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Future Competition Law Framework for the Automotive Sector: FIGIEFA's comments on the proposed Block Exemption Regulation and Guidelines

FIGIEFA is the international federation of independent distributors of automotive replacement parts. It represents the interests of 26 national trade associations of automotive aftermarket distributors from 23 countries worldwide. Founded in 1956, FIGIEFA's interest is to safeguard free competition in the aftermarket on European and international level.

In the context of the expiry of the Motor Vehicle Block Exemption Regulation 1400/2002 (hereafter **MVBER 1400/2002**), FIGIEFA is pleased to submit its comments on the recent publication, on the 21st December 2009, of a draft Regulation and draft Guidelines as future legal competition law framework applicable to the automotive sector.

The following intends to point out what FIGIEFA views as **strengths, limits and shortcomings of the proposed instruments** while providing suggestions for supplementary wording which could be introduced so as to make the future legal framework **more "future proof" and SME friendly** for all the market operators, to the benefit of the consumers.

1 – Preliminary remarks

In their day-to-day business, companies need to be sure that the European legislation will allow them to effectively compete with one another and that their freedom of entrepreneurship will not be impaired. **Only sector-specific, clear and robust rules** can achieve this aim in a market of unbalanced powers to the advantage of the vehicle manufacturers and in a fast evolving technological environment where vehicles have become real "computers on wheels". These are the reasons why FIGIEFA (together with the members of the Right to Repair Campaign alliance¹ in Europe) has persistently urged EU decision makers to update the provisions contained in the current MVBER 1400/2002 in the form of a new sector-specific Block Exemption Regulation to be accompanied with a set of clear guidelines. In FIGIEFA's view, such guidelines would chase away any remaining doubts on what is and what is not permitted as regards competition in the automotive aftermarket.

FIGIEFA therefore welcomes the decision of the European Commission's Directorate General for Competition to opt for a new sector specific Block Exemption Regulation for the automotive aftermarket together with a set of Guidelines in replacement of the MVBER 1400/2002 as of the 1st June 2010.

1 AIRC (Association Internationale des Réparateurs en Carrosserie), CECRA (European Council for Motor Traders and Repairs), EGEA (European Garage Equipment Association), the FIA (Fédération Internationale de l'Automobile), FIGIEFA (European Association of Independent Wholesalers of Automotive Replacement Parts), FIRM (International Federation of Engine Rebuilders and Remanufacturers).

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The opinion of FIGIEFA is that in an effort to re-balance market powers in the automotive aftermarket sector, this combination of instruments should include all the necessary provisions to provide market operators with certainty when it comes to the possibilities to source and to supply spare parts, to have access to technical information, tools and other equipment and to avoid the potential misuse of warranty terms aimed at tying consumer to a specific repair network.

2 - Review and comments on the proposed Block Exemption Regulation(s)

A) Conditions for block exemptions (Market threshold and Hardcore Restrictions)

FIGIEFA welcomes the alignment of the market share threshold in both the future Vertical Restraints Block Exemption Regulation (hereafter VRBER) and the proposed sector-specific BER at a level of 30%. This gives a clear indication that vehicle manufacturers are not anymore be easily granted a block exemption for their agreements with parts suppliers or authorised repairers. FIGIEFA is therefore pleased to note the Commission's view that vehicle manufacturers should be subjected to the strict application of articles 101(1) and 101(2) TFEU. This of course provided that **robust guidelines are adopted and enforcement actions carried out in practice**.

Moreover, the introduction of a "double test" (supplier/purchaser) whereby both the supplier and the purchaser will need to each concentrate less than 30% of shares in the relevant market in order for their agreement to be block exempted should substantially further limits cases of vehicle manufacturers' agreements block exempted in practice.

FIGIEFA takes good note that the provisions contained in the future VRBER, notably its hardcore restrictions, will also need to be complied with in order for an agreement to be block exempted. Nonetheless, the Commission might wish to consider including all relevant provisions in the proposed sector-specific Block Exemption Regulation. This would render the new instrument more user friendly (bearing in mind that SMEs can not always employ specialised lawyers), as one would have the advantage of only needing to consult a single, self-supporting instrument rather than having to deal with two Regulations which complement each other.

FIGIEFA also welcomes the decision of the Commission to carry over provisions from the current MVER 1400/2002 in the form of hardcore restrictions into the future Block Exemption Regulations, notably those which ensure the freedom of authorised repairers to supply independent repairers with spare parts (including the so-called captive parts), the OE parts suppliers' freedom to double-brand their products and their freedom to supply the independent aftermarket operators and authorised repairers with their products.

Given that vehicle manufacturers often 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 regulation with clearly defined hard-core restrictions is a very costly exercise, from which small and medium-sized enterprises are likely to shy away. The experience of FIGIEFA's members shows that it is helpful for SMEs, e.g. in disputes with vehicle manufacturers, to be able to refer to EU legislation with clearly defined hard-core restrictions.

Consequently, even in circumstances where a vehicle manufacturer (or the member of its authorised network) would be above the 30% market share threshold, clearly defined hard-core restrictions in the Block Exemption Regulation would have a strong light house effect on the market.² Since hardcore restrictions would render clear that certain behaviour would not be block exempted even where the market share is below 30%, a fortiori such behaviour would be considered even less acceptable where the market share exceeds 30%.

Therefore, FIGIEFA calls upon the Commission **to add two more hardcore restrictions** to the proposed sector-specific Block Exemption Regulation, one on **access to technical information** and another one on the **misuse of warranties**.

B) Definitions

For sake of clarity and legal certainty, the Commission should also introduce in the sector-specific Block Exemption Regulation **all-encompassing definitions** to go in pair with the above mentioned proposed

² The "Impact Assessment Report" published together with a Communication by the European Commission in July 2009 rightly mentions the „advantage of improving visibility“ (para. 156).

wording. Added to the list of definitions contained in article 1 of the draft Regulation, detailed and specific wording on “**Independent Operators**” and “**Technical Information**” should bring clarity to the sector.

The definition of “Independent Operators” should notably encompass all the operators directly or indirectly involved in the repair, servicing, maintenance, testing or inspection of vehicles. As for the definition of “Technical information”, it could be based on the existing definition of “Repair and Maintenance Information (RMI)” contained in the current European vehicle type-approval legislation³.

3 - Review and comments on the proposed sector-specific Guidelines

[Please note that the below comments follow the order of appearance of each specific issue in the proposed Guidelines.]

A) Original spare parts and parts of matching quality (para.19)

FIGIEFA welcomes the clear position of the European Commission as regards the availability of competing brands of spare parts in the aftermarket. However, FIGIEFA calls upon the Commission to bring more clarity in the **definition of “original spare parts” on the basis of the wording of Recital 24 of the MVBER 1400/2002.**

As for “part of matching quality”, as reported by many FIGIEFA members across Europe, the definition contained in the current MVBER 1400/2002 has truly and undeniably helped foster competition in the trade of spare parts. The Commission should therefore continue with its approach in Explanatory Brochure on the MVBER 1400/2002 and re-iterate in the Guidelines that matching quality spare parts “match the quality of the components used for the assembly of the relevant vehicle but have not necessarily been produced according to the specifications and production standards provided by the vehicle manufacturer”. This means that these parts are of the same or even higher quality, but may for example be made of another material or be painted in another color.

FIGIEFA takes this opportunity to stress out that in cases where vehicle manufacturers themselves provide the members of their repair network with spare parts which are neither “original spare parts” or “spare parts of matching quality” in the strict sense of the above-mentioned definitions (e.g. “economy lines”⁴) authorised repairers **should be free to source other spare parts not matching the quality of the components used for the assembly of the relevant vehicle but rather matching the quality of that spare part supplied by the vehicle manufacturer.**

B) Access to captive parts at wholesale level (para. 21)

FIGIEFA agrees with the Commission’s point of view that there should be no restriction of sales of spare parts by a member of a selective distribution system to independent repairers, as some parts can only be sourced from the vehicle manufacturers and for which no alternative exists in the market (so-called “captive parts”).

Nonetheless, FIGIEFA must point out that in its Impact Assessment of July 2009, the Commission rightly observed that it was not satisfactory for an independent repairer to have to source certain parts (captive parts, i.e. products for which there is no substitute from another supplier) at retail prices from the authorised repairer, its local competitor. On this point, FIGIEFA members ANCERA in Spain and ADF in the United Kingdom have observed many instances in which the authorised repairer refused to supply in practice parts to an Independent, apparently to prevent him from repairing the vehicle. In such situations, or when the local authorised repairer offers to sell the parts only at a high price, the independent repairer is locked out of the market. In theory he could attempt to source the part from another authorised repairer further away. But as this would not normally be possible within the same day (but by overnight delivery only), the time which it takes the independent to service or repair the vehicle is extended in a way that many consumers will find unacceptable. This is particularly true in the case of commercial vehicles, where an additional day during which the vehicle cannot be put to a productive use can result in a substantial loss of business.

³ 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 5/6) and on access to vehicle repair and maintenance information as implemented and amended by Commission Regulation (EC) No 692/2008 of 18 July 2008 and Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information.

⁴ Especially in cases when vehicle manufacturers supply their authorised repairers with “economy line” spare parts of a lower quality than those originally fitted in the vehicle as first equipment.

This is unacceptable, given that vehicle manufacturers and their authorised networks often dominate the market for servicing and repair of vehicles of the respective brand, and given that vehicle manufacturers are even monopolists with regard to captive parts.

To avoid such situations, FIGIEFA strongly upholds that **all repairers**, whether independent or member of the authorised network, **should be able to source all spare parts at wholesale level**. FIGIEFA calls upon the Commission to highlight in the proposed instrument that should a vehicle manufacturer or a member of its network refuse the access to **monopoly products**, such decision would be treated just like a refusal to provide access to technical information. In both cases, the vehicle supplier is the only source of 'something' that is essential for the repair or maintenance of a vehicle. Where access is refused, these anti-competitive effects of the vehicle manufacturer's distribution agreements are strengthened to a degree that renders them incompatible with Art. 101 TFEU.

Moreover, it is important for the future competition law framework 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. As the Commission stated in the past, "there is nothing in the nature of a spare part that requires it to be sold exclusively by firms that are authorised to repair vehicles of the make in question". In FIGIEFA's view, such an obligation amounts to a requirement that should not be exempted under article 101(3) in the context of a qualitative selective distribution system.

C) Tooling Arrangements and Subcontracting (para. 22)

FIGIEFA welcomes the decision of the Commission to tackle restrictions imposed by a vehicle manufacturer on a parts supplier aiming at limiting the ability of the latter to supply the aftermarket with its products.

Specialised parts producers are the key source for replacement parts. Access to their products is a prerequisite for the independent aftermarket's ability to compete with the vehicle manufacturers' networks. Therefore, **independent parts wholesalers should be able to source spare parts from specialised parts producers**. The vast majority of spare parts are manufactured by companies which also supply original equipment and spare parts to the vehicle manufacturers. Such suppliers of original equipment have often told members of FIGIEFA that they find themselves unable to sell their products to independent parts wholesalers because of respective obligations imposed on them by vehicle manufacturers.

FIGIEFA would like nonetheless to point out that the language chosen by the Commission could be refined and enhanced in order to avoid the existence of loopholes which would seriously harm the intention of the policy makers on this important issue. **More precise guidance is required** on practices constituting an indirect restraint on the supplier's ability to sell its products as spare parts to the aftermarket.

FIGIEFA strongly advocates that where a supplier is not certain about recouping its investments in product development or tooling, its ability to sell its products as spare parts should not be limited in an agreement with the vehicle manufacturer. At most, where the vehicle manufacturer provides indispensable know-how without which the supplier would have been unable to manufacture components of the relevant kind, or compensates the supplier **for the entire cost of product development and tooling up front**, one might accept that the vehicle manufacturer limits the aftermarket access of the supplier.⁵

D) Freedom of authorised repairers to source parts from independent parts distributors (para. 35)

1 - Non Compete Obligations and market share thresholds

FIGIEFA welcomes the Commission's approach as regards spare parts sourcing which ensures the freedom of authorised repairers to source spare parts from independent parts distributors and which is embedded into the future Vertical Restraints Block Exemption Regulation.

FIGIEFA also welcomes the clarification made by the Commission's services in the Guidelines that in most cases the market share of the vehicle manufacturer supplying spare parts is likely to exceed 30%, de facto making spare parts minimum purchase obligations subject to the strict application of article 101(1) TFEU.

⁵ Funke, *Erstausrüstungsverträge und Ersatzteilvertrieb*, ZfAW 2005 (3), p. 31, 34 f.

Nevertheless, FIGIEFA stresses that in order to bring clarity on this issue, the Commission could seize the opportunity to introduce indications on what percentage of minimum purchase could be regarded as not infringing competition law. On this point, question 79 of the Explanatory Brochure⁶ on the current MVBER 1400/2002 could be used as benchmark.

2 - Abusive loyalty schemes

The Commission has observed that authorised repairers continue to source the vast majority of their requirements in spare parts from within the authorised network. Given that original spare parts and parts of matching quality are often available at lower prices from independent parts wholesalers, this continued market trend might appear surprising. In its Evaluation Report of 28 May 2008, the Commission refers to abusive loyalty-inducing rebate schemes having been the subject of investigations in Denmark⁷. Against the background of this enforcement experience, the future sector-specific guidelines should highlight that bonus schemes, incentives or threats may not be abused to discourage authorised repairers from sourcing quality spare parts from independent operators.

A respective reference to the relevant principles of competition law would be helpful for repairers and other SMEs, which may not be familiar with the details of relevant case law but which would certainly find it helpful to be able to rely on tailored wording in the sector-specific guidelines in their dealings with vehicle suppliers. FIGIEFA members have reported that vehicle manufacturers use bonus schemes, rebates, incentives and threats to ensure that authorised repairers source spare parts almost exclusively from within the authorised network. The future guidelines should render clear that economic incentives and the application of pressure can amount to a violation of competition law. In this context, the guidelines should emphasize the freedom of authorised repairers to source spare parts complying with all applicable legal requirements from the supplier of their choice. In particular, authorised repairers should be free to source quality products from independent providers. Such purchases should not be discouraged by direct or indirect means. This aspect is made clear in the current Explanatory Brochure (i.a. at qu. 77 and 80), and not referring to these issues in the future instruments would send the wrong message to the market.

In the event of a dispute (between the vehicle supplier and its authorised repairer) related to the suitability of a part, the burden of proof should remain with the vehicle manufacturers. Furthermore, competition authorities should take enforcement action whenever vehicle manufacturers employ unlawful fidelity enhancing mechanisms.

E) Access to Technical Information for Independent Operators (paras. 52 - 58)

Competition law coherence with regards to access to technical information for both pre- and post-2009 type-approved vehicles is crucial as the independent aftermarket operators provide products and services for all types of vehicles irrespective of their age. FIGIEFA therefore welcomes the decision of the Commission **to refer to the Euro 5 Regulations' principles on access to repair and maintenance information in the future competition law framework**. Undeniably, and as pointed out by the Commission in its Communication published on the 22nd July 2009, maintaining a provision in the new Regulation on the access of independent operators to technical information would have the "advantage of improving visibility."⁸

FIGIEFA welcomes the Commission's view expressed in Recital 13 of the proposed Regulation that the existence of effective competition in the aftermarket depends on the level of competitive interaction not only between the members of the authorised repair network of the vehicle manufacturers but also between the members of such network and independent operators, including independent spare parts providers and independent repairers.

Despite the latter, FIGIEFA regrets that the Commission has not fully taken the opportunity to recognise more expressly that one essential function shared by all the independent aftermarket operators is to support directly or indirectly the activities of independent repairers and fostering true competition in the repair sector. FIGIEFA therefore calls upon the Commission **to better acknowledge the key role played by these operators** in the functioning and maintenance of effective competition between authorised and independent repairers.

⁶ "An obligation to use spare parts of a particular brand for up to 30% of the authorised repairer's purchases of competing spare parts is not considered to be a non-compete obligation and would be covered by the Regulation¹⁵⁶ as long as the authorised repairer is free to buy these goods from the supplier or from other sources designated by the supplier, e.g. as cross-supplies from other authorised distributors or repairers."

⁷ Staff Working Document N° 3, page 8. This enforcement experience is however not reflected in the assessment in Staff Working Document N° 4, page 26

⁸ Impact Assessment Report, para. 156.

To remedy this situation, FIGIEFA invites the Commission to **replace all references to “independent repairers” as recipient of the technical information by “independent operators”**.

Moreover, effective competition in the automotive repair sector largely depends on the availability of spare parts and repair equipment necessary to ensure quality repair and maintenance services in what has now become a **true multi-brand environment**.⁹ FIGIEFA therefore takes this opportunity to call upon the Commission to recognise this factual trend in paragraph (54) of the Guidelines.

FIGIEFA also strongly advocates for the introduction of a clear reference to the Euro 5 and Euro VI implementing measures in the proposed Guidelines as both the political part and the technical parts of the type approval legislation contains key provisions as regards what is to be considered as “repair and maintenance information”.

Furthermore, in the draft Guidelines the Commission has included a test aiming at defining whether withholding a specific piece of information may lead an agreement to be caught by article 101 TFEU. On this point FIGIEFA urges the Commission to **strike out the last criterion of the test** on whether the information in question is technical repair information or information of another type such as “commercial information”. Indeed, such a wording could open a door for many attempts of abuses by vehicle manufacturers (and thus lengthy litigation) refusing to grant access to technical information as it has been the case with the caveats contained in Recital 26 of the current MVBBER¹⁰. In any event, the question of whether the information is ultimately related to repair or maintenance services is already addressed in bullet point no. 2, which is why bullet point no. 4 appears to be redundant.

Furthermore, FIGIEFA would also welcome a clarification that test’s criteria are to be **individually assessed rather than being considered cumulative**, this in order to limit cases in which vehicles manufacturers may refuse to grant access to technical information. Moreover, the question whether withholding the information would restrict the ability of the independent operators to be active in the market should be the key issue to address and as such should be placed as the first criterion of the proposed test.

As regards the essence of “technical information”, FIGIEFA welcomes the efforts of the Commission to provide specific examples. However FIGIEFA firmly believes that the **introduction of a generic all-encompassing definition of “technical information”** would bring clarity for all market operators, including vehicle manufacturers. Nevertheless, **further examples of technical information¹¹ could be included** to provide a clearer and more complete the picture. In order for the Guidelines to provide the best guiding effect in the market, we suggest **adding** a reference to body repair procedures, temporary repair procedures, service schedules and electronic service history, unequivocal vehicle and parts identification and training material.

Furthermore, re-emphasising our above statement under point E), FIGIEFA stresses that it would be crucial to add explicit wording to clarify that **access shall be given to independent operators in a non-discriminatory, prompt and proportionate way**, and the information must be provided **in a usable form**. FIGIEFA also believes that the Commission’s proposed wording could do more justice to the role and needs of the many operators (publishers, parts distributors and suppliers) who directly or indirectly contribute to the supply of technical information to independent repairers. As an example, **for the redistribution and republishing of the information in question in the form of databases, independent operators should receive the information in bulk**.

This is also of importance as regards the unequivocal identification of a part fitted into a specific vehicle for its replacement with a correct spare part.

Last but not least, in order to ensure a true level playing field for all operators, notably at the repair level, the Commission should clarify in paragraph 58, that diagnostic tools and test equipment should be made available with the same functionalities and should comprise the scope and all functions included in the test equipment delivered to the authorised repairers.

⁹ Some positive effects of such multi-brand environments are already discussed in the current Explanatory Brochure on the MVBBER (questions 92 and 93).

¹⁰ On many occasions, this recital has been used to unduly withhold technical information and the originally well-intended reference to the use of “less restrictive means” was rarely used.

¹¹ When comparing the current provisions on technical information in the MVBBER 1400/2002, the Euro 5/6 Legislation and the ongoing standardisation process currently debated within CEN, with the Commission’s draft proposal, FIGIEFA noticed that some crucial features are missing.

F) Misuse of Warranties (para. 59)

FIGIEFA welcomes the wording proposed by DG Competition on this important issue and recognises the language put forward by the Commission as a true step forward in comparison to the actual provisions contained in the explanatory brochure on the current MVBBER 1400/2002.

Nonetheless, FIGIEFA calls upon the Commission to introduce, in a similar manner as for the paragraphs on access to technical information, **specific examples of what should be regarded as attempts to misuse warranties to reserve repairs to the members of the vehicle manufacturers' repair network.**

Furthermore FIGIEFA underlines that further details should be introduced in the proposed wording, and notably insists that the wording "all repairs" in the beginning of the paragraph should be replaced by "regular servicing or repair", this to avoid potential ill-interpretation of the will of the Commission to clarify that warranties should not be contingent upon anything.

Lastly, FIGIEFA would like to invite the Commission to also take this opportunity to tackle new forms of attempt to foreclose the independent aftermarket as more and more vehicle manufacturers render **any additional services proposed to the purchaser of a vehicle contingent upon the exclusive repair or maintenance of the vehicle in the vehicle manufacturers' repair network.**

FIGIEFA therefore calls upon the Commission to clearly state that such anti-competitive behaviour could also be caught by article 101 TFEU if vehicle manufacturers or the members of their distribution/repair network **act in a way so as to make directly or indirectly any ancillary services** added to the purchase of a new vehicle (such as breakdown covers, mobility insurances etc.) **contingent upon the vehicle being serviced, maintained or repaired in the vehicle manufacturers' network.**

4 – Concluding remarks

As Commissioner Kroes stated in summer 2009, "It is important to give the automotive sector... legal certainty and predictability". Only a sector-specific regulation complemented with detailed guidelines will ensure free and effective competition in the aftermarket to the benefit of consumers, while providing SMEs with legal certainty. As the European Court of Justice recently pointed out, "Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such"¹². The spare parts distributors and repair chains which FIGIEFA represents form an essential part of the structure of the market and contribute to effective competition therein. **Legal certainty is what they need, FIGIEFA therefore calls upon the Commission to adopt future-proof rules.**

FIGIEFA - Brussels, 10/02/10

¹² Judgment of the ECJ of 4 June 2009, C-8/08 T-Mobile Netherlands, at para. 38