

## **Consultation on Draft CMA Guidance on Motor Vehicle Agreements – Response of Haynes Group Limited (“Haynes”)**

### **1. Introduction**

- 1.1 Along with its affiliates, Haynes is a leading publisher of automotive repair and maintenance information<sup>1</sup> (‘RMI’), which it distributes to both businesses and consumers in multiple format. Our industry sector plays a critically important role in ensuring competition in the aftermarket by providing standardized RMI to multi-brand repairers. Haynes’ database provides multi-brand spare parts information covering all original equipment manufacturers (‘OEMs’) and around 310 million different vehicles. This information is key for ensuring competition in the spare parts market since it allows repairers to identify the spare parts they need and it allows suppliers of spare parts to correctly cross- reference their products.
- 1.2 We welcome the CMA’s consultation process, and its helpful Guidance, which features a wide-ranging examination of both the application mechanism for deploying the block exemption and the nature of commonly found abuses that preclude enjoying its benefits.
- 1.3 Given that there are around 40 major OEMs and cars have typically over 30,000 components, RMI information is indispensable for repairers. Without access to multi-brand software and technical information from independent data publishers, multi-brand repairers would have to purchase the required data directly from OEMs. This would be very costly, inefficient and time-consuming and would put them at a competitive disadvantage vis-à-vis authorized repairers, which have this information easily available as a result of their links with relevant OEMs. Accordingly, it is vital that the legal and regulatory framework safeguards the important role of independent data publishers in creative a competitive aftermarket.

### **2. General Competition Concerns**

- 2.1 We particularly value the acknowledgment set out in paragraph 3.6 of the Guidance of the existence of structural limitations on competition within motor vehicle after markets. As an independent operator within the aftermarket, we need access to manufacturers’ RMI data to enable us to compile and verify the information that we use to populate the products to which we make available to the market. In our recent experience that can prove challenging. We have encountered a number of obstacles when seeking to acquire access to RMI from leading manufacturers that significantly hamper our ability to operate our business profitably.

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<sup>1</sup> We include parts-related technical information within the definition of RMI.

- 2.2 In order for the MVBE0 to provide effective protection to independent operators it is important that they cover a broad range of RMI. The definition provided in the Type Approval Regulation<sup>2</sup> is overly rigid in that it does not clearly include software and algorithms needed to perform any diagnostic repairs.
- 2.3 Notwithstanding the existence of Regulation 2018/858 ('**Type Approval Regulation**'), which the MVBE0 will replace, our publishing activities are threatened by the scenario envisaged by Article 5(2)(b) of the MVBE0. We are routinely faced with demands from manufacturers to agree to direct or indirect restrictions that limit our ability to sell these goods to distributors, repairers and end-users.
- 2.4 The restrictions we have encountered and which we refer to in further detail below are arguably examples of 'excluded restrictions' for the purposes of Article 6 of the MVBE0. Furthermore, there is a persuasive argument that they amount to Chapter 1 prohibitions.

### **3. How Access to RMI is Provided**

- 3.1 The Type Approval Regulation<sup>3</sup> specifies:

*For independent operators other than repairers, the information shall also be given in a machine-readable format that is capable of being electronically processed with commonly available information technology tools and software and which allows independent operators to carry out the task associated with their business in the aftermarket supply chain.*

- 3.2 Our practical experience of the regulatory regime established as a result is mixed. On the one hand, the volume and the complexity of RMI is growing and the information is being updated frequently. We often do not get access to updated information quickly enough. Moreover, in spite of the provisions of Article 61(2) of the Type Approval Regulation, which requires OEMs to ensure that:

*for independent operators other than repairers, the information shall also be given in a machine-readable format that is capable of being electronically processed with commonly available information technology tools and software and which allows independent operators to carry out the task associated with their business in the aftermarket supply chain.*

we frequently receive information in a format that we cannot process electronically with commonly available tools and software. Not only does this raise our input costs, it also

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<sup>2</sup> Article 3(48).

<sup>3</sup> Article 61(2)

restricts our ability to offer effective RMI services to independent repairers. This is weakening competition between independent and authorized repairers.

- 3.3 SERMI provides a specific case in point. It is a cross-industry association of vehicle manufacturers and independent repairers, which was set up under the terms of EU Regulations to provide a one-stop shop in which technical information was supplied on a standardised basis while imposing accreditation requirements to limit access to vehicle security features. It is worth noting that it is not designed to be used in respect of any other kinds of information; technical or otherwise. The rationale for such a system is clear from a safety perspective since it ensures that independent repairers do not inadvertently misuse or misapply safety information. However, independent publishers cannot secure accreditation; accreditation being made available only to repairers.
- 3.4 We have encountered recent examples in which leading vehicle manufacturers have insisted that the requirements of SERMI also apply to non-security related data which necessarily creates an arbitrary barrier to market entry and the MVBE0 would do well to specifically address this problem.
- 3.5 Certainly, the Type Approval Regulation incorporates provisions in Article 61 that both distinguish between repairers and other independent operators and also stipulate that data is provided in a format that is capable of being processed by those independent operators (which thereby reduces the risk of further sunk costs burdening those same operators).
- 3.6 We feel it is important that safety concerns are not used as a spurious justification for market foreclosure, which is the natural consequence of providing an essential input product in a state in which it cannot be used. It is worth adding that SERMI has been cited by vehicle manufactures as the reason for very steep increases in licence fees associated with RMI data access.

#### **4. Formats**

- 4.1 The same problem that we have encountered in respect of SERMI has been played out in a similar way in our dealings with some vehicle manufacturers, who wish to provide data access using formats that are difficult or impossible to process using the tools we have available to us. For the avoidance of doubt, our IT systems and infrastructure are modern, up-to-date and feature access to most of the most commonly used software tools by businesses in this sector. The costs of developing an interface that we can use to access data from non-standard platforms and those stored in non-standard formats often reach £ [REDACTED] pa for each OEM. This necessarily creates a significant barrier to market entry.

## 5. Price

5.1 Perhaps the most obvious and egregious example of market abuse that we have recently encountered is excessive price increases. Such increases have seen demands for price hikes for annual access to the same data of up to [REDACTED]. It is very difficult to avoid concluding that such manufacturers are abusing a dominant position. The magnitude of such increases is such that it threatens the continued viability of our business.

5.2 Similar concerns have been triggered by [REDACTED] other manufacturers who seek a disproportionate slice of our revenues as the price for including their RMI data within a product that features a large portfolio of other vehicle manufacturers. Little regard appears to be paid to the consequences of all manufacturers applying that same approach, which we have calculated would - in some cases - result in our having to pay a sum equal to [REDACTED]% of our annual revenues in aggregate licence fees to all vehicle manufacturers. Clearly, we would not be able to maintain the viability of the business if that were to materialise.

5.3 It is our view that each of the vehicle manufacturers operates as a monopoly in the supply of its RMI data since it cannot be obtained from any other supplier. That monopoly status is entirely consistent with the pattern of price increases referred to in paragraph 5.1 above.

## 6. Enforcement

6.1 While the CMA has the power to investigate anti-competitive abuses, it is difficult not to ignore the lengthy process that such investigations require. The need to run a business with affordable inputs where contracts with suppliers are based on commercial and legal certainty requires a quick and cost-effective means of recourse. The UK has a well-developed system of regulation to deal with privatised utilities that enjoy monopoly or near-monopoly status. Each of them is able to set price controls that it cannot enforce against relevant companies through their respective licensing regimes. We are not suggesting that vehicle manufacturers should also be subject to a system of licensing, but an enforceable system in which pricing was subject to clear and transparent criteria would help to ensure that vehicle manufacturers did not seek to extract super-normal profits from independent operators such as publishers.

6.2 In Australia, the CMA's counterpart regulator has recently set up the Motor Vehicle Service and Repair Information Sharing Scheme, the remit of which includes a commitment to ensuring that data providers do not charge more than a fair market price for the provision of access to their data. Its guidance notes for data providers<sup>4</sup> sets out a number of factors

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<sup>4</sup> [https://www.accc.gov.au/system/files/22-50BKT\\_MVIS%20guidance\\_D02%20%281%29.pdf](https://www.accc.gov.au/system/files/22-50BKT_MVIS%20guidance_D02%20%281%29.pdf)

that are to be considered when determining whether a price genuinely reflects the fair market rate.

- 6.3 The consequences of the absence of this form of prescriptive intervention is clear when assessing the recent proceedings in the German courts between the Automotive Data Publishers' Association and Peugeot SA<sup>5</sup>. When the matter was referred to the European Court of Justice ("ECJ") the court failed to provide any guidance as to how to evaluate what was meant in the Regulation as 'reasonable and proportionate fees. Instead, it opined that:

*the concept of 'reasonable and proportionate fees', set out in [Article 63 of the Type Approval Regulation], first, requires automotive manufacturers to take into consideration the commercial activity in which the vehicle repair and maintenance information is used by the different independent operators and, second, allows them to charge fees which go beyond solely the costs borne as a result of access to that information, which that regulation requires them to grant to those operators, on condition, however, that those fees do not have a deterrent effect for those operators.*

- 6.4 This leaves independent publishers in an invidious position when OEMs seek to charge excessive prices. Faced with unaffordable licence fees, it is extremely risky for those independent operators to litigate even on an occasional basis with vehicle manufacturers, since our business model requires ongoing co-operation. Accordingly, it is very difficult, as a practical matter, to enforce OEMs competition law obligations. It is for this reason that intervention is required: either in the form of more prescriptive guidelines in respect of price calculations or alternatively, a bespoke regulatory mechanism that offers a speedy and cost-effective means of adjudicating disputes. The latter model could feature accredited arbitrators recognised for their industry expertise.

- 6.5 We have long argued that fees should be calculated by reference to the actual costs of providing access only. This approach reflects the fact that access to digitally stored information should not require incurring substantial incremental costs on the part of the supplier. In the case of OEMs' supply of data we do not believe that a reasonable return on the capital investment associated with their creation of the data should require licence fees that threaten the continued market involvement of independent operators. In any event, since that data needs to be made available to OEM-owned dealers in any event, the incremental costs of providing it to independent operators are likely to be low.

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<sup>5</sup> Case C-390/21 - Judgment of 27 October 2022

## **7. Miscellaneous anti-competitive Restrictions**

7.1 In addition to the practices outlined above, vehicle manufacturers have routinely engaged in other practices that are likely to stifle competition in the market. The following is not an exhaustive list, but highlights some of the more serious ones:

- The imposition of sign-up fees that represent a flat access fee charged as a sunk costs irrespective of usage of RMI data places a huge financial burden on independent operators. These can amount to anything up to [REDACTED]. Moreover, we have also encountered some OEMs insisting on minimum access fees that again don't correspond to usage, which in our experience can amount to as much [REDACTED] a year.
- OEMs are frequently relying on proprietary 'security' measures before a part can be installed. Such codes/software are needed to activate spare parts should be provided or otherwise licensed to independent parts producers to ensure that independently produced spare parts are available. We are aware of some OEMs imposing restrictions on the availability of proprietary certificates. It should be clarified that RMI encompasses all information incl. software and algorithms needed to perform any diagnostic job without such impediments

## **8. Conclusion**

We welcome the approach taken by the CMA in the Guidance and trust that the concerns outlined in this response can be given due consideration in framing the final draft of the MVBE0. We would be happy to assist further if you require any additional clarification in respect of the issues raised in this response.

Haynes Group Limited

15 May 2023