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Accompanying the document

REPORT FROM THE COMMISSION

Commission Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010

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Glossary

Term or acronym	*Meaning or definition*
Commission	European Commission
DG Competition	Directorate-General for Competition of the European Commission
EU	European Union
EUR	Euro
EEA Agreement	Agreement on the European Economic Area
EFTA	European Free Trade Association
VBER	Vertical Block Exemption Regulation
MVBER	Motor Vehicle Block Exemption Regulation
VGL	Guidelines on Vertical Restraints / Vertical Guidelines
SGL	Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles / Supplementary Guidelines
MVBER regime	VBER + MVBER + VGL + SGL
NCAs	National Competition Authorities
OEM	Original Equipment Manufacturer
OES	Original Equipment Suppliers
IAM	Independent Aftermarket Suppliers
RPM	Resale Price Maintenance
VM	Vehicle Manufacturer

1 INTRODUCTION

Article 101(1) of the Treaty on the Functioning of the European Union ("the Treaty") prohibits agreements between undertakings and concerted practices that restrict competition, unless, in accordance with Article 101(3) of the Treaty, they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits.

The prohibition in Article 101(1) of the Treaty covers, among other things, agreements and concerted practices entered into between two or more undertakings operating at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ("vertical agreements"). Council Regulation (EEC) 19/65[1] ("the Empowerment Regulation of 1965") enables the Commission to apply Article 101(3) of the Treaty by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission has made use of this power by adopting general as well as sector-specific measures.

Distribution and repair agreements in the motor vehicle sector have long been subject to sector-specific block exemption regulations. The current regime applicable to vertical agreements in the sector consists of the general block exemption rules, as set out in Regulation (EU) 330/2010[2] ("Vertical Block Exemption Regulation" or "VBER") and the Guidelines on Vertical Restraints[3] ("VGL"), sector-specific block exemption provisions, as provided for in Regulation (EU) 461/2010[4] (the "MVBER"), and the Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles[5] ("SGL"). These rules are referred to in this Staff Working Document ("SWD") as the "MVBER regime".

The MVBER expires on 31 May 2023. Pursuant to Article 7 thereof, the Commission has to draw up an evaluation report on its operation by 31 May 2021. When the evaluation of

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1 Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999.

2 Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1 of 23.4.2010.

3 Guidelines on Vertical Restraints, OJ C 130/1 of 19.5.2010.

4 Commission Regulation (EU) 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 129/52 of 28.5.2010.

5 Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ C 138/5 of 28.5.2010.

legislation is based on a review clause in a legal act which obliges the Commission to produce a Commission Report (i.e., one adopted by the College), a SWD should be linked to and support the main Commission Report.

This is therefore the SWD evaluating the impact of the MVBER regime on industry practices and the effect of those practices on competition in the markets for motor vehicle retailing and aftersales servicing within the EU. It does not prejudge the final nature or content of any decision that the Commission may take following this evaluation. The SWD is accompanied by six technical annexes.

The following sections set out the purpose of the evaluation (Section 1.1), as well as its substantive and geographic scope (Section 1.2).

1.1 Purpose of the MVBER evaluation

The purpose of the evaluation is to gather facts and evidence on the functioning of the MVBER regime which will serve as a basis for the Commission to decide whether it should let that regime lapse by 31 May 2023,[6] or should rather renew or revise it.

As required by the Commission's Better Regulation Guidelines,[7] the evaluation examines whether the objectives of the MVBER regime were met during the period of its application (*effectiveness*) and continue to be appropriate (*relevance*) and whether, taking account of the costs and benefits associated with applying it, the MVBER regime has been efficient in achieving its objectives (*efficiency*). It also considers whether, as legislation at EU level, the MVBER regime has provided added value (*EU added value*) and is consistent with other Commission documents providing guidance on the application of Article 101 of the Treaty and related legislation with relevance for vertical agreements in the motor vehicle sector (*coherence*).

The impact of the COVID-19 pandemic is not dealt with in this SWD, given that it is still ongoing, and that its impact was mostly not included in the evidence provided during the evaluation.

1.2 Scope of the MVBER evaluation

The motor vehicle sector has been subject to a specific block exemption regime since the mid-1980s. This regime has already been revised three times over the last three decades, most recently in 2010. Under the MVBER regime, agreements for the distribution of new motor vehicles were brought under the VBER from 1 June 2013. As to aftermarket agreements, these benefitted from the MVBER from 1 June 2010 so long as the

[6] If the current MVBER were to lapse, the VBER would apply by default.

[7] Commission staff working document, Better Regulation Guidelines, Brussels, 7 July 2017, SWD (2017) 350.

requirements of the VBER were met and provided that they did not contain any of the additional hardcore clauses listed in Article 5 MVBER.

The substantive scope of the evaluation therefore comprises four sets of rules: (i) the MVBER itself, which superseded the previous sector-specific block exemption regulation (Regulation (EC) 1400/2002[8]); (ii) the VBER, in so far as it applies to vertical agreements concerning motor vehicles; (iii) the VGL, which provide guidance on the application of the VBER; and (iv) the SGL, which provide guidance on the application of the MVBER and supplement the VGL with regard to the application of the VBER to the motor vehicle sector.

The VBER has also been subject to an evaluation, since it expires in May 2022, one year before the MVBER. The outcome of the VBER evaluation[9] will be taken into account in the context of the next steps of the review process of the MVBER regime.

The geographic scope of the evaluation includes all EU Member States.[10] Article 101(1) of the Treaty is directly applicable in all EU Member States.

By introducing a directly-applicable exemption system in which the competition authorities and the courts of the Member States have the power to apply not only Article 101(1) of the Treaty, but also Article 101(3), Council Regulation 1/2003[11] introduced parallel competences for both. When assessing the compatibility of vertical agreements in the motor vehicle sector that may affect trade between Member States within the meaning of Article 101 of the Treaty, National Competition Authorities ("NCAs") and national courts are bound by the directly-applicable provisions of the VBER and MVBER. The VGL and SGL, which are binding on the Commission, do not bind NCAs or national courts, but are typically taken into account when assessing the compatibility of vertical agreements in the motor vehicle sector with Article 101 of the Treaty.

Against this background, the evaluation of the MVBER regime not only covers the decisional practice of the Commission but also that of the NCAs, as well as the relevant case law of national courts. The three European Free Trade Area ("EFTA") States (Iceland, Liechtenstein and Norway) are not subject to this evaluation. This is because secondary EU law, such as the VBER and MVBER is not directly applicable in these countries as, to become applicable, first has to be included in the Agreement on the

8 Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. OJ L 203, 1.8.2002.

9 Commission staff working document, Vertical Block Exemption Regulation, Brussels, 8 September 2020, SWD (2020) 173.

10 Since the MVBER regime has been fully applicable in the UK during the period under review, the evaluation includes evidence gathered from stakeholders in the UK, in particular from the UK's Competition and Markets Authority.

11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Council Regulation 1/2003"), OJ L 1, 4.1.2003.

European Economic Area ("EEA Agreement") on the basis of Article 60 of the EEA Agreement, and then incorporated into the national legal orders of the EFTA States. In view of the Commission's obligation to informally seek advice from experts of the EFTA States for the elaboration of new legislative proposals, it informed the EFTA States of the evaluation of the MVBER regime to provide them with an early opportunity to share their experience in this regard.

2 BACKGROUND TO THE INTERVENTION

The following sections provide (i) an overview of the EU competition policy framework for vertical agreements in the motor vehicle sector (Section 2.1); (ii) a description of the current MVBER regime, which constitutes the intervention subject to this evaluation (Section 2.2); (iii) a presentation of the intervention logic (Section 2.3); and (iv) a presentation of the evaluation baseline for the MVBER regime (Section 2.4).

2.1 Overview of the motor vehicle block exemption regime

Vertical agreements between actors in the motor vehicle sector at different levels of the distribution chain are found in three main areas: (i) the distribution of new motor vehicles; (ii) the provision of repair and maintenance services; and (iii) the distribution of spare parts. The players involved in these agreements include vehicle manufacturers, authorised vehicle dealers and repairers, parts manufacturers and parts distributors. Other actors, such as independent repair shops, roadside assistance operators, specialist crash repair shops, car glass installers, insurers, finance firms and mobility providers are also affected.

Such vertical agreements may give rise to competition concerns and thus require assessment pursuant to Article 101 of the Treaty. Agreements that are caught by the prohibition in Article 101(1) of the Treaty may benefit from the exemption provided for in Article 101(3) of the Treaty, as long as they satisfy the cumulative conditions set out therein. In this regard, block exemption regulations create safe harbours for categories of agreements that are caught by the prohibition of Article 101(1) of the Treaty, relieving the parties from the need to analyse on an individual case-by-case basis whether they can benefit from Article 101(3) of the Treaty.

The motor vehicle sector has long been subject to specific block exemption regimes, beginning with Regulation (EC) 123/85,[12] which was successively superseded by Regulation (EC) 1475/95,[13] Regulation (EC) 1400/2002 and the currently applicable MVBER. While sector-specific block exemptions were the norm thirty years ago, in

[12] Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. OJ L 15, 18.1.1985.

[13] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. OJ L 145, 29.6.1995.

more recent years, the Commission has moved towards general regimes applicable to all sectors, and the motor vehicle sector is now unique in having its own block exemption regime. The last review of the regime applicable to the motor vehicle sector, whereby the currently applicable MVBER superseded Regulation 1400/2002, took place in 2010. This resulted in a major reform, with the sector being brought under the umbrella of the general regime for the first time.[14] However, for the reasons set out below, the MVBER narrowed the scope of the exemption available for agreements in all other sectors under the VBER by listing three additional clauses relating to spare parts, as hardcore restrictions.

2.2 Main elements of the 2010 reform

The change introduced in 2010 was more pronounced for the primary market, for which the sector-specific rules were abolished altogether, albeit subject to a transition period of three years, to allow market participants time to adapt. The underlying reasoning was the Commission's finding at the time that there did not appear to be any significant competition shortcomings in new motor vehicle distribution which would distinguish the motor vehicle sector from other economic sectors and which would require the application of rules different from and stricter than those set out in the VBER. At the same time, however, the Commission found that certain characteristics of and persisting competition issues in the motor vehicle aftermarkets still merited some sector-specific rules on top of the general ones.[15]

The **current regime applicable to vertical agreements in the motor vehicle sector consists of two set of rules**: (i) the general block exemption rules, as set out in the VBER, supplemented by the VGL; and (ii) sector-specific block exemption provisions, as provided for in the MVBER, which are supplemented by the SGL (see Section 1.2 above). It should be noted that the SGL also supplement the application of the VBER to the motor vehicle sector. In addition, in 2012, the Commission published a set of frequently asked questions ("FAQ") on the application of EU antitrust rules in the motor vehicle sector. The aim of the FAQ was to complement the SGL, by helping stakeholders operating in the sector to understand how the Directorate-General for Competition ("DG Competition") approaches particular issues regarding the motor vehicle markets. Moreover, on 22 July 2009 the Commission adopted a Communication entitled "The Future Competition Law Framework applicable to the motor vehicle sector" ("2009 Communication")[16] setting out seven areas which were found to be problematic from a competition perspective. The Communication is thus relevant for the specific objectives of the MVBER regime for the purposes of this evaluation.

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14 Articles 3 and 4 MVBER.

15 Article 5 MVBER.

16 The 2009 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.

The 2010 reform included, among other things, the following main elements:

a. The application of a uniform exemption threshold of 30%,[17] replacing the two different thresholds applicable under Regulation 1400/2002 and the exemption of qualitative selective distribution agreements without threshold;[18]
b. The treatment of non-compete / single-branding obligations was brought into line with the general regime for vertical agreements;[19]
c. Provisions[20] aimed at safeguarding motor vehicle dealers' sunk costs or regulating purely contractual issues between vehicle manufacturers and dealers were abolished;
d. Provisions[21] aimed at promoting certain distribution formats (e.g., the sale of vehicles from different manufacturers within the same showroom, the freedom to sell leasing services, and the freedom to open additional outlets) were abolished;
e. Only three of the sector-specific hardcore restrictions[22] previously included in Regulation 1400/2002 were carried over to the MVBER.[23] The rest were either replaced by those in the VBER[24] or abolished altogether;[25]
f. In the light of the application of the new exemption threshold to the qualitative selective agreements prevalent in motor vehicle repair, the hardcore provision relating to independent operators' access to technical information[26] was replaced by a section in the SGL and references to the related provisions that had just been incorporated in the type-approval rules.[27]

The MVBER regime provides for an exemption from Article 101(1) of the Treaty applicable to vertical agreements concerning conditions for the purchase, sale or resale of spare parts for motor vehicles, or repair and maintenance services for motor vehicles, provided that certain conditions are met.

First, the agreements must fulfil the requirements for an exemption under the VBER, implying that the market shares of the supplier and the buyer concerned must not exceed the threshold of 30%[28] and that the agreement in question must not include any of the

17 Article 3(1) VBER.

18 Article 3 Regulation 1400/2002.

19 Article 1(1)(d) VBER.

20 Article 3 Regulation 1400/2002.

21 Articles 1(1)(b) and 5(2)(b) of Regulation 1400/2002.

22 Article 4 Regulation 1400/2002.

23 Articles 5(a), (b) and (c) MVBER, which correspond to Article 4(1)(i),(j) and (l) respectively of Regulation 140//2002.

24 Articles 4(a), (b), (c) and (d) VBER, which correspond to Articles (1)(a), (b), (c) and (d-e) respectively of Regulation 1400/2002.

25 Article 4(1)(g) and (h) of Regulation 1400/2002.

26 Article 4(2) of Regulation 1400/2002.

27 Regulations 715/2007, 692/2008 and 595/2009.

28 Article 3 VBER.

hardcore restrictions listed under Article 4 VBER.[29] The presence of such clauses in an agreement implies that the whole agreement no longer benefits from the block exemption. Hardcore clauses are different from the so-called excluded restrictions listed under Article 5 VBER.[30] The presence of excluded restrictions in a vertical agreement does not imply the loss of the exemption for the entire agreement but only for the clauses constituting excluded restrictions under the VBER.

Second, the agreements must not contain any of the hardcore restrictions provided for in the MVBER itself.[31] These restrictions are: (i) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system; (ii) the restriction, agreed between a supplier of spare parts or repair 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 (iii) 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 visibly place its trade mark or logo on the components supplied.

2.3 Intervention logic and objectives

In essence, the MVBER regime exempts specific types of vertical agreements in the motor vehicle sector from the prohibition in Article 101(1) of the Treaty. For the purposes of this evaluation, the term "intervention" captures all four instruments making up the MVBER regime.[32] Therefore the "intervention logic" (summarised in **Figure 1** below) refers to the application of this regime in its entirety to the motor vehicle sector.

The **general objective** of the intervention is twofold: (i) to **preserve the deterrent effect** of Article 101 of the Treaty by facilitating the enforcement work of the Commission and also, in view of the decentralised enforcement system, the work of the NCAs and national courts, which no longer have to carry out an individual assessment under Article 101 of the Treaty for vertical agreements in the motor vehicle sector covered by the MVBER regime; and (ii) to **help businesses conduct the self-assessment** of their vertical agreements, thereby reducing costs.

The **specific objectives** of the MVBER regime are better understood in the context of the wider legal framework that was in place in 2010 for applying Article 101 of the Treaty (and remains in place today), as further explained below:

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29 These include price resale maintenance and certain restrictions relating to territories, customers, cross-supplies and sale of components as spare parts.

30 These restrictions include certain non-compete/single-branding obligations.

31 Article 5 MVBER.

32 The Commission´s 2009 Communication setting out specific situations characterized by competition problems in the automotive sector is also relevant for the evaluation.

First specific objective - increasing legal certainty: The abolition of the pre-notification system, established by the previous Council Regulation 17/62,[33] and its replacement by a self-assessment system, in the context of which undertakings need to check for themselves whether the agreements and/or specific clauses they (plan to) enter into comply with Article 101 of the Treaty, accentuated the need for legal certainty and guidance on the application of Article 101 of the Treaty. The VBER and the MVBER provide the general framework of the Commission's interpretation and implementation of Article 101 of the Treaty. Furthermore, the SGL and VGL set out the main elements of the Commission's interpretation of the MVBER and VBER, as well as the main parameters it would normally take into account when assessing vertical agreements falling outside the scope of the exemption. The SGL and VGL also provide examples of the most common vertical restraints relevant to the motor vehicle sector, thus covering a large part of the relevant market practices. Absent such guidance, undertakings would have to base their self-assessment exclusively on the Commission's administrative practice and the Union Courts' case law, which, albeit useful, cannot provide sufficient legal certainty, due to their nature, which is in principle case-specific.

Second specific objective - reducing the risk of false positives and false negatives: The Commission's power to adopt block exemption regulations identifying the categories of vertical agreements in the motor vehicle sector for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty goes hand-in-hand with the need to reduce errors in the form of so-called false positives (i.e., block exempting vertical agreements that should not benefit from the exemption) as well as the need to reduce errors in the form of so-called false negatives (i.e., leaving vertical agreements outside the scope of the exemption in situations where those agreements should have benefited from the exemption). It should be noted that false negatives (under-exemption) are less harmful than false positives (over-exemption), given that false negatives do not result in situations that are in breach of Article 101 of the Treaty and Regulation (EEC) 19/65, under which the Council has empowered the Commission to adopt block exemption regulations. In general, block exemption regulations aim to reduce the risk of errors in the form of false positives and negatives by means of three types of provisions: (i) the conditions for exemption; (ii) specific types of restrictions that, if present in an agreement, remove the benefit of the block exemption from the entire agreement (hardcore restrictions); and (iii) specific types of restrictions that are not exempted but still allow for the remaining part of the vertical agreement to benefit from the exemption, as long as it is severable from the restrictive clauses (excluded restrictions). A block exemption regime that manages – by the means set out above – to minimise false positives and negatives is, on the one hand, simplifying administration and reducing compliance costs as much as possible by avoiding under-exemption and, on the other hand, ensuring effective supervision of the markets by avoiding over-exemption.

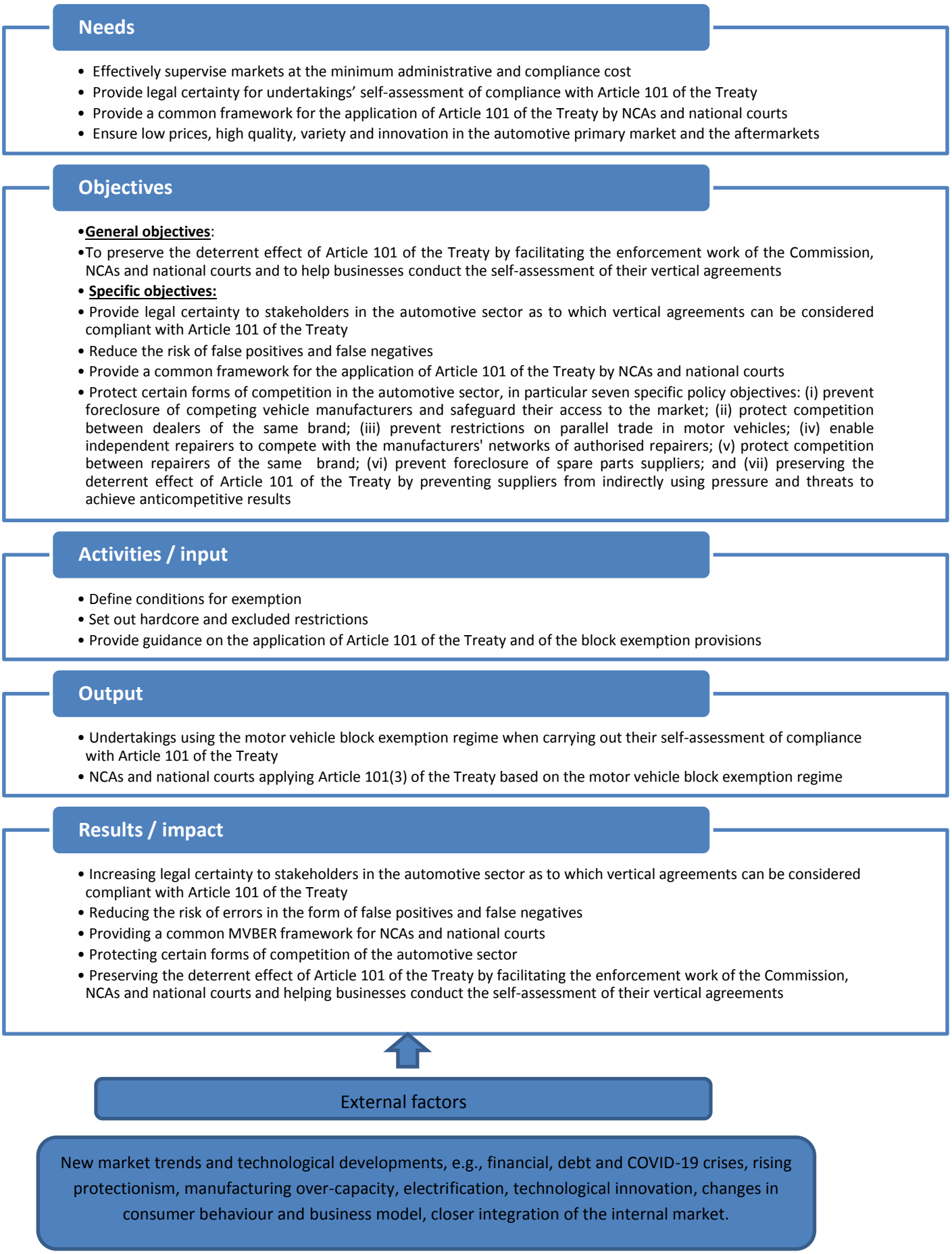
[33] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty. OJ 13, 21.2.1962.

Third specific objective - providing a common assessment framework for national authorities: The decentralisation of the application of Article 101(3) of the Treaty, whereby NCAs were empowered to grant exemptions, gave rise to **the need to ensure consistency across the EU and equal footing for companies active in different Member States**, by providing a common framework for NCAs and courts when applying Article 101(3) of the Treaty.

Fourth specific objective - protecting certain forms of competition in the motor vehicle sector: The need to protect certain forms of competition in the motor vehicle sector was most recently identified and deemed to be of continued validity by the Commission in its 2009 Communication, which preceded the adoption of the MVBER regime in 2010. It listed **seven specific policy objectives** in relation to "a number of problematic issues", which at that time were "particularly relevant for the motor vehicle sector", and stated that such policy objectives underlying Regulation (EC) No 1400/2002 remained valid. The present evaluation includes an analysis of whether each of these specific policy objectives has been achieved in practice and to what extent they have proven to be effective and/or necessary. **The seven specific policy objectives include**: (i) preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market; (ii) protecting competition between dealers of the same brand; (iii) preventing restrictions on parallel trade in motor vehicles; (iv) enabling independent repairers to compete with the manufacturers' networks of authorised repairers; (v) protecting competition between repairers of the same brand; (vi) preventing foreclosure of spare parts suppliers; and (vii) preserving the deterrent effect of Article 101 of the Treaty by preventing suppliers from indirectly using pressure and threats to achieve anticompetitive results.[34]

[34] These objectives are restated in Annex 1 to the accompanying impact assessment of the same date as the Communication (22 July 2009).

Figure 1: Intervention logic for the MVBER regime



2.4 Evaluation baseline

The main point of comparison for the evaluation is the hypothetical situation in which the MVBER regime is not in place. In this situation, vertical agreements in the motor vehicle sector would be subject to the same regime as any other vertical agreements, including the VBER and the VGL.[35] The evaluation therefore looks at the functioning of the MVBER regime as compared to a situation in which the assessment of whether vertical agreements in the motor vehicle sector comply with Article 101 of the Treaty would have to be done only in light of other Commission rules, namely the VBER and the VGL, relevant case law at EU and national level, as well as the enforcement practice of the Commission and the NCAs.

3 EVALUATION QUESTIONS

This evaluation assesses the MVBER regime against the five Better Regulation criteria, namely **effectiveness** (Section 6.1), **efficiency** (Section 6.2), **relevance** (Section 6.3), **coherence** (Section 6.4) and **EU added value** (Section 6.5), using the specific evaluation questions for each. The evaluation questions are in Annex 5.

4 METHODOLOGY

The evaluation consists of an assessment of the functioning of the MVBER regime both from a general perspective, taking into account the intervention as a whole, and more specifically, with regard to the conditions set out in the MVBER regime. The subject of this evaluation is the MVBER, the SGL and the application of the VBER and the VGL to the motor vehicle sector.

This section is structured as follows: Section 4.1 identifies the sources used for evaluating the functioning of the MVBER and the SGL. Section 4.2 describes how the evidence gathered from various sources was processed. Section 4.3 explains the limitations of the analysis carried out and the extent to which they were addressed in the evaluation exercise.

4.1 Description and use of the sources

In order to assess the functioning of the MVBER regime, evidence from various sources was gathered. These included a public consultation (Section 4.1.1.), two NCA consultations (Section 4.1.2), an external study (Section 4.1.3), spontaneous stakeholder submissions (Section 4.1.4) and evidence gathered through other Commission initiatives (Section 4.1.5).

[35] For further details on the cost of assessing vertical agreements under the VBER and VGL see Section 5.2.2 of Commission staff working document, Vertical Block Exemption Regulation, Brussels, 8 September 2020, SWD (2020) 173.

4.1.1 Open public consultation

Between 12 October 2020 and 25 January 2021, the Commission carried out a public consultation to gather stakeholder views on the functioning of the MVBER regime. The objective was to gather qualitative and quantitative evidence on all five evaluation criteria from the perspective of stakeholders. The consultation was initially planned to last 12 weeks but the deadline was extended by three weeks to accommodate the COVID-19 outbreak difficulties.

The public consultation generated 84 contributions, submitted through the online questionnaire. Seventeen participating respondents also submitted position papers, which largely echoed the issues raised in the contributions to the public consultation. In addition, a consumer association provided some background articles outside of the public consultation framework. The contributions to the public consultation came from a variety of respondents representing different levels of the supply chain, in particular business associations and companies/business organisations, but also motorists' associations, an academic institution, a non-governmental organisation, a trade union, an EU citizen, and some other stakeholders.

The summary report of the contributions to the public consultation was published on both the Better Regulation Portal[36] and the dedicated MVBER review webpage on DG Competition's website[37] on 16 March 2021 and 17 March 2021 respectively. This summary report is also part of the synopsis report provided in Annex 3.

4.1.2 Targeted consultations of NCAs

During the evaluation phase, two targeted consultations of NCAs were conducted. The first of these aimed at collecting mostly statistical information about the NCAs' enforcement activities concerning the MVBER regime. The Commission received 29 contributions, including one from one of the EFTA States. This consultation forms part of the synopsis report provided in Annex 4. The second questionnaire aimed to gather the NCAs' views about the performance of the MVBER regime against the five evaluation criteria. The Commission received 24 contributions, including one from one of the EFTA States. The information provided by NCAs contributed to the assessment all five evaluation criteria. A summary report of this second consultation was published on the dedicated MVBER review webpage on DG Competition's website[38] on 17 March 2021. It is also part of the synopsis report provided in Annex 3.

[36] See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2008-Evaluation-of-the-Motor-Vehicle-Block-Exemption-Regulation/public-consultation

[37] See: https://ec.europa.eu/competition/sectors/motor_vehicles/legislation/mvber_review.html

[38] See: https://ec.europa.eu/competition/sectors/motor_vehicles/legislation/mvber_review.html

4.1.3 External study

A contractor carried out an external fact-finding study ("fact-finding study") for the evaluation with respect to the three aspects of the motor vehicle sector: (i) the distribution of new motor vehicles; (ii) the provision of repair and maintenance services for motor vehicles; and (iii) the distribution of spare parts for motor vehicles.

The purpose of the study was to provide a detailed analysis of market developments with respect to three main economic activities in the motor vehicle sector on the basis of 111 indicators (23 qualitative and 88 quantitative). The final report for the study was due on 25 August 2020, but the COVID crisis affected the implementation of the contract. This resulted in: (i) a delay in a survey the contractor carried out in spring 2020 to collect primary data from market participants; (ii) a low response rate to this survey; and (iii) an incomplete interim report.

Due to these circumstances, the contractor requested four deadline extensions and, as a result, the final report was not delivered until 9 October 2020 and only covered 49 out of the 111 indicators contracted for. A summary of the key findings of this report is available in Annex 2.

4.1.4 Commission monitoring and enforcement practice

The evaluation included an analysis of the Commission's decision-making practice over the last ten years, as well as its informal correspondence[39] with stakeholders in the motor vehicle sector since 2010. The results of this review are incorporated into the synopsis report provided in Annex 4.

4.1.5 Spontaneous stakeholder submissions

The Commission also received a spontaneous submission from a consumer association that had not participated in the public consultation. In addition, some of the respondents shared position papers to supplement their contributions to the public consultation with additional evidence. These additional submissions were used to enhance the understanding of the positions of the respondents concerned.

4.2 Processing and triangulating of the evidence collected

Evidence from various sources was analysed and triangulated for the evaluation of the MVBER regime.

[39] Informal submissions (sometimes referred to as "market information letters") differ from formal complaints in that they do not contain the information required by "Form C" annexed to Commission Regulation 773/2004. Moreover, in many cases, they do not allege particular breaches of the EU competition rules, but rather ask questions relating to the qualification of a particular set of circumstances.

The main sources of evidence used for the assessment of each evaluation criterion are listed in the table below.[40] The evidence-gathering focused primarily on evidence, views and experiences provided by stakeholders having self-assessed the compliance of their vertical agreements in the motor vehicle sector with Article 101 of the Treaty, as well as NCAs' experience in the enforcement of the MVBER regime. This was supplemented by the Commission's monitoring and enforcing experience and the findings of the study.

Sources **Criteria**	Public consultation	NCA enforcement consultation	NCA consultation on MVBER regime performance	Study	Commission's experience
Effectiveness	✓	✓	✓	✓	✓
Efficiency	✓	✓	✓		
Relevance	✓		✓	✓	✓
Coherence	✓		✓		
EU added value	✓		✓		✓

For the assessment of each evaluation criterion, the following approach was used. The assessment started with the results of the **public consultation**. An in-depth analysis of the feedback received provided a preliminary but comprehensive understanding of the main issues faced by stakeholders as regards the functioning of the current rules. This allowed the Commission services to establish the issues on which stakeholders held common positions, as well as the issues on which their positions diverged. The assessment of the specific issues raised was carried out based on: (i) the examples and the level of detail provided by stakeholders to support their concerns with concrete evidence; (ii) the variety of positions; and (iii) the extent to which different types or groups of stakeholders shared the same view. The results of this consultation provided the stakeholders' perspective on the effectiveness, efficiency, relevance, coherence and EU added value of the MVBER regime. The evaluation took due account of the fact that the views of businesses operating at different levels of the supply chain might differ with regard to particular aspects of the MVBER regime.

The **first consultation** with NCAs aimed to gather statistical information about their enforcement activities with regards to vertical restraints in the motor vehicle sector. The **second consultation** aimed to gather the NCAs' perspective on the performance of the MVBER regime against the five evaluation criteria. The two consultations provided a significant amount of evidence on the most common types of behaviour encountered, as well as the challenges faced by NCAs in applying the MVBER regime. The evidence of the public consultation was compared to and contrasted with the evidence resulting from the consultation of the NCAs. The combination of these sources resulted in a more complete and balanced understanding of the areas where the MVBER regime had not been functioning well, or not functioning as well as it could.

[40] A further breakdown of this table, which includes the evaluation questions for each criterion and a more detailed reference to the sources used, is provided in the evaluation matrix contained in Annex 5.

The **fact-finding study** was designed to analyse market developments as regards three main economic activities in the motor vehicle sector. The study allowed to supplement the findings obtained through the abovementioned consultations with specific data and evidence on how the motor vehicle sector has evolved during the period under review.

Finally, whenever possible, the findings of the respondents and NCAs consultations as well as the fact-finding study have been supplemented by the **Commission's monitoring and enforcement experience** in the area over the last ten years.

4.3 Limitations and robustness of findings

The analysis of the different evaluation criteria, including the methodology applied and the evidence sources used for that purpose, is subject to the following limitations, the nature of which is described in the sections below: the limited scope of the fact-finding study (Section 4.3.1), limits to the representativeness of stakeholder feedback (Section 4.3.2) and limits to the enforcement experience of NCAs as regards the MVBER regime (Section 4.3.3). None of these limitations prevented the Commission from drawing conclusions from the evaluation exercise.

4.3.1 Limited scope of the fact-finding study

The contractor used a survey as the primary data source, the launch of which coincided with the escalation of the COVID-19 crisis and the introduction of "lockdown" measures in all countries covered by the survey. Although the Commission granted the contractor several deadline extensions, the final response rate was low, particularly with respect to businesses such as dealers, repairers and parts distributors. As for the methodology, the final dataset was assessed based on its representativeness with reference to the indicators.

To overcome the data-gathering limitations, the contractor considered the vehicle manufacturers' responses in respect of each indicator to be statistically significant when their combined market share reached 30%. For spare parts, the contractor considered it impossible to establish the total value of the market, and instead provided indications of the representativeness of the responses provided, by indicating the combined global revenue in 2019 and the combined number of employees.

4.3.2 Limits relating to stakeholder feedback

By definition, feedback exercises such as the public consultation, which are subject to voluntary participation, do not necessarily lead to representative results. Although a large variety of stakeholder groups responded to the public consultation, some of these accounted for a higher share of responses than others.

In the assessment in Section 6 below, reference is made to specific stakeholder groups whenever the views reported were expressed primarily by one or more such groups rather

than being shared by all respondents to the public consultation. However, the evaluation does not disregard diverging views, either within the same or across different stakeholder groups. This approach is also reflected in Annex 6, which presents the different views and issues raised by respondents per area of the rules.

In addition, the assessment in Section 6 below is presented on the basis of the views of those respondents to the public consultation which actually gave specific replies to the questions concerned. This means that the views of those respondents replying "don't know", "not applicable", "not relevant" and similar, or leaving their replies blank, are not taken into account where general conclusions are drawn. With regard to the views of NCAs, reference is made generically to "NCAs", since the purpose is to outline the main points raised without regard to the number of contributions addressing a particular point, or whether or not a particular point of view is shared by all the NCAs. However, for issues on which NCAs expressed clearly diverging views, both sides of the argument are presented. Finally, conclusions are based on those NCAs that expressed a view on a particular point, excluding therefore those indicating that they did not have a view and those that did not reply to a particular question.

As for the contributions received from consumers and/or their associations, a consumer association shared some materials outside of the framework of the public consultation, which were used for background purposes in the evaluation. Two other associations identifying themselves as "consumer associations" responded to the public consultation. Analysis of the profile of these stakeholders showed that these appear to represent their motorist members rather than consumers in general, and they or their members also have commercial interests.

This limited contribution of consumers to the evaluation is probably explained by two factors. First, the MVBER regime has a technical nature, being primarily aimed at providing guidance to businesses in the motor vehicles sector self-assessing compliance of their vertical agreements with EU competition law. Consumers and consumer associations may therefore be neither aware of the regime's existence, nor familiar with the way it functions. Second, although the regime has an impact on the prices at which consumers buy products and services in the sector and on the choice of such products and services available to them, consumers are generally not aware of the terms of vertical agreements in the sector. They may therefore not be able to link the prices and other purchase conditions they encounter with the way that the supply chain functions, or to the safe harbour provided by the MVBER regime. To overcome these limitations, *ad hoc* meetings were held with stakeholders representing diverse interests.

4.3.3 Limited experience in the enforcement of the MVBER regime

The enforcement experience of both NCAs and the Commission as regards the MVBER regime has been modest, in that although complaints were submitted and cases were pursued, few infringements were detected. Over the period covered by the review, NCAs

have reported a total of 156 closed cases concerning vertical restraints in the motor vehicle sector, of which 4% concluded with prohibition decisions. Over the same period, the Commission dealt with 22 cases, of which none resulted in a prohibition decision. To overcome these limitations, the Commission supplemented its enforcement practice with an analysis of the informal submissions concerning the automotive sector received over the last 10 years.

5 MARKET DEVELOPMENTS AND ENFORCEMENT ACTIVITIES IN THE MOTOR VEHICLE SECTOR

5.1 Market developments

Section 5.1 describes the main market developments, including the conditions of competition, during the period under evaluation.

5.1.1 General market developments

Since the adoption of the current MVBER regime, the markets have evolved in a number of ways, mainly due to the introduction of new technologies, environmental pressures and the aftershocks of the 2008 financial crisis. Notably, the sector has witnessed: (i) rising protectionism as regards extra-EU trade;[41] (ii) stricter emissions controls[42] and policies aimed at reducing emissions and achieving other environmental goals, such as the EU Sustainable and Smart Mobility Strategy[43] and the Green Deal;[44] (iii) major fluctuations in the price of fossil fuels;[45] (iv) the introduction of high-performance battery electric vehicles and the more widespread use of hybrid technologies;[46] (v) the so-called "Dieselgate" crisis;[47] (vi) increasing use of the Internet as a research tool for consumers and as a means for dealers to expand their geographic reach;[48] (vii) a continued reduction in dealer network density;[49] (viii) an evolution in vehicle typology, with more light commercial vehicles in use to reflect the internet-driven surge in home shopping and local distribution;[50] (ix) the integration of digital technology into vehicles themselves, and the increasing importance of vehicle-generated data for existing

41 See: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1765

42 See: https://ec.europa.eu/growth/sectors/automotive/environment-protection/emissions_en

43 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable and Smart Mobility Strategy – putting European transport on track for the future. COM/2020/789 final.

44 Communication from the Commission to the European Parliament, the European council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal. COM/2019/640.

45 See: https://ec.europa.eu/energy/data-analysis/energy-prices-and-costs_en

46 See: https://www.eea.europa.eu/data-and-maps/indicators/proportion-of-vehicle-fleet-meeting-5/assessment

47 See: https://ec.europa.eu/growth/content/eu-actions-dieselgate_en

48 See Section 5.1.1.3 and Section 2.1.5, Annex 2.

49 See Section 5.1.1.3.

50 See https://www.acea.be/automobile-industry/vans

aftermarket providers and for novel businesses;[51] and (x) the increasing use of connectivity, first for emergency services, and more recently for monitoring the performance of vehicles and drivers.[52]

In the context of the evaluation, a contractor carried out a fact-finding study to analyse market developments with respect to: (i) the distribution of new motor vehicles: (ii) the provision of repair and maintenance services; and (iii) the distribution of spare parts.[53] The study collected data on a representative sample of 12 EU Member States,[54] and four vehicle categories (passenger cars, light commercial vehicles, trucks and buses) for the period 2007-2017 ("period in scope").[55] The main findings of the study are summarised below and complemented by other sources.[56]

5.1.1.1 Motor vehicle production and sales

The motor vehicle industry is one of the most important sectors for the EU economy. Manufacturing of motor vehicles, bodies, trailers and semi-trailers employs around 2.5 million people in the EU and accounts for 8.5% of EU employment in manufacturing,[57] while another 5.3 million jobs relate to both indirect manufacturing,[58] sales and maintenance services.[59]

The EU produced almost 20 million motor vehicles in 2017 (ca. 20% of almost 99 million manufactured globally). Passenger cars accounted for 86.6% of all motor vehicle production.[60] The rest was made up of light commercial vehicles (10.8%) and medium and heavy commercial vehicles (2.8%). Almost 260 million passenger cars were in use in the EU in 2016, and more than 15 million were registered in the EU in 2017, of which 49.4% were petrol-fueled, 44.8% diesel-fueled, and 1.5% electric.[61]

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51 https://ec.europa.eu/jrc/sites/jrcsh/files/jrc112634.pdf

52 https://digital-strategy.ec.europa.eu/en/policies/connected-and-automated-mobility

53 Ernst & Young, Market developments in the distribution of new motor vehicles and spare parts and the provision of after-sales services under Regulation 461/2010 of 27 May 2010, November 2020. The figures in this section refer to the said study, unless specified otherwise.

54 Austria, Belgium, Cyprus, France, Germany, Greece, Ireland, Italy, the Netherlands, Poland, Spain and the United Kingdom.

55 As per paras. 3 and 9 of Tender Specifications, the contracted study "*will describe how market conditions have evolved in the European Union (EU) and its Member States (MS) over defined time periods before and after the Regulation's entry into force* ". The study "*shall provide* […] *qualitative and quantitative indicators for the time period 2007-2017*".

56 A more detailed overview of the study is provided in Annex 2.

57 https://ec.europa.eu/growth/sectors/automotive_en

58 Tyres, computer and peripherals equipment, electric motors, generators and transformers, bearing, gearing, cooling and ventilation equipment.

59 ACEA Pocket Guide 2018-2019, available at https://www.acea.be/publications/article/acea-pocket-guide

60 ACEA Economic and Market Report EU Automotive Industry Quarter 4 2017.

61 *Ibid*.

The EU is a major player in terms of motor vehicle trade: exports accounted for more than EUR 138 billion in 2017, with a trade balance of EUR 90.3 billion.[62]

According to the study, the sales of passenger cars, at aggregate level, dropped in 2008 during the financial crisis, and kept decreasing every year from 2009 to 2013. Sales in 2017 reached 13.3 million units for the countries in scope: 4% less than in 2007. A similar trend affected light commercial vehicles and trucks, with 2017 sales respectively 10.5% and 13% lower than in 2007. Despite some fluctuations, bus sales remained stable, with total sales in 2017 only 1% lower than in 2007 (24.8k vs. 25.1k).[63]

5.1.1.2 Product Innovation

According to the study, the use of alternative powertrains has gradually increased from a low base, with the proportion of fossil fuel-powered vehicles sold declining slightly over the years. In 2017, around 2 million (0.8%) of the 262 million cars registered in the EU Member States were classified as either electric cars or hybrid electric cars using a combination of an electric motor and a petrol or diesel engine. The number of hybrid electric-petrol cars in 2017 (1.5 million) was almost seven times the number recorded in 2013 (0.2 million).[64]

Based on vehicle manufacturers' annual reports, the study indicates that, on average, research and development (R&D) expenditure[65] increased over the period in scope for both manufacturers of passenger cars/ light commercial vehicles and for manufacturers making trucks and buses (respectively, from 4.3% in 2007 to 4.7% in 2017 and from 3.1% in 2007 to 4.1% in 2017).

5.1.1.3 Distribution patterns and network density

The study shows that quantitative selective distribution[66] was the preferred model in the passenger cars category. The only Member States where vehicle manufacturers opted for exclusive distribution systems were France and Italy (12.5% and 14.3%, respectively in 2017). According to the study, no vehicle manufacturer used purely qualitative selective distribution for passenger cars in any of the countries in scope. Innovative channels

62 ACEA Pocket Guide 2018-2019, available at https://www.acea.be/publications/article/acea-pocket-guide

63 A country level summary of these figures is provided in Annex 2.

64 Source: Eurostat.

65 As a percentage of overall revenues of selected vehicle manufacturers.

66 A 'selective distribution system' is a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system (See Article 1(1)(i) MVBER). Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold etc. Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc. (See paragraph 175 VGL).

(mobile pop-up stores, supermarkets, experience centers, third party platforms) were used extensively for sales across the countries in scope.[67] The study showed that there were no significant changes in these proportions across the period in scope.

In contrast to the position as regards passenger cars, many vehicle manufacturers present in the (more concentrated) light commercial vehicle category used qualitative selective distribution systems (50% in Austria and Italy, 40% in France). Quantitative selective distribution was prevalent in Cyprus and the UK (66.7%), while 20% and 25% of vehicle manufacturers opted for exclusive distribution systems in Spain and Germany.

Quantitative selective distribution was the most prevalent distribution method used for truck distribution over the period covered by the study. However, some truck manufacturers opted for qualitative distribution systems in France (20%), Italy and Spain (16.7%), while a variable number of truck manufacturers opted for mixed systems (notably 67% in Greece, 50% in the Netherlands, 40% in Poland and Ireland). These proportions did not significantly change over the period in scope. As for buses, manufacturers opted mainly for exclusive distribution systems. Direct sales formats were common for the sales of both trucks and buses.

The number of car dealer groups across all Member States increased from 2007 to 2011 then gradually declined during 2011 – 2017, leading to an overall decrease over the period in scope. According to the study, this result can be attributed to a consolidation trend between dealer groups.

The network density for all car brands in analysis declined over the years. Aggregate network density fell from 0.17 car outlets per 1,000 inhabitants in 2007 to 0.14 in 2017, continuing the decline that was reported in the Commission's evaluation report for Regulation 1400/2002.[68] The number of dealer outlets fell to 57,304 outlets in 2017, 10,831 outlets fewer than in 2007. According to the study, vehicle manufacturers reduced the numbers of dealers in their networks to maintain dealer profitability and recover from the Eurozone crisis. Rising real estate prices in inner cities were also a factor affecting the number of dealer outlets. The fall in outlet numbers took place against the background of emerging retail trends such as online car sales, growing demand for used cars and fleet services and "immersive" virtual retail experiences.[69]

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67 The low rate of survey responses on distribution systems and innovative channels does not allow to make intertemporal comparisons.

68 https://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf, p. 3.

69 EY analysis (Automotive Retail & Distribution, October 2015); "The traditional car dealer is disappearing: flagship stores and virtual reality are the new trends," Business Insider, December 2016, https://www.businessinsider.nl/auto-dealer-bmw-audi-virtual-reality-flagshipstore/ , accessed on 25 August 2020; "UK franchised dealer outlet numbers grow year on year," Motor Trader, https://www.motortrader.com/motor-trader-news/automotive-news/uk-franchised-dealer-outlet-numbers-grow-year-year-30-10-2015 , accessed on 25 August 2020; "Auto: the crisis has reduced the number of dealerships," Les Echos, August 2014, https://www.lesechos.fr/2014/08/auto-la-crise-a-reduit-le-nombrede-concessions-308291 , accessed on 25 August 2020.

5.1.1.4 Provision of repair and maintenance services

Repair and maintenance services are provided by both independent firms and members of authorised networks set up by a vehicle or parts manufacturers.[70]

The total turnover generated by the maintenance and repair of motor vehicles, for all categories in all countries in scope increased from EUR 106 billion in 2008 to EUR 145 billion in 2017. This figure should be appraised in the context of the increased size (from 197 to 225 million) and age of passenger cars parc.[71]

By 2017, the market for maintenance and repair had experienced significant growth compared to the position in 2008, particularly in the United Kingdom (+211% by 2017), Germany (+161%) and France (+148%). Out of all the countries in scope, 5 reported a decline in the total value of the market for repair and maintenance services, with the biggest such occurring in Greece (-69% in 2017 compared to 2008).

In terms of network density, the total number of repairers, both authorised and independent, increased in most countries between 2007 and 2017, with Cyprus, Greece, Ireland, Italy, Poland and Spain having a denser network compared to the other countries, and the Netherlands having the lowest network density.

5.1.1.5 Distribution of spare parts

According to the study, the market for spare parts supply (part manufacturers' sales) for the 12 countries in scope increased by 29.8% in terms of sales value, from EUR 160.5 billion in 2008 to EUR 208.4 billion in 2017. This increase was not continuous over the years: in particular, market size decreased by 25.4% in 2009, as a result of the 2008 economic crisis. Over the 2007-2017 period, parts manufacturers registered a stable operating margin, averaging around 6-7% despite a decrease in 2009. For the top 10 firms, the average margin was higher at around 11-15%.

As for motor vehicle spare parts distributors, their business grew by about 26% according to the study, with a volatile trend in all countries throughout the period 2007-2017.

Based on survey responses, the study showed that passenger cars and light commercial vehicle parts were mainly distributed using qualitative selective distribution systems and, to a minor extent, through vehicle manufacturers' own outlets. A number of survey

[70] The study findings are mostly based on data provided by passenger cars authorised repairer, given the lack of sufficient data for the other categories.

[71] According to the study, passenger cars parc's average age increased in all the countries in scope apart from Spain and Poland. Significant differences exist at country level: Italy registered the highest increase in the average age; Poland, which has the oldest car parc among the countries in scope, registered a slight reduction. The general increasing trend seems to continue since 2017 (See ACEA, https://www.acea.be/statistics/article/average-vehicle-age): this can be due to many reasons, like, for instance, the effect of financial crisis, longer duration of car loans, higher reliability of recent cars.

respondents used innovative distribution channels for spare parts sales; in particular, parts manufacturers used their own websites for ecommerce, and by 2012, direct sales of spare parts had increased for all vehicle categories.[72]

5.1.2 Developments in the conditions of competition[73]

5.1.2.1 *Market concentration*

The fact-finding study also analysed market concentration levels in the various segments by using metrics such as the Herfindahl-Hirshman Index (HHI), the CR4 index, as well as indexes of volatility (standard deviation and coefficient of variation).

The passenger car category has medium concentration, with Volkswagen Group, PSA group and Renault-Nissan-Mitsubishi representing around 55% of the average aggregated market share in terms of volume. The average percentage difference in the market shares of the top four manufacturers decreased, at an aggregate level, from 5.91% in 2007 to 5.47% in 2017. Some shifts occurred in the market shares of the significant manufacturers throughout the period in scope: the distance between the third (Renault-Nissan-Mitsubishi) and second (PSA Group) vehicle manufacturers decreased, mainly due to the decrease in sales of the latter, while the share of the 4th to the 9th largest vehicle manufacturer ("VM") remained relatively stable, and the difference in market share between the 4th and the 6th decreased over time.

The light commercial vehicles category was assessed as more concentrated than that for passenger cars, with three vehicle manufacturers (PSA Group, Renault-Nissan-Mitsubishi and Ford Group) representing more than half of the market in terms of sales in the countries in scope. During the period 2007-2017, the sales of PSA Group and Renault-Nissan-Mitsubishi remained relatively stable, while some significant changes occurred for the other manufacturers (accounting for approximately 52.1% of the market). In particular, Ford Group shifted from 5th in 2011 to 3rd place in 2017. In terms of closeness of competition, the average difference among the top 4 manufacturers decreased over time from 6.19% to 4.97%.

The truck and bus categories were found to be highly concentrated. At aggregate level, five vehicle manufacturers represented more than 97% of the total volume in sales for trucks. Three main vehicle manufacturers represented more than 67% of total bus sales, while a significant portion (around 20%) of the market was covered by small local manufacturers.

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[72] Results based on the responses of ten part manufacturers, jointly representing EUR 168 billion in global sales and 817,000 employees (2019).

[73] The findings described in this section are also taken into account for the evaluation of the effectiveness and relevance of the MVBER regime.

Although there was no major consolidation, mergers and acquisitions occurred in the motor vehicle sector during the period covered by the study, the largest in value being, for passenger cars, the acquisition of Porsche by Volkswagen Group (2009 and 2012) and the acquisition of Land Rover by Tata Motors in 2008. In the heavy-duty vehicles sector, the largest acquisition was that of MAN SE by Volkswagen in 2011. Finally, since the period covered by the study, PSA and FCA have merged to create Stellantis.

5.1.2.2 *Intensity of competition*

Respondents to the public consultation and NCAs shared their perceptions as to whether competition has intensified, weakened or stayed the same since 2010 in the three areas covered by the MVBER regime.

A large majority of respondents to the public consultation reported changes in the **intensity of competition in the distribution of new motor vehicles**. Almost 40% of respondents suggested that competition had *intensified.* Some of these pointed, *inter alia*, to: (i) the increased number of brands of motor vehicles in the EU market; (ii) the increased use of direct sales by vehicle manufacturers; (iii) the increased diversity in terms of product variety (e.g., hybrid, plug-in hybrid, battery electric); (iv) the increased offer in some technologies (e.g., powertrain technology); (v) the multiple sales channels; (vi) the diversification in vehicle use (e.g., leasing, sharing or renting); and (vii) the increased leverage of fleet operators. Around 36% of respondents to the public consultation suggested that competition had *decreased.*[74] Some of these supported their views by pointing to consolidation between OEMs, as well as mergers and takeovers of dealers.[75]

As for the NCAs, about 40% of them reported that the intensity of competition for the distribution of new vehicles had *not changed* significantly over the last 10 years. Those NCAs that reported an *increase* (31%) in competition intensity agreed with respondents to the public consultation that the wider range of vehicles available on the market and the increased use of multiple sales channels, such as internet platforms enabling price comparisons, have played a role in this *intensification* of competition. Some NCAs also pointed to other factors such as the increase in demand for new motor vehicles following the 2010 financial crisis and the decrease in the number of complaints received by NCAs. Only 13% of the NCAs reported a *decrease* in the intensity of competition. These NCAs point to the abolition of the previously-applicable motor vehicle block exemption rules (i.e., Regulation 1400/2002) as the alleged cause. The remaining 16% of the NCAs did not express a view.

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74 Primarily, associations representing vehicle importers and part dealers, but also companies (mainly vehicle leasing/rental companies and repairers).

75 For further details on the views of respondents on these issues, see Annex 3.

The fact-finding study mentioned above uncovered some elements pointing towards an increase in the intensity of competition in the distribution of new passenger cars. Despite the financial crisis, the demand for new vehicles has grown since 2013; new distribution channels, business models and players have started emerging, further stimulating demand and reaching new customer segments; several new models have been launched by car manufacturers that are new to the market (especially Asian) and alternative powertrains for passenger cars have been developed. The study highlights that passenger cars category is a sector of medium concentration, unlike the light commercial vehicles, trucks and buses categories, which are more concentrated.[76] These three categories, however, witnessed considerable market share fluctuations, with the main vehicle manufacturers shifting positions over the period in scope, thus suggesting that competition intensity has not decreased over the years.

The views of respondents to the public consultation are divided as to the evolution of the **intensity of competition in repair and maintenance services**, with 44.6% considering that competition had intensified and 44.6% considering the opposite. Some of the respondents claiming that competition has *intensified* referred to a number of factors to justify their views, such as (i) e-commerce; (ii) the VBER/MVBER rules; (iii) growth in the business of independent aftermarket operators; (iv) on-line reviews of repairers and more price transparency; (vi) authorised repairers' provision of aftersales services for several brands; (vii) an increase in competition between authorised and non-authorised repairers; and (viii) pressure from leasing / rental companies, which are alleged to wish to build their own service networks. The group of respondents claiming that competition had *weakened* pointed, *inter alia*, at (i) the decreasing number of repairers in some European regions; (ii) issues faced in accessing technical information; (iii) restrictive warranty terms; (iv) captive spare parts and requirements to activate spare parts after installation; (iv) restrictions on access to tools, diagnostic systems, digital updates and software; and (vi) technological developments in new vehicles making it harder for small independent repairers to provide their services effectively and affordably.

NCAs are also divided as to the evolution of the intensity of competition in the provision of repair and maintenance services. About 35% of the NCAs reported that the intensity of competition for the repair and maintenance services had *not changed* significantly over the last 10 years. The same percentage reported that competition had increased. NCAs claiming that competition had *intensified* referred to the following factors to justify their views: (i) the MVBER regime having reduced the "monopoly" of authorised repairers / distributors and consequent intensified competition between authorised and independent service providers; and (ii) the 2010 financial crisis having greatly increased the demand for repair and maintenance services, as consumers had a greater tendency to pay repair bills rather than purchasing a new vehicle. NCAs reporting a *decrease* (22%) in the intensity of competition in the provision of repair and maintenance services attributed the

[76] Based on HHI index. See Section 2.1.4, Annex 2 for more details.

changes mainly to mergers between players, changes in consumer preferences and technological developments. These NCAs also reported that insurance companies tended to favour repairs in authorised repair garages, making it more difficult for independent service providers to compete. Finally, they indicated that, due to the increased complexity of modern vehicles independent repairers are forced to focus on the simple mechanical operations that are decreasing in frequency, while more complex and software related operations are becoming more common.

The fact-finding study shows that the size of market for repair and maintenance services increased during the period in scope, which can be linked to the increased size and age of the passenger car parc. The study also shows a trend towards a decrease in network density, which can be due to several factors, including the continuing trend observed toward rationalisation and consolidation of vehicle manufacturers' networks.

As for the **intensity of competition in spare parts distribution**, a large majority of respondents to the public consultation believe that this has changed, with 54% reporting an *increase* in competition. Some of the latter pointed, *inter alia*, at: (i) the positive impact of the MVBER; (ii) the growth of e-commerce, which boosts price competition; (iii) the increasing demand for remanufactured/recycled parts; and (iv) the fact that new players had entered the EU parts distribution market (e.g., LKQ). In contrast, about 44% of the NCAs reported that the area had not undergone major changes in the intensity of competition over the last ten years, while 22% believed that competition had *generally intensified*. The latter nonetheless cautioned that, as a result of the increased connectivity of modern vehicles, more spare parts need to be registered with the vehicle's embarked software, which may constitute a risk to competition in the distribution of spare parts. Finally, only 4% of NCAs reported a *decrease* in the intensity of competition in spare parts distribution.

The fact-finding study shows a growth in terms of sales value of the business of both parts manufacturers and distributors over the period 2007-2017, which can be linked to the increase in the average age of vehicles and their growing complexity. Vehicle parts supply appears in general to be a profitable business which, mainly towards the end of the period in scope, is also increasingly taking advantage of innovative distribution channels (in particular e-commerce through own websites or third-party platforms) for spare parts distribution. Taking into account the limitations of the study and the elements collected through other sources, the overall picture suggests that the intensity of competition in spare parts distribution did not decrease during the period in scope.

Against this background, it can be concluded that the intensity of competition seems to have increased between 2007 and 2017 in the distribution of new passenger cars, but remained moderate for the distribution of light commercial vehicles, buses and trucks. The evidence collected for repair and maintenance services and spare parts distribution shows a mixed picture as data from the fact-finding study is not conclusive and views of stakeholders point in different directions.

5.1.3 Enforcement of the Commission and NCAs regarding vertical restriction in the motor vehicle sector

Section 5.1.3 presents an overview of the enforcement activities of the Commission and NCAs regarding vertical restrictions in the motor vehicle sector.

5.1.3.1 The Commission's enforcement and monitoring action regarding vertical restrictions in the motor vehicle sector

Between 2010 and 2020, the Commission did not adopt any prohibition or commitments decisions concerning vertical restraints in the motor vehicle sector. This is not to say that the Commission did not encounter allegations; rather, these complaints indicated, at most, only a limited likelihood of the Commission finding a breach of Article 101 of the Treaty

In particular, during this period, the Commission received 22 formal complaints concerning a variety of issues relating to vertical agreements in the sector,[77] but considered that none of these complaints were suitable for pursuit.[78] Two of the Commission's rejection decisions regarding these complaints were subject to appeals before the General Court. One of the decisions was upheld on appeal.[79] The other appeal is currently pending[80] before the General Court.

In addition to formal complaints, as part of its monitoring and enforcement activities in the sector, the Commission deals with informal correspondence/ submissions from stakeholders. Between 2010 and October 2020, it dealt with around 600 such informal submissions.[81] In a relatively small number of these cases, the initial informal correspondence evolved into a formal complaint. For about 28% of correspondence, the Commission found no indications of potential infringement that would justify pursuing an investigation, while in 26%, it provided clarification or guidance.[82] The largest proportion of these informal submissions concerned the distribution of new motor

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77 See Annex 4.

78 This led to 8 rejection letters under Article 7(1) of Regulation 773/2004, 12 rejection decisions under Article 7(2) of Regulation 773/2004, 1 rejection pursuant to Article 13 of Regulation 1/2003 and Article 9 of Regulation 773/2004, and 1 rejection pursuant Article 13 of Regulation 1/2003 and Article 7 (2) of Regulation 773/2004.

79 Case T-531/18 *LL-Carpenter s. r. o. v Commission*.

80 Case T-743/20 *Car-Master 2 v Commission*.

81 The statistics provided exclude submissions that were deemed to be completely outside DG Competition's remit.

82 Further, in 10% of the instances, the correspondents provided information without requesting action from the Commission, while in respect of 8% of the correspondence, the Commission found that the information provided was insufficient to reach any conclusions. In a further 8% of the cases, there was no follow up by the correspondent. In 7% of the submissions, the problem was addressed by informal means. In 6% of the submissions, the matter concerned a contractual issue. About 3% of the submissions were found to have no inter-state element, and 2% of the correspondence was referred or re-allocated to other DGs of the Commission. Finally, 1% of the submissions are still pending and a further 1% evolved into formal complaints.

vehicles, followed by the provision of repair and maintenance, and then the distribution of spare parts.

5.1.3.2 NCA enforcement and policy actions regarding vertical restrictions

Between 2010 and 2020, NCAs from the Member States, the UK and Norway received 142 complaints and started 25 *ex officio* procedures related to the motor vehicle sector. More than 90% of these cases were closed during the period under analysis, with only 11 cases still ongoing.[83]

A large majority of the cases (97) did not lead to a formal decision and were closed administratively, primarily due to absence of sufficient evidence or lack of priority. Three cases were administratively closed by providing guidance to the complainants. In 33 cases, the NCAs issued rejection decisions, primarily because they could not establish an infringement. In 19 cases, the NCAs issued commitment decisions, but none of these imposed financial or other types of penalties on their addressees. In six cases, the NCAs issued prohibition decisions; all of these decisions imposed either financial or other types of penalties on the addressees. In addition, the Belgian NCA was the only competition authority that reported having adopted a decision imposing interim measures in the motor vehicle sector in the period under analysis.[84] Finally, during the period concerned, Austria, Ireland and Latvia and Norway issued national guidance papers concerning vertical restraints in the motor vehicle sector. For Austria and Ireland, these are part of their general guidelines on vertical restraints.

6 THE EVALUATION CRITERIA

Against the background of Section 5, Section 6 evaluates the MVBER in the light of the five evaluation criteria.

6.1 Effectiveness

1. What is the level of legal certainty that the MVBER regime provides for undertakings assessing whether vertical agreements in the motor vehicle sector and/or specific clauses/restrictions are exempted from the application of Article 101 of the Treaty and thus compliant with this provision?

What is the issue?

As the function of the MVBER regime is to provide a safe harbour for certain categories of vertical agreements in the motor vehicle sector, by nature, one of its **specific objectives is to give legal certainty to stakeholders**, making it easier for them to perform the self-assessment required by the wider competition law framework. To

[83] See Annex 4.

[84] Decision no. BMA-2014-V / M-14 of July 11, 2014.

provide legal certainty, the conditions for exemption must be set out in a clear and comprehensible manner, allowing stakeholders to understand them and how they apply to their agreements. Nonetheless, the analysis of whether this objective has been met is predicated on the understanding that the MVBER regime could never provide absolute legal certainty. Instead, the assessment of whether this objective has been achieved seeks to determine whether the MVBER regime rules provided increased legal certainty as compared to a situation without them, but also whether there is room for improvement in achieving the objective.

The MVBER regime covers a sector within which business models, agreements and restrictions change over time. When setting the conditions for the exemption, it is thus not possible to predict exactly how markets will evolve and the types of restrictions that may appear. Therefore, to ensure that the exemption remained future-proof, the Commission had to set conditions that required some interpretation in their application to specific cases. Moreover, even though the SGL and VGL were intended to provide additional guidance on how to apply the MVBER, the VBER and Article 101 of the Treaty to the motor vehicle sector, for the same reasons, they could not have been made so exhaustive as to anticipate every possible market development, or every type of agreement or restriction that could conceivably have emerged.

Finally, individual respondents' assessment of the level of legal certainty provided by the rules may also depend on the specific difficulties they encounter when applying the rules to agreements in the particular field in which they are active within the overall motor vehicle sector. Therefore, the assessment pursuant to this objective takes into consideration the specific areas of the rules for which respondents and NCAs consider that there is uncertainty as well as the Commission's enforcing and monitoring experience and the findings of the study.

What are the findings?

A majority of **respondents to the public consultation**[85] **consider that the MVBER regime has achieved its aim of providing legal certainty**. Similarly, **NCAs are generally of the view that the MVBER has provided a helpful framework for companies** (and advisors) to self-assess compliance with Article 101 of the Treaty while also reducing the risk for a divergent application of Article 101 of the Treaty, and adding legal certainty for companies operating in more than one Member State.

Despite the general view that the MVBER regime has provided legal certainty, **respondents to the public consultation,** from different stakeholders' groups, point to some areas of the rules which they consider not sufficiently clear. In this sense, definitions such as "vertical agreements",[86] "agency agreements",[87] "subcontracting"[88] or

[85] See Annex 3 and Annex 6.

[86] Article 1(1)(a) VBER, paragraphs 24-26 VGL and Article 1(1)(a) MVBER.

"tool"[89] are seen by a significant share of respondents as providing little legal certainty. Similarly, a considerable number of respondents[90] perceive that certain hardcore restrictions such as: (i) the restriction on the ability of suppliers of parts/tools/equipment to sell to authorised and independent repairers, distributors or end users;[91] (ii) the restriction of original equipment suppliers'(OES) ability to sell spare parts to end users or repairers;[92] and (iii) the restriction of dealers ability to sell motor vehicles spare parts to other dealers within the same distribution system[93] provide little legal certainty.

Some replies[94] to the public consultation also suggest that the provisions that deal with a number of specific vertical restraints may provide insufficient legal certainty. In particular, these submissions refer to: (i) the restriction on independent operators' access to technical information;[95] (ii) placing limits in the numbers of authorised repairers within a brand network;[96] and (iii) the misuse of warranties[97] have provided little or very little legal certainty. With regard to point (ii), it should be noted that the **fact-finding study**[98] confirms that vehicle manufacturers use a combination of distribution systems that took into account the caveats set up in the MVBER. In particular, vehicle manufacturers preferred quantitative distribution systems in the medium concentrated passenger car category, whereas qualitative distribution systems were mostly used in the more concentrated light commercial vehicle category.

A few **NCAs** are also of the view that further clarifications and guidance on some rules would be welcomed. They also pointed to the fact that recent market developments, new business models and new technologies should also be considered. A few NCAs felt the need for further clarifications as regards the definitions of "vertical agreements",[99] "agency agreements",[100] "selective distribution",[101] "non-compete obligation",[102]

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87 Paragraphs 12-17 VGL.

88 Paragraph 22 VGL and Paragraph 23 SGL.

89 Paragraph 68 SGL.

90 43% of respondents in the case of the restriction on the ability of suppliers of parts/tools/equipment to sell to authorised and independent repairers, distributors or end users; 37% in the case of the restriction of OES ability to sell spare parts to end users or repairers; and 23% in the case of the restriction of dealers ability to sell motor vehicles spare parts to other dealers within the same distribution system.

91 Article 5(b) MVBER.

92 Article 4(e) VBER and paragraph 59 VGL.

93 Article 4(d) VBER and paragraph 59 VGL.

94 32% and 6% of respondents considered the provisions on access to technical information to provide little and very little legal certainty respectively. 35% and 8% of respondents considered the provisions on the limits in the numbers of authorised repairers within a brand network to provide little and very little legal certainty respectively. 20% and 8% of respondents considered the provisions on misuse of warranties provide little and very little legal certainty respectively.

95 Paragraphs 62-68 SGL.

96 Paragraph 70 SGL.

97 Paragraph 69 SGL.

98 See Section 5.1.1.

99 Article 1(1)(a) VBER, paragraphs 24-26 VGL and Article 1(1)(a) MVBER.

100 Paragraphs 12-17 VGL.

101 Article 1(1)(e) VBER and Article 1(1)(i) MVBER.

"intermediary",[103] "spare parts"[104] and "connected undertaking".[105] A considerable number of NCAs perceived certain provisions on specific vertical restraints, such as those dealing with independent operators' access to technical (repair and maintenance) information,[106] and the misuse by suppliers of vehicle warranties[107] as providing little legal certainty. Similarly, a few NCAs indicated that the hardcore restriction concerning resale price maintenance[108] provide little legal certainty. In addition, few NCAs suggest integrating the recent case law in relation to vertical restraints into the respective provisions to increase legal certainty.

Finally, the MVBER regime appears to have made it easier for NCAs and national courts to apply the rules consistently by p**roviding a common framework for the application of Article 101 of the Treaty.**[109] Respondents and NCAs suggest that national guidance, enforcement practice of NCAs and relevant national case-law could not have been more than or as effective as the MVBER regime. Nevertheless, few NCAs note that the rules might be difficult to understand for those who are not legal experts, since five different documents[110] have to be taken into account and the wording can be highly technical. In this regard, only one NCA notes that it should be discussed whether the VBER and the MVBER should be merged. However, if the motor vehicle rules were to be incorporated in the VBER regime, the NCA notes the following points: (i) including sector specific rules in the VBER and the VGL might increase the length and complexity of these documents; (ii) other sectors might also ask for sector-specific rules in the VBER regime; and (iii) the strong signaling effect of the MVBER regime on the sector might be reduced. Therefore, it appears that merging both instruments would not automatically increase legal certainty for NCAs.

Based on the **Commission's monitoring and enforcing experience,** the MVBER regime appears to have provided a high degree of legal certainty. In particular, the Commission has received – informally - relatively few questions[111] as to how the rules should be interpreted, and none of the formal complaints that it has received and subsequently rejected concerning vertical agreements in this sector hinged on a misunderstanding of the substantive rules.

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102 Article 1(1)(d) VBER.

103 Paragraph 52 SGL.

104 Article 1(1)(h) MVBER.

105 Article 1(2) VBER and Article 1(2) MVBER

106 Paragraphs 62-68 SGL.

107 Paragraph 69 SGL.

108 Article 4(a) VBER.

109 The third specific objective (i.e., to provide a common framework for the application of Article 101 of the Treaty) was treated in the questionnaires to the public and NCAs consultation under the EU added value criterion.

110 VBER, MVBER, VGL, SGL and the FAQs.

111 About 14% of the informal submission received by the Commission between 2010 and 2020 concerned general questions on the applicability of the MVBER regime.

Overall, respondents to the public consultation as well as NCAs consider the MVBER regime to have **generally met the specific objective** of increasing **legal certainty** for companies and NCAs and national **courts** as compared to a situation without the MVBER regime. In general, the MVBER regime is considered to be a useful instrument that has increased legal certainty as compared to a situation without it. The MVBER regime also appears to have made it easier for the relevant authorities to apply the rules consistently and, therefore, to have **met the specific objective** of **facilitating the enforcement work** of NCAs and courts, and the self-assessment of vertical agreements, by providing a common framework for the application of Article 101 of the Treaty. Nevertheless, it appears that certain provisions: (i) may benefit from further clarifications; (ii) may be difficult to apply or; (iii) may not take into account recent market developments.

2. *To what extent do the conditions currently defined in the MVBER regime meet the objective of only exempting those agreements for which it can be assumed with sufficient degree of certainty that they generate efficiencies in line with Article 101(3) of the Treaty?*

What is the issue?

The safe harbour provided by the MVBER regime is limited by the Empowerment Regulation of 1965, which only authorises the Commission to block exempt those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. In this regard, the Commission must pay particular attention to **avoiding false positives**, this is exempting agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty (over-exemption). At the same time, the Commission also seeks to **avoid false negatives**, which result in a situation where the respective vertical agreement or practice is not block exempted despite fulfilling the conditions of Article 101(3) of the Treaty (under-exemption). A false negative increases the burden for businesses when self-assessing the compliance of their agreements with Article 101 of the Treaty, as they have to perform an extended individual assessment, instead of being able to rely on a simpler set of rules (i.e., the MVBER regime). In light of the above, it has been assessed to what extent the MVBER regime has correctly drawn the line when setting out the conditions that vertical agreements need to meet in order to benefit from the block exemption.

The conditions to take into account when assessing this specific objective are those set out in Articles 3 to 5 VBER and Article 5 MVBER. These include firstly the conditions to be met by all agreements: namely, the market share threshold below which the exemption is granted[112] and the hardcore restrictions that remove the benefit of the block

[112] Article 3 VBER.

exemption for the whole agreement.[113] Secondly, the conditions include certain restrictions excluded under the VBER, to which the block exemption does not apply, although the remainder of the agreement in which they are contained may still be exempted.[114] The VGL and the SGL are also relevant for this assessment insofar as they provide additional guidance on the interpretation of the respective provisions of the VBER and MVBER.

What are the findings?

Article 3 VBER provides that the exemption shall only apply on condition that the market share of the supplier and the buyer concerned do not exceed the threshold of 30%. A **majority of respondents and NCAs believe this market share threshold to be appropriate for vertical agreements in the motor vehicle sector**. Some respondents and a few NCAs however pointed to potential false positives and false negatives as regards the level of the market share threshold. Those views are outlined below:

- As for potential **false positives (over-exemption),** some respondents[115] argued that the current threshold may be *too high*, pointing out that very few players actually exceed 30% market shares.

  Some respondents drew a distinction between the distribution of new cars and the aftermarket sectors. This group mentioned that while the 30% threshold still seemed appropriate for the market of distribution of new cars, for the aftermarket the current approach of calculating market share for each brand separately means that, in practice, the threshold has little effect, since few agreements fall below it. A few NCAs noted that the current threshold is *too high* with regards to the market for new motor vehicles, as for certain countries and segments the market is very fragmented, meaning that all agreements fall below the market share threshold.

- As for potential **false negatives (under-exemption)**, a few respondents to the public consultation considered the threshold to be *too low*.[116] In this regard, they pointed out, for example, that 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

[113] Article 4 VBER and Article 5 MVBER.

[114] Article 5 VBER.

[115] Around 28%. Primarily, associations representing parts dealers and manufacturers, but also companies (mainly part dealers and repairers).

[116] Around 5%. Associations representing vehicle manufacturers, dealers and importers, a vehicle importer and a company active in the mineral-oil market.

manufacturers on the upstream market, the majority of agreements for repair and maintenance and spare parts distribution would fall outside the exemption. Similarly, a few NCAs noted that the threshold may be *too low*, at least for the provision of repair and maintenance services and for the distribution of spare parts.

In the **Commission's monitoring and enforcement experience**, 30% has proven itself to be a market share threshold below which it can be presumed with sufficient certainty that agreements will satisfy the conditions of Article 101(3) of the Treaty. To date, the Commission has not identified any category of agreements that are unable to benefit from the exemption because of the parties' market share, but which are relatively unproblematic in terms of competition; the identification of such a category would have been an indication that the threshold was set too low. Nor has it found any elements that have led it to consider withdrawing the exemption from any agreement or category of agreements in the motor vehicle sector, which is an indication that the exemption threshold is not set too high.[117]

Article 4 VBER and Article 5 MVBER provide for a list of hardcore restrictions. These are particularly severe restrictions which inclusion in an agreement implies that the latter cannot benefit from the block exemption under the MVBER regime. As regards these provisions, **a majority of respondents to the public consultation and NCAs do not indicate having encountered other types of vertical restrictions** beyond those currently included in the VBER and MVBER which should be considered severe restrictions of competition.

At the same time, a significant share of respondents[118] and a few NCAs reported that they had encountered restrictions that should be qualified as hardcore, thereby identifying a number of potential **false positives**. The following in particular were identified: (i) restrictions on access to technical information and in-vehicle data for aftermarket operators; (ii) direct or indirect quantitative criteria for access to authorised networks; (iii) requiring the use of vehicle manufacturer-branded spare parts in respect of replacements that are not covered by the terms of the warranty; (iv) bundling sales and aftersales markets; (v) refusing to license certain rights necessary to allow suppliers to offer spare parts to the independent channel; (vi) restrictions on the sale of brands from different suppliers; and (vii) restrictions that were included in Article 4.2[119] and Article

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117 Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003 gives the Commission the power to withdraw the benefit of the exemption from certain categories of agreements where it finds effects which are incompatible with Article 101(3) of the Treaty.

118 Around 41%. Although the profile of respondents replying in this sense is very diverse, none of the vehicle manufacturers associations participating in the consultation replied affirmatively to this question.

119 This Article provided that the exemption would not apply "*where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures*".

4.1.(k)[120] of Regulation 1400/2002. Based on their enforcement experience, a few NCAs also pointed to refusals by OEMs to give independent repairers access to technical information as a potential additional hardcore clause. A few NCAs suggested that in practice the inclusion of such a clause might not have real effects, since for passenger cars at least, most repair agreements may not benefit from block exemption in any event, due to the high market shares of the members of the authorised networks. Nevertheless, a few NCAs considered that listing this provision as a hardcore restriction could have a signaling effect on the market for the provision of repair and maintenance services.

In addition, a majority of NCAs and respondents to the public consultation did not consider that there were any restrictions currently listed in Article 4 VBER and Article 5 MVBER that should not be included in this list. In general therefore, **the majority of NCAs and respondents to the public consultation did not consider that the current lists of hardcore restrictions created a risk of false negatives**. Despite this general view, there were however a few respondents to the public consultation - mainly vehicle manufacturers - that considered that some of the restrictions that are currently listed as hardcore should not be considered as such. The main concern expressed in this regard related to resale price maintenance.[121]

Finally, Article 5 VBER provides for a list of excluded restrictions. The presence of these restrictions in a vertical agreement does not imply the loss of the exemption for the entire agreement but only for the particular clauses that qualify as excluded restrictions. The majority of respondents to the public consultation and NCAs saw the current list of excluded restrictions contained in Article 5 VBER as appropriate. This means that **overall, no risks of false positives or false negatives were identified** in this regard.

The **Commission's monitoring and enforcing experience** in the motor vehicle sector has not led it to identify **any need for additional hardcore or excluded restrictions.**

The evidence gathered in the evaluation suggests that the MVBER regime has **generally met the specific objective of avoiding false positives and false negatives**. This means that: (i) the MVBER regime generally does not exempt agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty; and (ii) the MVBER regime does not fail to exempt agreements that could be exempted, respectively. This being said, with regard to specific points, a few NCAs and some respondents to the public consultation mentioned additional practices that

[120] *"The restriction of a distributor's or authorised repairer's ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice and to use them for the repair or maintenance of motor vehicles, without prejudice to the ability of a supplier of new motor vehicles to require the use of original spare parts supplied by it for repairs carried out under warranty, free servicing and vehicle recall work*"

[121] According to these respondents, although RPM is currently permitted when new products are launched, companies applying RPM in this manner run the risk of losing the exemption for their entire agreement if the Commission finds that on the facts, the RPM in question is caught by the hardcore provision. In their view, this allegedly creates a disincentive for VMs to use RPM in these cases even though it may lead to efficiencies. For further details see Annex 3.

could be considered as hardcore restrictions.

3. *To what extent has the MVBER regime contributed to protecting competition in certain dimensions of the motor vehicle sector?*

What is the issue?

As explained in Section 2.3, in the 2009 Communication that preceded the entry into force of the current MVBER regime, the Commission identified certain problematic dimensions of competition in the motor vehicle sector which were considered to be of particular relevance for the future. These specific policy objectives[122] are englobed by the fourth specific objective of the MVBER regime: protecting competition in certain dimensions of the motor vehicle sector (see Section 2.3). Against this background, the evaluation analyses whether the **seven specific policy objectives** identified in the 2009 Communication have been achieved.

What are the findings?

1. *Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market*

In the 2009 Communication, the Commission found that in certain circumstances, restrictions in distribution agreements - especially the widespread use of single-branding clauses[123] in motor vehicle distribution agreements entered into between suppliers and distributors - might make it unduly difficult for competing vehicle manufacturers to access the retail and/or repair market. To ensure that inter-brand competition was not undermined, the Commission stressed the need to preserve the ability of competing vehicle manufacturers to enter the market and/or expand their market presence.

Overall, **respondents to the public consultation[124] and NCAs were of the view that full or partial progress had been made in terms of enabling competing vehicle manufacturers to enter the market and / or expand their market presence**. Indeed, only a few respondents to the public consultation expressed the view that this objective had not been achieved. None of the respondents replying that this objective had not been

[122] Namely: (i) preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market; (ii) protecting competition between dealers of the same brand; (iii) preventing restrictions on parallel trade in motor vehicles; (iv) enabling independent repairers to compete with the manufacturers' networks of authorised repairers; (v) protecting competition between repairers of the same brand; (vi) preventing foreclosure of spare parts suppliers; and (vii) preserving the deterrent effect of Article 101 of the Treaty by preventing suppliers from indirectly using pressure and threats to achieve anticompetitive results.

[123] Under a single branding clause, the buyer is obliged or induced to concentrate his orders for a particular type of product on one brand.

[124] See Annexes 3 and 6.

achieved or had only partially been achieved provided specific explanations for their positions. Of the NCAs, only a few considered that the objective had been only partially achieved or not achieved at all. The latter pointed to the alleged lack of new players in certain national markets or to the lack of growth of existing markets to justify their reply. Similarly, at the NCA level, only 1% of all the complaints received by NCAs were filed by vehicle manufacturers.

The **fact-finding study** showed that **inter-brand competition was fairly present at least in the passenger cars and light commercial vehicles segments** in the period under review (2007-2017). In the same vein, the study also showed that no **passenger car** manufacturer appears to have had particularly strong market power in any of the countries in scope. The passenger cars segment can be classified as having medium levels of concentration. Over the period under review, the market shares of the players fluctuated considerably, which can be an indication of a competitive market. As with passenger cars, the **light commercial vehicle** category reported fluctuating market shares over the period in scope. Despite being a more concentrated segment than passenger cars, no manufacturers held particularly strong market power during the period covered by the study. It should however be noted that after the period covered by the study, two major manufacturers of light commercial vehicles - FCA and PSA – merged to create a new company named Stellantis,[125] implying that at the date of the evaluation, concentration in this segment will have increased compared to the position at the time of the study. In the **trucks category**, in terms of sales, all main manufacturer groups registered a decrease during the period 2007-2017, although some shifts in market positions took place during the same period. Finally, the **bus category** appears to have suffered less from the crisis, with an overall minor sales decrease. As with trucks, the bus sector is also highly concentrated.

When looking at innovation, the fact-finding study highlighted that, on average, R&D expenditure as a percentage of revenue remained rather stable for passenger cars and light commercial vehicles, while it increased throughout the years for buses and trucks, despite the serious economic crisis that affected the sector in 2008/2009.

In line with the views of respondents and the fact-finding study, the **Commission's monitoring and enforcement experience indicates that this specific policy objective has been largely achieved.** In particular, it points to inter-brand competition for new passenger cars in the EU being healthy. In contrast, the truck and bus sectors have traditionally been more concentrated. It should also be noted that the markets for light commercial vehicles (and the concentration levels thereon) have recently been particularly affected by the merger of FCA and PSA, which calls for monitoring this markets particularly carefully in the future.

[125] M.9730 FCA / PSA.

Over the period covered by this evaluation, based on the Commission's experience, there are no indications that manufacturers have found it particularly difficult to access the EU motor vehicle markets, either by entering, or by expanding their presence. Only one of the 22 formal complaints received by the Commission between 2010 and 2020 was lodged by a vehicle manufacturer / national importer, and only 3% of the informal submissions to the Commission were filed by this type of stakeholder. Moreover, it does not appear that a vehicle manufacturers operating in other parts of the world would have attempted to enter / expand their presence in the EU markets, but being stymied by the existence of mono-brand sales networks.[126]

In light of the above**,** it appears that **overall, the specific policy objective of preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market has been either fully or partially achieved**.

2. Protecting competition between dealers of the same brand

New motor vehicles are almost entirely distributed through the vehicle manufacturers' authorised networks. By exempting vertical agreements providing for quantitative selective distribution or exclusive distribution so long as the market share threshold of 30% is not exceeded and that no hardcore restrictions are included therein,[127] the MVBER regime allows suppliers that do not have significant market power to limit the numbers of the firms authorised to distribute their products. In its 2009 Communication, the Commission considered that there was a danger that intra-brand competition could be undermined, particularly in a context where new vehicles were distributed through dealers with near-identical business models. It was therefore considered that there was a need to protect price competition between dealers of the same brand and to encourage diversity in distribution formats.

NCAs and respondents to the public consultation[128] were generally of the view of that full or partial progress had been made in terms of protecting competition between dealers of the same brand. Only some respondents and a small share of NCAs considered that this objective had not been achieved. These NCAs reported that the increasing consolidation between dealers combined with a growing presence of vehicle manufacturers-owned outlets (this trend being also echoed by some respondents to the public consultation), rigid remuneration systems and sales campaigns left little room for effective competition in the distribution of new vehicles. In the same vein, these NCAs also reported a trend towards direct distribution by OEMs when it comes to new motor vehicles, with dealers acting as delivery and configuration points. The increase in direct

[126] The fact-finding study shows that some non-European vehicle manufacturers entered the EU market after 2007 (Tesla Motors) while others expanded their market presence during the observation (Mahindra Group and Tata Group), see Annex 2.

[127] Paragraph 46 SGL and paragraph 152 VGL.

[128] See Annexes 3 and 6.

sales by vehicle manufacturers has also been indicated as a relevant factor by a number of respondents - mainly dealers - to the public consultation. Finally, some respondents, mainly dealers, argued that intra-brand competition has decreased due to, among other things, the removal of the sector-specific block exemption from agreements for new car sales which, in their view, has increased the dependence of dealers on vehicle manufacturers.

The **fact-finding study** showed that **intra-brand competition did not decrease significantly over the period in scope,** at least as far as passenger cars are concerned. The study did not provide indications in this respect as regards light commercial vehicles, or trucks and buses.

The fact-finding study has shown that the density of all passenger car manufacturers' authorised networks decreased over the period 2007-2017, although in differing fashion, depending upon the brand. In general, the greatest reductions in density over the period affected brands like Renault, Dacia, Peugeot and Citroën, which had a relatively denser dealer network in 2007. Other brands, like Nissan and Toyota, whose network was already less dense than the average, reported a smaller decrease in density. The study provides limited input concerning market concentration of dealers. However, based on survey results, the average percentage difference in market shares of the top three passenger car dealers reported many fluctuations year over year, with an overall slight increase of this figure for seven out of 11 countries.

Based on survey results, the study showed a certain homogeneity of the models used by vehicle manufacturers for the distribution of passenger cars and trucks, in that vehicle manufacturers opted mainly for quantitative selective distribution systems. There was more diversity in the distribution of light commercial vehicles, where qualitative and quantitative distribution models were evenly spread across each of the countries in scope. Exclusive distribution systems seem to be the preferred system for bus distribution, although a certain diversity can also be observed in this category.

In light of the study's findings, the observed slight decline in aggregate network density for passenger cars and the increase in market concentration appear to have been moderate overall, considering the effects of the financial crisis and the observed trend of network rationalisation and consolidation of dealer groups. Moreover, a certain diversification of distribution systems was also observed, albeit without significant changes in the way that the different systems were used at country level.

The Commission's monitoring and enforcement experience indicates that the need to protect dealers of the same brand has largely been met, a finding which is in line with the views of respondents to the public consultation and the fact-finding study. Its experience is that the homogeneity in distribution formats observed prior to 2010 is still present in the markets in 2021, and in particular it notes that the vast majority of passenger cars continue to be distributed through quantitative selective distribution

networks, as confirmed by the findings of the study. It has also observed the density of these networks declining over the period covered by this evaluation, which represents a continuation of the trend observed at the time of its last review of the MVBER regime[129] and is confirmed by the findings of the fact-finding study.[130] On the other hand, its experience is that consumers are increasingly using the Internet to shop around for vehicles, and that this is extending the geographic reach of individual authorised dealers. Finally, over the period since the MVBER regime was adopted, the Commission has not pursued any cases demonstrating that suppliers had put barriers in the way of intra-brand competition, for instance via resale price maintenance. Sixteen out of the 22 formal complaints received between 2010 and 2020 were submitted by authorised dealers (or repairers), but all of them were rejected.[131] There were two informal submissions including allegations of restrictions to access authorised dealers' networks that turned into formal complaints,[132] however, one of them was rejected and the Commission's decision was upheld by the EU General Court[133] and the other was withdrawn.[134]

In light of the above, it appears that **overall, the specific policy objective of protecting competition between dealers of the same brand has been partially or even fully achieved.**

3. Preventing restrictions on parallel trade in motor vehicles

In its 2009 Communication, the Commission found that the protection of cross-border trade had enabled consumers to shop within the Single Market and take advantage of price differentials between Member States. There was thus a need to ensure that this continued to be the case and that distribution agreements did not restrict parallel trade.

Overall, both NCAs and respondents[135] to the public consultation were of the view that full or partial progress had been made in terms of preventing restrictions of parallel trade in motor vehicles. Some NCAs even reported that cross-border competition had intensified slightly. This being said, some NCAs reported a tendency to prevent cross-border sales via indirect means (e.g., by shortening the warranty period in certain Member States or "accidentally" failing to provide the registration document for the end consumer). These NCAs reported that since car sales margins are low, and

129 See Section III of Commission Evaluation Report on the operation of Regulation (EC) N° 1400/2002 concerning motor vehicle distribution and servicing, May 2008.

130 See Section 5.1.

131 One of the rejections (AT.40665) concerned a complaint filed by a Polish car dealer against Toyota Motor Poland with regard to a refusal to access the authorised network of the latter. The decision is currently under appeal before the EU General Court, T-743/20 - *Car-Master 2 v Commission*.

132 The first one was a complaint from a company in the Czech Republic that had seen it application to become an authorised distributor of Subaru motor vehicles rejected, while the second one was a complaint against a vehicle manufacturer for not allowing its authorised dealers to sell certain type of cars to certain consumers.

133 Case T-531/18 - *LL-Carpenter v Commission*.

134 The complaint was not made public.

135 For further details on the comments of respondents and NCAs see Annexes 3 and 6.

dealers make much of their profit from repair and maintenance on cars that they have sold locally, they have few incentives to sell to consumers resident in other Member States. It is also worth noting that, only one of the decisions issued by NCAs finding an infringement of competition involved parallel trade restrictions.

This position seems to be supported by the fact that only 8% of the respondents to the public consultation declared to have encountered restrictions of authorised dealers' ability to sell motor vehicles or spare parts in other Member States in their agreements. In contrast to the overall picture, a few respondents raised concerns that the EU Single Market had been segmented into national markets, thereby obstructing any real EU-wide competition; and that intra-brand competition between dealers only existed at national level.

The **Commission's monitoring and enforcement experience** also points in the direction that **the objective of preventing obstacles to parallel trade** and largely enabling consumers to purchase vehicles in other Member States **has, at least in part, been met**. Although the Commission has had substantial volumes of correspondence[136] on this issue since the current MVBER regime was adopted, and 9% of the formal complaints filed with the Commission contained allegations regarding restrictions on cross-border trade, this has not allowed it to detect any substantial obstructions on the part of suppliers. More concretely, the Commission has not had cause to adopt any decision similar to those pursued in the early 2000s.[137]

In light of the above, it appears that **overall the specific policy objective of preventing restrictions on parallel trade in motor vehicles has been either fully or partially achieved.**

4. Enabling independent repairers to compete with the manufacturers' networks of authorised repairers

In its 2009 Communication, the Commission observed 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 their related 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 and technical information. It was thus necessary to safeguard this access, as well as to prevent other indirect means from affecting independent repairers' positions, such as the misuse of warranties by vehicle manufacturers and/or their authorised repairers.

[136] About 25% of the informal submission received by the Commission since 2010 concerned restrictions of parallel trade.

[137] Case IV/35.733 – *VW* Case COMP/36.653 - *Opel*, Case COMP/F-2/36.693 - *Volkswagen*, and Case COMP/36.264 - *Mercedes- Benz*.

The evaluation shows that **the majority of respondents to the public consultation and NCAs considered that this objective had been partially achieved** and some respondents and NCAs considered it to have been even fully achieved.[138] Despite the general views, based on their enforcement experience, some NCAs report difficulties for independent repairers to obtain timely access to spare parts and to information relevant for the provision of aftersales services - notably repair and maintenance - persisted and that this may become more important in the future as result of the increasing digitalisation of motor vehicles. This is also echoed by some respondents to the public consultation, which flagged (i) difficulties accessing OEM-branded (captive) parts, in particular from independent distributors; (ii) limitations on independent publishers' access to full / up-to-date technical information; and (iii) restrictions on access to in-vehicle data and security-related functions.

Moreover, some NCAs reported that as result of the increase in complexity of motor vehicles authorised repairers gained an advantage over their independent competitors, forcing the latter to focus mainly on simple mechanical operations. Similarly, some respondents to the public consultation noted restrictions on access to aftermarket diagnostics technologies, which allegedly leads to independent repairers being mainly focused on basic repairs / common maintenance, while more sophisticated interventions are conducted by authorised repairers. Some NCAs suggested that the transition to electric and hybrid vehicles may reinforce these trends.

Further to the above, some respondents argued that the misuse of warranties leads consumers towards the authorised repair networks. In this regard, NCAs indicated that consumers do not often ask independent repairers to provide services in the first part of the life cycle of vehicles (e.g., the period covered by warranty) as certain conducts (e.g., complex warranty conditions, long warranty periods) direct customers towards authorised repairers. Finally, some NCAs highlighted that the limited case law on independent repairers' access to technical information and the fact that this behaviour is not listed as a hardcore restriction makes enforcement more complex for NCAs.

These views of NCAs and respondents to the public consultation on the misuse of warranties, access to technical information and vehicle data and access to spare parts / diagnostic tools find some support in the decisional practice of NCAs. Around 39% of the infringement decisions adopted by NCAs concerned abuse of warranties, 16% included restrictions on access to spare parts / diagnostic tools and about 7% involved restrictions to access technical information and vehicle data.[139]

The **fact-finding study** provided limited information about independent repairers, given the low participation of this category to the survey, therefore does not provide enough

[138] See Annexes 3 and 6.

[139] See Annex 4.

elements to evaluate the key parameters of competition for this objective. Most of the information present in the fact-finding study was collected by parts manufacturers through the survey.

The **Commission's monitoring and enforcement experience** indicates that **the specific policy objective of protecting the ability of independent repairers to compete has been at least partially met.** Since the previous review of the MVBER regime, independent operators that compete with authorised repairers still face difficulties in accessing the inputs they need to repair vehicles[140] While some of these issues may be linked to these operators' (often multi-brand) business models, and to the major investments needed to repair increasingly technologically-advanced vehicles, it cannot be excluded that some of the difficulties encountered may be due to restrictions on the markets, in particular as regards access to key inputs such as repair and maintenance information. However, it should be noted that since it adopted the four *Technical Information* decisions in 2007,[141] and included the lessons learned in the SGL, the Commission has not examined complaints the facts of which would render it necessary to adopt further decisions in this area.

In light of the above, it appears that **overall the specific policy objective of enabling independent repairers to compete with the manufacturers' networks of authorised repairers has been partially achieved.** The evaluation shows, however, that **stakeholders are still encountering some difficulties in this area,** mainly in connection with the misuse of warranties, access to technical information and vehicle data and access to spare parts / diagnostic tools.

5. Protecting competition between authorised repairers of the same brand

In its 2009 Communication, the Commission found that effective competition on the market for repair and maintenance services not only depended on the competitive interaction between independent and authorised repairers but also on the degree of such interaction within the network of authorised repairers. This was all the more true for owners of new vehicles, who tended to have them serviced in authorised garages. In 2010, it was therefore concluded that submitting applicants to quantitative selection (including by obliging them to also sell new cars) was likely to cause the agreement to fall within Article 101(1) of the Treaty.[142] Since most authorised repair agreements could not benefit from block exemption, due to the market shares of the parties, this implied that limits on repairer numbers would need individual self-assessment under Article 101(3) of the Treaty.

[140] About 10% of the informal submissions received by the Commission since 2010 concerned restrictions on restrictions on access to RMI / vehicle data.

[141] See cases AT. 39140 - *DaimlerChrysler*, AT. 39141- *Fiat*, AT. 39142 - *Toyota Motor Europe* and AT. 39143 - *Opel*.

[142] See paragraph 70 SGL.

The majority of respondents to the public consultation believe that the specific policy objective has been partially achieved[143] while a few deem it fully achieved. Conversely, **NCAs are mostly of the view that the objective has been fully achieved,** with only a few considering it partially achieved. The latter NCAs indicated that the quality requirements set by vehicle manufacturers for authorised repairers had become increasingly strict, requiring large investments in personnel, buildings and equipment, which in turn translated into fewer authorised repairers being admitted to the network. Certain respondents to the public consultation also expressed the view that intra-brand competition is decreasing as a result of refusals on the part of suppliers to allow candidate repairers enter the authorised networks and the termination of contracts that provide for both vehicle sales and aftersales functions.

As for **enforcement in this area, between 2010 and 2020,** there were no infringement decisions taken by the Commission in this area. There were nevertheless two informal submissions which turned into formal complaints involving allegations that a vehicle manufacturer had engaged in anticompetitive behaviour as regards the provision of after-sales services by implementing a number of practices to exclude small repairers from its authorised network. However, after assessing the evidence on these cases, the Commission rejected the complaints on the basis of lack of Union interest.[144] At the same time, only around 7% of the infringement decisions adopted by NCAs involved inappropriate selection criteria.

The **fact-finding study** highlighted a general decrease in the number of authorised repairer outlets from 2007 to 2017, as well as a reduction of the total number of contracts signed by vehicle manufacturers with authorised repairers. These findings appear consistent with the position of some NCAs reporting fewer authorised repairers being admitted to the network, although some differences exist at country level both in terms of the number of authorised repairers and of the number of contracts for authorised repairers signed, with a general decreasing trend apart from some brands, which might be partly due to vehicle manufacturers' observed trend towards rationalisation and consolidation of their networks.

The **Commission's monitoring and enforcing experience** tends to show that this **specific policy objective has been partially met.** In particular, the evidence available does not seem to indicate any generalised or widespread practices on the part of suppliers to refuse network entry to candidate repairers that met quality criteria. The Commission has, however, encountered individual instances where it appeared that importers had refused access to a particular firm on the grounds that there was already an authorised

143 See Annexes 3 and 6.

144 See cases: AT.39804 *Volkswagen Group Italia* (*Audi I*) and AT.39836 *Volkswagen Group Italia* (*Audi III*).

repairer in the area in question. This situation was resolved on an informal basis.[145] The Commission has also encountered occurrences where an individual repairer was refused access to a network because of an allegedly poor pre-existing relationship with the supplier. As these situations were not indicating that the supplier in question was operating a quantitative restriction, no action was taken.

In light of the above, it appears that **overall the specific policy objective of protecting competition between authorised repairers of the same brand has been partially achieved.** The evaluation indicates that, among others, certain issues with regard to access to authorised repairers' networks seem to remain problematic.

6. Preventing foreclosure of spare parts suppliers

In its 2009 Communication, the Commission found that there were often large differences in price between parts sold or resold by a vehicle manufacturer and alternative parts. The availability of alternative parts brought considerable benefits to consumers, in terms of both choice and price. The Commission therefore considered it necessary to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continued to be available to both independent and authorised repairers, as well as to parts wholesalers.

Most respondents to the public consultation consider this specific policy objective as partially achieved[146], while a handful of respondents consider it to be fully achieved, and only a few consider it not to be achieved. **NCAs were generally of the view that this objective had been fully achieved or partially achieved,** although one NCA considered that the objective had not been achieved. As regards the NCAs, some indicated that independent repairers still struggled to obtain some categories of spare parts. In particular, some NCAs noted that authorised repairers still did not often use parts of brands competing with those supplied by the car manufacturers. In relation to this, certain respondents noted that authorised repairers remain largely dependent on the OEMs, mainly for commercial reasons (e.g., bonuses / rebates / audits). Some respondents referred to: (i) restrictions on the development of aftermarket spare parts or their remanufacturing due to, for example, restrictions brought about by a lack of access to OEMs' parts coding or the integration of logos in the design; (ii) hampering of Tier 1 suppliers by "tooling arrangements" and the introduction of electronic codes for spare parts; and (iii) spare parts suppliers being increasingly obliged to transfer intellectual property titles and tooling rights to OEMs.

With regard to **enforcement and monitoring**, the third and fifth most common allegations included in informal submissions sent to the Commission between 2010 and

[145] 2.6 % of the informal submissions received concerned inappropriate selection criteria for dealers / repairers and were resolved on an informal basis.

[146] See Annexes 3 and 6.

2020 concerned restrictions on sales to end users and restrictions on access to spare parts / diagnostic tools, respectively. As for NCAs, the second most recurrent restrictions identified in infringement decisions adopted by NCAs concerned restrictions on access to spare parts / diagnostic tools, with 16% of the decisions pertaining this issue. Around 7% of the infringement decisions adopted by NCAs involved restrictions on component or parts suppliers' downstream sales.

The **fact-finding study** mainly provided data regarding spare parts sales trends, market size and profitability. In particular, the study showed that both the market for spare parts supply (sales of part manufacturers) and that for spare parts distribution (sales by parts distributors) registered an increase in terms of sales value in the period 2007-2017. Moreover, the study shows that vehicle parts supply is a profitable business. The average operating margin of the top 10 parts manufacturers increased from 8.7% in 2007 to 11.7% in 2017, with the most profitable companies reaching 18%. Globally, the average operating margin of parts manufacturers remained rather stable at above 7% over the period 2007-2017. Given the limitations of the study, it is not possible to draw meaningful conclusions on other parameters of competition regarding this objective, like, for instance, the possibility for independent repairers to obtain certain spare parts.

The Commission's enforcement and monitoring experience tends to point towards this specific policy objective having been partially met. As to enforcement, the Commission has received three formal complaints concerning distribution of spare parts in recent years, but rejected all of them.[147] These markets seem to be characterised by two rigidities. Firstly, OES' contractual arrangements with motor vehicle manufacturers may, in some circumstances, prevent or hamper the former from supplying the aftermarket directly, in competition with parts sold to the OEMs and then resold as spare parts. In particular, suppliers in the sector seem to use so-called "tooling arrangements"[148] in the sector, and of requirements sometimes placed on OES' to transfer intellectual property rights to their OEM customers. Secondly, agreements between OEMs and authorised repairers may oblige or incite the latter to purchase most of their supplies of parts directly from the OEM. However, to date, the Commission has not found any elements that led it to assess the compatibility of these rigidities with Article 101 of the Treaty. On the other hand, in its experience, alternatives usually exist on the markets for the most common parts used in vehicle maintenance, and independent repairers often use such parts to service customers' vehicles.

Taking all of this into account, it appears that overall, the **specific policy objective of preventing foreclosure of spare parts suppliers has been partially achieved**. The evaluation shows that, inter alia, independent repairers seem to face difficulties in obtaining some spare parts and access to electronic codes. Issues also appear to still arise

147 See Annex 4.

in relation to requirements placed on OES' to transfer intellectual property rights to their OEM customers.

7. Preserving the deterrent effect of Article 101 of the Treaty – preventing suppliers from using indirect pressure and threats to achieve anticompetitive results

In its 2009 Communication, another factor of particular importance identified by the Commission was the need to ensure that the manufacturers did not use the safe harbour granted by regulation in order to hinder independent procompetitive behaviour of authorised dealers and repairers through various forms of indirect pressure and threats which might lead to similar outcomes to those prohibited by means of hardcore provisions.

The evaluation has shown that some **respondents to the public consultation** and a few **NCAs** have encountered in their agreements and enforcement activities, respectively, conduct which could serve as an indirect means of achieving anti-competitive results (i.e., indirect pressure or threats by suppliers on dealers or repairers). [149] In evaluating this objective, attention has been given to the fact that, as in many durable goods industries, distributors are often the weaker party to agreements with suppliers. This is not of itself anticompetitive; nor does it amount to *prima facie* evidence of anti-competitive behaviour, but this imbalance should nonetheless be kept in mind when assessing allegations of such behaviour.

In any event, despite the options open to dealers and repairers to have their identities protected, in the period 2010 to 2020 the Commission did not received any formal complaints that would allow it to find that suppliers had hindered pro-competitive behaviour by exerting means of indirect pressure or threats on dealers or repairers . It cannot be excluded that some of the disputes may have been resolved through negotiation or arbitration.[150] **The Commission's monitoring and enforcement experience therefore tends to show that this specific policy objective has been largely met.**

Contributions from a few **NCAs** as well as **respondents** to the public consultation bear out the above observations as regards the relative weakness of dealers' contractual

[149] NCAs have indicated the following practices: (i) setting qualitative standards may raise / unify costs, thereby increasing dealers' economic dependence on a particular supplier; (ii) inciting authorised distributors to merge may increase market concentration at dealer level; (iii) imposing commercial / pricing policies on dealers may indicate an imbalance in rights and obligations between the parties; (iv) setting arbitrary limits on the number of dealers may exclude some from the distribution networks; and (v) fixing remuneration systems / sales campaigns may have steering effects on dealers' conduct and unifying price effects. In the same vein, some respondents, mainly dealers / repairers, point to the following practices: (i) an increase in direct (including online) sales by vehicle manufacturers; (ii) decreasing basic discounts or increasing promotional campaigns may allegedly amount to indirect resale price maintenance; (iii) fees paid to dealers for delivering and preparing a car that has been purchased directly from the vehicle manufacturer are allegedly too small to make the dealers' business profitable.

[150] This seems supported by the replies to the public consultation: it appears that although respondents came across certain restrictions in their agreements with third parties, the large majority of the respondents which found such clauses in their agreements and contested them, did not end up in court. See Annex 3.

position,[151] but do not seem to indicate that pressure or threats have been used *indirectly* to exploit this weakness for anticompetitive gain.

One reason for the lack of indications in this area could be an increased awareness of the rules applicable to vertical agreements in the motor vehicle sector, which may have steered market players towards compliance. In this regard, the evaluation revealed that, as suggested in the 2010 Evaluation Report,[152] some stakeholders are putting in place codes of conduct / practice that apply to contractual relations between the respondents and their contractual partners in the motor vehicle sector.[153]

In light of the above, it appears that **overall the specific policy objective of preventing suppliers from using indirect pressure and threats to achieve anticompetitive results has been partially or fully achieved.**

The evidence gathered in the evaluation suggests that **generally the fourth specific objective of the MVBER regime – i.e., protecting competition in number of dimensions in the motor vehicle sector - has been partially or fully achieved**. Nevertheless, **potential competition concerns seem to remain**, in particular with regard to three of the specific policy objectives, namely: (i) enabling independent repairers to compete effectively with authorised repairers, with respondents to the public consultation pointing at issues on access to technical information and vehicle data, misuse of warranties and access to spare parts / diagnostic tools; (ii) protecting competition between authorised repairers of the same brand, where certain issues with regard to access to authorised repairers' networks seem to remain; and (iii) preventing foreclosure of spare part producers in the aftermarket, where there are some indications of independent repairers facing difficulties to obtain certain spare parts and access to electronic codes, and where some issues also appear to arise in relation to requirements placed on OES' to transfer intellectual property rights to their OEM customers.

6.2 Efficiency

4. Are the incurred compliance and enforcement costs involved in the assessment of the application of the MVBER regime to vertical agreements in the motor vehicle sector reasonable and proportionate to the benefits that the rules bring?

What is the issue?

[151] See footnote 150.

[152] See subsection G of section 3 of Commission Evaluation Report on the operation of Regulation (EC) 1400/2002 concerning motor vehicle distribution.

[153] See, for example, ACEA's "Code of good practice regarding certain aspects of vertical agreements in the motor vehicle sector", available here.

When considering this criterion, the evaluation looked into whether the MVBER regime was efficient in achieving its objectives, taking into account the costs and benefits associated with applying it. In accordance with the current framework, businesses have to self-assess their vertical agreements in the motor vehicle sector to ensure compliance with Article 101 of the Treaty, which necessarily entails costs for businesses. The MVBER regime aims to facilitate this self-assessment. In this context, it is important to note that the MVBER regime does not impose any additional compliance obligations on businesses beyond those reflected in Article 101 of the Treaty. Nevertheless, in order to verify whether their agreements can benefit from the safe harbour provided by the MVBER regime, businesses need to check them against the conditions set out in the MVBER regime, which may entail costs.

In assessing whether the MVBER regime has been efficient in achieving its objectives, several elements were considered: (i) the types and amount of costs incurred by businesses when assessing whether their vertical agreements in the motor vehicle sector can benefit from the exemption; (ii) whether such costs are proportionate to the benefits the MVBER regime brings; and (iii) whether, absent the MVBER Regime, the costs of ensuring that vertical agreements in the motor vehicle sector comply with Article 101 of the Treaty would increase.

What are the findings?

A large majority of **respondents to the public consultation and NCAs[154] considered that, without the MVBER regime,[155] costs** stemming from the assessment of the compliance of vertical agreements in the motor vehicle sector with Article 101 of the Treaty **would have been higher** and that the current level of costs seemed proportionate to the benefits brought by the MVBER Regime.

As to the type of costs incurred by businesses when assessing whether their vertical agreements in the motor vehicle sector can benefit from the exemption, most respondents to the public consultation referred to costs for external counsel and internal administrative costs, followed by costs for internal lawyers. Although respondents were asked to provide estimates on the yearly amount of such costs, only a few provided actual figures. The latter range from EUR 10,000 to EUR 140,000 per year and do not allow to draw general conclusions on the real level of costs.

The NCAs also generally assessed the costs to be reasonable and proportionate to the benefits obtained but reported not being able to provide exact figures. This being said, some NCAs were of the view that the reduction of costs may be small, as assessing the complexities of vertical agreements in the motor vehicle sector still requires intense

154 See Annexes 3 and 6.

155 If the current MVBER were to lapse, the VBER would apply by default.

resources due to *inter alia* the intricate legal framework that made up the motor vehicle rules, the limited case law, and the complex and technical nature of the specific cases in the motor vehicle sector.

The evidence gathered in the evaluation suggests that the MVBER regime has been efficient as, absent the latter, the costs resulting from assessing compliance of vertical agreements in the motor vehicle sector with Article 101 of the Treaty would have been higher. **Costs are generally seen as proportionate** to the benefits brought by the MVBER regime, notably the safe harbour and the resulting increase in legal certainty. Nevertheless, the data collected is not sufficient to allow to quantify such costs and to conclude clearly on whether the compliance costs have decreased.

6.3 Relevance

5. Do the objectives of the MVBER regime reflect current needs and are they appropriate to meet those needs?

What is the issue?

The assessment of the relevance of the MVBER regime focuses on whether its objectives have proven to be appropriate and whether they still correspond to current needs, taking into account market developments since its adoption. As mentioned above, the MVBER regime pursues a **general objective** through **four specific objectives**.[156] In order to assess the relevance of these objectives, the following elements were examined (i) how the evolution of the motor vehicle sector over the last decade might have impacted the needs and objectives of the intervention; (ii) whether, in view of new market developments, respondents still saw the objectives of the MVBER regime as relevant; (iii) whether additional objectives should be pursued in respect of vertical agreements in the motor vehicle sector; and (iv) whether the material scope of the MVBER was still appropriate, i.e., whether it should continue to cover only self-propelled vehicles intended for use on public roads and having three or more road wheels, or whether it could be extended to cover other vehicles.

What are the findings?

Overall, **respondents to the public consultation and NCAs**[157] indicate that the general and specific objectives of the MVBER regime continue to be relevant today. This general view is **aligned with the Commission's monitoring and enforcement experience**, which is that the general objective of the MVBER regime - preserving the deterrent effect of Article 101 of the Treaty by facilitating the enforcement work of the Commission,

[156] See Section 2.3.

[157] See Section 5.1.1 questions 2 and 3 and Section 5.1.5 respectively.

NCAs and national courts and to help businesses conduct the self-assessment of their vertical agreements – as well as its three of the four specific objectives - providing legal certainty to stakeholders in the sector; reducing the risk of false positives and false negatives; and providing a common framework for the application of Article 101 of the Treaty – remain relevant today, both for this sector, and others in which vertical agreements are used.[158]

On balance, therefore, it appears that **both the general objective and the three specific ones remain relevant today.** As regard the current relevance of the **fourth specific objective** (and its sub-specific policy objectives), the views of the NCAs and respondents to the public consultation, as well as the findings of the study, and the Commission's monitoring and enforcement experience are presented below:

1. *Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market*

NCAs and respondents to the public consultation on the whole indicated that this specific policy objective was still relevant, without further qualification or distinction between the different markets.

The protection of inter-brand competition is highly relevant, and indeed is one of the core ambitions of competition policy. However, given the level of intensity of inter-brand competition in the passenger car markets revealed by the fact-finding study, it follows that the protection of market access for competing car manufacturers may not still have the same relevance as regards these markets. However, the same may not be said for the light commercial vehicles, truck and bus sectors, where the fact-finding study found that inter-brand competition appears to be weaker.

On balance, therefore, it appears that **this specific policy objective seems to still be relevant for light commercial vehicles, truck and bus sectors but that it may not be as relevant for passenger cars**.

2. *Protecting competition between dealers of the same brand*

On the whole, NCAs as well as respondents to the public consultation indicated that this specific policy objective was still relevant.

Fostering intra-brand competition is particularly important where inter-brand competition is only moderate or weak. The fact-finding study showed that intra-brand competition did not decrease significantly between 2007 and 2017, at least as far as passenger cars were concerned.

[158] Commission Staff Working Document Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 173 final, Section 5.2.3.

In line with the above, the Commission's monitoring and enforcement experience in this regard is that this specific policy objective remains relevant for the light commercial vehicle, truck and bus sectors. As regards passenger cars, the existence of dealer groups that may hold a portfolio of brands in a particular local area, thereby potentially reducing inter-brand competition in that area,[159] may be an indication that the protection of intra-brand competition may also remain a relevant objective for passenger car distribution.

On balance, therefore, it appears that **protecting this specific policy objective seems to still be relevant.**

3. Preventing restrictions on parallel trade in motor vehicles

NCAs and respondents to the public consultation were, on the whole, of the view that this specific policy objective was still relevant.

The Commission's monitoring and enforcement experience also points in the direction that this specific policy objective is still relevant. For example, the Commission has recently reaffirmed that the protection and promotion of the Single Market remains a core policy objective. For individual consumers to benefit from the Single Market, it is essential that they are able to purchase products and services across borders without encountering artificial barriers. Next to a home, the motor vehicle is the most expensive investment that the average consumer will make, and if cross-border purchases are hampered, the risk of consumer harm is therefore high.

On balance, therefore, it appears that **this specific policy objective continues to be relevant**.

4. Enabling independent repairers to compete with the manufacturers' networks of authorised repairers

On the whole, the opinion of NCAs and respondents to the public consultation was that this specific policy objective was still relevant, with many contributors indicating the need to ensure that new technologies, such as those related to vehicle-generated data, are taken into account.[160]

The Commission's monitoring and enforcement experience is that independent repairers exert vital competitive pressure on the authorised networks. They are also of particular importance for owners of older vehicles, helping to keep these products in a safe and environmentally-friendly condition. Their presence on the markets may be becoming all the more important as the investment requirements placed on authorised repairers are

[159] As a result of the observed consolidation trend between dealer groups. See Sections 5.1.1.3, 5.1.2.2 and Annex 2.

[160] See Annex 3.

increased, thereby harmonising more of their cost base.[161] Independent repairers' ability to compete is dependent on their access to key inputs such as spare parts, technical information, tools, training, and – increasingly – data. Where such inputs can only be obtained from car manufacturers or their nominated partners, it is especially important to ensure that these are not unjustifiably withheld, or that access to them is not restricted.

On balance, therefore, it appears that **this specific policy objective continues to be relevant**.

5. Protecting competition between repairers of the same brand

NCAs and respondents to the public consultation on the whole indicated that this specific policy objective was still relevant.

The fact-finding study highlighted a general decrease in the number of authorised repairer outlets from 2007 to 2017, as well as a reduction of the total number of contracts signed by vehicle manufacturers with authorised repairers. According to the study, the observed gradual expansion of new alternative fuel vehicles – in particular hybrid and electric – in all countries in scope, was likely to lead authorised repairers to incur additional investments (training, tooling, diagnostic, charging equipment) to meet the specific maintenance and repair requirements of such vehicles.

In the Commission's monitoring and enforcement experience, partly because they are the only outlets able to honour the vehicle manufacturers' warranties, and partly because of consumer perception, authorised repairers have an important role to play on the aftermarkets, especially for the owners of newer vehicles. They are also frequently the only local source for vehicle-manufacturer branded spare parts used in the independent sector. The qualitative requirements placed on authorised repair shops appear to have increased, partly due to the increase in technology in modern cars, and the correspondingly high investments needed to be able to maintain and repair them.[162] This in turn may have harmonised more of authorised repairers' costs than was the case in the past.

On balance, therefore, it appears that this **specific policy objective continues to be relevant**.

6. Preventing foreclosure of spare parts suppliers

NCAs and respondents to the public consultation on the whole indicated that this specific policy objective was still relevant, with some respondents indicating that independent repairers still seem to face issues to in relation to spare parts.

[161] See Annex 3.

[162] See Annex 3.

In the Commission's monitoring and enforcement experience, competition from spare parts suppliers (both OES[163] and IAM / "matching quality"[164]) continues to be vitally important for repairers wishing to offer a high-quality service at a reasonable cost to end consumers. Spare parts make up a major fraction of the cost of vehicle repair and maintenance and when alternative brands of parts are available, competition drives prices down. Two kinds of rigidities seem to persist on the spare parts markets. Firstly, authorised repairers continue to source a large percentage of their parts requirements from the OEM,[165] instead of directly from the manufacturer of those parts, or from matching quality suppliers. Secondly, "tooling arrangements" and other restrictions often prevent OES from directly supplying the aftermarkets. The Commission's experience therefore supports the line broadly advanced by NCAs and respondents to the public consultation.

On balance, therefore, it appears that **this specific policy objective continues to be relevant**.

7. Preserving the deterrent effect of Article 101 of the Treaty by preventing suppliers from using indirect pressure and threats to achieve anticompetitive results

In its 2009 Communication, the Commission indicated the need to preserve the deterrent effect of Article 101 of the Treaty by preventing suppliers from using indirect pressure and threats to achieve anticompetitive results. This objective, described as "flanking", therefore related in the main to the maintenance of intra-brand competition.

On the whole, the views of NCAs and contributors to the public consultation were that this objective was still relevant as some of them have identified a number of conducts which, in their view, could serve as an indirect means of achieving anti-competitive results.[166]

Based on the Commission's monitoring and enforcement experience there seem to be few positive indications showing that suppliers achieve anti-competitive results by exerting pressure on their dealers / repairers and issuing threats. Rather, its experience tends to point in the direction that the ability of suppliers to influence their dealers' / repairers' behaviour in particular lies in the fact that they make large investments in the brand, and are therefore unwilling to jeopardise those investments by going against what

163 OES are the manufacturers of the parts used for the initial assembly of the new vehicle.

164 Independent Aftermarket Suppliers of matching quality parts supply products that match the quality of the parts used for the initial assembly of the new vehicle, and/or of the spare parts supplied by the vehicle manufacturer.

165 The fact-finding study shows that vehicle manufacturers adopt a wide range of rebates, incentives and bonus schemes on both vehicles and parts, which may lead authorised repairers to source certain parts directly from vehicle manufacturers.

166 See Annexes 3 and 6.

they perceive as their supplier's interests.[167] Therefore, this objective does not appear to be of particular relevance, particularly on the markets for passenger cars, where, as the study confirms,[168] there is healthy inter-brand competition. Given the contrast between the expressed views of respondents and Commission' experience, **further analysis as to whether this remains a relevant flanking objective appears to be needed.**

The stakeholders were also asked in the public consultation whether the MVBER regime could contribute to the pursuit of **other objectives which were not considered at the time of the adoption of the current framework**. A number of respondents to the public consultation opined that the application of the MVBER regime should facilitate or contribute to the pursuit of sustainability objectives, in the context of the Green Deal.[169] It was suggested, for example, that ensuring full reparability of cars and recycling / remanufacturing of spare parts would be helpful in this regard.[170] Another potential objective identified by some respondents referred to the need to ensure access to in-vehicle data necessary for repair and guaranteeing security of connected cars.[171]

As to sustainability, the most effective way for the competition rules to contribute to sustainability objectives is to ensure effective competition, stimulate innovation and thereby encourage the offer of sustainable products and services. The current MVBER regime already allows for the exemption of all agreements, including those that target sustainability objectives, so long as the market shares of the parties do not exceed the 30% threshold[172] and the agreement does not contain hardcore restrictions.[173] Where the market shares exceed the 30% threshold such agreements will remain subject to individual assessment pursuant to Article 101(3) of the Treaty.

As regards to access to in-vehicle data, where such data, or indications that result from it, are supplied to authorised repairers, that data should be also supplied on an equal basis to independent operators that compete with those repairers. However, the evaluation shows that access to data, like access to other essential inputs, should be seen as a subset of the specific objective of enabling independent repairers to compete with the manufacturers' networks of authorised repairers, rather than as a separate objective.

As for the current **scope** of the MVBER regime, **NCAs** are of the view that this is appropriate. Conversely, a **majority of respondents**[174] to the public consultation argued

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167 See Annex 3.

168 See Section 5.3.1, Question 4.

169 Communication from the Commission to the European Parliament, the European council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal. COM/2019/640.

170 See Annexes 3 and 6.

171 See Annexes 3 and 6.

172 See Article 3 VBER.

173 See Article 4 VBER and Article 5 MVBER.

174 Primarily associations representing parts dealers, parts manufacturers, vehicle dealers or vehicle importers, but also companies (mainly parts dealers, but also other types of market operators such as repairers).

that the scope of the MVBER regime should be widened to also cover two-wheel vehicles (mainly motorcycles, but some also mentioned electric bikes or electric scooters) and some vehicles not meant for roads (such as agricultural machinery, tractors and forestry vehicles or construction vehicles). According to certain of these respondents, OEMs place significant pressure on authorised repairers to use only specific spare parts to the detriment of alternative spare parts suppliers with regard to these types of vehicle. The increasing importance of electric bikes and scooters as new forms of mobility was also underlined.

In 2010, the Commission decided that, although the general regime for vertical agreements was appropriate for motor vehicle distribution agreements, a narrower exemption was necessary for vertical agreements relating to the provision of repair and maintenance services and distribution of spare parts for "self-propelled vehicles intended for use on public roads and having three or more road wheels".[175] This was done following a full analysis of the sector in question which showed considerable rigidities on the spare parts markets.[176] At this stage, there are no concrete indications that similar rigidities exist in respect of two-wheeled or off-road vehicles (e.g., agricultural machinery, tractors and forestry vehicles, construction vehicles).

On balance therefore, it appears that the **current scope of MVBER is still appropriate**.

The evidence gathered in the evaluation suggests that the **first three specific** objectives of the MVBER regime – legal certainty, avoiding false positives and false negatives as well as creating a common framework of assessment - are **still relevant today**. As to the seven elements of competition under the fourth specific objective, the evaluation shows that overall they are still relevant. Nevertheless, the evaluation points at **potential adjustments of certain aspects of the fourth specific objective**, namely the specific policy objectives of: (i) preventing foreclosure of competing vehicle manufacturers; (ii) safeguarding their access to the market and protecting competition between dealers of the same brand; (iii) preserving the deterrent effect of Article 101 of the Treaty by preventing suppliers from using indirect pressure and threats to achieve anticompetitive results. Finally, as to the material scope, the evidence gathered in the evaluation suggests that the **current scope of MVBER is still appropriate**.

6.4 Coherence

Is the MVBER regime coherent within itself and with other Commission instruments that lay down rules or provide guidance on the application / interpretation of Article 101 of the Treaty as well as with other current or upcoming Commission instruments in the area of competition policy and enforcement, and EU legislation?

[175] Article 1(g) and 4 MVBER.

[176] See para 64 et seq of Commission staff working document, 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".

What is the issue?

When assessing the coherence of the MVBER regime, the different instruments that make it up must be considered. In addition, both other Commission rules and guidance on the application of Article 101 of the Treaty and other EU legislation with relevance for vertical agreements in the motor vehicles sector also require consideration.

As regards other Commission rules and guidance on the application of Article 101 of the Treaty, there are a number of guidelines, notices and other block exemptions, many of which touch upon concepts and issues also dealt with in the MVBER regime. For example, the Article 81(3) Guidelines[177] provide additional guidance on the application of the four conditions of Article 101(3) of the Treaty and therefore apply for the purposes of carrying out individual assessments of vertical agreements covered by the MVBER regime. Similarly, the Notice on the definition of the relevant market[178] and the Horizontal Block Exemption Regulations[179] and related Guidelines[180] are also relevant. In addition, it is necessary to assess whether other EU legislation with relevance for vertical agreements in the motor vehicle sector is coherent with the MVBER regime. In this regard, it is important to consider the Type Approval Regulation[181] to the extent that it interacts with the MVBER regime as well as any potential upcoming legislation on access to in-vehicle data.

What are the findings?

The **majority of respondents to the public consultation** did not provide examples of specific inconsistencies or contradictions within the different instruments that compose the MVBER regime or between them. Similarly, most of the respondents did not refer to concrete inconsistencies or contradictions between the MVBER regime and other Commission instruments that lay down rules or provide guidance on the application / interpretation of Article 101 of the Treaty, or between the MVBER regime and existing or upcoming Commission instruments in the area of competition policy and enforcement.

177 Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004.

178 Commission notice on the definition of the relevant market for the purposes of Community competition law ("Market Definition Notice"), OJ C 372, 9.12.1997. The Market Definition Notice is currently subject to a separate review launched in April 2020.

179 Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36, and Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18.12.2010.

180 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 11, 14.1.2011.

181 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, OJ L 151, 14.6.2018.

Similar views were expressed with regard to inconsistencies between the MVBER regime and other existing or upcoming EU rules, with a majority of respondents not identifying any.[182]

In line with the general view of respondents, the majority of NCAs considered the instruments of the MVBER regime to be coherent both in themselves and with other instruments that provide guidance on the interpretation of Article 101 of the Treaty.

This being said, some NCAs pointed to three perceived inconsistencies concerning: (i) the market share thresholds set out in paragraphs 56 and 12 of the SGL for the exemption of agreements for the distribution of new vehicles; (ii) the overall notion of bilateral and unilateral behaviour in the context of access to technical information; and (iii) the definition of the relevant market in the motor vehicle sector.

Finally, both respondents and NCAs emphasised the importance of coherence between the MVBER regime and any potential future EU rules on access to in-vehicle data, so as to ensure competitive access to data for all actors involved. It was argued that the recitals of a possible future MVBER regime should contain a reference to upcoming regulations on access to in-vehicle data and that the MVBER regime should be consistent with the aims of the Commission in relation to the data economy, the data strategy and the EU Data Governance Act.[183]

Based on the evidence gathered, it appears that generally **the different instruments of the MVBER regime[184] are coherent within and between themselves**. The evidence also indicates that the MVBER regime is coherent overall both with other Commission rules and guidance on the application of Article 101 of the Treaty, as well as with other EU legislation with relevance for vertical supply and distribution agreements. Nevertheless, both respondents and NCAs identify a few areas where they perceive a lack of consistency. Moreover, both respondents and NCAs call on the Commission to ensure consistency with any potential upcoming legislative initiative particularly in the area of access to in-vehicle data.

6.5 EU added value

As an intervention at EU level, has the MVBER regime provided EU added value in terms of companies' self-assessment of compliance with Article 101 of the Treaty?

What is the issue?

[182] See Annexes 3 and 6.

[183] Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act). COM/2020/767 final. OJ L 325, 16.12.2019.

[184] The MVBER regime includes the VBER, MVBER, VGL, and SGL.

When assessing whether, as an intervention at EU level, the MVBER regime provides added value, it must be considered that competition law is an area where the EU has exclusive competence. This means that the EU alone is allowed to legislate and adopt binding acts in this area, whereas the Member States are only allowed to legislate if empowered by the EU to implement these acts. Moreover, the Empowerment Regulation of 1965 grants only the Commission, and not the Member States, the power to adopt block exemption regulations for certain categories of vertical agreements. Therefore, in the absence of the MVBER regime, which is the relevant point of comparison for the assessment, stakeholders would be deprived of the safe harbour that only an EU intervention can provide. Hence, they would have to rely on other instruments for the purpose of self-assessing the compliance of their vertical agreements with Article 101 of the Treaty, instead of being able to rely on this set of rules.

What are the findings?

Evidence suggests that a large majority of both **respondents to the public consultation and NCAs**[185] **believe that the MVBER regime provides added value**. Overall, respondents and NCAs consider that: (i) the MVBER regime has made it easier for NCAs and national courts to apply the rules consistently; and (ii) national guidance, enforcement practice of NCAs and relevant national case-law could not have been equally or more effective than the MVBER regime.

Only a minority of respondents believed that the MVBER regime had not made it easier for NCAs and national courts to apply the rules consistently. According to some of these respondents, for some topics, the absence of cases at EU level has made it difficult for market players and Member States to apply the rules coherently. A few respondents also maintain that in certain Member States, NCAs did not seem to apply the MVBER regime and that national courts do not take proper notice of the MVBER and especially not of the SGL. A few also mentioned diverging rulings of the European Court of Justice and decisions of NCAs.[186] Finally, NCAs report only limited experience in the application of the MVBER regime, and highlight that in certain Member States, courts have applied national rules on abuse of dominance instead of the MVBER rules to particular practices (e.g., refusal to access technical information).

Based on the evidence gathered, it appears that the MVBER regime **provides added value**. In particular, the MVBER regime appears to have made it easier for NCAs and national courts to apply the rules consistently increasing legal certainty and guidance as compared to existing, more general and nationally fragmented guidance on the

185 See Annex 3 and 6.

186 An example given was the recent decision by the German Federal Cartel Office regarding provisions within selective distribution agreements that prohibited distributors from selling products via third-party platforms (German Competition Authority, Intersport, Press release, 25 June 2020).

application of Article 101 of the Treaty to the motor vehicle sector. Views of stakeholders suggest that national guidance, enforcement practice of NCAs and relevant national case-law could not have been equally or more effective than the MVBER regime.

7 CONCLUSIONS

Based on the assessment developed in the previous sections, this section presents the conclusions on the evaluation of the MVBER regime.

The substantive scope of the evaluation comprises four sets of rules: (i) the MVBER itself; (ii) the VBER, in so far as it applies to vertical agreements concerning motor vehicles; (iii) the VGL, which provide guidance on the application of the VBER; and (iv) the SGL, which provide guidance on the application of the MVBER and supplement the VGL with regard to the application of the VBER to the motor vehicle sector.

The geographic scope of the evaluation extends to all EU Member States. NCAs and national courts are bound by the directly applicable provisions of the MVBER and VBER. Thus, the evaluation of the MVBER regime includes not only the decisional practice of the Commission, but also that of the NCAs.

The evaluation is based on evidence gathered from various sources. These include a public consultation, two targeted consultations of NCAs, and an external fact-finding study, as well as the Commission's experience gained through enforcement and monitoring activities in the motor vehicle sector over the last decade. The evidence-gathering during the evaluation was subject to certain limitations. First, the scope of the fact-finding study was significantly reduced as a result of the COVID-19 outbreak and the subsequent lockdown measures. Second, in the public consultation, due to its voluntary nature, some stakeholder groups accounted for a higher share of responses than others and limited information on consumer views was received. Finally, the enforcement experience of both NCAs and the Commission as regards the MVBER regime has been modest: even though complaints have been submitted and pursued, few infringements were detected. The above limitations did not however prevent drawing conclusions from the evaluation exercise.

Overall, **the evidence suggests that the MVBER regime is useful and remains relevant for stakeholders**. Nonetheless, the evaluation has identified a number of issues, which may limit the effectiveness, relevance and coherence of the intervention. These are summarised below.

Effectiveness: The evidence gathered in the evaluation suggests that:

- The intensity of competition **seems to have increased in the distribution of new passenger cars**, but remained moderate for the distribution of light commercial

vehicles, buses and trucks. The evidence collected for **repair and maintenance services and spare parts distribution shows a mixed picture**. On balance, the evidence does not reveal changes that would have significantly affected the MVBER regime's effectiveness.

- The MVBER regime is overall considered to have **generally met the first specific objective of increasing legal certainty** for companies and NCAs. It also appears to have made it easier for NCAs and national courts to apply the rules consistently and, therefore, to have **met the third specific objective of facilitating the enforcement work of the relevant authorities and the stakeholders' self-assessment** of their vertical agreements by providing a common framework for the application of Article 101 of the Treaty. Nevertheless, the evaluation identified certain provisions that: (i) may benefit from further clarifications; (ii) may be difficult to apply or; (iii) may require adjustments due to recent market developments.

- The MVBER regime has **generally met the second specific objective of avoiding false positives and false negatives**. This means that the MVBER regime: (i) generally does not exempt agreements for which it cannot be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty; and that (ii) does not fail to exempt agreements that could be exempted. This being said, with regard to specific points, some respondents to the public consultation and a few NCAs mentioned practices that they believe could be also considered as hardcore restrictions.

- Generally the **fourth specific objective** of the MVBER regime has been fully or partially achieved. Nevertheless, potential competition concerns seem to remain, in particular with regards to three aspects**:** (i) enabling independent repairers to compete effectively with authorised repairers; (ii) preventing foreclosure of spare part producers in the aftermarket; and (iii) protecting competition between authorised repairers of the same brand.

- Against this background, considering that the **four specific objectives** have been generally achieved, it follows that the **general objective** of the MVBER regime (i.e., to preserve the deterrent effect of Article 101 of the Treaty by facilitating the enforcement work of the Commission, NCAs and national courts and to help businesses conduct the self-assessment of their vertical agreements) **has also been generally achieved**. This conclusion is also supported by the general market developments and in particular the evolution of the intensity of competition in the motor vehicle sector, especially in the passenger car segment.

Efficiency: The evidence suggests that **the MVBER regime has been efficient**, as in its absence, the costs resulting from assessing compliance of vertical agreements in the motor vehicle sector with Article 101 of the Treaty would have been higher. Costs are generally seen as proportionate to the benefits brought by the MVBER regime.

Nevertheless, the data collected is not sufficient to allow to quantify such costs and to conclude clearly on whether the compliance costs have decreased.

Relevance: The evidence suggests that the **specific objectives** of the MVBER regime are **still relevant today**. Nevertheless, the evaluation suggests that adjustments might be necessary on certain aspects of the fourth specific objective, namely: (i) preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market; (ii) protecting competition between dealers of the same brand; and (iii) preserving the deterrent effect of Article 101 of the Treaty by preventing suppliers from using indirect pressure and threats to achieve anticompetitive results. Finally, as to the **material scope**, the evidence suggests the current scope is still appropriate.

Coherence: The evidence suggests that **the different instruments of the MVBER regime are coherent** both within and between themselves. The evidence also indicates that the MVBER regime is overall **coherent both with other Commission rules and guidance** on the application of Article 101 of the Treaty, **as well as with other EU legislation** with relevance for vertical agreements. Nevertheless, both respondents and NCAs identify a few areas where they perceive a lack of consistency.

EU added value: The evidence suggests that **the MVBER regime provides added value.** In particular, the MVBER regime appears to have made it easier for NCAs and national courts to apply the rules consistently. Therefore, the objective of facilitating the enforcement work of the relevant authorities and the stakeholders' self-assessment of their vertical agreements by providing them with legal certainty has been met.

Annex 1: Procedural information

1.1 Lead DG, Decide Planning/CWP references

The Directorate-General for Competition of the European Commission ("DG Competition") is the lead DG for the review of the regime applicable to vertical agreements in the motor vehicle sector, which consists of the general block exemption rules, set out in Regulation (EU) 330/2010 ("Vertical Block Exemption Regulation" or "VBER") and the Guidelines on Vertical Restraints ("VGL"), sector-specific block exemption provisions, provided for in Regulation (EU) 461/2010 (the "Motor Vehicle Block Exemption Regulation" or "MVBER)"), and the Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles ("VGL"). These rules are referred in this SWD as the "MVBER regime".

The review was registered in the Decide Planning system with the reference PLAN/2018/4817.[187]

1.2 Organisation and timing

The evaluation of the MVBER regime was launched on 3 December 2018, in order to ensure sufficient time to carry out the procedural steps required by the Commission's Better Regulation Guidelines. The evaluation roadmap, which set out the background of the evaluation as well as its purpose and scope, was published on 19 February 2019. The evaluation roadmap also presented the consultation activities that the Commission would conduct during the evaluation (notably a public consultation, an external fact-finding study and a consultation of the NCAs) and explained the data collection methodology that would be followed to gather relevant information for the purpose of the evaluation.
The evaluation was carried out in close cooperation with other interested Commission services. The inter-service steering group ("ISSGL") set up for that purpose comprises representatives of the Directorates General CNECT, CLIMA, ECFIN, GROW, JRC, ENV, and MOVE, as well as the Secretariat-General and the Legal Service, which are associated by default to any such initiative. The ISSGL was consulted on the evaluation roadmap, the consultation strategy and the online evaluation questionnaire aimed at collecting the views of the respondents in the context of the public consultation. The ISSGL also reviewed the summary of the results of the public consultation and the stakeholder workshop. The ISSGL was likewise consulted on the tender specifications and the milestones for the fact-finding study. The evaluation of the MVBER regime was also carried out in close cooperation with the NCAs, which were consulted on their enforcement experience and the performance of the regime.

[187] See Better Regulation Portal at https://intragate.ec.europa.eu/decide/sep/index-compressed.html?Bali_3.16.6-2021-02-22%2016:48:17#/overview-screen/view=recent-files&display=table&dossier-details-uuid=DORSALE-DOSSIER-2018-30251.

The different **milestones of the evaluation phase** are reflected in the table below:

Timing	Step
3 December 2018	Launch of the evaluation in the Commission's Decide Planning
15 January 2019	1st ISSGL Meeting with the following agenda items: - Evaluation roadmap - Consultation strategy - Tender specifications
19 February 2019	Publication of the evaluation roadmap (4-weeks comments period)
26 November 2019	Signature of the contract for the external study
8 June 2020	First questionnaire to NCAs (7-weeks consultation period)
11 September 2020	2nd ISSGL Meeting (video-conference) with the following agenda items: - Questionnaire for public consultation - Intervention logic - Evaluation matrix
9 October 2020	Submission of the final report of the external study
12 Octobre 2020	Second questionnaire to NCAs (5-weeks consultation period)
12 Octobre 2020	Publication of the online evaluation questionnaire (15-weeks consultation period)
26 February 2021	3rd ISSGL Meeting (video-conference) with the following agenda items: - Presentation of summary of NCA replies - Presentation of summary of external study - Presentation of summary of public consultation
16 March 2021	Publication of the summary report of the public consultation on the Better Regulation Portal.
17 March 2021	Publication of the summary report of NCA consultations and public consultation on DG Competition's website.
16 April 2021	4th ISSGL Meeting (video-conference) with the following agenda items: - Consultation on the draft Evaluation Report and draft SWD
31 May 2021	Publication of Evaluation Report and SWD

1.3 External Evaluation Support Study

As explained in Section 4.1.3 of the SWD, the evaluation was supported by an external fact-finding study. The purpose of the study was to provide a detailed analysis of market developments with respect to three main economic activities in the motor vehicle sector – distribution of new motor vehicles, provision of repair and maintenance services and distribution of spare parts on the basis of 23 qualitative and 88 quantitative indicators.

Following an open tender process[188] concluded without any tenders being received, it was decided to have recourse to a negotiated procedure without prior publication of a contract notice, as laid down in Art. 164 para. (5) indent (f) of the Financial Regulation. Two consultancies that downloaded the procurement documents from the eTendering platform as registered users were contacted. The Commission also contacted a consultancy that has been active in the context of previous reviews of the exemption regime applicable to the motor vehicle sector.

Following the negotiated procedure, a contract was signed with Ernst & Young Special Business Services (EY) on 26 November 2019.[189] According to Article I.3.3 of the contract, the duration of the contract could not exceed 9 months, meaning that the final report was due by 25 August 2020.

In mid-March 2020, EY launched a survey, with a view to collecting primary data from market participants. The launch of the survey coincided with the escalation of the COVID-19 pandemic, with all countries covered by the survey introducing lockdown measures to contain its spread and with stakeholders requesting extensions of the deadline to reply to the contractor's survey. Due to these special circumstances, EY was granted four deadline extensions and the study was finally submitted on 9 October 2020. The ISSGL was consulted on all the interim documents related to the fact-finding study.

[188] See OJ 2019/S 040-089199, OJ 2019/S 059-135550 and OJ 2019/S 089-212315.

[189] Award notice OJ 2019/S 240-587964.

Annex 2: Key findings of fact-finding study

1 INTRODUCTION

The European Commission ("the Commission") is currently evaluating the functioning of the motor vehicle block exemption rules,[1] comprising the Motor Vehicle Block Exemption Regulation (EU) No 461/2010 ("MVBER"), the application of the General Block Exemption Regulation (EU) No 330/2010 to the motor vehicle sector ("VBER"), along with the Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles ("SG") and the Guidelines on vertical restraints ("VGL").

In this context, the Commission commissioned a study on market developments in the distribution of new motor vehicles and spare parts and the provision of after-sales services under Commission Regulation (EU) 461/2010 ("the study"). The contract was awarded to Ernst & Young Special Business Services ("E&Y") by virtue of contract signed on 26 November 2019.[2] The final Report was delivered on 9 November 2020.

1 BACKGROUND INFORMATION

The purpose of the study is to present an analysis of market developments with respect to three main economic activities in the motor vehicle sector – the distribution of new motor vehicles, the provision of repair and maintenance services and the distribution of spare parts, on the basis of 111 indicators (23 qualitative and 88 quantitative).

A large proportion of these indicators required the collection of raw primary data directly from undertakings active in the motor vehicle sector. E&Y proposed to use surveys to collect such data, which would cover 89 indicators out of 111. The remaining 22 indicators were populated with data coming from databases.

The launch of the survey coincided with the escalation of the COVID-19 pandemic and with the introduction of "lockdown" measures in all countries covered by the survey. These circumstances affected the response rate of the survey, particularly with respect to businesses

[1] Any reference to the motor vehicle block exemption rules in this document should be understood as comprising the four set of rules, namely the MVBER, the VBER and their respective Guidelines.

[2] Contract n. COMP/2019/005 of 26 November 2019.

such as dealers, repairers and parts distributors.[3]

In conclusion, the final deliverable covered (fully or partially)[4] 49 indicators (17 qualitative; 32 quantitative) of the 111 indicators and failed to cover 62 indicators (6 qualitative; 56 quantitative).

2 STRUCTURE OF THE STUDY AND METHODOLOGY

The study is structured in three sections: 1) New motor vehicles and their distribution; 2) Provision of repair and maintenances services, and 3) Distribution of spare parts.

E&Y collected and analysed data, where possible at both aggregate and country level, for a representative sample of 12 EU Member States (Austria, Belgium, Cyprus, France, Germany, Greece, Ireland, Italy, the Netherlands, Poland, Spain and the United Kingdom[5] and of 4 vehicle categories: passenger cars ("PC"), light commercial vehicles ("LCV"), trucks and buses. The study covers the period 2007-2017.[6]

The following sections summarize the main findings of the study. Data limitations or data gaps, when relevant, are indicated in footnotes. For further details, reference should be made to the full text of the study and on the caveats and footnotes thereof.

2.1 New motor vehicles and their distribution

The study analyses new vehicle sales, market concentration, distribution patterns and financial performance.

2.1.1 Size and structure of the market for new vehicle sales

[3] These circumstances led, in turn, to a postponement of the conclusion of the survey to 15 June 2020 (initially expected to run until 17 April 2020) and, in turn, to an extension, upon request of E&Y, of the final deadline for the delivery of the fact-finding study.

[4] A partially covered indicator presents data gaps of diverse magnitude (e.g. one or more years missing).

[5] The 12 Member States were selected by E&Y to ensure a balanced representation of the EU market, covering all EU regions, ranging from small to large, and including a broad range of economic characteristics. For the purpose of this fact-finding study the United Kingdom is still treated as a Member State given that over the time period in scope 2007-2017, the United Kingdom was still part of the EU.

[6] E&Y considered statistical significance to be met when the corresponding average market share of survey participation by vehicle manufacturers achieved a 30% threshold. Indicators for which the combined market share of all respondents was inferior to 30% of their respective market, by year and by country, were not considered in this report, unless otherwise specified. E&Y specified that applying a similar minimum threshold to the answers of parts manufacturers was not possible, as the total value of this market is unknown and therefore it was not possible to calculate an accurate market share of the respondents. The representativeness of the responses provided by parts manufacturers was indicated by providing their combined global revenue (in EUR 2019) as well as their combined number of employees.

Passenger cars

The study shows that the 2008 financial crisis had an impact on sales level for all types of motor vehicle. At aggregate level, the sales of PC contracted as of 2007 and reached the lowest level in 2013. Sales in 2017 reached 13.3 million units for the countries in scope, 4% less than in 2007. A similar trend affected LCVs and trucks, with 2017 sales respectively 10.5% and 13% lower than in 2007, despite continuous growth as of 2013-2014. Bus sales, despite some fluctuations, remained stable, with total sales in 2017 only 1% lower than in 2007 (24.8k vs. 25.1k).

At country level, Germany is the largest market for PC, accounting for approximately 25% of sales in the countries in scope. Germany's sales remained rather stable, unlike other EU countries. Notably, Italy moved from being the second largest market in 2007 to the fourth; France lost one position (3rd to 4th). While overall PC sales contracted from 2007 to 2017, the change in sales at country level differs significantly. On the one hand, Poland registered the highest increase in sales (+66%), followed by Austria (+18.5%) and Germany (+9.3%). On the other, Greece reported a decrease of almost 70%, followed by Ireland (-29.6%), Spain (-23.1%) and Italy (-21.6%).

In terms of VMs, the study shows that Volkswagen Group was the market leader across many of the countries in scope during the period covered, including Austria, Germany, Greece, Ireland, the Netherlands, Poland and Spain. PSA Group led the market in Belgium, France and the UK, while the FCA group was leader in Italy.[7]

Light commercial vehicles, trucks and buses

According to the study, France is the largest market for LCV in terms of sales for the 12 countries in scope. Germany gained a position (from 4th to 3rd), while Spain lost one (from 3rd to 4th) and Italy remained stable in fifth place. PSA Group is the market leader in Belgium, France, Poland and Spain, while Volkswagen is the market leader in Austria, Germany and the Netherlands.

Germany is the largest market in terms of sales of trucks, followed by France and UK. Poland increased its sales by 20% in the period 2007-2017, becoming the fourth largest market in terms of sales among the countries in scope. Sales in Spain and Italy witnessed a strong contraction of 45% and 34% respectively. Daimler Group is the market leader in Germany and Greece, while TRATON Group is the market leader in Austria, Belgium, Ireland and Poland.

[7] Since the period covered by the fact-finding study, PSA and FCA have merged to create Stellantis.

France, Germany and UK are the first three countries in terms of buses sold in the period 2007-2017. CNH Industrial is the market leader in France and Italy, while Daimler Group is the market leader in Austria, Germany and Greece. The bus market in UK, Poland and Belgium is fragmented, with many small operators accounting for around 40% of the total sales.

2.1.2 Breakdown of new vehicle sales by powertrain

The fact-finding study analyses the innovation in manufacturing on new vehicles in PC and trucks based on different powertrains installed in 11 of the countries in scope.

The use of alternative powertrains in new vehicle sales has gradually increased, with the proportion of fossil fuel-powered vehicles reducing slightly over the years. The implementation of stringent emission regulations and incentives such as free parking, access to high-occupancy vehicle lanes for zero-emission vehicles is likely to further drive the electrification of vehicles in the Member States. The total number of electric vehicles (EVs) across Europe reached about 1 million in 2017.[8]

The transition towards the use of alternate fuels for heavy commercial vehicles such as trucks has been slower compared to passenger cars due to multiple factors: limited economies of scale, long range requirements, payload mass and volume constraints, comparatively lower charging and refuelling infrastructure than for passenger cars.[9]
The 1 million EV milestone reached in 2017 was mostly driven by Nordic countries. Among the countries in scope, Germany, France, the UK and the Netherlands have been the primary contributors to the growth in EVs in total numbers. Favourable government incentives have been crucial to EV adoption levels.

An analysis of the percentage of new vehicle registrations by powertrain compared to the total number of new alternative fuel vehicle registrations, indicates that, among vehicles powered by alternative fuels, hybrid electric vehicles (HEV)[10] have the highest share in the majority of the countries under study. In the Netherlands the electric chargeable vehicles (ECV)[11] represent the

[8] "Electric vehicles sales in Europe surpassed 1 million," Energy Industry Review, August 2018, https://energyindustryreview.com/energy-efficiency/electric-vehicles-sales-in-europe-surpassed-1-million/, accessed on 23 September 2020.

[9] "Transitioning to zero-emission heavy duty freight vehicles," The International Council of Clean Transportation, September 2017, https://theicct.org/sites/default/files/publications/Zero-emission-freighttrucks_ICCT-white-paper_26092017_vF.pdf, accessed on 3 September 2020.

[10] Hybrid electric vehicles (HEV) are full hybrids and mild hybrids.

[11] Electric chargeable vehicles (ECV) are battery electric vehicles (BEV), extended-range electric vehicles (EREV), plug-in hybrid electric vehicles (PHEV) and fuel cell electric vehicles (FCEV).

highest share, while in Italy the highest share is for the other alternative fuel vehicles (AFV).[12]

2.1.3 Vehicle manufacturers' market presence

The fact-finding study analysed the market presence of VMs in the countries in scope by examining the new vehicle models entering or exiting a certain segment of the market, as well as by registering the most relevant mergers and acquisitions affecting the countries in scope.

The fact-finding study shows that, at an aggregate level over the period covered by the study, more models of PC entered the market than left it. In terms of VMs, Mahindra Group, Tesla Motors and Tata Group had the highest number of models entering the market, while General Motors Group, PSA Group and Hyundai Group made the highest number of models reaching the end of production. Segment "C" (compact) appears to be the most competitive, with the most manufacturers present. A similar trend affected trucks, with more than 10 VMs were reported to have withdrawn a model from multiple segments, whereas fewer VMs introduced new models. At aggregate level, Isuzu Motors, Toyota Group and other smaller VMs introduced new models in the heavy and medium truck segment during this period, while Renault-Nissan Group, Isuzu Motors and Ford Group had the highest number of models reaching the end of production.

LCV and buses showed an opposite trend, with more new models than models leaving the market; Volkswagen Group, Mahindra Group and Hyundai Group registered the highest number of new models in the LCV segment, while Fiat Chrysler Automobiles, PSA Group and Hyundai Group had the highest number of models reaching the end of production.

In terms of mergers and acquisitions, the main operations (in terms of value) affecting PC were the acquisition of Dr. Ing. h.c. F. Porsche AG by Volkswagen AG and the acquisition of Land Rover by Tata Motors Limited. In the heavy-duty vehicles market, the largest acquisition was that of MAN SE by Volkswagen AG in 2011.

2.1.4 Market concentration of vehicle manufacturers

The fact-finding study analyses the concentration level of the various segments by using metrics such as the Herfindahl-Hirshman Index, the CR4 index, as well as indexes of volatility (standard deviation and coefficient of variation). The following findings are intended at aggregate level. The full study provides further analysis at country level.

[12] Other alternative fuel vehicles are vehicles other than electric: natural gas vehicles (NGV), LPG-fueled vehicles and ethanol (E85) vehicles.

Passenger cars

The analysis showed that the PC category has medium concentration.[13] At an aggregate level, Volkswagen Group, PSA group and Renault-Nissan-Mitsubishi represent more than half (±55%) of the average aggregated market share in terms of volume. The leading VMs are, in order: Volkswagen Group, PSA Group, Renault-Nissan-Mitsubishi, Ford Group, Fiat Chrysler Automobiles, BMW Group, Daimler Group, Hyundai Group, and Toyota Group.

In terms of closeness of competition, the fact-finding study shows that the average percentage difference in the market shares of the top four manufacturers decreased, at an aggregate level, from 5.91% in 2007 to 5.47% in 2017. There were some shifts in the market shares of the significant manufacturers throughout the period in scope. Notably, the distance between the third (Renault-Nissan-Mitsubishi) and second (PSA Group) VMs decreased, mainly due to the decrease in sales of the latter. The share of the 4th to the 9th largest VM remained relatively stable, while the difference in market share between the 4th and the 6th decreased over time.

Light commercial vehicles

The LCV category is more concentrated than that for PCs,[14] with three VMs (PSA Group, Renault-Nissan-Mitsubishi and Ford Group) representing more than half of the market in terms of sales in the countries in scope. During the period 2007-2017, the sales of PSA Group and Renault-Nissan-Mitsubishi remained relatively stable, while some significant changes occurred for the other manufacturers (accounting for approximately 52.1% of the market). In particular, Ford Group shifted from 5th in 2011 to 3rd place in 2017. In terms of closeness of competition, the average difference among the top-4 manufacturers decreased over time from 6.19% to 4.97%.

Trucks and Buses

The truck and bus categories are traditionally highly concentrated.[15] At aggregate level, five VMs represent more than 97% of the total volume in sales for trucks. Three main VMs represent more than 67% of total bus sales, while a significant portion (around 20%) is covered by small local manufacturers.

[13] According to the study, the HHI index for passenger cars category was 1,290 in 2017. In empirical literature, a market presenting an HHI index greater than 1,000 and lower than 1,800 is considered of medium concentration.

[14] HHI index equal to 1,650 in 2017.

[15] HHI index respectively equal to 2,050 for trucks and 2,010 for buses in 2017.

2.1.5 Distribution patterns and networks

The fact-finding study analyses the types of distribution models used for each category of vehicle, the network density of passenger car dealers, the market concentration of dealers, and provides an overview of dealers' remuneration at country level.

Distribution patterns for new vehicles

The fact-finding study shows that quantitative selective distribution is the preferred model in the PC category. The only Member States where VMs opted for exclusive distribution systems were France and Italy (12.5% and 14.3%, respectively in 2017). Innovative channels (mobile pop-up stores, supermarkets, experience centers, third party platforms) were used extensively for sales across the countries in scope.[16] The fact-finding study shows that there were no significant changes in these proportions across the period in scope.

In contrast to PCs, many VMs present in the (more concentrated) LCV category used qualitative selective distribution systems (50% in Austria and Italy, 40% in France). Quantitative selective distribution is prevalent in Cyprus and UK (66.7%), while 20% and 25% of VMs opted for exclusive distribution systems in Spain and Germany.

Quantitative selective distribution is the most prevalent distribution method used for truck distribution. Some truck manufacturers opted for qualitative distribution systems in France (20%), Italy and Spain (16.7%), while a variable number of truck manufacturers opted for mixed systems (notably 67% in Greece, 50% in the Netherlands, 40% in Poland and Ireland). These proportions, however, did not significantly change over the period in scope. As for buses, manufacturers opted mainly for exclusive distribution systems. Direct sales formats are common for the sales of both trucks and buses.

Network density of passenger car dealers

The network density for car dealers measures the total number of car dealer outlets broken down by car brands in each country, per 1,000 inhabitants, during the period 2007-2017.

The number of car dealer groups across all Member States increased from 2007 to 2011 then gradually declined during 2011 – 2017, leading to an overall decrease over the period in scope. According to the fact-finding study, this result can be attributed to a consolidation trend between dealer groups. For instance, Penske Automotive expanded its independent dealer group

[16] The low rate of survey responses on distribution systems and innovative channels does not allow to make intertemporal comparisons.

in Europe by acquiring multiple dealer groups such as Sytner Group in the UK, Jacobs Gruppe in Germany, several dealerships selling Porsche, Audi, Volvo and Land Rover in Italy and by forming a joint venture with Portuguese based Caetano Group to capture part of the local BMW market.[17] The number of Volkswagen dealer groups fell by 1,787 year-on-year in 2017 as it aimed to reduce network size, primarily in Germany, to strengthen its efforts in e-mobility, digitalization and consumer loyalty. Audi reduced the number of dealerships with 433 from 2007 to 2017 and introduced direct online sales for fleets. Porsche Holding Salzburg's subsidiary PGA Motors sold 275 of its dealer outlets to Emil Frey Group and consolidated its French dealerships with Volkswagen brands to form a joint retailing entity: Volkswagen Group Retail France.[18]

The aggregate network density declined from 0.17 in 2007 to 0.14 car outlets per 1,000 inhabitants in 2017. While the population of the Member States has grown over the years, the number of dealer outlets fell to 57,304 outlets in 2017, 10,831 outlets less than in 2007. According to the fact-finding study, VMs reduced their dealer networks to maintain dealer profitability and recover from the Eurozone crisis. Rising real estate prices in inner cities are also a factor affecting the number of dealer outlets. Traditional dealer outlets also face competition from independent "fast fitters" and Original Equipment Supplier (OES) workshops, which aim to provide both parts sales and aftersales services. This is also against the background of emerging retail trends such as online car sales, growing demand for used cars and fleet services and "immersive" virtual retail experiences.[19]

The analysis of network density broken down by car brands revealed that French brands Renault, Dacia, Peugeot and Citroen had a denser dealer network between 2007 – 2017 than did Nissan and Toyota, which had the lowest density dealer networks among the car brands in

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17 "Penske doubles up in Italy, buys 8 dealerships," Autonews, October 2016, https://www.autonews.com/article/20161004/RETAIL/161009956/penske-doubles-up-in-italy-buys-8-dealerships, accessed on 2 September 2020; "Penske adds Spain to its overseas roster," Autonews, August 2014, https://www.autonews.com/article/20140804/RETAIL/308049930/penske-adds-spain-to-its-overseasroster, accessed on 2 September 2020.

18 "VW Group's retail company to sell 275 dealerships," Autonews, March 2017, https://europe.autonews.com/article/20170323/ANE/170329928/vw-group-s-retail-company-to-sell-275-dealerships, accessed on 2 September 2020; "Volkswagen to reorganize its dealer network to take advantage of future mobility," Autovista Group, January 2018, https://autovistagroup.com/news-andinsights/volkswagen-reorganise-its-dealer-network-take-advantage-future-mobility, accessed on 2 September 2020; "Volkswagen and Audi plan big dealership network changes," Autovista Group, May 2017, https://autovistagroup.com/news-and-insights/volkswagen-and-audi-plan-big-dealership-network-changes, accessed on 2 September 2020.

19 EY analysis (Automotive Retail & Distribution, October 2015); "The traditional car dealer is disappearing: flagship stores and virtual reality are the new trends," Business Insider, December 2016, https://www.businessinsider.nl/auto-dealer-bmw-audi-virtual-reality-flagshipstore/, accessed on 25 August 2020; "UK franchised dealer outlet numbers grow year on year," Motor Trader, https://www.motortrader.com/motor-trader-news/automotive-news/uk-franchised-dealer-outlet-numbers-grow-year-year-30-10-2015, accessed on 25 August 2020; "Auto: the crisis has reduced the number of dealerships," Les Echos, August 2014, https://www.lesechos.fr/2014/08/auto-la-crise-a-reduit-le-nombrede-concessions-308291, accessed on 25 August 2020.

analysis. The network density for all the car brands in analysis declined over the years. During the Eurozone crisis, German and Asian brands managed to maintain better profitability compared to French brands.[20]

Overview of dealer remuneration for vehicles (country level)[21]

The analysis shows that, at country level, about 20% - 30% of the VMs offered factory-to-dealer incentives and a vehicle financing share across the 12 countries in scope. According to survey responses, some of the factory-to-dealer incentives may be included as a percentage of the invoice value. About 30% - 40% of VMs offered increasing volume-based bonuses, such as the stair-step programme.[22]

Survey responses also indicated that bonuses may be based on the level of sales target achieved quarterly or monthly or annually, or could be separate volume bonuses for fleet and personal car sales. Bonuses may further be dependent on improving customer satisfaction and market share. Approximately 20% of VMs offered fixed volume-based bonuses in Austria, France, Greece, Ireland and Italy, while 10% of VMs offered these bonuses in Poland and the Netherlands. Such bonuses could also relate to compliance with targets. About 10% of VMs in Austria, Spain and the UK offered special bonuses for specific vehicle models/ engine types, which reached 30% in 2017, including bonuses on EVs, stock clearances, age of stock or special trim levels. According to the survey results, other forms of remuneration were also offered by VMs, such as annual quality bonuses as a proportion of sales turnover.

According to survey responses from the VMs, an analysis of their sales targets for dealers revealed that the majority were set by the VMs themselves and were volume-based. In most of the countries, the VMs responded that the majority of the targets were aggregated. The timeframe on which those targets were set (monthly, quarterly, annual or other) varied greatly between the countries and over the years. The majority of those targets were, according to the VMs, adjustable during the year in most of the countries in scope, with an exception of Austria and the Netherlands where the majority of the targets were reported to be unchangeable. The methodology and the main parameters used for the calculation of these targets were in most

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[20] "Automakers strive to save dealers in Europe," Autonews, July 2013, https://europe.autonews.com/article/20130704/ANE/130709956/automakers-strive-to-save-dealers-ineurope, accessed on 25 August 2020.

[21] The analysis does not demonstrate an aggregated view or intertemporal comparison of dealer remuneration for the 12 countries in scope given that the limited information is sourced from 10 self-identifying VM respondents for passenger cars and eight VM respondents for LCVs in the survey. The average total market share of respondents for the whole period (2007, 2012 and 2017) and across all countries is approximately 24%, as such the results hereafter report the survey and no major conclusions for the wider market should be drawn.

[22] Stair-step programme is a programme in which the manufacturer retroactively pays a bonus for each vehicle sold within certain volume thresholds.

cases a combination of several options such as past market performance and forecast market performance. Not meeting the sales targets had, in most cases, an impact on the dealer bonuses.

2.1.6 Financial Performance

The fact-finding study provides an overview of VMs' financial performance, by analysing operating margins and expenditure on research and development. Financial performance of VMs is also compared with the following industries: computers and peripheral equipment; communication equipment; consumer electronics. These industries were selected as they present similar aspects to the motor vehicle industry: suppliers trade consumer products, have a large network of dealers and/or repair service providers and distribute spare parts in the aftersales market.

2.1.7 Operating margin of vehicle manufacturers

The average operating margin of VMs (of PC and LCV)[23] increased from 4.9% to 6.9% between 2007 and 2017, along a non-constant trend. In particular, some small decreases took place in 2012, 2013, 2015 and 2016, and in 2008, a significant drop, due to the financial crisis, resulted in operating margin levels of only 1.5%.

BMW Group and Daimler Group (Mercedes-Benz Cars and Vans) experienced a quick recovery after the financial crisis (8.4% and 8.3% respectively in 2010, and of 8.9% and 9.6% respectively in 2017). Ford Motor Group also experienced a quick recovery, with an operating margin of 11.3% in 2010. Renault Group, Volkswagen Group and Fiat Chrysler Automobiles experienced a gradual improvement in operating margins throughout the years in scope; the three companies improved their operating margin to 6.8%, 4.1% and 6.9% respectively in 2017. PSA Group only significantly improved its operating margin from 2015 onwards, reporting 6.1% in 2017. Toyota Group endured a volatile period with margins varying between -2.2% and 10.1%, and reported a slightly lower operating margin in 2017: 8.2% compared to 8.6% in 2007.

As for trucks and buses (as with PC and LCV, several truck manufacturers also produce buses), Paccar reported the highest operating margins throughout the years in scope, varying between 6% and 15.8%. While Daimler Group Trucks and Buses and Paccar continued to grow after 2012, Volvo Group experienced a limited decline in 2013 and 2014 before recovering to a level of 9.1% in 2017. CNH Industrial's operating margin decreased from 2014 until 2016, but this recovered in 2017, with a reported value of 4.6%.

[23] The study highlights that most passenger car VMs are also manufacturers of LCVs, and they rarely provide their financial data broken down by vehicle category. Therefore, passenger cars and LCV are treated together in this section of the study.

2.1.8 R&D expenditure of vehicle manufacturers[24]

As a percentage of overall revenues of selected VMs making PCs and LCVs, R&D expenditure remained, on average, rather stable throughout the period, despite the serious economic crisis that affected the sector in 2008-2009. A slight increase from 4.3% in 2007 to 4.7% in 2017 is noted. BMW Group, Volkswagen Group and Daimler Group (Mercedes-Benz Cars and Vans) report the highest R&D expenditures as a percentage of revenue over the period in scope, varying between 4.8% and 7.3%. In contrast Fiat Chrysler Automobiles and Hyundai Motor Company seem to have invested the least in R&D, with expenditures fluctuating between 1.9% and 3.2% of overall revenue.

As a percentage of overall revenues of selected VMs making trucks and buses, average R&D expenditure increased over the 2007-2017 period, from 3.1% to 4.1% in 2017, which contrasts with the overall decrease in operating margin. Daimler Group (Daimler Trucks and Buses), Volvo Group and Paccar, followed more or less the same course over the years. R&D expenditure was increased from 2007- 2012, decreased between 2013 and 2014 and increased again from 2015 onwards. CNH Industrial's R&D expenditure percentage remained rather stable between 2013 and 2017, evolving from 3.6% to 3.5%.

When looking at R&D expenditure as percentage of revenue, the range of values reported and their evolution over the years for all categories in the motor vehicle sector are in line with the range of values and the evolution thereof in the computers and peripheral equipment industry. As to the other industries compared, both consumer electronics manufacturers and communication equipment manufacturers experienced a dissimilar trend over the years in scope, as they witnessed a stronger increase in operating margin between 2007 and 2012, while remaining at a stable level between 2012 and 2017. Manufacturers of communication equipment tended to spend a significantly higher percentage of revenue on R&D compared to the other industries judged to be comparable. It is notable however that the life expectancy of communication equipment is much shorter than is the case for vehicles: a factor which might be expected to imply greater R&D investments.

2.2 Provision of repair and maintenance services

2.2.1 Size and structure of the market for repair and maintenance services

The total turnover generated by the maintenance and repair of motor vehicles, for all categories in all countries in scope increased from EUR 106,065M in 2008 to EUR 145,608M in 2017.

[24] See footnote 24.

France, Germany, Italy and the UK accounted for the largest slice of the market.

By 2017, the market for maintenance and repair had experienced significant growth compared to the position in 2008, particularly in the United Kingdom (+211% by 2017), Germany (+161%) and France (+148%).

Out of all the countries in scope, 5 reported a decline in the total value of the market for repair and maintenance services, with the biggest such occurring in Greece (-69% in 2017 compared to 2008).

2.2.2 Size and age of vehicle parc

The fact-finding study provides an analysis of the vehicle parc, including its size and age: the total size of this parc for all categories in all countries in scope increased by 13.7%, from 227M in 2007 to 258M in 2017. PC represent by far the largest section of the vehicle parc, and increased from 197M vehicle in 2007 to 225M in 2017. The number of LCVs grew from 24.1M to 27.5M over the same period, while the truck fleet was almost stagnant at 5M vehicles on average. Buses made up the lowest share of the total parc, with units increasing from 565,881 to 606,998 over the 2007-2017 period.

At an aggregate level, across all countries and years in scope, the number of PC represents approximately 87.1% of the size of vehicle parc. LCVs represent 10.6%, while trucks and buses make up 2.08% and 0.24% respectively. From 2007 to 2017, there was no significant change in the overall typology.

Over the period covered by the fact-finding study, the size of the PC parc increased in all countries in scope, although at different rates: Poland had the largest increase (+54%), followed by the UK (+12.9%) and Germany (+12.8%). Italy had the highest number of cars per inhabitant (over 0.6), followed by Austria and Germany. As for the age of PC parc, Poland has, on average, the oldest parc (16.4 years), followed by Greece (12.3 years) and Spain (12 years), while the UK has the youngest vehicle parc (7.6 years), with Austria and Ireland trailing slightly behind. The average age of the parc increased over the period in all countries covered by the fact-finding study, with the exception of Poland and Spain. For half of the countries in scope, the majority of the parc consisted of PC of above 10 years old, while for the other half, the majority of the parc was between 5-10 years old.

The overall size of the LCV parc for all countries in scope increased by 14.3% over the 11 years, from 24.1M to 27.5M. According to the fact-finding study, this increase was mainly driven by the growth in e-commerce, which increased demand for the types of transport service often carried out by LCVs. Considering the LCV parc of all countries in scope, France has the

highest share (23%, on average), followed by Spain (18.3%), Italy (15%) and UK (14.6%).

Apart from Spain, all the other countries under fact-finding study showed a consistent increase in the LCV parc (Poland +41%, Germany +40%, Belgium and Austria +25%, the Netherlands +4%). The highest number of LCVs per inhabitant were reported in Spain, followed by France, Greece, Ireland and Italy. Germany had a significantly lower number of LCVs per inhabitant relative to the other countries in scope. According to the fact-finding study, these differences are partly due to the difference in age of the respective LCV parcs. Greece (15.4 years) and Poland (16.1 years) had the oldest vehicle parc in 2017, while the average age of LCVs over the period in Austria, Belgium and the UK was around 7.5-8 years.

The overall size of the truck parc for all countries in scope increased by approximately 7% over the 11 years covered by the fact-finding study (from 4.92M to 5.26M). The biggest annual increase occurred between 2010 and 2011, when the total size of the truck parc increased by approximately 3.6%. Italy had, on average (over 2007-2017), the largest vehicle parc for trucks among the countries in scope (18.9%), followed by Germany (17.8%), Poland (17.5%), United Kingdom and France (11%). The average age of the parc differed significantly among the countries, ranging on average from 7.6 to 17.5 years.

The overall size of the bus parc for all countries in scope increased by approximately 7.3% over the 11 years covered by the fact-finding study (from 566,000 to 607,000), although with falls in 2009, 2012 and 2014. Poland had the highest percentage of buses among the countries in scope (17.2%), followed by Italy (16.7%), UK (15.2%) and France (14.8%). As for the trend at country level, the biggest increase was observed in Poland (+32.5%), largely due to investments in public transport, while the biggest decrease was for Ireland (-39.9%) over the period 2007-2017. The oldest vehicle parc was in Greece (14.2 years in 2013). Austria had the youngest fleet (6.37 years).

2.2.3 Network density of repairers for passenger cars

The fact-finding study covers the network density of repairers for PC only, in terms of the number of authorised and independent repairers[25] per 1000 inhabitants and per 1000 PC.[26]

[25] Authorised repairers: operating within the distribution system set up by a supplier of motor vehicles. Independent repairers: not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance services or an authorised repairer within the distribution system of a given supplier to the extent that it provides repair or maintenance services for motor vehicles in respect of which it is not a member of the respective supplier's distribution system.

[26] Source: Eurostat, 2008-2017. Data refer to for all entities that have a NACE code registered for the repair activity. It cannot be excluded that these numbers include repairers with multiple activities, or for which the repair business is not their main activity.

The total number of legal entities operating as repairers, both authorised and independent, increased in most countries between 2008 and 2017. Exceptions were Greece and Italy, where the numbers decreased, and Cyprus, where the number of legal entities decreased over the time period but returned to 2008 levels by 2017.

The density of the network (measured by the number of legal entities per 1,000 inhabitants) varied greatly between countries. The overall average from 2008 to 2017, was 1 legal entity per 1,000 inhabitants. However, Cyprus, Greece, Ireland, Italy, Poland and Spain had a denser network compared to the other countries, while the Netherlands had the lowest network density, ranging from 0.25 legal entities per 1,000 inhabitants in 2008 to 0.40 in 2017.

An indication of the competitive interplay between repairers can be gained by looking at the number of repair and maintenance service providers compared to the overall size of the vehicle parc. Overall, the number of legal entities per 1,000 PC appeared to decrease over time, in that the increase in the size of the vehicle parc is slightly larger (+14%) than the increase in legal entities (+12%) performing repair and maintenance services for PC.

As for authorised repairers, the fact-finding study analysed the number of contracts in force and the total number of outlets.[27]

The total number of contracts remained relatively stable in most countries throughout the years, with exceptions in Germany, Italy and Spain, where the number of contracts declined slightly. The total number of contracts decreased over the years from more than 60,000 in 2007 to approximately 53,000 in 2016. Most of the contracts relate to the Citroen, Volkswagen and Ford brands. However, the position is not identical for all countries, as France has the highest numbers of contracts for the Citroen brand, while Germany has the highest number for the Volkswagen brand. With the exception of some brands, such as BMW, Hyundai and Mini, the general trend is a decline in the number of contracts for authorised repairers over the time period.

The number of authorised repairer outlets decreased in Germany, Italy and Spain, but increased in France, fluctuating over the time period, with a downward trend since 2013.

For France and Italy, the number of outlets is significantly higher than the number of legal entities, indicating that it is common for multiple outlets to operate under the same contract. The number of authorised repair outlets in Ireland is only 5% higher than the number of

[27] The fact-finding study does not provide a reasonable overview of independent repairers. According to the contractor, the combination of several sources (Eurostat and International Car Distribution Program (ICDP)) would result in a potential underestimation of the independent network.

contracts signed, indicating that the vast majority of contracts are entered into for a single outlet.

The percentage of stand-alone repairer outlets (i.e., service-only dealer locations) varies significantly from country to country. The fact-finding study shows, on average, an increase in the number of authorised stand-alone repairers over time.

The density of the authorised repair' networks, measured by the number of outlets, shows wide differences between the countries studied. Austria had the highest network density, more than double the average, while Poland had the lowest, at between 0.04 and 0.05 authorised repairer outlets per 1,000 inhabitants. Over the time period, the density of the authorised repair networks decreased in all countries, with the exception of France and Poland.

The distribution of authorised repair outlets at the brand level, reveals top-5 VM brands (Renault, Fiat, Ford, Peugeot, Citroen, Opel/Vauxhall, Volkswagen and Audi) have approximately 50% of the total number of service points. With an exception of some brands, such as Smart, Mini and Jaguar, the total number of outlets at brand level have decreased over the time period in almost all countries.

2.2.4 Typology of services and service providers

The study provides some indications on the effect of brand standards on the scope of repair activities carried out by authorised repairers.[28] 70% of authorised repairers in the countries in scope were required to perform a full range of repairs, while 2% were required to carry out body repairs only, 2% "fast-fit" repairs, and 26% other ranges of repair services.[29] This position remained stable over the period 2007-2017.

VMs indicated that four main types of warranty were offered over the period: anti-corrosion warranty; powertrain warranty; overall warranty; and extended warranty. According to the survey respondents, the length of the overall warranty (covering any defect attributable to manufacturing or assembly fault and usually expressed both in mileage and years), remained stable over the period covered by the study and did not vary significantly between countries. Based on the contributions of the VMs participating in the survey, the overall warranty covered, on average, 100,000 km and 2 years in all countries, except for France, where it is reported to cover 200,000 km.

[28] Based on vehicle manufacturers' replies to the survey, covering a minimum of 20% of the market shares for all vehicle categories.

[29] This latter category contains variants such as: no formal requirements, a requirement for accessory assembly in addition to full-range repair, and full-range repairers allowing the option for subcontracting body repair.

The VMs reported that, for all countries in scope, the anti-corrosion warranty (covering repair or replacement of corroded parts of the vehicle's bodywork and sub-frame subject to them being a result of a manufacturer defect, material fault or the application of anticorrosion products recommended by the manufacturer) is expressed in years, and the average ranged between 11.4 and 13 years over the time period covered by the study.

The VMs reported that, for all countries in scope, the power train warranty (the warranty that covers the systems and components that make a car run including the engine, transmission and drivetrain) stayed stable at 2 years over the time period covered by the study. However, when measured in mileage, there is a variation between the different countries.

2.2.5 Typology of repairers

The study analyses the contractual ties between parts manufacturers and independent repairers, with a view to getting insights into the typology of repairers.[30]

Parts manufacturers ("PMs") responding to the survey mainly indicated that their dealers benefited from "fidelity" programmes, in the form of volume/value-based discounts (ranging from 29%- 50% among the countries in scope), or no contractual relationships at all (14% - 57% of the respondents). Other similar provisions include financial and/or framework contracts or loyalty programs.

Based on contributions from trade associations, the study reports that over the years, the efficiency of spare part distribution within the wholesale level has been increasingly optimised, evolving from a three-layered distribution system to one with only two-layers, and also shifting towards more direct distribution models and partnerships. More recently, wholesalers are increasingly introducing services to assist repairers with marketing and communication, education and training, process automation and business intelligence linked to volume-based parts turnover.[31]

2.2.6 Typology of technical information and vehicle data

The study provides a description of the types of vehicle-generated data provided by VMs to authorised repairers, and the extent and conditions of independent repairers' access to these data, based on the opinion of vehicle and parts manufacturers.[32]

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[30] This section only reflects the view of parts manufacturers as the number of replies by independent manufacturers was too limited.

[31] Stakeholder consultations conducted with CECRA and its national members.

[32] The fact-finding study does not include the views of repairers, given the low response rate of this category.

According to the VMs responding to the survey, in 2007, the majority of technical information for both authorised and independent repairers, was passed on through documents. The importance of documents as a means of accessing vehicle-generated information in 2017 appears to have decreased relative to 2007, as can be expected from the impact of increased digitization. By 2017 websites had become the second most frequently-used source (after documents) for both authorised and independent repairers.

The use of plug-in devices slightly decreased for authorised repairers in 2017 compared to 2007, while the opposite was true for independent repairers. For both, the use of servers as a source for accessing different types of data increased over the years.

As for the type of data accessed by repairers, in 2007, a number of types were accessed, mainly through documents, in particular aggregated driver data, driver-specific data, other data and traffic/road data are, for both authorised and independent repairers.

To obtain aggregated data from many vehicles, the VMs indicate a nearly even split between the four sources for authorised repairers, as well as a nearly even split between documents, server access and website access for independent repairers. The use of documents as the source for accessing aggregated driver data and driver-specific data decreased over the years for both independent and authorised repairers and was gradually replaced by server and website access.

2.3 Distribution of spare parts

2.3.1 Size and structure of the market for sales of spare parts

The study highlights that the market size for spare parts supply (PMs' sales) for the 12 countries in scope increased by 29.8% in terms of sales value, from EUR 160.5 billion in 2008 to EUR 208.4 billion in 2017. The increase was not continuous over the years: in particular, market size decreased by 25.4% in 2009, as a result of the 2008 economic crisis.

At country level, Germany represented the largest market for motor vehicle PMs among the countries in scope, with 43.7% of total sales (in value) in the country, followed by France (12.4%) and Italy (11.8%).

As for motor vehicle spare parts distributors (SPDs), Germany represents the largest market for SPDs, with 31.7% of total sales, followed by the UK (21.5%) and France (18.8%). The trend in all countries was very volatile throughout the period 2007-2017.

2.3.2 Distribution patterns and networks

This section summarizes the study results at aggregate level (i.e. considering all the countries in scope). The full study provides also a country-by-country analysis, where this is possible/ supported by sufficient data.

Vehicle manufacturers

Based on survey replies,[33] the study showed that at aggregate level, between 2007 and 2017, VMs primarily used qualitative selective systems for spare parts distribution. Respondents in the LCV, truck and bus segments also used quantitative selection and exclusive distribution for this purpose.

During this period, innovative channels were seldom used for spare parts sales. Survey data indicated the occasional use of e-commerce websites owned by respondents for passenger car spare parts sales in 2017. The responses also revealed that VM-owned distribution outlets constituted only 10% - 30% of the total sales in all vehicle categories during 2007 – 2017.

Parts manufacturers

The study analyses parts manufacturers' distribution patterns in all Member States over the period 2007-2017, broken down by type of customer (VMs, final customers, parts wholesalers, repairers).[34] Over this period, at an aggregate level, for all vehicle categories, parts manufacturers primarily supplied parts to parts wholesalers and VMs. A small proportion of PMs (5% - 30% of respondents) supplied spare parts to final customers, again for all vehicle categories.

To some extent, survey respondents used innovative distribution channels for spare parts sales; in particular, parts manufacturers used their own websites for ecommerce, and by 2012, direct sales of spare parts had increased for all vehicle categories.[35] 20% - 40% of survey respondents

[33] This section of the fact-finding study is based survey responses by vehicle manufacturers. To establish the significance of the replies, the contractor considered the average total market share represented by the respondents for each section. This figure varies greatly section by section and country by country, therefore the findings of this section of the study should generally not be extended to the entire population. The study provides detailed explanations for each indicator on the coverage (e.g. number of respondents, market shares represented by the respondents, etc.), and it generally excludes those indicators for which a minimum coverage was not reached.

[34] This section of the fact-finding study is based on survey responses collected from eight part manufacturers, jointly representing EUR 104 billion in global sales and 445,000 employees (2019).

[35] Results based on the responses of ten part manufacturers, jointly representing EUR 168 billion in global sales and 817,000 employees (2019).

across all vehicle categories did not use any innovative distribution channel for spare parts sales during 2007 – 2017, while the role played by third-party platforms in e-commerce and direct sales of spare parts either remained constant or decreased for all vehicle categories during 2007 – 2017. Supermarkets were used by respondents in countries such as France, Italy and the UK for PC and LCV spare parts distribution during this timeframe.

Financial information

The fact-finding study collected information on the financial performance of parts manufacturers by analysing their operating margins.[36]

Among the top-10 global parts manufacturers by revenue, Michelin had the highest operating margin during 2015-2017. Most parts manufacturers recorded an increase in their operating margin over this period, while Continental AG, Robert Bosch GmbH and Benteler International AG experienced some declines.

The fact-finding study also calculated the median, average, 90th-percentile and 10th-percentile of the same 1,122 global parts manufacturers. The median and average operating margins remained stable over the years in scope, except for 2009, where the average dropped to 3.6% and 2017 where both the median value and average value amounted to 7.7%.

The 90th-percentile indicates the minimum operating margin reported by the top 10 percent of parts manufacturers based on operating margins. The top-performing PMs increased their operating margin from 16.8% in 2007 to 18.6% in 2017 (with a drop to 14.4% in 2009).

The 10th-percentile indicates the maximum operating margin reported by the 10% of parts manufacturers with the lowest operating margins. These firms report negative operating margins in all but 2 years. In 2009, they observed a decrease of their operating margin to -7%, although in later years these companies were able to recover.

[36] Data were calculated based on data of 1,120 global parts manufacturers, including multi-line part manufacturers, with activities beyond the automotive industry and geographic coverage beyond the countries in scope of the study.

Annex 3: Consultations

This annex presents the results of the consultation activities performed in the context of the evaluation of the MVBER regime. The objective of the consultation process was to collect in-depth and high quality evidence on the key competition issues arising in vertical relationships in the motor vehicles sector from the perspective of the businesses, consumers and EU competition law enforcers.

The various consultation activities consisted of:

- A consultation on the evaluation roadmap;
- An open public consultation based on an online questionnaire;
- Two targeted consultations with NCAs.

The different consultation activities set out in this annex aimed to gather input from stakeholders on how the MVBER regime has functioned since its adoption. To that end, the Commission focused in particular on trying to understand which areas of the rules have not functioned well or have not functioned as well as they could have, and the underlying reasons. Many stakeholders also provided input on the changes they consider necessary to improve the functioning of the rules and what these changes should look like. This input has been analysed and taken into account, to the extent that it provided useful insights into why the rules are considered not to have functioned as well as they could have. Any reference to such proposed changes by stakeholders in the following summaries of the various consultation activities should therefore be understood in this context.

1. Consultation on the Evaluation Roadmap

1.1. Overview of respondents

The consultation on the roadmap ran between 19 February 2019 and 19 March 2019. The Commission received a total of 32 submissions as feedback to the evaluation roadmap.
The large majority of the entities that provided feedback were business associations, followed by companies. Feedback was also received from one citizen, one consumer organization, one non-governmental organization, one trade union and two other entities. Stakeholders represented different levels of the supply chain of the motor vehicles sector. As to the breakdown by country of origin, 9 respondents were domiciled in Belgium, 6 in Spain, 4 in Austria, 3 in France, 2 in Germany, 2 in Italy, 2 in the UK, 1 each in Czech Republic, Denmark, Finland and Poland.

1.2. Overview of submissions

The views put forward by stakeholders were varied and sometimes conflicting.

Vehicle manufacturers, represented by their European association, ACEA, expressed their content with the current regime and the flexibility that it provided, which, they claimed, allowed them to optimise their networks and adapt them to technological developments and changing customer expectations. They therefore indicated that they advocate the preservation of the current principles, while at the same time proposing that legal certainty could be improved if certain provisions of the current Guidelines were included in future regulations.

As to motor vehicle dealers, their European association, CECRA, claimed that the abolition of certain conditions[1] for the application of the previous MVBER had increased contractual "imbalances" between vehicle manufacturers and dealers. This argument was also put forward by other associations representing dealers, such as Federauto, ZDK, CNPA, BF and GANVAM, some of which further pointed to related issues of increased financial pressure facing dealers, due to the alleged shifting of costs and investment requirements from vehicle manufacturers to the authorised networks. Finally, this category of stakeholders stressed their wish for a future MVBER to capture vehicle manufacturers' new technically advanced capabilities to prevent, restrict and distort competition, without however elaborating further on the nature and scope of such capabilities.

The spare parts manufacturers' association, CLEPA, claimed that the MVBER provisions on original equipment suppliers' access to the aftermarket have been circumvented by vehicle manufacturers by means of both legal (invocation of tooling rights and IPRs) and technical restrictions (withholding of necessary software).

The independent aftermarket, which was the most widely represented group of stakeholders in the consultation, focused on the significance of ensuring aftermarket operators' non-discriminatory access to spare parts and to information relevant for the provision of aftersales services, notably repair and maintenance. In this connection, many stakeholders underlined that vehicle manufacturers have developed indirect means of circumventing their obligation to ensure an equal footing for authorised and independent operators, such as application of extended warranties, burdensome accreditation processes, steering of demand towards the authorised networks and withholding of captive parts. Moreover, many aftermarket operators set particular store by the necessity to take the specific situation of SMEs into account, pointing to their significance for the European economy and employment. Finally, almost all stakeholders of this category drew the Commission's attention to the emerging issue of access to in-vehicle data and resources and to what they perceive as an attempt by vehicle manufacturers to take advantage of

[1] Mainly contained in Article 3 of the previous MVBER (Regulation 1400/2002).

their function as designers of the vehicle architecture to maintain and entrench their position as exclusive gatekeepers to such data and resources.

Insurers were another group of stakeholders that focused on the implications of increasing digitalisation. In this regard, they asked for the digitised automotive services to be brought under the MVBER, pointing to the need for a regulatory framework that ensures open, standardised and interoperable access to in-vehicle data for all economic operators upon consent of the driver.

Rental and leasing companies' associations also touched upon the issue of access to in-vehicle data, advocating a regulatory framework that would provide for unrestricted access. They also expressed concerns with regard to the alleged onerous requirements put in place by vehicle manufacturers as to the proof required for a warranty to be honoured.

The response from consumers was muted, in that no consumer association in the strict sense chose to respond to the consultation. The Commission did, however, receive two contributions from related types of association: one from the FIA (which has a broad spread of commercial interests, and also acts as a motorists' organization) .and the other from the ÖAMTC, which is a national motorists' club. These submissions focused mainly on the significance of safeguarding independent operators' access to spare parts and technical information, as well as on the need to prevent vehicle manufacturers' alleged monopoly over in-vehicle data.

All in all, stakeholders appeared as unanimously supporting the preservation of the current regime's basic principles, with all but vehicle manufacturers expressing the view that this regime should be further reinforced, notably to address current and future challenges arising due to increasing digitalisation.

2. Summary of the open public consultation

A summary report of the open public consultation was published on both the Better Regulation Portal[2] and the dedicated MVBER review webpage on DG Competition's website[3] on 16 March 2021 and 17 March 2021 respectively.

2.1.Introduction

The European Commission ("the Commission") is currently evaluating the functioning of the

[2] See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2008-Evaluation-of-the-Motor-Vehicle-Block-Exemption-Regulation/public-consultation

[3] See: https://ec.europa.eu/competition/sectors/motor_vehicles/legislation/mvber_review.html

motor vehicle block exemption rules,[4] comprising the Motor Vehicle Block Exemption Regulation (EU) No 461/2010[5] ("MVBER"), the application of the General Block Exemption Regulation (EU) No 330/2010 to the motor vehicle sector[6] ("VBER"), along with the Supplementary Guidelines[7] ("SGL") and the Guidelines on vertical restraints[8] ("VGL").

In this context, the Commission launched a public consultation on 12 October 2020. Although the consultation was initially planned to run for 12 weeks, the Commission decided to extend this period to 15 weeks to accommodate COVID-19-related difficulties. The consultation was finally closed on 25 January 2021. The aim of the consultation was to gather stakeholders' views and evidence to assess whether and to what extent the objectives of the motor vehicle block exemption rules have been fulfilled, as well as to collect facts on the key competition issues arising in vertical relationships in the motor vehicles sector.

The questionnaire for the consultation was published in English, but participants could reply in any of the 24 official languages of the EU. The consultation was promoted through Twitter and the DG Competition website.

The Commission received 84 contributions to the public consultation, which were submitted through the online questionnaire tool. 17 participating stakeholders also submitted position papers, which largely echoed the issues raised in the contributions to the public consultation.

The statistics computed in this summary are based only on contributions to the public consultation submitted through the online questionnaire. The input has been analysed using a data analysis tool[9], and completed by manual analysis.

The contributions received cannot be regarded as the official position of the Commission and its services and, thus, do not bind the Commission. The summary of the contributions is preliminary and does not prejudge the findings of the Staff Working Document.

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4 Any reference to the motor vehicle block exemption rules in this document should be understood as comprising the four set of rules, namely the MVBER, the VBER and their respective Guidelines.

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

6 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L 102, 23.4.2010.

7 Commission notice — Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. OJ C 138, 28.5.2010.

8 Guidelines on Vertical Restraints. OJ C 130, 19.5.2010.

9 The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analyzing and visualizing replies to public consultations. It relies on open-source libraries using machine-learning techniques and allows for the automatic creation of charts for closed questions, the extraction of keywords and named entities from free-text answers as well as the filtering of replies, sentiment analysis and clustering.

2.2.Profile of respondents

Among the 84 respondents to the consultation, there were 37 business associations; 30 company/business organizations; 2 consumer organizations;[10] 1 EU citizen; 1 non-governmental organization; 1 academic/research institution; 1 public authority; 1 trade union; and 10 other.[11] The large majority of the contributions were submitted in English.[12]

The distribution of replies across organization size is relatively homogenous with 30 micro (1 to 9 employees); 21 small (10 to 49 employees); 19 large (250 or more employees); 13 medium organizations (50 to 249 employees); and, 1 EU citizen. Table 1 below shows the geographic origin of respondents.[13]

Country	Count
Belgium	13
Netherlands	12
Germany	11
UK	10
France	8
Austria	7
Spain	5
Italy	4
Finland	3
Czech Republic	2
Denmark	2
Sweden	2
Switzerland	2
Ireland	1
Norway	1
Portugal	1

Table 1 - Distribution of respondent associations across countries

Respondents which contributed on behalf of a company/business organization or business association presented themselves as active at various levels of the motor vehicle supply chain.

[10] The 2 respondents which identified as "consumer organizations" are actually motorists associations.

[11] The 10 stakeholders, which identified as "other" include associations and companies.

[12] A few contributions were submitted in German (13), French (3), Finnish (2) and Spanish (1).

[13] It should be noted that most of the respondents that selected "Belgium" as country of origin are associations of European scope, which are based in Brussels.

In particular, 27 respondents identified themselves as non-authorised parts dealers; 22 as non-authorised repairers; 15 as authorised parts dealers; 14 as authorised repairers; 14 as authorised dealers; 10 as parts manufacturers; 10 as non-authorised dealers; 9 as vehicle leasing / rental; 6 as vehicle importers; 5 as intermediaries purchasing vehicles on behalf of individual identified end consumers; 4 as vehicle manufacturers ("VMs"); 3 as agents selling vehicles on behalf of one or more VMs / importers; and 3 as agents selling vehicles on behalf of one or more dealers[14]. 1 respondent identified as a law firm acting on its own account. In addition, 25 respondents did not indicate main function / activity.[15]

As for the type of product concerned by the business of the respondents, 58 declared themselves to be active in the passenger cars segment; 53 in light commercial vehicles; 38 in heavy goods vehicles; 30 in buses and coaches; and, 9 in other.[16]

2.3.Contributions

The questions of the public consultation were structured around the five evaluation criteria of the Better Regulation Guidelines,[17] namely, effectiveness, efficiency, relevance, coherence and EU added value. The below summary follows this structure and only represents the views of those that participated in the consultation. As the content of this summary is not the result of a large-scale survey, statistics regarding number of respondents supporting a particular view may not be representative of the actual views of all market operators.

2.3.1. Effectiveness (*Have the objectives been met?*)[18]

In order to evaluate whether the motor vehicle block exemption rules have met their objectives, respondents were asked to answer several sets of questions.

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14 It should be noted that some of the respondents selected several main functions / activities.

15 These include (i) data publishers; (ii) insurance companies / associations; (iii) car dealers and repairers associations; (iv) garage equipment associations; (v) public entities; (vi) an association of importers of spare parts, accessories and garage equipment; (vii) an academic institution; (viii) an oil recycling company; (ix) an automotive industry staff association; (x) an automotive industry consultancy; and, (xi) a competition lawyers association.

16 Some of the respondents selected several segments and 26 respondents did not specify the product concerned by their business.

17 The better regulation requirements are about designing and evaluating EU policies and laws transparently on the basis of evidence and the views of stakeholders and citizens. They are applicable to all policy areas and aim for targeted and proportionate regulation that does not go further than required to achieve a given objective, while bringing benefits at minimum cost.

18 Respondents which did not provide any reply to any of the questions of the "Effectiveness" section are not taken into account in the graphs below.

Intensity of competition

The first question of this set enquired whether respondents believed that **competition in new motor vehicle distribution had intensified, weakened or stayed the same since 2010**.

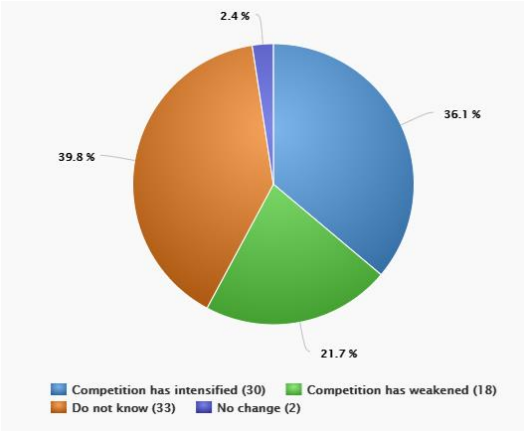


Figure 1 – Changes in intensity of competition in the new motor vehicles distribution sector

The group of respondents claiming that competition has intensified[19] referred to issues such as: (i) the increasing number of brands of motor vehicles in the EU market; (ii) increasing direct sales by VMs; (iii) more diversity in terms of product variety (e.g., hybrid, plug-in hybrid, battery electric, hydrogen, etc.); (iv) more offer in some technologies (e.g., powertrain technology); (v) multiple sales channels; (vi) increase of vehicle use (e.g., leasing, sharing or renting); (vii) easier access to information on new vehicles, spare parts and service agreements; (viii) more leverage of fleet operators; (ix) the growth of repairer networks; (x) the impact of COVID-19 on demand and, thus, on competition; and, (xi) the better access to data thanks to publishers.

The group of respondents claiming that competition has weakened[20] pointed at: (i) consolidation of the market; (ii) large groups of dealers continuing to grow, while numbers of SME dealers continues to decrease; and, (iii) the lack of a level playing field, reducing real competition.

[19] Primarily, associations representing vehicle dealers, importers or manufacturers, but also companies (mainly parts manufacturers and dealers).

[20] Primarily, associations representing vehicle importers and part dealers, but also companies (mainly vehicle leasing/rental companies and repairers).

The second question of this set enquired whether respondents believed **competition in repair and maintenance services for motor vehicles had intensified, weakened or stayed the same since 2010**.

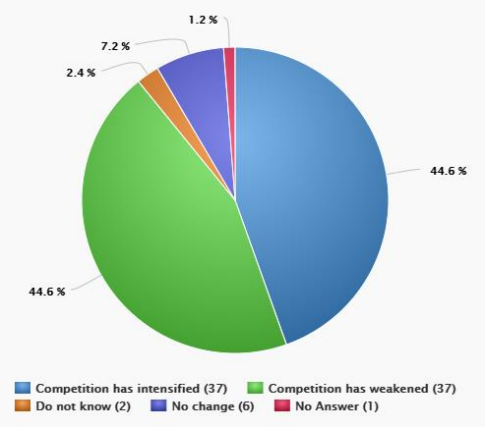


Figure 2 - Changes in intensity of competition in R&M

The group of respondents claiming that competition has intensified[21] referred to a number of factors to justify their views, such as (i) e-commerce; (ii) VBER/MVBER rules; (iii) growth in the business of independent aftermarket ("IAM") operators; (iv) on-line reviews of repairers and more price transparency; (vi) authorised repairers' provision of aftersales services for several brands; (vii) an increase in competition between authorised and non-authorised repairers; and, (viii) pressure from leasing / rental companies, which want to build up their own service networks.

The group of respondents claiming that competition has weakened[22] pointed, among other things, at (i) issues faced in accessing technical information (restrictions/too cumbersome/too expensive); (ii) restrictive warranty terms; (iii) the decreasing number of repairers in some European regions; (iv) captive spare parts and requirements to activate spare parts after installation; (iv) restrictions on access to tools, diagnosis, digital updates and software; and, (vi) technological developments in new vehicles making it harder for small independent repairers to provide their services effectively and affordably.

[21] Primarily, associations representing vehicle dealers, VMs or part manufacturers, but also companies (mainly vehicle and part dealers).

[22] Primarily, associations representing vehicle and part dealers, importers and agents, but also companies (mainly repairers and dealers).

The third question of this set enquired whether respondents believed **competition in the distribution of spare parts for motor vehicles had intensified, weakened or stayed the same** since 2010.

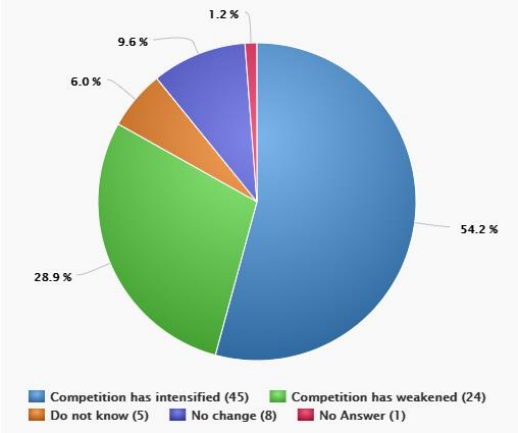


Figure 3 - Changes in intensity of competition in spare parts distribution

The group of respondents claiming that competition had intensified[23] noted, for example, (i) the positive impact of MVBER; (ii) that the growth of e-commerce options boosts price competition; (iii) the increasing demand for remanufactured/recycled parts; (iv) that big new players had entered the EU parts distribution market (e.g., LKQ); and, (v) that although for many spare parts competition had increased, competition issues remained with regard to high added value spare parts (e.g., captive parts), parts where logos are displayed, parts requiring activation after installation, and vehicle glass (especially for new vehicles).

The group of respondents claiming that competition had weakened[24] pointed, among other things, at (i) barriers for data publishers to access information on spare parts; (ii) VMs hindering the capacity of their networks to buy spare parts from independent suppliers; (iii) a significant increase in prices of spare parts in some Member States (e.g., France); and, (iv) fewer operators in the spare parts distribution market as a result of mergers.

[23] Primarily, associations representing vehicle and part dealers or VMs, but also companies (mainly part dealers).

[24] Primarily, associations representing vehicle importers and part manufacturers, but also companies (mainly repairers).

Scope of the exemption

The first question of this set asked respondents whether they considered the **MVBER threshold to still be appropriate today**.

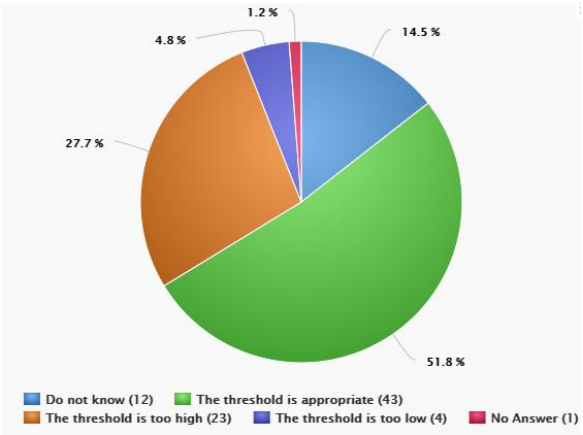


Figure 4 – Appropriateness of MVBER's threshold

Some respondents considering the threshold to be appropriate expressed the view that there is no reason to depart from the 30% market threshold for the market of new cars, whereas for the aftermarket the current approach of calculating market share for each brand separately means that, in practice, the threshold has little effect, since few agreements fall below it. Some respondents also pointed out that the threshold could be reconsidered for VMs or importers engaging in dual distribution. Some respondents advanced the view that the MVBER and/or SGL should stipulate that the large majority of single-branding obligations could not benefit from the block exemption.

Respondents considering the threshold to be too high[25] argued, for example, that the threshold should be lowered to 20%, due to (i) the increase in direct sales by VMs; (ii) the fact that very few players actually reach 30% market shares (e.g., important groups with significant market power hold market shares very close to 30%); or (iii) the fact that lowering the threshold could improve access to the original equipment manufacturers ("OEMs") networks for sales and aftersales services. Other respondents believed that the current threshold had had no effect on anti-competitive behaviour and that they would therefore suggest to lower it.

Respondents considering the threshold to be too low[26] explained, for example, that the 30% threshold seemed 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

[25] Primarily, associations representing parts dealers and manufacturers, but also companies (mainly part dealers and repairers).

[26] Associations representing VMs, dealers and importers, a vehicle importer and a company active in the mineral-oil market.

(ii) the market shares of authorised repairers (even if legally they are separate companies) were attributed to VMs or if these were used as a proxy for the position of VMs on the upstream market, as this would entail that VMs' agreements regarding repair, maintenance and spare parts would not benefit from the exemption.

The second question of this set asked respondents to identify **any other elements,** besides the current threshold criterion, **on which the exemption should be made conditional**.

With the exception of VMs' associations, which argued that adding more conditions would create legal uncertainty, a majority of respondents identified conditions that could be added for agreements to benefit from the exemption. Many parts dealers, parts manufacturers and repairers referred to the need to make access to technical information as a condition to benefit from the exemption or, as an alternative, to recognize the failure to provide such access as a competition law violation. Another point raised by these respondents was that the misuse of warranties should be deemed as a violation of competition law or, at least, result in the loss of the benefit of the exemption. A few parts manufacturers and parts dealers argued that absence of restrictions on the freedom of choice by dealers and end users should be a condition for the exemption to apply. Some dealers and repairers also asked for direct sales by VMs to be capped at 20% of the overall sales volumes of each VM.

An association of the vehicle leasing / rental sector argued that the "end user" status of leasing companies should be mentioned explicitly in the VBER and MVBER, as currently it is only found in the SGL. The exemption should be made conditional on (i) OEMs not discriminating between end users; (ii) OEMs not applying registration and use requirements; (iii) OEMs not requiring retention periods for vehicles; and, (iv) purchasers of vehicles not being obliged by OEMs to provide the name of the end customer. An oil/lubricants company mentioned that the analysis (of the market share threshold) should take account of VMs' market shares for both car sales and servicing for a better understanding of the impact on the market. Finally, a dealer/repairer argued that the exemption for the sale of new cars should be conditional on the admittance to the authorised network of all repairers that meet the VM's selection criteria.

The third question of this set asked respondents whether they had encountered any **types of vertical restriction in the motor vehicle sector that the VBER / MVBER do not list as *hardcore*** but which, in the view of the respondent, should nonetheless be considered as such.

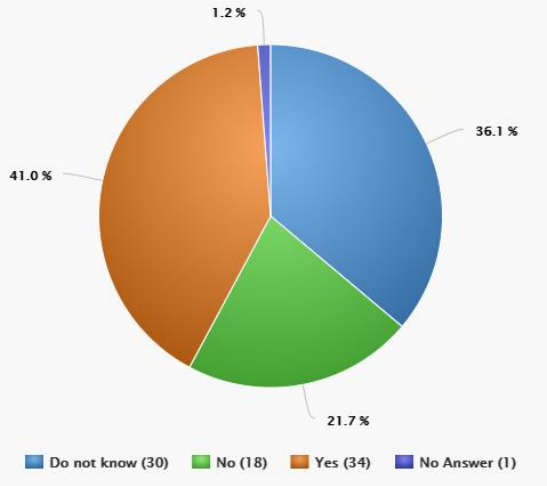


Figure 5 – Restrictions not listed as hardcore but that should be considered as such

The respondents which replied affirmatively to this question[27] identified the following practices as vertical restrictions that should be considered as *hardcore*: (i) direct or indirect quantitative criteria on the access to authorised networks (including refusal of access when quality criteria are met); (ii) restrictions on access to technical information and in-vehicle data for aftermarket operators (including data publishers); (iii) bundling sales and aftersales markets, for example, by offering inclusive maintenance plans by default, which allegedly tie the sale of new cars to the use of specific aftermarket providers, or by including both sales and aftersales functions within the same contracts, which is then terminated; (iv) refusing to license certain rights necessary to allow suppliers to offer spare parts to the independent channel; (v) restrictions on the sale of brands from different suppliers; (vi) including terms in warranties that require the use of VMs' brands of spare parts in respect of replacements that are not covered by the terms of the warranty; and (vii) restrictions that were included in Article 4.2 and Article 4.1.(k) of Regulation 1400/2002.

The fourth question of this set asked respondents to indicate whether they had experienced any **types of vertical restriction in the motor vehicle sector that the VBER did not list as excluded** but which, in their experience, should nonetheless be considered as such.

The majority of respondents replied negatively to this question (46).[28] The minority of

[27] Although the profile of respondents replying in this sense is very diverse, none of the VMs associations participating in the consultation replied affirmatively to this question.

[28] 20 respondents declared not to know and 3 did not provide an answer.

respondents (14)[29] which replied affirmatively to this question identified some practices that should be considered as excluded restrictions. For example, a couple of respondents mentioned that if the following restrictions are not added as *hardcore*, they should at least be considered as excluded: (i) OEMs discriminating between end-users; (ii) OEMs making sales conditional on registration and use requirements; (iii) OEMs requiring retention periods for vehicles; (iv) purchasers of vehicles being obliged by OEMs to provide end customer names; and, (v) a lack of fair access to in-vehicle data for leasing / rental companies and other stakeholders in the motor vehicle aftermarket.

Another respondent stated that, to improve legal certainty, clauses that impose the use of original parts or authorised-only repair/maintenance services beyond the legal guarantee period for brands with aftermarket shares above a certain threshold should be included in the MVBER or VBER as an excluded restriction. Impediments to accessing vehicle software were similarly suggested as a potential future excluded restriction. Finally, some respondents said that the specific conditions included in the previous MVBER should be reintroduced and that direct sales by VMs should be capped.

The fifth question of this set asked respondents to identify any **types of vertical restriction in the motor vehicle sector that the VBER / MVBER listed as *hardcore* but which, in their experience, should not be considered as such**.

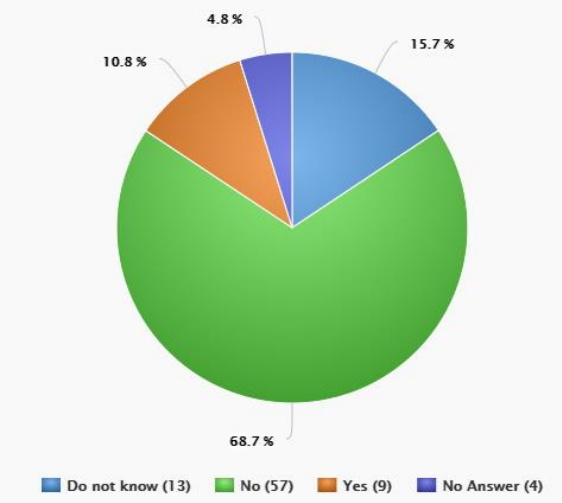


Figure 6 – Current hardcore restrictions that should not be considered as such

The majority (6) of respondents indicating that some of the current *hardcore* restrictions should

[29] This group of respondents included (i) some vehicle dealers and their associations; (ii) some parts manufactures/dealers and their associations; (iii) some repairers and their associations; (iv) a vehicle leasing association; (v) an association of competition law attorneys; (vi) an association of companies active in equipment for vehicles and (vii) a car data consultancy.

no longer be classified as such[30] referred to resale price maintenance ("RPM") (Article 4(a) VBER). Some of these pointed out that although RPM is currently permitted when new products are launched, companies applying RPM in this manner run the risk of losing the exemption for their entire agreement if the Commission finds that on the facts, the RPM in question is caught by the *hardcore* provision. This allegedly creates a disincentive for VMs to use RPM in these cases even though it can create efficiencies. Since the same should be true in other sectors, these respondents considered that the matter would therefore best be addressed in the review of the VBER.

Some of these respondents (4) also referred to the restriction on parts/tool/equipment suppliers' ability to sell to authorised/IRs/distributors or end users (Article 5(b) MVBER). However, none of these elaborated on the reasons as to why this excluded restriction should no longer be considered as such. A few respondents (2) referred to: (i) territorial/customer restrictions (Article 4(b) VBER); (ii) the restriction of sales to end customers by members of a selective distribution system (Article 4(c) VBER); (iii) the restriction of cross supplies within a selective distribution system (Article 4(d) VBER); (iv) the restriction of component suppliers' ability to sell components as spare parts to end users or repairers (Article 4(e) VBER); (v) the restriction of sales of spare parts by members of a selective distribution system to IRs (Article 5(a) MVBER); and, (vi) the restriction of component/part suppliers' ability to place their trademark/logo on the components/parts supplied (Article 5(c) MVBER).

Although in most cases no explanations were given as to why these restrictions should not be excluded from the block exemptions, one respondent did elaborate on the territorial/customer restrictions. In particular, this respondent noted that, in its view, in the context of selective distribution, there is a lack of clarity as to whether setting sales objectives and penetration goals in respect of an assigned territory could amount to a territorial restriction. This respondent pointed out that such territorial obligations are accepted in franchising agreements. This raises the question of whether franchising agreements may be used in the distribution of new cars.

The last question of this set asked respondents to identify **any types of vertical restriction in the motor vehicle sector that the VBER lists as excluded but which, in the respondents' view, should not be considered as such.**

[30] Primarily VMs associations, but also an association of competition lawyers, a car data consultancy and a parts manufacturer.

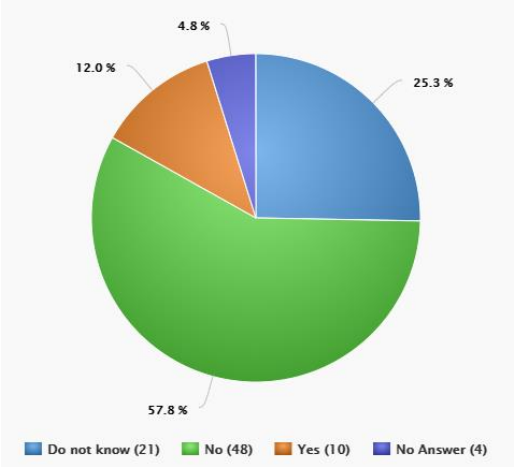


Figure 7 - Current excluded restrictions that should not be considered as such

With regard to (i) the non-compete/single-branding obligation (Articles 5(1)(a) and 5(2) VBER) and (ii) the restriction of sales of particular competing suppliers by members of a selective distribution system (Article 5(1)(c) VBER), certain of the respondents declaring that some of the current excluded restrictions should no longer be classified as such[31] mentioned the desirability of obliging manufacturers to permit their dealers to sell other brands as, in their view, this would increase consumer choice. Some other respondents referred to the post-term non-compete obligation (Articles 5(1)(b) and 5(3) VBER) as a practice that should no longer be considered as "excluded restriction", however, no specific explanations were provided to support this position.

Prevalence of particular restrictions

The first question of this set aimed at verifying **whether the motor vehicle block exemption rules achieved the following specific objectives** to the sector.

On ensuring access to vehicle retail and repair markets for VMs wishing to enter new markets or expand their market presence, out of the respondents that provided their views on this objective,[32] a majority considered that this objective had been achieved (14) or partially achieved (9). Only a few respondents (3) declared that, in their view, this objective had not been achieved. None of the respondents replying that this objective had either not been achieved or that it had only partially been achieved provided specific explanations for their positions.

On protecting competition between dealers of the same brand, out of the respondents that

[31] Primarily, associations of vehicle dealers, parts dealers and repairers.

[32] 43 respondents declared that this objective was not relevant to them, 11 declared not to know and 3 did not provide an answer.

provided their views on this objective,[33] a majority considered that the objective had been achieved (11) or partially achieved (15). Some respondents (15) declared that, in their view, this objective had not been achieved. Some respondents considering that this objective had either not been achieved or had only partially been achieved observed that intra-brand competition had decreased due to, among other things, (i) the removal of the sector-specific block exemption from agreements for new car sales which, in the view of certain respondents, has increased the dependence of distributors on VMs; (ii) growing concentration and mergers between OEMs; and, (iii) the increasing number of dealerships that are owned by VMs. In addition, another argument raised was that with the increasing amount of vehicle data generated and the wireless technologies included in vehicles, OEMs tend to create an advantage for their brand networks over the IAM.

On preventing restrictions on cross-border trade in motor vehicles, out of the respondents that provided their views on this objective,[34] most declared that it had been achieved (23) or partially achieved (5). Some (9) expressed that, in their view, this objective had not been achieved. Some of the respondents considering that this objective had either not been achieved or had only partially been achieved explained that, in their view, manufacturers had effectively segmented the EU Single Market into national markets, thereby obstructing any real EU-wide competition; and that intra-brand competition between dealers only exists at the national level.

On enabling independent repairers to compete effectively with authorised repairers, out of the respondents that provided their views on this objective,[35] a majority opined that either this objective had been partially achieved (46) or fully achieved (11). Some declared that this objective had not been achieved (19). Some of the respondents considering that this objective had either not been achieved or had only partially been achieved referred to (i) restrictions on access to OEM-branded (captive) parts (e.g., issues to source them efficiently and in a cost effective manner through independent distributors); (ii) limitations on independent publishers' access to full/up-to-date technical information; (iii) OEMs preventing access to aftermarket diagnostics technologies (this allegedly leads to independent repairers being mainly focused on basic repairs/common maintenance, while more sophisticated interventions are conducted by authorised repairers); (iv) restrictions on access to in-vehicle data and security-related functions; (v) misuse of warranties by VMs to push consumers towards their network of authorised repairers.

On protecting competition between authorised repairers of the same brand, out of the

[33] 35 respondents declared that this objective was not relevant to them, 5 declared not to know and 2 did not provide an answer.

[34] 38 respondents declared that the objective was not relevant to them, 5 declared not to know and 3 did not provide an answer.

[35] A few respondents declared that the objective was not relevant to them (2), that they did not know (4) or did not provide an answer (1).

respondents that provided their views on this objective,[36] the majority said that it had been fully achieved (14) or partially achieved (30). Some (17) believed it had not been achieved. Some of the respondents considering that this objective had either not been achieved or had only partially been achieved referred to (i) refusals to allow access to official networks or termination of contracts that provide for both vehicle sales and aftersales functions, thereby reducing intra-brand competition; (ii) application of disadvantages (bonus schemes, audits) if authorised repairers do not use official spare parts; (iii) intra-brand competition between authorised repairers is limited to national level.

On ensuring spare parts suppliers' access to the aftermarket, out of the respondents that provided their views on this objective,[37] most indicated that this objective had been fully achieved (16) or partially achieved (43). Some (11) considered that it had not been achieved. Some of the respondents considering that this objective had either not been achieved or had only partially been achieved referred to (i) the fact that although authorised repairers within the same brand do, in theory, have the right to diversify their sourcing, in practice, they remain largely dependent on the OEMs, mainly for commercial reasons (e.g., bonuses/rebates/audits); (ii) restrictions on the development of aftermarket spare parts or their remanufacturing due to, for example, restrictions brought about by a lack of access to OEMs' parts coding or the integration of logos in the design; (iii) the hampering of Tier1 suppliers by 'tooling arrangements' and the introduction by the OEMs of electronic codes for spare parts; (iv) spare parts suppliers being increasingly requested to transfer IP titles and tooling rights to OEMs; (v) shortages of particular spare parts (e.g., vehicle glass, especially, for new models) as manufacturers often reserve their production for VMs and their authorised dealers, which results in a shortage for the aftermarket and, therefore, limited choice and potentially increased costs for consumers.

The second question of this set asked respondents **whether, since 2010, they had encountered a number of specific restrictions in the context of agreements to which them or their clients were party**.

On resale price maintenance (Article 4(a) VBER and paragraphs 48-49 and 223-229 VGL), only 12 respondents reported encountering this restriction in their agreements, and only 4 of these stated to have contested it. Out of the latter, 2 acknowledged that the dispute had been resolved through negotiation/arbitration and none of them indicated that the dispute had ended up in court.

[36] A fair share of respondents replied that the objective was not relevant to them (10), that they did not know (9) or did not provide an answer (3).

[37] A few indicated that either they did not know (10), it was not relevant to them (2) or did not provide an answer (1).

On restriction of authorised dealers' ability to sell motor vehicles or spare parts in other Member States (Article 4(b) VBER, paragraphs 50-55 VGL and paragraphs 48-50 SGL), only 7 respondents reported finding this type of restriction in their agreements. 6 out of these respondents marked that they had contested the restriction and 3 mentioned that the dispute had been resolved through negotiation/arbitration. None of the respondents stated that their disputes regarding this type of restriction had ended up in court.

On the restriction of authorised dealers' ability to sell motor vehicles or spare parts to end customers (Article 4(c) VBER, paragraphs 56-57 VGL and paragraphs 51-52 SGL), while 22 respondents stated to have encountered this type of restriction in their agreements, only 6 of them declared to have contested it. Out of the latter, 3 said to have encountered a solution through arbitration/negotiation and 2 replied by saying that "sometimes" they had resolved the dispute through such means. None of the respondents declared that their disputes on this issue had ended up in court.

On the restriction of authorised dealers' ability to sell motor vehicles or spare parts to other dealers within the same distribution system (cross-supplies) (Article 4(d) VBER and paragraph 58 VGL), 3 respondents reported having encountered this restriction in their agreements. 2 of them said they had contested the restriction and the same 2 mentioned the dispute had been resolved through arbitration/negotiation. None of the respondents indicated that the dispute had ended up in court.

On the restriction of original equipment suppliers' ability to sell spare parts to end customers or repairers (Article 4(e) VBER and paragraph 59 VGL), 34 respondents reported having encountered this restriction in their agreements. However, only 7 acknowledged having contested the restriction and 6 of them declared to have resolved the dispute through negotiation/arbitration. None of the respondents indicated that the dispute had ended up in court.

On the restriction of authorised dealers' ability to sell spare parts to independent repairers (Article 5(a) MVBER and paragraph 22 SGL), whereas 26 respondents reported having encountered this restriction in their agreements, only 6 mentioned that they had contested it. Moreover, 4 of them said that the dispute had been resolved through negotiation/arbitration and none of them declared that the dispute had gone to court.

On the restriction of components / parts suppliers' ability to place their trademark / logo on the components / parts supplied (Article 5(c) MVBER and paragraph 24 SGL), 19 respondents reported having encountered this restriction in their agreements. Out of these respondents, only 1 reported having contested the restriction but did not specify whether the dispute had been resolved through negotiation/arbitration and stated that the dispute had not gone to court.

On single-branding / non-compete obligations (Articles 5(1)(a) and 5(2) VBER, paragraphs 66-67 and 129-150 VGL and paragraphs 26 and 28-41 SGL), 33 respondents indicated that they had encountered this type of restrictions in their agreements. 9 of these respondents reported having contested the restriction and 7 of them said the dispute had been resolved through negotiation/arbitration. None of the respondents declared that the dispute had gone to court.

On post-term non-compete obligations (Articles 5(1)(b) and 5(3) VBER and paragraph 68 VGL), only 1 respondent declared to have encountered this restriction in its agreements. This respondent said the dispute had been resolved through negotiation/arbitration and, therefore, had not ended up in court.

On the restriction on authorised dealers not to sell motor vehicles or spare parts from particular competing suppliers (Article 5(1)(c) VBER, paragraphs 69 and 182 VGL and paragraph 27 SGL), 6 respondents indicated that they had encountered this type of restriction in their agreements. 5 of them indicated that it had contested the restriction and 2 said the dispute had been resolved through negotiation/arbitration. None of the respondents declared that the dispute had gone to court.

On the restriction of independent operators' access to technical information (paragraphs 62-68 SGL), 46 respondents replied that they had encountered this restriction in their agreements. 29 of them said they had contested the restriction and 7 said that (sometimes) the dispute had been solved through negotiation/arbitration. 3 respondents said that the dispute had gone to court but that the court had not found that restriction breached EU competition law.

On misuse of warranties (paragraphs 49 and 69 SGL), 41 respondents replied that they had encountered this type of restriction and 32 out of them declared they had contested it. 23 respondents said that (sometimes) the dispute had been solved through negotiation/arbitration and 8 said that the dispute had gone to court. According to 5 respondents, in their cases the court found that the restriction was in breach of EU competition law.

On the restriction on the number of authorised repairers within a brand network (paragraph 70 SGL), 32 respondents indicated that they had encountered this type of restriction in their agreements. 25 of them declared to have contested the restriction and 6 said the dispute had been resolved through negotiation/arbitration. In 5 cases, respondents indicated that the dispute had gone to court and in 1 of these, the respondent said the court had found the restriction was in breach of EU competition law.

On the requirement that authorised repairers within a brand network also sell vehicles of the brand (paragraph 71 SGL), 7 respondents indicated that they had encountered this type of restrictions in their agreements and that all of them had contested it. 1 of these respondents said

that the dispute had been resolved through negotiation/arbitration and 5 said that the dispute had ended up in court. Only 1 respondent said that the court had found the restriction to be in breach of EU competition laws.

The third question of this set asked respondents whether they had encountered **any conduct on the part of a contractual partner that, in their view, served as an indirect means of achieving anti-competitive results**. A majority of respondents (52) replied "yes".[38] Some of the specific practices identified by the latter were:

- Restrictions to access technical information and in-vehicle data. One of the examples given by respondents was the provision of outdated or incomplete information which, according to these respondents, can result in an inability to perform repairs/maintenance, inaccurate/inefficient repairs, loss of trust in the independent data publishers that provide access to that information and, allegedly, even safety risks for drivers. Another issue raised was the slow processing of requests or the application of excessive fees for accessing technical information which, the respondents reported, can drive independent data publishers out of the business or prevent them from developing competitive products.
- Refusal to access the official network of repairers which, in the view of some respondents, results in a decrease in intra-brand competition.
- Bundling of captive and non-captive parts in sales to independent repairers.
- Anticompetitive application of bonus/rebates schemes and pricing/commercial terms, leading to the exclusion of competitors in the aftermarket. For example, discounts being refused if leasing companies offer vehicles for private lease may allegedly result in input foreclosure and limit competition on the private lease market. Decreasing basic discounts or increasing promotional campaigns has been alleged by these respondents to amount to indirect resale price maintenance.
- Obligations to register and use vehicles in the country of purchase can result in restrictions of the territory into which, or of the customers to whom, leasing companies may lease the contract goods.
- The misuse of warranties to (i) funnel consumers to authorised repairers, thereby *de facto* excluding independent repairers, or (ii) restrict parallel imports.
- Automatic cession/license of IP rights may make it impossible for OES to sell to the aftermarket.
- Direct sales by VMs (including online sales) puts authorised dealers at a competitive disadvantage, as they are not able to offer competitive prices to consumers. In addition, the fee paid to dealers for delivering and preparing a car that has been purchased directly

[38] Primarily associations representing parts dealers and vehicle dealers/importers, but also parts dealers, vehicle dealers and vehicle leasing rentals. Some respondents (14) replied that they had not encountered any such conduct, some declared not to know (12) and a few did not provide an answer (5).

from the VM is too small to make the dealers' business profitable.

- Termination of dealer contracts without giving reasons, even if the operator respects the criteria of the selective network. This results in less choice for consumers.
- The use of applications installed in cars to direct consumers to authorised dealers/authorised repairers rather than independent repairers in case of breakdown or necessary maintenance.
- Making OES obtain VMs' consent before using tooling paid by VM to make parts for direct aftermarket supply, such consent being usually subject to a payment on the part of the IAM for each part produced.
- Cartels between OES.
- Refusals on the part of VMs to supply spare parts to independent wholesalers.
- VMs failing to grant end-user status to leasing companies.

Finally, the last question of this set asked **whether there is there a code of conduct / practice** that applies to contractual relations between the respondents and their contractual partners in the motor vehicle sector. Most respondents said that there was no such code of conduct / practice (35), while some declared the opposite (25).[39]

Legal certainty: clarity for firms as to what the law means

The first question of this set asked respondents **whether, based on their experience, the motor vehicle block exemption rules have achieved legal certainty**.

A majority of respondents (48) considered that the aim had been achieved,[40] while some (15) believed the opposite.[41] The latter supported their views by referring, among other things, to: (i) self-assessment being difficult and costly for SMEs; (ii) distributors' increased dependence on manufacturers as a result of the removal of the sector-specific block exemption from contracts for the sale of new vehicles; (iii) the drop in basic margins and the increase in promotional campaigns by OEMs reducing distributors' to set their own prices; (iv) the low risk that those who commit anti-competitive practices will be sanctioned; (v) national courts not following the provisions of the MVBER and SGL; and, (vi) the removal of certain definitions/clauses that were present in the previous MVBER.

[39] A few declared not to know (12), that they had no contractual relations with other companies in the motor sector (6) or did not provide an answer (5).

[40] Primarily associations representing parts dealers, parts manufacturers and vehicle dealers, but also parts dealers, parts manufacturers and VMs replied in this sense. 17 respondents declared not to know and 3 did not provide an answer.

[41] Primarily associations representing vehicle dealers, but also individual undertakings (mostly vehicle dealers, parts dealers and repairers).

The second question of this set asked whether the **definitions contained in the motor vehicle block exemption rules have increased legal certainty** compared to a hypothetical situation in which no such rules existed.

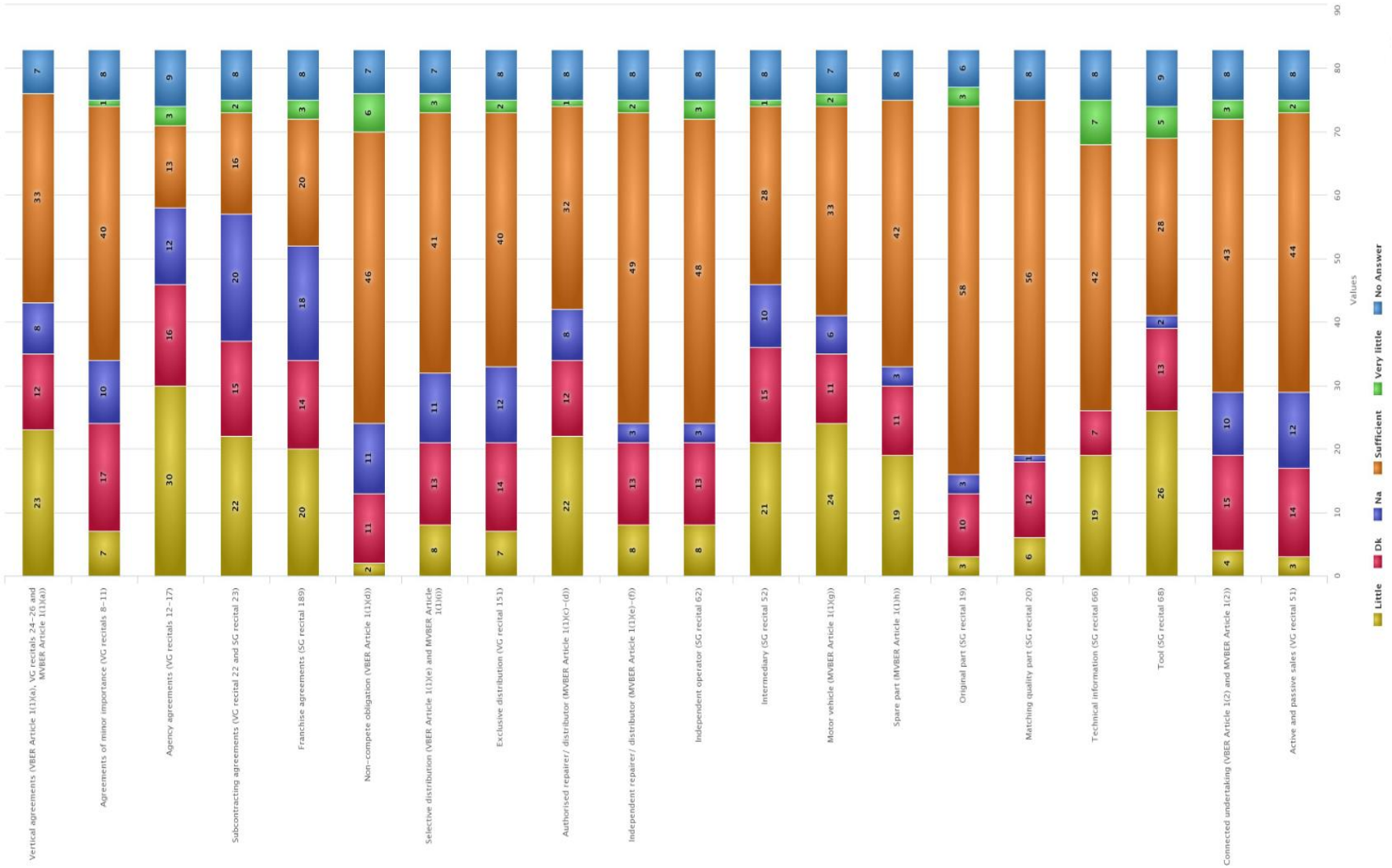


Figure 8 – Legal certainty achieved by definitions

As regards the definition of "vertical agreements" (Article 1(1)(a) VBER, paragraphs 24-26 VGL and Article 1(1)(a) MVBER), some of the respondents considering that the definitions had done "little" to increase legal certainty pointed out that (i) references to online and direct sales are missing; and that (ii) clarification was needed as to the circumstances under which agreements between dealers and online platforms may constitute "vertical agreements" for the purpose of the VBER.

As for the definition of "agreements of minor importance" (paragraphs 8-11 VGL), the few respondents which selected the option "little" or "very little" explained their view that (i) the market share threshold should not be 15% but rather 5%; and, that (ii) it could be useful to add some practical examples of cases where although *de minimis* threshold is not reached, the presence of a *hardcore* restriction nonetheless leads to the application of Article 101 of the Treaty.

On the definition of "agency agreements" (paragraphs 12-17 VGL), some of the respondents considering that this definition had done little or very little to increase legal certainty indicated that (i) the current rules seem too restrictive in that they prevent agents from undertaking "other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal"; (ii) as the difference between genuine agents and non-genuine agents is allegedly not sufficiently clear, it would be good to include some examples in the VGL; (iii) the term "commercial agent" should be defined, particularly in light of the increase in agency sales as well as sales over online platforms; and, (iv) the circumstances under which car dealers can be considered as agents rather than authorised distributors should be clarified.

Concerning the definition of "subcontracting agreements" (paragraph 22 VGL and paragraph 23 SGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty stated that the SGL are helpful on subcontracting restrictions but should nonetheless be updated to improve legal certainty.

With regard to the definition of "franchise agreements" (paragraph 189 VGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty referred to lack of clarity as to the possibility to use franchise agreements in the motor vehicle sector.

On the definition of "non-compete obligation" (Article 1(1)(d) VBER), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty mentioned that the previous MVBER did not apply to provisions obliging dealers to buy more than 30 % of their total purchases on the relevant market from one single supplier (such obligations were subject to individual self-assessment as to their compatibility with Article 101 of the Treaty). This provision no longer exists in

the current MVBER, with claimed adverse effects.

On "selective distribution" (Article 1(1)(e) VBER and Article 1(1)(i) MVBER), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty pointed out that this definition did not distinguish between qualitative and quantitative selective distribution.

As for the definition of "exclusive distribution" (paragraph 151 VGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty claimed that onerous requirements relating to corporate identity were reducing business opportunities available to dealers.

On the scope of the term "independent operator" (paragraph 62 SGL – the list of operators from whom "technical information" within the meaning of paragraph 65 should not be withheld), some of the respondents considering that this had done "little" or "very little" to increase legal certainty argued that the list should be expanded to include insurance companies.

As for the definition of "intermediary" (paragraph 52 SGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty argued that this definition was too strict for the opening given to such operators to be used in practice.

On the definition of "motor vehicle" (Article 1(1)(g) MVBER), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty referred to the fact that it needed to be updated to reflect technical developments (connectivity/digitalization), while others argued that a definition of "new vehicle" was needed.

With regard to the definition of "spare part" (Article 1(1)h) MVBER), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty argued that this definition should updated to reflect technical developments and that the word "component" should not be used, as this term is not normally used to describe certain goods included in the definition, such as lubricants. The suggestion would be to replace this word by "parts" and to define "parts" as "goods used for the assembly, repair and maintenance of a vehicle, as well as spare parts". According to these operators, a distinction between "repair parts" and "consumable parts" should also be considered.

On the definition of "original part" (paragraph 19 SGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty argued that the choice available to consumers and repairers would be fairer and prices would be more reasonable if the term "original parts" was also used for parts that did not bear the car manufacturer's brand, but were nonetheless produced by the

OES on the same production line as the parts used in the original equipment. This, it was argued by some, would improve the choice of consumers and repairers and reduce prices.

Regarding the definition of technical information (paragraph 66 SGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty pointed out that this definition could usefully be adapted to technical progress (so-called "digitalization"). These respondents argued that some terms in paragraph 67 SGL require more precise definitions such as (i) the description of the way in which technical information is being supplied (in particular what should be considered information "in a usable form"); (ii) the term "without undue delay"; and, (iii) under what conditions the price charged for access to technical information does "not discourage access to it". The definitions should take account of the specific situation of data publishers, whose needs differ from those of repairers. The definition should be amended and aligned with the definition included in the Type Approval Regulation 2018/858 ("TAR").

As for the definition of "tool" (paragraph 68 SGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty pointed out that this definition should also be updated as technical developments occur. The term "tools" is not defined clearly enough in paragraph 68 SGL. It should also include software codes for spare part learning.

With regard to "connected undertaking" (Article 1(2) VBER and Article 1(2) MVBER), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty indicated that this reference is arguably inconsistent with the definition of undertaking as an economic unit.

On the rest of definitions, the respondents which selected the option "little" or "very little" did not provide any specific explanations for their views.

The third question of this set asked respondents to evaluate **whether the provisions of the motor vehicle block exemption rules have increased legal certainty** compared to a situation in which no such rules existed[267].

[267] The paragraphs below contain the main comments raised by respondents. Comments have been classified manually by the Commission according to topic. Comments which were not clear have not been reflected in this section.

General provisions

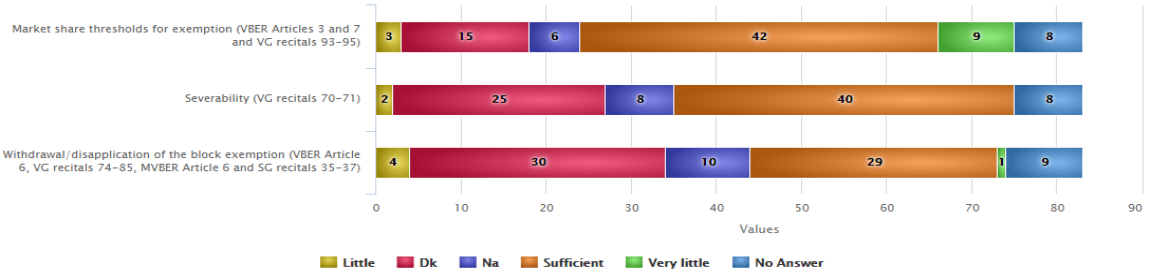


Figure 9 – Legal certainty achieved by general provisions

On market share thresholds for exemption (Articles 3 and 7 VBER and paragraphs 93-95 VGL), some of the respondents considering that this definition had done "little" or "very little" to increase legal certainty flagged that legal certainty is prevented by the fact that the high market share thresholds have little or no application in the motor vehicle market due to its fragmented structure. On severability (paragraphs 70-71 VGL) and the withdrawal/disapplication of the block exemption (Article 6 VBER, paragraphs 74-85 VGL, Article 6 MVBER and paragraphs 35-37 SGL), those respondents considering that this definition had done "little" or "very little" to increase legal certainty did not provided specific explanations for their position.

Hardcore restrictions

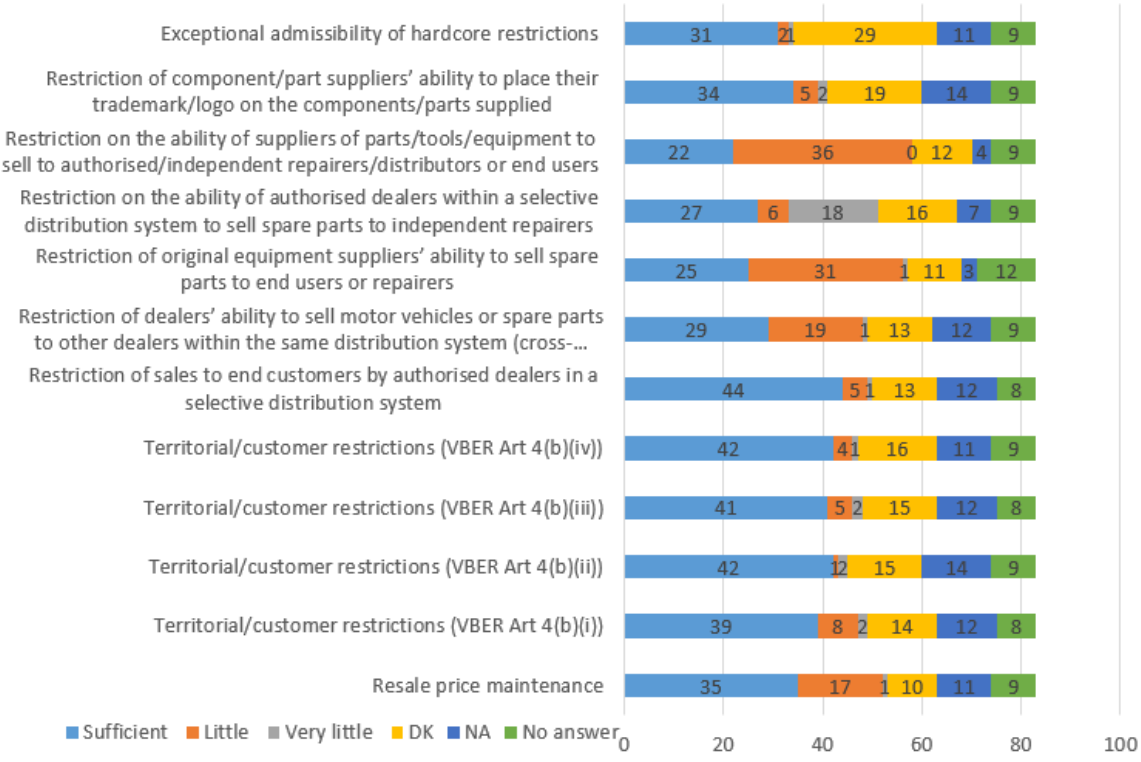


Figure 10 – Legal certainty achieved by hardcore restrictions

On resale price maintenance (Article 4(a) VBER and paragraphs 48-49 and 223-229

VGL), respondents which selected the option "little" or "very little" argued that resale price maintenance was justifiable in cases where new products or innovative services are launched. As the same should be true in other sectors, this matter would be best addressed in the review of the VBER. An association of dealers reported that maximum prices can turn into fixed prices in practice.

With regard to territorial/customer restrictions (Article 4(b)(i) VBER and paragraphs 50-54 VGL), some of the respondents which selected the option "little" or "very little" argued that the possibility for the supplier to restrict the sales of distributors to a clientele that the supplier has exclusively reserved for itself should be exempted only on condition that the sales made by the supplier to these customers do not represent more than 20% of the overall volume of its sales. In addition, they referred to the fact that manufacturers/suppliers may wish to sell directly to consumers online and may therefore curb authorised resellers' online sales by imposing disproportionate quality standards and platform bans. Further guidance on this point would be helpful.

On territorial/customer restrictions (Article 4(b)(iii) VBER and paragraphs 50 and 55 VGL), a respondent which selected the option "little" or "very little" mentioned that there was a lack of clarity in respect of obligations with a territorial dimension in selective distribution and as to the availability of franchising agreements. This respondent argued that clarity was necessary as to whether specific territorial obligations may be imposed.

As for the restriction of original equipment suppliers' ability to sell spare parts to end users or repairers (Article 4(e) VBER and paragraph 59 VGL), some respondents which selected the option "little" or "very little" mentioned that technical barriers (e.g., coding of spare parts and the requirement for software activation of replacement parts with OEMs' proprietary codes) currently limit Tier1 suppliers' ability to sell spare parts to end users/repairers/distributors. This effectively blocks the implementation of Article 4€ VBER/ paragraph 59 VGL. They also added that spare parts manufacturers often reserve their production for VMs and their authorised dealers, thereby resulting in a shortage for the aftermarket (e.g., in glass for vehicles) and limiting choice and potentially increasing costs for consumers.

On all the other *hardcore* restrictions, respondents which selected the option "little" or "very little" did not provide specific explanations for their position.

Specific vertical restraints

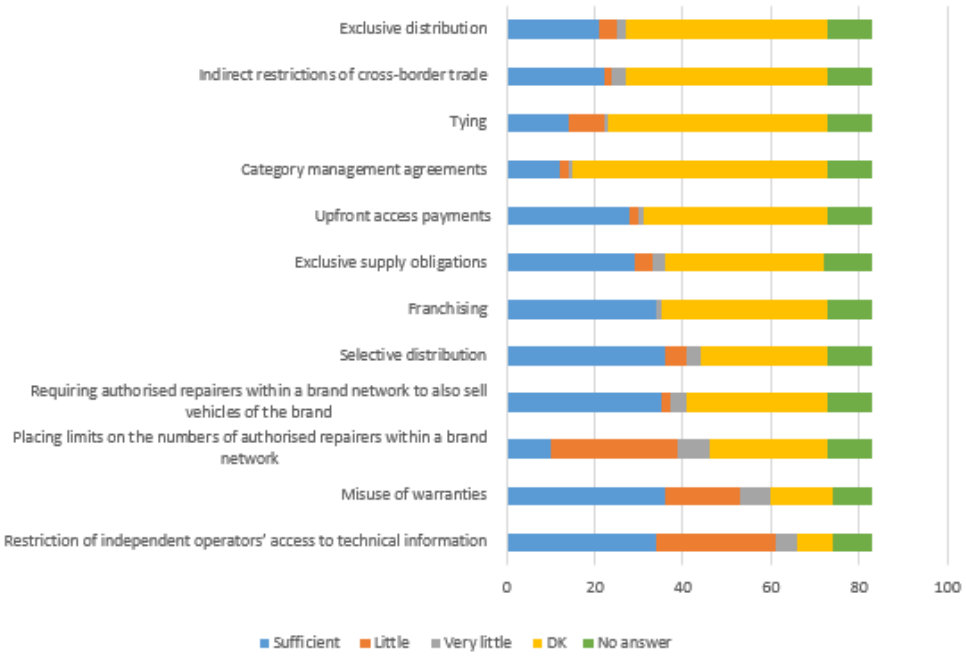


Figure 11 – Legal certainty achieved by specific vertical restraints

On the restriction of independent operators' access to technical information (paragraphs 62-68 SGL), many respondents provided their views:

- A data publisher advocated for a better definition of the format of technical information to be provided to independent operators (e.g., data publishers) who need to aggregate and process it. Paragraph 67 SGL only states that this information should be provided in a "usable form", without further details. It was argued that the term "usable form" should take into account the role of the respective independent operator in the supply chain and, therefore, should explicitly mean provision to publishers and others of mass/bulk data in the form of unrestricted electronically actionable datasets. In addition, MVBER rules should also clarify that any fees for technical information should be solely based on the actual costs stemming from the technical / organisational provision of access.

- A motorists' association referred to the tendency of VMs to classify parts as being "security parts" to make independent repairers' access to technical information more difficult. This concern was also echoed by data publishers, which stated that it should be clarified that technical information encompasses all information, including software and algorithms needed to perform any diagnostic job without impediments.

- The same motorists' association stated that independent operators have no control

over the costs charged by OEMs for accessing the in-vehicle data needed to provide repair/maintenance. It argued that disproportionate prices had a deterrent effect and limited fair competition between authorised and independent repairers. Moreover, a lot of cars are provided with a digital service booklet. Although the IAM is generally granted access to the VM tools for updating the booklet, technological and bureaucratic barriers are high in that each VM has different requirements for access, uses different software and has different handling processes.

- A repairers' association expressed that the lack of consistency of platform and platform structure as well costing models made accessing VM technical information time and cost prohibitive and detrimental to consumer choice.

- An EU citizen suggested that there should be guidelines in which it is more precisely defined what further training and diagnostic tools must be accessible for independent repairers. Independent repairers should have access to the in-vehicle generated service data and thus should be able to carry out remote maintenance. In-vehicle generated data should be stored centrally, independently of the manufacturer.

- An association representing dealers, intermediaries, agents, leasing/rental, repairers, parts' dealers asked for more clarity with regard to access to in-vehicle data. It argued that access to all information related to parts, reset error codes, update software, electronic central units ("ECUs"), equivalences between OEM and IAM parts, VIN, etc. should be guaranteed.

- Some parts dealers, repairers and their associations said that the definition of "technical information" should be updated more explicitly following the increased interconnectivity of components inside the vehicle and digitization. Regarding activation codes and software needed to activate spare parts, these respondents mentioned that VMs are installing increasingly proprietary security measures (for example, coding (QR) or software) needed to activate spare parts and systems (e.g., for setting up an engine after changing nozzles). To enable the consumer to have safe and secure and competitive aftermarket spare parts, these codes must be provided / licensed to Tier1 and aftermarket suppliers to ensure safe and secure interoperability and to enable direct use of multi-brand tools.

- A Chamber of Commerce suggested that the SGL should refer to the definitions and detailed provisions of the TAR that govern access to repair and maintenance information. There should be only one definition of "repair and maintenance information" in EU law.

On the misuse of warranties (paragraph 69 SGL), respondents identified as an importer/dealer/repairer and an academic institution mentioned that consumers are still dissatisfied with the fact that repair and maintenance work that is not covered by the

warranty can, in practice, only be carried out by authorised repairers. These respondents also alleged that garage owners were also still obliged to use original spare parts from the manufacturer. In addition, they submitted that warranties on new and second hand cars are used to pressurise consumers to have repair and maintenance services carried out by authorised repairers. Associations representing importers, dealers, intermediaries, leasing/rental and repairers have argued that the market requires clarification as to whether authorised repairers my legitimately refuse to honour the warranty on vehicles purchased from independent resellers, as current warranty practices deter parallel trade in new motor vehicles. A repairer also suggested that there should be more legal certainty with regards to warranties on second-hand vehicles.

On placing limits on the numbers of authorised repairers within a brand network (paragraph 70 SGL), VMs have flagged that courts in different countries are giving diverging assessments of the extent to which VMs 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, VMs see a significant risk of underinvestment if they are not allowed to place quantitative limits on the number of authorised repairers. 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 supplier to re-approve a repairer meeting the qualitative selective criteria should constitute a *hardcore* restriction, without it being necessary to demonstrate that such a refusal of approval falls within the framework of a "general policy" of the supplier.

With regard to requiring authorised repairers within a brand network to also sell vehicles of the brand (paragraph 71 SGL), some respondents identifying themselves as importers, dealers, parts dealers and repairers as well as an academic institution have claimed that VMs put limits on the number of authorised repairers and refuse access to companies that do not also wish to sell new cars.

As for exclusive supply obligations (paragraphs 192-202 VGL), some parts manufacturers, parts dealers and their associations have raised the example of a major oil company, partner of an OEM, which only supplies the authorised network with the lubricant "recommended" by the OEM for a certain period of time. These respondents indicate that as a consequence, often during this period, no other product matching the OEM's technical specifications is available on the market.

On indirect restrictions of cross-border trade (paragraphs 49-50 SGL), some associations representing importers, dealers, intermediaries, leasing and rental, and repairers have stated that VMs continue to market new cars without always supplying the Certificate of Conformity ("CoC") in paper format. As a result, consumers, agents and both authorised as well as independent retailers struggle with cross-border transactions due to the missing CoC, since the car in question may not be registered in

the target country without it.

On the rest of specific vertical restraints, respondents which selected the option "little" or "very little" did not provide specific explanations on their position.

The fourth question of this set asked respondents to point out any other areas where, in their view, there is a **lack of legal certainty**.[268]

A competition lawyers' association submitted that there is significant lack of clarity as to when spare parts and services would merit defining as a separate relevant market. According to this association, market evolution suggests that a greater proportion of customers consider the aftermarket in their initial choice. In the view of this association, it would be appropriate to maintain a block exemption regulation and guidelines, while avoiding the adoption of frequently asked questions ("FAQ") or similar. Associations of dealers/importers argued that dealers should have the freedom to sell their dealership to any other dealer (of the same brand), and that this should be mentioned in the MVBER rules, and that the exemption should be once more removed from contracts that do not contain specific provisions on "dealer protection".

The last question of this set concerned paragraph 66 SGL, which includes a non-exclusive **list of items commonly provided to authorised repairers and that should be considered as technical information that should not be withheld from independent operators. Respondents were asked to identify any** other items provided to authorised repairers that, in their view, should have been considered as technical information for the purposes of the motor vehicle block exemption rules.

Some of the main items referred to by respondents were: (i) digital service/maintenance records and over-the-air technology and services; (ii) information embedded in OEMs' proprietary tools; (iii) the standardized billing times for service; (iv) with respect to connected and automated vehicles: the diagnostics, software update and security-related functions; (v) technical specifications for lubricants and other fluids used for vehicle maintenance; (vi) human machine interface (HMI) functions and resources; (vii) OBD; (viii) mileage (odometer) reading, days and miles to next maintenance service, longitude & latitude, g-forces, emission data; (ix) information to code and calibrate advanced driver assistance systems; (x) in-vehicle consumer "personal" data, provided that the consumer/individual has agreed to share it; (xi) apps on-board the vehicle (e.g., to inform the customer about upcoming repair and maintenance requirements); (xii) prices for VM-branded parts; (xiii) cybersecurity information; (xiv) information about EVs (e.g., electrical motors, battery pack, battery status, cable, electrical components which work on 15V or higher); and, (xv) training provided directly by VMs (e.g., face-to-face or online training).

[268] Points included as reply to this question that were already mentioned in the replies to the previous set of questions have not been included here to avoid repetition.

In addition to the specific items above, some respondents also included a few general comments. Several referred to the format and timescale for the release of technical information. In particular, they argued that VMs should release accurate and updated technical information to independent operators within a defined period of time after making it available to their own network. In their view, full, open and clear release notes should be available in a common format so independent repairers can quickly establish which is the latest version of a given item of technical information. A few respondents argued that it would make sense to refer in the SGL to the definition and detailed provisions of the TAR governing access to repair and maintenance information. Some others underlined that the reference to the fact that "the notion of technical information is fluid" included in the SGL is very important, but is not equally echoed in the TAR.

2.3.2. Efficiency *(Were the costs involved proportionate to the benefits?)*[269]

The first question of this set asked respondents to identify the **types of costs incurred when assessing whether vertical agreements can benefit from the motor vehicle block exemption rules** (namely the VBER, the MVBER, the VGL and the SGL).

Most respondents referred to costs for external counsel and internal administrative costs, followed by costs for internal lawyers. A minority mentioned that they had not incurred any costs or that they had incurred other types of costs. A few did not provide an answer to this question.

The second question of this set asked respondents to provide an **estimate of the amount of such costs on an annual basis both in terms of value (in EUR) and as a percentage of the respondents' turnover**.

Among the respondents that actually provided an estimate (9),[270] costs seem to range from EUR 10,000 to EUR 140,000. On the lower range of costs, there is an insurance company (EUR 10,000 to 15,000); a parts' manufacturer/dealer (EUR 20,000); a parts manufacturers' association (EUR 20,000 to 40,000, corresponding to 1% of the association's budget[271]); a company which reported itself to be a dealer, parts' dealer, and repairer (EUR 20,000); and a small company which identified itself as a dealer, parts dealer and repairer (around EUR 40,000[272]). At the higher range of reported costs was an association representing dealers, importers and repairers (EUR 100,000[273]); an

269 Respondents which did not provide any reply to any of the questions of the "Efficiency" section are not taken into account in the graph below.

270 A majority of respondents (45) did not reply to this question. Some declared not to know, being unable to make such an estimate or replied with "N/A", and some provided a reply that did not address the actual question.

271 This association attributed the above costs to external support for the evaluation of the VBER and MVBER.

272 This respondent indicated that their insurance had covered around EUR 30,000 of these costs.

273 The association specified that this amount corresponded to a dealer's cost for cartel proceedings.

association representing parts dealers and repairers (over EUR 100,000); and a large car parts dealer (EUR 140,000, corresponding to 0.1% of its turnover). Finally, two respondents only provided the requested data as a percentage of their sales and profit: both an association representing dealers, importers and repairers, and an academic institution declared that these costs represented 1-5% of sales or 1-20% of profit. No VM provided figures on the costs incurred to assess the VBER/MVBER.

The third question of this set asked respondents to indicate **whether they consider costs to have been proportionate to the benefits that the motor vehicle block exemption rules have brought**.

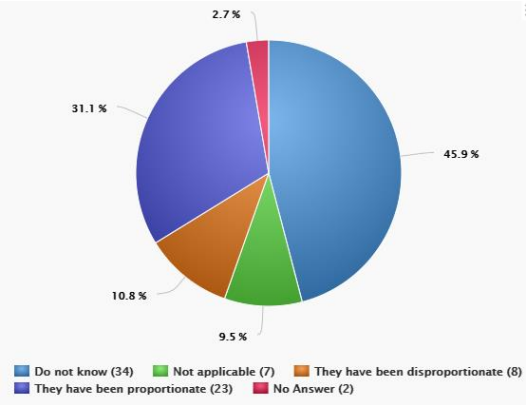


Figure 12 – Proportionality of costs

Only a few of the respondents that considered the costs to be disproportionate provided any explanations as to the reasons for their position. One of these respondents argued that applying the MVBER and the SGL directly and proving the effects of practices on the market and consumers was so difficult that the costs were not proportionate to the benefits. This respondent also argued, however, that if the MVBER were not prolonged, legal uncertainty would increase. Another respondent mentioned that the legal costs of a dispute do not outweigh the potential benefits of challenging behaviour since the probability of success is low. Another reported that they had lost court cases, so in their case the costs did not compensate the benefits. Finally, a respondent mentioned that, in their experience, the legal costs of challenging particular behaviour had been disproportionate for individual dealers and legal proceedings had been long.

The last question of this set asked respondents to provide an estimate of the **level of assessment costs they would have incurred if the assessment had had to rely directly on Article 101 of the Treaty** (i.e., no motor vehicle block exemption rules).

The large majority (55) of respondents considered that without the motor vehicle block exemption rules, assessment costs would have been higher. Only 2 respondents said that costs would have been the same, and 1 respondent said that costs would have been

lower without the MVBER regime.[274] None of the respondents that estimated that costs would have been the same or lower without the MVBER regime gave any reasons behind their view.

2.3.3. Relevance *(Do the objectives of the rules still correspond to the current needs?)* [275]

The first question of this set asked respondents to identify any **changes affecting their business since 2010 that, in their view, should be reflected in the objectives of the block exemption rules covering the motor vehicle sector** (namely of the VBER, the MVBER, the VGL and the SGL).

The changes most frequently identified by respondents mainly concern technology developments and business model developments. As for technology, respondents referred to connected cars, digitalization, (access to) in-vehicle and users' data, electric vehicles, new types of engines (e.g., electric or hydrogen engines), development of ADAS, the rising number of sensors, the rising use of electronics and software (e.g., software as a spare part), cybersecurity, remote connectivity/over-the-air technology (including remote diagnosis and remote repair), and independent operators' increasing need for training. As for business model developments, respondents mentioned increasing direct sales by VMs, more renting/leasing, increasing use of car sharing, bundling of warranties with maintenance/servicing contracts or issues with second-hand vehicle warranties, issues with the parallel trade of vehicles, growing concentration among VMs, an expected decrease in spare parts market size as a result of electrification of vehicles (which may require less maintenance), and the fact that market shares of manufacturers and dealers are below 30%.

In addition to the above, some respondents mentioned the need for: (i) the imposition of higher demands on the timeliness for the provision of technical information; (ii) the adoption of additional protection around the end-user status of leasing and rental firms; (iii) the explicit mention of insurance companies as independent operators. Some respondents mentioned current problems such that when spare parts (e.g., car glass) are in short supply, manufacturers privilege their own network over independent operators; or that manufacturers / importers require resellers to disclose business-critical data about their customers, profitability, pricing, etc., while, at the same time, they compete with those resellers at the same level of distribution. Finally, some dealers pointed to the fact that the application of the exemption to dealership agreements was no longer conditional on the inclusion of contractual stipulations. These dealers claimed that the change meant that they were no longer free to transfer their distribution contract to other

[274] 9 respondents declared not to know, 6 declared that the question was not applicable to them and 1 did not provide an answer.

[275] Respondents which did not provide any reply to any of the questions of the "Relevance" section are not taken into account in the graph below.

authorised dealers, that they had reduced protection if their contracts were terminated, and that there were barriers to multi-brand distribution.

The second question of this set asked respondents **whether the objectives of the motor vehicle block exemption rules are still relevant today.**

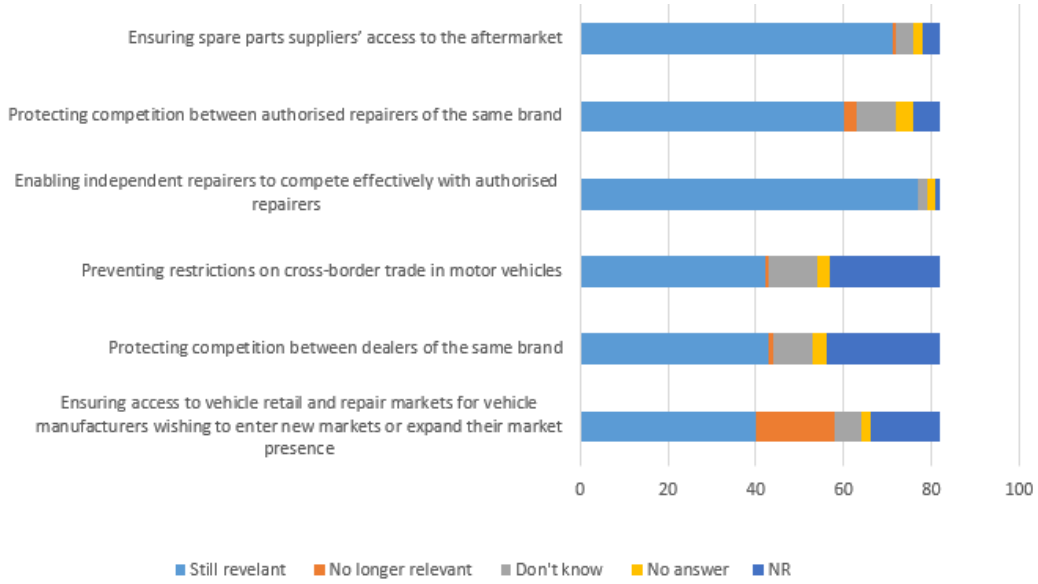


Figure 13 – Relevance of objectives

On ensuring access to vehicle retail and repair markets for VMs wishing to enter new markets or expand their market presence, respondents which selected the option "no longer relevant" explained that VMs have full opportunities to enter new markets. They have and are expanding quite aggressively into servicing and repair markets through, among others, bundling the sale of new vehicles with extended warranties/servicing contracts or pooling the full range of OEM-branded spare parts on online platforms. One respondent also pointed out that, in some Member States, authorised repairers have very high market shares (over 50% in the quantity of services provided, and over 60% in terms of value). In the view of this respondent, VMs may enter any market easily by building their own network of authorised repairers or by concluding agreements with existing IAM garage networks.

As to the rest of the objectives, the respondents which selected the option "no longer relevant" did not provide any explanation for their replies.

The third question of this set asked respondents to **(i) describe any other objectives that, in their view, the Commission should pursue in respect of vertical agreements in this sector, and (ii) to explain their relevance for competition on the markets in question.**

Some of the main points identified by respondents were:

- Ensuring the full reparability of vehicles and the remanufacturing and recycling of spare parts to respond to sustainability goals.

- Discouraging (new) business practices which weaken competition, such as the bundling of purchasing contracts, servicing contracts and warranties.
- Ensuring a level playing field with regard to access to in-vehicle data, including technical information and data linked to connected vehicles, for all stakeholders, (while taking into account consumers choice to share such data).
- Guaranteeing the cybersecurity of vehicles while enabling fair competition to protect the interests of the consumer. Prevention of market foreclosure to the detriment of independent workshops via so-called "Security Gateways" or comparable mechanisms.
- Ensuring independent distributors' access to OEM-branded parts.
- Protecting inter-brand competition of dealers and repairers.
- Ensuring that authorised dealers can participate in direct sales (including online sales) or limiting the volume of direct sales by OEMs (to e.g., 20 percent).
- Ensuring that agreements between OEMs and authorised dealers contain clauses protecting the latter.
- Considering more frequent updates of the motor vehicle block exemption rules (10 years may be too long).
- Considering the impact of "over the air diagnosis", which allows VMs and authorised dealers to contact customers directly and to offer innovative services.
- Ensuring that independent repairers have access to advanced training, face-to-face training and online training from the manufacturer.

The last question in this set asked respondents to indicate **whether**, in their view, **the material scope of the sector-specific regime for vertical agreements concerning motor vehicles**, defined in the MVBER as self-propelled vehicles intended for use on public roads and having three or more road wheels was **still appropriate**.

24 respondents considered that the current scope was still appropriate,[276] whereas 47 believed that the current definition should be widened.[277] The group of respondents advocating for the current scope to be widened mainly mentioned the following categories of vehicles that should be included in the motor vehicle block exemption rules: two wheel vehicles (mainly motorbikes, but some also mentioned electric bikes or electric scooters); vehicles not meant for roads (such as agricultural machinery, tractors and forestry vehicles, construction vehicles). Some respondents mentioned that it would be advisable to have specific mentions for electric vehicles.

2.3.4. Coherence *(Are the rules consistent internally and with other EU rules?)*

The first set of questions in this section asked respondents to indicate **whether**, in their

[276] Primarily associations representing vehicle dealers and VMs, but also companies (mainly parts dealers, parts manufacturers and repairers).

[277] Primarily associations representing parts dealers, parts manufacturers, vehicle dealers or vehicle importers, but also companies (mainly parts dealers, but also other types of market operators such as repairers).

experience, **there were any inconsistencies or contradictions within any of the individual instruments making up the motor vehicle block exemption rules** (VBER, VGL, MVBER and SGL).

The views on this question were divided. Whereas 27 respondents considered that there were inconsistencies or contradictions,[278] 27 believed that there were none.[279]

Some of the respondents considering that inconsistencies existed further details on their position. For example, according to certain respondents, although not an inconsistency as such, Article 5b MVBER also prevents restrictions on the original equipment supplier's ability to sell spare parts to wholesalers. This is an important difference between VBER and MVBER which, according to these respondents, the questionnaire did not capture. Another respondent argued that the existence of specific rules for one sector of the economy (motor vehicles) in itself raised a consistency issue. According to this respondent, the structure of the regime (MVBER, SGL and FAQ) also raised similar issues. Finally, this respondent submitted that there are inconsistencies/lack of clarity in respect of geographical limitations and the treatment of guarantees.

The second question of this set enquired whether, in the respondents' experience, there are i**nconsistencies or contradictions between the instruments that make up the motor vehicle block exemption rules (for example, instances where a provision of the MVBER is inconsistent with a provision of the VBER**).

The large majority of respondents (48) believed that there were no inconsistencies or contradictions[280], while only a minority of respondents (3) indicated that such inconsistencies or contradictions were present.[281] A respondent in the latter group mentioned that the definition of a separate relevant market for each brand has the effect of impeding quantitative limitations in selective repair networks (see paragraph 70 SGL). This, the respondent claimed, was inconsistent with the general framework on vertical restrictions and contractual freedom generally and did not seem necessary in view of the notable increase in competition from independent networks. Another respondent mentioned that paragraph 19 SGL refers to the definition of "original part" or "original equipment" in the type approval framework Directive 2007/46/EC. However, the latter has been replaced by TAR, which does not contain this definition. Therefore, the definitions of parts should remain anchored in the SGL.

The third question of this set asked whether, in the respondents' experience, there were

[278] Primarily associations representing parts dealers, but also companies (mainly parts dealers).

[279] Primarily associations representing vehicle dealers and VMs, but also other types of stakeholders.

[280] Primarily associations representing parts dealers/importers, vehicle dealers or VMs, but also companies (mainly parts dealers and vehicle dealers/importers, but also other types of stakeholders).

[281] Namely, an association representing vehicle dealers, an association representing parts' dealers and an association of competition lawyers.

any **inconsistencies or contradictions between the motor vehicle block exemption rules and other Commission instruments that lay down rules or provide guidance on the application / interpretation of Article 101 of the Treaty** (such as other block exemption regulations, the Horizontal Guidelines, the Notice on the definition of the relevant market or the Guidelines on the application of Article 101(3) of the Treaty).

While 28 respondents indicated that, in their view, there were no such inconsistencies/contradictions[282], 19 replied that, in their view, such inconsistencies/contradictions were present.[283] The respondents which identified inconsistencies or contradictions were asked to elaborate on their position.[284] However, most of these simply added general comments without identifying specific inconsistencies or contradictions.

The fourth set of questions asked **whether**, in the respondents' views, **there were inconsistencies between the motor vehicle block exemption rules and other existing or upcoming Commission instruments in the area of competition policy and enforcement**.

39 respondents believed that there were no inconsistencies or contradictions. By contrast, 11 respondents considered that there were some inconsistencies or contradictions.[285] The latter mentioned that in the context of qualitative selective distribution, if manufacturers refused access to the network to repairers that fulfil the selective network criteria, courts and national authorities generally ruled in favour of the repairers, based on the notion of contractual freedom. This allegedly gave rise to legal uncertainty. A few respondents referred to the risk that VMs would close the OBD port with reference to cybersecurity provisions in UNECE 115-116, but in contradiction with the TAR. A couple of respondents argued that the block exemption regulations should be more geared towards "private enforcement" in the B2B area in the future. This would be particularly important with regard to the question of the burden of proof. Finally, another respondent called on the Commission to ensure consistency with the proposed new competition tool. According to this respondent, the Commission should also ensure consistency with its aims to make the most of the data economy and data spaces, especially in ensuring innovation and growth in the aftermarket.

In the last question of this set, respondents were asked **whether**, to the best of their knowledge, **there were any inconsistencies between the motor vehicle block exemption rules and other existing or upcoming EU rules**.

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[282] Primarily associations representing vehicle dealers or VMs, but also other stakeholders belonging to various categories.

[283] Primarily associations representing parts dealer, but also independent undertakings (mainly parts dealers).

[284] A number of comments did not refer to identifiable inconsistencies or contradictions and, therefore, have been omitted here.

[285] Primarily associations representing vehicles dealers or vehicle importers.

23 respondents replied "yes", whereas 35 answered in the negative. Some of the respondents in the latter group referred to the TAR and stated that although the new TAR contains provisions on the access to repair and maintenance information, the description of technical information in the MVBER is by its very nature more "fluid", to take account of technical progress. The MVBER should therefore emphasize that the notion of technical information should not be strictly limited to the lists of examples provided in the TAR. This would help independent operators to access and use state-of-the-art technical information. Some other respondents also said that the motor vehicle block exemption rules should be updated according to new provisions on vehicle technical information included in the TAR, such as recitals 50, 51 and 52.

Some other comments concerned in-vehicle data. In particular, a respondent argued that in the recitals of the MVBER there could be a reference to upcoming regulations on access to in-vehicle data. Another respondent was concerned to avoid inconsistencies or contradictions with future European rules on this matter, so as to ensure free and competitive access to data for all actors involved. The MVBER should be consistent with the aims of the Commission in relation to the data economy, the data strategy and Data Governance Act.

Finally, some respondents referred to the UNECE regulations. One indicated that the integration of UNECE regulations 155 and 156 via Regulation (EU) 2019/2144 is going to have an impact on the overall regulatory framework, and that potential issues of conflict required additional consideration. A few raised the risk that VMs would use the UNECE regulations as an excuse to block access to in-vehicle data via the OBD port. Another respondent mentioned that in the draft of the delegated legal act on the TAR and Annex X - Diagnosis, access to information relevant to repairs is apparently reduced to safety- and environmentally-relevant systems. Some respondents argue that this formulation is misleading and could be misused to exclude competition from independent market participants. Therefore, these respondents argued, special attention should be paid to ensuring that the provisions of the MVBER regime are not undermined this way.

2.3.5. EU added value *(Could the same results have been achieved with action at national level?)*

The first set of questions in this section asked respondents to indicate **whether**, in their experience, **the motor vehicle block exemption rules (namely the VBER, the MVBER, the VGL and the SGL) had made it easier for national competition authorities ("NCAs") and national courts to apply the rules consistently**.

The large majority of respondents (59) replied "yes" to the above question, while some (15) concluded the opposite. Some of the arguments raised by those responding in the negative concerned enforcement. In this vein, it was noted that although, in general, the MVBER had given clear guidance and made it easier for NCAs to apply the rules, the

Commission should have an active role in enforcing the current rules. Some respondents considered that for some topics, the absence of cases at EU level made it difficult for market players and Member States to apply the rules coherently. Some respondents maintained that in certain Member States, NCAs did not seem to apply the MVBER rules. It was also claimed that national courts did not take proper notice of the MVBER and especially not of the SGL. Some respondents pointed to diverging rulings of the European Court of Justice and decisions of NCAs (an example given was the recent decision by the German Federal Cartel Office[286] regarding provisions within selective distribution agreements that prohibited distributors from selling products via third-party platforms). Finally, some respondents flagged that as a result of the removal of the specific provisions for dealers from the MVBER, some Member States had adopted specific provisions on this. This may lead to fragmentation on rules across Member States as some national regimes may be more extensive than others. Finally, a respondent claim for clearer definitions of original parts and parts of matching quality, emphasizing that the latter are the same quality as original parts. That way VMs/authorised dealers would be unable to make claims in relation to the spare parts (e.g., glass) supplied by the aftermarket.

The second set of questions enquired **whether**, in the experience of the respondents, **the motor vehicle block exemption rules had provided added value,** or whether national guidance, the enforcement practice of NCAs and relevant national case-law could have been equally or more effective.

A large majority of respondents (64) considered that national provisions would have been less effective. Only a few respondents considered that national provisions would have been equally effective (2)[287] or more effective (2).[288] One of the two respondents considering that national rules would have been more effective argued that local rules could have been adopted to require make VMs' market access conditional on giving access to technical information to independent operators within a given Member State. One of the respondents stating that national rules would have been equally effective explained that since the transfer of the exemption for motor vehicles to the VBER in 2013, the conditions for exemption relating to contractual standards for dealerships had been transferred to national provisions in the respondent's Member State. The respondent indicated that this had been welcomed at dealer and repairer level. However, the EU provisions in the MVBER framework make sense within their scope and should also be extended further.

2.4.Final comments

To conclude the questionnaire, respondents were asked whether they had **anything else**

[286] German Competition Authority, Intersport, Press release, 25 June 2020.

[287] A business association representing vehicle dealers and an employee/consumer organization.

[288] A trade organization and a repairer.

to say that might be relevant for the evaluation of the motor vehicle block exemption rules (namely the VBER, the MVBER, the VGL and the SGL).

Most respondents reiterated the main points of their position. Many respondents referred to the need to address access to in-vehicle-data (and some mentioned that consumers should be able to decide to whom this data goes) and to the fact that access to technical information should continue or be reinforced. Dealers referred to their wish to see contractual protection (including by limiting direct sales by OEMs to end users and by dealing with franchise-like contractual relationships in the MVBER and VBER). Some respondents reiterated the need for better enforcement of the MVBER (adapted to SMEs) and flagged that in some Member States the standard of proof required by courts for bringing a case against VMs was very high (e.g., in the Netherlands). One respondent wished to see the introduction of an EU regulation against the "abuse of economic dependence" in vertical relationships. Finally, a couple of respondents active in the insurance sector mentioned that the questionnaire did not explicitly take account of insurers (which are also indirect consumers of spare parts).

3. Summary of the targeted consultation of NCAs

A summary report of the targeted consultation of NCAs was published on the dedicated MVBER review webpage on DG Competition's website[289] *on 17 March 2021.*

3.1. Introduction

The European Commission ("the Commission") is currently evaluating the functioning of the motor vehicle block exemption rules[290], comprising the Motor Vehicle Block Exemption Regulation (EU) No 461/2010 ("MVBER"), the application of the General Block Exemption Regulation (EU) No 330/2010 to the motor vehicle sector ("VBER"), along with the Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles ("SGL") and the Guidelines on vertical restraints ("VGL").[291]

In this context, the Commission asked the National Competition Authorities ("NCAs") to share their experience in applying the motor vehicle block exemption rules. NCAs are bound by the MVBER and the VBER but not by the Commission's Guidelines, although they do tend to also take the latter into account.

The Commission received 24 contributions.[292]

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289 See: https://ec.europa.eu/competition/sectors/motor_vehicles/legislation/mvber_review.html

290 Any reference to the motor vehicle block exemption rules in this document should be understood as comprising the four instruments, namely the MVBER, the VBER and their respective Guidelines.

291 As per Articles 3 and 4 MVBER, the VBER has applied to after-sales agreements since June 2010 and to motor vehicle distribution since June 2013, the latter falling exclusively within the scope of the VBER ever since.

292 One contribution was submitted by one of the Contracting Parties to the EEA Agreement.

Overall, the NCAs consider that the Commission should maintain the motor block exemption rules in place, while taking the opportunity of the review to simplify and fine-tune the current regime, notably in light of market developments over the last decade.

The purpose of this summary is to outline the main points raised by the NCAs without regard to the number of contributions addressing a particular point, or whether or not a particular point of view is shared by all the NCAs. Therefore, in the following, reference is made generically to "NCAs". However, for issues on which NCAs expressed clearly diverging views, both sides of the argument are presented.[293]

This summary provides the NCAs' general views on the evaluation of the motor vehicle block exemption rules, following the five evaluation criteria established by the Better Regulation Guidelines,[294] namely: effectiveness, efficiency, relevance, coherence and EU added value (see **section 3.2**). It also summarizes the comments made by the NCAs as regards the functioning of some specific aspects of the motor vehicle block exemption rules (see **section 3.3)**.

3.2.General views of the NCAs

Regarding the *effectiveness* of the motor vehicle block exemption rules, NCAs generally share the view that the rules have met their objectives and have contributed to keeping markets competitive in the EU. NCAs report that intensity of competition in the three areas of the motor vehicle sector has either not changed significantly or has mostly intensified. Few NCAs report a decrease in the intensity of competition in the three areas of the motor vehicle sector covered by this report. Nevertheless, NCAs report having encountered in their enforcement activities conducts which could in their view serve as indirect means of circumventing the obligation to ensure an equal footing for authorised and independent operators, such as the application of extended warranties, burdensome accreditation processes, and the steering of demand towards the authorised networks (see **section 3.3**). Additionally, some NCAs suggest that the abolition of the so-called "dealer protection" clauses[295] may have aggravated existing imbalances of contractual power between vehicle manufacturers and dealers. In this regard, they point to dealers facing increased financial pressure, due to Vehicle manufacturers having shifted costs and investment requirements on to them.

As to the coverage of the block exemption, NCAs are mostly of the view that the market share threshold, by virtue of which the regime only exempts agreements where neither

[293] The contributions received from the NCAs cannot be regarded as the official position of the Commission and its services and thus do not bind the Commission.

[294] The better regulation requirements are about designing and evaluating EU policies and laws transparently on the basis of evidence and the views of stakeholders and citizens. They are applicable to all policy areas and aim for targeted and proportionate regulation that does not go further than required to achieve a given objective, while bringing benefits at minimum cost.

[295] Mainly contained in Article 3 of the previous MVBER (Reg. 1400/2002).

the market share of the buyer nor that of the seller exceed 30%, is still appropriate. However, they point at difficulties in relation to market definition and the calculation of market shares (see **section 3.3**). Finally, NCAs note that the motor vehicle block exemption rules have provided helpful guidance to NCAs and legal certainty to stakeholders for the assessment of vertical agreements and restrictions. However, they are of the view that the effectiveness of the rules could be increased by providing clarifications and further guidance on some issues (see **section 3.3**) and by reflecting recent market developments, new business models and new technologies. NCAs also suggest integrating the recent case law in relation to vertical restraints into the respective provisions to increase legal certainty.

Regarding the *efficiency* of the motor vehicle block exemption rules, NCAs generally consider that the motor vehicle block exemption rules have reduced the cost stemming from the assessment of the compliance of vertical agreements in the motor vehicle sector with Article 101 Treaty on the Functioning of the European Union ("the Treaty"). Although the rules provide NCAs with a structured framework for their enforcement activities, the NCAs highlight that the reduction of cost may be minimal, as assessing the complexities of vertical agreements in the motor vehicle sector still requires intense resources due to *inter alia* the intricate legal framework that made up the motor vehicle rules, the limited case law, and the complex and technical nature of the specific cases in the motor vehicle sector. Nevertheless, NCAs generally assess the cost as reasonable and proportionate to the benefits obtained.

Regarding the *relevance* of the motor vehicle block exemption rules, NCAs generally consider that all the objectives of the motor vehicle block exemption rules are still relevant today. Moreover, NCAs also indicate that the current scope of the rules - that is to say, self-propelled vehicles intended for use on public roads and having three or more road wheels - is still generally appropriate. However, some NCAs also indicate that the rules should be revised to reflect recent market developments and to clarify existing obligations. First, these NCAs note the increasing importance ensuring that independent repairers have access to information relevant for the provision of aftersales services, notably repair and maintenance, and to spare parts. Secondly, several NCAs draw the Commission's attention to the emerging issue of access to in-vehicle generated data and resources, which have the potential to unlock new business opportunities for traditional players and new entrants. Finally, some NCAs stress the increased importance of online sales and sales facilitators (e.g., online platforms) as well as a perceived shift towards new distribution models (e.g., dual distribution combining agency and selective distribution, online sales, direct distribution by OEMs) (see **section 3.3**).

NCAs generally consider that the motor vehicle block exemption rules are *coherent* both in themselves and with other instruments that provide guidance on the interpretation of Article 101 of the Treaty. That being said, some NCAs note that three potential inconsistencies (see **section 3.3**). Moreover, NCAs call for ensuring consistency between the motor vehicle block exemption rules and other upcoming legislative initiatives (e.g., the Digital Markets Act or the Digital Services Act, the Type

Approval Regulation) particularly concerning the issue of access to in-vehicle data.

Finally, NCAs generally consider that the motor vehicle block exemption rules have *added value* and have facilitated the assessment of the compatibility of vertical agreements in the motor vehicle sector with Article 101 of the Treaty and that action at only national level would have been less effective. This being said, NCAs have reported only limited experience in the application of the vehicle block exemption rules.

3.3.Overview of the main issues raised by NCAs

When evaluating the functioning of the motor vehicles block exemption rules, NCAs have identified a number of specific issues. In the following, these issues are grouped in main categories: (i) scope of the exemption, (ii) achievement of objectives and indirect means of achieving anticompetitive results, (iii) legal certainty, and (iv) potential inconsistencies.

3.3.1. Scope of the exemption

Market share thresholds for exemption and market definition

Based on their experience and subject to the points set out below, NCAs indicate that the 30% market share threshold for agreements to benefit from the motor vehicle block exemption[296] is generally still appropriate.

Nevertheless, some NCAs point out that, as result of the brand-specific nature of the of the markets for repair and maintenance services and for the distribution of spare parts, the practical applicability of the motor vehicle rules in these areas is limited, as the 30% threshold is generally exceeded. Some NCAs deduce from this that the threshold may be too low, at least for the provision of repair and maintenance services and for the distribution of spare parts. On the other hand, following the same logic, some NCAs consider that the current threshold is too high with regards to the market for new motor vehicles, as for certain countries and segments the market is very fragmented, meaning that all agreements fall below the market share threshold.

NCAs also express differing views with regard to the market definition and the calculation of market shares in the motor vehicle sector. In particular, some NCAs consider that certain markets for repair and maintenance services and for the distribution of spare parts may not be brand-specific. In this regard, these NCAs suggest that there may be a distinction between "complex repairs", for which there are no / few alternative service providers, and more "simple" repairs, for which there are effective alternatives. In their view, while in the first example the market could be brand specific, it would not be so in the second example. In the same vein, some NCAs suggest that, from the point of view of the repairer, the offers of vehicle manufacturer / importers, parts suppliers

[296] Articles 3 and 7 VBER and paragraphs 93-95 VGL.

and other independent repair chains may be regarded as substitutable. Therefore, in the NCAs view, the market may not be brand-specific as access to the brand of a particular vehicle manufacturer / importer may not be indispensable for a repairer to operate on the relevant market. Finally, some NCAs question whether the hitherto separate markets for the sale of new motor vehicles and for aftersales services may not be tipping towards an integrated multi-brand "system" market.

Finally, some NCAs highlight their view that guarantee services and services provided during vehicle recalls should be excluded when calculating the market share of the authorised networks. In the view of these NCAs, the inclusion of such services may artificially inflate the perceived market shares of authorised repairers vis-à-vis their independent competitors.

Hardcore restrictions

NCAs recognise the importance of the hardcore restrictions,[297] the presence of which removes the benefit of the exemption from the whole agreement. However, based on their enforcement experience, some NCAs point out two types of behaviour which they consider should also be considered as "hardcore".

First, some NCAs point to refusals by Original Equipment Manufacturers (OEMs) to give independent repairers access to technical information, diagnostic and other equipment, tools, including any relevant software, or training required for repair and maintenance of motor vehicles. These NCAs concede however that in practice the inclusion of such a clause may not have real effects, since for passenger cars at least, most repair agreements may not benefit from block exemption in any event, due to the market shares of the members of the authorised networks. Nevertheless, NCAs consider that listing a OEMs' refusal of giving independent repairers access to technical information as a hardcore restriction, may still have a signalling effect on the market for provision of repair and maintenance services.

Second, some NCAs also suggest that the hardcore clause listed in Article 5(c) MVBER - namely the restriction on component / part suppliers' ability to place their trademark / logo on the components / parts supplied - may be redundant. In this regard, the NCAs suggest that in their experience the true issue relates more to the ability of the supplier to erase the brand of the motor vehicle manufacturer rather than its ability to place its own trademark.

Excluded restrictions

NCAs indicate that the current list[298] of contractual clauses that may not benefit from the exemption ("excluded restrictions") is sufficient. NCAs generally agree that there

[297] Article 4 VBER and Article 5 MVBER.

[298] Article 5 VBER, paragraphs 66-68, 69-182 and 129-150 VGL and paragraphs 26, 27 and 28-41 SGL.

are no other types of vertical restriction in the motor vehicle sector that the VBER / MVBER lists as excluded but which should not be considered as such. One NCA nevertheless points to the need to include as an excluded restriction the alleged obligation imposed on dealers / service partners to transfer business information to Vehicle manufacturers.

3.3.2. Achievement of objectives and alleged indirect means of achieving anti-competitive results

Achievement of specific policy objectives

NCAs indicate that the specific policy objectives[299] that the motor vehicle block exemption rules aim at achieving have generally been fully or partially achieved. Nevertheless, potential competition concerns remain, in particular with regards to the specific objectives of enabling independent repairers to compete effectively with authorised repairers, preventing foreclosure of spare part producers in the aftermarket and protecting competition between dealers / repairers of the same brand.

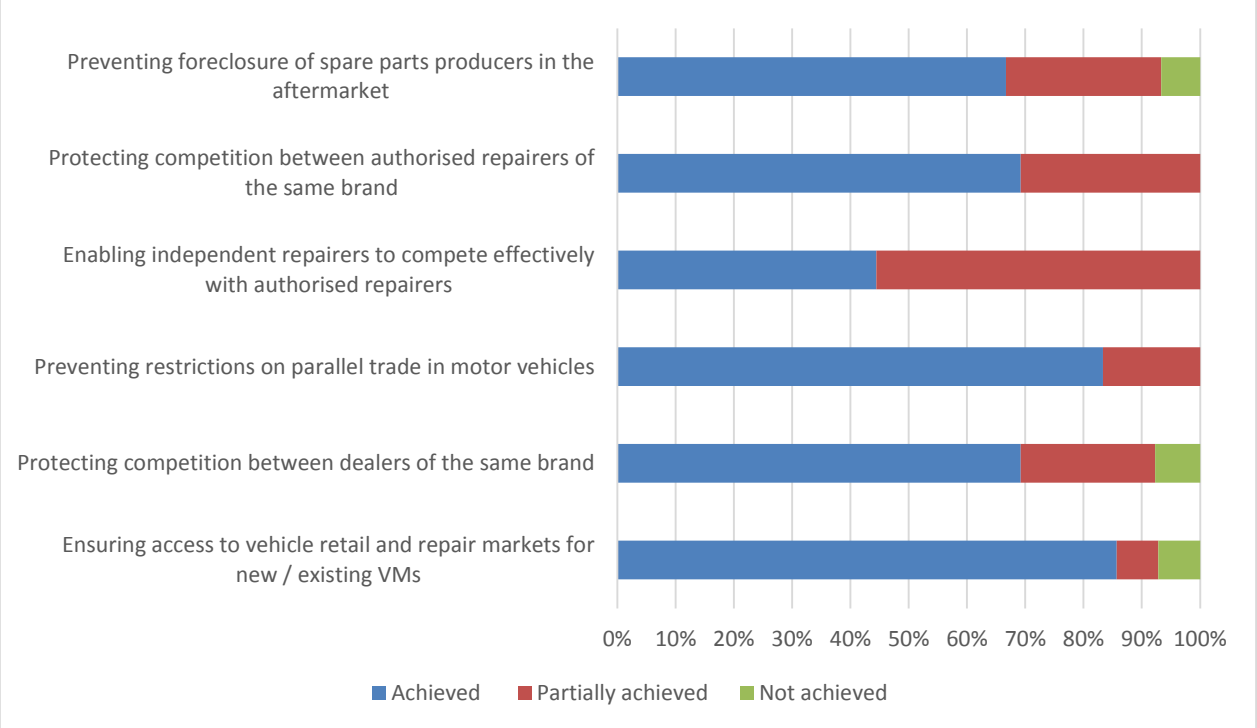


Figure 6: NCAs views on the achievement of the specific policy objectives

First, as regards the objectives of enabling independent repairers to compete effectively with authorised repairers and preventing foreclosure of spare part producers in the aftermarket, some NCAs indicate, based on their enforcement experience, that difficulties for independent repairers to obtain timely access to spare parts and to

[299] These specific policy objectives were identified for the first time in Annex I of the Communication pursuant to Article 5 of Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 81(3) of the Treaty to categories of agreements and concerted practices. OJ C 67/2 of 16.3.2002.

information relevant for the provision of aftersales services - notably repair and maintenance -, persist and that this may become more important in the future. Moreover, some NCAs report that as result of the increase in complexity of motor vehicles, specialized trained personnel and complex equipment are needed, which in turn may give authorised repairers an advantage over their independent competitors, forcing the latter to focus mainly on simple mechanical operations. Some NCAs suggest that the transition to electric and hybrid vehicles may reinforce this trend.

Secondly, on the objective of protecting competition between authorised repairers of the same brand, some NCAs indicate that the quality requirements set by vehicle manufacturers for authorised repairers have become increasingly strict, requiring large investments in personnel, buildings and equipment, which in turn translates into fewer authorised repairers being admitted to the network and thus to less intra-brand competition.

As to the objective of ensuring access to vehicle retail and repair markets for new and existing market players, some NCAs report that the increasing consolidation between dealers combined with a growing presence of vehicle-manufacturer-owned outlets and rigid remuneration systems and sales campaigns leaves little room for effective competition in the distribution of new vehicles. In this vein, few NCAs also report a trend towards direct distribution by OEMs when it comes to new motor vehicles, with dealers acting as mere delivery and configuration points. Some NCAs also highlight that remuneration schemes and sales campaigns imposed on dealers have the effect of harmonising costs, decreasing dealer margins, and thus reducing the intensity of intra-brand competition.

Finally, on the objective of preventing restrictions of parallel trade of motor vehicles, some NCAs report that cross-border competition has intensified slightly as car manufacturers no longer try to prevent the re-import of motor vehicles directly. However, some NCAs report a tendency to attempt to prevent cross-border sales via indirect means (e.g., by shortening the warranty period in certain Member States or "accidentally" failing to provide the registration document for the end consumer). Finally, some NCAs report that since car sales margins are low, and dealers make much of their profit from repair and maintenance on cars that they have sold locally, they have few incentives to sell to consumers resident in other Member States.

Indirect means of achieving anti-competitive results

Several NCAs report having encountered conduct in their enforcement activities which could serve as an indirect means of achieving anti-competitive results.

Some NCAs describe a set of conducts in respect of the relationship between OEMs and the members of their authorised networks that could potentially be anticompetitive. In particular, NCAs indicate the following: (i) fixing remuneration systems / sales campaigns that may have steering effects on dealers' conduct and unifying price effects; (ii) setting qualitative standards may raise / unify costs, thereby increasing dealers'

economic dependence on a particular supplier; (iii) pushing authorised distributors to merge may increase market concentration at dealer level; (iv) imposing commercial / pricing policies on dealers may indicate an imbalance in rights and obligations between the parties; (v) setting arbitrary limits on the number of dealers may unjustifiably exclude some from the distribution networks.

Secondly, some NCAs refer to agreements between vehicle manufacturers / importers / authorised repairers and insurance companies to allegedly direct customers to authorised repairers to the detriment of independent repairers. These NCAs are concerned that such agreements may hamper market access for independent repairers and serve as an indirect means to stimulate the use of spare parts sourced from the vehicle manufacturers. NCAs also report allegations that importers / vehicle manufacturers / dealers have dissuaded customers from using independent repairers to repair their vehicles by stating that the warranty would be voided if maintenance and repairs were carried out by a non-authorised repairer.

Thirdly, some NCAs report that consumers have no visibility as to the supplier's recommended prices for repair and maintenance services and that authorised repairers seem to consistently apply the recommended price. In these NCAs' view, this may lead to higher prices for consumers and potentially to price coordination.

Finally, some NCAs report having encountered instances where vehicle manufacturers / importers allegedly withheld a code necessary for the installation of a third-party tool. According to the NCAs, this could significantly reduce the ability of such tool suppliers to offer their services.

3.3.3. Legal certainty

Definitions

NCAs consider that the motor vehicle block exemption rules have provided a helpful framework for companies (and advisors) to (self-)assess the compatibility of agreements in the motor vehicle with Article 101 of the Treaty. However, NCAs argue that some of the definitions given by the motor vehicle block exemption rules are not sufficiently clear.

First, on the definition of *vertical agreements*,[300] some NCAs report difficulties assessing agreements between competitors in which one party to the agreement acts as a distributor. In this regard, the NCAs note that the Horizontal Guidelines[301] refer back to the VGL for vertical aspects of horizontal agreements.

[300] Article 1(1)(a) VBER, paragraphs 24-26 VGL and Article 1(1)(a) MVBER.

[301] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements. OJ C 11, 14.1.2011.

Second, as regards *agency agreements*,[302] some NCAs note that the VGL lack the necessary detail to assess the distinction between independent traders and agents acting on behalf of a supplier, especially with regard to the difference in the legal and / or commercial risks incurred. Moreover, these NCAs argue that the VGL do not provide adequate clarity as regards the increased use of mixed distribution models, under which a single undertaking combines the functions of agent and authorised distributor in the same product market for the same brand[303] In this regard, the NCAs note that it may be questionable whether an OEM should be allowed to have two separate contracts with the same dealer, as the agency model should prevent the dealers from taking any financial or business risk, which the dealers already are bearing due to the current dealer contracts. The NCAs point out that this is particularly important question for the motor vehicle sector as OEMs usually enjoy a strong market position and impose very costly standards on authorised motor vehicle dealers.

Third, certain NCAs note that through practices commonly known as tooling arrangements, vehicle manufacturers are prohibiting original equipment suppliers from using the original tools to manufacture parts for aftermarket supply under the suppliers' own brands. The NCAs question whether these could constitute genuine *subcontracting agreements*[304] such as would not be caught by Article 101 of the Treaty, and express concern that the Commission's 1978 Subcontracting Notice[305] does not provide clarity on this issue, potentially allowing vehicle manufacturers to remove all sources of potential competition for spare parts supply.

Fourth, on the definition of *non-compete obligation*,[306] some NCAs seem to suggest that the wording of the "no-compete" may be unclear as the clause seems to refer rather to a ban on exclusivity obligations than to a non-compete obligation in the sense used when referring to horizontal agreements.

Fifth, as regards the concept of s*elective distribution*,[307] NCAs indicate that there is insufficient clarity regarding the assessment of vertical restraints within the framework of selective distribution systems in light of the recent jurisprudence. In particular, NCAs seek clarifications on the following points: (i) the implication of recent judgments to assess a vertical restraint when implemented in the framework of a selective distribution system; (ii) the limits to quantitative selective distribution systems for motor vehicle distribution and provision of repair and maintenance services in light of recent

302 Paragraphs 12-17 VGL.

303 Please note that the present consultation with NCAs was conducted between October 2020 and January 2021. On 5 February 2021, the Directorate General for Competition published a Working Paper titled "*Distributors that also act as agents for certain products for the same supplier*" setting out its preliminary views on this issue.

304 Paragraph 22 VGL and paragraph 23 SGL.

305 Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty. OJ C 1, 3.1.1979.

306 Article 1(1)(d) VBER

307 Article 1(1)(e) VBER and Article 1(1)(i) MVBER.

jurisprudence (e.g., *C-158/11*);[308] (iii) the qualification of online sales restrictions and the legal treatment of online sales in the context of selective distribution.

Sixth, on the concept of *intermediary*,[309] some NCAs highlight that clarity is needed with respect to the position of internet platforms. In this regard, NCAs highlight that in the field of motor vehicle sales, online e platforms act could also be said to act as intermediaries between customers and dealers. In addition, NCAs indicate that there are also firms active in the provision of repair services, who intermediate between customers and repairers. Some NCAs are of the view that both kinds of operator are related to the current notion of intermediary, since they constitute channels by which end customers acquire vehicles from dealers or services from repairers without being part of the distribution chain themselves. They therefore suggest that clarification is lacking on these recent developments. NCAs note nevertheless that the question if and under which conditions platform bans constitute a hardcore infringement pursuant to Article 4 (c) VBER is a general question which should be addressed across sectors in the VBER and/or VGL.

Seventh, on the *concept of motor vehicle*,[310] some NCAs note the absence of a definition indicating when a motor vehicle should be considered "new".

Eighth, as regards *spare parts*,[311] some NCAs argue that the scope of the definition should be expanded to encompass accessories: that is to say, parts which are not intended to replace components of the vehicle, but which are rather "add-ons".This question is relevant for the scope of the MVBER, since Article 4 MVBER only refers to the conditions under which the parties may purchase, sell or resell spare parts. If the definition of spare parts were to be altered or expanded, it should be kept in mind that the notion would deviate from the definition set out in Regulation 2018/858.[312]

Ninth, as regards the concept of *connected undertaking*,[313] some NCAs indicate that the current definition encompasses situations where neither of the undertakings in question actually control the other.

Finally, on the concept of *active and passive sales*,[314] few NCAs are of the view clarification is needed as to how to interpret indirect restrictions on online sales which, they argue, are analogous to the imposition of dual prices, and therefore should be

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308 Case C-158/11 Auto 24 SARL v Jaguar Land Rover France SAS of 14 June 2012.

309 Paragraph 52 SGL.

310 Article 1(1)(g) MVBER.

311 Article 1(1)h) MVBER.

312 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. OJ L 151, 14.6.2018.

313 Article 1(2) VBER and Article 1(2) MVBER.

314 Paragraph 51 VGL.

considered as restrictions of passive sales.

3.3.4. Specific conducts

Access to technical information

NCAs point to the need to reflect on whether the current definition of technical information[315] could be updated, against the background of the rising complexity of motor vehicles and the increasing potential of in-vehicle data[316]. They also indicate that the list of "technical information" in the Supplementary Guidelines should be considered non-exhaustive, in line with the fast-paced technological developments facing the motor vehicle sector.

In particular, some NCAs raise the question of whether data generated in-vehicle should be included in the notion of "technical information" given in the Guidelines, and thus shared on an equal basis with authorised and independent repairers, or whether this data rather constitutes a separate category of essential input. Some NCAs note that if OEMs share in-vehicle generated data with authorised repairers then it should be considered "technical information" and should therefore be shared with independent repairers to allow effective competition on the aftermarkets. On the other hand, certain NCAs also question whether access to such data can indeed be considered essential. NCAs nevertheless also note that the number of connected cars is still relatively low and that manufacturers are still largely experimenting with in-vehicle data, meaning that it may be too early to judge whether anticompetitive behaviour may emerge. Some NCAs also question whether competition law is in general the appropriate instrument to govern such data access.

NCAs identify the following items that should be considered as technical information for the purposes of the motor vehicle block exemption rules and that, if provided to authorised shops, should also be shared on an equal footing with independent repairers:

Some NCAs report that an increasing number of brands use "digital service booklets" instead of the traditional physical booklets, which remained with the vehicle owner, meaning the documentation of service and maintenance work done on a vehicle is registered (only) on a digital platform run by the respective OEM. NCAs report that registration and access to those platforms for independent operators as well as providers of multi-brand services is in some instances being impeded or made overly difficult, with potentially exclusionary effects on independent operators. Some NCAs advocate that free access should be given to such digital service booklets.

Some NCAs indicate that access to information related to the performance of repair

315 Paragraph 66 SGL.

316 Data has the potential to support a wide range of innovative services (e.g., remote prognostics and diagnostics, accident and breakdown assistance, navigation, fleet management, leasing and car-sharing, traffic management, usage-based insurance and infotainment) for traditional players and new entrants and therefore, NCAs note that in the future independent market participants will need access to data directly collected by the car.

services to the electronic control units (ECUs) of motor vehicles, including all features concerning safety and security, should be considered to be technical information and should be provided to independent operators.

Some NCAs indicate that OEM have started using specific codes for the installation of spare parts in motor vehicles which are needed for a replacement part to be registered and therefore recognised by the vehicle's software. NCAs note that it may be necessary to allow independent repairers to have access to such software to allow them to register replacement parts.

Finally, NCAs flag the need to update paragraph 67 of the SGL to reflect the fact that, since the SGL were adopted, Regulation 715/2007[317] has been replaced by Regulation 2018/858.

Misuse of warranties

Some NCAs advance the view that the guidance given on the misuse of manufacturers' warranties is not clear enough.[318]

They report that independent repairers do not often have the opportunity to carry out repair and maintenance on vehicles during the warranty period. In this vein, some NCAs also note that consumers' reluctance to use the services of an independent repairer during the warranty period or warranty extension period is considerable as OEMs / importers / authorised dealers or repairers allegedly convey either *directly or indirectly* the message that the warranty will cease to apply if the end user has repair and maintenance work carried out outside the authorised repair networks. Some NCAs refer to conducts such as complex warranty conditions or long warranty periods, which in their view, steer vehicle owners towards authorised repairers. NCAs further add that this trend is exacerbated by insurance companies' certification requirements, which allegedly tend to favour authorised garages.

In this light, some NCAs stress the importance of keeping an explicit reference to the misuse of warranties in the SGL. In the same vein, NCAs highlight 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.

Finally, certain NCAs indicate that the SGL could be clearer as regards the distinction between legal (statutory) warranties, extended (unilateral) warranties, and warranty extensions (often issued in combination with maintenance contracts). Additionally, certain NCAs indicate that it is not clear whether authorised repairers may legitimately

317 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information. OJ L 171, 29.6.2007, p. 1–16.

318 Paragraphs 49 and 69 SGL.

refuse to honour the manufacturer's warranty on a whole element of a vehicle, if an alternative brand of spare parts has been used to replace a particular part of that system.

Resale price maintenance

In line with their contributions to the VBER consultation, some NCAs note that the VBER and the VGL do not provide sufficient legal certainty as to whether certain "grey areas" constitute resale price maintenance (RPM).[319] In particular, they point to a lack of clarity as regards the circumstances in which recommended resale prices amount to RPM and whether certain practices restricting the ability of buyers to determine their selling price should be considered as RPM (e.g., suppliers setting indicative margin based on recommended sales price, and then pushing the actual resale price down by forcing the distributors to pass on / grant extra discounts). In addition, NCAs indicate that the distinction between clear-cut RPM and so-called "hub & spoke" scenarios is currently not reflected in the VBER and the VGL.

Restriction of the buyer's ability to sell components

Some NCAs suggest clarifying that Article 4 (b) (iv) VBER does not apply to spare parts and other components which are supplied to a vehicle manufacturer for resale in their supplied state, but only to components which are to be incorporated in other products.

3.3.5. Potential inconsistencies

The majority of NCAs consider that the instruments making up the motor vehicle block exemption rules are generally coherent and that there are no inconsistencies either between them or with other legal instruments. Nevertheless, some NCAs draw the attention of the Commission to three potential inconsistencies.

First, certain NCAs highlight what they see as a discrepancy in the market share thresholds set out in paragraphs 56 and 12 of the SGL for the exemption of agreements for the distribution of new vehicles. While paragraph 12 states that the Commission did not identify any significant competition shortcomings in the new motor vehicle distribution sector which would require the application of a market share threshold different from and stricter than those in the VBER (30%), recital 56 indicates that, when conducting the assessment of selective distribution systems outside of the block exemption regulation, quantitative selective distribution of vehicles will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40%. In the NCAs view, this implies that motor vehicle distribution is treated differently to other sectors.

Second, on access to technical information, some NCAs note that there might be a discrepancy with the overall notion of bilateral and unilateral behaviour. According to

[319] Article 4(a) VBER and paragraphs 48-49 and 223-229 VGL.

paragraph 62 of the SGL, qualitative selective distribution agreements concluded with authorised repairers and / or parts distributors may be caught by Article 101 (1) of the Treaty if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, for instance by failing to release technical repair and maintenance information to them. In this regard, NCAs express the view that although the application of Article 101 (1) of the Treaty requires an agreement or concerted practice, paragraph 62 of the SGL foresees the application of Article 101 (1) of the Treaty when only one of the parties to the agreement acts in a way that forecloses independent operators from the market which, in the NCAs view, would usually qualify as unilateral behaviour falling under the abuse of dominance provisions.

Thirdly, NCAs indicate that there could be said to be a contradiction concerning the definition of the relevant market in the motor vehicle sector. In the NCAs view, in its Notice on the definition of relevant market[320], the Commission focuses on the perspective of the direct customer to analyse whether the respective goods or services are substitutable to satisfy a particular demand: an approach also replicated in Article 3 (1) VBER and Recital 7 of the VBER. However, NCAs highlight that when determining if a contract between an OEM and its authorised repairer is caught by Article 101 (1) of the Treaty or whether it satisfies the conditions of Article 101 (3) of the Treaty, in paragraph 15 of the SGL[321] the Commission seems to focus on the point of view of the end consumer (the motorist) instead of that of the direct contractual partner: the authorised repairer.

Finally, NCAs stress that, when conducting its review, the Commission should carefully consider any upcoming regulatory measure which may impose obligations on OEMs concerning access to vehicle generated data (e.g., under the Digital Markets Act, Digital Services Act, or the type approval rules).

[320] Paragraphs 15-19 of the Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997.

[321] Paragraph 15 SGL: *"[..] On the spare parts markets, 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 on those markets, which in turn maintains pressure on prices on the repair and maintenance markets, since spare parts make up a large percentage of the cost of the average repair. Moreover, repair and maintenance as a whole represent a very high proportion of total consumer expenditure on motor vehicles, which itself accounts for a significant slice of the average consumer's budget."*

Annex 4: Public enforcement of the Motor Vehicle Block Exemption Regime

The European Commission ("the Commission") is evaluating the functioning of the motor vehicle block exemption rules, comprising the Motor Vehicle Block Exemption Regulation (EU) No 461/2010[1] ("MVBER"), the application of the General Block Exemption Regulation (EU) No 330/2010 to the motor vehicle sector[2] ("VBER"), along with the Supplementary guidelines[3] ("SGL") and the Guidelines on vertical restraints[4] ("VGL").

In this context, the Commission has conducted a review of the enforcement and monitoring activities that have taken place at the European and the national level in the motor vehicles sector since 2010.

This document summarizes the main findings of this exercise. Its three sections report on the enforcement and monitoring actions of the Commission, the activity of national competition authorities ("NCAs") and the Court of Justice respectively.

1. Enforcement and monitoring by the Commission

1.1 Enforcement

Between 2010 and 2020, the Commission has adopted eight rejection letters under Article 7(1) of Regulation 773/2004,[5] 12 rejection decisions under Article 7(2) of Regulation 773/2004, one rejection pursuant to Article 13 of Regulation 1/2003[6] and Article 9 of Regulation 773/2004, and one rejection pursuant Article 13 of Regulation 1/2003 and Article 7 (2) of Regulation 773/2004 relating to the motor vehicles sector. Out of the 22 formal complaints received by the Commission, 20 targeted vehicle manufacturers or national importers, one concerned a parts supplier and one related to a company active in the energy / petrol stations sector. Nine of these formal complaints concerned the distribution of new vehicles, nine the provision of repair and maintenance

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

2 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L 102, 23.4.2010.

3 Commission notice — Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. OJ C 138, 28.5.2010.

4 Guidelines on Vertical Restraints. OJ C 130, 19.5.2010.

5 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. OJ L 123, 27.4.2004.

6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003.

services, three the distribution of spare parts, and one concerned both the distribution of new vehicles and the provision of repair and maintenance services. Sixteen of the complaints were submitted by dealers / authorised repairers, one by a vehicle manufacturer / national importer, one by a parts distributor, one by an independent repairer and three by other types of entities (a national association of dealers, a national association of small and medium enterprises active in the motor vehicle sector and another entity).

Of the complaints concerned, 27%, purportedly inappropriate selection criteria combined with an alleged abuse of dominance, 23% related to an alleged abuse of dominance, 9% concerned alleged inappropriate selection criteria, 9% related to possible restrictions in distribution agreements, 9% referred to suspected refusal to access authorised networks, 9% concerned alleged parallel trade restrictions, 4% related to purported abuse of warranties, 5% were linked to possible restrictions on cross-supplies between authorised distributors and 5% related to other alleged restrictions.

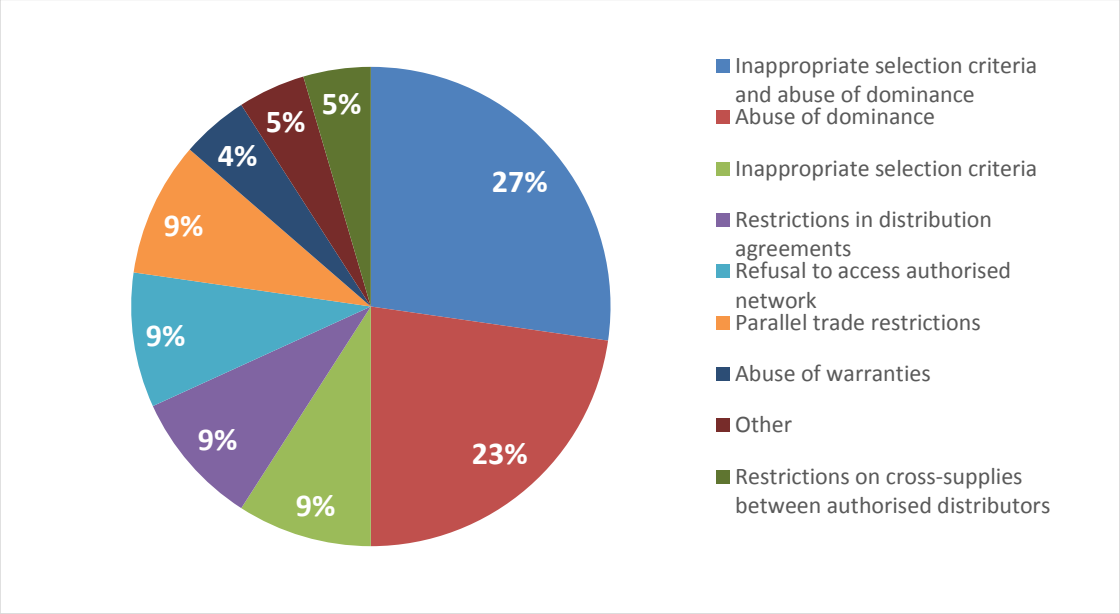


Figure 1: Main allegations raised in formal complaints filed with the Commission

As for the reasons for rejection, the Commission rejected 19 complaints on the basis of lack of community interest, two complaints on grounds of lack of community interest and NCAs dealing or having dealt with the case, and one complaint because an NCA was already dealing or had dealt with the same case.

Appeals before the General Court of the EU were filed against two of the Commission's decisions.[7] Sections 2.2 and 4 below include further details on these cases.

[7] See cases T-531/18 and T-743/20.

1.2 Monitoring

In addition to formal complaints, as part of its monitoring and enforcement activities in the sector, the Commission deals with informal correspondence / submissions from stakeholders.[8]

Between the entry into force of the current motor vehicle block exemption regime and October 2020, the Commission dealt with around 600 of such informal submissions relating to the motor vehicle sector. In a relatively small number of these cases, the initial informal correspondence evolved into a formal complaint.

The informal correspondence received by the Commission over the period at issue has been very varied. Some items did not relate to the EU competition rules at all, while for some others, these rules only had an incidental bearing. Many correspondents put questions to the Commission as to where particular information could be found, or as to the relevance of the rules for a particular situation. In other instances, competition concerns were briefly raised, but the requirements of "Form C" of Regulation 773/2004 were not fulfilled, and/or little or no evidence was provided to support allegations.

In instances where it appears that there may *prima facie* be a competition issue, but further information is needed or the practical effect appears limited in scope, the Commission takes a pragmatic approach. In some cases, this may involve requesting more information or evidence from the correspondent, while in others, the Commission may also take direct informal contact with the target of the allegations, inviting them to take remedial action to deal with a dispute.

Given the very varied nature of the correspondence, only general statistics can be provided. What follows excludes submissions that were deemed to be completely outside the Directorate General ("DG") for Competition's remit, mainly because the EU competition rules did not apply.

As for the outcome of the correspondence received, with respect to 28% thereof the Commission found no indications of any infringement. In 26% of submissions, the Commission provided clarification or guidance. In 10% of instances, the correspondents provided information without requesting action from the Commission, while in 8% of the correspondence the Commission found that the information provided was insufficient to reach any conclusions. In a further 8% of the cases, there was no follow up by the correspondent. In 7% of the submissions, the problem was addressed by informal means. In 6% of the submissions, the matter concerned a contractual issue. About 3% of the submissions were found to have no cross-border element, and 2% of the correspondence

[8] Informal submissions (sometimes referred to as "market information letters") differ from formal complaints in that they do not contain the information required by "Form C" annexed to Commission Regulation 773/2004. Moreover, in many cases, they do not allege particular breaches of the EU competition rules, but rather ask questions relating to the qualification of a particular set of circumstances.

was referred or re-allocated to other DGs of the Commission. Finally, 1% of the submissions are still pending and a further 1% evolved into formal complaints.

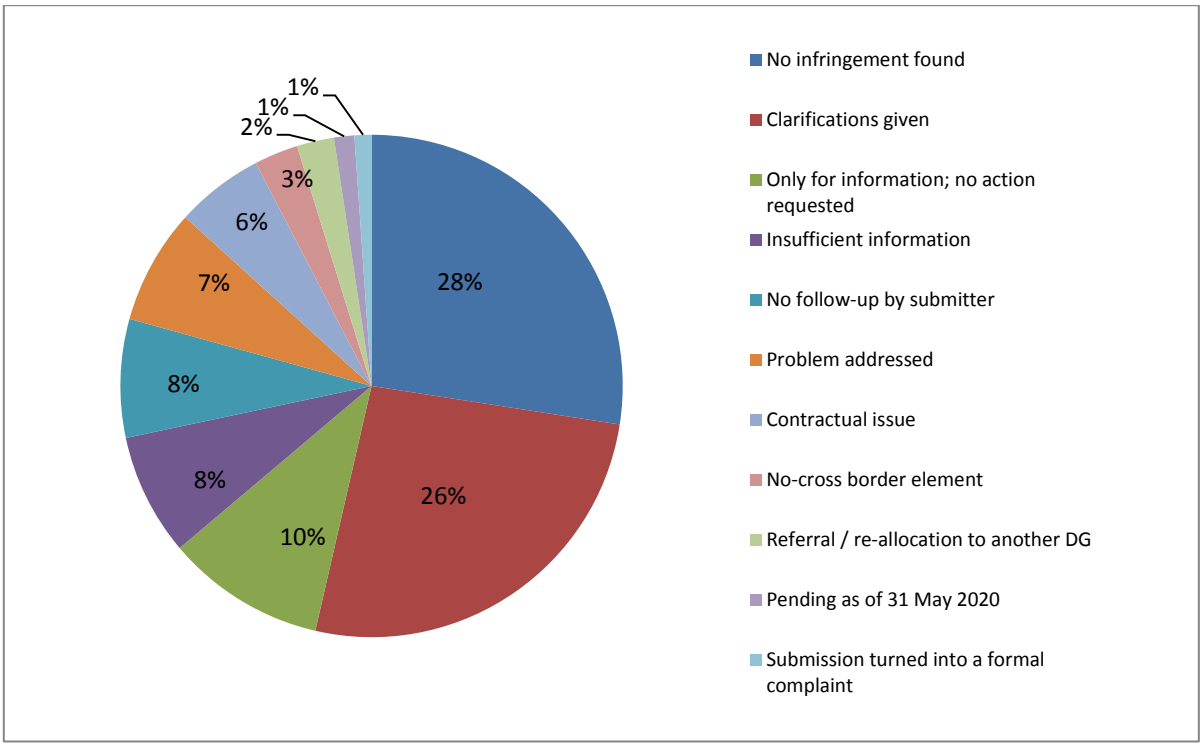


Figure 2: Breakdown of submissions by outcome

The informal submissions that turned into a formal complaint are briefly described below.

- First, Case AT.39804 (*Volkswagen Group Italia (Audi I)*) and Case AT.39836 (*Volkswagen Group Italia (Audi III)*) concerned similar complaints. In particular, both complainants argued that Volkswagen Group Italy was engaging in anticompetitive behaviour as regards the provision of after-sales services regarding Audi cars in Italy. According to the complainants, the target had breached Articles 101 and 102 of the Treaty by implementing a number of practices to exclude small repairers from its authorised network. After assessing the evidence on these cases, the Commission decided not to carry out in-depth investigations and adopted two rejection decisions under Article 7(2) of Regulation 773/2004 based on lack of Union interest.

- Second, Case AT.40037 concerned a complaint from a company in the Czech Republic - Carpenter s.r.o. - that had applied to become an authorised distributor of Subaru motor vehicles but seen its application rejected. The complainant argued that several Subaru entities were in breach of Article 101 of the Treaty. The allegations of the complainant were that: (i) Subaru's distribution agreements were prohibited under Article 101 of the Treaty; (ii) several Subaru entities and importers had tried to prevent Subaru dealers located outside of the Czech Republic from selling Subaru vehicles in the Czech Republic; (iii) Subaru

subsidiaries had been coordinating sales prices in a number of Member States; (iv) German and Czech authorised Subaru distributors had refused to provide warranty services to consumers who had purchased through intermediaries; and (v) the Czech Subaru subsidiary had failed to deliver spare parts for Subaru motor vehicles and to disclose technical information. As regards the latter, Carpenter also argued a breach Article 102 of the Treaty. The Commission dismissed part of the complaint pursuant to Article 13 of Regulation 1/2003 on the ground that the Czech competition authority had already dealt with the case. The remainder of the complaint was rejected under Article 7(2) of Regulation 1/2003 on the grounds that there was a low likelihood of finding an infringement and that further investigation would be onerous and would require a disproportionate use of resources. The Commission's decision was appealed before the General Court of the EU (see section 4 below for further details).

- Third, there were two other cases of informal submissions that turned into formal complaints, which have not been published. The first concerned a complaint from an industry association, which claimed that some of its members were not being granted access to information that was necessary for them to compete on the market for an input necessary for certain equipment. In the complainants' view, this conduct was in breach of Article 102 of the Treaty. After assessing the evidence in this case, the Commission issued a rejection letter under Article 7(1) of Regulation 1/2003 due to lack of Union interest. The other case related to allegations that a vehicle manufacturer did not allow its authorised dealers to sell certain type of cars to a particular category of consumers. This complaint was withdrawn following communications between the Commission and the target of the complaint aimed at resolving the issue.

Regarding the type of correspondent behind the informal submissions, about 37% came from consumers, 12% from independent repairers, 10% from vehicle dealers, 7% from intermediaries, 3% from parts distributors, 3% from vehicle manufacturers or national importers, 3% from parts/ components suppliers, and 25% from other types of correspondents[9]. As to the subset of informal correspondence which was received from consumers, 57% involved vehicle manufacturers/national importers, 24% dealers/authorised repairers, 2% component/part suppliers, 1% independent repairer, 1% parts distributor, and 15% other.

In terms of substance, 58% of the informal correspondence involved allegations against or queries concerning vehicle manufacturers / national importers, with 13% concerning dealers / authorised repairers, 4% component / part suppliers, 1% independent repairers, 1% intermediaries and 23% involving others.

[9] The category "others" includes anonymous correspondents.

The largest proportion of the informal submission concerned the distribution of new motor vehicles, followed by the provision of repair and maintenance, and distribution of spare parts. Some queries related to more than one type of activity.

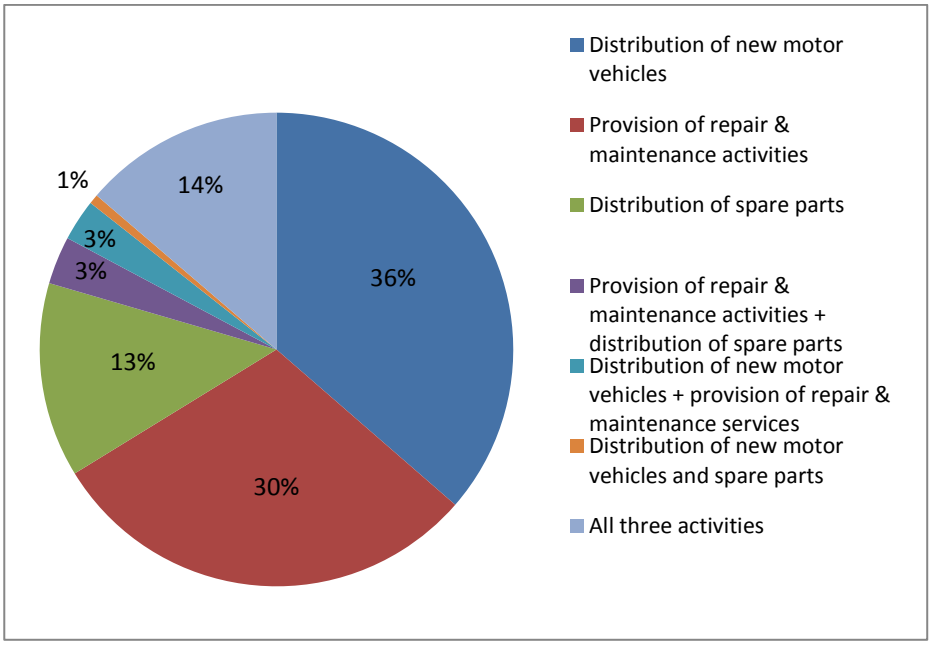


Figure 3: Breakdown of submissions by type of activity concerned

The most common restrictions alleged in the Commission's informal correspondence concerned parallel trade and other restrictions on sales to end users, followed by aftermarket restrictions such as the misuse of warranties and restrictions on access to technical information. Allegations of restrictions on access to spare parts were also prominent.

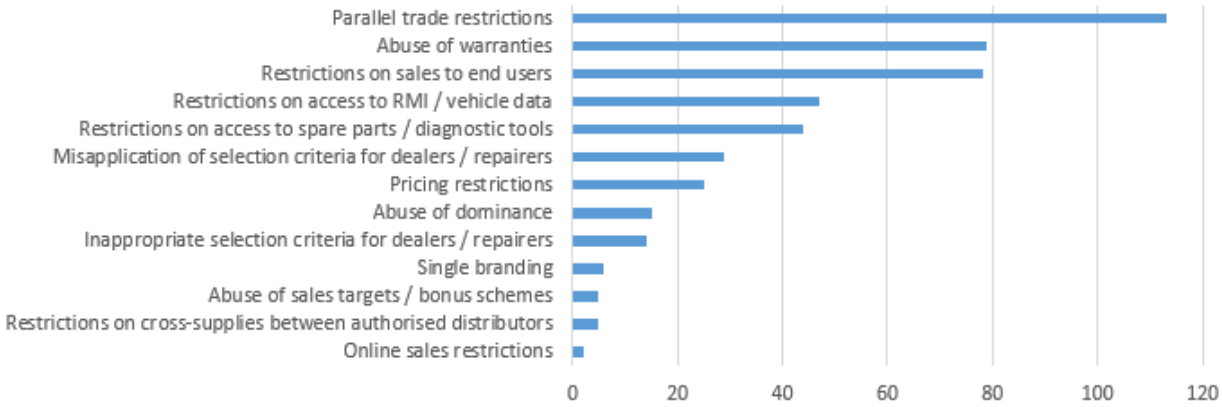


Figure 4: Types of alleged restrictions

Although certain submissions were not classifiable under the typical types of restrictions, some of them presented interesting aspects. For example, one concerned an alleged imposition of a particular charger for certain electric vehicles. Another, involving the so-

called "repair clause", was reallocated to DG GROW, as the case was related to EU legislation on design protection of spare parts, for which DG GROW is competent.

2. Enforcement by national competition authorities

The Commission asked NCAs in all 28 Member States[10] and the Contracting Parties to the EEA Agreement about their enforcement experience with the application of the motor vehicle block exemption regime since 2010, and all provided answers.

With the exception of three Member States (i.e., Austria, Ireland and Latvia) and Norway, there are currently no national guidance papers concerning vertical restraints in the motor vehicle sector. In the case of Austria and Ireland, these guidelines are part of their general guidelines on vertical restraints.

The total number of complaints received by all NCAs was 142. The total number of complaints received by individual NCAs ranges from 0 to 30. In addition to these complaints, there were 25 *ex officio* procedures initiated by the NCAs.

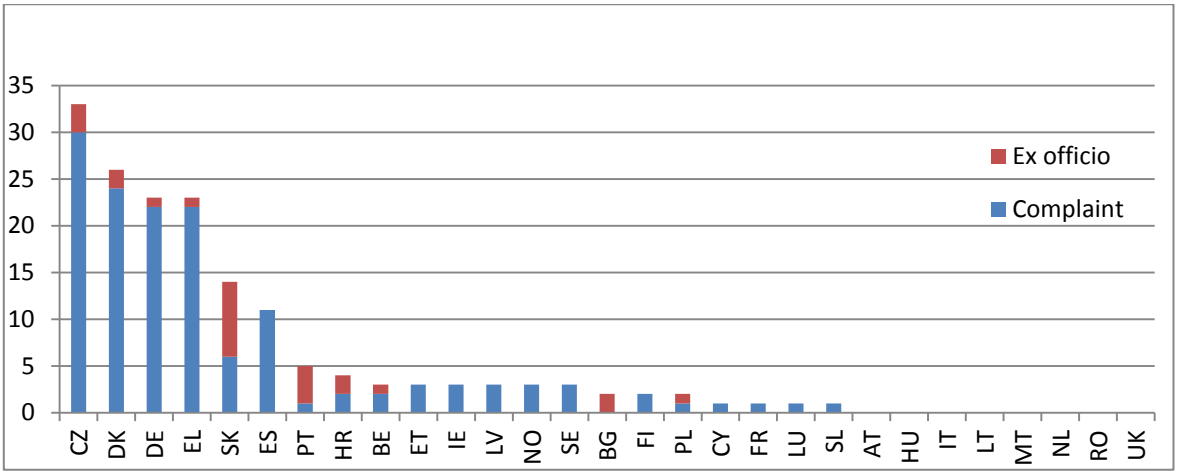


Figure 4: Origin of cases related to vertical restraints in the motor vehicle sector (2010-2020)

During the period at issue, the majority of cases (more than 90%) were closed by the NCAs, while 11 cases are still ongoing.

The most active category of complainants were independent repairers (32 complaints), followed by consumers (30 complaints) and independent dealers of new vehicles (22 complaints). By contrast, only a few complaints were received from vehicle manufacturers, online vehicle sales platforms, insurance companies, authorised dealers/repairers, intermediaries and component/parts suppliers or distributors.

[10] The United Kingdom was consulted, as it was a Member State during the majority of the period of application of the motor vehicle block exemption rules.

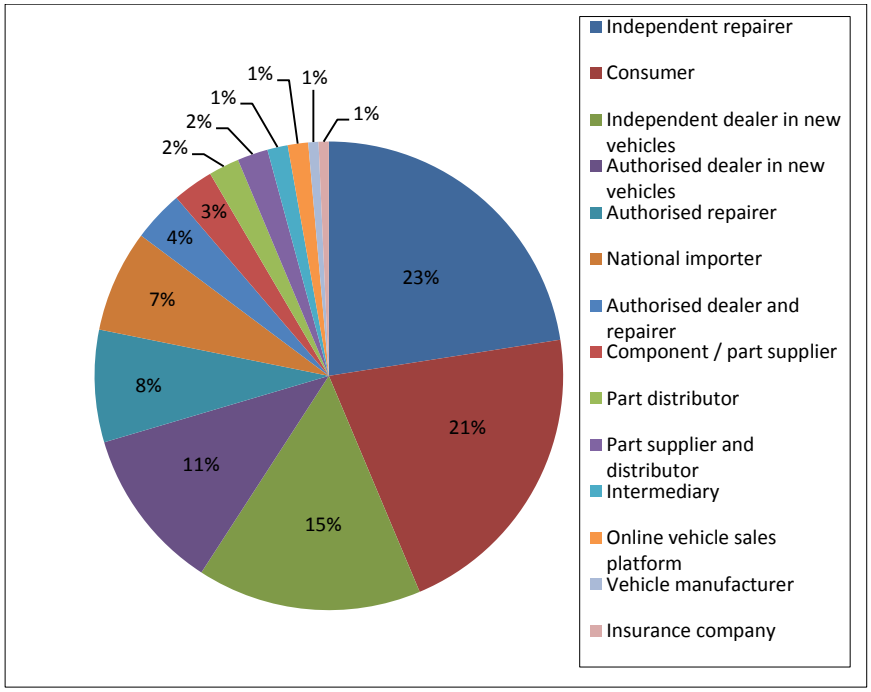


Figure 5: Type of complainants before NCAs

As for the target of the complaints, a majority of complaints concerned activities of national importers (62%), followed by those of vehicle manufactures (23%). A minority of complaints concerned activities of authorised repairers (7%), authorised dealers of new vehicles (4%), component/part suppliers (2%), insurance companies (1%) and independent dealers of new vehicles (1%).

The most frequent activity challenged by the complaints was the provision of repair and maintenance services, with a total of 65 complaints before the NCAs. The second most common activity concerned by the complaints was distribution of new motor vehicles, with a total of 44 complaints before NCAs.

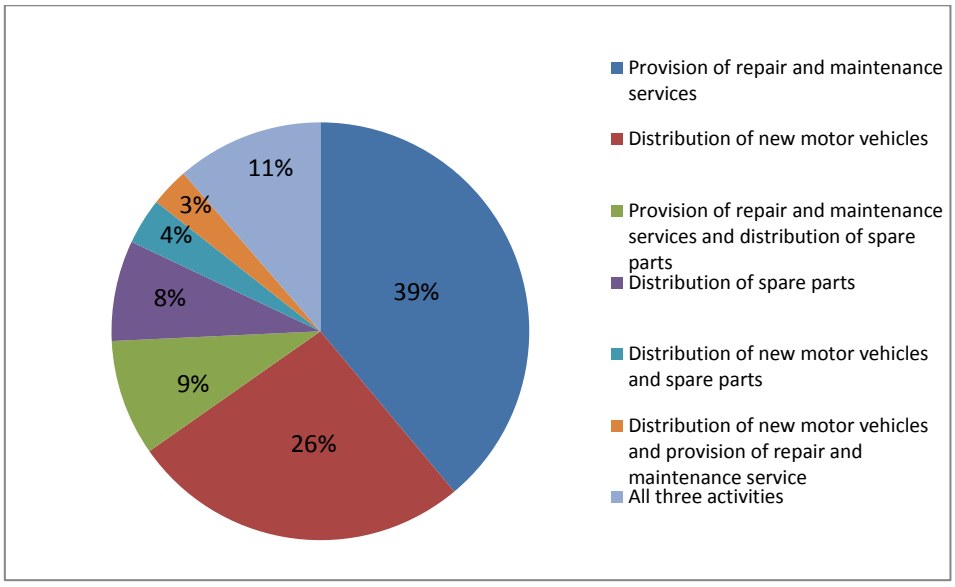


Figure 6: Type of activity concerned by the complaints

In the period under analysis, the NCAs closed a total of 156 cases:

- A majority of these cases (97) were closed administratively without formal decision, primarily due to absence of sufficient evidence or lack of priority. None of these cases were re-allocated to the Commission.
- Three cases were administratively closed by providing guidance to the complainants.
- In 33 cases, the NCAs issued rejection decisions, primarily because they could not establish an infringement.
- In 19 cases, the NCAs issued commitment decisions. None of these decisions imposed financial or other types of penalties on their addressees.
- In six cases, the NCAs issued prohibition decisions. All of these decisions imposed either financial or other types of penalties on their addressees.
- The Belgian NCA was the only competition authority that adopted an interim measures decision in the motor vehicle sector in the period under analysis[11] and a follow-up decision on the case in question. The case concerned a national importer and a former authorised dealer, where the latter wanted to remain active as independent repairer.

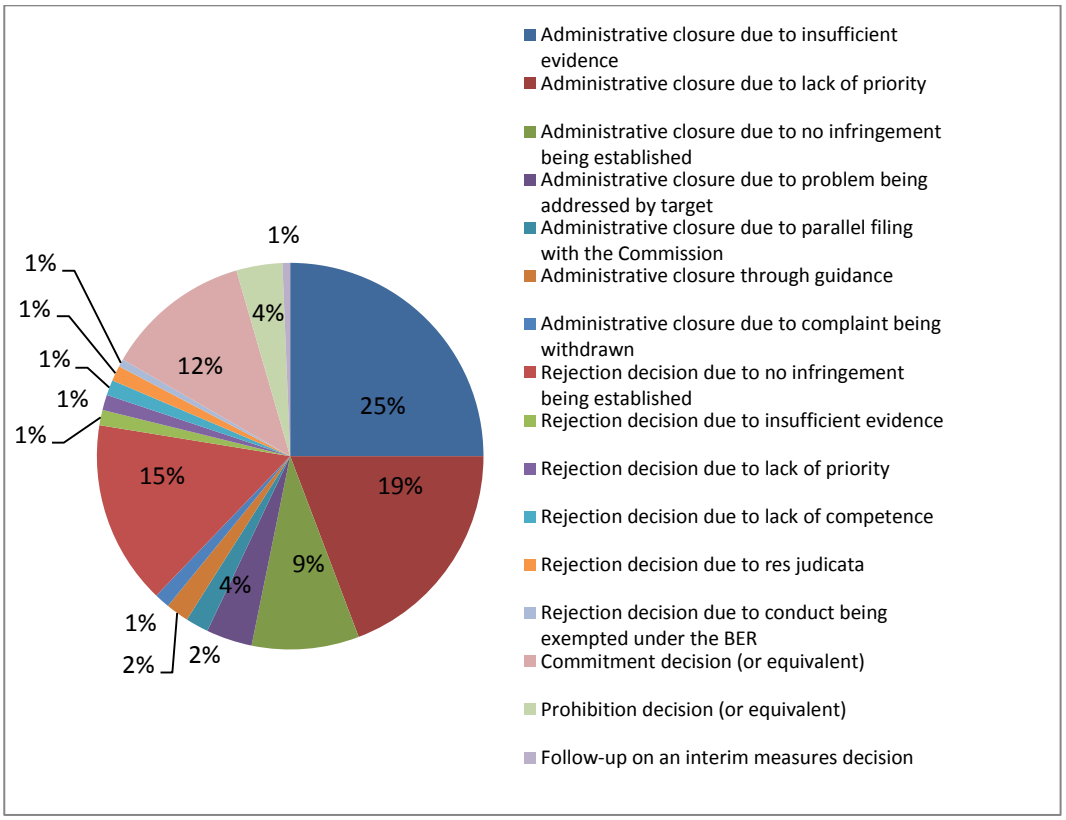


Figure 7: Types of closure

[11] Decision no. BMA-2014-V / M-14 of July 11, 2014.

As for the type of restrictions identified by Member States' NCAs in their decisions where an infringement was found, the most common of these was abuse of warranties (representing almost 40% of all identified restrictions), followed by restrictions on access to spare parts / diagnostic tools, and pricing restrictions.

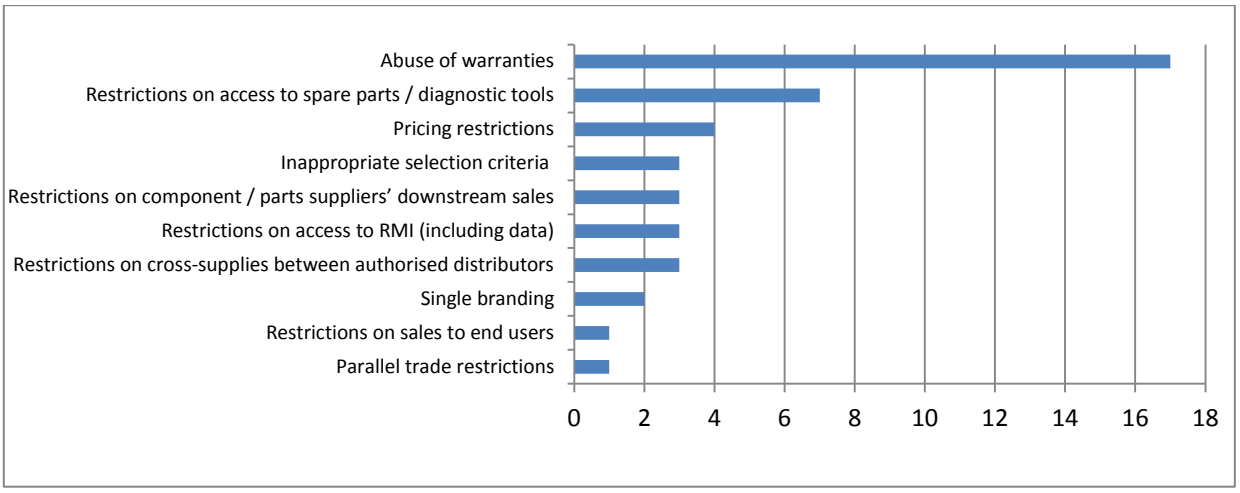


Figure 8: Types of restrictions identified in infringement decisions

With regard to the legal instruments used by Member States' NCAs in their infringement decisions in this sector, the most common instrument was reported to be Article 101 of the Treaty, followed by national legislation, the SGL and the MVBER. In a few cases, the NCAs also referred to the VBER and the VGL, as well as national guidance papers.

Out of all the decisions adopted by NCAs concerning motor vehicles, eight were appealed in court, with four being upheld in first instance and three pending before the first instance courts. Two decisions were further appealed on second instance and are currently pending.

Regarding the legal instruments applied by national courts, NCAs reported that each of the following instruments had been used once in national judgments: the MVBER, Article 101 of the Treaty, the SGL, national legislation and national guidance paper.

3. Court of Justice of the EU

Since 2010 there has only been one case concerning the motor vehicle sector which arrived before the Court of Justice of the EU, namely, the preliminary ruling from the French *Cour de Cassation* in Case C-158/11.[12] The latter concerned the previous MVBER,[13] in particular, whether the term "specified criteria" in Article 1(1)(f) of such Regulation had to be interpreted as requiring, in order to benefit from the exemption, that a quantitative selective distribution system is based on criteria which are (i) objectively

[12] Case C-158/11 Auto 24 SARL v Jaguar Land Rover France SAS of 14 June 2012.

[13] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector. OJ L 203, 1.8.2002.

justified; and (ii) applied in a uniform and non-differentiated manner in respect of all applicants for authorisation. The answer of the Court was that the term "specified criteria" under the previous MVBER referred to criteria the precise content of which may be verified and that, in order to benefit from the exemption, it was not necessary for such a system to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates for the authorisation.

In addition, there were two cases brought before the General Court of the EU against two Commission rejection decisions.

The first appeal concerned the Commission decision on Case AT.40037 *Carpenter / Subaru* (see section 2.2 above for further details). In this case, the Commission had dismissed part of the complaint pursuant to Article 13 of Regulation 1/2003 based on the fact that the Czech competition authority had already dealt with the case, and the rest of the complaint on the basis of Article 7(2) of Regulation 1/2003 on the grounds that (i) there was a low likelihood of finding an infringement; and (ii) further investigation would have been onerous and would have required a disproportionate use of resources. This decision was appealed by the complainant before the General Court of the EU, giving rise to Case T-531/18.[14] The complainant argued that the Commission decision was vitiated, on the one hand, by an error resulting from an incorrect legal and factual assessment and, on the other, by a procedural error due to a lack of appropriate reasoning in the decision. In its judgement, the General Court rejected the pleas of the plaintiff and upheld the Commission's decision.

The second appeal concerned Case AT.40665 *Toyota*. This case was triggered by a complaint filed by a Polish car dealer against Toyota Motor Poland with regard to a refusal to access the authorised network of the latter. The Commission rejected this complaint on the basis of Article 13 of Regulation 1/2003 and Article 9 of Regulation 774/2004 as it found that the Polish NCA had already dealt with the same case. The complainant filed an appeal against the Commission decision on 17 December 2020, which gave rise to Case T- 743/20. In its appeal, the complainant argues (i) misinterpretation and misapplication of Article 13(2) of Regulation 1/2003; and (ii) infringement of the right to good administration resulting from Article 41 of the Charter of Fundamental Rights of the European Union. This case is currently pending before the General Court of the EU.

[14] Case T-531/18 LL-Carpenter s. r. o. v Commission of 12 March 2020.

Annex 5: Methods and analytical mode

Evaluation criterion		Evaluation question					Evidence		
						Objective pursued	Type		Source
A	Effectiveness	**A.1**	How have market conditions in the motor vehicle sector evolved since the rules took effect?	**A.1.1**	Distribution of new motor vehicles		**a**	Objective market data	Study
							b	Perceptions of competition law enforcers	NCAs consultation
							c	Perceptions of stakeholders	Public consultation
				A.1.2	Provision of repair and maintenance services		**a**	Objective market data	Study
							b	Perceptions of competition law enforcers	NCAs consultation
							c	Perceptions of stakeholders	Public consultation
				A.1.3	Distribution of spare parts		**a**	Objective market data	Study
							b	Perceptions of competition law enforcers	NCAs consultation
							c	Perceptions of stakeholders	Public consultation
		A.2	To what extent have the general objectives of the rules been achieved? (*What is the level of legal certainty that the MVBER regime has provided? Do the conditions currently defined in the MVBER regime meet the objective of only exempting those agreements for which it can be*	**A.2.1**	Legal certainty for companies' self-assessment of compliance with Article 101 of the Treaty	First specific objective	**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.2	Identification of agreements whose benefits outweigh negative effects	Second specific objective	**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation

			assumed with sufficient degree of certainty that they generate efficiencies?)		(minimisation of false positives and false negatives)				
				A.2.3	Provision of a common framework for the consistent application of Article 101 of the Treaty by NCAs and national courts (treated in the questionnaires under the EU added value criterion)	Third specific objective	**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4	Protecting competition in specific dimensions of the motor vehicle and aftermarkets sectors	Fourth specific objective			
				A.2.4.1	Preventing foreclosure of competing vehicle manufacturers and safeguarding their access to the market	First sub-part of the fourth specific objective	**a**	Own analysis of the study results	Study
							b	Perceptions of stakeholders	Public consultation
							c	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.2	Protecting competition between dealers of the same brand	Second sub-part of the fourth specific objective	**a**	Own analysis of the study results	Study
							b	Perceptions of stakeholders	Public consultation
							c	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.3	Preventing restrictions on parallel trade in motor vehicles	Third sub-part of the fourth specific objective	**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.4	Enabling independent repairers to compete	Fourth sub-part of the fourth	**a**	Own analysis of the study results	Study

					with the manufacturers' networks of authorised repairers	specific objective	**b**	Perceptions of stakeholders	Public consultation
							c	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.5	Protecting competition between repairers of the same brand	Fifth sub-part of the fourth specific objective	**a**	Own analysis of the study results	Study
							b	Perceptions of stakeholders	Public consultation
							c	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.6	Preventing foreclosure of spare parts suppliers	Sixth sub-part of the fourthspecific objective	**a**	Own analysis of the study results	Study
							b	Perceptions of stakeholders	Public consultation
							c	Perceptions of competition law enforcers	Own experience; NCAs consultation
				A.2.4.7	Preserving the deterrent effect of Article 101	Seventh subpart of the fourth specific policy objective	**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation
B	Efficiency	**B.1**	Are the incurred compliance costs reasonable and proportionate to the benefits that the rules bring?				**a**	Perceptions of stakeholders	Public consultation
		B.2	Are the incurred enforcement costs reasonable and proportionate to the benefits that the rules bring?				**b**	Perceptions of competition law enforcers	NCAs consultation
C	Relevance	**C.1**	Do the objectives of the MVBER regime reflect current needs and are they appropriate to meet those needs?				**a**	Own analysis of the study results	Public consultation
							b	Perceptions of competition law enforcers	Own experience; NCAs consultation
							c	Perceptions of stakeholders	Public consultation
D	Coherence	**D.1**	Are the rules internally consistent?				**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	NCAs consultation
		D.2	Are the rules coherent with other EU rules?				**a**	Perceptions of stakeholders	Public consultation
							b	Perceptions of competition law enforcers	NCAs consultation
E	EU Added	**E**	Have the rules provided EU added value in companies' self-assessment of compliance				**a**	Perceptions of stakeholders	Public consultation

	value		with Article 101 of the Treaty?	**b**	Perceptions of competition law enforcers	NCAs consultation

Annex 6: Overview of issues identified during the evaluation process[1]

1. SCOPE OF EXEMPTION

1.1. Material scope

The evidence gathered during the evaluation indicates conflicting views with regard to the material scope of the MVBER regime, which is limited to vertical agreements relating to spare parts or repair and maintenance services for motor vehicles, which are defined as "self-propelled vehicles intended for use on public roads and having three or more road wheels".[2]

While NCAs overall find the current scope appropriate, most respondents to the public consultation believed that the current material scope of the MVBER should be widened.

The majority of NCAs indicate that there does not seem to be a need for the current material scope to be widened or narrowed. In contrast, a majority of respondents to the public consultation believe that the current definition should be widened[3] to mainly include: two-wheeled vehicles (mainly motorbikes, but some also mention electric bikes or electric scooters) and vehicles not meant for roads (such as agricultural machinery, tractors and forestry vehicles, construction vehicles). According to certain respondents, OEMs place significant pressure on authorised repairers to use only specific spare parts to the detriment of alternative spare parts suppliers with regard to these types of vehicle. The increasing importance of electric bikes and scooters as new forms of mobility was underlined. In the view of some respondents, it was important to extend the scope of the MVBER to such vehicles in order to achieve coherence across types of vehicles. Finally, some respondents also mentioned that it would be advisable to make specific mention of electric vehicles.

1.2. Market threshold

1 This annex presents an overview of the main issues related to the design and performance of the MVBER regime which were raised by either a significant share of respondents the public consultation or by a considerable number of NCAs.

2 Article 1(g) MVBER.

3 Primarily associations representing parts dealers, parts manufacturers, vehicle dealers or vehicle importers, but also companies (mainly parts dealers, but also other types of respondents such as repairers).

The likelihood that efficiency-enhancing effects will outweigh any anti-competitive effects resulting from restrictions contained in vertical agreements and that such vertical agreements therefore comply with the conditions of Article 101(3) of the Treaty depends on the degree of market power held by the parties to the agreement. The MVBER regime therefore relies on market share thresholds for both the supplier and the buyer to determine the scope of the block exemption. The block exemption will only apply if (i) the market share held by the supplier does not exceed 30% on the market on which it sells the contract goods or services; and (ii) the market share held by the buyer does not exceed 30% on the market on which it purchases the contract goods or services.[4]

Articles 7(a)-(c) VBER set out the rules for calculating the market share of the supplier and the buyer in order to determine whether the VBER applies to a particular vertical agreement. Paragraphs 86-95 VGL provide further guidance on the definition of the relevant market and the calculation of the market shares of the parties to a vertical agreement.

The evidence gathered during the evaluation indicates that, generally, **stakeholders and NCAs consider the provisions concerning the market share thresholds as appropriate**.

Nevertheless, some stakeholders and few NCAs express some issues with regard to the functioning of these provisions. Some stakeholders expressed the view that the threshold was too high.[5] These respondents argued, for example, that the threshold could be lowered based on the fact that very few players actually reach 30% market shares and because of the alleged increase in direct sales by vehicle manufacturers. In contrast, some respondents considered the threshold to be too low.[6] These respondents argue, for example, that the 30% threshold seems too low if certain potential market definitions are considered. In particular, they explained that 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. Finally, some other respondents drew a distinction between the sale of new cars and the aftermarket sectors. This group mentioned that while, in their view, there would be no reason to depart from the 30% market threshold for the market of new cars, for the aftermarket, the current approach of

4 Article 3 VBER.

5 Primarily, associations representing parts dealers and manufacturers, but also companies (mainly part dealers and repairers).

6 Associations representing vehicle manufacturers, parts manufacturers, vehicle and parts dealers and importers, a vehicle importer/part dealer and a company active in the mineral-oil market.

calculating market share for each brand separately means that, in practice, the threshold has little effect, since few agreements fall below it.

Based on their experience, NCAs indicated that the 30% market share threshold for agreements to benefit from the motor vehicle block exemption is generally still appropriate. Nevertheless, a few NCAs pointed out that, as a result of the brand-specific nature of the markets for repair and maintenance services and for the distribution of spare parts, the practical applicability of the motor vehicle rules in these areas is limited, as the 30% threshold is generally exceeded. Some NCAs deduced from this that the threshold may be too low, at least for the provision of repair and maintenance services and for the distribution of spare parts. On the other hand, following the same logic, some NCAs considered that the current threshold is too high with regards to the market for new motor vehicles, as for certain countries and segments the market is very fragmented, meaning that all agreements fall below the market share threshold.

1.3. Market definition

With regard to market definition, the Commission follows the approach defined in its Notice on this subject[7]. It also takes into account previous decisions which have precisely defined relevant markets, subject to an assessment of the changes which may have occurred since the decision and taking into account the level of trade at which the decision has defined the market. The VGL also clarify specific issues which may arise in respect of market definition in the context of vertical agreements.

The evaluation has pointed to some issues with regards to the market definition and the calculation of market shares in the motor vehicle sector.

A few respondents to the public consultation - mainly vehicle manufacturers - indicate that if the vehicle manufacturers' market shares were taken to encompass those of their authorised repairers, after-market agreements would automatically fall outside of the block exemption. By contrast, a company active in the oil/lubricants sector mentioned that, in order to better understand the impact of an agreement on the market, the analysis should take account of vehicle manufacturer's market shares for both car sales and servicing.

Some NCAs considered that certain markets for repair and maintenance services and for the distribution of spare parts might not be brand-specific. In this regard, these NCAs suggested that there might be a distinction between "complex repairs", for which there are no / few alternative service providers, and "simpler repairs", for which there are effective alternatives. In their view, while in the first example the market could be brand specific, it would not be so in the second example. Further to the above, some NCAs also

[7] Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, p. 5–13.

suggested that, from the point of view of the repairer, the offers of vehicle manufacturer / importers, parts suppliers and other independent repair chains may be regarded as substitutable. Therefore, in these NCAs' view, the market may not be brand-specific, as access to the brand of a particular vehicle manufacturer / importer may not be indispensable for a repairer to operate on the relevant market.

Further to the above, a few NCAs question whether the markets for the sale of new motor vehicles and for aftersales services, which have hitherto been considered to be separate, may not be tipping towards an integrated multi-brand "system market".[8] Finally, some NCAs highlight their view that guarantee services and services provided during vehicle recalls should be excluded when calculating the market share of the authorised networks. In the view of these NCAs, the inclusion of such services may artificially inflate the perceived market shares of authorised repairers vis-à-vis their independent competitors.

1.4 Potential additional elements on which the exemption should be made conditional

The evaluation has shown that **some respondents are of the view that there could be other elements upon which the exemption could be made conditional. Although a few NCAs proposed reflecting on potential additional conditions,** overall, they opined that there should not be other elements beside the current threshold criterion upon which the exemption should be made conditional.

Generally, respondents[9] pointed to some elements that they believed could be added so as to narrow the exemption. In this regard, a number of parts dealers, parts manufacturers and repairers referred to the need to make access to technical information a condition to benefit from the exemption or, as an alternative, to recognize the failure to provide such access as an infringement of Article 101(1) of the Treaty. Another point raised by these stakeholders was that the misuse of warranties should be deemed to be an infringement of Article 101 (1) of the Treaty or, at least, result in the loss of the benefit of the exemption. A few parts manufacturers and parts dealers argued that the absence of restrictions on dealers' and end users' freedom of choice should be a condition for the exemption to apply. Some dealers and repairers also suggested that direct sales by vehicle manufacturers should be capped at 20% of the overall sales volumes of each manufacturer.

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8 Footnote 26 of the SGL states that *"In some circumstances, a system market which includes motor vehicles and spare parts together may be defined, taking into account, inter alia, the life-time of the motor vehicle as well as the preferences and buying behaviour of the users. [..] One important factor is whether a significant proportion of buyers make their choice taking into account the lifetime costs of the motor vehicle or not. [..] Another relevant factor is the existence and relative position of part suppliers, repairers and/or parts distributors operating in the aftermarket independently from motor vehicle manufacturers. [..]."*

9 Vehicle manufacturers' associations argued that adding more conditions would create legal certainty, and a couple of insurance companies and a few other respondents said no other elements should be added as conditions to the exemption.

An association in the vehicle leasing / rental sector argued that the "end user" status of leasing companies should be mentioned explicitly in the VBER and MVBER, as currently it is only found in paragraph 51 SGL. In this regard, the association argued that the exemption should be made conditional on (i) OEMs not discriminating between end users; (ii) OEMs not applying registration and use requirements; (iii) OEMs not requiring retention periods for vehicles; and (iv) purchasers of vehicles not being obliged by OEMs to provide the name of the end customer. Finally, a dealer/repairer argued that the exemption for the sale of new cars should be conditional on the admittance to the authorised network of all repairers that meet the vehicle manufacturer's selection criteria.

The majority of NCAs did not consider that there should be other elements beside the current threshold criterion upon which the exemption should be made conditional. However, some NCAs proposed reflecting on certain elements, such as (i) the degree to which dealers / service partners within an authorised network are actually able to act as independent market participants; (ii) the vehicle manufacturer's ability to restrict the number of authorised dealers / repairers; and (iii) whether access to vehicle-generated data should be set as a further condition for exemption.

1.5 Hardcore restrictions

Article 4 VBER and Article 5 MVBER contain a closed list of restrictions applicable to vertical agreements in the motor vehicle sector which are likely to restrict competition and harm consumers, or which are not indispensable to the attainment of efficiency-enhancing effects. These restrictions are also known as "hardcore restrictions". Vertical agreements in the motor vehicle sector containing such severe restrictions of competition are excluded from the benefit of the block exemption, irrespective of the market share of the parties to the agreement.

Paragraph 47 VGL and paragraph 17 SGL set out a double presumption for the individual assessment under Article 101 of the Treaty of vertical agreements in the motor vehicle sector that include one or more hardcore restrictions. First, there is a positive presumption that the agreement falls within Article 101(1) of the Treaty. Second, there is a negative presumption, in that the agreement is unlikely to fulfil the conditions of Article 101(3) of the Treaty. The latter presumption is rebuttable, meaning that it is without prejudice to the possibility of the parties to demonstrate the pro-competitive effects of a particular hardcore restriction. In addition, paragraphs 48-59 VGL and paragraphs 17-24 SGL provide guidance on the interpretation of the list of hardcore restrictions set out in Article 4 VBER and Article 5 MVBER respectively.

1.6 Appropriateness of current list of hardcore restrictions

In general, the evaluation has **not identified any specific issues with regard to hardcore restrictions**. The majority of respondents to the public consultation indicated

that they had not encountered other types of vertical restrictions, beyond those currently included in Article 4 VBER and Article 5 MVBER, which should be considered severe restrictions of competition.

Nevertheless, **several respondents**[10] **and a few NCAs** reported encountering restrictions that they believed should be qualified as hardcore. According to these respondents, the most recurrent ones were: (i) restrictions on access to technical information and in-vehicle data for aftermarket operators; (ii) direct or indirect quantitative criteria for accessing authorised networks; (iii) requiring the use of vehicle manufacturers' brands of spare parts in respect of replacements not covered by the terms of the warranty; (iv) bundling sales and aftersales markets, for example, by offering inclusive maintenance plans by default, which allegedly tie the sale of new cars to the use of specific aftermarket providers, or by including both sales and aftersales functions within the same contracts, which is then terminated; (v) refusing to license certain rights necessary to allow suppliers to offer spare parts to the independent channel; (vi) restrictions on the sale of brands from different suppliers; and (vii) restrictions that, prior to 2010, were included in Article 4(2) and Article 4(1)(k) of Regulation 1400/2002.

Based on their enforcement experience, a few NCAs also point to refusals by OEMs to give independent repairers access to technical information as a potential additional hardcore clause to be considered. However, NCAs acknowledge that in practice the inclusion of such a clause may not have real effects, since for passenger cars at least, most repair agreements may not benefit from block exemption in any event, due to the market shares of the members of the authorised networks. Nevertheless, these NCAs consider that listing OEMs' refusal to give independent repairers access to technical information as a hardcore restriction may still have a signaling effect on the market for provision of repair and maintenance services.

1.7 Specific comments on particular hardcore restrictions

a. Resale price maintenance

Resale price maintenance is considered a severe restriction of competition[11] and is therefore qualified as a hardcore restriction pursuant to Article 4 VBER. More specifically, Article 4(a) VBER provides that vertical agreements having as their object the restriction of the buyer's ability to determine its sales price (so-called resale price maintenance or "RPM") are excluded from the benefit of the block exemption irrespective of the market share of the parties to the agreement. Article 4(a) VBER clarifies, however, that the supplier is allowed to impose a maximum or recommended sales price, provided that it does not amount to a fixed or minimum sales price as a

[10] Although the profile of respondents replying in this sense is very diverse, none of the vehicle manufacturers' associations participating in the consultation replied affirmatively to this question.

[11] Recital 10 VBER.

result of pressure from or incentives offered by any of the parties to the agreement. Paragraphs 48-49 and 223-229 VGL provide further guidance on this matter.

Overall, respondents and NCAs consider that the current provisions on resale price maintenance have provided a sufficient degree of legal certainty. NCAs report having encountered pricing restrictions in about 9% of their infringement decisions.

Nevertheless, the evaluation pointed to **some issues with regard to the functioning of the provisions on RPM**.

First, in line with their contributions to the VBER consultation, some NCAs note that the VBER and the VGL do not provide sufficient legal certainty as to whether certain "grey areas" constitute RPM. In particular, they point to a lack of clarity as regards the circumstances in which recommended resale prices amount to RPM and whether certain practices restricting the ability of buyers to determine their selling price should be considered as RPM (e.g., suppliers setting indicative margin based on recommended sales price, and then pushing the actual resale price down by forcing the distributors to pass on / grant extra discounts). In addition, NCAs indicate that the distinction between clear-cut RPM and so-called "hub & spoke" scenarios is currently not reflected in the VBER and the VGL. NCAs also indicate that difficulties arise when it comes to prove the acceptance or the implementation of RPM practices by retailers when there is no explicit RPM contractual provision.

Second, a minority of respondents to the public consultation - mainly vehicle manufacturers - considered that some of the restrictions that are currently listed as hardcore should not be considered as such. In particular, the main concern was expressed with regard to RPM. According to some of these respondents, although RPM is currently permitted when new products are launched, companies applying RPM in this manner run the risk of losing the exemption for their entire agreement if the Commission finds that on the facts, the RPM in question is caught by the hardcore provision. This allegedly creates a disincentive for vehicle manufacturers to use RPM in these cases even though it may lead to efficiencies. This being said, these respondents pointed out that, since the same should be true in other sectors, the matter would therefore best be addressed in the review of the VBER. Moreover, only 14% of respondents to the public consultation report having encountered this type of restriction in their agreements but none of them reported ending up in court.

b. Restriction of the buyer's ability to sell components

Article 4(b) VBER provides that vertical agreements that have as their object the restriction of the territory into which or of the customers to whom the buyer or the buyer's customers may sell the contract goods or services are excluded from the benefit of the block exemption irrespective of the market share of the parties to the agreement. Paragraph 50 VGL explains that this provision aims at preventing market partitioning

by territory or by customer group and provides examples of direct and indirect measures qualifying as territorial or customer restriction pursuant to Article 4(b) VBER.

The general rule laid down in Article 4(b) VBER includes four specific exceptions. One of these exceptions is Article 4(b)(iv) VBER, which allows a supplier to restrict a buyer of components or any intermediate goods, to whom those components are supplied for the purpose of incorporation (e.g., for use as an input to produce other goods), from reselling them to competitors of the supplier. Paragraph 55 VGL further clarifies that the term "component" includes any intermediate goods and the term "incorporation" refers to the use of any input to produce goods.

Overall**, respondents and NCAs consider that these provisions have provided a sufficient degree of legal certainty**. In their enforcement activities, NCAs report having encountered restrictions on component / parts suppliers' downstream sales in about 7% of their infringement decisions. This being said, some NCAs suggest clarifying that Article 4(b)(iv) VBER does not apply to spare parts and other components which are supplied to a vehicle manufacturer for resale in their supplied state, but only to components which are to be incorporated in other products.

c. Restriction of authorised dealers' ability to sell motor vehicles or spare parts to other dealers within the same distribution system (cross-supplies)

Article 4(d) VBER removes the benefit of the block exemption for those agreements which directly or indirectly restrict cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade. Paragraph 58 VGL clarifies that selective distribution cannot be combined with vertical restraints aimed at forcing distributors to purchase the contract products exclusively from a given source. It also adds that within a selective distribution network no restrictions can be imposed on appointed wholesalers as regards their sales of the product to appointed retailers.

Overall, **respondents and NCAs consider that these provisions have provided a sufficient degree of legal certainty**. This being said, without providing further explanations on their position, a non-negligible share of respondents to the public consultation indicated that the provisions in question provided little or very little legal certainty. In addition, only a small minority of respondents (less than 4%) indicated that they had encountered this type of restriction in their agreements. In their enforcement activities, NCAs reported having encountered restrictions on cross-supplies between authorised distributors in about 7% of their infringement decisions.

d. Restriction of original equipment suppliers' ability to sell spare parts to end users or repairers

Article 4(e) VBER is an aftermarket-related hardcore restriction for practices preventing or restricting end users, independent repairers and service providers from obtaining spare parts directly from the manufacturer of these spare parts.

The evaluation has shown that while the majority of NCAs consider that these provisions have provided legal certainty, **several respondents[12] to the public consultation would like to see further clarification**. The disparity between the reported frequency of this type of restriction is notable in this regard: NCAs report having encountered restrictions on sales to end users in about 2% of their decisions while 40% of respondents reported to have encountered this restriction in their agreements.

According to some of those respondents that consider that the provisions on this restriction provide little or very little legal certainty, technical barriers, such the coding of spare parts and the requirement for software activation of replacement parts with what they describe as OEMs' proprietary codes, limit Tier1 suppliers' ability to sell spare parts to end users/repairers/distributors. In the view of these respondents, this effectively blocks the implementation of Article 4(e) VBER and paragraph 59 of the VGL. The respondents also alleged that spare parts manufacturers often reserve their production for vehicle manufacturers and their authorised dealers, thereby resulting in a shortage for the aftermarket (e.g., as regards vehicle glass), limiting choice and potentially increasing costs for consumers.

e. Restriction on the ability of suppliers of parts / tools / equipment to sell their products to authorised / independent repairers / distributors or end users

Article 5(b) MVBER concerns any direct or indirect restriction agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods to authorised and / or independent distributors and repairers. Paragraph 23 SGL refers to the so-called 'tooling arrangements' between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type.

The **majority of NCAs consider that these provisions have provided a sufficient degree of legal certainty**. Although a significant share of respondents to the public consultation consider that these provision have provided sufficient legal certainty, **a larger share of respondents believe that they provide little certainty**. However, the latter do not include explanations on their position.

f. Restrictions on component / part suppliers' ability to place their trademark / logo on the components / parts supplied

[12] Although a significant share of respondents considered that these provisions provide sufficient legal certainty, a slightly larger share pointed out that they provide little or very little legal certainty.

Article 5(c) MVBER provides that the exemption will not apply to vertical agreements which, directly or indirectly, have as their object the restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

Paragraph 24 SGL adds that 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 original equipment suppliers. By not allowing this, motor vehicle manufacturers could restrict the marketing of original equipment suppliers' parts and limit consumer choice in a manner that runs counter to the provisions of Article 101 of the Treaty.

The evaluation suggests that **overall, stakeholders and NCAs consider that these provisions provide a sufficient level of legal certainty**. Only 22% of the respondents to the public consultation reported having found this type of restriction in their agreements. In addition, only one NCA suggests that the hardcore clause listed in Article 5(c) MVBER may be redundant. In this regard, some NCAs suggest that in their experience the true issue relates more to the ability of the supplier to erase the brand of the motor vehicle manufacturer rather than its ability to place its own trademark.

1.8 Excluded restrictions

Article 5 VBER contains a closed list of vertical restrictions that are excluded from the benefit of the block exemption even though the parties to the vertical agreement do not exceed the market share thresholds set out in the VBER. These restrictions are single-branding / non-compete obligations lasting more than five years (Articles 5(1)(a) and 5(2) VBER) and post-term non-compete obligations (5(1)(b) and 5(3) VBER).

Unlike for Article 4 VBER and 5 MVBER, which exclude the entire agreement containing a hardcore restriction from the benefit of the block exemption, if a vertical agreement contains one of the excluded restrictions listed in Article 5 VBER, the remainder of the agreement continues to benefit from the block exemption if it is severable from the excluded restriction. Paragraphs 65-69 VGL provide general guidance on the interpretation of the list of excluded restrictions set out in Article 5 VBER, while paragraphs 26-41 SGL provide further general guidance for the assessment of single-branding obligations in the motor vehicle sector.

Evidence gathered during the evaluation suggests that **respondents to the public consultation and NCAs generally see the current list of excluded restrictions as appropriate.** Overall, NCAs and respondents did not indicate any vertical restrictions in

the motor vehicle sector that the VBER / MVBER listed as excluded but which, in their view, should not be considered as such. One NCA nevertheless wished to see included as an excluded restriction the alleged obligation imposed on dealers / service partners to transfer business information to vehicle manufacturers.

As to the prevalence of excluded restrictions, with regard to post-term non-compete obligations, only one respondent reported having encountered this restriction in its agreements. In their enforcement activities, NCAs report having encountered restrictions on sales to end users in about 5% of their infringement decisions.

1.9 Indirect means of achieving anti-competitive results

Anti-competitive results may also be achieved through types of behaviour not explicitly listed in the current MVBER regime. In this regard, **a majority of respondents to the public consultation and some NCAs reported having encountered** in their agreements and enforcement activities, respectively, **conducts which could serve as an indirect means of achieving anti-competitive results**.

First, some NCAs described a set of conducts in respect of the relationship between OEMs and the members of their authorised networks that could potentially be anticompetitive. In particular, NCAs indicated the following: (i) setting qualitative standards that might raise / unify costs, thereby increasing dealers' economic dependence on a particular supplier; (ii) pushing authorised distributors to merge might increase market concentration at dealer level; (iii) imposing commercial / pricing policies on dealers might indicate an imbalance in rights and obligations between the parties; and (iv) setting arbitrary limits on the number of dealers might unjustifiably exclude some from the distribution networks.

Some NCAs also mentioned that fixing remuneration systems / sales campaigns could have steering effects on dealers' conduct as well as unifying price effects. In this sense, decreasing basic discounts or increasing promotional campaigns was alleged by some respondents to the public consultation to amount to indirect RPM. In relation to this, some respondents also referred to the alleged anticompetitive application of bonus/rebates schemes and pricing/commercial terms, in a way that leads to the exclusion of competitors in the aftermarket, for example, when discounts are being refused to leasing companies if they offer vehicles for private lease. This is alleged to result in input foreclosure and limit competition on the private lease market.

Another alleged indirect means of achieving anticompetitive results identified by a number of respondents, mainly dealers, concerned the increase of direct (including online) sales by vehicle manufacturers. According to these respondents, such sales put authorised dealers at a competitive disadvantage, as they are not able to offer competitive prices to consumers. In addition, the fee paid to dealers for delivering and preparing a car

that has been purchased directly from the vehicle manufacturer is allegedly too small to make the dealers' business profitable.

Secondly, some NCAs referred to agreements between vehicle manufacturers / importers / authorised repairers and insurance companies to allegedly direct customers to authorised repairers to the detriment of independent repairers. These NCAs expressed their concern that such agreements might hamper market access for independent repairers and serve as an indirect means to stimulate the use of spare parts sourced from the vehicle manufacturers. NCAs also reported allegations that importers / vehicle manufacturers / dealers have dissuaded customers from using independent repairers to repair their vehicles by stating that the warranty would be voided if maintenance and repairs were carried out by a non-authorised repairer. Similar allegations concerning misuse of warranties were also flagged by some respondents. For a number of respondents, another alleged indirect means used to the detriment of independent repairers and other independent operators concerned restrictions on access to technical information and in-vehicle data. It was argued that such restrictions could result in an inability to perform repairs/maintenance, inaccurate/inefficient repairs, loss of trust in the independent data publishers that provide access to that information and, allegedly, even safety risks for drivers. In this regard, some respondents also referred to the use of applications installed in cars to direct consumers to authorised repairers, rather than independent repairers, in case of breakdown or necessary maintenance, and to alleged bundling of captive and non-captive parts in sales to independent repairers.

Thirdly, some NCAs reported that consumers have no visibility as to the supplier's recommended prices for repair and maintenance services and that authorised repairers seem to consistently apply the recommended price. In these NCAs' view, this may lead to higher prices for consumers and potentially to price coordination.

Fourthly, some NCAs reported having encountered instances where vehicle manufacturers / importers allegedly withheld a code necessary for the installation of a third-party tool. According to the NCAs, this could significantly reduce the ability of such tool suppliers to offer their services. In a similar vein, some respondents to the public consultation alleged that OES are sometimes required to obtain vehicle manufacturers' consent before using tooling paid by the vehicle manufacturer to make parts for direct aftermarket supply, such consent being usually subject to a payment on the part of the OES for each part produced.

Fifthly, some respondents to the public consultation alleged that certain practices such as the misuse of warranties and the imposition of obligations to register and use vehicles in the country of purchase, amounted to anti-competitive restrictions on parallel trade.

Finally, some respondents claimed to have encountered refusals on the part of vehicle manufacturers to appoint candidates as authorised repairers, which could allegedly result in a decline in intra-brand competition.

2 DEFINITIONS

2.1 Vertical agreements

Article 1(1)(a) and Article 1(1)(a) VBER define “vertical agreement” as an "agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, 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".

Paragraphs 25-26 VGL specify the four main elements to this definition. First, the VBER applies to agreements and concerted practices, but not to unilateral conduct by undertakings. However, in the absence of an explicit agreement expressing the concurrence of wills between the parties to the agreement, a unilateral policy of one party can constitute a tacit agreement if it receives the (explicit or tacit) acquiescence of the other party. Second, the VBER covers agreements and concerted practices between two or more undertakings, but not with final customers not operating as an undertaking. Third, the undertakings concerned should operate, for the purposes of the agreement, at a different level of the production or distribution chain (e.g., at manufacturer, wholesale or retail level), while not excluding the possibility of being active at more than one level. Fourth, the VBER covers purchase and distribution agreements concerning the conditions for the purchase, sale or resale of the goods or services supplied and/or the conditions for the sale by the buyer of the goods or services that incorporate these goods or services. This means that vertical agreements relating to all final and intermediate goods and services are covered by the VBER.

The evaluation has shown that **overall, and taken together, respondents and NCAs consider that these provisions are well-worded, providing a sufficient level of legal certainty**. However, a non-negligible share of respondents indicate the opposite: that the provisions have provided little legal certainty. In this regard, some of these respondents pointed out that, in their view, (i) references to online and direct sales are missing; and that (ii) clarification was needed as to the circumstances under which agreements between dealers and online platforms may constitute “vertical agreements” for the purpose of the VBER. At the same time, a few NCAs report difficulties assessing agreements between competitors in which one party to the agreement acts as a distributor. In this regard, the NCAs note that the Horizontal Guidelines[13] refer back to the VGL for vertical aspects of horizontal agreements.

[13] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance. OJ C 11, 14.1.2011.

2.2 Agency agreements

Paragraphs 12-21 VGL provide guidance on the factors that define agency agreements. They explain that all obligations imposed on the agent in relation to the contracts concluded under an agency agreement fall outside Article 101(1) of the Treaty, since the selling or purchasing function of the agent forms part of the principal's activities and the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods or services. Provisions which concern the relationship between the agent and the principal may, however, infringe Article 101(1) of the Treaty.

Both stakeholders and NCA have pointed to **some issues with regard to the functioning of these provisions**.

First, NCAs are mostly of the view that the relevant paragraphs in the VGL provide an appropriate level of legal certainty. Nevertheless, some NCAs note that the VGL lack the necessary detail to assess the distinction between independent traders and agents acting on behalf of a supplier, especially with regard to the difference in the legal and / or commercial risks incurred. Moreover, these NCAs argue that the VGL do not provide adequate clarity as regards the increased use of mixed distribution models, under which a single undertaking combines the functions of agent and authorised distributor in the same product market for the same brand. In this regard, the NCAs note that it may be questionable whether an OEM should be allowed to have contracts with the same dealer for both agency and distribution activities as, to be considered an agency agreement, the agent should not take any financial or business risk, which they are already doing as distributors under their existing dealer contracts. The NCAs point out that this is particularly important question for the motor vehicle sector, as OEMs usually have considerable power vis-a-vis their dealers, and impose very costly standards upon them.

A significant share of respondents to the public consultation considered that the provisions on agency agreements included in the VGL provided **little or very little level of legal certainty**. In contrast to the position expressed by certain NCAs, some of these respondents explained that, in their view, (i) the current rules were too restrictive, in that they prevented agents from undertaking "*other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal*"; (ii) as the difference between genuine agents and non-genuine agents is allegedly not sufficiently clear, it would be good to include some examples in the VGL; (iii) the term “commercial agent“ should be defined, particularly in light of the increase in agency sales as well as sales over online platforms; and (iv) the circumstances under which car dealers can be considered as agents rather than authorised distributors should be clarified.

The large majority of the issues raised by respondents and NCAs with regard to agency agreements were already raised in the context of the evaluation of the VBER. In this regard, it should be noted that on 5 February 2021 the Commission’s Directorate General

for Competition published a Working Paper titled "Distributors that also act as agents for certain products for the same supplier" setting out its preliminary views on this issue.[14]

2.3 Subcontracting agreements

Paragraph 22 VGL explains that subcontracting agreements are agreements whereby a subcontractor undertakes to produce certain products (exclusively) for the contractor based on technology or equipment provided by the contractor. These agreements are covered by the Subcontracting Notice[15], which provides that these agreements generally fall outside Article 101(1) of the Treaty so long as certain conditions are met. Other restrictions imposed on the subcontractor may, however, be caught by Article 101(1) of the Treaty.

Paragraph 23 SGL refers to the Subcontracting Notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty.[16] Normally, Article 101(1) of the Treaty does not apply to an arrangement whereby a motor vehicle manufacturer provides a tool to a component manufacturer which is necessary for the production of certain components, shares in the product development costs, or contributes necessary intellectual property rights or know-how, and does not allow this contribution to be used for the production of parts to be sold directly in the aftermarket. On the other hand, if a motor vehicle manufacturer obliges a component supplier to transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how, the agreement at issue will not be considered to be a genuine sub-contracting arrangement. Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations.

The evidence gathered during the evaluation indicates that the **relevant provisions provide a degree of legal certainty**. Most NCAs consider that the level of legal certainty provided by the provisions in question is adequate. However, NCAs question whether practices commonly known as "tooling arrangements", whereby vehicle manufacturers prohibit original equipment suppliers 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. NCAs express concern that the Commission's Subcontracting Notice does not provide clarity on this issue, potentially allowing vehicle manufacturers to remove all sources of potential competition for spare parts supply. Finally, a non-negligible share of respondents to the public consultation believed that the provisions on subcontracting

14 Available here.

15 Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty. OJ C 1, 3.1.1979.

16 Now Article 101(1) of the Treaty.

provided little or very little legal certainty. However, these stakeholders provided no specific suggestions for improvement.

2.4 Intermediaries

Paragraph 52 SGL clarifies that the notion of "end users" also encompasses consumers who purchase through an intermediary and defines "intermediary" as a person or an undertaking which purchases a new motor vehicle on behalf of a named consumer without being a member of the distribution network.

The evaluation suggests that **overall stakeholders and NCAs consider that this provision has provided sufficient legal certainty but they point at some issues with regard to the functioning of the current rules in this area**. Some respondents which believe the definition of intermediary has done "little" or "very little" to increase legal certainty argued that it was too strict for the opening given to such operators to be used in practice. Besides the comments made by leasing / rental entities suggesting that the "end user" status of leasing companies should be mentioned explicitly in the VBER and MVBER instead of only in the SGL (see Section 1.4 above), no suggestions or examples were included to improve this definition.

These views were supported by NCAs, which indicated that the definition, while generally adequate, did not fully capture recent market developments such as the increased use of internet platforms. In this regard, some NCAs expressed the view that in the field of motor vehicle sales, online platforms could also be said to act as "intermediaries" between customers and dealers. In addition, some NCAs indicated that there were also firms active in the provision of repair services, which could be said to "intermediate" between customers and repairers. NCAs therefore suggested that clarification was lacking on these recent developments. They nevertheless noted that the question as to when and under what conditions platform bans constitute a hardcore infringement pursuant to Article 4(c) VBER is a general question which should be addressed across sectors in the VBER and/or VGL.

2.5 Spare parts

Article 1(1)(h) MVBER 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.

The evaluation suggests that, **generally**, **stakeholders and NCAs consider that this definition has provided a sufficient level of legal certainty**. Nevertheless some respondents and NCAs point to some issues with regard to the current definition.

Some of the respondents considering that this definition had provided "little" or "very

little" legal certainty argued that the definition should updated to reflect technical developments and that the word "component" should not be used, as this term is not normally used to describe certain goods included in the definition, such as lubricants. These respondents' suggestion would be to replace this word by "parts" and to define "parts" as "goods used for the assembly, repair and maintenance of a vehicle, as well as spare parts". According to these operators, a distinction between "repair parts" and "consumable parts" should also be considered.

Some NCAs argue that the scope of the definition should be expanded to encompass accessories: that is to say, parts which are not intended to replace components of the vehicle, but which are rather "add-ons".This question is relevant for the scope of the MVBER, since Article 4 MVBER only refers to the conditions under which the parties may purchase, sell or resell spare parts. If the definition of spare parts were to be altered or expanded, it should be kept in mind that the notion would deviate from the definition set out in Regulation 2018/858. [17]

2.6 Tool

Paragraph 68 SGL provides that the term "tools" includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.

While a significant share of respondents to the public consultation indicate that this definition has provided a sufficient level of legal certainty, a larger share believe that it has only achieved little or very little legal certainty. Despite this, not many explanations are provided to support the positions of stakeholders, with some respondents simply indicating that this definition should be updated to reflect technical progress. The evaluation has shown that NCAs are generally of the view that the definition has provided a sufficient level of legal certainty.

2.7 Non-compete obligation

Article 1(1)(d) VBER defines "non-compete obligation" as any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year.

[17] 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. OJ L 151, 14.6.2018.

The evaluation has shown that a **majority of respondents to the public consultation, and NCAs, consider that this definition has provided a sufficient level of legal certainty**. Nevertheless, one NCA seemed to suggest that the wording of the definition may be unclear, as the clause seems to refer to a ban on exclusivity obligations rather than to a non-compete obligation in the sense commonly used when referring to horizontal agreements.

2.8 Connected undertaking

Article 1(2) VBER and Article 1(2) MVBER define the concept of "connected undertaking".

The evaluation suggests that **stakeholders and NCAs consider that this definition has provided a sufficient level of legal certainty.** One NCA however indicated that the current definition encompasses situations where neither of the undertakings in question actually control the other, and one respondent to the public consultation claimed that the reference to connected undertakings in the VBER and MVBER are arguably inconsistent with the usual definition of an undertaking as an economic unit.

3 SPECIFIC VERTICAL RESTRICTIONS

This section sets out the evidence collected during the evaluation on a number of specific vertical restrictions which have been reported as being prevalent and/or as to which substantive issues have been raised, namely (i) the misuse of warranties (see Section 3.1); (ii) independent operators' access to technical information (see Section 3.2); (iii) placing limits on the numbers of authorised repairers within a brand (see Section 3.3); and (iv) selective distribution (see Section 3.4).

3.1 Misuse of warranties

Paragraph 69 SGL sets out the general principle that, for qualitative selective distribution agreements to benefit from an exemption under the EU competition rules, the vehicle manufacturer's warranty must not be made conditional on the end user having repair and maintenance work that is not covered by the warranty carried out within the vehicle manufacturer's authorised repair networks. Likewise, 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. These types of behaviour may result in the foreclosure of independent repairers or the closing of alternative channels for the production and distribution of spare parts, which ultimately may have a bearing on the price that consumers pay for repair and maintenance services.

The evaluation revealed that the **misuse of warranties may still be a prevalent**

restriction: 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 in the top three alleged vertical restrictions in the context of informal submissions concerning the motor vehicle sector received by the Commission over the last 10 years (see Annex 4 for further details).

Overall, NCAs and respondents believe that this provision has achieved a sufficient level of legal certainty. **Nevertheless, some issues with regard to the functioning of the current provision have been identified.**

First, some NCAs advance the view that the guidance given on the misuse of manufacturers' warranties is not clear enough. NCAs note that consumers' reluctance to use the services of an independent repairer during the warranty period or warranty extension period is considerable as OEMs / importers / authorised dealers or repairers allegedly convey either directly or indirectly the message that the warranty will cease to apply if the end user has repair and maintenance work carried out outside the authorised repair networks. Some respondents echoed the NCAs' arguments expressing their view that, in practice, repair and maintenance work that is not covered by the warranty can only be carried out by authorised repairers. In this regard, these respondents also alleged that garage owners were also still obliged to use original spare parts from the manufacturer and that warranties on new and second hand cars are used to pressurise consumers to have repair and maintenance services carried out by authorised repairers.

Second, some NCAs refer to conducts such as complex warranty conditions or long warranty periods, which in their view, steer vehicle owners towards authorised repairers. These NCAs further add that this trend is exacerbated by insurance companies' certification requirements, which allegedly tend to favour authorised garages. In relation to this, certain NCAs indicate that it is not clear whether authorised repairers may legitimately refuse to honour the manufacturer's warranty on a whole element of a vehicle, if an alternative brand of spare parts has been used to replace a particular part of that system. Moreover, certain NCAs indicate that the SGL could be clearer as regards the distinction between legal (statutory) warranties, extended (unilateral) warranties, and warranty extensions (often issued in combination with maintenance contracts).

Finally, some NCAs stress the importance of keeping an explicit reference to the misuse of warranties in the SGL. In the same vein, NCAs highlight 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. Finally, one respondent also suggested that there should be more legal certainty with regard to warranties on second-hand vehicles.

3.2 Restriction of independent operators' access to technical information

Paragraphs of the 62-68 SGL set out guidance on the situations in which qualitative selective distribution agreements concluded with authorised repairers and/or parts distributors may be caught by Article 101(1) of the Treaty 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. A lack of access to necessary technical information could cause the market position of independent operators to decline, leading to consumer harm, in terms 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. The SGL state that technological progress implies that the notion of technical information is fluid and provide a non-exhaustive list of examples of technical information. The SGL also underline the importance of the way in which technical information is supplied for the assessment of compatibility with Article 101 of the Treaty.

Overall, **NCAs consider that the provisions on access to technical information have provided a sufficient degree of legal certainty**. Nevertheless, some NCAs also point to the need to reflect on whether the current definition of technical information should be updated against the background of the rising complexity and digitalization of motor vehicles.

In particular, some NCAs also raise the question of whether data generated in-vehicle should be included in the notion of "technical information" given in the SGL, and thus shared on an equal basis with authorised and independent repairers, or whether this data rather constitutes a separate category of essential input. Some NCAs note that if OEMs share in-vehicle generated data with authorised repairers then it should be considered "technical information" and should therefore be shared with independent repairers to allow effective competition on the aftermarkets. On the other hand, certain NCAs also question whether access to such data can indeed be considered essential. NCAs nevertheless also note that the number of connected cars is still relatively low and that manufacturers are still largely experimenting with in-vehicle data, meaning that it may be too early to judge whether anticompetitive behaviour may emerge. Some NCAs also question whether competition law is in general the appropriate instrument to govern such data access. In any case, NCAs stress that, in any case, the list of "technical information" in the SGL should be considered non-exhaustive.

Further to the issue of access to in-vehicle data, NCAs flag two additional points: (i) some NCAs indicate that OEM have started using specific codes for the installation of spare parts in motor vehicles which are needed for a replacement part to be registered and therefore recognised by the vehicle's software. NCAs note that it may be necessary to allow independent repairers to have access to such software to allow them to register replacement parts; and (ii) Paragraph 67 SGL would need to be updated to reflect the

fact that, since the SGL were adopted, Regulation 715/2007[18] has been replaced by Regulation 2018/858.[19]

Respondents to the public consultation had different views as to the level of legal certainty achieved by the provisions on the restriction of independent operators to access technical information. Although a significant share of respondents believed that these provisions had provided a sufficient legal certainty, almost an equal amount of respondents considered that they had only provided little or very little legal certainty.[20]

As to the **prevalence of the restriction of independent operators' access to technical information**, about 54% of respondents to the public consultation declare to have encountered restrictions to access technical information while NCAs report having encountered restrictions on access to repair and maintenance information in about 7% of their decisions.

3.3 Placing limits on the numbers of authorised repairers within a brand

Paragraph 70 SGL provides that one of the main factors driving intra-brand competition relates to the conditions of access to the network established under the standard authorised repairer agreements. In view of the generally strong market position of networks of authorised repairers, their particular importance for owners of newer motor vehicles, and the fact that consumers are not prepared to travel long distances to have their cars repaired, it is important that access to the authorised repair networks should generally remain open to all firms that meet defined quality criteria. Submitting applicants to quantitative selection is likely to cause the agreement to fall within Article 101(1) of the Treaty.

The evidence gathered during the evaluation indicates that **NCAs are generally of the view that his provision has provided sufficient legal certainty but note that the effectiveness of the MVBER regime could be higher if further clarification is provided for certain areas**. For example, NCAs would like further guidance and examples of quantitative requirements that would likely fall out of Article 101 of the Treaty. Moreover, NCAs raise the question of whether the 40% threshold is applicable in every product and geographical market.

Conversely, **only a small share of respondents to the public consultation believe**

[18] Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information. OJ L 171, 29.6.2007.

[19] 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. OJ L 151, 14.6.2018.

[20] The arguments raised by these respondents are available in Section 2.3.1 (see "Specific Vertical Restraints"), Annex 3.

that this provision has provided a sufficient level of legal certainty, with a larger share of respondents considering that this has only achieved little or very little legal certainty. In addition, 38% of respondents to the public consultation declare to have encountered this restriction in their agreements.

In this regard, vehicle manufacturers have flagged 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. 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, without it being necessary to demonstrate that such a refusal of approval falls within the framework of a "general policy" of the supplier.

3.4 Selective distribution

Selective distribution refers to a distribution system in which the supplier undertakes to sell the contract goods or services to distributors selected on the basis of specified criteria, while the distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.[21]

The VBER exempt selective distribution agreements, irrespective of whether quantitative or purely qualitative selection criteria are used, so long as the parties' market shares do not exceed 30%. However, that exemption is conditional on the agreements not containing any of the hardcore restrictions or excluded restrictions set out in Article 4 VBER and Article 5 MVBER.

As explained in paragraph 175 VGL, to assess the possible anti-competitive effects of selective distribution under Article 101 of the Treaty, a distinction needs to be made between purely qualitative selective distribution, where distributors are selected only on the basis of objective criteria required by the nature of the product (e.g., training of sales personnel), and quantitative selective distribution, where selection criteria are used that limit the potential number of distributors more directly (e.g., requiring minimum or maximum sales or fixing the number of dealers). Purely qualitative selective distribution is considered to fall outside Article 101(1) of the Treaty due to the lack of anti-

[21] See Article 1(e) VBER.

competitive effects, provided that the conditions established by the CJEU in its *Metro* judgment (the so-called "Metro criteria") are fulfilled.[22]

The evaluation has shown that, overall, respondents to the public consultation consider that both the definition of "selective distribution" (Article 1(1)(e) VBER and Article 1(1)(i) MVBER) as well the provisions thereon included in the VGL and SGL (paragraphs 174-178 VGL and paragraphs 42-71 SGL) have provided **a sufficient level of legal certainty**. In the same vein, NCAs generally also consider that the provisions on selective distribution have provided sufficient legal certainty. However, some of them mention that its **effectiveness could be increased if further clarifications were provided.** In line with their comments to the evaluation of the VBER, NCAs indicate that there is insufficient clarity regarding the assessment of vertical restraints within the framework of selective distribution systems in light of the recent jurisprudence. In particular, NCAs seek clarifications on the following points: (i) the implication of recent judgments to assess a vertical restraint when implemented in the framework of a selective distribution system;[23] (ii) the limits to quantitative selective distribution systems for motor vehicle distribution and provision of repair and maintenance services in light of recent jurisprudence;[24] and (iii) the qualification of online sales restrictions and the legal treatment of online sales in the context of selective distribution.

Based on the fact-finding study, quantitative selective distribution was the preferred model in the passenger cars category for the countries in scope, while vehicle manufacturers operating in the category of light commercial vehicle category opted mainly for qualitative selective distribution. In the trucks category, many vehicle manufacturers used mixed systems, with a prevalence of quantitative distributions systems. Exclusive distribution is the prevalent type of distribution for buses. Direct sales formats were also common for the sales of both buses and trucks.

4 INCONSISTENCIES

The evidence gathered in the evaluation shows that the MVBER regime is overall coherent internally and also both with other Commission rules and guidance on the application of Article 101 of the Treaty, as well as with other EU legislation with relevance for vertical supply and distribution agreements. Nevertheless, stakeholders and

[22] Judgment of 25 October 1977 in Case 226/76, ECLI:EU:C:1977:167, *Metro SB-Großmärkte GmbH & Co. KG v Commission*. Selective distribution systems, however, are considered to restrict competition if they, especially as a result of market concentration or of the cumulative effects of parallel networks of similar agreements, impair price competition between products of different brands or block access to the market for undertakings using other forms of distribution. See Judgment of 22 October 1986 in Case 75/84, ECLI:EU:C:1986:399, *Metro v Commission, (Metro II).*

[23] In particular, the interaction between the Metro criteria and the conditions for exemption of selective distribution under the VBER.

[24] Judgment of 14 June 2012 in Case C-158/11, EU:C:2012:351, Auto 24 SARL v Jaguar Land Rover France SAS.

NCAs pointed to a **few areas in which coherence is not as high as it could be due to a lack of clarity or perceived inconsistencies between certain rules.**

4.1 Internal inconsistencies

When asked whether there are **internal inconsistencies within each of the instruments of the MVBER regime, an identical number of respondents reply in the positive as in the negative.** The share of respondents that reply in the positive generally do not specify the inconsistencies they appreciate.[25]

Further, respondents were asked to indicate **whether there were inconsistencies between the different instruments of the MVBER regime. A majority said there were no such inconsistencies** and only very few respondents declared the opposite.[26]

In general, NCAs do not see internal inconsistencies but flag three potential inconsistencies in this regard.

First, NCAs highlight what they perceive as a discrepancy in the market share thresholds set out in paragraphs 56 and 12 SGL for the exemption of agreements for the distribution of new vehicles. While paragraph 12 states that the Commission did not identify any significant competition shortcomings in the new motor vehicle distribution sector which would require the application of a market share threshold different from and stricter than those in the VBER (30%), recital 56 indicates that, when conducting the assessment of selective distribution systems outside of the block exemption regulation, quantitative selective distribution of vehicles will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40%. In the NCAs view, this implies that motor vehicle distribution is treated differently to other sectors.

Second, NCAs note that there might be a discrepancy with the overall notion of bilateral and unilateral behaviour on the issue of access to technical information. According to paragraph 62 SGL, qualitative selective distribution agreements concluded with authorised repairers and / or parts distributors may be caught by Article 101 (1) of the Treaty if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, for instance by failing to release technical repair and maintenance information to them. In this regard, NCAs express the view that although the application of Article 101 (1) of the Treaty requires an agreement or concerted practice, paragraph 62 SGL foresees the application of Article 101 (1) of

[25] It should be noted that one respondent did argue that the existence of specific rules for one sector of the economy (motor vehicles) in itself raises a consistency issue. According to this respondent, the structure of the regime (MVBER, SGL and FAQ) also raises similar issues. Finally, this respondent submitted that there are inconsistencies/lack of clarity in respect of geographical limitations and the treatment of warranties.

[26] For example, a respondent mentioned that paragraph 19 SGL refers to the definition of "original part" or "original equipment" in the type approval framework Directive 2007/46/EC. However, the latter has been replaced by TAR, which does not contain this definition. Therefore, according to this respondent the definitions of parts should remain anchored in the SGL.

the Treaty when only one of the parties to the agreement acts in a way that forecloses independent operators from the market which, in the NCAs view, would usually qualify as unilateral behaviour falling under the abuse of dominance provisions.

Finally, NCAs note that, as perparagraph 62 SGL, qualitative selective distribution agreements could be caught by Article 101 (1) of the Treaty if a manufacturer fails to provide independent operators with information necessary for repair and maintenance services. In this regard, spare parts manufacturers and distributors are defined as independent operators which may be foreclosed by the manufacturer. Nevertheless, paragraphs 63-65 SGL indicate that when considering whether technical information has to be made available to independent operators, it is required to assess if the technical information will be used for the manufacture of spare parts or for repair and maintenance. In the NCAs' view, this distinction appears inconsistent, since spare parts manufacturers might be foreclosed by withholding technical information regarding the manufacture of spare parts.

4.2 Inconsistencies with other rules / guidance on the application of Article 101 of the Treaty

When asked **whether there are any inconsistencies with other rules / guidance on the application of Article 101 of the Treaty**, although some respondents believe there are some inconsistencies, **a larger share believes there are none**. The former group generally added general comments without identifying specific inconsistencies or contradictions.

As for NCAs, only one of them flags a potential inconsistency in this regard. They indicate that there could be said to be a contradiction concerning the definition of the relevant market in the motor vehicle sector. In the NCAs view, in its Notice on the definition of relevant market, the Commission focuses on the perspective of the direct customer to analyse whether the respective goods or services are substitutable to satisfy a particular demand: an approach also replicated in Article 3(1) VBER and recital 7 VBER. However, NCAs highlight that when determining if a contract between an OEM and its authorised repairer is caught by Article 101(1) of the Treaty or whether it satisfies the conditions of Article 101(3) of the Treaty, in paragraph 15 SGL, the Commission seems to focus on the point of view of the end consumer (the motorist) instead of that of the direct contractual partner: the authorised repairer.

4.3 Inconsistencies with other EU rules

When asked **whether there are any inconsistencies between the MVBER regime rules and other existing or upcoming Commission instruments in the area of competition policy and enforcement**, **NCAs and respondents to the public consultation generally expressed the view that there are no such inconsistencies**.

Some of the few respondents that see certain inconsistencies included specific examples concerning the interaction between the MVBER regime and the Type Approval Regulation. For example, the issue was raised that although the Type Approval Regulation contains provisions on the access to repair and maintenance information, the description of technical information within the MVBER is by its very nature more "fluid", to take account of technical progress. In this sense, it was suggested that the MVBER should emphasize that the notion of technical information should not be strictly limited to the lists of examples provided in the Type Approval Regulation to help independent operators get access to state-of-the-art technical information. Some respondents also suggested that the MVBER could be updated according to new provisions on vehicle technical information included in the Type Approval Regulation, such as Recitals 50, 51 and 52.

Some other issues that came up related to the interaction between the MVBER and other EU rules concerned the UNECE regulations. For example, it was suggested that the integration of UNECE Regulations 155 and 156 via Regulation (EU) 2019/2144[27] would have an impact on the overall regulatory framework, and that potential issues of conflict would require additional consideration. A few respondents suggested that UNECE regulations could be used to block access to in-vehicle data via the OBD port.

Finally, NCAs stress that, when conducting its review, the Commission should carefully consider any upcoming regulatory measure which may impose obligations on OEMs concerning access to vehicle generated data (e.g., under the Digital Markets Act, Digital Services Act, or the type approval rules). Similar comments were shared by a few respondents.

[27] Regulation (EU) 2019/2144 of the European Parliament and of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users.