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II

*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

Amendments to the 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

(2023/C 133 I/01)

1. The 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’ ⁽¹⁾ is hereby amended as follows.

2. In paragraph 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’ is replaced by ‘Commission Regulation (EU) 2022/720 of 10 May 2022 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’. The content of footnotes 3 and 4 is replaced by ‘OJ L 134, 11.5.2022, p. 4.’ and ‘OJ C 248, 30.6.2022, p.1.’ respectively.

3. Paragraph 17 is replaced by the following:

‘(17) Agreements will not benefit from the Motor Vehicle Block Exemption Regulation if they contain hardcore restrictions. These restrictions are listed in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation. As hardcore restrictions are serious restrictions of competition for which it is presumed that they generally result in a net harm to competition, the Commission assessment will be guided by the following considerations when assessing vertical agreements in the motor vehicle sector that contain hardcore restrictions: (a) where a hardcore restriction within the meaning of Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation is included in an agreement, that agreement is likely to fall within the scope of Article 101(1) of the Treaty; and (b) an agreement that includes a hardcore restriction within the meaning of Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation is unlikely to fulfil the conditions of Article 101(3) of the Treaty. However, an undertaking may demonstrate that, in the individual case, such an agreement fulfils the conditions of Article 101(3) of the Treaty. For that purpose, the undertaking must substantiate that efficiencies are likely and that the efficiencies are likely to result from including the hardcore restriction in the agreement, as well as demonstrating that the other cumulative conditions of Article 101(3) of the Treaty are fulfilled.’

⁽¹⁾ OJ C 138, 28.5.2010, p. 16.

4. Paragraph 19 is replaced by the following:

'(19) "Original parts or equipment" means parts or equipment which are manufactured according to the specifications and production standards provided by the motor vehicle manufacturer for the production of parts or equipment for the assembly of the motor vehicle in question (see second paragraph of Article 55(5) of 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^(?).'

5. The first sentence of paragraph 21 is replaced by the following:

'Article 4(f) of the General Vertical Block Exemption Regulation describes it as a hardcore restriction for an agreement between a supplier of components and a buyer who incorporates those components, to prevent or restrict the supplier's ability to sell its components to end-users, independent repairers, wholesalers or other service providers not entrusted by the buyer with the repair or servicing of its goods.'

6. The last two sentences of paragraph 26 are replaced by the following:

'Non-compete obligations that are tacitly renewable beyond a period of five years are covered by the Block Exemption Regulations, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period.'

7. Paragraph 31 is replaced by the following:

'Article 1(1)(f) of the General Vertical Block Exemption Regulation defines a 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.'

8. In paragraph 34, the content of footnote 19 is replaced by 'See General Vertical Guidelines at paragraph 310'.

9. In paragraph 38, 'Section VI.2.1 of the General Vertical Guidelines' is replaced by 'Section 8.2.1 of the General Vertical Guidelines'.

10. In paragraph 40, 'Section VI.2.1 of the General Vertical Guidelines' is replaced by 'Section 8.2.1 of the General Vertical Guidelines'.

11. The first sentence of paragraph 44 is replaced by the following:

'(44) Whereas qualitative criteria limit the number of distributors or repairers indirectly, by imposing conditions that cannot be met by all of them, quantitative criteria limit the number of distributors or repairers directly by, for instance, fixing their number.'

12. Paragraph 46 is replaced by the following:

'(46) Selective distribution agreements will be assessed in accordance with the general principles set out in Section 4.6.2 of the General Vertical Guidelines. The Block Exemption Regulations exempt selective distribution agreements, irrespective of the nature of the product or of the nature of the selective criteria applied, whether quantitative or qualitative, 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 set out in Article 4 of the General Vertical Block Exemption Regulation and Article 5 of the Motor Vehicle Block Exemption Regulation,

(?) OJL 151, 14.6.2018, p. 1.

or any of the excluded restrictions described in Article 5 of the General Vertical Block Exemption Regulation that cannot be severed from the rest of the agreement. In the case the excluded restriction can be severed, the remainder of the vertical agreement continues to benefit from the block exemption.’

13. Paragraph 47 is replaced by the following:

‘(47) There are three hardcore restrictions in the General Vertical Block Exemption Regulation that relate specifically to selective distribution. Article 4(c)(i) thereof characterises as hardcore the restriction of the territory into which, or of the customers to whom, the members of a selective distribution system may actively or passively sell the contract goods or services. There are exceptions to this hardcore restriction such as the restriction of active sales by members of a selective distribution system and their customers into another territory or to a customer group reserved to the supplier or allocated by the supplier to a maximum of five exclusive distributors (Article 4(c)(i)(1) of the General Vertical Block Exemption Regulation); the restriction of active and passive sales by the members of a selective distribution system and their customers to unauthorised distributors located within the territory where such a system is operated (Article 4(c)(i)(2) of the General Vertical Block Exemption Regulation); the restriction of the place of establishment of the members of the selective distribution system (Article 4(c)(i)(3) of the General Vertical Block Exemption Regulation); the restriction of active or passive sales to end users by members of the selective distribution system operating at the wholesale level of trade (Article 4(c)(i)(4) of the General Vertical Block Exemption Regulation); and the restriction of the ability to actively or passively sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier (Article 4(c)(i)(5) of the General Vertical Block Exemption Regulation). Article 4(c)(ii) of the General Vertical Block Exemption Regulation characterises as hardcore the restriction of cross-supplies between distributors within a selective distribution system operating at the same or different levels of trade. Article 4(c)(iii) of the General Vertical Block Exemption Regulation characterises as hardcore 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 exceptions mentioned in Article 4(c)(i)(1) and Article 4(c)(i)(3) of the General Vertical Block Exemption Regulation. Those three hardcore restrictions have special relevance for motor vehicle distribution.’

14. In paragraph 51, ‘Article 4(c)’ is replaced by ‘Article 4(c)(iii)’.

15. Paragraph 53 is replaced by the following:

‘(53) As paragraph 146 of the General Vertical Guidelines explains, the possible competition risks brought about by selective distribution are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of certain type(s) of distributors, as well as softening of competition and facilitation of collusion between suppliers or buyers, due to the limitation of the number of buyers.’

16. The last sentence of paragraph 54 is replaced by the following:

‘Purely qualitative selective distribution may fall outside the scope of Article 101(1) of the Treaty provided that the three conditions laid down in paragraph 43 of these Guidelines are fulfilled.’

17. The last sentence of paragraph 60 is replaced by the following:

‘To this end, particular attention should be paid to three specific types of conduct which may restrict such competition, namely preventing access of independent operators to essential inputs, misusing the legal and/ or extended warranties to exclude independent repairers, or making access to authorised repairer networks conditional upon non-qualitative criteria.’

18. The title preceding paragraph 62 is replaced by the following:

‘Access to essential inputs by independent operators’

19. Paragraph 62 is replaced by the following:

‘(62) Purely qualitative selective distribution may fall outside the scope of Article 101(1) of the Treaty provided that the three conditions set out in paragraph 43 of these Guidelines are met. This being said, 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 to them inputs such as technical information, tools, training and vehicle-generated data, that are essential for repair and maintenance. In that context, the notion of independent operators includes independent repairers, spare parts manufacturers and distributors, manufacturers and distributors of repair equipment or tools, publishers of technical information and publishers of vehicle-generated data, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering training for repairers.’

20. The following paragraph 62a is inserted after paragraph 62:

‘(62a) When considering whether withholding a particular item, such as those belonging to the categories of input set out in paragraph 62 of these Guidelines, may lead the agreements at issue to be caught by Article 101(1) of the Treaty, a number of factors should be considered, including:

- (a) whether withholding the item in question will have an appreciable impact on the ability of independent operators to carry out their tasks and exercise a competitive constraint on the market (i.e., the item is essential for repair and maintenance);
- (b) whether the item in question is made available to members of the relevant authorised repair network; if it is made available to the authorised network in whatever form, it should also be made available to independent operators on a non-discriminatory basis;
- (c) whether the item in question will ultimately ⁽³⁾ be used for the repair and maintenance of motor vehicles, or rather for another purpose ⁽⁴⁾, such as for the manufacturing of spare parts or tools.’

21. The following paragraph 62b is inserted after the new paragraph 62a:

‘(62b) When considering withholding on security grounds a particular item that is essential for repair and maintenance, such as those belonging to the categories of input set out in paragraph 62 of these Guidelines, parties should assess whether withholding the item in question would be a proportionate means to address the security concerns at issue. They should therefore examine in particular whether less restrictive measures would suffice.’

22. The following title is inserted before paragraph 63:

‘Technical information’.

23. The following is added at the beginning of paragraph 63:

‘(63) Technical information is potentially an essential input for repair and maintenance activities. To determine whether a particular item of technical information constitutes an essential input for repair and maintenance activities, the criteria set out in paragraph 62a of these Guidelines are to be taken into account. Technical information should be distinguished from information of other types, such as commercial information ⁽⁵⁾, which may legitimately be withheld.’

⁽³⁾ Such as information supplied to publishers for resupply to motor vehicle repairers.

⁽⁴⁾ Information used for fitting a spare part to or using a tool on a motor vehicle should be considered as being used for repair and maintenance, while information on the design, production process or the materials used for manufacturing a spare part should not be considered to fall within this category, and may therefore be withheld.

⁽⁵⁾ For the purposes of these Guidelines, commercial information is information that is used for carrying on a repair and maintenance business but is not needed to repair or maintain motor vehicles. Examples include billing software, or information on the hourly tariffs practiced within the authorised network.

24. Paragraph 65 is replaced by the following:

‘(65) 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 provides, inter alia, for a system for disseminating repair and maintenance information in respect of motor vehicles. Furthermore, Commission Delegated Regulation (EU) 2021/1244 of 20 May 2021 amending Annex X to Regulation (EU) 2018/858 of the European Parliament and of the Council as regards the standardised access to vehicle on-board diagnostics information and repair and maintenance information, and the requirements and procedures for access to vehicle security information ⁽⁶⁾ lays down a specific procedure for the approval and authorisation of independent operators to access vehicle security features. The Commission will take these Regulations into account when assessing cases of suspected withholding of technical repair and maintenance information.’

25. Paragraph 66 is replaced by the following:

‘(66) Technological progress implies that the notion of technical information is fluid. Currently, particular examples of technical information include software, fault codes and other parameters, together with updates, which are required to work on electronic control units, advanced driver-assistance systems and battery management systems for electric vehicles with a view to introducing or restoring settings recommended by the supplier, motor vehicle identification numbers or any other motor vehicle identification methods, parts catalogues, repair and maintenance procedures, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network. The part code and any other information necessary to identify the correct car manufacturer-branded spare part to fit a given individual motor vehicle (that is to say the part that the car manufacturer would generally supply to the members of its authorised repair networks to repair the vehicle in question) also constitute technical information ⁽⁷⁾, as do the activation codes needed to install certain replacement parts. The relevant requirements and lists of items set out in Regulation (EU) 2018/858 should also be used as a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty.’

26. The last sentence of paragraph 67 is replaced by the following:

‘Article 101 of the Treaty does not, however, oblige a supplier to provide technical information in a standardised format or through a defined technical system, such as standard EN ISO 18541 – 2014 or any format or technical system provided for by Commission Regulation (EC) No 295/2009 of 18 March 2009 concerning the classification of certain goods in the Combined Nomenclature ⁽⁸⁾.’

27. After paragraph 67, the following title and paragraph 67a are inserted:

‘Vehicle-generated data

(67a) To the extent that vehicle-generated data is essential for repair and maintenance, the considerations set out in paragraphs 62 to 67 of these Guidelines also apply to its availability for independent operators. To determine whether a particular item of vehicle-generated data constitutes an essential input for repair and maintenance activities, the criteria set out in paragraph 62a of these Guidelines are to be taken into account. In this context, existing standards and the relevant requirements of Regulation (EU) 2018/858 should be used as a guide ⁽⁹⁾.’

⁽⁶⁾ OJ L 272, 30.7.2021, p. 16.

⁽⁷⁾ The independent operator should not have to purchase the spare part in question to be able to obtain this information.

⁽⁸⁾ OJ L 95, 9.4.2009, p. 7.

⁽⁹⁾ This includes the availability to independent operators of such data to carry out repair and maintenance activities supported by wireless wide area networks. See Article 61(11) of Regulation (EU) 2018/858.

28. The following title is inserted before paragraph 68:

‘Tools and training’.

29. Paragraph 68 is replaced by the following:

‘(68) To the extent that tools and/ or training are essential for repair and maintenance, the considerations set out in paragraphs 62 to 67 of these Guidelines also apply to their availability to independent operators. To determine whether a particular tool and/ or item of training constitutes an essential input for repair and maintenance activities, the criteria set out in paragraph 62a of these Guidelines are to be taken into account. “Tools” in this context includes electronic diagnostic and other repair tools, together with related software, including periodic updates thereof, and after-sales services for such tools.’.

30. After paragraph 68, the following title and paragraph 68a are inserted:

‘Other considerations

(68a) Withholding a particular item, such as an essential input belonging to the categories set out in paragraphs 62 to 68 of these Guidelines, including vehicle-generated data, that is not made available by motor vehicle manufacturers to members of the relevant authorised repair network, may amount to an abuse under Article 102 of the Treaty where a dominant supplier withholds such an item from independent operators ⁽¹⁰⁾.’.

⁽¹⁰⁾ For the test set by the Union courts under Article 102 TFEU for refusals to supply to be considered abusive, see *inter alia* Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, ECLI:EU:C:1998:569; Joined cases C-241/91 P and C-242/91 P, *Radio Telefís Éireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, ECLI:EU:C:1995:98; Case T-201/04, *Microsoft Corp. v Commission*, ECLI:EU:T:2007:289; and Case C-165/19 P, *Slovak Telekom, a.s. v Commission*, ECLI:EU:C:2021:239.

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