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## **EU competition rules on vertical agreements – evaluation**

Dear Sir or Madam,

FIGIEFA, the European association of the automotive aftermarket distributors ([www.figiefa.eu](http://www.figiefa.eu)), aims at maintaining free and effective competition in the market for vehicle replacement parts, servicing and repair. European policy actions must ensure an equal level playing field for the independent automotive aftermarket, which accounts for more than 500,000 companies employing more than 4.3 million people across Europe and offering services to more than 290 million vehicle owners.

With view to the public consultation on the evaluation of EU competition rules on vertical agreements, you will find in attachment a detailed position on our legal analysis. We have identified several key issues, which we believe should be taken into account by the European Commission:

- Competition in spare parts markets requires specific rules to benefit the consumers;
- Hardcore clauses on the availability of spare parts for independent operators, on the ability of component suppliers to sell their products as spare parts should be strengthened and modernised;
- Safe harbours are beneficial for SMEs by incentivising other companies to comply with the guidelines;
- As information and data have become even more important for the automotive aftermarket, the anti-competitive effects of supplier refusing to supply data or other information essential for competition in downstream markets should be assessed and addressed.

FIGIEFA would be pleased to offer additional details and discuss any questions you may have.

Sincerely,

Sylvia Gotzen  
Chief Executive

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## FIGIEFA comments on the VR-BER public consultation

With view to the public consultation we are pleased to offer the following comment:

### 1 Competition in spare parts markets deserves specific protection

The EU competition rules on vertical agreements should continue to take account of specific market characteristics that industries or product categories may have. In particular, this holds true for spare parts markets. Spare parts differ from other product categories as by themselves they have no practical value, except when they can be used with the primary product they are designed to repair or maintain.

Where spare parts are readily available and products can be repaired rather than discarded, they contribute to a sustainable use of resources. This thus brings a benefit not only to consumers, but as well to environmental policy goals.

Suppliers of the original product frequently dominate spare parts markets and look to avoid competition from competing parts suppliers. The EU recognized the specific characteristics of spare parts markets in previous sector-specific block exemption regulations and guidelines, as well as in other legal instruments such as Regulation 6/2002.<sup>1</sup>

Commissioner Vestager emphasised at the GCLC Conference in Brussels on 25 January 2018 that competition policy needs to *"make sure that our markets stay competitive enough to give consumers the power to demand a fair deal."* European consumers need a fair deal when it comes to affordable mobility. The average passenger car in Europe is almost eleven years old. Servicing, repair and spare parts are a significant cost factor in individual mobility as well as in commercial transportation, i.e. the cross-border trade in goods. Especially in rural regions within the EU where hardly any brand-specific repair networks exist, consumers and businesses should have affordable access to servicing, repair and spare parts. The main sources of competition in automotive aftermarkets are independent operators, many of them SMEs.

FIGIEFA submits that competition policy should keep mobility affordable. Where there is no effective competition suppliers can easily disadvantage consumers by setting prices that make professional repair and maintenance difficult to afford for many European citizens. Consumers lack awareness that parts and maintenance often account for more than half the total cost of automotive mobility. They do not normally consider these aspects when purchasing a new car. Therefore, the Commission mission rightly chose to enact specific rules to encourage competition in automotive spare parts markets in its sector-specific block exemptions of 1985, 1995, 2002 and 2010, which should be preserved.

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<sup>1</sup> Art. 20(2) Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1) amended by Council Regulation No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs (OJ EC No L 386 of 29.12.2006, p. 14).

## 2 Hardcore clauses

FIGIEFA submits that the specific rules for the distribution of automotive parts should be renewed and that their scope of application could be extended to other spare parts markets as well. The VBER revision offers an opportunity for achieving this.

As in the past, the future legislative framework needs to support the entire lifecycle of a vehicle, thereby assuring continuous mobility and downstream supply, from first acquisition and mobility over the lifetime of the vehicle. The same should be the case for other products requiring spare parts for repair and maintenance. Such approach is well in line with the notion of the circular economy.

The current sector-specific hardcore restrictions in Article 5 Regulation 461/2010 read:<sup>2</sup>

*The exemption provided for in Article 4 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:*

*(a) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle;*

*(b) the restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users;*

*(c) the restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.*

### 2.1 Hardcore clause 5 (a) on the availability of spare parts

The first of the current sector-specific hardcore provisions ensures that consumers will be able to have their vehicle serviced or repaired even when the next franchised repair station is far away, as it ensures that non-franchised repairers can have access to all parts needed to service or repair a particular vehicle. The vehicle manufacturer and its distribution network are the only source of suitable spare parts in a significant number of instances. In practice we can witness that the lack of competing suppliers can have different reasons – the vehicle manufacturer may be able to exclude competition because of intellectual property rights, or the manufacturing of competing spare parts may not be commercially viable for parts that are expensive to produce and which the market does not require in sufficient numbers. In these “monopoly parts” cases there is no competition between competing suppliers of spare parts. But there can – and should – be competition between repairers, allowing consumers to patronize a local repairer of their choice. This is only possible where repairers can source all necessary spare parts.

Ideally multi-brand repairers should be able to source these not just from the franchised repairer as their immediate competitor at retail prices, but from the distributor of their choice at wholesale

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<sup>2</sup> Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 129, 28.5.2010, p. 52–57).

prices. This would promote efficiencies in parts distribution and would allow independent repairers to compete on a level playing field with authorised repairers.

In this context, FIGIEFA suggests to introduce a hardcore clause in the future VBER that would read:

*“The exemption provided for in Article [x] shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:*

- *the restriction of sales of spare parts to independent repairers which use those parts for repair and maintenance or wholesalers acting on their behalf; (...)*

At least, future vertical guidelines could identify repairers as end users to which sales cannot normally be restricted. This would make good sense against the backdrop of repairers normally selecting and installing the suitable spare part on behalf of the vehicle owner.

## **2.2 Hardcore clause 5 (b) on the ability of OE suppliers to sell products as spare parts**

The sector-specific rules for the automotive aftermarket help manufacturers of automotive components used in the original assembly of the vehicle to market their products as spare parts directly to the authorised and independent aftermarket. This ensures that both franchised and multi-brand repairers can source spare parts directly from their original maker rather than indirectly via the vehicle assembler. This principle currently codified in art. 5 (b) of Regulation 461/2010 helps create efficiencies in spare parts distribution. It should be codified in future rules also, and even apply across all sectors as it creates greater efficiencies than the present art. 4 (e) VBER.<sup>3</sup> Therefore, FIGIEFA submits that in a future VBER its current art. 4 (e) should be replaced with the wording of art. 5 (b) Regulation 461/2010, i.e.

- *the restriction of the supplier’s ability to sell spare parts, repair tools or diagnostic or other equipment effectively to authorised or independent distributors or to authorised or independent repairers or end users;*

## **2.3 Hardcore clause 5 (c) on Branding**

Component suppliers should be able to identify themselves by placing their logo or trademark on the component supplied for the original assembly of an overall product. This will allow repairers or end users to identify the original component manufacturer and make it easier for them to directly source the corresponding spare part directly from the original component manufacturer, rather than indirectly via the assembler of the overall product. To this end, a future VBER should include a hardcore restriction worded like the current art. 5 (c) Regulation 461/2010, i.e.:

(...)

- *the restriction, of the supplier’s ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied for the initial assembly or on spare parts.*

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<sup>3</sup> The current VBER merely blacklists restrictions agreed between the component manufacturer and the assembler of the overall product that would limit the component manufacturer’s sale of spare parts to the independent aftermarket but block exempts restrictions regarding the sale of the same spare parts by the same component manufacturer to franchised repairers.

### **3 Additional aspects and next steps**

#### **3.1 Benefit of the safe harbour**

By providing a safe harbour for companies with limited market shares, block exemptions create legal certainty for SMEs. Guidelines should continue to operate as a valuable guide even to interpreting vertical agreements that do not qualify for the safe harbour.

Even though a block exemption regulation does not define rights or obligations, companies are often drawn to comply with its requirements in order to benefit from the safe harbour. Hardcore restrictions may still allow for individual exemptions in theory, but in practice the incentive to observe them is very strong. The same may hold true for the Commission guidelines. FIGIEFA is not aware of any studies that would have analysed this effect in more detail but believes that examining it might reveal how specific norms in block exemption regulations and Commission guidelines can lead large companies to adopt compliant behaviours.

We are aware of examples in which parts suppliers were able to use the Commission guidelines and the sector-specific hardcore clauses to negotiate with their OE customers (i.e. the vehicle manufacturers) the contractual right to supply the independent & authorised aftermarket or to brand their OE products with their own logo (dual branding). FIGIEFA and its members have also used the Commission guidelines on tooling, warranties or access to technical information to encourage compliant behaviour in the industry.

FIGIEFA therefore urges the Commission to continue to clearly identify hardcore restrictions and make use of additional guidelines to give as much guidance as possible, keeping in mind that digitisation and the Internet of Things (IoT) create new opportunities, but can also severely restrict competition on the aftermarket of products, for example by restricting effective sale and distribution of spare parts for use by repairers. Due to the IoT technical/digital restrictions can easily be included by the manufacturer, which could enable restrictions that would generally not be allowed under 101 TFEU (e.g. by restricting access to the technical information / data / algorithms / interfaces or distort access to interfaces or interoperability). The Commission should address these issues proactively in the upcoming review process.

#### **3.2 Anti-competitive effects strengthened where essential data is unavailable**

Even though anti-competitive effects that might result from selective distribution are often outweighed by efficiencies this should not be deemed to be the case where the supplier refuses to supply data or other information essential for competition in downstream markets.<sup>4</sup> As information and data have become even more important since the Commission accepted and declared binding commitments from Daimler, Fiat, GM and Toyota in its decisions of 13 September 2007, FIGIEFA suggests that scrutiny regarding access to data is increased rather than weakened. Absent a Commission initiative on data access and digital gatekeepers it would remain likely that decisions in the Member States lead to a fragmented landscape and cause uncertainties for businesses, especially those operating in the independent aftermarket.

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<sup>4</sup> Cf. [http://europa.eu/rapid/press-release\\_IP-07-1332\\_en.htm](http://europa.eu/rapid/press-release_IP-07-1332_en.htm)

Please find attached the feedback submitted by FIGIEFA on the Roadmap on the Evaluation of the Motor Vehicle Block Exemption Regulation. Additional details will be submitted during the public consultation for Regulation 461/2010 next year.

### **3.3 Non-compete obligations**

The Commission should review whether non-compete clauses should continue to be considered to be concluded for an indefinite term whenever a contract is automatically renewable, as is presently the case under art. 5(1)(a) VBER and the Vertical Guidelines. FIGIEFA submits that there is no need to generally consider contracts with automatically renewable terms to exceed the statutory five-year limit. It should suffice for the distributor to have the opportunity to terminate the agreement to prevent its extension beyond a five-year term as this gives competitors a sufficient opportunity for market entry.

### **3.4 Dual distribution**

The new framework should also address dual distribution in greater detail. The internet has made direct sales much more common in recent years. Where different levels of trade use the same routes to approach the same consumers, competition authorities need to decide whether the horizontal or vertical aspects of their relationship prevail. Guidelines could offer clarity on what “Chinese walls” might be needed. As the new Commission reviews both the Horizontal and Vertical guidelines it should design a balanced approach, including a comprehensive look at platform models and multi-sided markets.

To protect sustainable and actual consumer/end-user choice, special attention is required when platforms are under control of parties who are also competing with the parties that use the platform for their businesses. Especially when these competitors can in practice (e.g. technically and/or commercially) not avoid to use a certain platform, the platform operator must not leverage its position to monopolize downstream markets.

### **3.5 Unilateral conduct vs. agreements**

Future guidelines should also clarify when an “agreement” is deemed to exist. Distributors may be confronted with unilateral decisions or policies of their suppliers and should not be easily deemed to have consented to these. In particular, this holds true where powerful suppliers insist on resale price maintenance.