

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



It means that operators are not restricted over where they can access parts.



## FOREWORD

With the expiry of the EU Block Exemption regulation NO 1400/2002 on the 31st May 2010, the European Commission (EC) has introduced new automotive competition laws dealing with aftermarket issues. Relevant to the market since the 1st June 2010, there are four key texts to ensure effective competition applies.

- 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. 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.

# 1/

## The Block Exemption Regulations (BERS)

Block Exemption Regulations exempt an entire category of agreements 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. 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 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.





# 2/

## Trade in spare parts

### 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.

## Freedom to supply spare parts 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.

### The new regime on "tooling arrangements"

The European Commission has 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.

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 tools, intellectual property rights, or know-how, the agreement at stake will not be considered to be a genuine sub-contracting arrangement.

**As a consequence the vehicle manufacturer will not be allowed to forbid its parts suppliers to sell parts directly in the aftermarket.**

## Access to vehicle manufacturers 'captive' parts

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 normally 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 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

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".





# 3/

## Service, maintenance and repair during the warranty period

### The key concept

In its Explanatory Brochure on the MBER 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**.

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## Access to technical information

The European Commission has emphasised the importance of "Independent Operators".

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**.

### The scope of technical information

**Any information communicated to the members of the authorised networks should be made available to independent operators.** 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 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 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 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. 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 availability of 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 information. 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.

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**Disclaimer**

The content of this leaflet is designed to highlight the key points of the new competition law. Wording in this leaflet has been extracted from the Right to Repair Campaign brochure FIGIEFA July 2010. A copy of this brochure can be supplied upon request. It should, however, be noted that the explanations given herein are of a general nature. As any individual case may bear different characteristics, they are not meant to replace specific legal advice.