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Towards the Reform of the Motor Vehicle Block Exemption Regulation

The European Commission (“Commission”) published on 6 July 2022 a draft Regulation extending the duration of the validity of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010 (MVBER) for five years, along with a draft Communication amending the old Supplementary Guidelines, and launched a public consultation until 30 September 2022, aiming to receive comments and feedback from stakeholders on the proposed changes.

The draft Communication updating the Supplementary Guidelines introduces amendments to the rules applicable to vertical agreements in the automotive sector, following the findings gathered during the evaluation process of the MVBER regime. Additionally, this draft proposal contains updates regarding the reform of the General Vertical Block Exemption Regulation (EU), with reference to the modified hardcore restrictions and the exceptions for selective distribution systems.

I. What stays the same (and why it shouldn’t have)?

A. Market Definition: Has the Commission’s position changed at all?

A vertical agreement in the automotive sector must meet the required threshold in order to benefit from the MVBER, therefore the market share must first be assessed. To assess the market share, the relevant market needs to be defined. By way of reminder, the Commission in its old Supplementary Guidelines (SLG) was referring to a brand specific market and a systems market, as regards the definition for the aftermarket. These issues were unclear under the old regime and needed to be clarified, as the National Competition Authorities (NCAs) and national courts define the product market broadly.

In particular, the Commission stated in the old SLG (Point 13) that two distinct markets may be defined, those relating to the distribution of new motor vehicles and those to the purchase, sale and resale of spare parts for motor vehicles and/or the provision of repair and maintenance services. In particular, as provided in Point 15 SLG, the nature of the market for distribution of spare parts/ repair and maintenance is brand-specific, as the Commission states in Point 57 that *“as far as a market exists for repair and maintenance services that is separate from the sale of new motor vehicles, this is considered to be brand specific”*. This means that for every brand, there is a market, in which the brand’s aftermarket network naturally surpasses the 30% market share threshold, and therefore the block exemption does not apply.

However, the Commission also left the window open noting (in the footnotes of the old SLG) that a systems market, including both motor vehicles and spare parts, may be defined, which includes motor vehicles and spare parts together, when the

purchase decision was based on the total cost of the vehicle, maintenance and repairs. In this context, two factors must be taken into account when analyzing the market, (a) the significant proportion of buyers making their purchasing choices taking into account the lifecycle costs and (b) the existence and relative position of entities operating in the aftermarket independently from the suppliers of the primary goods. Although the Commission presented this view, in defining a systems market instead of brand specific aftermarket, it concluded that a systems market is likely to be defined for industrial vehicles, where buyers take into account the maintenance costs at the moment of purchasing, and not for passenger cars, as the buying behavior is thought to be different. In support of this view, the Commission noted that the majority of buyers are private individuals or small and medium-size companies that purchase motor vehicles and aftermarket services separately and don't have systematic access to data permitting them to assess the overall costs of motor vehicle ownership in advance.

This view was expressed in the Commission's evaluation report issued on 28.5.2021, where based on the information collected during the consultation, it seems that at least for passenger cars the aftermarket is brand-specific. Some NCAs suggest that the motor vehicle markets could be considered to be a systems market. It should be noted that in this case the relevant market shares concern the whole system and not only the repair and maintenance/supply of spare parts.

The Commission's above position on brand specific aftermarket is not revised in its draft Guidelines. Thus, the sale and resale of spare parts for motor vehicles and/or the provision of repair and maintenance services continues to constitute a separate market from the distribution of vehicles. In order for the block exemption regime to apply to a vertical agreement, the required threshold criteria must be met. In light of the Commission's position on the existence of a separate brand specific aftermarket, the application of the block exemption regime seems to be impossible.

B. Access to repairer networks: The same access principles in a changed landscape threaten the quality of the networks' vertical relationships.

The Commission, by retaining Point 70 of the old SGL, insists that access to the networks of authorized repairers shall be open to any firm that meets the quality criteria, essentially implying an obligation to approve any applicant for entry that meets the approval criteria to join the repair network.

This practice however has become somewhat problematic in today's aftermarket as it forces the suppliers to perpetuate relationships with members of the network that are underperforming and whose contracts have been terminated, by forcing the brand to

renew their contracts when they re-apply, as rejection on any grounds other than not meeting the quality criteria, is not accepted. This way, sub-par firms can benefit by constantly re-entering the repair network all while the relationship with the brand is degrading and they have no incentive to improve their performance or the cooperation with the brand.

In addition to forcing the preservation of those relationships, despite the supplier's wishes and the harm to the brand, another failing of retaining Point 70 unaltered, is that it does not reflect the state of competition in today's aftermarket. The Commission operates under the perception that, as a brand-specific market, there is no significant competition in the aftermarket. In reality however, every authorized repairer is in full competition with all the non-branded, independent repairers who offer their services in competitive prices to vehicles of any brand.

II. What's new: Access to vehicle-generated data and technical information

The most significant update the new text introduces and which reflects the needs for efficient competition in the aftermarkets and repair markets in a data driven economy is the recognition that vehicle-generated data is an essential input for repair and maintenance services. Therefore, the Commission proposes the extension of the existing principles for the provision of technical information, tools and training necessary for the repair and maintenance services to explicitly cover vehicle-generated data. That being the case, it follows that a party to an agreement that refrains from providing independent repairers, manufacturers/distributors of spare parts and other independent operators with an *essential input*, such as vehicle-generated data, it is restricting the competition under Article 101 (1). Similarly, the standard arrangements stipulated in Point 67 of the old SGL should now apply also to vehicle-generated data. According to the Commission the existing standards and the relevant requirements of Regulation (EU) 858/2018 as regards the provision of vehicle OBD information and vehicle repair and maintenance information should be taken into account (Article 61 of the above Regulation). This means that vehicle-generated data should be made available on request by the interested independent operator, without undue delay, in a useable form and without charge, at the same time that it available to authorized repairers etc. This way access to technical information and in-vehicle data for aftermarket operators is facilitated as any impediments to accessing vehicle software will be considered anti-competitive conduct.

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