for spare parts suitable for the repair and maintenance of vehicles of its own brands in a given national territory, the lower the percentage of minimum spare parts sourcing it will be allowed to impose on the members of its authorised repair network.

Furthermore, since authorised repairers may also have to carry out repair or maintenance services on vehicle of other brands, they also need to purchase parts from other sources. In this situation, they are to be considered as “independent/multibrand” repairers and therefore may source any spare parts from independent parts producers or spare parts distributors, as long as these fulfil legal requirements, notably those contained in the product safety and environmental legislations.

Access to the vehicle manufacturers’ “captive” parts

For independent repairers

Some parts are exclusively produced by vehicle manufacturers themselves (e.g. chassis, engine blocks or certain body parts) or are parts on which vehicle manufacturers hold a

valid industrial property right. These are only supplied to the aftermarket by the vehicle manufacturers themselves. However, access to these is indispensable in order to allow independent repairers to properly maintain and repair vehicles and to compete with the authorised repair networks. Therefore, the legal framework continues to state that a vehicle manufacturer may not prevent its authorised repairer from selling spare parts to an independent repairer requiring these for the repair or maintenance of a specific customer vehicle.

However, this does not represent an ideal solution, as independent repairers should be able to source any part, including “captive” parts, from the wholesale level (and not from their direct competitors) and at wholesale price in order to truly compete with the authorised repair network.

For independent parts distributors

The new competition law framework follows the same approach as the expired MBER 1400/2002. It differentiates between motor vehicle sales channels, the trade in spare parts and the repair and maintenance services. As a consequence, vehicle manufacturers have the option to offer to the members of their authorised network three separate contracts whereby their contractual partner can carry out all three functions, two functions or just one of the three functions:

- distribution contract for new vehicles (official dealer)
- distribution contract for replacement parts (“authorised” parts distributor)
- contract for service, maintenance and repair (“authorised” repairer)

Concerning the distribution of the vehicle manufacturers’ original spare parts, the vehicle manufacturers will usually opt for a distribution system with clear qualitative selection criteria. Therefore, if an independent parts distributor fulfils the qualitative criteria of the vehicle manufacturer (with regard e.g. to possible stock keeping requirements or the qualification of the personnel), he could be a candidate for an “authorised parts distribution contract”.



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Service, maintenance and repair during the warranty period

The key concept

In its Explanatory Brochure on the MVBBER 1400/2002, the European Commission had introduced an important clarification that independent repairers may carry out regular maintenance service and repair jobs during the warranty period. Despite this clarification many vehicle manufacturers continued to make warranty claims of vehicle owners universally dependent upon the condition that all services and repairs had been carried out by the authorised network, and with the exclusive use of the vehicle manufacturer's spare parts.

One of the major improvements in the new competition law framework in comparison with the expired Motor Vehicle Block Exemption Regulation 1400/2002 is the clarification by the European Commission that **vehicle manufacturers may not make the warranties conditional on the repair and servicing of a vehicle within their network, or on the use of their own branded spare parts.**

According to the new set of rules, **consumers have the right to use any repair shop for non warranty work, during both the statutory warranty period (2 years in most EU member states) and any extended warranty period.**

Of course, every operator is subject to statutory product and service liability. Thus, anyone who damages a vehicle as a result of negligent work or use of defective parts is responsible for it.

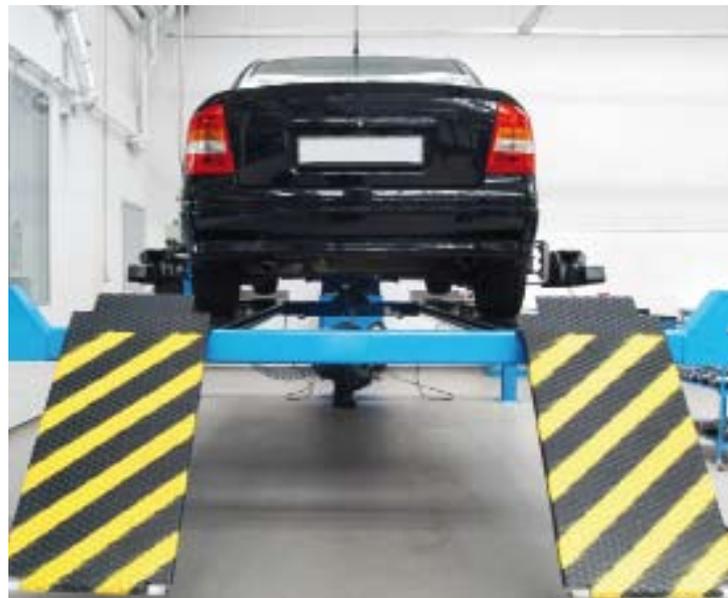
Recall actions, free servicing and warranty work

Within the warranty period, any defect originating from the car manufacturing process must be corrected by the vehicle manufacturer. Normally, the network of authorised repairers will execute the work on behalf of the vehicle manufacturer,

and at its expense. In such cases paid for by the manufacturer, i.e. recall actions or free servicing or warranty works etc., the works must be carried out where specified by the manufacturer. Where it pays the repairer, the manufacturer may also determine which parts are to be used.

Insurance policies and warranty contracts

These rights to choose during the warranty period apply to warranties forming an integral part of the purchase of the vehicle. However, warranties which are in fact insurance policies, purchased separately, may not be covered. Leasing or financing contracts may also provide for additional limitations.





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Access to technical information

With the adoption of sector-specific Guidelines, the European Commission has emphasised the importance of “Independent Operators”. It has recognised that the independent aftermarket increases choice for consumers and keeps the price of repairs competitive by putting pressure on car manufacturers’ authorised repair networks².

In order to truly achieve effective competition in the after-sales services, it is essential that all operators can get the technical information necessary to do the repairs and maintenance on increasingly sophisticated vehicles. To that end, the keystone of the new competition law framework is that **withholding technical information will be dealt with directly under Treaty rules on restraints of competition.**

Compared to the former Motor Vehicle Block Exemption Regulation 1400/2002, granting access to technical information is no longer viewed as a mere prerequisite for vehicle manufacturers wishing to enjoy an exemption from the normal competition rules. The new competition framework recognises that access to technical information, tools and training continues to be a prerequisite for effective competition in the automotive aftermarket.

Key definitions

Independent operators

The definition of independent operators is based on the definition which already exists in the Euro 5/6 Type-Approval legislation³. It includes independent repairers, spare parts manufacturers and distributors, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering

training for repairers. This list is however non-exhaustive.

The scope of technical information

On the issue of access to technical information, several technical European Type-Approval Regulations already contain key provisions on the access to vehicle repair and maintenance information for independent operators⁴.

The novelty brought by the European Commission in the new competition law framework is the cross-referencing between the type-approval legislation and the competition law rules. In other words, in order to know whether a piece of information should be made available to the independent aftermarket operators, reference should be made to the provisions on access to repair and maintenance information in the type-approval instruments. Any information communicated to the members of the authorised networks should be made available to independent operators. This applies to the entire vehicle park of all self-propelled vehicles with 3 or more wheels.

Regulation (EC) No 715/2007 contains a generic definition of technical information which gives a good summary of what “technical information for the repair and maintenance of vehicles” means:

‘vehicle repair and maintenance information’ means all information required for diagnosis, servicing, inspection, periodic monitoring, repair, re-programming or re-initialising of the vehicle and which the manufacturers provide for their authorised dealers and repairers, including all subsequent amendments and supplements to such information. This information includes all information required for fitting parts or equipment on vehicles;

In order to bring clarity on this matter, the European

² European Commission’s Memo n° 10/217 of 27/05/2010 – Antitrust: Commission adopts revised competition rules for the motor vehicle sector: frequently asked questions.

³ Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

⁴ These are:

- Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information
- Regulation (EC) No 692/2008 which implements and amends Regulation (EC) No 715/2007
- Regulation (EC) No 595/2009 on type approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information
- the ensuing implementing measures for the Regulation 595/2009 still to be adopted.



Commission also pointed out that the lists of items set out in Article 6(2) of Regulation (EC) No 715/2007 and Regulation (EC) No 595/2009 should also be used as a guide to assess what could be considered as technical information for the purposes of competition law. This list includes:

- unequivocal vehicle identification
- service handbooks
- technical manuals
- component and diagnosis information
- wiring diagrams
- diagnostic trouble codes (including manufacturer specific codes)
- software calibration identification number applicable to a vehicle type
- information provided concerning, and delivered by means of, proprietary tools and equipment
- data record information and two-directional monitoring and test data

Further to this clear reference to the Type-Approval legislation, **the new competition law instrument** also contains further specific examples.

- software
- fault codes and other parameters, together with updates, which are required to work on electronic control units with a view to introducing or restoring settings recommended by the supplier
- motor vehicle identification numbers or any other motor vehicle identification methods
- parts catalogues

- repair and maintenance procedures
- working solutions resulting from practical experience and relating to problems typically affecting a given model or batch
- recall notices
- notices identifying repairs that may be carried out without charge within the authorised repair network.

For the **parts identification**, the European Commission's Guidelines explicitly state that parts codes and any other information necessary to identify the correct car manufacturer-branded spare part to fit a given individual motor vehicle should be made available to independent operators if it is made available to the authorised network.

The technical information assessment "test"

The concept

The overarching principle under this competition law angle is that all the information for the repair and maintenance of vehicles made available to members of the relevant authorised repair network shall also be communicated to the independent operators.

If the lists and examples provided by the European Commission in the Guidelines bring clarity on what could be considered as technical information for the repair and maintenance of vehicles, it is non exhaustive. As such, if an item is not explicitly enumerated in the list, this does not mean that a vehicle manufacturer may withhold this piece of information. The European Commission pointed out that technological

progress in vehicle and in parts manufacturing implies that the notion of technical information is fluid. As such, if advances in vehicle technology engender new techniques in the repair or maintenance of vehicles or require new pieces of technical information, access to this information must be given to independent operators.

The test and the limits

The European Commission has elaborated a “test” in order to assess at any moment in time if a particular item of information should be made available to independent operators. Some information provided to the authorised repair network may not be considered as “true” technical information for “the repair and maintenance of vehicles” and could therefore be withheld by vehicle manufacturers. These limits cover purely commercial information (e.g. hourly tariffs of the authorised repairers) or the genuine information necessary for the manufacturing of spare parts or tools, such as the information on the design, production process or the materials used for manufacturing of a spare part. However, the Commission pointed out that in cases where the information can be used for a “double purpose” - such as information showing the interconnection of parts - the information should be made available as it is a necessary information in order to maintain and repair a vehicle.

One important notion must be kept in mind though: withholding information shall not have an appreciable impact on the ability of independent operators to carry out their tasks in the market.

It is also worth noting that in contrast to the expired MVBBER 1400/2002, the new competition law framework does not contain any reference to the possibility for vehicle manufacturers to withhold information by e.g. simply referring to the anti-theft or anti-tampering system of the vehicle or in general to “industrial and intellectual property rights” (IPRs).

The availability of the information

The way in which technical information is supplied is also important. The European Commission has emphasised that **access should be given** upon request and **without undue delay**, in a usable form, and **the price charged should not discourage access** to it by failing to take into account the extent to which the independent operator uses the information⁵.

For new vehicles on the market, **vehicle manufacturers are asked to give independent operators access to technical information** at the same time as to its authorised repairers. They should not oblige independent operators to purchase more than the information necessary.

⁵ It is important to underline that for the vehicles type-approved according to the Euro 5 or Euro VI Regulations, the list of information contained in these respective legislations (including specific OBD information for the manufacturing of parts and tools) will have to be provided to independent operators even though these might not be communicated, in the strict sense, to the members of the authorised networks.



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