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DRAFT COMMISSION NOTICE

Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

(Text with EEA relevance)

I. INTRODUCTION

1. Purpose of the Guidelines

(1) These Guidelines set out principles for assessing under Article 101 of the TFEU[1] particular issues arising in the context of vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts. They are aimed at helping companies to make their own assessment of such agreements. The Guidelines provide clarification on issues that are particularly relevant for the motor vehicle sector, without prejudice to the applicability of the General Vertical Guidelines ("the General Vertical Guidelines") thereto. They are therefore to be read in conjunction with and as a supplement to the General Vertical Guidelines[2].

(2) The category of agreements and concerted practices to which these Guidelines apply are those which fall within the scope of the Motor Vehicle Block Exemption. As regards vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles or repair and maintenance services for motor vehicles, the Motor Vehicle Block Exemption applies as of 1 June 2010. This means that, in order to be exempted pursuant to Article 4 thereof, those agreements need not only to fulfil the conditions for exemption under the General Vertical Block Exemption, but also must not contain any of the hardcore clauses listed in Article 5 of the Motor Vehicle Block Exemption. Article 2 thereof extends the period of validity of Regulation 1400/2002 of 31 July 2002 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector in relation to vertical agreements *"relating to the conditions under which the parties may purchase, sell or resell new motor vehicles"*. As of 1 June 2013, the General Vertical Block Exemption will also apply to agreements relating to new motor vehicles, pursuant to Article 3 of the Motor Vehicle Block Exemption. These Guidelines do not apply to vertical agreements in sectors other than motor vehicles, and the principles set out herein may not necessarily be used to assess agreements in other sectors.

(3) For the purpose of these Guidelines, the term "vertical agreement" has the meaning ascribed to it in Article 2(1) of the General Vertical Block Exemption. A vertical

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[1] With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are in substance identical. For the purposes of these Guidelines, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

[2] Reference

agreement is therefore an agreement *"entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain"*.

(4) These Guidelines are without prejudice to the possible parallel application of Article 102 of the TFEU to vertical agreements in the sector, or to the interpretation that the Court of Justice of the European Union may give in relation to the application of Article 101 to such vertical agreements.

(5) Unless otherwise stated, the analysis and arguments in the text apply to all levels of trade. The terms "supplier" and "distributor"[3] are used for all levels of trade. The General Vertical Block Exemption and the Motor Vehicle Block Exemption are collectively referred to as "the Block Exemption Regulations"

(6) The standards set forth in these Guidelines must be applied to each case having regard to the individual factual and legal circumstances. The Commission will apply[4] these Guidelines reasonably and flexibly, and having regard to the experience that it has acquired in the course of its enforcement and monitoring activities.

(7) In interpreting these Guidelines, the Commission will also take into account the Code of Conduct put forward by the car manufacturers' associations ACEA and JAMA[5] relating to certain good business practices that motor vehicle manufacturers are committed to apply so as to act in good faith in the execution of their contractual obligations towards their authorised distributors and repairers. The history of competition enforcement in this sector shows that certain restraints can be arrived at either as a result of explicit direct contractual obligations or through indirect obligations or indirect means which nonetheless achieve the same anti-competitive result. A supplier wishing to influence a distributor's competitive behaviour may, for instance, resort to threats or intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to sales to foreign consumers or the observance of a given price level. Transparent relationships between the parties would normally reduce the risk for manufacturers to be held responsible of using such indirect forms of pressure aimed at achieving anticompetitive outcomes. In particular, the observance of the Code of Conduct would make it easier for a supplier to demonstrate that allegations that contract termination was being used as a means of influencing a distributor's pro-competitive behaviour were ill-founded.

2. Structure of the Guidelines

(8) The Guidelines are structured in the following way:

- Scope of the motor vehicle block exemption and relationship with the general vertical block exemption
- The application of the additional provisions in the motor vehicle block exemption

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3 Retail level distributors are commonly referred to in the sector as "dealers".

4 Since the modernisation of the EU competition rules, the primary responsibility for such analysis lies with the parties to agreements. The Commission may however investigate the compatibility of agreements with Article 101, on its own initiative or following a complaint.

5 Code of good practice regarding certain aspects of vertical agreements in the motor vehicle sector, at http://ec.europa.eu/competition/consultations/2008_motor_vehicle/acea_annex_en.pdf.

- The treatment of specific restraints: single branding and selective distribution

II. SCOPE OF THE MOTOR VEHICLE BLOCK EXEMPTION AND RELATIONSHIP WITH THE GENERAL VERTICAL BLOCK EXEMPTION

(9) Pursuant to Article 4, the Motor Vehicle Block Exemption covers vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to repair and maintenance services for motor vehicles, also referred to as the aftermarket.

(10) Moreover, Article 2 the Motor Vehicle Block Exemption extends the validity of the provisions of Regulation (EC) No 1400/2002 relating to vertical agreements for the purchase, sale or resale of new vehicles until 31 May 2013. As of 1 June 2013, vertical agreements for the purchase, sale and resale of new motor vehicles will be covered by the General Vertical Block Exemption, pursuant to Article 3 of the Motor Vehicle Block Exemption.

(11) This legal framework reflects the prevailing competitive conditions on the relevant markets and relies on a basic distinction between the markets for the sales of new motor vehicles and the aftermarkets.

(12) On the basis of an in- depth market analysis[6], it appears that, as regards the new motor vehicle distribution sector, there are no significant competition shortcomings which would distinguish it from other economic sectors and which could require the application of rules different from and stricter than those in the General Vertical Block Exemption. The European markets for motor vehicle distribution are fairly open, with relatively low barriers to entry. Technology is an increasing factor driving competition. Model ranges have expanded, and manufacturers tend to have a global or regional presence rather than simply having a strong position on their home market. This vigorous and increasing inter-brand competition has translated into highly competitive price levels.

(13) Consequently, the competition law framework for this sector should not impose regulatory constraints which might increase distribution costs and that is not justified by the objective of protecting competition. The application of the market-share limit, the non-exemption of certain vertical agreements and the conditions provided for in the General Vertical Block Exemption normally ensure that vertical agreements for new motor vehicle distribution comply with the requirements of Article 101(3) of the TFEUwithout the need for any additional requirements over and above those applicable to other sectors.

(14) However, in order to allow all operators time to adapt to the general regime, in particular in view of relationship-specific investments which were made in the long term, the period of validity of Regulation (EC) No 1400/2002 is extended by three years until 31 May 2013 with regard to those requirements that relate specifically to vertical agreements for the purchase, sale or resale of new vehicles. Those provisions

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[6] See Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 of 28 May 2008 and the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle sector of 22 July 2009 - COM(2009) 388 -, including an Impact Assessment Report - SEC(2009) 1052.

of Regulation (EC) No 1400/2002 which relate to both agreements for new vehicles distribution and agreements for the purchase, sale and resale of automotive spare parts and/or repair and maintenance services, will apply during the period of prolongation only in respect of the former. During the period of prolongation the present Guidelines may not be used for interpreting the provisions of that Regulation. Instead, reference should be made to the Explanatory Brochure on that Regulation.[7]

(15) As regards vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles or repair and maintenance services for motor vehicles, the Motor Vehicle Block Exemption applies as of 1 June 2010. This means that, in order to be exempted pursuant to Article 4 thereof, those agreements need not only to fulfil the conditions for an exemption under the General Vertical Block Exemption, but also must not contain any of the hardcore clauses listed in Article 5 of the Motor Vehicle Block Exemption.

(16) The brand-specific nature of the markets for repair and maintenance services and for spare parts distribution means that competition on these markets is inherently less intense compared to that on the market for the sale of new motor vehicles. While reliability has improved and service intervals have lengthened, thanks to technological improvement, this evolution is outpaced by an upward price trend for individual repair jobs. On the spare parts markets, parts bearing the vehicle manufacturer's brand face competition from those supplied by the Original Equipment Suppliers (OES). This maintains price pressure on those markets, which in turn keeps pressure on prices on the repair markets, since spare parts make up a large percentage of the cost of the average repair. Repair and maintenance as a whole represents a very high proportion of total consumer expenditure on motor vehicles, which itself accounts for a major slice of the average consumer's budget.

(17) In order to address these particular competition issues arising on the motor vehicle aftermarkets, the General Vertical Block Exemption is supplemented with three additional hardcore clauses in the Motor Vehicle Block Exemption applying to agreements for the repair and maintenance of motor vehicles and for the supply of spare parts. Further guidance on those additional hardcores is given in section III of the present guidelines.

III. THE APPLICATION OF THE ADDITIONAL PROVISIONS IN THE MOTOR VEHICLE BLOCK EXEMPTION

(18) If the parties' market shares do not exceed the 30% threshold provided for in Article 3 of the General Vertical Block Exemption Regulation read in conjunction with Article 4 of the MVBER, their agreements will not benefit from the block exemption if they contain serious restrictions of competition, commonly referred to as hardcore restrictions. These restrictions are listed in Article 4 of the General Vertical Block Exemption and Article 5 of the Motor Vehicle Block Exemption. Including any of such restrictions in an agreement gives rise to the presumption that the agreement falls

[7] Explanatory brochure for Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector
http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/explanatory_brochure_en.pdf

within Article 101(1). It also gives rise to the presumption that it is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 101(3) EC in an individual case.

(19) One of the Commission's objectives as regards competition policy for the motor vehicle sector is to promote spare parts manufacturers' access to the automotive aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers. The availability of such parts brings considerable benefits to consumers, especially since there are often large differences in price between carmaker-branded parts and alternative brands. Other than parts bearing the trademark of the vehicle manufacturer (OEM parts) there are parts made according to specifications of the vehicle manufacturer concerned on the same production line as the original components of the vehicle (OES parts), while other parts matching the quality of the original components are made by "matching quality" parts manufacturers.

(20) Article 4(e) of the General Vertical Block Exemption describes it as a hardcore restriction for an agreement between a supplier of components and a buyer who incorporates those components, to prevent or restrict the supplier of components to sell its components to end-users, independent repairers and service providers. Articles 5(a) to (c) of the Motor Vehicle Block Exemption lay down three additional hardcore clauses relating to restrictions on the ability of original component suppliers (also called original equipment suppliers or OES) to sell spare parts to authorised repairers, restrictions on authorised repairers' ability to sell parts to independent repairers, as well as restrictions limiting OES’ ability to affix their logo on parts supplied to vehicle manufacturers for the purposes of first assembly.

(21) Article 5(a) of the Motor Vehicle Block Exemption concerns the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers. This provision is most relevant for a particular category of parts, sometimes referred to as captive parts, which may only be obtained from the vehicle manufacturer or from members of its authorised networks. If a supplier and a distributor agree that such parts may not be supplied to independent repairers, this agreement would be likely to foreclose such operators from the market for repair and maintenance services and fall foul of Article 101.

(22) Article 5(b) concerns any direct or indirect restriction agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods or services to authorised and/or independent distributors and repairers. So-called "tooling arrangements" between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type. An arrangement whereby a vehicle manufacturer provides the tool to a component manufacturer for the production of certain components, shares in its project development costs, or contributes IPRs and know-how and does not allow that tool to be used for direct aftermarket supply will not normally be caught by Article 101(1). Reference should be made in this respect to

the Notice on Subcontracting[8]. On the other hand, if a vehicle manufacturer obliges the component supplier to transfer its ownership or intellectual property rights in such a tool or bears only an insignificant part of the project development costs, or does not contribute any essential IPR or know-how, this will not be considered to be a genuine sub-contracting arrangement and will be subject to the provisions of the block exemption regulations.

(23) Article 5(c) relates to 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 which limits the latter's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts. In order to improve consumer choice, repairers and consumers should be enabled to identify which spare parts from alternative suppliers match a given vehicle, other than those bearing the carmaker's brand. Putting the trade mark or logo on the components and on spare parts facilitates the identification of compatible replacement parts of OES or matching quality suppliers in an easy manner.

IV. THE ASSESSMENT OF PARTICULAR RESTRAINTS

(24) Parties to vertical agreements in the motor vehicle sector should use the present document as a supplement to and in conjunction with the General Vertical Guidelines in order to assess the compatibility of particular restraints with Article 101 of the Treaty. This section gives particular guidance as to single branding and selective distribution, which are two areas which may have particular relevance for assessing the category of agreements referred to in Section II above. These two areas were identified in the Commission's Communication of July 2009 as necessitating further explanation. Each of these areas is therefore dealt with under two sub-sections below.

1. Single branding obligations

i. Assessment of single-branding obligations under the Block Exemption Regulations

(25) Article 5 of the General Vertical Block Exemption read in conjunction with Articles 3 and 4 of the Motor Vehicle Block Exemption excludes certain obligations, referred to as "excluded restrictions", from its coverage even though the market share threshold is not exceeded. In particular, pursuant to Article 5(a) of the General Vertical Block Exemption read in conjunction with Article 3 of the Motor Vehicle Block Exemption, a supplier and a distributor which do not hold more than 30% share of the relevant market may agree on a single-branding obligation that obliges the distributor to purchase vehicles only from the supplier or from other firms designated by the supplier, on condition that the duration of such non-compete obligations is limited to five years or less. The same principles apply to agreements between suppliers and authorised repairers.[9] A renewal beyond five years requires explicit consent of both

[8] Commission Notice on Subcontracting Agreements (1979 OJ C 1/2).

[9] The reference point for the beginning of the five-year period is the start of the contractual relationship between the parties, rather than the replacement of one contractual document by another that covers the same subject matter. In particular, the fact that a pre-existing contractual relationship ceases to become subject to Regulation (EC) No 1400/2002 and instead falls within the scope of the General Vertical

parties, and no obstacles should exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period. Non-compete obligations are not covered by the Block Exemption Regulations when their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulations. However, the Block Exemption Regulations continues to apply to the remaining part of the vertical agreement.

(26) Non-compete obligations in vertical agreements do not constitute hardcore restrictions, but, depending on the market circumstances, can have negative effects. Anticompetitive foreclosure of competing suppliers by raising barriers to entry or expansion is regarded as the most harmful effect which may cause the agreements to fall under Article 101(1).[10] It may harm consumers in particular by increasing the prices of the products, limiting the choice of products, lowering their quality or reducing the level of product innovation.

(27) However, non-compete obligations may also have positive effects which may justify the application of Article 101(3). Non-compete obligations may in particular help to overcome a «free-rider» problem. One supplier may free-ride on the promotion efforts of another supplier, for instance where one invests in promotion at the distributor's level, that may also attract customers for the vehicles of a competing brand displayed at that distributors premises. The same applies to investments made by the supplier which may be used by the distributor to sell vehicles of competing manufacturers, such as investments in training.

(28) Another positive effect of non-compete obligations in the motor vehicle sector relates to the enhancement of the brand image and reputation of the distribution network. The restraint may help to create a brand image by imposing a certain measure of uniformity and quality standardisation on the distributors, thereby increasing the attractiveness of the motor vehicles of that brand to the final consumer and increasing its sales.

(29) Pursuant to Article 1(b) of the General Vertical Block Exemption Regulation, a non-compete obligation is defined as:

- any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or

- any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market.

Block Exemption Regulation will not allow the supplier to stipulate that its existing distributors sell or repair and maintain only its brands for a period of five years.

[10] As regards the relevant factors to be taken into account to carry out the assessment of non-compete obligations under Article 101(1), see the relevant section in the General Vertical Guidelines, in particular § 125 to 146.

(30) Apart from direct means to tie the distributor to its own brand(s), a supplier may also take recourse to indirect means having the same effect. In the motor vehicle industry indirect means causing the distributor not to carry another brand may include qualitative standards specifically designed to discourage the distributors to sell vehicles of competing brands,[11] bonuses conditional on the acceptance by the distributor to sell exclusively one brand, target rebates or certain other requirements such as the requirement to set up a separate legal entity for the competing brand or the obligation to present the additional competing brand in a separate showroom in a geographic location where the fulfilment of such a requirement would not be economically viable (e.g. sparsely populated areas).

(31) The block exemption provided for in the General Vertical Block Exemption Regulation covers all forms of direct or indirect non-compete obligations provided that the market share of the supplier and its distributor does not exceed 30% and the duration of that non-compete obligation does not exceed 5 years. However, even in cases where individual agreements comply with these conditions, the use of non-compete obligations may result in anti-competitive effects not outweighed by their positive effects. In the motor vehicle industry, such net anticompetitive effects could in particular be the result of cumulative effects leading to the foreclosure of competing brands.

(32) For the distribution of motor vehicles at the retail level, foreclosure of this type is unlikely to occur in markets where all suppliers have market shares below 30 % and where the total tied market share is below 40%.[12] In a situation where there is one non-dominant supplier with a market share of more than 30% of the relevant market whereas all other suppliers' market shares are below 30%, cumulative anticompetitive effects are unlikely as long as the total tied market share is not exceeding 30%.

(33) However, if access to the relevant market for the sale of new vehicles and competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements containing single branding obligations, the benefit of the block exemption may be withdrawn by the Commission, pursuant to Article 6 of the General Vertical Block Exemption.[13] In case of a national market, the National Competition Authorities of that Member State may also withdraw the benefit of the Block Exemption in respect of that territory.

(34) With regard to the assessment of minimum purchasing obligations calculated on the basis of the distributor's total annual requirements, a withdrawal of the block exemption in case of cumulative anticompetitive effects may be warranted even if the minimum purchasing obligation is below the 80% limit established in Article 1(b) of the General Vertical Block Exemption Regulation. The parties need to consider, whether in the light of the relevant factual circumstances, an obligation on the distributor to ensure that a given percentage of its total purchases of vehicles bear the supplier's brand will prevent the distributor from taking on one or more additional competing brands. From this perspective, an obligation on the distributor to purchase less than 20% of its annual purchases from a competing supplier could force the latter to split its envisaged sales volume in a given territory over several distributors, leading

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11 See cases BMW IP/06/302 - 13.03.2006 and Opel 2006, IP/06/303 - 13.03.2006.

12 See Vertical Guidelines at para 137.

13 See Vertical Guidelines, paras 70-76

to duplication of investments and a fragmented sales presence. Limiting the distributors' purchases of a competing brand to less than 20% could therefore amount to an artificial barrier to entry by raising rivals' cost of entry to a level, which makes entry economically not viable. In such a case, a minimum purchasing obligation may be regarded as anti-competitive even below the 80% ratio established in Article 1(b) of the General Vertical Block Exemption Regulation.

ii. Assessment of single-branding obligations not covered by the Block Exemption Regulations

(35) Parties may also be called upon to assess the compatibility with the competition rules of single-branding obligations in respect of agreements that do not qualify for block exemption because the parties' market shares exceed 30% or the agreement is not in compliance with the 5-year duration limit. In particular, spare parts distribution and authorised repair agreements would fall outside the safe harbour granted by the Block Exemption Regulations when the spare parts supplier's market share or the authorised repairer's market share exceeds the 30% threshold, which is likely to be the case for most of such agreements. The same may be true in certain Member States as regards agreements for the distribution of new motor vehicles where the market share of the supplier exceeds 30%. The parties would therefore have to subject agreements containing single-branding obligations to individual scrutiny to see whether they are caught by Article 101(1) and if so, whether off-setting efficiencies could be demonstrated such as would allow the agreements to benefit from the exception laid down in Article 101(3) of the Treaty. For the assessment in an individual case the general principles as set out in section VI.2.1 of the Guidelines on Vertical Restraints shall apply.

2. Selective distribution

(36) Selective distribution is currently the predominant form of distribution in the motor vehicle sector; its use is widespread in motor vehicle distribution, as well as for repair and maintenance and the distribution of spare parts.

(37) In purely qualitative selective distribution, distributors and repairers are only selected on the basis of objective criteria required by the nature of the product, such as the technical skills of sales personnel, the layout of sales facilities, sales techniques and the type of sales service to be provided by the distributor[14]. The application of such criteria does not put a direct limit on the number of distributors or repairers admitted to the supplier's network. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary.

[14] See for example judgment of the Court of First Instance in Case T-88/92 Groupement d'achat Édouard Leclerc v Commission [1996] ECR II-1961.

(38) Whereas qualitative selective distribution involves the selection of distributors or repairers only on the basis of objective criteria required by the nature of the product or service, quantitative selection adds further criteria for selection that more directly limit the potential number of distributors or repairers either by directly fixing their number, or for instance, requiring a minimum level of sales. Networks based on quantitative criteria are generally held to be more restrictive than those that rely on qualitative selection alone, and are accordingly more likely to be caught by Article 101(1).

(39) If selective distribution agreements are caught by Article 101(1), the parties will need to assess whether their agreements can benefit from the block exemption, or individually, from the exception in Article 101(3) of the Treaty.

i. The assessment of selective distribution under the Block Exemption Regulations

(40) The Block Exemption Regulations exempt selective distribution agreements, irrespective of whether quantitative or purely qualitative selection criteria are used, so long as the parties' market shares do not exceed 30%. However, that exemption is conditional on the agreements not containing any of the hardcore restrictions set out in Article 4 of the General Vertical Block Exemption and Article 5 of the Motor Vehicle Block Exemption, nor any of the excluded restrictions described in Article 5 of the General Vertical Block Exemption.

(41) Three of the hardcore restrictions in the General Vertical Block Exemption relate specifically to selective distribution. Article 4(b) describes as hardcore the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, except (…) the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is operated, (…). Article 4(c) excludes from the exemption agreements restricting active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment, while Article 4(d) relates to the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade. These three hardcore restrictions have special relevance for motor vehicle distribution.

(42) The Single Market has enabled consumers to purchase motor vehicles within the Single Market and take advantage of price differentials between Member States, and the Commission views the protection of parallel trade in this sector as an important competition objective. The ability of a consumer to buy goods in other Member States is especially important as far as motor vehicles are concerned, given the high value of the good and the direct benefits in the form of lower prices accruing to consumers buying motor vehicles elsewhere in the EU. The Commission is therefore concerned that distribution agreements should not restrict parallel trade, since this cannot be expected to meet the conditions of Article 101(3) [15].

[15] The notion that cross-border trade restrictions may harm consumers has been confirmed by the Court in case C-551/03 P, General Motors, [2006] ECR 1-3173, paragraphs 67-68; Case C-338/00 P, Volkswagen/Commission, [2003 ECR I-9189, paras 44 and 49, and Case T-450/05, Peugeot/Commission, judgment of 9.07.2009, not yet published, paras 46-49.

(43) The Commission has brought several cases against vehicle manufacturers for impeding such trade, and its decisions have been largely confirmed by the European Courts[16]. This experience acquired by the Commission shows that restrictions on parallel trade may take a number of forms. A supplier may, for instance, put pressure on distributors, threaten them with contract termination, fail to pay bonuses, refuse to honour warranties on vehicles imported by a consumer or cross-supplied between distributors established in different Member States, or make a distributor wait significantly longer for delivery of an identical vehicle when the consumer in question is resident in another Member State.

(44) One particular example of indirect restrictions on parallel trade arises when a distributor is unable to obtain new motor vehicles with the appropriate specifications needed for cross-border sales. In these specific circumstances, the exemptability of a distribution agreement may be held to depend on whether a supplier provides its distributors with vehicles with specifications identical to those sold in other Member States for sale to consumers from those countries (so-called "availability clause")[17]. In particular, this would place a restriction on a distributor's ability to sell actively and passively to end users from other parts of the Single Market and may be seen as falling foul of Article 4(c) of the General Vertical Block Exemption, thereby giving rise to the presumption that the agreement falls within Article 101(1), and to the exclusion of the distribution agreement in question from the benefit of the block exemption[18].

(45) For the purposes of the application of the Block Exemptions, and in particular as regards the application of Article 4(c) of the General Vertical Block Exemption, the notion of "end users" includes leasing companies. This means in particular that distributors in selective distribution systems may not normally be prevented from selling to such firms. However, a supplier using selective distribution may prevent dealers from supplying contract goods to leasing companies when there is a verifiable risk that the leasing company will resell these motor vehicles while they are new.

(46) The notion of "end users" also encompasses that of "intermediaries", which perform an important role in the motor vehicle sector, in particular by facilitating consumers' purchases of vehicles in other Member States. An intermediary is a person or an undertaking which purchases a new motor vehicle on behalf of a named consumer without being a member of the distribution network. Evidence of intermediary status should as a rule be provided by a valid mandate or request including the name and address of the consumer. Intermediaries are to be distinguished from independent resellers, which purchase vehicles for resale and do not operate on behalf of named consumers. Independent resellers are not to be considered as end users for the purposes of the Block Exemptions.

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16 Commission Decision of 28 January 1998 (Case IV/35.733 — VW), Commission Decision of 20 September 2000 (Case COMP/36.653 - Opel) Official Journal L 59, 28.02.2001, pages 1-42, Commission decision of 10 October 2001 (Case COMP/36.264 - Mercedes-Benz) Official Journal L 257, 25.09.2002, pages 1-47, Commission Decision of 5 October 2005 (Cases F-2/36.623/36.820/37.275 – SEP et autres / Peugeot SA).

17 Judgment of the Court of 17 September 1985. Ford - Werke AG and Ford of Europe Inc. v. Commission of the European Communities. Joined cases 25 and 26/84. European Court reports 1985 Page 2725.

18 The same principle would apply to a failure to provide such vehicles to a distributor in an exclusive distribution system.

ii. The assessment of selective distribution outside the scope of the block exemption regulations

(47) As paragraph 171 of the General Guidelines explains, the possible competition risks brought about by selective distribution are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors and facilitation of collusion between suppliers or buyers.

(48) To assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. As pointed out in paragraph 37 above, qualitative selective distribution is normally not caught by Article 101(1) of the Treaty[19].

(49) The fact that a network of agreements does not benefit from the block exemption because the market share of one or more of the parties is above the 30% threshold for exemption does not imply that such agreements are illegal. Instead, the parties to such agreements need to subject them to an individual analysis to check whether they fall under Article 101(1) and, if so, whether they may nonetheless benefit from the exception in Article 101(3).

(50) As regards the specificities of new motor vehicle distribution, quantitative selective distribution will generally comply with the requirements of Article 101(3) if the parties' market shares do not exceed 40%. However, the parties to such agreements should bear in mind that the presence of particular selection standards could affect the compatibility of their agreements with Article 101(3). For instance, although the use of location clauses[20] in selective distribution agreements for new motor vehicles will usually bring efficiency benefits in the form of more efficient logistics and predictable network coverage, these benefits may be outweighed by disadvantages if the market share of the supplier is very high, and in these circumstances such clauses might not be able to benefit from the exception in Article 101(3).

(51) Individual assessment of selective distribution for authorised repairers also raises specific issues. In particular, the selection standards for being admitted to the authorised networks are currently in practice similar for all authorised repairers within each network, which implies that the fixed and, to a lesser extent, variable costs of all such repairers are significantly aligned. Moreover, such repairers generally have to provide a full range of repair and maintenance services. Insofar as a market exists[21] for

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19 It should be recalled however that, in accordance with the established case law of the European Courts, purely qualitative selective distribution systems may nevertheless restrict competition where the existence of a certain number of such systems does not leave any room for other forms of distribution based on a different way of competing. See in particular, the judgment of the Court of First Instance of 12 December 1996. - *Groupement d'achat Édouard Leclerc v Commission of the European Communities.* - Case T-88/92. This situation will generally not arise on the markets for the sale of new vehicles, on which leasing and other similar arrangements are a valid alternative to outright purchase of a vehicle.

20 The term "location clause" refers to agreements containing a prohibition on a member of a selective distribution system from operating out of an unauthorised place of establishment.

21 For the majority of motor vehicles, there is a separate brand-specific aftermarket, in particular because the buyers are private individuals or SMEs that purchase vehicles and after-market services separately and do not have systematic access to data permitting them to assess overall costs of vehicle ownership in advance.

repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific; the main competitive forces on the aftermarket are independent repairers together with authorised repairers of the brand in question, and competition is therefore by nature limited. This is even more so in respect of repairs on newer vehicles, only a small percentage of which are carried out in independent repair shops because the owners often regard a "full dealer service history" as a way of maintaining the vehicles' residual value. It is therefore important to preserve competition both between the members of authorised repair networks and between those members and independent repairers. To this end, particular attention should be paid to three specific conducts which may restrict such competition by preventing access of independent repairers to technical information, or by misusing the legal and/or extended warranties to exclude independent repairers, or by making the access to authorised repairer networks conditional upon non-qualitative criteria.

Access to technical information by independent operators

(52) The Commission regards independent repairers as providing vital competitive pressure, as their business model and their related operating costs are different to those in the authorised networks. Therefore, although as explained above purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anti-competitive effects[22], qualitative selective distribution agreements concluded with authorised repairers and/or parts distributors may be caught by Article 101(1) if, within the context of those agreements, one of the parties acts in a way that forecloses independent repairers or independent parts distributors from the market, for instance by failing to release technical repair and maintenance information to these operators.

(53) Suppliers provide their authorised repairers with the full scope of technical repair information needed to perform repair and maintenance work on vehicles of their brands and are often the only firms able to provide repairers with all of the technical information that they need on the brands in question. In such circumstances, if the supplier fails to provide independent repairers or independent parts distributors with appropriate access to its brand-specific technical repair and maintenance information, possible negative effects stemming from its agreements with authorised repairers and/or parts distributors could be strengthened, and cause the agreements to fall within Article 101(1).

(54) Moreover, the lack of access to necessary technical information could cause independent actors market position to decline, leading to consumer harm, in terms of a significant reduction in choice of spare parts, higher prices for repair services, a reduction in choice of repair outlets and potential safety problems. In these circumstances, the efficiencies that might normally be expected to result from the authorised repair and parts distribution agreements would not be such as to offset these anti-competitive effects, and the agreements in question would consequently fail to comply with the conditions laid down in Article 101(3).

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[22] As clarified by the European Courts, purely qualitative selective distribution may fall under Article 101(1) where the existence of a certain number of qualitative selective distribution systems on the same market does not leave any room for other forms of distribution based on a different way of competing. This will generally not be the case on the markets for repair and maintenance as long as independent repairers provide consumers with an alternative channel for the upkeep of their vehicles.

(55) Regulation (EC) No 715/2007[23] provides for a system of dissemination of repair and maintenance information in respect of passenger cars put on the market as of 1 September 2009; whereas Regulation (EC) 595/2009[24] provides for such as system in respect of commercial vehicles put on the market as of 31 December 2012. The Commission will take these Regulations into account when assessing cases of suspected withholding of technical repair and maintenance information concerning vehicles commercialised before those dates. When considering whether withholding a particular item of information may lead its agreements to be caught by Article 101, a number of factors should be considered, including:

- Whether the item in question is made available to members of the relevant authorised repair network. If it is made available to the authorised network in whatever form, it may also have to be made available to independent operators on a non-discriminatory basis;

- Whether the information in question will ultimately[25] be used for the repair and maintenance of motor vehicles, or rather for another purpose;

- Whether withholding the information will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market;

- Whether the item in question is technical repair and maintenance information, or information of another type, such as commercial information, which may legitimately be withheld.

(56) As to this latter point, technological progress implies that the notion of technical information is fluid. Currently, particular examples of technical information include software, fault codes and other parameters, together with updates, which are required to work on electronic control units (ECUs) with a view to introducing or restoring settings recommended by the supplier, vehicle identification methods, parts catalogues, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network. The list of items set out in Article 6(2) of Type Approval Regulation 715/2007 should also be used as a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty.

(57) The modalities for supplying technical information are also important for assessing the compatibility of authorised repair agreements with Article 101. Access must be given upon request and without undue delay, and the price charged for the information should not discourage access to it by failing to take into account the extent to which

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[23] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 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, OJ L 171 of 29.6.2007, p.1, as implemented and amended by Commission Regulation (EC) No 692/2008 of 18 July 2008 (OJ L 199, 28.7.2008, p. 1).

[24] Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro 6) and on access to vehicle repair and maintenance information (OJ L 188 of 18.7.2009, p. 1).

[25] Such as information supplied to publishers for resupply to motor vehicle repairers.

the independent operator uses it. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to its authorised repairers and must not oblige independent operators to purchase more than the information necessary to carry out the work in question.

(58) The above considerations also apply to the availability of tools and training to independent operators. "Tools" in this context includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.

Misuse of warranties

(59) Qualitative selective agreements may also be caught by Article 101(1) if the supplier acts more directly to reserve repairs on certain categories of vehicle to the members of its authorised networks, for instance by making the manufacturer's warranty, whether legal or extended, conditional on the end user having all repairs, including those not covered by warranty, carried out within the authorised repair networks. It also seems doubtful that such a practice could bring benefits to consumers such as could allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty. However, if a supplier refuses to honour a particular warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of an independent repairer to carry out a particular repair or maintenance operation in the correct manner, this will have no bearing on the compatibility of its authorised repair agreements with the competition rules.

Access to authorised repairer networks

(60) As already noted, competition between authorised and independent repairers is not the only form of competition that needs to be taken into account when analysing the compatibility of authorised repair agreements with Article 101; parties should also assess the degree to which authorised repairers within the relevant network are able to compete with one another. The main factor driving the intensity of such competition relates to the conditions of access to the network established under the standard authorised repairer agreements. In view of the generally strong market position of networks of authorised repairers, their particular importance for owners of newer vehicles, and the fact that consumers are not prepared to travel long distances to have their cars repaired, the Commission considers it important that access to the authorised repair networks should generally remain open to all firms that meet defined quality criteria. Submitting applicants to quantitative selection is likely to cause the agreement to fall within Article 101(1).

(61) A particular case arises when agreements oblige authorised repairers to also sell new motor vehicles. Such agreements would be likely to be caught by Article 101(1), since the obligation in question is not required by the nature of the contract services. Moreover, for an established brand, agreements containing such an obligation would not normally be able to benefit from the exception in Article 101(3), since the impact would be to severely restrict access to the authorised repair network, thereby reducing competition without bringing corresponding benefits to consumers. However, in certain cases, a supplier wishing to launch a brand on a particular geographic market

might initially find it difficult to attract distributors willing to make the necessary investment unless they could be sure that they would not face competition from "stand-alone" authorised repairers that sought to free-ride on these initial investments. In these circumstances, contractually linking the two activities for a limited period of time would have a pro-competitive effect on the vehicle sales market by allowing a new brand to launch, and would have no effect on the potential brand-specific repair market, which would in any event not exist if the vehicles could not be sold. The agreements in question would therefore be unlikely to be caught by Article 101(1).