TMD Friction UK Ltd., response

to the CMA's Consultation on the Draft MV-BEO

Guidance – 16th May 2023

TMD Friction broadly welcomes the CMA's intention to provide orientation on how competition law will be applied to automotive aftermarket.

TMD Friction UK Ltd., would like to make the following observations:

1. **Section 2 – Legal Framework**

   TMD Friction UK Ltd., welcomes the reference in section 2.3 that competition law is to protect businesses and the consumer. Fair competition within the automotive aftermarket depends on the ability of businesses on each level of the sector to exercise competitive pressure on the vehicle manufacturer and its network. We welcome the CMA's intent to protect these businesses and their ability to compete fairly within the sector.

   We also note the references to the Chapter I prohibition and agrees that anti-competitive agreements and their effects should be monitored. Furthermore, the enforcement of Chapter II should also serve to protect competition in automotive aftermarkets. The European Commission recently highlighted this by including in its new sector-specific Guidelines

   Against this backdrop we welcomes the references to Chapter II, such as in section 1.4. we appreciate that details on Chapter II enforcement might be rare in the context of block exemption guidelines, yet with view to providing comprehensive orientation on how competition law applies to the industry it will be beneficial to provide additional detail.

2. **Section 3 – Scope of the MVBEO and relationship with the VABEO**

   Again we welcome the observations in section 3.6. The challenges in automotive aftermarkets are likely to remain for the years to come; the increasing complexity of vehicles and their components as well as the relevance of data and information could render the competitive situation even more problematic. Therefore, sector specific rules and enforcement activities will continue to be required.

3. **Section 4 – The hardcore provisions**

   We welcome the definition of "aftermarket goods" in section 4.3 explicitly to include software and that the definition of "goods" now includes software and information. However, it would seem incoherent to refer to "information" with regard to goods but not aftermarket goods. Hence, we suggest **adding** the term "information" in the definition of "aftermarket goods".

   The definition of "aftermarket goods" in **section 4.3 we suggest should be amended** to include 'diagnostic tools and equipment'. The diagnostic tool and the diagnostic data to be used in an independent aftermarket tool are essential requirements' and are increasingly used

as the basis to code and integrate replacement parts into a vehicle.

As experts in this field may we point out an inadvertent typo **in section 4.3**, the term "breaking" should be spelt "braking".

4. **MV-BEO Article 5(2)(a) – Spare parts sales to independent repairers**

Additional clarity would be appreciated in relation to an indirect restraint often encountered in practice: Vehicle manufacturers sometimes impede the ability of their authorised repairers to sell to independent repairers by requiring them to keep extensive records for which specific customer vehicle a part sold to an independent repairer will be fitted. These burdens can render these sales commercially unviable. Hence, we would welcome the **addition of a sentence in section 4.5** clarifying that the vehicle manufacturer may oblige the member of its selective distribution system to demonstrate that the recipient of the part was in the business of repairing or maintaining motor vehicles but that any further requirements would likely be deemed excessive and amount to an indirect restriction.

Furthermore, the future competition framework should qualify as an indirect means of hindering efficient access by independent repairers where vehicle manufacturers prevent sales to independent wholesalers. The ability of independent repairers to compete effectively with the contracted 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. The CMA should **add in section 4.6** that restrictions imposed by a vehicle manufacturer on the members of its selective distribution network preventing the sale of spare parts to an independent wholesaler would amount to an indirect restraint on the ability of an independent repairer to obtain these parts, violating the hard-core clause.

5. **MV-BEO Article 5(2)(b) – Supplier's ability to sell to the entire aftermarket**

The principle expressed in the second sector-specific hardcore applies regardless of whether the supplier's products are provided to the motor vehicle manufacturer for the purpose of reselling them as spare parts (which the term "aftermarket goods" clearly covers already), or for the purpose of installing the same components as original equipment in the vehicle assembly process (which should be clarified by adding a sentence at the end of section 4.7). The wording of the EU MVBER is not sufficiently clear in this regard. The CMA should clarify that the provision, in addition to contracts for the supply of spare parts, also applies to contracts for the supply of original components.

There is a need for guidance in situations where the supplier can only supply its products as spare parts directly to the aftermarket if it can use individual tools owned by its original equipment customer (i.e. the vehicle manufacturer) for production, especially where the acquisition of a second set of tools for supplying the aftermarket would be economically impossible. The vehicle manufacturer should then allow their supplier to use such a tool for aftermarket production. Where such a tool is an *Essential Facility*, the question of the amount of a corresponding usage fee arises. It would therefore be helpful for the CMA to provide orientation on how to determine an appropriate fee; the costs of the tool and the extent of its use are the appropriate basis for such fees. Against this backdrop, **section 4.8 should be expanded** to address that, where it would be impracticable or commercially unviable for the supplier to procure a second tool for aftermarket production, or where it would otherwise need to use a contribution of the motor vehicle manufacturer to engage in aftermarket production, the motor vehicle manufacturer should make its contribution available to the supplier against a fair and reasonable fee which is based on the cost of the contribution provided and the extent of its use for aftermarket production.

6. **MV-BEO Article 5(2)(c) – Dual branding**

The effectiveness of this provision is enhanced where parts suppliers place their own parts identification number on the component supplied as original equipment, as this allows aftermarket operators to identify the suitable replacement part and order it from its original manufacturer. This is already a common practice for many components. Therefore, the second sentence in **section 4.12 should be amended** to include a reference to the parts ordering number, i.e. "*Allowing the suppliers of these original parts to place their trade mark, parts number or logo on the parts facilitates the identification of compatible replacement parts which can be obtained from these suppliers*."

7. **Excluded restriction – Access to essential inputs**

Proposed adjustment paragraph 5.16 of the draft guidance:

5.16 When considering whether withholding or restricting access to one of the essential inputs listed in Article 6(2) MVBEO may lead the agreement at issue to infringe the Chapter I prohibition, a number of additional factors should be considered, including whether:

(a) Withholding the input in question will have an appreciable impact on the ability of independent operators to operate on the market and exercise a competitive constraint **(i.e. the input is necessary and thus essential).**

Comments:

Par. 5.12 of the draft Guidance provides steps to assess whether an MVA agreement contains an excluded restriction. The explained first step in this assessment is to determine the ability of an independent operator to access technical or vehicle information, tools or training. As part of that assessment, itis necessary to consider whether a specific input is "*a type of input which is essential for independent operators to access"*. The introduction of par. 5.16 DCMAG confirms the importance of the use of the notion of '**essential input'**, but Article 6(2) MVBEO itself only refers to '***necessary***'. Thus to avoid legal uncertainty on such an important element of anti-competitive foreclosure, a clearer link between these terms is required and can be provided by the addition of the part "**(i.e. the input is necessary and thus essential)."**

- **Proposed adjustment paragraph 5.17 draft guidance:**

5.17 Restrictions on access to one of the inputs listed in Article 6(2) MVBEO may be driven by suppliers of motor vehicles. In these instances, suppliers of motor vehicles in particular should carefully assess the implications of any restrictions imposed on other market participants (both authorised and independent providers) under the CA98. **In addition, where a dominant supplier withholds an essential input from an independent operator it is likely to amount to an abuse under Chapter II, whether or not it is made available to members of the relevant authorised network of the dominant supplier.**

Comments:

Especially when dominant suppliers are involved, it is important to provide crystal-clear guidance on the risks involved of withholding essential input. Foreclosure of independent operators from aftermarkets must be prevented, as it - inevitably - will lead to consumer harm. This risk of foreclosure has increased significantly due to new (digital) business models based on abilities that provide significant operational benefits and cost reductions, such as embedded vehicle diagnostics or prognostics for real-time repair and maintenance services. Foreclosure,

whether under Chapter I or Chapter II, can be profitable in many ways (e.g. obtain market share, obstruct innovation by competitors, avoid development of alternatives). Cancellation of the exemption is not the most far-reaching consequence for a dominant supplier and might – as such - not have the required deterrent effect. Therefore a clear reference to Chapter II is needed and provides more legal certainty to all parties active on the aftermarket.

With regard to qualifying parts as an essential input we had suggested the following in our earlier paper:

The competitiveness of independent operators depends on several inputs - in addition to technical and vehicle information, tools and training, notably spare parts. Spare parts are often available from a variety of suppliers, but in a number of cases the only suitable spare part is available from the vehicle supplier. These spare parts are commonly referred to as "captive parts". As no substitutes exist from alternative suppliers for a significant and growing number of vehicle manufacturer parts, it is of the utmost importance for the independent aftermarket (at wholesale, retail and repair levels) to have effective access to these parts. These parts are highly relevant for the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market. Therefore, we advocate **adding** in section 6(2) MVBEO:

(c) original spare parts for which no substitute is available from independent operators

- **Proposed adjustment par. 5.27 and 5.31 DCMAG:**

Assessment of restrictions on access to vehicle information

5.27 The considerations for individual assessment under the Chapter I prohibition set out above (paragraphs **5.12 – 5.26**) **also** apply to any restrictions on access to vehicle information (defined in paragraph 5.8) which are characterised as 'excluded' under Article 6(2) and (3) MVBEO. *[Adjustments bold/strikethrough]*

Assessment of restrictions on access to tools and training

5.30 In order to establish whether a restriction on access to tools and training amounts to an 'excluded restriction' under the MVBEO, it is necessary to take account of the general considerations set out in paragraphs 5.12 – 5.13

5.31 If the restriction in question is excluded then its individual assessment under the Chapter I prohibition should **also** have regard to the criteria set out in paragraphs 5.14-**5.26 of this Guidance.**

Comments:

The current draft guidance restricts the paragraphs with considerations related to access to '*Vehicle information'* and '*tools and training'* to some limited (general) paragraphs of the guidance only, thus excluding paragraphs applicable to considerations on access to '*Technical information'.* This could result in an undesirable distinction. It could provide room to claim that -for example - access to '*Vehicle information'* needs to be assessed fundamentally different from access to '*Technical information*'. Gained experience with restrictions on access to '*Technical information'* would be much more difficult to take into consideration and apply on restrictions of access to '*Vehicle information*', '*tools and training*'. One can think in this respect for example of the principle that access to '*Technical information*' should be provided

in a manner that does not place independent operators at a disadvantage vis-à-vis authorised networks (par 5.26 DCMAG). This kind of consideration can become extremely important to allow independent operators access to '*Vehicle information*' in real-time. Access to '*Vehicle information*' and '*tools and training*' should also adjust over time to new developments, in line with the fluid notion of '*Technical information*'. Moreover, independent operators should not be confronted with strictly different regimes for access, but should be encouraged to rely on overarching access principles. Extending the considerations expressed in paragraphs related to '*Technical information*' also as considerations that apply for the assessment of '*Vehicle information*', '*tools and training*', would solve this in a straightforward manner.

The 2023 EU Guidelines extend significantly the range of cases that may entail foreclosure risks for independent operators by introducing the concept of "essential input". This concept includes all items available to VMs the withholding of which may have an "***appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market***" (revised SGL par. 62a, under (a)). The term "essential" is defined in such a manner that excludes any possible analogy with the different notion of "essential facility". While the latter requires the demonstration that access to such a facility is "indispensable" and the facility itself is "not replicable", the new concept of essential input entails a much lower threshold, requiring only to show that withholding of such an input has "an appreciable impact" on the independent operator's ability to carry out its repair tasks and exercise a competitive constraint on the market.

We therefore believe that the final Guidance should include the same clarification.

With regard to qualifying parts as an essential input we suggest the following:

The competitiveness of independent operators depends on several inputs - in addition to technical and vehicle information, tools and training, notably spare parts. Spare parts are often available from a variety of suppliers, but in a number of cases the only suitable spare part is available from the vehicle supplier. These spare parts are commonly referred to as "captive parts". As no substitutes exist from alternative suppliers for a significant and growing number of vehicle manufacturer parts, it is of the utmost importance for the independent aftermarket (at wholesale, retail and repair levels) to have effective access to these parts. These parts are highly relevant for the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market. Therefore, we advocate **adding** in section 6(2) MVBEO:

(c) original spare parts for which no substitute is available from independent operators

In support of the principle of access to an 'essential input', the position of the Advocate General in C-319/22 – GVA v Scania of 4 May 2023 is of interest: https://curia.europa.eu/juris/document/document.jsf?text=&docid=273316&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3189997]

8. **Warranty restrictions**

Some further clarifications should be made with regard to warranties.

Section 5.39 highlights that parts restrictions are unlikely to bring benefits to consumers in a way that would allow the agreements in question to benefit from the Section 9 exemption. This is an important statement, which should also apply to servicing restrictions but is missing in section 5.38. Therefore, we suggest to **either end section 5.39 after the first sentence** (to demonstrate that the following statements apply to 5.38 and 5.39) **or to insert as a second sentence in 5.38**: "*It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the Section 9 exemption*."

The principle of causation should be expressed in clearer terms than currently provided for at the end of section 5.39. It serves no purpose to generally speak of "poor quality spare parts" when the real issue is what caused the defect, i.e. whether a situation is the result of a manufacturing defect or a defective aftermarket part. Therefore, we respectfully suggest **replacing the final sentence in section 5.39** with the following: "*However, it will have no bearing on the compatibility of the supplier's agreements with Chapter I prohibition if a supplier refuses to honour a warranty claim on the grounds that the situation leading to the claim in question resulted from a failure on the part of an independent repairer to carry out a particular repair or maintenance operation in the correct manner or resulted from the failure of a spare part supplied by a third party*."

9. **Parts distribution**

A key issue which should be added to the Guidance is that a vehicle supplier should offer separate distribution contracts for maintenance and repair on the one hand, and spare parts on the other hand. Where vehicle suppliers make spare parts available only to businesses which also operate a repair shop, they do not select their partners for spare parts distribution on the basis of qualitative criteria.

Agreements by which vehicle suppliers appoint authorized repairers typically contain provisions prohibiting the sale of spare parts to unauthorised resellers. As such, they have the object or effect of restricting competition, except where the agreements are aimed at establishing a selective distribution system that is only based on qualitative selection criteria. Indeed, according to a consistent case-law, purely qualitative selective distribution is generally considered to have no anti-competitive effects, provided that three conditions are satisfied:

"Firstly, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use.

Secondly, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner.

Thirdly, the criteria laid down must not go beyond what is necessary."

However, a vehicle supplier which operates an after-sales network that excludes standalone distributors of spare parts by making the access to the selective distribution networks for spare parts dependent on the concomitant obligation to also provide repair services, cannot claim that its network is based on qualitative selective criteria only.

We consider that a requirement to operate a repair shop is by no means a legitimate requirement, having regard to the nature of the product concerned, for the sale of spare parts. There is nothing in the nature of a spare part that requires it to be sold exclusively by firms that are authorised to repair vehicles of the make in question. Quite the contrary: Trading in spare parts, without also repairing vehicles, seems rather the most efficient option, as demonstrated by the existence on the market of independent wholesalers of spare parts that do not provide any repair service while ensuring high quality distribution services to vehicle repairs.

Our view is supported by DG Competition's statements in its FAQ document of 2012, which points out that *"The question therefore arises as to whether an obligation to repair vehicles within the manufacturer's network is a valid quality requirement for a spare parts distributor. In order to determine this, one needs to examine whether or not this requirement (to also be authorised to repair vehicles) is objective and required by the nature of the product (spare parts). There is nothing in the nature of a spare part that requires it to be sold exclusively by firms that are authorised to repair vehicles of the make in question…"*[7]

This approach is also consistent with statements made by the former EU Competition Commissioner, clarifying that "*The discussions we are having with distributors and consultants show that the new rules are likely to lead to the development of a new distribution channel for spare parts. Vehicle manufacturers have traditionally only distributed parts through their dealer network. However, carmakers will almost always have high market shares for spare parts for the vehicles they produce, and under the new regulation they will therefore only be able to apply quality-based criteria to those they select to distribute these parts. As a result, they will also have to supply such parts to any independent spare part distributor that meets these criteria*." [8]

Block-exemption will not be available to such agreements: For many types of spare parts, manufacturers will have market shares exceeding 30%. This will certainly be the case for so-called captive parts, and is also the case for other, so-called competitive parts, as has been stated by the EU Commission and its officials thus:

"In the vast majority of cases suppliers will be above the market share threshold of 30% for certain categories of spare parts…"

London Economics have emphasised:

"…the figures provided in this section treat all spare parts as belonging to one market, which does not necessarily correspond to an appropriate market definition from the point of view of an anti-trust analysis. Therefore, the market position of authorised networks may be dramatically higher in certain markets (e.g. captive parts) and substantially lower in other markets…"

Individual exemption also seems unlikely: Given the importance of independent wholesalers as a channel for the distribution of spare parts in the automotive aftermarket, the potential anti-competitive effects of aftermarket agreements which exclude stand- alone distributors of spare parts are significant and are unlikely to be outweighed by any efficiency gains. On the contrary: Stand-alone distributors who focus solely on the distribution of spare parts without having to concern themselves with repair and servicing would, as specialists in that field, be able to bring the greatest efficiency gains.

Therefore, a manufacturer operating an after-sales network that only accepts repairer-distributors and excludes standalone distributors of spare parts will normally be incompatible with Chapter I.

Normally, authorised repairers are prohibited by virtue of their agreements with the manufacturers from selling the manufacturer's spare parts to anyone other than end-users (including independent repair shops for their own use) and other authorised repairers. This is a corollary of the fact that authorised repairers are normally part of a selective distribution system.

If, however, a manufacturer refuses to offer stand-alone agreements for parts distribution, then the manufacturer's distribution system is no longer be based solely on qualitative selection and, therefore, within the ambit of the Chapter I prohibition. As the manufacturer's agreements will be ineligible for block or individual exemption, any restrictive clauses contained in the agreements will become unenforceable, including the prohibition on sales to unauthorised resellers.

Hence, vehicle suppliers should offer distinct distribution contracts for repair and maintenance services on the one hand, and for spare parts on the other.

We invite the CMA to **add** the following in its Guidance:

"Selective distribution systems combining the distribution of spare parts with repair and maintenance services, or agreements which oblige authorised distributors of spare parts to also provide repair services, are likely to be caught by the Competition Act. Such an obligation is not required by the nature of spare parts, as demonstrated by the existence on the market of independent wholesalers of spare parts that do not provide any repair service whilst ensuring professional distribution services to vehicle repairers. Such agreements would be unlikely to qualify for an exemption, since their impact would be to restrict spare parts distributors, thereby reducing competition without bringing corresponding benefits to consumers."