

Freedom From Choice.



FNA's Contribution on the Evaluation of Vertical Block Exemption Regulation (VBER) and Vertical Guidelines in the automotive aftermarket

Summary

► Freedom from consumer's choice

— Problem to be addressed

Improving VBER and Vertical Guidelines to ensure real free competition in the automotive aftermarket

— Objective

Enabling all stakeholders to operate on a level playing field and contribute equally to the economic recovery

— Policy option

A specific regulation putting consumers in the driving seat

► Choice depending on independent repairers' access to consumers and key inputs

— Problems to be addressed

■ Opening access to in-vehicle data as it is vital for independent repairers, i.e. it is a direct and real-time access to consumers and key inputs

■ Prohibiting misuse of car warranty to foreclose independent repairers

— Objectives

To offer consumers the best deal for repairs and servicing

To restore a level playing field that has been distorted by car manufacturers'

— Policy option

A specific regulation based on a more consumer oriented policy which stimulates efficiency and finally advantages for the production sector

Federation of Craft Businesses in the automotive sector and in mobility services (FNA) would like to thank the authors of published drafts of the revised Vertical Block Exemption Regulation (“VBER”) and Vertical Guidelines for stakeholder comments.

https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en

→ This information will make a substantial contribution towards an improved understanding of the European provisions relating to the key competition issues arising on the automotive market from businesses, consumers and European competition law enforcers.

→ FNA representatives express their thanks for being given the opportunity of once again, through this consultation, provide feedback on the changes the European Commission proposes to address the issues identified in the evaluation of the current rules.

→ FNA members, i.e. independent repairers share the European Commission’s view that the VBER and the Vertical Guidelines are useful tools that facilitate the assessment of vertical agreements. However, they submit the following comments aimed at improving the draft provisions in order to adapt both texts to present market developments.

1. FNA claims in the hereafter comments that this VBER together with the Vertical Guidelines, which aim to prohibit *“vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects”*, do not go so far as to ensure real competition in the automotive aftermarket.

2. The proposal is based on a more flexible market approach, which entails allowing the industry to consolidate its control over the aftermarket. While the EU Consumer Policy strategy 2007-2013 was designed to empowering consumers, because *“putting consumers in the driving seat benefits citizens but also boosts competition significantly”*, the purpose of the proposed provisions and guidelines is more mixed. Improving greater dynamism is yet correctly seen as a result of a more consumer oriented policy which stimulates efficiency.

3. The draft regulation does not take enough into account the lack of independent repairers’ access to consumers which is achieved either directly by applying a selection strategy or indirectly misusing warranty. Also access to key inputs, even if it is raised in the proposal, has not received sufficient considerations. These observations are FNA’s focal points in the following comments

Freedom from consumer’s choice

4. It is part of the overall global economic trend. Original Equipment Manufacturers (OEMs) may find untapped goldmines in aftermarket services by strengthening their core business in parts, repair, and maintenance. Industrial OEMs are increasing their focus on aftermarket services—the provision of parts, repair, maintenance, and digital services for the equipment they sold. The appeal of this strategy is simple: services provide stable revenue—and often higher margins—than sales of new equipment. One McKinsey analysis across 30 industries showed that average earnings-before-interest-and-taxes margin for aftermarket services was 25 percent, compared to 10 percent for new equipment.

5. Car manufacturers depend on servicing, parts, car finance and insurance to make their profit margins. A motor industry report from Deloitte found on average almost 30% of their profits come from servicing, while they lost money on new car sales. Their business model is based on revenues from the aftermarket. By generating sales volumes, they create opportunities to build customer relationships which result in a future stream of income. Such revenue includes adding and installing

aftermarket accessories on the new vehicle sale, dealership finance and insurance and servicing the customer's vehicle throughout the life of the car.

6. Empowered consumers need real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights given by competition rules. However, to analyse the impact on the market the draft regulation and the guidelines focus on the degree of market power of undertakings, i.e. *"(7) that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement."* In paragraph (9) of the Guidelines, they assume that *"undertakings party to a vertical agreement usually have an incentive to prevent the exercise of market power by their contract party."*

7. Such presumption does not apply in the automotive aftermarket where the really hard problem lies in implementation and enforcement of competition rules, as car dealers, sub-dealers and repairers are SMEs that cannot afford either the time or the money for litigation. Moreover, for fear of reprisals, many of them may choose not to lodge a complaint against car manufacturers for maintenance and repairs and insurers for collision repairs. They feel alone and disadvantaged against long and complicated procedures.

8. FNA therefore advocates for a specific regulation which would better suit the need of freedom from consumer' choice in the complex relationship between those who have the market power, i.e. car manufacturers and insurers, and those who lack the power to negotiate, i.e. independent repairers.

9. The stakes are high. Commercial dependence on car manufacturers and insurers is an important issue for many dealers, sub-dealers and bodywork repairers. In the context of vertical agreements, the dependence of one contractual partner on the other is not viewed as a competition problem in itself. Nonetheless, such a situation may create a problem for competition if it makes it easier for the stronger party to pressurise the weaker party (the dealer, the sub-dealer and the bodywork repairer) to implement anti-competitive practices.

10. For example, on French bodywork repair market among the 14,000 repairers, 57% are weakened, on the verge of being foreclosed from the market. FNA has been calling the authorities for years on the significant pressure applied by insurers: rates bereft of any realism; many free services imposed, while following legal provisions insurers have to cover the costs; automotive appraisers contracted by insurers to underestimate the extent of the work required for repairing the vehicle, which can put motorists' safety at risk. French Directorate-General for Competition, Consumer Affairs and Fraud Control 2018 Report states in page 14 that *"automobile repairers regularly denounce strained commercial relations with insurers, arguing the strong pricing pressure on authorized networks to which the insured are directed to the detriment of independent repairers."*

11. There is also a high degree of market power of car manufacturers creating a problem for competition as it makes easier for them to pressurise dealers, sub-dealers and repairers to implement anti-competitive practices. Recent years have seen car manufacturers shifting investments onto dealers, sub-dealers and repairers, while they were tightening the profit margins of these contracting parties. As being one of those worst hit by the economic crisis, the automotive market needs to benefit from conditions that ensure that all stakeholders are operating on a level playing field and contribute equally to the economic recovery.

Choice depending on independent repairers' access to consumers and key inputs

12. Advanced technologies win the automotive industry: on the one hand, the electric car revolutionizes maintenance methods; on the other hand, the increasing connectivity of new "*smart*" vehicles tends to channel diagnostic, maintenance and repair services through the manufacturer's network.

13. While the classic vehicle has thousands of moving parts in the engine, the electric car is less than ten: maintenance is therefore simpler and 30 to 40% cheaper. The battery, which is managed by the on-board electronics, warns the driver of the level of his capacity being affected by the charge and discharge cycles. In order to carry out the maintenance of the vehicle, it must be temporarily deactivated via a safety connector. The specificity of the maintenance relies precisely on the safety instructions and data to be applied: the work is done under tension, the electrical intensities are strong.

14. Difficulties in access to the maintenance and repair market, which have already been identified for the combustion engine, are focused on the electrical system where many safety data and a specific equipment are needed. While the new technique is designed to reduce the cost of maintenance and repair, car manufacturers tend to reserve the operation to their network at the expense of consumers' choice.

15. For example, Mrs. Johanne Berner Hansen, lawyer of Dansk Bilbrancheråd (DBR) reported that TESLA representatives are able to "*bypass*" the car. They can make it "*unsupported*" which means that TESLA can remove the capability of fast charge. This makes the car useless in many ways. TESLA has an intern notification that states why a car is being "*unsupported*". There is no opportunity to reverse, i.e. the car cannot be supported again. It is a major issue for consumers as TESLA is in this way keeping competition out.

16. This Scandinavian case raises the question of independent repairers' access to consumers. TESLA strategy is to sell and service cars by themselves. They have TESLA Approved Body Shops, but these repairers are only entitled to collision repairs. For example, a change of the 12V-battery cannot be done by these body repairers. Consumers have to get the car maintained by TESLA, which is a higher cost for them than if the work was done by their entrusted independent repairer.

17. New technology is here used like a selection strategy carried to a crisis point so that it becomes foreclosure of independent repairers. It is a common trend in the automotive aftermarket as nowadays cars send mechanical data to manufacturers without any direct in-vehicle possibility for independent repairers to have access to this technical information. Independent repairers are therefore competitively closed out of the market.

18. Putting consumers in the driving seat should be the right approach to open up the aftermarket for independent repairers. Consumers, i.e. car owners should also be recipient of these mechanical wirelessly transmitted data to manufacturers. They could then share these data with any independent repairer of their choosing. Car software must also allow repairers to send wireless commands to vehicles, a capability that has become increasingly important for testing, fixing, and installing parts as car manufacturers have slowly transformed their cars into computers on wheels. Access to in-vehicle data is vital for independent repairers, because it is a direct and real-time access to consumers and key inputs.

19. To this end, Commission Delegated Regulation (EU) 2021/1244 of 20 May 2021 amending Annex X to Regulation (EU) 2018/858 of the European Parliament and of the Council as regards the standardised access to vehicle on-board diagnostics information and repair and maintenance information, and the requirements and procedures for access to vehicle security information should be complemented by a more consumers' approach which should be based on Competition provisions of August 27, 2012: *"as regards access to technical information and tools for independent repairers, the Supplementary Guidelines aim to prevent vehicle manufacturers from discriminating between their authorised repairers and independent repairers as regards the provision of essential inputs that are entirely under the vehicle manufacturer's control and that are not available from other sources."*

20. These Guidelines state that *"independent garages are generally familiar with systems with safety implications, including tyres, steering, brakes and shock absorbers, and indeed have historically worked on them without demonstrable negative consequences for safety."* Therefore, the current provisions advocate *"the availability of less-restrictive forms of protection."* They consider in particular: *"as regards security-related information, a criminal records check can often be seen as an appropriate, less restrictive means of ensuring protection."*

21. As competition rules prevent discrimination, a specific VBER and Vertical Guidelines in the automotive market should confirm and that vehicle OBD information and vehicle repair and maintenance information is accessible *"in a manner which is non-discriminatory compared to the provisions given or access granted to authorised dealers and repairers"* and that safety-related information is not to be misused to exacerbate selection of repairers foreclosing the market for the independent ones.

22. Another hardcore restriction which VBER and Guidelines do not take into consideration is misusing warranty as a tying provision to force independent repairers out of the aftermarket. FNA representatives understand that car manufacturers exclude from the scope of their warranty problems caused by repair or maintenance works incorrectly carried out by an independent repairer. It would be wrong to require vehicle manufacturers to cover under a warranty services for which they are not responsible, as they were not carried out by them or under their supervision in the network. A car manufacturer may also refuse a warranty claim if there is evidence of lack of vehicle maintenance.

23. Whilst control is acceptable as far as it is specific, i.e. restricted to the warranty scope, many car manufacturers take for granted to govern all of the automotive aftermarket over time. They enjoy a degree of privileged access to customers during and shortly after the purchase period and they take benefit of it. Because of this special commercial relationship with clients, car manufacturers have authority over them. They lead them to believe that the warranty will be invalidated if servicing work is carried out by independent repairers and/or if alternative brands of spare parts are used.

24. They provide either false or misleading information.

→ Many give incorrect advice explaining that motorists have to return to car manufacturer's repairers to maintain the warranty. They use terms such as *"advisable"*, *"recommended"* and *"preferred"* in relation to their servicing, which can further add to the impression that using an independent repairer may result in problems.

→ Some implement sales tactics such as capped price service deals and extended warranties, both of which usually lock consumers into servicing their vehicle at car manufacturer's repairers.

→ Most of them use technology to convey misleading messages to motorists, i.e. logbooks making it look that they have to be stamped and/or signed by car manufacturer's repairers to keep warranty intact. Another lock-in tactic is to let motorists understand that independent repairers are not able to offer all the software updates that are required for every service so that warranty be maintained.

25. The real reason behind all these restrictions is an economic one, since out-of-warranty repairs generate significant gains. Indeed, a car manufacturer's warranty only covers limited damages such as mechanical defects and similar problems. There is, in fact, a wide range of automotive items that are out-of-warranty, as follows.

→ Wear items, i.e. parts that are designed to wear down, such as tires, brakes, certain engine belts and hoses, the clutch and sometimes even headlight bulbs or interior lighting. They can be some of the most expensive items to fix.

→ Body panels: car manufacturer's warranty does not cover motorists if they get a door ding, if they scrape the side of their car in a parking lot or if they get in an accident and need to replace any components that were damaged in the collision. Motorists' car insurance will cover these items.

26. Furthermore, most warranties do not cover repairs to the interior of a car, unless they stem from a vehicle fault. For example, if the seat belt stops working in normal use, virtually all automotive warranties will cover the replacement or repair of the seat belt. But if motorists accidentally poke a hole in their driver's seat, this would be defined as an issue caused by the owner, who will have to pay up to fix his seat. Some warranties have also clauses that can void the warranty if motorists use their car in an unusual manner, i.e. the car being driven off road or hard on a race track. As a result, in too many cases motorists will have to pay very expensive repairs.

27. These out-of-warranty repairs and the necessary regular vehicle maintenance must be unbundled from the car manufacturer's warranty repairs. Global institutions such as the World Bank state that highly concentrated, uncompetitive sectors are a big reason for sluggish growth. At a time when national automotive markets are still dealing with the impact of the coronavirus pandemic, this must change for consumers, who have fewer options to get the best deal for repairs and servicing and also for independent repairers to restoring a level playing field that had been distorted by car manufacturers' unfair practices.

28. Antitrust law is concerned with sellers who leverage power in one market to gain power in another market, because of tying arrangement. Implementing this tying practice on the aftermarket, car manufacturers deny competitors free access for the tied product, not because they have a better product/service or a lower price but because of their power or leverage in another market, i. e. the car sales market. At the same time, consumers are forced to forego their free choice between competing products/services.

29. The specific VBER and Guidelines for the automotive market should highlight this restriction and give examples of misusing warranty. General ground had already been emphasized in the Frequently Asked Questions (FAQS) on the application of the EU Antitrust rules in the motor vehicle sector, on August 27, 2012 as follows: *"the vehicle manufacturer's warranty must not be made conditional on the end user having repair and maintenance work that is not covered by the warranty carried out within the vehicle manufacturer's authorised repair networks. The reasoning behind this general principle is that such behaviour may result in the foreclosure of independent repairers or the closing of alternative channels for the production and distribution of spare parts, which ultimately may have a bearing on the price that consumers pay for repair and maintenance services."*

30. Car manufacturers have invested significant funds into research and innovation, training, tools, equipment and staff so that they deserve to have a return on that investment. However, this should not be a reason to limit competition. In fact, removing the existing restrictions will reward the best car manufacturers, dealers and repairers. As explained by former Commissioner for Competition, Mr. Mario Monti, *"I would like to underline that the Commission is in no way pursuing an anti-industry policy. On the contrary, top industry management has repeatedly and explicitly invited politicians to open up markets and to move closer towards the US economic model. The greater dynamism which exists in the US is correctly seen as a result of a more consumer oriented policy which stimulates efficiency, and finally advantages, for the production sector."*

FNA representatives are looking forward to the discussions when the Consultation process continues and are confident that consensus is possible on the issues highlighted in this contribution.

Federation of Craft Businesses in the automotive sector and in mobility services (FNA)

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