

# UK competition law: Motor Vehicle Block Exemption Regulation

CMA's recommendation

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# 1. Summary

- 1.1 The purpose of this document is to make a recommendation to the Secretary of State for Business, Energy and Industrial Strategy (Secretary of State) as to whether or not the existing retained Motor Vehicle Block Exemption (the retained MVBBER) should be renewed or varied when it expires on 31 May 2023.<sup>1</sup>
- 1.2 On 21 July 2022, the Competition and Markets Authority (CMA) published a [consultation document](#) pursuant to section 8(1) of the Competition Act 1998 (the Act).<sup>2</sup> In the consultation document, the CMA sought views on its proposed recommendation to the Secretary of State to renew the block exemption and to make certain improvements. This consultation (the Consultation) ran until 22 August 2022, and the CMA received a total of fourteen responses. Broadly speaking, stakeholders were supportive of the CMA's recommendations. They suggested areas where the block exemption could be improved or adapted which generally coincided with the areas for improvement identified by the CMA in the Consultation. We are very grateful for the useful contributions from respondents. The responses to the Consultation will be published on the relevant CMA webpage in due course.
- 1.3 Having carefully considered the various issues, the CMA is recommending that the Secretary of State replace the retained MVBBER with a United Kingdom (UK) Motor Vehicle Block Exemption Order (MVBEO) updated to reflect market developments. The CMA is recommending that the UK MVBEO be in place until 31 May 2029.

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<sup>1</sup> Regulation 461/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector. The MVBBER is one of the 'retained exemptions' from EU law that was retained in UK law after EU law generally ceased to have effect in the UK on 1 January 2021, as a result of a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

<sup>2</sup> Under section 8(1) of the Act, before making a recommendation under section 6(1), the CMA must publish details of its recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected; and consider any representations about it which are made to it.

## 2. Introduction

- 2.1 The retained MVBBER provides a block exemption for vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles.<sup>3</sup>
- 2.2 The Competition Act 1998 (the Act) prohibits anticompetitive agreements between businesses (known as the Chapter I prohibition).<sup>4</sup> The prohibition applies to agreements and concerted practices between undertakings and to decisions by associations of undertakings (eg trade associations) which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (UK) and which may affect trade within the UK.
- 2.3 However, section 9(1) of the Act provides that an agreement is exempt from the Chapter I prohibition if it:
- (a) contributes to
    - (i) improving production or distribution, or
    - (ii) promoting technical or economic progress
  - (b) while allowing consumers a fair share of the resulting benefit; and
  - (c) does not
    - (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
    - (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 2.4 An agreement may be individually recognised as exempt by a competition authority or a court and, in addition, certain types of agreement will be treated as automatically exempt if they meet conditions set out in a 'block exemption' regulation or order applicable to that category of agreements.

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<sup>3</sup> Vertical agreements are agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice concerned, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell, or resell certain goods or services (article 3(2) of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022

<sup>4</sup> The Act, section 2.

- 2.5 Block exemptions have several benefits for businesses. First, they provide legal certainty to businesses as they enable them to know in advance how to ensure that their agreements comply with competition law. Second, they avoid placing on businesses the burden of scrutinising a large number of agreements that are likely to satisfy the requirements for exemption under section 9(1) of the Act. Third, the existence of a block exemption also ensures consistency of approach by providing a common framework for businesses to assess their agreements against the Chapter I prohibition.
- 2.6 Block exemptions also help to ensure that the CMA does not need to spend time scrutinising what are essentially benign agreements, and so is able to concentrate its resources on other matters that are more likely to give rise to significant competition concerns. In this regard, the CMA notes that the various conditions of the current block exemptions ensure that they are unlikely to apply to agreements that may give rise to significant competition concerns.<sup>5</sup>
- 2.7 The retained MVBBER sets out a block exemption from the Chapter I prohibition that applies to certain categories of agreements related to the purchase, sale, and resale of spare parts for motor vehicles, and to the provision of repair and maintenance services for motor vehicles. Vertical agreements for these aftermarkets benefit from the block exemption only if, in addition to the conditions set out in the retained MVBBER, they also comply with the conditions of the Vertical Agreements Block Exemption Order 2022 (VABEO).
- 2.8 Vertical agreements for the purchase, sale and resale of new motor vehicles also used to be covered by the MVBBER,<sup>6</sup> but it was determined in 2013 that they should be subject to assessment under the Vertical Agreements Block Exemption Regulation (VBER), which has now been replaced in the UK by the VABEO
- 2.9 The MVBBER was retained in UK law<sup>7</sup> following the UK's withdrawal from the European Union (EU) and the end of the Transition Period,<sup>8</sup> and is due to expire on 31 May 2023.

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<sup>5</sup> For example, through the operation of the market share threshold and list of hardcore and excluded restrictions.

<sup>6</sup> European Commission Regulation No. 1400/2002.

<sup>7</sup> See fn1 above.

<sup>8</sup> Previously, the EU MVBBER applied in the UK and provided an automatic exemption for vertical agreements meeting their conditions. The block exemption set out in this Regulation is substantively the same as the retained MVBBER except that it applies to the EU rather than the UK.

- 2.10 The retained MVBBER regime pursues general and specific objectives designed to ensure that the requirements of section 9(1) of the Act are met. The specific objectives of the retained MVBBER regime are:<sup>9</sup>
- (a) to provide legal certainty to UK stakeholders in the motor vehicle sector as to which vertical agreements can be presumed to be exempt for the purposes of the Chapter I prohibition;
  - (b) to reduce the risk of ‘false positives’ (ie over-exemption) and ‘false negatives’ (ie under-exemption);
  - (c) to provide a common framework of assessment for businesses, in order to ensure consistency and certainty in the application of the Chapter I prohibition; and
  - (d) to ensure effective competition in the motor vehicle aftermarket sector.
- 2.11 Since the legal, economic and factual background has changed since the retained MVBBER first came into force, the CMA has considered whether the retained MVBBER regime and its objectives remain appropriate, taking into account the specific features of the UK economy and the needs of British consumers.
- 2.12 In its review of the retained MVBBER (formally launched in March 2022) the CMA has carefully assessed and considered the written submissions received during the Consultation. Before the opening of the Consultation, the CMA also met certain stakeholders in order to gather views on the operation of the retained MVBBER regime in the UK. We have taken those views into account in addition to those received in response to the Consultation. Furthermore, to the extent that such issues are also relevant to the review of the retained MVBBER, the CMA has also drawn on relevant input to its previous review of the retained VBER.<sup>10</sup> In particular, the CMA has taken into account the views expressed by representatives from the automotive industry.<sup>11</sup>
- 2.13 The CMA has also taken into consideration the evidence from the European Commission’s review of the equivalent EU block exemption (EU MVBBER).

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<sup>9</sup> In addition to the retained MVBBER, the European Commission has published guidance (EU Supplementary Guidelines) that provide high-level guidance on the application of the MVBBER and on the circumstances in which an agreement for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles may restrict competition and, if it does, whether it can benefit from an individual exemption in the absence of an applicable block exemption.

<sup>10</sup> As explained in paragraphs 5.1– 5.2, one of the conditions for the benefit of the retained MVBBER to apply is that the general conditions of the VBER are all met.

<sup>11</sup> Retained Vertical Agreements Block Exemption Regulation consultation document. See in particular Annex D: Evidence gathering setting out the views expressed at the roundtable sessions held by the CMA as part of the review process.

The European Commission officially launched the evaluation process for the EU MVBER in December 2018 (the Evaluation) at a time when the UK was still a member of the European Union.<sup>12</sup> This Evaluation was based on a broad range of information sources: the European Commission's monitoring and enforcement activities in the sector; a public consultation with stakeholders; a fact-finding study regarding the evolution of the motor vehicle sector between 2007 and 2017; and two targeted consultations with national competition authorities (NCAs) to (i) gather data on the NCAs' enforcement of the EU MVBER regime and equivalent national rules; and (ii) collect their opinions on the performance of the EU MVBER regime.

- 2.14 After the publication of the CMA's final recommendation, the CMA envisages preparing guidance to accompany the UK MVBER and will consult on a draft version of such guidance in due course.<sup>13</sup>

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<sup>12</sup> EC (2021), Commission Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010 (Evaluation Report).

<sup>13</sup> Subject to the CMA's recommendation being accepted by the Secretary of State.



### 3. The CMA's recommendation

- 3.1 The CMA's recommendation to the Secretary of State is that it would be appropriate to replace the retained MVBER when it expires on 31 May 2023 with a block exemption that is tailored to the specific needs of businesses operating in the UK and UK consumers.<sup>14</sup>
- 3.2 The CMA's recommendation is that any MVBER should be broadly similar to the retained MVBER that expires on 31 May 2023, in order to ensure the continuity of the current regime for businesses, while making some amendments to improve the block exemption and reflect market developments.
- 3.3 The CMA's recommendation reflects the broad consensus in the responses to the Consultation and the evidence we reviewed that a motor vehicle block exemption is a relevant and useful tool for businesses that increases legal certainty compared to a situation where businesses would have to rely solely on self-assessment.<sup>15</sup>
- 3.4 The Evaluation indicates that the MVBER regime has been efficient and that the costs of assessing compliance of vertical agreements in the motor vehicle sector with competition law are lower than they would have been absent the MVBER. Moreover, the Evaluation has shown that the framework provided by MVBER, VBER, EU Supplementary Guidelines and EU Vertical Guidelines, and other relevant legislation, is coherent and consistent.<sup>16</sup>
- 3.5 Given the strong evidence and views in favour of a block exemption for motor vehicle aftermarket agreements, the CMA is recommending that there should continue to be a block exemption and that letting the retained MVBER expire without providing for replacement is not currently appropriate in the UK. In this context, the CMA considers that motor vehicle aftermarket agreements falling within the scope of the current block exemption are likely to continue to satisfy the requirements for exemption under section 9(1) of the Act.
- 3.6 However, the evidence we have seen also indicates that the retained MVBER regime should be revised in certain respects. The evidence indicates certain issues with the retained MVBER that may need to be addressed, including

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<sup>14</sup> The replacement will result in the adoption of a UK block exemption order under section 6 of the Act (Part I of the Act), the provisions of which will be interpreted in accordance with section 60A of the Act (see the CMA's Guidance on the functions of the CMA after the end of the Transition Period (Brexit Guidance), paragraphs 4.18–4.24).

<sup>15</sup> This is based on the responses to the Consultation, preliminary feedback received from UK stakeholders and the Evaluation Report.

<sup>16</sup> Evaluation Report, pp12-13.

issues relating to the definitions of ‘spare parts’ (paragraphs 5.24 – 5.26) and access to technical and vehicle information (paragraphs 5.62 – 5.91). We address these specific recommendations in more detail in Part 5.

- 3.7 The CMA intends to provide further clarity in relation to certain issues by way of revised guidance, instead of recommending that the Secretary of State address the issue in the block exemption itself. These issues are covered in more depth in Part 5, but include:
- (a) Vehicle warranties and repair/maintenance carried out by independent providers (paragraphs 5.92 – 5.98).
  - (b) Limits on the numbers of authorised repairers within a brand network (paragraphs 5.99 – 5.107).
- 3.8 While it is important to ensure that the scope of any future MVBE0 is clearly set out, an advantage of providing greater clarity through guidance is that, in principle, the guidance can more easily be adapted to reflect important market developments that the CMA becomes aware of during the life of the block exemption. The main disadvantage is that guidance provides less legal certainty than changes to the text of the block exemption itself. Conversely, making clarificatory changes in the text of the block exemption provides a greater degree of legal certainty than providing additional guidance, but also less flexibility to make additional clarifying changes during the life of the block exemption.
- 3.9 The CMA has been mindful of the approach proposed in the EU by the European Commission. The CMA is conscious that there may be advantages in divergence from the EU in certain circumstances – for example to address features specific to UK markets and better protect UK consumers. Equally, the CMA recognises that, all things being equal, there can also be benefits in consistency between the EU and the UK block exemptions, particularly for the various businesses with activities in both the UK and the EU (eg by reducing administrative burdens and compliance costs). When deciding about how to best address the various substantive issues at play we have sought to be guided by what is best for UK consumers and businesses when balancing these considerations.
- 3.10 The CMA is not recommending an extension of the scope of the MVBE0 to include agreements relating to motor vehicle distribution.<sup>17</sup> This is based on the fact that, according to the Evaluation, there are no specific indications of

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<sup>17</sup> One respondent (NFDA) in its response to the Consultation submitted that the distribution of motor vehicles should be brought within the scope of the MVBE0.

market failure or actual or potential consumer harm that would justify distinguishing motor vehicle distribution from the distribution of other durable goods which is subject to the application of the VABEO.<sup>18</sup> Therefore, the application of the VABEO appears appropriate for motor vehicle distribution. By contrast, in relation to vehicle repair and maintenance as well as the supply of spare parts, the CMA considers that there are features and competitive constraints in those markets which justify the existence of a separate and specific block exemption. We address these features in the following paragraphs.

- 3.11 So far as concerns the motor vehicle repair market, intra-brand competition within authorised networks is limited by strict and detailed quality criteria and the large investments that authorised repairers are required to make. This is why it is important that independent repairers continue to exert vital competitive pressure on authorised repairers and ensure that consumers can enjoy choice in provision and prices. These operators can only continue to exert such pressure if they have access to key inputs such as spare parts, tools, training, technical information and in-vehicle generated data. The current regime aims to support competition in these markets and therefore remains appropriate but may require updating to take account of technological progress.<sup>19</sup>
- 3.12 The Evaluation also showed that the motor vehicle spare parts market appears to have features and competitive constraints that (indirectly) reduce the choice available to end consumers (see paragraph 5.48). In particular, it is vital to ensure that parts bearing the motor vehicle manufacturer's brand face competition from those supplied by the original equipment suppliers (OES) and by other parties. This maintains price pressure in those markets, which in turn places downward pressure on prices in the repair and maintenance markets, since spare parts make up a large percentage of the cost of the average repair.<sup>20</sup> The CMA therefore considers that special treatment of these markets continues to be merited.<sup>21</sup>
- 3.13 In relation to the current market share thresholds, the Evaluation shows that many authorised repairers may have a high market share in the market for repairs on newer passenger cars and light commercial vehicles. The CMA's view is that it would therefore not be appropriate to increase the market share threshold of the MVBBER. This is to ensure that the benefit of the block exemption does not extend to agreements between those repairers that have

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<sup>18</sup> Evaluation Report, p13.

<sup>19</sup> Evaluation Report, p14.

<sup>20</sup> EU Supplementary Guidelines, paragraph 15.

<sup>21</sup> Evaluation Report, p14.

a high market share and their suppliers since these agreements are not likely to satisfy the criteria for individual exemption under section 9(1) of the Act.<sup>22</sup>

3.14 The evidence suggests that the current market share threshold (30%) remains appropriate, and we are not making any recommendation to change it:

- (a) In the responses to the Consultation and in our meetings with UK stakeholders this was generally not mentioned as an area of concern.
- (b) The UK stakeholder community's views are consistent with the views of the majority of respondents to the European Commission's Evaluation and NCAs on this issue.
- (c) No enforcement issues have been identified at UK and EU level as a result of the current thresholds.

3.15 Overall, the current retained MVBER regime has proven to be appropriate and adapted to diverse situations. The CMA therefore does not consider that a comprehensive overhaul of the existing rules is warranted. However, it also observes that some provisions need updating, and accordingly is making various recommendations to the Secretary of State, in particular to reflect technological developments and the importance that access to data already has as a factor of competition and the likelihood that it will become even more important in the future.

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<sup>22</sup> Extending the benefit of the block exemption to agreements entered into by businesses with market power would be likely to negatively affect competition and consumers.

## 4. The UK motor vehicle industry

### Overview

- 4.1 The motor vehicle industry in the UK has a complex supply chain comprised of vehicle manufacturers, spare parts manufacturers, dealers in motor vehicles, and authorised and independent repairers and parts distributors. Of particular relevance to the retained MVBBER are those goods and services related to the repair and maintenance of vehicles and the supply of spare parts, which together form the UK aftermarket sector. Vertical agreements related to these aftermarkets have been the sole focus of the MVBBER regime since 2013.<sup>23</sup> As set out below, these entities coexist and interact at different levels of the supply chain.
- 4.2 In terms of vehicle distribution, manufacturers and their importers act as suppliers, providing vehicles primarily to private individuals and companies. Some of the latter are professional transport and mobility operators (such as vehicle rental or leasing firms)<sup>24</sup> while others are active in other sectors but use motor vehicles to transport goods and workers.<sup>25</sup>
- 4.3 Both repair and maintenance services as well as the supply of spare parts comprise the so-called ‘aftermarket’ sector. This sector is concerned with goods and services that follow the initial sale of an automotive by an original equipment manufacturer (OEM).<sup>26</sup> With regard to repair and maintenance, service providers are authorised repairers<sup>27</sup> (companies with formal contractual arrangements with motor vehicle suppliers) or independent repairers (companies without such formal arrangements). On the demand side, the main actors are private individuals and companies.
- 4.4 Spare parts are provided by OES,<sup>28</sup> either directly or through the vehicle manufacturers, and by independent suppliers which – in contrast to OES – do

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<sup>23</sup> See paragraph 5.3.

<sup>24</sup> See EU Supplementary Guidelines, paragraph 51. For the purposes of the VABEO, and in particular as regards the application of Article 8(2)(c) VABEO, the notion of ‘end users’ includes motor vehicle leasing companies.

<sup>25</sup> Please note that, as mentioned in paragraph 2.8, agreements relating to the distribution of vehicles are not within the scope of the retained MVBBER. Instead, these vertical agreements are covered by the VABEO.

<sup>26</sup> ‘OEM’ refers to vehicle manufacturers; OEMs also distribute parts and set service requirements for workshops in their franchised network.

<sup>27</sup> The CMA notes that some stakeholders consider the term ‘authorised’ to be prejudicial against the independent aftermarket. The term is used here simply to reflect the language used in the retained MVBBER and Supplementary Guidelines.

<sup>28</sup> These are the manufacturers of the parts used for the initial assembly of the vehicle. OES also provide parts for aftermarket purposes.

not supply parts for vehicle assembly. Their primary clients are repairers, and to a lesser extent fleet operators and private individuals.<sup>29</sup>

- 4.5 The UK automotive aftermarket sector employs around 350,000 workers, in about 35,000 small businesses. The UK aftermarket sector is the fourth largest in Europe (and ninth largest in the world), contributing an estimated £12.2 billion to the economy each year.<sup>30</sup> The UK market for maintenance and repair of motor vehicles was 211% larger in 2017 as compared to 2008, and is projected to grow at 2.3% per annum during 2023 to 2028.<sup>31</sup>
- 4.6 The aftermarket sector encompasses both authorised dealer networks and repairers (who have formal contractual arrangements with motor vehicle suppliers) and independent repairers. There are over 35,000 ‘all makes’<sup>32</sup> independent repairers across the UK, as well as around 4,800 active franchised dealers. Independent repairers and operators are an important part of the UK aftermarket sector and offer consumers choice on where and how their vehicles are serviced and repaired. They exert vital competitive pressure on authorised networks in terms of services and prices.<sup>33</sup> Independent operators conduct the vast majority of MOT tests, accident repairs, windscreen repairs/replacements and other vehicle related services. Authorised repairers form a similarly important part of the UK aftermarkets, particularly for owners of newer passenger vehicles, for whom they play a significant role in, amongst other things, honouring warranties and sourcing OEM-branded spare parts.<sup>34</sup>

## Market developments

- 4.7 In making its recommendation, the CMA is mindful that the sector has undergone several changes since the adoption of the EU MVBER in 2010. Three factors in particular are worth considering:

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<sup>29</sup> Evaluation Report, p3.

<sup>30</sup> Society of Motor Manufacturers and Traders (SMMT) (2017). *The importance of the UK aftermarket to the UK economy*, p5; as of 2017, the UK was also the third largest market in Europe for automotive spare parts distributors, as per the EC’s Consultation Study Final Report, p112. IBISWorld data from June 2022 suggests the UK motor vehicle maintenance and repair market generates £28.2bn in revenue, although it should be noted that the market definition used in the report also includes car washing services.

<sup>31</sup> EC Consultation Study Final Report, p83; IBISWorld (June 2022). *Report: Motor Vehicle Maintenance & Repair in the UK*, p7.

<sup>32</sup> ‘All makes’ repairers, as their name suggests, service and repair all makes and model of car; see also Car Dealer Magazine, February 2021.

<sup>33</sup> Commission Staff Working Document of the Motor Vehicle Block Exemption Regulation (EC Staff Working Document), p53.

<sup>34</sup> EC Staff Working Document, p54.

- (a) First, the sector is experiencing substantial technological evolution, particularly in relation to communications technologies and the growing importance of in-vehicle data.
- (b) Second, there is a constant pressure to reduce emissions in light of the UK's [Net Zero Strategy](#) and to shift towards more environmentally friendly fuels and power trains. The increasing adoption of EVs and alternate fuel vehicles (AFVs) will necessitate further training for mechanics.<sup>35</sup>
- (c) Third, the sector will need to face the post-COVID-19 world and the likelihood that mobility patterns may, to some extent, have permanently changed.<sup>36</sup> Fuel price increases are also projected to contribute to a fall in car usage during 2022-23.<sup>37</sup>

4.8 As a result of meetings with UK stakeholders and the Consultation, the CMA has been made aware that the increasing sophistication of automotive telematics (and issues around access to, and use of, this vehicle-generated data) and evolving distribution models within the UK such as OEMs shifting towards an agency model or introducing direct sales platforms, are likely to impact the competitive dynamics of the sector in the coming years.<sup>38</sup>

4.9 It therefore seems likely that some parts of the motor vehicle sector will evolve rapidly over the coming years and that this will have an impact on the conditions of competition that cannot currently be quantified.<sup>39</sup>

4.10 Statistics show that the size of the UK market for repair and maintenance services increased between 2007 and 2017, with revenue growth projected to resume from 2023 onwards after a period of negative growth during 2018 to 2023.<sup>40</sup> They also show a decreasing trend in the density of the authorised networks, which could be due to several factors, including the continuing movement observed toward consolidation of authorised dealer networks, or the need to incur greater investments to meet the demands of digital technologies and hybrid/ electric power trains.<sup>41</sup>

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<sup>35</sup> IBISWorld (2022). *Industry Report G45.200: Motor Vehicle Maintenance & Repair in the UK*, p15.

<sup>36</sup> As per IBISWorld data from June 2022, new car purchases are forecast to fall over the course of the year, compounding the sharp decline in vehicle sales that was seen during the height of the pandemic.

<sup>37</sup> IBISWorld (2022). *Industry Report G45.200: Motor Vehicle Maintenance & Repair in the UK*, p2.

<sup>38</sup> See also, for example, EC/TRL (2017) *Final Report: Access to In-vehicle Data and Resources*, and relevant industry reports from Deloitte and Accenture.

<sup>39</sup> Evaluation Report, p13.

<sup>40</sup> IBISWorld figures from June 2022 suggest that the industry will see negative annual growth of -1.1% during the period from 2018 to 2023 before recovering in the period 2023-2028. See: IBISWorld (2022). *Industry Report G45.200: Motor Vehicle Maintenance & Repair in the UK*, p7, p14.

<sup>41</sup> Evaluation Report, p4.

- 4.11 The market for spare parts supply in selected Member States covered in the Evaluation increased by almost 30% in terms of sales value between 2007 and 2017.<sup>42</sup> Over the same period, parts manufacturers registered a stable operating margin, averaging around 6-7%.<sup>43</sup> Revenues in the UK motor vehicle parts retail and wholesale sectors are both projected to grow during 2022 through 2027.<sup>44</sup>
- 4.12 The responses to the Consultation and the EC's Evaluation indicate that independent operators competing with authorised repairers on the repair and maintenance markets may still face difficulties in accessing the inputs they need to repair and maintain vehicles.<sup>45</sup> These inputs include spare parts, technical information, tools, training, and data, with the latter of increasing importance. This issue may become more pronounced with the increased use of on-board digital technologies and the development of alternative fuel vehicles that require specific expertise, tooling and spare parts.<sup>46</sup>

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<sup>42</sup> Evaluation Report, p4; the UK market for spare parts supply was around 7% larger in 2017 as compared to 2008 in terms of sales value, see EC Consultation Study Final Report, p112.

<sup>43</sup> Evaluation Report, p4.

<sup>44</sup> IBISWorld (2021). *Industry Report G45.320: Motor Vehicle Parts Retailers in the UK*, p7; IBISWorld (2021). *Industry Report G45.310: Motor Vehicle Parts Wholesaling in the UK*, p7.

<sup>45</sup>UK AFCAR, Vehicle Recycler's Association, TMD Friction, RAC, Anonymous 1, ABI/Thatcham Research, LKQ; EC Staff Working Document, p44.

<sup>46</sup> EC Staff Working Document, p54.



## 5. Retained MVBBER

### Overview of the block exemption

- 5.1 The current regime applicable to vertical agreements in the motor vehicle sector consists of the general block exemption rules, as set out in the VABEO and the VABEO Guidance,<sup>47</sup> sector-specific block exemption provisions, as provided for in the retained MVBBER, and the EU Supplementary Guidelines. The retained MVBBER expires on 31 May 2023.
- 5.2 In the aftermarkets for the provision of repair and maintenance services and the distribution of spare parts, vertical agreements fall under the scope of the VABEO and retained MVBBER if (i) neither party's market share exceeds 30%; (ii) the agreements do not contain any hardcore restrictions (as listed in Article 8 VABEO); and (iii) the agreements do not contain any sector-specific hardcore restrictions (as listed in Article 5 retained MVBBER).<sup>48</sup>
- 5.3 Since June 2013, the MVBBER has applied only to vertical agreements involving these aftermarkets (ie agreements relating to spare parts and repair and maintenance services), and not to vertical agreements for the purchase, sale or resale of new motor vehicles.<sup>49</sup> The latter are treated in the same way as any other vertical agreements (ie such arrangements should be assessed by reference only to the VABEO and the VABEO Guidance).
- 5.4 As mentioned above, vertical agreements involving these aftermarkets benefit from the block exemption only if, in addition to the conditions set out in the VABEO, they also comply with the retained MVBBER. The recitals to the retained MVBBER set out the specific characteristics of the motor vehicle aftermarkets that justify the approach of imposing additional and specific block exemption conditions for the aftermarket sector:<sup>50</sup>
- (i) Price increases for individual repair jobs are only partially reflected in increased reliability of modern cars and lengthening of service intervals. These trends are linked to technological evolution and to the increasing complexity and reliability of automotive components that the vehicle manufacturers purchase from OES. Such suppliers sell

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<sup>47</sup> See Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 and Vertical Agreements Block Exemption Order Guidance ([publishing.service.gov.uk](https://publishing.service.gov.uk)).

<sup>48</sup> MVBBER's hardcore restrictions are: (i) restricting the sale of spare parts by members of a selective distribution system to independent repairers; (ii) restricting the sale by a supplier of spare parts, repair tools or diagnostic equipment to independent distributors, repairers or end-users; (iii) restricting a supplier's ability to place its logo or trade mark on components or spare parts that it sells to manufacturers of motor vehicles.

<sup>49</sup> Articles 2 and 3 retained MVBBER.

<sup>50</sup> Recitals 11-15 retained MVBBER.

their products as spare parts in the aftermarket both through the vehicle manufacturers' authorised repair networks and through independent channels, thereby representing an important competitive force in the motor vehicle aftermarket. The average costs borne by consumers for motor vehicle repair and maintenance services represent a very high proportion of total consumer expenditure on motor vehicles.<sup>51</sup> Price increases may be indicative of insufficient competitive pressure which in turn justifies the need for a block exemption (specifically, the need for the introduction of specific hardcore restrictions) to ensure that the scope for competition from independent players is viable.

- (ii) Competitive conditions in the motor vehicle aftermarkets also have a direct bearing on public safety, in that vehicles may be driven in an unsafe manner if they have been repaired incorrectly, as well as on public health and the environment, as emissions of carbon dioxide and other air pollutants may be higher from vehicles which have not undergone regular maintenance work.<sup>52</sup> Strong competition in the aftermarkets, including the competitive pressure exerted by independent channels, is therefore ancillary to the promotion of public safety and public health.

5.5 Effective competition on aftermarkets depends on the degree of competitive interaction between authorised repairers, as well as between authorised and independent operators, including independent spare parts suppliers and repairers. The ability to compete is dependent on the existence of a level-playing field between authorised and independent operators and on access to essential inputs such as spare parts and technical and vehicle information.

## **General recommendation**

5.6 Respondents to the Consultation were strongly in favour of the retention of a specific block exemption for the motor vehicle aftermarket sector. All respondents thought there would be negative consequences for the sector and consumers if the block exemption were to expire without replacement and most thought that those consequences would be significant. This position is consistent with the feedback received by the CMA before the opening of the Consultation.<sup>53</sup> A few stakeholders emphasised that substantial market

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<sup>51</sup> Retained MVBBER, recital 11.

<sup>52</sup> Retained MVBBER, recital 12.

<sup>53</sup> Meetings with IAAF/UK AFCAR, Anonymous 1, NFDA, and SMMT.

developments since 2010 merited particular attention.<sup>54</sup> Several of the changes recommended by the CMA in its final recommendation are aimed at addressing or reflecting those market developments.

- 5.7 As mentioned in Parts 2 and 3, the CMA recommends that there continues to be a safe harbour for some vertical agreements related to the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. The CMA considers that letting the retained MVBBER expire without providing for a replacement is currently not appropriate in the UK.

## **Changes to the scope or definitions in the retained MVBBER**

### ***Current regime***

- 5.8 The scope and definitions of the retained MVBBER are included in Article 1. These provisions are an important part of the regime as they set out the types of agreements that may benefit from the block exemption provided by the retained MVBBER.
- 5.9 The current material scope of the retained MVBBER<sup>55</sup> was set in 2010 following a full analysis of the sector, which showed, inter alia, that there were certain features and competition constraints<sup>56</sup> on the markets for spare parts for four-wheeled vehicles.<sup>57</sup>
- 5.10 The retained MVBBER includes, among others, the following two definitions:
- (a) 'motor vehicle': Article 1(g) of the retained MVBBER currently defines a 'motor vehicle' as a "self-propelled vehicle intended for use on public roads and having three or more road wheels."
  - (b) 'spare parts': Article 1(h) of the retained MVBBER defines 'spare parts' as goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle, with the exception of fuel.

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<sup>54</sup> Meetings with NFDA, Anonymous 1. The NFDA were of the opinion that any UK MVBEO should be expanded to cover automotive sales.

<sup>55</sup> Articles 1(g) and 4 of the retained MVBBER.

<sup>56</sup> Namely: (i) OES' contractual arrangements with vehicle manufacturers (eg so-called tooling arrangements); and (ii) incentives given to authorised repairers to purchase most of their supplies of parts directly from the OEM.

<sup>57</sup> See para 64 et seq of EC Staff Working Document; EC (2009) *The Future Competition Law Framework applicable to the motor vehicle sector*, Impact Assessment and Section 4 of the London Economics study on *Developments in car retailing and after-sales markets under Regulation N° 1400/2002*.

5.11 There are also certain relevant definitions which are contained in the EU Vertical Agreements Guidelines:

- (a) Agency agreements: an agreement will generally be defined as an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services.<sup>58</sup>
- (b) Subcontracting agreements: an agreement in which the subcontractor undertakes to produce certain products exclusively for the contractor. These will generally fall outside Article 101(1) of the Treaty (the equivalent of the UK Chapter I prohibition at EU level) provided that the technology or equipment is necessary to enable the subcontractor to produce the products.<sup>59</sup>

### **Recommendations**

5.12 The CMA recommends that:

- (a) the current material scope of the retained MVBEO should be maintained, ie with the notion of ‘motor vehicle’ being limited to three and four-wheeled vehicles (paragraphs 5.14 – 5.21);
- (b) the definition of ‘spare parts’ be updated to reflect technological developments and to clearly capture the relevant goods necessary for the use of the motor vehicle (paragraphs 5.24 – 5.26 and 5.41 – 5.52);
- (c) a new definition of ‘technical and vehicle information’ be included in any MVBEO (paragraphs 5.84 – 5.89);<sup>60</sup>
- (d) any issues and submissions made in relation to the notion and operation of ‘agency agreements’ and ‘subcontracting’ be considered in the context of our review of the CMA MVBEO Guidance (paragraphs 5.28 – 5.29).

5.13 We explain each of these recommendations in further detail below, summarising the stakeholder feedback taken into account in reaching the recommendations.

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<sup>58</sup> For the applicable guidance in the UK please see paragraphs 4.8 – 4.33 of the [VABEO Guidance](#).

<sup>59</sup> For the applicable guidance in the UK please see paragraph 4.34 of the [VABEO Guidance](#).

<sup>60</sup> In addition, we recommend that a new definition of ‘independent operator’ and a reference to other essential inputs such as tools and training in accordance with the position in the EU Supplementary Guidelines be added to the MVBEO.

## *Material scope*

- 5.14 At the UK level, both in the Consultation and during the course of the engagement with stakeholders that preceded the opening of the Consultation, the majority of stakeholders did not raise significant concerns about the current scope of the retained MVBBER, although several stakeholders did argue that the material scope should be expanded to include two-wheeled vehicles,<sup>61</sup> and one stakeholder submitted that the scope of the MVBER should be extended to include the distribution of motor vehicles.<sup>62</sup>
- 5.15 One respondent to the Consultation mentioned that vehicles other than two-wheeled vehicles may already be subject to access to technical information obligations, provided the respective regulations that set out those obligations were retained in UK law.<sup>63</sup> This respondent suggested that EC Reg. No 168/2013) and No 44/2014 (applicable to L-category vehicles) and EC Regulation No 167/2013 (applicable to T-category vehicles) already mandate 'access to technical information' in relation to such types of vehicles. The same respondent indicated that, to the extent that these regulations were retained in UK law at the end of the transition period, it may not be necessary to expand the scope of the retained MVBBER to vehicles other than three and four-wheeled vehicles (ie because issues access to technical and vehicle information are already dealt with in those regulations).
- 5.16 Several respondents to the Consultation did however express the view that the scope of the retained MVBBER should be expanded. The reasons given to justify this position included:
- (a) Modern motorcycles use almost identical engine management, power control and ABS technology as four-wheeled vehicles. Therefore, to ensure their owners the same freedom of choice as other vehicle users, the MVBER should be extended to include two wheeled vehicles.<sup>64</sup>
  - (b) Two-wheeled vehicles are becoming increasingly complex with more sophisticated and expensive parts. With the increase in the number of 'city' type vehicles,<sup>65</sup> it is necessary to ensure that independent operators

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<sup>61</sup> Independent Garage Association, ABI/Thatcham Research, UK AFCAR, Anonymous 2.

<sup>62</sup> Meeting with NFDA. See also paragraph 3.10 which sets out the CMA's position on this matter.

<sup>63</sup> TMD Friction. The CMA notes that the Retained EU Law (Revocation and Reform) Bill was introduced to Parliament on 22 September 2022 and proposes to sunset the majority of retained EU law so that it expires on 31 December 2023. In accordance with this bill retained EU law contained in domestic secondary legislation and retained direct EU legislation will expire on this date, unless otherwise preserved.

<sup>64</sup> Independent Garage Association.

<sup>65</sup> These are three-or four-wheeled vehicles that may share more components and parts with a two-wheeled vehicle and are predominantly used as individual transport in urban environments.

have adequate access to parts in order to work on more sophisticated two-wheeled and ‘city’ vehicles as they become more prevalent.<sup>66</sup>

- (c) Increasing issues preventing independent operators from offering competing vehicle repair and maintenance services for two-wheeled vehicles without the current benefits of the retained MVBER requirements. The inclusion of two-wheeled vehicles within the scope of the retained MVBER would help support effective competition and benefit consumer choice in the rapid shift towards electrically powered vehicles.<sup>67</sup>

5.17 Another respondent also proposed that the scope of the MVBER should be extended to include T-category vehicles (agricultural and forestry vehicles), as these types of vehicles are technically advanced and there are significant restrictions being imposed by the T-category vehicle manufacturers over the ability of independent operators to diagnose, repair, service and maintain these vehicles.<sup>68</sup>

5.18 In addition to the responses to the Consultation, the CMA acknowledges that a majority of respondents to the Evaluation considered that the scope should be widened to also cover two-wheeled vehicles and some vehicles not meant for roads (eg agricultural machinery, tractors and forestry vehicles, and construction vehicles).

5.19 However, the CMA has reached the view that the current scope of the block exemption remains appropriate. While the CMA recognises that there may well be certain similarities between two-wheeled vehicles and four-wheeled vehicles, there are important differences in terms of their functionalities, characteristics and the legal regimes to which they are subject, all of which militate in favour of classing those types of vehicles as distinct products.

5.20 Furthermore, in deciding not to recommend a change to the material scope, the CMA has taken into account the following additional considerations:

- (a) The CMA does not have any concrete evidence or indications that the competition constraints identified in relation to four-wheeled vehicles are also present, at least to the same extent, in two-wheeled aftermarkets. This is corroborated by the evidence from the Evaluation in which it was concluded that:

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<sup>66</sup> ABI/Thatcham Research, UK AFCAR, Anonymous 2.

<sup>67</sup> UK AFCAR.

<sup>68</sup> UK AFCAR. This respondent noted that given the timeframes for the consultation period, it had not been able to investigate these issues in sufficient depth to provide the supporting evidence for the inclusion of T-category vehicles in the scope of the MVBER and suggested that this issue could be considered at the next review of the MVBER.

*Finally, as for the relevance of the current material scope of the MVBER, this was set in 2010 following a full analysis of the sector, which showed inter alia considerable rigidities on the markets for spare parts for four-wheeled vehicles. Although a majority of respondents to the public consultation considered that the scope should be widened to also cover two-wheeled vehicles and some vehicles not meant for roads (e.g., agricultural machinery, tractors and forestry vehicles, construction vehicles), the Commission's experience over the last decade has not given any concrete indications that similar rigidities exist in respect of such products. Its current assessment is therefore that the current scope remains relevant and appropriate: a view which is shared by the majority of NCAs.<sup>69</sup>*

- (b) The extension of the scope of the MVBER to two-wheeled vehicles, specifically the imposition of hardcore restrictions, would increase the administrative burden and compliance costs of the parties involved.
- (c) The provision of spare parts to, and repair/maintenance service of, two-wheeled vehicles is already covered by the VABEO.
- (d) Access to two-wheeled vehicle information is regulated in secondary legislation.<sup>70</sup>
- (e) Modifying the scope of the MVBER would result in divergence from the EU regime.

5.21 On balance, the CMA's assessment is therefore that, at the present moment, the scope of the retained MVBER remains appropriate, a view which was shared by the majority of NCAs in the Evaluation. The CMA, however, notes the various submissions made by UK stakeholders in favour of extending the scope and will keep this issue under review during the currency of the MVBE0 with a view to reassessing this matter in light of any potential new evidence when the MVBE0 expires.

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<sup>69</sup> Evaluation, p12.

<sup>70</sup> EC Reg. No 168/2013, EC Reg. No 44/2014 (L-category) and EC Regulation No 167/2013 (T-category). The CMA notes that the Retained EU Law (Revocation and Reform) Bill, if passed, will result in retained EU law contained in domestic secondary legislation and retained direct EU legislation expiring on 31st December 2023, unless otherwise preserved. The existence of the above-mentioned secondary legislation that regulates access to two-wheeled vehicle information is, however, only one of the factors which the CMA has taken into account when recommending that the scope of the MVBE0 not be extended to two-wheeled vehicles. If this secondary legislation expires at the end of 2023 without being replaced, the CMA would take this factor into account at the next review of the MVBE0.

## *Definitions in the retained MVBER*

- 5.22 The Consultation, engagement with UK stakeholders, and evidence from the Evaluation have shown that, in general, the definitions in the retained MVBER remain useful and appropriate, with the exception of the notion of ‘spare parts’. Many respondents to the Consultation and the Evaluation considered that the definition was sufficiently clear, although several also suggested it could be updated to reflect technical developments and that the word ‘component’ should not be used as this term would not usually describe certain goods included in the definition such as lubricants (see further below).<sup>71</sup>
- 5.23 In relation to the notion of ‘motor vehicle’, as noted above, the CMA considers that the current scope of the block exemption should be maintained. However, if the Secretary of State decided to extend the scope to other vehicles, then the definition of ‘motor vehicle’ would need to be updated accordingly.
- 5.24 In relation to the definition of ‘spare parts’, the CMA considers that, for the most part, the definition is clear and comprehensive but is in need of some updating to reflect technological developments and to clearly capture other relevant goods necessary for the use of the motor vehicle. In the Consultation, the CMA therefore invited views from stakeholders on how the definition should be modified in order to reflect such developments and whether the reference to ‘components’ should be removed in order to clearly capture all goods which are necessary for the use of a motor vehicle.
- 5.25 This was supported by several respondents to Consultation that submitted the existing definition should be revised to address the requirements for access to software to update components and in-vehicle systems, together with activation/configuration codes for replacement parts and components. Additionally, some of the responses mentioned that lubricants and fluids should be more clearly identified as ‘spare parts’.<sup>72</sup> This is consistent with the submissions made by respondents to the Evaluation that considered that despite the definition being sufficiently clear, suggested it could be updated to reflect technical developments and that the word “component” should not be used as this term would not usually describe certain goods included in the definition such as lubricants.<sup>73</sup>

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<sup>71</sup> EC Staff Working Document, p110. UKLA, TMD Friction, RAC, UK AFCAR.

<sup>72</sup> The CMA received submissions supporting the updating of the definition of ‘spare parts’ from RAC, Independent Garage Association, BVLRA, ABI/Thatcham Research, UK AFCAR, Anonymous 2, NFDA, LKQ, Anonymous 3, TMD Friction, UKLA.

<sup>73</sup> EC Staff Working Document, p113.



- 5.26 The CMA agrees with these stakeholders that lubricants should clearly be included in the scope of the current definition in the MVBER and that the current wording (specifically the use of the word ‘components’) creates doubt on whether they are in fact within scope.<sup>74</sup> Furthermore, access to software is increasingly a necessary condition to ensure providers of repair and maintenance are able to fit certain spare parts. In this context, the CMA considers that the definition of ‘spare parts’ should encompass all software, together with activation/configuration codes for replacement parts and components, which are strictly necessary to fit those parts and to replace or update components or systems of the vehicle, which are necessary for the use or operation of a motor vehicle, with the exception of fuel. The CMA considers that given technological developments, without access to such software, independent operators are unlikely to exert significant competitive pressure on authorised repairers which in turn is detrimental to competition and UK consumers. Accordingly, the CMA is recommending that the various changes to the definition of ‘spare parts’ referred to in this paragraph should be made in the MVBE0.
- 5.27 Finally, as noted above, on the issue of ‘access to technical and vehicle information’, we are recommending the addition of a definition of such information in the MVBE0 itself.<sup>75</sup> This issue is discussed in detail at paragraphs 5.62 – 5.89

*Definitions in the EU Vertical Agreements Guidelines and/or EU Supplementary Guidelines*

- 5.28 At UK and EU level, certain stakeholders also raised a number of issues around definitions which are contained in guidance (EU Vertical Agreements Guidelines and/or EU Supplementary Guidelines). We list these issues below:
- (a) ‘Agency agreement’: during the Evaluation, some NCAs noted that the EU Vertical Agreements Guidelines lacked the necessary detail to assess the distinction between independent traders and agents acting on behalf of a supplier, especially with regards to legal and/or commercial risks. The majority of respondents considered that the provisions on agency agreements in the EU Vertical Agreements Guidelines provided very little

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<sup>74</sup> The current definition states that ‘spare parts’ are “goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle”. This definition is slightly misleading given that lubricant is not a component but a consumable good.

<sup>75</sup> We are also recommending the introduction of the definition of ‘independent operator’ to the MVBE0. This definition is currently set out in the EU Supplementary Guidelines.

legal certainty.<sup>76</sup> One respondent to the Consultation noted its significant concern regarding the possibility that the current transition on the part of certain OEMs to different forms of agency(including ‘non-genuine’ agency models) could virtually eliminate intra-brand competition (and possibly weaken inter-brand competition). According to this respondent more detail is needed in any new regulation/order and/or guidelines to address this concern.<sup>77</sup>

(b) ‘subcontractor agreement’: some NCAs questioned whether practices commonly known as “tooling arrangements”, whereby vehicle manufacturers prohibit OES from using the original tools (or parts thereof) to manufacture parts for aftermarket supply under the suppliers’ own brands, could constitute genuine subcontracting agreements and thus not be caught by Article 101 of the Treaty (the equivalent of the Chapter I prohibition at EU level).

5.29 The CMA is recommending that these issues be considered in the context of any future CMA MVBEQ Guidance by reference to the position set out in the VABEQ Guidance. The CMA will consider whether additional and specific guidance for the aftermarket sector should be added to any CMA MVBEQ Guidance. This position was supported by the majority of respondents to the Consultation.<sup>78</sup>

## **Market definition and market share thresholds**

### **Current regime**

5.30 Whether a particular agreement may benefit from exemption under the retained MVBER depends, inter alia, on market share. Correct market definition is therefore an important factor in any assessment. In some circumstances, it may be appropriate to define a single relevant market as including a primary product such as motor vehicles and a secondary product such as spare parts, taking into account, inter alia, the life-time of the motor vehicle as well as the preferences and buying behaviour of the users.<sup>79</sup> In such cases, the relevant market shares would be those for the whole (multi-

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<sup>76</sup> See p69 *et seq.*, paragraph 2.2, EC Staff Working Document; one UK stakeholder (NFDA) has recommended that definitions of ‘agent’ and ‘genuine agent’ be added to Article 1 of the MVBER.

<sup>77</sup> NFDA.

<sup>78</sup> NFDA, Anonymous 2, ABI/Thatcham Research, Anonymous 1, Belron, RAC, Independent Garage Association, TMD Friction, UK AFCAR expressed the view that clarifications are appropriate and should be introduced in the block exemption.

<sup>79</sup> See *Market Definition* (OFT 403), in particular Part 6. See also paragraph 56 of Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.

brand) system rather than for repair and maintenance and the supply of spare parts.

- 5.31 Article 4 of the retained MVBBER provides a safe harbour for vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles or provide repair and maintenance services for motor vehicles on condition that the conditions of the VABEO are met. These conditions include the requirement that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

### **Recommendations**

- 5.32 For the reasons set out below, the CMA recommends that the current market share threshold (30%) should be maintained.
- 5.33 The majority of respondents to the Consultation agreed with the CMA's recommendation to retain the current market share threshold.<sup>80</sup> A few respondents expressed concern about the strong position that certain OEMs enjoy and that the current market share thresholds may not capture this strong position (ie despite their strong position they may still benefit from the VABEO/retained MVBBER safe harbours).<sup>81</sup> In the engagement that took place before the opening of the Consultation, UK stakeholders did not generally raise significant concerns related to the existing market share thresholds, although one stakeholder suggested that the raw market share of OEMs belied their actual influence over their authorised retail network.<sup>82</sup>
- 5.34 The evidence from the Evaluation is consistent with the views expressed by UK stakeholders. The majority of respondents and NCAs considered that the thresholds were appropriate. A few stakeholders suggested that they were too high and that very few players actually reach 30% market share due to the increase in direct sales by manufacturers. Others suggested the threshold might be too low.<sup>83</sup> This appears to indicate that the current market share

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<sup>80</sup> TMD Friction, Independent Garage Association, RAC, Anonymous 1, Belron, Anonymous 3, SMMT, UK AFCAR.

<sup>81</sup> NFDA, ABI/Thatcham Research, UKLA.

<sup>82</sup> Meeting with NFDA.

<sup>83</sup> In particular, some respondents considered the 30% market threshold to be too low if '(i) the market for repair and maintenance (insofar as it is separate from the market for the sale of new motor vehicles) were considered to be brand-specific; and (ii) the market shares of authorised repairers (even if legally they are separate companies) were attributed to vehicle manufacturers, or if these were used as a proxy for the position of vehicle manufacturers on the upstream market, this would imply that vehicle manufacturers' agreements regarding repair, maintenance and spare parts could not benefit from the exemption'; see p157 of the EC Staff Working Document.

threshold of 30% seems to have been appropriate and to remain relevant today.<sup>84</sup>

- 5.35 Furthermore, to date, the CMA has not identified any category of agreements that are unable to benefit from the exemption because of the parties' market share, but which are likely to meet the conditions for individual exemption under section 9(1) of the Act; the identification of such a category would have been an indication that the threshold was set too low. Similarly, the CMA has not found any elements that have led it to consider withdrawing the exemption from any agreement or category of agreements in the motor vehicle sector. If it had, that might suggest that the exemption threshold was set too high.
- 5.36 In relation to any possible difficulties in defining relevant markets in the aftermarket sector, the CMA notes that its Guidance on Market Definition provides guidance on the rules, criteria and evidence to which the CMA has regard when considering market definition issues.<sup>85</sup> The CMA considers that this guidance should serve as the basis for assessing market definition and that therefore it is not necessary or indeed appropriate to address this issue in the context of the review of the block exemption itself.
- 5.37 As regards the market share threshold, the evidence the CMA has seen is not sufficient to conclude that a higher market share threshold would be appropriate, or indeed which alternative level would be appropriate. The CMA therefore considers that the current market share threshold remains an appropriate threshold and is not therefore recommending changes to it.

## ***Hardcore restrictions***

### ***Current regime***

- 5.38 In order to benefit from the block exemption provided by the retained MVBER the agreements must not contain any of the hardcore restrictions set out in the VABEO and in the retained MVBER. Where an agreement includes a hardcore restriction that agreement is likely to fall within the scope of the Chapter I prohibition. Such inclusion also gives rise to the presumption that the agreement is unlikely to fulfil the conditions for exemption from the Chapter I prohibition, for which reason the retained MVBER does not apply.

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<sup>84</sup> Evaluation Report, pp5-6.

<sup>85</sup> *Market Definition* (OFT 403), in particular Part 6. The CMA will also have regard to the European Commission's Notice on the definition of relevant market, OJ C 372, 9 December 1997, which is a relevant statement of the European Commission for the purpose of section 60A of the Act.

However, undertakings have the possibility to raise an efficiency justification under section 9(1) of the Act.

5.39 Article 8(2)(e) of the VABEO describes it as a hardcore restriction for an agreement between a supplier of components and a buyer who incorporates those components, to restrict the supplier's ability to sell its components as spare parts to end-users, repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods. Articles 5(a), (b) and (c) of the retained MVBBER lay down three additional hardcore restrictions relating to agreements for the supply of spare parts.<sup>86</sup>

5.40 The hardcore restrictions in Article 5 of the retained MVBBER are:

- (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;<sup>87</sup>
- (b) the restriction, agreed between a supplier of spare parts, repair tools or diagnostics or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors, repairers or end users; and
- (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 visibly manner on the components supplied or on spare parts.<sup>88</sup>

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<sup>86</sup> One of the objectives of the retained MVBBER is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers. Alternatives for parts bearing the trademark of the motor vehicle manufacturer (OEM parts) include original parts manufactured and distributed by original equipment suppliers (OES parts), while other parts matching the quality of the original components are supplied by 'matching quality' parts manufacturers.

<sup>87</sup> This provision is most relevant for a particular category of parts, sometimes referred to as captive parts, which may only be obtained from the motor 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 repairers from the market for repair and maintenance services and fall foul of the Chapter I prohibition.

<sup>88</sup> In order to improve consumer choice, repairers and consumers should be able to identify which spare parts from alternative suppliers match a given motor vehicle, other than those bearing the car manufacturer's brand. Putting the trade mark or logo on the components and on spare parts facilitates the identification of compatible replacement parts which can be obtained from OES. By not allowing this, motor vehicle manufacturers can restrict the marketing of OES parts and limit consumers' choice in a manner that runs counter to the Chapter I prohibition.

## Recommendations

- 5.41 For the reasons set out below, the CMA recommends that the current list of hardcore restrictions in the retained MVBER should be maintained. Taking into account the fact that certain restrictions on access to spare parts are already treated as hardcore restrictions, the CMA is minded to address residual and novel issues reported by stakeholders by issuing further guidance on these matters. The only exception to this relates to the modification of the definition of ‘spare parts’ in the retained MVBER to take account of technical developments and relevant products currently not explicitly covered by the definition (see paragraph 5.24 – 5.26 and the paragraphs below). We summarise below the views expressed by UK stakeholders and the CMA’s assessment of the various issues at play.
- 5.42 The majority of respondents to the Consultation agreed with the CMA’s provisional recommendation.<sup>89</sup> One respondent was of the view that current issues around access to spare parts are sufficiently serious to be addressed by way of changes to the MVBER itself, rather than by changes to guidance.<sup>90</sup> Another respondent agreed with the CMA’s recommendation but suggested a change to the current hardcore restriction by replacing the term “independent repairer” with “independent operator”, which, according to this respondent, would enhance the ability of independent wholesalers to source spare parts from the vehicle manufacturer or its network and, in turn, the ability of independent repairers to source all parts at competitive prices from wholesalers, rather than having to resort to the authorised repairer as their immediate competitor (at retail prices).<sup>91</sup> In relation to this last point, the CMA considers that a change to Article 5(a) of the retained MVBER is not strictly necessary since the objective pursued by the respondent may be, at least to some extent, achieved through the application of Article 5(b) of the retained MVBER which treats as hardcore:

*‘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***

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<sup>89</sup> TMD Friction, Independent Garage Association, RAC, Belron, Anonymous 1, Anonymous 3.

<sup>90</sup> ABI/Thatcham Research.

<sup>91</sup> UK AFCAR explained that ‘*the ability of independent repairers to compete effectively with the authorised network hinges on their ability to obtain all parts in a cost-efficient manner, best afforded by purchasing all parts for a specific repair or maintenance job from a single source at wholesale prices (cf. Becker/Simon, in: MüKo WettbR, 3. ed. 2020, art.5 para. 12). Such a special rule would improve the availability of spare parts and increase the number of service outlets in which complex products can be repaired. This would prove particularly useful in rural areas, where repair for complex products might otherwise be difficult to reach.*’

*distributors or to authorised or independent repairers or end users;*<sup>92</sup>  
(emphasis added)<sup>92</sup>

- 5.43 In the meetings with the CMA which took place before the Consultation, UK stakeholders did not voice specific or significant concerns with the current range of hardcore restrictions contained in the retained MVBER.<sup>93</sup> There were strong concerns expressed about access to technical and in-vehicle information (see paragraph 5.80(a)) and some UK stakeholders representing the independent aftermarket sector outlined their concerns with the increasing difficulty in sourcing and fitting certain replacement parts produced by OEMs which could only be sourced through the OEM's authorised network.<sup>94</sup> According to these stakeholders, QR codes, OEM-produced diagnostic tools and specific software were increasingly needed to activate spare parts from OEMs; this was particularly a problem with Advanced Driver Assistance Systems (ADAS).
- 5.44 One UK stakeholder representing the franchised dealers sector noted the substantial supply chain issues that were currently affecting the market for spare parts.<sup>95</sup> However, there were no specific suggestions that such issues should be addressed via an expansion of the current list of hardcore restrictions.
- 5.45 We set out below the CMA's assessment of the issues relating to the operation of the hardcore restrictions relating to the supply of spare parts, starting with an explanation of why the European Commission considered it necessary to protect access to spare parts and the CMA's assessment of the extent to which there is a continued need for such protection.
- 5.46 In its 2009 Communication, the European Commission observed that there were often large differences in price between parts sold or resold by a motor vehicle manufacturer and alternative brands of parts. The availability of alternatives brought considerable benefits to consumers, in terms of both choice and price. Thus, the European Commission considered it necessary to protect spare parts manufacturers' access to the motor vehicle aftermarkets, in particular through the identification of three hardcore clauses in the EU

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<sup>92</sup> For further details on the competition concerns that this hardcore provision is designed to tackle see paragraph 5.48.

<sup>93</sup> Meeting with Anonymous 1; meeting with IAAF/UK AFCAR (who suggested the current hardcore restrictions should be retained in any MVBER); meeting with NFDA, who suggested more guidance may be needed to safeguard against the application of indirect restrictions that might inhibit price or other forms of competition (particularly in the context of non-genuine agency arrangements).

<sup>94</sup> Meeting with IAAF/UK AFCAR.

<sup>95</sup> Meeting with NFDA.

MVBER, thereby ensuring that competing brands of spare parts continued to be available.

- 5.47 The Evaluation showed that this objective of protecting spare parts manufacturers' access to the motor vehicle aftermarket has been partially met. First, alternatives are usually available for the most common parts used in motor vehicle maintenance, and independent repairers often use such parts to repair and maintain customers' vehicles.<sup>96</sup> Secondly, although some stakeholders have indicated that independent repairers still face certain difficulties, there have been no antitrust complaints to the European Commission in this area that would indicate more than a limited likelihood of finding an infringement of competition law.
- 5.48 As to the continued need to protect access to spare parts, the spare parts markets generally seem to be characterised by two competitive constraints in particular. First, OES' contractual arrangements with motor vehicle manufacturers may prevent or hamper the former from supplying the aftermarket directly, in competition with parts sold to the vehicle manufacturers and then resold as spare parts. In particular, there are so-called "tooling arrangements" which sometimes place requirements on OES to transfer intellectual property rights to their OEM customers.<sup>97</sup> Secondly, agreements between OEMs and authorised repairers may oblige or incite the latter to purchase most of their supplies of parts directly from the motor vehicle manufacturer.<sup>98</sup>
- 5.49 Other issues were raised in the meetings the CMA held with stakeholders. As noted above, one UK stakeholder referred to the increasing importance of access to software in order to be able to fit spare parts. This stakeholder explained that these codes and software were increasingly needed to activate spare parts from OEMs, which, as noted above, was particularly a problem with ADAS.<sup>99</sup>
- 5.50 However, taking into account the fact that certain restrictions on access to spare parts are already treated as hardcore restrictions, the CMA is not recommending that the list of hardcore restrictions be amended in light of

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<sup>96</sup> See Annex 4 to EC Staff Working Document, pp175-177.

<sup>97</sup> Tooling is the process of designing and engineering the tools used to manufacture components. In the context of the motor vehicle industry, tooling relates to designed tools that automakers use to forge vehicle parts. Tooling arrangements amount to a 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 to authorised and/or independent distributors and repairers. As set out at paragraph 23 of the EU Supplementary Guidelines these arrangements are one example of possible indirect restrictions under Article 5(b) of the retained MVBER.

<sup>98</sup> EC Staff Working Document, pp47.

<sup>99</sup> Meeting with IAAF/UK AFCAR.



these concerns as it considers that the list of hardcore restrictions remains appropriate, subject to the update of the definition of ‘spare parts’.<sup>100</sup> The CMA’s recommendation takes into account the evidence that the CMA gathered, including the feedback from stakeholders, which did not result in any additional clauses being identified that should have been considered either as general conditions for the application of the block exemption, or as hardcore restrictions.<sup>101</sup>

- 5.51 Instead, in line with the views expressed by the majority of respondents to the Consultation, the CMA is recommending that further guidance on this matter be issued in order to address residual and novel issues reported by stakeholders.<sup>102</sup> The CMA considers that it is not necessary to enshrine these considerations in legislation and that clarifications on the scope of the relevant statutory provisions in any CMA MVBERO Guidance would be a proportionate way to address the issues identified. In particular, consideration will need to be given to the need to access certain software systems in order to fit certain spare parts, and how restrictions at software level can render physical access to spare parts meaningless.
- 5.52 The recommended update to the definition of spare parts to include access to the necessary software (paragraphs 5.24 – 5.26 and 5.41 – 5.51) is a first but necessary step in order to address these issues.

## ***Excluded restrictions***

### ***Current regime***

- 5.53 Under the VABEO, the presence of so-called excluded restrictions in a vertical agreement does not result in the loss of the exemption for the entire agreement but only for the clauses constituting excluded restrictions under the VABEO (even if the parties to the vertical agreement do not exceed the market share thresholds set out in the VABEO). The excluded restriction must be individually assessed to establish whether it benefits from the individual exemption under section 9 of the Act.

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<sup>100</sup> The EU is similarly not proposing to make any changes to the hardcore and excluded restrictions in the EU MVBER. In previous consultations regarding the review of retained block exemptions (ie, retained VBER and retained HBERs) we received feedback from stakeholders about the cost of compliance arising from possible divergence between the EU block exemption and the UK BEO. This is a consideration which the CMA took into account in its proposed recommendation.

<sup>101</sup> Evaluation Report, p6.

<sup>102</sup> For example, coding of parts and number of captive parts.

- 5.54 Article 10(2) VABEO contains a closed list of vertical restrictions that are excluded from the benefit of the block exemption:
- (a) any non-compete obligation, the duration of which is indefinite or exceeds five years (and a non-compete obligation which is automatically renewable beyond a period of five years is deemed to have been concluded for an indefinite duration);
  - (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell any goods or services; and
  - (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.
- 5.55 The retained MVBER does not currently include any excluded restrictions.

### ***Recommendations***

- 5.56 The CMA recommends that the current list of excluded restrictions in Article 10(2) of the VABEO be maintained.
- 5.57 The CMA sought views from UK stakeholders on whether to recommend that a new excluded restriction relating to access to technical and vehicle information be added in the MVBER. This is dealt with in the following section (see paragraphs 5.62 – 5.89).
- 5.58 In responding to the Consultation, UK stakeholders overwhelmingly supported the CMA's proposal to retain the current list of excluded restrictions in the VABEO.<sup>103</sup>
- 5.59 In meetings between the CMA and UK stakeholders which took place before the opening of the Consultation, no specific concerns were expressed in relation to the current list of excluded restrictions.
- 5.60 Evidence from the Evaluation also suggested that the current list of excluded restrictions in the VBER remains appropriate.<sup>104</sup>
- 5.61 The CMA is therefore of the view that, in general, the current list of excluded restrictions remains appropriate. This is subject, however, to the CMA's recommended introduction of new excluded restriction relating to access to

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<sup>103</sup> Thirteen respondents supported the CMA's proposal.

<sup>104</sup> See Evaluation Report, p6, and EC Staff Working Document, p36.

vehicle information, which we address in more detail in paragraphs 5.62 – 5.89 below.<sup>105</sup>

## ***Restrictions on access to technical and vehicle information (and other essential inputs)***

### ***Current regime***

- 5.62 Paragraphs 62 to 68 of the EU Supplementary Guidelines set out guidance on the situations in which qualitative selective distribution agreements concluded with authorised repairers and/or parts distributors may be caught by the Chapter I Prohibition of the Act if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, by failing to release technical repair and maintenance information to them.
- 5.63 The EU Supplementary Guidelines clarify at paragraph 62 that the notion of ‘independent operators’ includes independent repairers, spare parts manufacturers and distributors, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators offering inspection and testing services, and operators offering training for repairers.
- 5.64 The EU Supplementary Guidelines set out at paragraph 65 some of the factors which are taken into account when considering whether a restriction on access to technical information or vehicle data may be caught by the Chapter I prohibition:
- (a) whether the item in question is technical information, or information of another type, such as commercial information, which may be legitimately withheld;
  - (b) whether withholding the technical information in question will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market;
  - (c) whether the technical information in question is made available to members of the relevant authorised repair network: if it is made available

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<sup>105</sup> The EC is not proposing to make any changes to the hardcore and excluded restrictions in the EU MVBER. In previous consultations regarding the review of retained block exemptions (ie, retained VBER and retained HBERs) we received feedback from stakeholders about the cost of compliance arising from possible divergence between the EU block exemption and the UK BEO. This is a consideration which the CMA has taken into account in its proposed recommendation.

to the authorised network in whatever form, it should also be made available to independent operators on a non-discriminatory basis;

(d) whether the technical information in question will ultimately be used for the repair and maintenance of motor vehicles, or rather for another purpose such as for the manufacturing of spare parts or tools.<sup>106</sup>

5.65 The CMA notes that there is secondary legislation dealing with the issue of access to vehicle repair and maintenance information.<sup>107</sup> In line with the position set out at paragraph 65 of the EU Supplementary Guidelines, when assessing information cases of suspected withholding of technical and vehicle information, the CMA will take into account the relevant provisions in this legal instrument.

5.66 The EU Supplementary Guidelines at paragraph 68 clarify that the considerations relating to access to technical and vehicle information (mentioned in the preceding paragraphs) also apply to the availability of tools and training to independent operators.<sup>108</sup>

## **Recommendations**

### *The treatment of restrictions on access to technical and vehicle information as excluded restrictions in the MVBE0*

5.67 The CMA is recommending that restrictions on access to technical information be treated in the MVBE0 as excluded restrictions. As mentioned in paragraph 5.76, given the potential for these restrictions to distort competition, in particular, competition between authorised and independent providers, it would be appropriate to ensure that these types of restrictions are carefully self-assessed by businesses on a case-by-case basis, taking account of the specific circumstances.

5.68 In the Consultation, the CMA sought views from UK stakeholders on two policy options for addressing the issues, which are discussed below:

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<sup>106</sup> Information used for fitting a spare part to or using a tool on a motor vehicle should be considered as being used for repair and maintenance, while information on the design, production process or the materials used for manufacturing a spare part should not be considered to fall within category and may therefore be withheld.

<sup>107</sup> Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC provides, inter alia, for a system for disseminating repair and maintenance information in respect of motor vehicles.

<sup>108</sup> The CMA notes that the draft version of the EU Supplementary Guidelines makes an important clarification by stating that the regime relating to access to technical and vehicle information only applies to availability of tools and training to independent operators, to the extent that the latter amount to essential inputs.

- (a) treating access to technical and vehicle information as an excluded restriction under the MVBER; or
- (b) dealing with the issue in any CMA MVBER Guidance with a reference to a possible cancellation of the benefit of the block exemption in individual cases.

5.69 In proposing these two policy options, the CMA had taken into account feedback received before the opening of the Consultation from certain UK stakeholders representing the aftermarket sector. They had highlighted their concerns related to access to data, and the rapid changes in the sector that were being driven by the increasing volume of vehicle-generated data within 'connected vehicles', as well as the difficulties faced in securing the required information from OEMs needed for vehicle repair and maintenance (paragraph 4.63 of the consultation document).<sup>109</sup>

5.70 In the Consultation, we noted that the concerns expressed by some UK stakeholders had also been considered at EU level, including when the UK was still a member state. In its 2009 Communication,<sup>110</sup> the European Commission noted that independent repairers provided consumers with an alternative channel for the upkeep of their motor vehicles and were a source of vital competitive pressure, as their business models and operating costs were different from those in the authorised networks. Independent repairers' ability to compete depended on unrestricted access to essential inputs such as spare parts, tools, training and technical information. It therefore considered it necessary to safeguard this access, as well as to deter suppliers and/or their authorised repairers from using other indirect means to foreclose independent repairers.

5.71 The Evaluation broadly confirmed that one of the original objectives of the EU MVBER, specifically to enable independent repairers to compete with the manufacturers' networks of authorised repairers, had been at least partially achieved.<sup>111</sup> Since the Commission had adopted the four Technical

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<sup>109</sup> Meeting with IAAF/UK AFCAR; in a meeting with the CMA, the NFDA noted issues related to OEMs receiving the majority of vehicle generated data, as OEMs were in increasing competition with their own dealer networks given changes in industry structure, with the importance of maintaining strong intra-brand competition emphasised. IAAF/UK AFCAR were of the view that these issues should be further addressed in an update to the EU Supplementary Guidelines and aligned with the vehicle type approval legislation to provide the detailed technical requirements.

<sup>110</sup> On 22 July 2009 the Commission adopted a Communication, *The Future Competition Law Framework applicable to the motor vehicle sector* (2009 Communication), setting out seven areas which were found to be problematic from a competition perspective. The 2009 Communication was accompanied by an impact assessment containing, inter alia, a Technical Annex No 1 which restates the seven areas in which competition was found to be problematic.

<sup>111</sup> Evaluation report, pp8-9.

Information decisions in 2007,<sup>112</sup> and included the lessons learned in the EU Supplementary Guidelines, no robust complaints had been brought to its attention on this specific point. However, independent operators that compete with authorised repairers still reported difficulties in accessing the inputs they needed to repair vehicles (eg issues with obtaining full or up-to-date information and restrictions on access to in-vehicle data) (paragraph 4.64 of the consultation document).<sup>113</sup> Based on the above, the Evaluation found that the objective continues to be relevant (paragraph 4.65 of the consultation document).

5.72 Restrictions on access to data are one of the main competition issues to have been identified in the Evaluation. In particular, some NCAs were of the view that new business models, new technologies and recent market developments should be considered in the provision of further clarification and guidance on the MVBER rules. They noted that data collected by vehicles 'has the potential to support a wide range of innovative services' (paragraph 4.67 of the consultation document).

5.73 The Evaluation concluded that in-vehicle data, or the information derived from it (such as the fact that a vehicle has a particular fault, or needs a routine service), may be considered an essential input for repair and maintenance. Where such data or information is not available from other sources, and is supplied to authorised repairers, it should therefore also be supplied on an equal basis to independent operators that compete with those repairers.<sup>114</sup> Although the Evaluation did not lead to changes being made to the EU MVBER in order to address access issues, there was a recognition of a potential issue:

*Based on the above, the evaluation finds that **the objective continues to be relevant**, in that independent repairers continue to provide an important value proposition for consumers, although some behaviour by market players may need deeper scrutiny, notably in light of recent market developments concerning the increased importance of data access<sup>115</sup>*

5.74 The CMA explained in the Consultation that it favoured the option of treating restrictions on access to technical and vehicle information as excluded restrictions under the MVBER and set out various reasons why this option was to be preferred to the option of addressing the issue in any CMA MVBER

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<sup>112</sup> See cases AT. 39140 - *DaimlerChrysler*, AT. 39141- *Fiat*, AT. 39142 - *Toyota Motor Europe* and AT. 39143 - *Opel*.

<sup>113</sup> About 10% of the informal submissions received by the European Commission since 2010 concerned restrictions on access to repair and maintenance information / vehicle data.

<sup>114</sup> EC Staff Working Document, p56.

<sup>115</sup> Evaluation Report, p9.

Guidance with a reference to a possible cancellation of the benefit of the block exemption in individual cases. The CMA was also minded to recommend that the approach to the treatment of restrictions on access to technical and vehicle information (as reflected in the two policy options set out above) should also extend to access to other essential inputs necessary for repair and maintenance (eg availability of tools and training to independent operators) in accordance with the position set out in paragraph 68 of the EU Supplementary Guidelines.<sup>116</sup>

- 5.75 On balance, taking into account all the evidence set out above, including the feedback that the CMA received in response to the Consultation, the CMA has decided to recommend that the issue be addressed by adding an excluded restriction to the MVBEO in addition to the current list of excluded restrictions in the VABEO, for the reasons set out below.
- 5.76 The CMA considers that a lack of appropriate access to necessary technical information and vehicle information as well as access to other essential inputs (eg tools and training to independent operators) can lead to a decline in the market position of independent operators, and ultimately to consumer harm in the form of a significant reduction in choice of spare parts, higher prices for repair and maintenance services, a reduction in choice of repair outlets and potential safety problems. As a consequence, we consider it necessary that restrictions on access to technical and vehicle information and other essential inputs are assessed against the Chapter 1 prohibition instead of automatically benefiting from the safe harbour provided by the MVBEO.
- 5.77 The CMA does not consider that the option of retaining the status quo, or, in other words, to block exempt all restrictions on access to technical and vehicle information where the conditions of the VABEO and MVBEO are met is appropriate:
- (i) This option does not sufficiently take into account the fact that access to information may constitute an input which is essential to ensure that there is a level-playing field and rivalry between authorised and independent aftermarket players. In addition, given the non-binding nature of the guidance, there is a risk that these competition concerns would, to some extent, remain unaddressed (ie if addressed by way of guidance only).
  - (ii) the CMA could be prevented from taking enforcement action against a restriction on access to information where all the conditions of the

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<sup>116</sup> The CMA notes that this paragraph has been amended in the draft version of the EU Supplementary Guidelines 2022.

block exemption are met. This could also place an additional burden on the CMA to consider requests for cancellation in individual cases (ex officio or upon request).<sup>117</sup>

- (iii) The importance of access to information is very likely to increase over the next few years with the advent of digital and interconnected vehicles and the growing relevance of electric vehicles. This militates in favour of taking a cautious approach to restrictions on access to information.
- (iv) The CMA accepts that the treatment of these restrictions as ‘excluded’ could potentially increase the degree of legal uncertainty (in comparison to the current position). However, the CMA considers that this risk could be sufficiently mitigated by the issuance of revised guidance which could assist and help businesses to carry out the self-assessment and to distinguish restrictions which meet the conditions for individual exemption from those that do not.
- (v) All of these factors, taken together, mean that retaining the status quo may not address the competition concerns mentioned above and could lead to block exempting restrictions which in the CMA’s opinion may not meet the conditions for individual exemption under section 9(1) of the Act. As mentioned above, under section 6(1) of the Act the CMA can only recommend that certain types of agreements should be block exempted where, in its opinion, it is likely that these will satisfy the conditions in section 9(1) of the Act. The evidence available to the CMA calls into question whether these types of restrictions are likely to satisfy those conditions.

5.78 The CMA’s proposal to treat these restriction as ‘excluded’ restrictions under the MVBE0 was supported by the majority of UK stakeholders that responded to the Consultation on this particular subject.<sup>118</sup> Furthermore, a majority of respondents did not support the policy option of addressing the issue solely by way of guidance.<sup>119</sup> There were significant concerns about the effect that a lack of appropriate access of technical and vehicle information has on independent operators to compete effectively with OEMs and authorised providers and a concern. The reasons given by these stakeholders included:

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<sup>117</sup> Consideration of such requests would be subject to the CMA’s prioritisation principles. Prioritisation principles for the CMA (CMA116).

<sup>118</sup> TMD Friction, Independent Garage Association, RAC, Belron, Anonymous 1, UK AFCAR, Anonymous 2.

<sup>119</sup> Although the CMA consulted on this policy option, its preferred policy option in the draft recommendation was to treat these restrictions as ‘excluded’ under the MVBE0.



- (a) Vehicle manufacturers have an unfair advantage over third-parties as far as access to technical and vehicle information is concerned. This is because of the proprietary control of every vehicle manufacturer who acts as ‘system administrator’ for the vehicles that they manufacture which means they can set the ‘rights and roles’ of ‘who’ can do ‘what’ with these vehicles. In addition, there is a risk that safety security reasons may have been used thus far as a pretext to impose those restrictions on other market participants, notably independent operators.<sup>120</sup>
- (b) It is vitally important that the aftermarket sector can have appropriate access to certain types of technical and vehicle information which amount to an essential input (eg, to diagnose a fault and be able to repair it). Such access is also necessary to allow repairers to use the correct spare parts to be able to fix the vehicle.<sup>121</sup>
- (c) The lack of access in individual cases can become increasingly detrimental to independent providers and consumers as vehicles become increasingly connected with new technology installed in the vehicle.<sup>122</sup>
- (d) Access to in-vehicle generated data is vital in terms of protecting the ability to create and develop innovative and fairly-priced product and service offerings for consumers.<sup>123</sup>

5.79 Notwithstanding the above, a few respondents to the Consultation acknowledged that, in some instances, a degree of restriction on access to certain technical and vehicle information should be expected:<sup>124</sup>

- (a) access to security related data should be restricted unless accessed via an approved scheme;<sup>125</sup>
- (b) manufacturers will not want to allow unrestricted access to certain commercially sensitive information that puts them at a disadvantage.<sup>126</sup>

5.80 A few respondents to the Consultation expressed a preference for, or suggested the CMA could consider, solutions other than treating these restrictions as ‘excluded’. We set out below those submissions:

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<sup>120</sup> TMD Friction, UK AFCAR.

<sup>121</sup> RAC.

<sup>122</sup> RAC.

<sup>123</sup> Anonymous 1.

<sup>124</sup> These are relevant considerations which, in the CMA’s view, demonstrate that a blanket approach to these restrictions is not merited and that, instead, a case-by-case assessment is more appropriate.

<sup>125</sup> Independent Garage Association.

<sup>126</sup> RAC.

- (a) Restrictions on access to technical and vehicle information could be treated as ‘hardcore restrictions’ to ensure that, if restrictions are imposed on accessing this type of information, the applicable regime is similar for the one already in place for restrictions on access to physical spare parts.<sup>127</sup>
- (b) Addressing these issues by way of guidance would be more appropriate given:
  - (i) the fact that they are also relevant in the context of the Chapter II prohibition (the MVBEO will only apply to agreements and concerted practices);<sup>128</sup> and
  - (ii) the lack of detail about the CMA’s proposals and the short duration of the Consultation.<sup>129</sup>
- (c) The CMA could recommend vehicle type approval requirements<sup>130</sup> to ensure the potential technological advances in vehicles do not enable OEMs to restrict access to in-vehicle data (ie, fault code reading, service indicator resets and replacing service parts, such as the brake pads used in electric parking brakes).<sup>131</sup>

5.81 Finally, a number of other relevant points were made by respondents to the Consultation, including:

- (a) The need for providing extensive guidance on the assessment of restrictions on access to technical and vehicle information if these were to be treated as ‘excluded’ under the MVBEO.<sup>132</sup>
- (b) If these restrictions were treated as excluded, the burden of self-assessment should be placed on the parties imposing these restrictions (not on the parties that see their requests for access refused).
- (c) Under partial and (non-genuine) agency models, OEMs are also potentially competing with their own authorised networks; it is not simply a question of independent players driving competition. OEMs have a

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<sup>127</sup> ABI/Thatcham Research. UK AFCAR also suggested that the importance of this issue could justify elevating the treatment of these issues as ‘hardcore’ restrictions.

<sup>128</sup> NFDA.

<sup>129</sup> SMMT.

<sup>130</sup> These are technical and administrative requirements concerning the type-approval of motor vehicles and of systems, components and separate technical units intended for such vehicles. Typically these requirements are designed to ensure a level of safety and of health and environmental protection. These requirements also specify obligations on manufacturers to provide access to technical and vehicle information to independent operators.

<sup>131</sup> Independent Garage Association.

<sup>132</sup> Anonymous 1.

particular advantage in terms of the connected vehicle data they capture and, if they choose to pursue a direct aftersales proposition, authorised dealers and agents will become even more dependent on them, not only economically as a result of having made investments in facilities for carrying out repairs, but also operationally in terms of the OEM controlling all contact with customers in respect of aftersales.<sup>133</sup>

5.82 As noted above, the majority of UK stakeholders that responded to the Consultation supported the CMA's proposed recommendation. The CMA does not consider that any of the issues raised by those stakeholders who had concerns about the proposed inclusion of an excluded restriction provided a basis for departing from our proposed recommendation for the reasons set out below:

- (a) The CMA considers that the option of treating these restrictions as 'hardcore' (paragraph 5.80(a)) is not appropriate. This is because a blanket approach to restrictions on access to information would not take account of the various situations where those restrictions may be warranted and imposed in the best interest of consumers (eg vehicle safety, cyber security, brand reputation), thereby potentially meeting the conditions for individual exemption under section 9(1) of the Act. Furthermore, treating these restrictions as 'hardcore' would mean that the entire agreement containing such restrictions would lose the benefit of the exemption. Such approach, in the CMA's view, is disproportionate.
- (b) With regards to the need to have a longer period of consultation and the alleged lack of detail on the CMA's recommendation (paragraph 5.80(b)(ii)), if the Secretary of State accepts the CMA's recommendation, the CMA is minded to provide further guidance on how parties should self-assess these restrictions, and interested parties will have the opportunity to make representations on a draft version of any such guidance.<sup>134</sup>
- (c) The CMA notes that the modification of the legislation relating to vehicle type approval requirements (paragraph 5.80(c)) is outside of its remit and is a matter for the Department of Transport to consider.<sup>135</sup>
- (d) In relation to the issue of which party must bear the burden of self-assessment (paragraph 5.81(b)), the CMA considers that, in general, all undertakings should assess whether their agreements comply with

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<sup>133</sup> NFDA.

<sup>134</sup> Prior to that there would also be a technical consultation on the text of the draft MBVEO carried out by BEIS.

<sup>135</sup> See also UK AFCAR's submission which highlighted the need for having up to date type approval legislation in the UK in order to ensure that appropriate access to information is mandated, in particular the way in which such access should be granted by manufacturers.

competition law. Therefore, we do not consider it appropriate to provide for the burden of such self-assessment to fall exclusively on manufacturers. The CMA is, however, minded to clarify by way of future guidance that it expects that manufacturers in particular will carefully assess the implications of any restrictions imposed on other market participants (both authorised and independent providers) and that, in any possible investigation under the Act into these restrictions, the CMA would consider whether, in light of the particular circumstances, it would be appropriate to rely on rule 5(3) of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 in order to address any proposed infringement decision to manufacturers imposing the restrictions only (ie not to the counterparties on which the restrictions are imposed). In any event, we consider that self-assessment is not an issue which can be appropriately dealt with in the MVBE0 itself and is a matter best left for any MVBE0 Guidance.

- (e) The CMA acknowledges that there may be a degree of competition between OEMs and their authorised networks on the provision of certain services (paragraph 5.81(c)) and is minded to explore this issue further when preparing any MVBE0 Guidance.
- (f) The CMA will consider in due course whether or not references to the Chapter II prohibition in any future MVBE0 Guidance (paragraph 5.80(b)(i)) are merited and will consult on a draft version of any such guidance. However, for reasons set out above, the CMA does not consider it appropriate to deal with the issue of access to technical and vehicle information by way of guidance only and the fact that there may also be issues in the context of Chapter II is not a reason not to address the Chapter I issues in the MVBE0.

5.83 Finally, the CMA considers that the approach of treating restrictions on access to technical and vehicle information as 'excluded restrictions' should extend to restrictions on access to other essential inputs such as tools and training for independent operators (in accordance with the current position in paragraph 68 of the MVBER Supplementary Guidelines which is to treat both of them consistently). A significant number of respondents to the Consultation supported this position.<sup>136</sup> The CMA considers that, to the extent that tools and training amount to essential inputs, these are analogous to technical and vehicle information and therefore both should be treated in the same manner

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<sup>136</sup> TMD Friction, Independent Garage Association, RAC, Belron, Anonymous 1, Anonymous 3, ABI/Thatcham Research, UK AFCAR, Anonymous 2. SMMT argued that more detail and consultation was required.

under the MVBEO (ie restrictions on access to these essential inputs should be treated as ‘excluded’).

*The scope of the definition of ‘technical and vehicle information’ and ‘independent operators’*

5.84 We dealt above with the issue of how, in the CMA’s view, restrictions on access to technical and vehicle information should be treated under the MVBEO. A critical question which is closely linked to this consideration is how best to define the scope of ‘technical and vehicle information’ for the purposes of ensuring that only information which amounts to an essential input for repairs and maintenance carried out by independent operators is caught by the excluded restriction.<sup>137</sup> In this context, we have also considered whether it is necessary to add to the MVBEO a definition of ‘independent operator’, and, if so, how to best define it. We address these questions in turn below.

*Definition of ‘technical and vehicle information’*

5.85 In defining ‘technical and vehicle information’ the CMA recommends that regard should be had to the definitions in the EU Supplementary Guidelines<sup>138</sup> and in Regulations (EC) 2018/858 of 30 May 2018, (EC) No 715/2007 and (EC) No 595/2009.<sup>139</sup> However, in the Consultation the CMA sought views from stakeholders on whether, and if so how, these definitions could be updated or improved in order to capture information which amounts to an essential input for independent providers in light of recent technological and market developments.<sup>140</sup>

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<sup>137</sup> If the final decision of the Secretary of State is to treat restrictions on access to technical and vehicle information as ‘excluded restrictions’ then the definition should be contained in the MVBEO. However, if the decision is to address this matter in any CMA MVBEO Guidance only, then the definition should be set out in the guidance rather than in the block exemption.

<sup>138</sup> Including the definitions in the draft EU Supplementary Guidelines (eg, the definition of vehicle data in paragraph 67a).

<sup>139</sup> Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC provides, inter alia, for a system for disseminating repair and maintenance information in respect of motor vehicles. The CMA will take these retained Regulations, or any other legal instruments which may supersede them, into account when assessing cases of suspected withholding of technical repair and maintenance information.

<sup>140</sup> The CMA notes that the EC’s draft revised Supplementary Guidelines refer at para.62a to three factors which should be considered when determining whether a particular restriction amounts to a restriction of an essential input caught by Article 101 TFEU:

- a) whether withholding the item in question will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market;
- b) 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 should also be made available to independent operators on a non-discriminatory basis;

- 5.86 A few UK stakeholders took the view that the current version of the EU Supplementary Guidelines and (EC) Regulation 2018/858 of 30 May 2018 are too narrow in scope and do not currently address the issue of how the information should be provided.<sup>141</sup> In relation to how the information is provided it was mentioned by a few stakeholders that the data flows should be provided in real time.<sup>142</sup> The CMA acknowledges that the manner in which technical and vehicle information is provided is a relevant consideration and notes that this issue is already covered in the EU Supplementary Guidelines in paragraph 67. Furthermore, the CMA is minded to issue further guidance on this subject in the context of any MVBEO Guidance. We also received comments that the legal instruments above mentioned do not cover in-vehicle generated data which may constitute an essential input for independent providers.<sup>143</sup> The CMA agrees the in-vehicle data may amount to an essential input on which independent operators rely and recommends that this type of information is included in the definition of technical and vehicle information.<sup>144</sup>
- 5.87 The CMA acknowledges the interaction between vehicle type approval legislation and the operation of the block exemption. The CMA considers that the starting point for the definition of ‘technical and vehicle information’ should be (EC) Regulation 2018/858 of 30 May 2018 since it includes definitions well-established and well-understood by the industry, and also agrees with the

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- c) whether the item in question will ultimately be used for the repair and maintenance of motor vehicles, or rather for another purpose, such as for the manufacturing of spare parts or tools.

The draft revised Supplementary Guidelines (para.62) also state that an essential input may include technical information, tools, training and vehicle-generated data that are essential for repair and maintenance.

<sup>141</sup> RAC, UK AFCAR. The latter also submitted that the UK faces the issue of not benefitting from the application of some of the delegated and implementing acts of EC Reg 2018/858 (*ie because those legal instruments, unlike the original regulation which they implement, were not retained as EU law in the UK: '[a]lthough 2018/858 is now the primary Regulation (under which both 715/2007 and 595/2009 are now replaced) that includes the requirements for 'repair and maintenance information' (RMI), it is the European Commission's delegated acts and implementing acts (e.g. (EU) 2019/2144, (EU) 2020/683 and (EU) 2021/1244) which contain the technical details that describe the obligations of how the vehicle manufacturer must fulfil the requirements contained in (EU) 2018/858. Without the UK secondary legislation either covering these detailed technical requirements, or directly referencing the EU's delegated and implementing acts, then the MV-BEO will not resolve the distortion of competition that is likely to otherwise occur and the MV-BEO would potentially have a reverse and counter-productive impact on the UK automotive aftermarket. This would have the effect of legitimising the vehicle manufacturers to be able to decide on the wide range of conditions that would define the data, information, access and functional aspects in a way which would distort competition (see our comments in 4.5 above), as the vehicle manufacturers operate as 'system administrator' and as arbitrator of the 'rights and roles' of the repair process'*).

<sup>142</sup> According to Anonymous 1, '*if data flows are restricted only to when they are needed to actualise a physical repair, it will leave the independents at a significant disadvantage. Maintenance on modern connected vehicles does not just occur when there is a fault logged. Through connected vehicles and real-time monitoring, the health of all elements of a vehicle can be proactively monitored, harmful driver behaviours addressed, and more holistic maintenance services offered. Some providers claim to be able to reduce operational costs by over 80% through prognostics delivering reduced downtime and optimisation of maintenance.*' This view was shared by ABI/Thatcham Research according to whom '*the criticality of information is changing with the increased connectivity of vehicles. The speed at which this information is accessed is imperative to the functioning of the aftermarket.*'

<sup>143</sup> Anonymous 1

<sup>144</sup> To this end, the Secretary of State may have regard to the definition of vehicle data in the draft EU Supplementary Guidelines.

views expressed by some stakeholders, corroborated by evidence from the Evaluation, that this should be complemented by references to in-vehicle generated data as this may constitute an essential input for independent providers (see previous paragraph).<sup>145</sup>

- 5.88 The CMA notes that, if accepted by the Secretary of State, the inclusion of in-vehicle generated data within the scope of the MVBEO would not affect manufacturers' obligations under vehicle type approval legislation and, in particular, does not place an obligation on manufacturers to provide unrestricted access to such information. It simply means that, if restrictions are placed on other market participants, being authorised providers or independent providers, those will need to be self-assessed by the parties involved against the Chapter I obligation and would not automatically benefit from the block exemption provided by the MVBEO.
- 5.89 The CMA is minded to provide further guidance on the assessment of the excluded restriction in any MVBEO Guidance, and stakeholders will have the opportunity to make representations on a draft version of such guidance.

*The definition of 'independent operator'*

- 5.90 Considering that the CMA's final recommendation is that restrictions of access to technical and vehicle information (and other essential inputs such as tools and training) should be treated as 'excluded' under the MVBEO, the CMA considers that the introduction of a definition of 'independent operator' in the MVBEO itself is necessary. This is because the 'essential' nature of these inputs is closely linked with the fact that, unlike 'authorised providers', 'independent operators' are not part of OEM's authorised networks and therefore are more likely to experience issues surrounding access to information (and other essential inputs) than 'authorised providers'.
- 5.91 In the Consultation, the CMA sought views on the possible need to update the definition of 'independent operators' (currently in the EU Supplementary Guidelines) to take account of new players who may require access to information as an essential input. There was broad consensus amongst respondents to the Consultation that, for the purposes of creating a new excluded restriction the notion of independent operator should be included, although there were mixed views on whether such a notion (already included in the EU Supplementary guidelines) should be updated to include new operators. The CMA considers that such a notion is already sufficiently broad

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<sup>145</sup> To this end, the CMA considers that regard may be had to the wording in paragraphs 62 and 62a of the EC's draft revised Supplementary Guidelines which define the type of information which constitutes an essential input

and saw no concrete evidence that it needs to be substantially amended or expanded.<sup>146</sup> However, taking into account feedback from stakeholders, the CMA does consider that owners and/or operators of fleets of vehicles should be included in the definition given i) their legitimate interest in having access to certain essential inputs such as technical and in-vehicle generated data,<sup>147</sup> ii) the fact that such access could intensify competition at the downstream level,<sup>148</sup> and iii) the benefits that this could deliver for consumers and the wider economy more generally.<sup>149</sup>

## ***Vehicle warranties and repair/maintenance carried out by independent providers***

### ***Current regime***

5.92 Qualitative selective distribution agreements may also be caught by the Chapter I prohibition if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks.<sup>150</sup> In addition, warranty conditions must not require the use of the vehicle manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms.

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<sup>146</sup> SMMT, Anonymous 3, NFDA, were all stakeholders that supported retaining the current definition.

<sup>147</sup> Independent Garage Association, UK AFCAR, Anonymous 1, and ABI/Thatcham Research were all in favour of updating the definition. Anonymous 1 in particular argued that '*the current definition excludes the owners of the [fleet] vehicles and/or their operators. These are central parties who control and administer the repair and maintenance of vehicles, especially in fleets. Many of those other independent repairers will be taking their instructions from the fleet owners/operators to trigger their right to access, and so it would leave a potential hole if those owners weren't recognised as being included in the list of those with an interest in access. Given the interest of other parts of the supply chain in selling services to their vehicle users, owner/operators need access to be able to ensure their instructions are being adhered to.*' The addition of owners and operators of fleets to the definition of 'independent operators' was also supported by Thatcham and Research.

<sup>148</sup> Wider access to technical and vehicle information by certain businesses operating downstream such as owners and operators of fleets may contribute to exerting competitive pressure on OEMs who enjoy a privileged position when it comes to accessing such information.

<sup>149</sup> See BVRLA's [submission](#) to the CMA's Mobile Ecosystems market study, pp.2-3.

<sup>150</sup> EU Supplementary Guidelines, paragraph 69. However, if a supplier legitimately refuses to honour a warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of a repairer to carry out a particular repair or maintenance operation in the correct manner or to the use of poor-quality spare parts, this will have no bearing on the compatibility of the supplier's repair agreements with the competition rules.



## **Recommendations**

- 5.93 The CMA's recommendation is to produce additional and updated guidance to clarify that the clauses contained in all the documents proposed to consumers by OEMs/ authorised dealers or repairers should clearly state the consumer's right to use the services of an independent repairer without losing the benefit of the warranty.
- 5.94 The majority of respondents to the Consultation agreed that further guidance on this issue is warranted,<sup>151</sup> and referred to the fact that there are still concerns about vehicle warranties being used as a way to give undue preference to repair and maintenance carried out within authorised networks to the detriment of independent providers. A few respondents also mentioned the issue of the fitting of 'green parts'<sup>152</sup> in a vehicle potentially leading to its warranty being declared void by the manufacturer,<sup>153</sup> and the fact that OEM service history is allegedly still being required in order for repairs to be performed under warranty.<sup>154</sup> Two respondents expressed the view that further guidance is not strictly necessary as the current position is well understood in the market.<sup>155</sup>
- 5.95 The responses to the Consultation were consistent with the feedback that we had received prior to the Consultation in the meetings that we had held. Several UK stakeholders had voiced concerns in those meetings over contracted dealer non-compliance with the current warranty regime (see paragraph 5.92 above) and noted that customers still faced issues when they had, or planned to, have their vehicles serviced in the independent aftermarket.<sup>156</sup>
- 5.96 The Evaluation similarly had revealed that warranty restrictions may still be prevalent: almost 40% of all vertical restrictions identified by NCAs in their enforcement activities related to abuses of warranties, while 49% of respondents to the public consultation indicated that they had encountered this restriction in their agreements. Moreover, this restriction also featured as one of the most prevalent vertical restrictions mentioned in the context of informal submissions concerning the motor vehicle sector received by the

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<sup>151</sup> UKLA, TMD Friction, Independent Garage Association, RAC, Belron, Anonymous 1, Anonymous 3, UK AFCAR, Anonymous 2, LKQ.

<sup>152</sup> 'Green parts' are undamaged and reusable parts of end-of-life and written-off vehicles which are routinely reclaimed during the dismantling and recycling process.

<sup>153</sup> Anonymous 1 and ABI/Thatcham Research.

<sup>154</sup> ABI/Thatcham Research

<sup>155</sup> SMMT and NFDA.

<sup>156</sup> Meeting with IAAF/UK AFCAR. An anonymous stakeholder noted the increased relevance of warranty issues in relation to the proliferation of EVs, and the use of warranties by manufacturers to keep automotive batteries as 'black boxes'.

Commission over the last 10 years.<sup>157</sup> Some NCAs had stressed the importance of keeping an explicit reference to the warranty restrictions in the EU Supplementary Guidelines. In the same vein, NCAs had highlighted the importance of ensuring that the clauses contained in all the documents proposed to consumers by OEMs/ authorised dealers or repairers clearly state the consumer's right to use the services of an independent repairer without losing the benefit of the warranty.<sup>158</sup>

- 5.97 The CMA considers that consumers should have the choice of having their vehicles serviced or repaired by independent providers without running the risk of seeing their warranties invalidated as a result of this.<sup>159</sup> The CMA agrees with the majority of respondents to the Consultation, with the findings of the Evaluation and the views expressed by some NCAs that the current guidance may not be sufficiently clear and comprehensive, and that this may have contributed to the issues mentioned above.<sup>160</sup> While the CMA is not recommending that the Secretary of State address this issue in the MVBEO itself,<sup>161</sup> it is minded to produce additional and updated guidance to make clear that the clauses contained in all the documents proposed to consumers by OEMs/ authorised dealers or repairers should clearly state the consumer's right to use the services of an independent repairer without losing the benefit of the warranty.<sup>162</sup>
- 5.98 Finally, the CMA notes that will keep this issue under review with a view to reassessing the position upon expiry of any future block exemption.<sup>163</sup>

## **Limits on the numbers of authorised repairers within a brand network**

### ***Current regime***

- 5.99 Competition between authorised and independent repairers is not the only form of competition that needs to be taken into account when assessing the compatibility of authorised repair agreements with the Chapter I prohibition. Paragraph 70 of the EU Supplementary Guidelines explains that one of the main factors driving intra-brand competition relates to the conditions of access to the network established under standard authorised repairer agreements. In

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<sup>157</sup> EC Staff Working Document, pp175-177, pp172-173.

<sup>158</sup> EC Staff Working Document, pp175-177, p174.

<sup>159</sup> Subject to certain exceptions such as those set out in paragraph 69 of the Supplementary Guidelines.

<sup>160</sup> EC Staff Working Document, p171.

<sup>161</sup> The CMA notes that this is consistent with the position adopted by the EC at EU level.

<sup>162</sup> This is consistent with the views expressed by some national competition authorities during the Evaluation.

<sup>163</sup> It should be noted that the recommended duration of the MVBEO is six years.

view of the generally strong market position of networks of authorised repairers, their particular importance for owners of newer motor vehicles, and the fact that consumers are not prepared to travel long distances to have their cars repaired, the EU Supplementary Guidelines make clear that it is important that access to authorised repairer networks should generally remain open to all firms that meet defined quality criteria. It is also stated in the EU Supplementary Guidelines that imposing quantitative selection criteria is likely to cause the agreement to fall within the scope of the Chapter I prohibition.

5.100 Paragraph 71 of the EU Supplementary Guidelines provides that agreements which oblige authorised repairers also to sell new motor vehicles are likely to be caught by the Chapter I prohibition. This is because any such obligations are not required by the nature of the contract services and its impact would be to severely restrict access to the authorised repair network, thereby reducing competition without bringing about corresponding benefits for consumers.<sup>164</sup>

### **Recommendation**

5.101 As discussed below, given the uncertainty as to whether the introduction of certain restrictions which indirectly limit the number of repairers falls within the scope of the Chapter I prohibition, the CMA is minded to provide guidance on this issue in the context of any MVBEQ Guidance in order to increase legal certainty.

5.102 A majority of respondents to the Consultation that addressed this specific issue supported the CMA's provisional recommendation.<sup>165</sup> A few stakeholders recognised that the issue in question gives rise to competition issues.<sup>166</sup> One stakeholder suggested that qualitative requirements (not quantitative requirements) pose the greatest threat to independent providers since those requirements may have a 'spill over' effect on the position of the latter who may have to comply with proprietary requirements of vehicle manufacturers when repairing vehicles.<sup>167</sup>

5.103 In meetings between the CMA and UK stakeholders prior to the Consultation, no specific concerns about this issue had been raised. The evidence gathered during the Evaluation indicated that NCAs were generally of the view that the guidance has provided sufficient legal certainty but also suggested that the effectiveness of the MVBER regime could be improved if further clarification

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<sup>164</sup> This paragraph also refers to the possibility of establishing an obligation on authorised repairers to sell new motor vehicles may be permissible for a limited period of time in order to protect new entry.

<sup>165</sup> UKLA, Independent Garage Association, RAC, Anonymous 1, Anonymous 3.

<sup>166</sup> UK AFCAR, Independent Garage Association,

<sup>167</sup> UK AFCAR.

were provided for certain areas. For example, NCAs pointed out during the Evaluation that further guidance and examples of quantitative requirements that would likely fall outside of Article 101 of the Treaty (the equivalent of the Chapter I prohibition in the UK) would be merited.<sup>168</sup>

- 5.104 However, only a small share of respondents to the EC's public consultation considered that the guidance had provided a sufficient level of legal certainty, with a larger share of respondents considering that this had only achieved little or very little legal certainty. In addition, 38% of respondents to the Evaluation declared to have encountered this restriction in their agreements.<sup>169</sup>
- 5.105 Furthermore, vehicle manufacturers flagged in the Evaluation that courts in different countries are giving diverging assessments of the extent to which vehicle manufacturers can adopt measures that indirectly limit the number of authorised repairers, thereby undermining legal certainty. Considering the growing technical complexity of vehicles and the increasing investment cost for repairers, vehicle manufacturers see a significant risk of underinvestment if they are not allowed to place quantitative limits on the number of authorised repairers. They say that this would undermine service quality as well as the reputation of the brand, since consumers associate authorised repairers with the brand they represent. In contrast, associations representing dealers, parts' dealers and repairers have argued that the refusal by a supplier to re-approve a repairer meeting the qualitative selective criteria should constitute a hardcore restriction.<sup>170</sup>
- 5.106 However, the Evaluation concluded that despite a general decrease in the number of authorised repairer outlets from 2007 to 2017, as well as a reduction in the total number of contracts signed by motor vehicle manufacturers with authorised repairers, there was no evidence of any generalised practices on the part of suppliers to refuse network entry to candidate repairers that met the applicable quality criteria.<sup>171</sup>
- 5.107 The CMA considers that the views expressed by NCAs and vehicle manufacturers demonstrate that there is a degree of uncertainty around the question of whether certain restrictions which indirectly limit the number of repairers fall within scope of the Chapter I prohibition in the first place<sup>172</sup> The CMA is therefore minded to provide guidance on this issue in the context of

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<sup>168</sup> EC Staff Working Document, p181-182.

<sup>169</sup> EC Staff Working Document, p181-182.

<sup>170</sup> EC Staff Working Document, p182.

<sup>171</sup> Evaluation Report, p10.

<sup>172</sup> If certain restrictions are not within scope of the Chapter I prohibition then it is not necessary to assess whether they meet the conditions of the block exemption or the conditions of section 9(1) of the Act.

the MVBEQ Guidance in order increase legal certainty. In reaching this view, the CMA has taken into consideration that, under the VABEQ, it is possible to have quantitative restrictions in selective distribution systems provided the general conditions of the VABEQ are met.<sup>173</sup> In the absence of good reason for distinguishing agreements in the motor vehicle aftermarket, we are of the view that we should not recommend the inclusion of a specific provision in the MVBEP that removes the exemption for such arrangements.

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<sup>173</sup> Paragraphs 10.84 and 10.90 of the VABEQ Guidance.

## 6. Duration of MVBER

- 6.1 The current retained MVBER has a duration of ten years and is due to expire on 31 May 2023.
- 6.2 Under section 6(7) of the Act, a block exemption order may provide that the order is to cease to have effect at the end of a specified period. The CMA recommends that the MVBER should include such a provision.
- 6.3 Part of the benefit of the MVBER expiring after a specified period is that it provides the opportunity for the CMA to conduct a further review of the regime, taking account of market developments since the last review.
- 6.4 The CMA recommends a duration for the MVBER of six years. This relatively short duration would enable the CMA to carry out a review of the block exemption at an early stage taking account of likely significant ongoing developments in the sector (see Part 4) ahead of the phase-out date for the sale of new petrol and diesel cars and vans in 2030.<sup>174</sup> The CMA is concerned that, given those significant ongoing developments, a longer duration could render the block exemption obsolete before its expiry date.
- 6.5 The CMA also considers that a six-year duration has the merit of enabling the review of the UK VBER (due to expire on 1 June 2028) to be completed ahead of the expiry of the MVBER (which assuming the CMA recommends this duration to the Secretary of State – and this is accepted - would expire on 31 May 2029). Considering the interplay between the VBER and the MVBER, the CMA considers that having a one-year gap between the expiry of these block exemptions is appropriate.
- 6.6 The majority of respondents to the Consultation agreed with the CMA's recommendation, although a few suggested that the appropriate duration was less than six years.<sup>175</sup> One respondent submitted that the duration should be at least ten years.<sup>176</sup> In meetings with the CMA prior to the Consultation, UK stakeholders had generally expressed support for the MVBER having a shorter duration than the current retained MVBER (ten years).<sup>177</sup>

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<sup>174</sup> The CMA notes that this duration would also be consistent with the proposed duration of the new EU MVBER.

<sup>175</sup> NFDA and ABI/Thatcham Research.

<sup>176</sup> UKLA.

<sup>177</sup> Meeting with IAAF/UK AFCAR, who stated that this was conditional on any MVBER being aligned with the updated requirements in vehicle type approval/data access legislation; meeting with Anonymous 1.

6.7 Despite the proposed duration being shorter than the duration of the retained MVBBER, the CMA considers that a six-year period is sufficiently long to provide a reasonable degree of legal certainty for businesses.

## 7. Other Provisions

### Consultation

- 7.1 Respondents to the Consultation did not provide comments on the CMA's provisional recommendation regarding 'other provisions'. The CMA considers that its provisional recommendations remain appropriate and have included them in its final recommendation as set out in more detail below.

### Transitional period

- 7.2 The CMA considers that the MVBE0 should provide for a transitional period of one year. This means that the Chapter I prohibition would not apply during a period of one year from the date on which the MVBE0 comes into effect in respect of agreements already in force on that date which (i) do not satisfy the conditions for exemption provided for in the MVBE0, but (ii) on that date, satisfied the conditions for exemption provided for in the retained MVBER.<sup>178</sup> In other words, existing agreements that meet the conditions of the retained MVBER could continue to benefit from its terms for a year after its expiry, whereas agreements entered into after its expiry would need to meet the conditions of the new MVBE0 to benefit from the block exemptions.
- 7.3 The CMA is therefore recommending that the MVBE0 have a transitional period of one year to allow businesses that wish to take advantage of the 'safe harbour' to review and (if necessary) revise their agreements.

### Cancellation in individual cases

- 7.4 Section 6(6)(c) of the Act provides that a block exemption order may provide that if the CMA considers that a particular agreement is not an exempt agreement,<sup>179</sup> it may cancel the block exemption in respect of that agreement. The CMA recommends that the MVBE0 should contain such a provision. The CMA further recommends that any cancellation, ie withdrawal of the benefit of the MVBE0 in an individual case, should be in writing, and that the CMA should first give notice in writing of its proposal and consider any representations made to it before making a decision to cancel the block exemption in respect of that agreement. The CMA also recommends that any notice should state the facts on which the CMA bases its decision or proposal

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<sup>178</sup> Unless the benefit of the block exemption is cancelled, or otherwise varied or revoked, in accordance with the provisions of the MVBE0 or the Act.

<sup>179</sup> Exempt agreement means an agreement which is exempt from the Chapter I prohibition as a result of section 9 of the Act (the Act, section 6(8)).



and its reasons for making it. The CMA envisages that these provisions would be similar to those in the Vertical Agreements Block Exemption Order 2022 and those that have been proposed for the Horizontal Block Exemption Orders.<sup>180</sup>

- 7.5 The CMA is therefore recommending that the MVBEO provides for the CMA to cancel the benefit of the block exemption in individual cases to ensure that the ‘safe harbour’ is only available for those agreements that satisfy the conditions for exemption under section 9 of the Act. The CMA considers that this provision is likely only to be used in exceptional circumstances and that the proposal to provide notice in writing and to consider any representations would ensure that the provision was used appropriately.

## **Obligation to provide information**

- 7.6 Section 6(5) of the Act provides that a block exemption order may impose obligations subject to which a block exemption is to have effect and section 6(6)(b) of the Act provides that a block exemption order may provide that if there is a failure to comply with an obligation imposed by the order, the CMA may, by notice in writing, cancel the block exemption in respect of the agreement. The CMA recommends that the MVBEO should impose an obligation for parties to provide the CMA with information in connection with those vertical agreements within the scope of the MVBEO to which they are a party if requested to do so and that failure to do so without reasonable excuse should result in cancellation, ie withdrawal, of the block exemption.
- 7.7 The CMA recommends that the obligation should be for businesses to supply the CMA with such information in connection with those relevant vertical agreements to which they are a party as the CMA may require within ten working days from the date on which the party receives notice in writing of the request or within such longer period of working days commencing with the relevant day as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.<sup>181</sup> The CMA also recommends that if it proposes to cancel the block exemption, it should first give notice in writing of its proposal and consider any representations made to it. The CMA envisages that these provisions would be similar to those in the Vertical

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<sup>180</sup> See the CMA’s final recommendation on the retained VABER, and Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.

<sup>181</sup> The CMA is minded to clarify in any CMA MVBEO Guidance that where appropriate, it will seek to give recipients of large information requests advance notice so that they can manage their resources accordingly. The CMA is also minded to clarify that, in certain circumstances and, where it is practical and appropriate to do so, it may send the information request in draft.

Agreements Block Exemption Order 2022 and those proposed for the Horizontal Block Exemption Orders.

- 7.8 The CMA is therefore recommending that the MVBEO provide for an obligation to provide information to ensure that the CMA is in a position to assess whether an agreement that benefits from the block exemption is one that satisfies the conditions for exemption under section 9 of the Act. This provision would also enable the CMA to investigate instances where competition law concerns arise from parallel networks of similar restraints.<sup>182</sup>

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<sup>182</sup> The process for providing representations where a response contains commercially sensitive information or details of an individual's private affairs and the sender considers that disclosure might significantly harm their interests or the interests of the individual, is explained in Chapter 7 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, which the CMA will have regard to when exercising the power in Article 12(1) VABEO.