

Brussels, 30th July 2008

**Reaction to the Commission's Evaluation Report of 28 May 2008
on the operation of Regulation (EC) No. 1400/2002
concerning motor vehicle distribution and servicing**

FIGIEFA is the International and European representative of the independent distributors of automotive replacement parts. It represents 26 national trade associations from 23 countries worldwide.

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TABLE OF CONTENTS

1.	EXECUTIVE SUMMARY	3
2.	FIGIEFA FAVOURS SECTOR-SPECIFIC REGULATION.....	4
	(a) Ensuring competition and the availability of after-sales services and spare parts	4
	(b) Better Regulation.....	4
	(c) Benefit of specific norms for SMEs	5
	(d) Benefit of a block exemption regulation	6
	(e) Benefit of clear rules for competition authorities	6
3.	FIGIEFA FAVOURS EXTENDING CERTAIN PROVISIONS OF THE CURRENT REGULATION.....	7
	(a) Aftermarket sales by suppliers of original equipment.....	7
	(b) Tooling arrangements	7
	(c) Double (dual) branding.....	7
	(d) Access to OEM-branded spare parts for independent aftermarket operators.....	8
	(e) Access to technical information for aftermarket operators	10
	(f) The commercial vehicles sector – not different from the passenger cars sector	11
4.	FIGIEFA FAVOURS CERTAIN IMPROVEMENTS TO THE CURRENT REGIME	12
	(a) The scope of the Block Exemption.....	12
	(b) The right to repair - the motorist’s freedom to choose the repairer and the parts	12
	(c) Warranties	14
	(d) Mere guidelines helpful, but not enough	14
5.	CONCLUSION	15

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1. EXECUTIVE SUMMARY

In response to the Commission's Evaluation Report of 28 May 2008 (the "Report"), FIGIEFA advocates that as from 1 June 2010, the distribution of automotive spare parts and after-sales services should be governed by specific rules which ensure effective competition on all levels of the automotive after-sales market and allow independent aftermarket operators to foster consumer choice by offering multi-brand alternatives to the networks tied to a particular vehicle manufacturer ("OEM").

Such a legal framework should contain particular elements outlined in this document. In essence, FIGIEFA finds that:

- The automotive sector has been subject to specific rules for several decades, and for good reasons which continue to hold true.
- The rules currently embodied in the Vertical Restraints Regulation (EC) No. 2790/1999 (the "VRBER") would not be an ideal framework for the automotive sector:
 - Direct sales from the parts manufacturer to the aftermarket would not be sufficiently protected under Art. 4(e) VRBER, as the norm only addresses sales to end users, independent repairers and independent service providers, but not sales to authorised repairers or to parts distributors.
 - The VRBER does not address the parts manufacturer's ability to apply its own trademark to components sold to an OEM for the original equipment of a vehicle, even though this is a helpful mechanism to stimulate competition in the markets for spare parts.
 - The VRBER does not contain an explicit provision on access to technical information, tools or training, which is particularly troublesome for those indirectly involved in the repair or maintenance of motor vehicles.
- Block Exemption Regulations provide for greater clarity than any individual assessment under Art. 81(3) EC ever could. Such clarity is needed to encourage investments, and to protect effectively smaller players faced with the market power of vehicle manufacturers ("OEMs").
- Guidelines are very helpful, but are not sufficient to secure a uniform application of EU competition law across the 27 member states.
- In the absence of clearly defined rules, competition authorities would need to devote additional resources to providing guidance on and ensuring compliance with applicable Competition law.

IN DETAIL:

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2. FIGIEFA FAVOURS SECTOR-SPECIFIC REGULATION

The Report leaves open the question of whether the motor vehicle sector may be adequately covered within a general regime on vertical restraints. It claims that several sector-specific provisions were not effective, and that a more flexible regime would have led to an equivalent level of protection of competition.

FIGIEFA does not share this view and does not find that a more general regime would be preferable.

(a) Ensuring competition and the availability of after-sales services and spare parts

The automotive sector is different from other sectors. For other technologically complex consumer goods, repair and maintenance are not nearly as important as for motor vehicles. In the 21st century, many consumer goods are no longer repaired, but simply replaced if they become dysfunctional. This is not an option with motor vehicles, which require regular servicing to ensure continuous operation as well as adherence to the highest standards of environmental protection and road safety.

Road transport is essential to mobility across the EU. Every day citizens rely on motor vehicles for their commute, and the distribution of goods and services largely depends on commercial vehicles. For the family budget and the economy as a whole, affordable and reliable road transport are of the essence.

The availability of after-sales service and spare parts is particularly important in the event of a sudden breakdown or an accident. Especially in rural areas, it may not be reasonable to tow a vehicle to an authorised workshop over long distances. Rather, local repairers and roadside assistance providers should be in a position to get a vehicle back on the road and running again. This is essential for assuring mobility and vehicle safety, and thus for attaining consumer benefits.

In its report to the European Commission, London Economics rightly refers to the “unique structure of the automotive spare parts and repair market” (London Economics Report, p. 244). This unique structure can best be addressed by a specific set of norms.

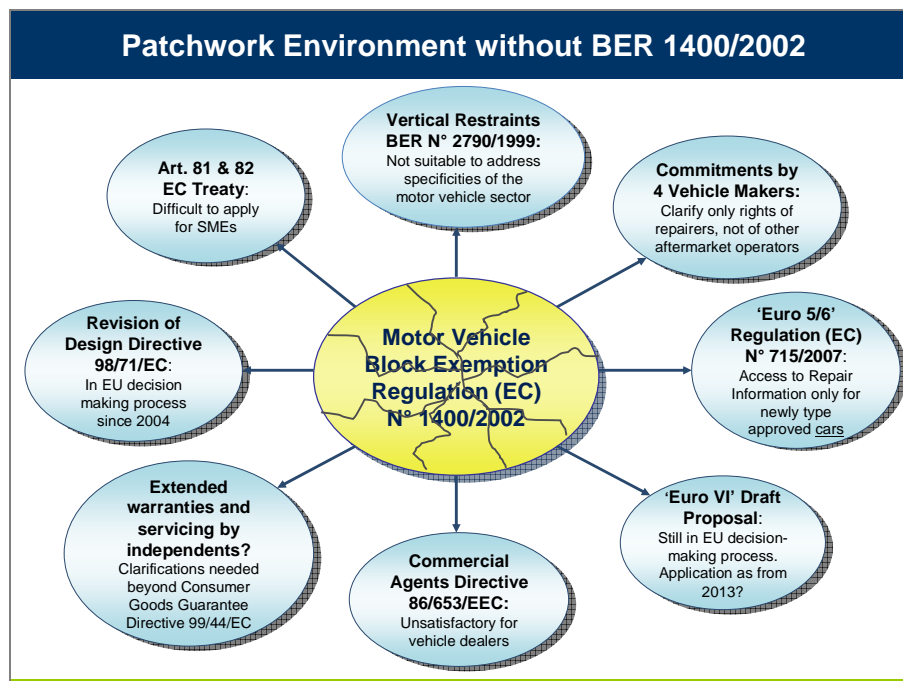
The Commission opted in favour of consecutive pieces of sector-specific legislation in 1985, 1995 and 2002, and it should do so again in 2010.

(b) Better Regulation

The Report claims that the MVBBER has “helped to protect competition in the markets for new motor vehicle distribution, and especially in the markets for after-sales services, to the benefit of consumers, and therefore has complied with the conditions on Art. 81(3)”.¹ Allowing these rules to expire would put any recent achievements at stake, and would send the wrong message to the market.

Not including certain subjects in a future block exemption regulation would create uncertainty, or the need to cover these in separate pieces of legislation. It would not be an example of “better regulation” if market players were left to deal with a multitude of instruments creating a legal patchwork.

¹ Evaluation Report, Part I “Objective and Result of the Review”, page 2/3



With view to the aftermarket provisions, FIGIEFA disagrees with the conclusion of the Report stating that “several provisions of the BER would risk constraining contractual parties in a way that is not indispensable to protect effective competition.”² One should bear in mind that a block exemption regulation (“BER”) is not an administrative burden imposed on OEMs or anyone else, and allowing the MVBER to expire would *not* remove any administrative burdens from industry players.

By its very nature, a BER does not impose restrictions. In the new era of EU competition law brought about by Regulation (EC) No 1/2003, a BER is not a straightjacket. Manufacturers not wanting to rely on it can aim for an individual exemption under Art. 81(3) EC. If there are constraints, they result from Art. 81 and Art. 82 EC, but not from the BER.

Therefore, it would be more adequate to describe the BER as a safe harbour in the vast seas of post-liberalisation competition law. And eliminating safe harbours is not necessarily an example of “better regulation”.

(c) Benefit of specific norms for SMEs

In Europe’s independent multi-brand automotive aftermarket, 665,000 companies, predominantly small and medium-sized enterprises (SMEs), provide competitive components and quality services. 3.5 million people are employed in component production, distribution and the servicing of vehicles. In compliance with the EU’s SME policy and the Lisbon Strategy, improving the business environment for the small and medium-sized enterprises in the automotive aftermarket clearly means maintaining a legal framework, which fosters fair and effective competition in the markets for automotive spare parts and servicing.

² Evaluation Report, Part I “Objective and Result of the Review”, page 3

In the absence of specific norms, the automotive aftermarket players would be left with a more abstract set of rules, which can be difficult to apply in particular for small and medium-sized enterprises.

Given that vehicle manufacturers already dominate the markets for spare parts and repairs, any regulatory mechanism which makes it costly for SMEs to afford legal certainty must be avoided. Arguing a case in the absence of a Block Exemption Regulation with clearly defined hard-core restrictions is a very costly exercise, from which small and medium-sized enterprises are likely to shy away. Individual assessments imply a significant degree of uncertainty. They normally require economic evaluations and legal opinions, the cost of which may be excessive for SMEs.

In a market of unbalanced power, legal clarity is crucial for SMEs to exert their business and to ensure a competitive automotive aftermarket market. Strengthening SMEs by providing them with a robust legal framework is therefore in compliance with the European Union's SMEs policy and the Small Business Act for Europe.

(d) Benefit of a block exemption regulation

The MVBBER applies, *inter alia*, to the distribution of spare parts by independent operators. It provides a safe harbour by exempting certain agreements. This safe harbour is highly valued by independent operators involved in the distribution of spare parts, most of which are SMEs. In the absence of such a safe harbour, the market players would be left with self-assessment under Art. 81 (3) EC, a costly exercise which rarely leads to legal certainty.

Vehicle manufacturers and importers ("OEMs") may have available the resources required for self-assessment. By contrast, the already weaker market players faced with the market power of the OEM - such as repairers or suppliers - may find themselves unable to afford a dispute over the intricacies of Art. 81 (3) EC.

Given that OEMs already dominate the markets for spare parts, any regulatory mechanism which makes it costly for SMEs to afford legal certainty, or to bring challenges, must be avoided.

Furthermore, a block exemption provides a strong incentive even for the powerful aftermarket players, namely the OEMs. Faced with the uncertainties of self-assessment as the only alternative, an OEM will normally prefer to comply with the terms of a block exemption regulation. Where such a safe harbour is offered to an OEM, it is likely to use it. The design of such a safe harbour may thus serve as a powerful instrument to influence industry practices. Such influence should be used to stimulate competition to the benefit of consumers.

(e) Benefit of clear rules for competition authorities

The Report highlights the multitude of queries received by the Commission after the coming into force of the Motor Vehicles Block Exemption Regulation (EC) No. 1400/2002 (the "MVBBER").

FIGIEFA believes that even more abstract rules would lead to an even larger number of queries, thus increasing the workload of the Commission as well as national competition authorities. In the absence of clearly defined rules, national competition authorities would need to devote additional resources to providing guidance on and ensuring compliance with applicable Competition law.

3. FIGIEFA FAVOURS EXTENDING CERTAIN PROVISIONS OF THE CURRENT REGULATION

The Report claims that conditions for competition in the markets for automotive retailing and servicing have improved since the MVBBER came into force.³ Where this is the case, the rules, having furthered such supposed improvements, should not be allowed to expire.

(a) Aftermarket sales by suppliers of original equipment

The Report claims that the sector-specific rule, Art. 4(1)(j), on the parts supplier's ability to market spare parts directly to the aftermarket was not essential, as the same restriction was also treated as hardcore by Regulation (EC) No 2790/1999 ("VRBER").⁴ This is hardly correct. The respective hardcore restriction in the VRBER merely addresses sales to independent repairers and service providers. In other words, the VRBER would exempt an agreement by which an OEM limits the ability of a supplier to sell its products as spare parts to authorised repairers or distributors. In contrast, Art. 4 (1) (j) MVBBER ensures that sales to both independent and authorised aftermarket operators cannot be restricted. If a vehicle manufacturer was allowed to limit the ability of a parts supplier ("OES") to supply its products directly to any aftermarket operator, including authorised repairers, this would limit competition.

In this regard, the rules embodied in the Motor Vehicles BER appear more suitable for protecting competition and consumer interests than those of the VRBER.

(b) Tooling arrangements

The Report describes certain agreements between an OEM and an OES as falling outside the scope of Art. 81 (1).⁵ For the avoidance of doubt, FIGIEFA would like to point out that any limitation on the ability of a supplier of automotive components to sell its products not just to the OEM, but directly to the aftermarket, represents a restraint of competition. The principles of the Commission's Subcontracting Notice of 1978 do not normally apply in this context, as suppliers of automotive components almost always have the relevant expertise required for the production of such parts, without having to rely on know-how provided by the vehicle manufacturer. Therefore, where an OEM forces the supplier directly or indirectly (i.e. by making the transfer of the title to tools or the transfer of intellectual property a precondition for awarding a contract) to abstain from selling its products as spare parts to the after-sales market, this should normally be considered a violation of Competition law.

The Report rightly observes that certain agreements between OEM and OES have caused many parts to remain captive to the OEM's network, and "translated into higher overall repair prices."⁶ Therefore, FIGIEFA advocates that competition authorities monitor the content of such agreements between OEM and OES more closely.

(c) Double (dual) branding

The Report claims that certain sector-specific rules were not effective, or that they may not be needed in the future. For example, it doubts whether a hardcore restriction is needed which

³ Evaluation Report, Part I "Objective and Result of the Review", page 2/3

⁴ Evaluation Report, Part I "Objective and Result of the Review", page 9/10

⁵ Evaluation Report, Part I "Objective and Result of the Review", page 7

⁶ Evaluation Report, Part I "Objective and Result of the Review", page 12

safeguards the ability of a parts manufacturer to apply its own logo to products supplied as original equipment [Art. 4(1)(I)], claiming that the presence of such a logo is not essential for the identification of suitable replacement parts.⁷

This argument falls short. The parts identification information to be provided to independent operators by an OEM will not normally include any reference to the actual parts producer. Rather, OEMs will only try to market suitable parts offered under their own brand. Therefore, the parts identification information will not reveal the actual parts producer, and thus not help a repairer in identifying an alternative source of supply.

It is essential that the “original” parts producer can be identified by the workshop. This will help any repairer to identify the true origin of the part, and thus facilitate competition between different providers of parts, direct sales, and freedom of choice. In other terms, the goals described in Recital 24 MVBBER can best be attained where the supplier may apply its own logo to a component supplied as original equipment.

Due to the sensitive relationship between the original equipment supplier (OES) and the OEM, the question of whether the (original) parts supplier may affix its own logo to its components, should not be subject to commercial negotiations or discrimination, but should be clarified and fixed by legislation.

Therefore, the rule currently embodied in Art. 4 (1) (I) MVBBER is useful.

(d) Access to OEM-branded spare parts for independent aftermarket operators

For an independent, obtaining parts from the competitor, the authorised repairer, at retail prices is a means of last resort, which must however be safeguarded. It is often the only possibility to obtain parts which are otherwise “captive” in the market.

The Report claims that the presence of a sector-specific hard-core clause in Art. 4 (1) (i) of the MVBBER may have helped to clarify legal position, but the enforcement of the general rule whereby a supplier using selective distribution systems can not restrict its distributors from selling (parts) to end-users, would protect competition in the same manner.⁸ FIGIEFA has doubts as to this.

The current MVBBER ensures that authorised parts distributors and authorised repairers may sell replacement parts to an independent repairer needing such parts for servicing or repairing a customer’s vehicle by outlawing

“the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use these parts for the repair and maintenance of a motor vehicle.”

The rules embodied in the VRBER are less comprehensive. Its Art. 4(c) refers to

“the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.”

Such reference to an unauthorised place of establishment is contrary to the policy goal of Art. 5(3) MVBBER. Furthermore, because of its limitation to the “retail level of trade”, the provision in the

⁷ Evaluation Report, Part I “Objective and Result of the Review”, page 10

⁸ Evaluation Report, Part I “Objective and Result of the Review”, page 7.

VRBER does not protect sales by an authorised parts wholesaler. The MVBER goes further by also protecting sales by an authorised distributor operating at the *wholesale* level of trade.

Besides, Art. 4 (c) of the VRBER only mentions sales to “end users”, while Art. 4(e) mentions “repairers” in addition to “end users”. The use of both of these terms could be interpreted as indicating that the VRBER considers repairers to be different from end users, and that Art. 4 (e) VRBER only mentions end users but not repairers for a purpose.

As the current guidelines on Vertical Restraints are not entirely clear in this regard, the Commission is asked to clarify that, for the purpose of Art. 4(e) VRBER, repairers are “end users”.

Furthermore, FIGIEFA does not share the view expressed in the Report, according to which authorised repairers rarely refuse to supply spare parts to their independent competitors.⁹ For example, FIGIEFA members ANCERA in Spain and ADF in the United Kingdom have observed substantial difficulties in this regard. In certain instances, the authorised repairer refused to supply an independent, apparently to prevent him from repairing the vehicle and thus to provide the impression to motorists that independents are not able to do the job. Spreading the idea (or rather: the misconception) that only authorised repairers are able properly to repair or service a vehicle must not become a strategy for OEMs or their networks. Against this background, FIGIEFA disagrees with the Report’s assumption that, due to the fact that the Commission hardly received any complaints that independent repairers had difficulties in obtaining original spare parts from authorised outlets¹⁰, it can not be concluded that there were no problems in obtaining OEM-branded spare parts.

While it is important to keep this distribution channel open and ensure access to OEM-branded parts on the local level, purchasing captive parts from a competitor at retail prices is hardly ideal for an independent repairer. From a logistical and practical point of view, it is inefficient for a multi-brand independent repair outlet to shop around and buy each OEM spare parts for each brand from the respective authorised repairer. It would be more economical to source such parts from a wholesaler with a comprehensive product offering (“one stop shop”). However, this presupposes that independent wholesalers have access to the OEM’s product range.

For all these reasons it is important for any future Regulation to continue with the approach which the Commission took in the addendum to the explanatory brochure (“Frequently asked questions”) at question no. 16, by indicating that vehicle manufacturers should offer distribution contracts for spare parts to wholesalers, regardless of whether these also operate a repair shop.¹¹ As obtaining such distribution agreements has often been difficult for wholesalers, and with certain OEMs still refusing to make spare parts of their brand available to wholesalers, it should be clarified that independent parts wholesalers must be given the possibility to access OEM branded spare parts.

In the Report, the issue of an OE-spare parts distribution contract is only briefly addressed. Such distribution agreements between an OEM and wholesalers are however necessary for wholesalers to provide the complete range of parts to independent workshops (in particular in remote areas). Parts distributors, who have taken this route, have made use of the opportunities for new business fields and marketing forms. This leads to a variety of marketing channels and boosts competition and therefore meets the objectives of the legislator.

⁹ Evaluation Report, page 7

¹⁰ Staff Working Document N° 4, “The impact of Regulation 1400/2002: an effects-based analysis”, page 19

¹¹ Staff Working Document N° 2, page 35 and Staff Working Document N° 4, page 17 (which mentions that most vehicle manufacturers do not offer separate contracts for spare parts distribution).

(e) Access to technical information for aftermarket operators

Technical information is essential for the repair or maintenance of vehicles, which are increasingly “computers on wheels”. Art. 4(2) MVBBER includes a specific provision to facilitate access to such technical information by independent operators.

The provision required enforcement action, and allowing it to expire would send the wrong message.

The Commission report refers to the Decisions to declare binding the commitments offered by GM, Fiat, DaimlerChrysler and Toyota, which point out that an obligation to provide technical information rests on general principles of competition law. These decisions are helpful for independent repairers, but the commitments are only binding until 31 May 2010, and technically concern only the four manufacturers which offered them.

Besides, the Decisions do not address the particular needs of those *indirectly* involved in the repair or servicing of motor vehicles, i.e. providers of roadside assistance, manufacturers of multi-brand diagnostic equipment, publishers of multi-brand databases, or parts wholesalers supplying workshops with parts and related information. The MVBBER Explanatory Brochure states that these should receive the data, and are entitled to pass it on to other independent operators. Otherwise, the creation of multi-brand products would become impractical. Furthermore, producers of multi-brand diagnostic tools and test equipment need the pertinent system data to design multi-brand tools and test equipment.

In the future, the rights of independent parts wholesalers, publishers and multi-brand diagnostic tools and test equipment producers, who traditionally supply technical information and tools to independent workshops, should be delineated more clearly. OEMs should make raw data and system data available in a format which enables these independent operators to include such data in their multi-brand products.

The Evaluation Report insinuates that concrete provisions such as Art. 4(2) MVBBER would become redundant in the future.¹² FIGIEFA strongly disagrees with this assessment, for the following reasons:

- Regulation (EC) No. 715/2007 (the “Euro 5 Regulation”) provides for an obligation on vehicle manufacturers to supply repair information only for new *car* models which are type-approved in September 2009 or later. It does not apply to the vehicles already on the road today, and it does not cover heavy commercial vehicles at all.¹³
- Regulation (EC) No. 715/2007 does not explicitly mention access to OEM-tools or diagnostic and other test equipment. Access to these devices is however absolutely crucial for the ability of multi-brand repair shops to offer services and for their ability to compete for the aftermarket care of vehicles.
- Allowing Art. 4(2) MVBBER to expire would be perceived as the Commission not prioritising the issue any longer. In view of the need for enforcement action in recent years, and the deficiencies observed by IKA Aachen and London Economics, this would be most unfortunate. *Clearly defined rules* on access to technical information were and are essential for effective competition, and should thus be dealt with in future instruments of competition law. Regulation (EC) No. 715/2007 may contain the technical details, but the fundamental rule should continue to be reflected in a BER.

¹² Evaluation Report, Part I “Objective and Result of the Review”, page 7

¹³ The Euro VI Regulation for heavy duty vehicles is supposed to enter into force in 2013 only.

- The Report states that, even in the absence of the current rules in the BER, the Commission would still be in a position to take appropriate enforcement action on the basis of Articles 81 and/or 82 of the Treaty. This argument is theoretically right, but fails to take into account the practical situation in the market: In the absence of a sector-specific rule, including a confirmation that those indirectly involved in repair or maintenance should have access, it will be much more difficult in particular for SME-companies to argue their case. This is not only true in the context of private enforcement, but also in the context of negotiations, in which the reference to explicit provisions has been found helpful in reaching proper solutions without needing to involve competition authorities.
- Without Art. 4(2) MBER, which also addresses those *indirectly* involved in the repair or maintenance of motor vehicles, publishers or independent parts distributors fear that they would be denied access to the required information and thus be eliminated from the market. Independent workshops often receive their technical information through intermediaries, such as e.g. publishers or parts wholesalers to which repairers look for advice. Where possible, these buy the technical information from the OEMs and disseminate it - often in an improved format and with added value - to independent workshops in their own multi-brand data structure. The availability of such multi-brand databases and diagnostic equipment makes repair and maintenance more efficient, and thus more affordable.
- Furthermore, the Report's argument that "information on older models should already have been widely disseminated", falls short. Vehicles are not a static device, but are subject to constant updates. Therefore, information available today will not be sufficient tomorrow. OEMs will continue to update data and software programmes for "older" vehicles not covered by Regulation (EC) No. 715/2007. Software updates are nowadays an integral part of repair and maintenance processes. After e.g. the replacement of a broken spare part, the control unit must be adapted ("flashed") to integrate the new part into the central vehicle communication system. Or, OEMs collect data on frequent defects and other field data, which evolves long after the vehicle is first placed on the road. Any future regulatory regime must render clear that up-to-date information must be made available to independent operators.

(f) The commercial vehicles sector – not different from the passenger cars sector

Section 2.1 of Staff Working Document No. 2 gives an overview of the market for passenger cars and commercial vehicles as well as the maintenance and repair market. It is alleged in several instances that the passenger cars and the commercial vehicles markets are different because of the assumed stronger countervailing power that fleet owners could exercise over vehicle manufacturers.

FIGIEFA finds that this analysis does not adequately describe the situation in the market.

In terms of spare parts, servicing and repair, the commercial vehicles sector is not different from the passenger cars sector. As such, competition aspects are absolutely similar to the passenger cars sector. Both sectors have authorised and independent workshops, both have roadside assistance and repair organisations, both have individual and business customers, and both have fleet maintenance repairers.

Whilst fleet owners may, in general terms, have more power than do individual consumers, yet by no means is every buyer of a commercial vehicle a fleet owner. Rather, the commercial sector is characterised by many smaller commercial and transport vehicles, which are used by craftspeople. These SMEs do not operate fleets, but just own one or a few vehicles. They do not have superior knowledge or bargaining power, leaving them in a situation similar to that of private motorists. And other than certain fleet operators, SMEs do normally not carry out their own repair and maintenance work.

Besides, fleets tend to be composed of a variety of brands. As a consequence, multi brand repairers are needed in their proximity in order for fleet owners to have all of their vehicles maintained and repaired whenever and wherever necessary. It is clear that efficient and effective access to spare parts, tools and technical information is highly critical for transport companies, and thus for reliable and safe road transportation of goods throughout the EU.

The distinction between the three areas, new vehicles, maintenance and spare parts, must be preserved. There is no “natural link” between these markets. If the link was “natural”, there would be no independent market for spare parts, servicing and repair.

Commercial vehicle manufacturers’ claim that independent parts distributors “cherry pick” those parts with which they can make particularly large profits must be contradicted: independent parts distributors offer the full range of spare parts wherever possible. There are generally several independent parts wholesalers that offer the item in question; they have to price-compete against each other for the spare parts business (in contrast to the vehicle manufacturer). For every offer by an independent parts distributor there is always at least one competing offer, namely that of the automobile manufacturer which sells the spare parts for that particular vehicle under its own brand.

4. FIGIEFA FAVOURS CERTAIN IMPROVEMENTS TO THE CURRENT REGIME

The Report also contains observations which make it clear that market conditions are not satisfactory yet: market power of the vehicle manufacturer at every level of the supply chain; rising prices of repair; an independent repair sector in difficulties; repeated need for antitrust intervention by the Commission.

(a) The scope of the Block Exemption

The Report advocates bringing the future regulatory framework for the motor vehicle sector in line with the rules currently reflected in the VRBER, i.e. by abolishing the 40% market share threshold for the distribution of new vehicles. If one goes down this road, one should also abolish Art. 3 (1) (3) MVBER, according to which market share thresholds do not apply to qualitative distribution systems.

Currently, the exemption applies even in areas where the respective manufacturer enjoys a dominant market position (as is the case for most vehicle manufacturers when it comes to after-sales services and spare parts for vehicles of the respective brand). This is most uncommon. Besides which, having first to withdraw the benefit of the exemption renders enforcement actions more difficult for competition authorities.

Therefore, as is the case in other sectors, the benefit of the Block Exemption should be available only where the relevant market share does not exceed 30%.

(b) The right to repair - the motorist’s freedom to choose the repairer and the parts

The report makes it clear that competition in the after-sales markets still leaves much to be desired. The high profit margins reported by vehicle manufacturers and their authorised repairers,¹⁴ as well as the large market shares of vehicle manufacturers in the respective markets for spare parts, indicate that consumers pay too much for servicing and repair of their vehicles.

¹⁴ Staff Working Document N° 2, pages 31 and 34

When it comes to spare parts, the lack of choice continues to be a problem. Many parts remain captive to the OEM and its authorised network where IP legislation (to which the Report rightly refers to as “over-protective”)¹⁵ accords design protection, leading to monopolies and excessive prices. Therefore, FIGIEFA welcomes the Commission’s support for the introduction of a “repair clause” in the Design Directive.¹⁶ But as long as it is uncertain whether Design Directive 98/71/EC will be amended to provide for an EU-wide repair clause, FIGIEFA advocates that DG Competition uses its competences to remedy the situation by furthering the freedom of choice through future competition norms.

Consumers should not be tied to a specific network of repairers or a certain brand of replacement parts. They should be free to have their vehicle serviced or repaired at the workshop, and with the spare parts, of their choice. Such choice requires that information and parts required for a particular inspection or repair job are indeed available to the repairer. Any agreement restricting their ability to source what the motorist requires should be considered incompatible with EU law.

The Report highlights that authorised repairers continue to source the vast majority of their requirements from within the authorised network. In this context, it refers to abusive loyalty-inducing rebate schemes having been the subject of investigations in Denmark.¹⁷ The Commission should emphasise that bonus schemes, incentives or threats may not be abused to discourage authorised repairers from making use of their right to source quality spare parts from third parties. Furthermore, any future set of norms should emphasize the freedom of authorised repairers to source spare parts complying with all applicable legal requirements from the supplier of their choice.¹⁸ In particular, authorised repairers should be free to source quality products from independent wholesalers.¹⁹ In this regard, competition authorities should remain vigilant for any direct or indirect obstacles imposed on authorised repairers by an OEM.

An increasingly important limitation on the freedom of authorised repairers to use spare parts from the supplier of their choice currently derives from the fact that OEMs may insist on the use of parts sourced from them for warranty work, recall actions or free servicing. FIGIEFA considers an exception acceptable where it extends to work eventually paid for by the OEM. On the contrary, no such exception should be interpreted to cover work or parts provided to the motorist as part of an “*all-inclusive*” package under which a new vehicle is sold with the inclusion of any servicing which the vehicle may require during its lifetime. Where the motorist purchases a bundle consisting of the vehicle and the servicing/parts required over a certain period of time, the servicing/parts are eventually paid for by the motorist, not the OEM.

¹⁵ Staff Working Document N° 4, page 19

¹⁶ Evaluation Report, page 12 and Staff Working Document N° 4, page 19

¹⁷ Staff Working Document N° 3, page 8. It is somewhat surprising that this enforcement experience is not reflected in the assessment in Staff Working Document N° 4, page 26.

¹⁸ FIGIEFA anticipates that an OEM would not be able to impose a non-compete obligation on its authorised repairers under the VRBER, as its market share will almost certainly exceed 30%. This is based on the assumption that the Commission views vehicle distribution, parts distribution and servicing for vehicles of a particular brand, or even for a particular vehicle type, as separate markets.

¹⁹ In the event of a dispute (between the OEM and its authorised repairer) related to the suitability of a part, the burden of proof should remain with the OEM.

(c) Warranties

The Report rightly delineates that warranties offered by OEMs may result in categories of repair becoming “captive”.²⁰ Such captivity results in an impediment to effective competition.

As the European Commission stated in its Explanatory Brochure on the MVBBER, a vehicle manufacturer’s warranty should require neither the use of specific spare parts, nor the customer’s patronage of authorized workshops only for normal repair and maintenance during the warranty period. In a subsequent letter to the German association ZDK, the Commission rightly delineated that these principles apply not just to basic statutory warranties, but also to extended long-term warranties (anti-corrosion, mobility etc.).

The motorists’ ability to have a vehicle serviced at the workshop of their choice should never be limited. Where restrictive warranty terms are tolerated, consumers hope to maintain rights by patronising authorised workshops only, in which case independent repairers become unable to compete, and the market for servicing and repair of cars of the respective brand is likely to be foreclosed. Similarly, the market for parts suitable for vehicles of the respective brand is under risk of foreclosure where warranty terms effectively limit the choice of parts or workshops. The ability of independent parts providers to sell quality parts obtained not from the OEM, but from a third party (such as the OES) should not be limited as a result of warranty terms.

While a warranty may normally be seen as a consumer benefit, it should not be considered acceptable where it limits the choice of parts or workshops for regular maintenance work or accident repair. Inherent in such limitations is the risk of foreclosure of the respective market for parts and/or servicing. Such limitations are not essential for attaining the consumer benefit. Rather, they restrain competition in the after-sales-market, i.e. drive independents out of the market, and thus - in the long run - produce effects which leave the consumer with little or no alternative to the OEM and its authorised network.

(d) Mere guidelines helpful, but not enough

The Commission’s guidance in the Explanatory Brochure caused a number of OEMs to amend their warranty terms. It has started to bring about changes in the behaviour of vehicle manufacturers, and many independent aftermarket operators have relied on this interpretation in the past years.

In the United Kingdom, the Office of Fair Trading conducted a study in 2003, which eventually lead to OEMs removing restrictive conditions from their warranty terms. In Germany, the Bundeskartellamt reported to the Federal Parliament that it had engaged in enforcement action, which also lead to OEMs amending their warranty terms.²¹

Nonetheless, it was repeatedly observed in several member states, including Austria, France, the United Kingdom and Germany, that OEMs or their authorised repairers misinformed motorists, and tried to tie them to the authorised network by claiming that taking the vehicle to an independent would result in the loss of warranties.

²⁰ Staff Working Document N° 2, page 28

²¹ The bi-annual report of the Bundeskartellamt 2003/2004 states:

"Ebenso wirkte das Bundeskartellamt in mehreren Fällen auf eine Änderung der Bedingungen für die vom Automobilhersteller gewährte Fahrzeuggarantie hin, soweit diese einen Garantieverlust allein schon deshalb vorsahen, wenn während der Garantiefrist Ersatzteile dritter Hersteller verwandt oder Inspektions- und Wartungsarbeiten durch nicht vom Hersteller autorisierte Servicebetriebe durchgeführt wurden."

Furthermore, in a case in which FIGIEFA, its members and its lawyers had no part, the German Federal Court of Appeals (Bundesgerichtshof) ruled in November 2007 that a limitation in a long-term warranty was compatible with consumer protection law - the decision does not elaborate on the compatibility with Competition law.

This is one of many examples showing that mere guidelines, which are not legally binding, might not be sufficient to ensure the uniform application of Competition law throughout the EU.

The Report states that consumers may be afraid that if they have repairs or servicing done in an independent repair shop during the warranty period, this may invalidate the warranty.²² Yet consumers should not be afraid. Therefore, the Commission is urged to include a specific provision on this topic in a future Regulation.

5. CONCLUSION

Affordable mobility largely depends on the motorists' ability to have their vehicles serviced and repaired at a reasonable cost. Over the lifetime of a vehicle, a family will spend about the same amount on maintenance and repair as was spent on the purchase of the vehicle. Effective competition on each level of the automotive aftermarket is of the essence when it comes to fostering innovation and keeping mobility affordable.

This can best be achieved by sector-specific rules, such as those outlined above.

²² Staff Working Document N° 2, page 28