



INDEPENDENT UNION OF THE EUROPEAN LUBRICANT INDUSTRY
UNION INDEPENDANTE DE L'INDUSTRIE EUROPEENNE DES LUBRIFIANTS

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Contribution of the Independent Union of the European Lubricant Industry (UEIL) to the Commission's policy on the future competition framework applicable to the motor vehicle sector

I. Introduction

UEIL is the independent umbrella association for the European lubricants industry, representing more than 400 predominantly small and medium-sized companies who account for over 30% of the automotive oil market share and manufacture and distribute lubricant products throughout the European Union. The lubricant industry employs more than 100 000 people in Europe and produces a turnover of approximately €30bn. As the sole and preeminent representative body for lubricant companies in Europe, UEIL aims to improve the competitive conditions for lubricants and to advocate for a fairer, stable and transparent regulatory level playing field in the future competition law framework applicable to the motor vehicle sector.

UEIL welcomes the opportunity the Commission has given to all stakeholders to present their views on the slimmed Motor Vehicle Block Exemption Regulation and its accompanying guidelines since the changes suggested in the legislation will shape the future of the automotive sectors' competitiveness.

Whilst pleased with some of the changes proposed by the Commission, UEIL regrets to acknowledge that most of the comments of the lubricant industry outlined in the previous consultation have not been duly taken into account for the draft of a Regulation that will have a great impact on our industry in the next 10 years. Generally speaking, UEIL would like to avoid existing loopholes in the Regulation, which have, in the past, lead to a reduced competition and an increase on end-user prices. In order to avoid such loopholes, UEIL has proposed some wording which could be used in the formulation of the new BER and guidelines (*see the grey boxes*).

UEIL calls upon the Commission to pay special attention to:

- Ensuring to **all operators** full access to technical repair and **maintenance information** with no delay and at latest when the new car model is placed on the market – and in a non-discriminatory way;
- Addressing the **non-compete obligations**;
- Ensuring that Vehicle Manufacturers will not **threaten consumers and repairers with a breach of warranty because of the use of matching quality spare parts**.

II. General observations

UEIL reiterates its recognition for the Commission's efforts to find an appropriate and practical solution to establish a level playing field for all the actors in the automotive sector. However, UEIL would like to make a few observations as regards the independent operator status, the importance of the maintenance sector in the aftermarket and the need for clear and binding rules to preserve competition through SMEs.

1. INDEPENDENT OPERATORS CONTRIBUTE TO THE AFTERMARKET COMPETITIVENESS

The proposed Regulation and accompanying guidelines apply to "independent actors or operators". Yet, the only definition appearing in the proposed Regulation, is that of independent repairer, which fails to include all independent undertakings operating in the aftermarket such as manufacturers or distributors of spare parts, automobile clubs and roadside assistance operators amongst others.

This is obviously an unintended consequence of the formulation of the Regulation and the guidelines which requires correction. In light of this, and given that this notion exists already in the guideline no.54 of the accompanying document, **UEIL calls upon the Commission to include the notion of "independent operator" in the definitions of the Regulation** and to amend guidelines no. 52 and no.53 as to include all operators.

Regulation

Article 1. Definitions

(c) "independent operators" means undertakings which are directly or indirectly involved in the repair and maintenance of motor vehicles, in particular independent repairers, manufacturers or distributors of repair equipment, tools, spare parts, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services, operators offering training for repairers.

Guidelines

(52) The Commission regards independent ~~repairers~~ **operators** as providing vital competitive pressure, [...] within the context of those agreements, one of the parties acts in a way that forecloses independent ~~repairers~~ **operators** from the market, for instance by failing to release technical repair and maintenance information to these operators.

(53) [...] In such circumstances, if the supplier fails to provide independent ~~repairers or independent parts distributors~~ **operators** with appropriate access to its brand-specific technical repair and maintenance information, possible negative effects stemming from its agreements with authorised repairers and/or parts distributors **and/or parts manufacturers** could be strengthened, and cause the agreements to fall within Article 101(1).

In line with this, we would like to draw attention to the fact that independent operators, mostly produce and distribute spare parts of matching quality. These spare parts, which –as its name indicates– must match the specifications and production standards of original parts, contribute to increase competition in the market and thus, offer consumers free choice and fairer prices. UEIL believes it is important to **recognise the value of spare parts of matching quality** and not to focus only on original spare parts and original spare parts suppliers for the competitiveness of the market and for the consumers' freedom of choice. For these reasons, we would like to see this reflected in the text, notably in the following clauses:

Regulation

Recital

(11) [...] Such **Component** suppliers sell their products as spare parts in the aftermarket both through the vehicle manufacturers' authorised repair networks and through independent channels, thereby representing an important competitive force in the automotive market. [...]

Guidelines

(16) [...] on these spare parts markets, parts bearing the vehicle manufacturer's brand face competition from those supplied by the Original Equipment Suppliers (OES) and **by those supplied by matching quality spare parts suppliers**

UEIL shares with the Commission the appreciation that the protection of competition on the aftermarket is an important policy objective, and so is the protection of competing brands on the aftermarket. It is crucial for the automotive market itself, and for consumers alike, to have a high degree of competition which can lead to the lowest possible prices, notably at times of economic recession.

2. THE IMPORTANCE OF THE MAINTENANCE SECTOR

UEIL has the feeling that the proposed Regulation and guidelines are very much focused on the repair sector. The Block Exemption Regulation and accompanying guidelines, however, are intended to cover all aftermarket operators, including the maintenance sector. It can be argued that maintenance and repair are the same, and that one includes the other, but it needs to be taken into account that for some spare parts servicing, as is the case for lubricants, there are only maintenance and not repair operations. In addition, the **maintenance sector** faces similar problems to those of the repair sector, albeit those have **not been duly taken into account**. UEIL strongly believes that all aftermarket players should be included in the proposed legislative text as well as in the proposed guidelines. For this reason, we would advocate the inclusion of the word "maintenance" in the following clauses of the text:

Guidelines

(53) Suppliers provide their authorised repairers with the full scope of technical repair **and maintenance** information needed to perform repair and maintenance [...]

(54) Moreover, the lack of access to necessary technical information could cause independent actors market position [...] higher prices for repair **and maintenance** services [...]

(59) Qualitative selective agreements may also be caught by Article 101 (1) if the supplier acts more directly to reserve repairs **or maintenance** on certain categories of vehicle to the members of its authorised networks, for instance by making the manufacturer's warranty, whether legal or extended, conditional on the end user having all repairs, including those not covered by warranty, **and maintenance services**, carried out within the authorised repair networks. [...]

3. PREVENTIVE POLICIES NEEDED FOR SMES

As stated in our previous contribution, preventive policies instead of corrective ones, promotes SMEs competitiveness and confidence on the market conditions. Clearer and binding rules will lead to legal certainty, which is essential for SMEs to invest and be able to compete in such a fragmented market as the automotive one.

UEIL would like to highlight again that the sole reliance on Article 101 (or on Article 102) of the EC Treaty would lead to Court cases for each individual complaint, thus making complaints prohibitively expensive for consumers and independent operators who are often small SMEs. If Article 101 (or Article 102) can be used to penalize abusive behaviors, it is not sufficient to prevent them. In light of this, SMEs –who cannot afford the price of Court cases against major companies– are inevitably left outside the market.

Therefore, **UEIL calls upon the Commission to add to the Regulation a few hardcore restrictions which can provide this legal certainty on the most outstanding issues faced by SMEs in the aftermarket sector as the misuse of warranties and the access to technical information** (see *section III* below).

III. Specific observations about the proposed legislation

The new Regulation and accompanying guidelines will certainly bring improvements in competition terms to the highly fragmented automotive sector as a whole; however, some existing loopholes remain as result of the “format” of the proposed legislation. In this sense, UEIL would like to question the Commission's decision to **scrap hardcore restrictions** relating to **access to technical information and misuse of warranties** from the Block Exemption Regulation and place them in the form of guidelines under Regulation 2790/1999.

UEIL fears that guidelines instead of hardcore provisions on access to technical information and misuse of warranties –identified as essential for the existence of effective competition on the repair, maintenance and spare parts markets– might lead the **business to misunderstand** the real nature of these by considering them as a recommendation instead of legally binding rules that have to be respected when entering into vertical agreements with aftermarket operators.

1. ACCESS TO TECHNICAL INFORMATION

On the one hand, UEIL would like to point out at the fact that the Regulation and guidelines focus excessively on repairers, despite the fact that the problem of access to technical information concerns all independent operators, including lubricant manufacturers and distributors. On the other hand, UEIL would like to stress that the protection of competition between authorised and independent operators (including those that provide maintenance services) implies the latter's full access to technical information. However, it is common practice for vehicle manufacturers **to fail to provide technical information, in particular the specifications needed to produce lube oil, to independent operators** such as lubricant manufacturers, in a timely fashion¹ or to provide it in an

¹ Example: A VM launched new specifications for new engines in September 2007. The definitions for these specifications were set in January 2006. However, apart from the “recommended lubricant manufacturer”, lubricant operators only got the information about these standards during the first semester of 2008 and their products could only be approved during the second semester 2008.



incomplete or inadequate way (i.e. allocating internal codes to define the lubricant required for a particular engine instead of providing clear technical specifications, which are required for the production of this lubricant). The time delays are of particular concern when Vehicle Manufacturers only provide the information relating to technical information needed to manufacture lubricants *once a new car model is already on the market*. In such circumstances, given that it takes many months to produce new lube oil approved by Vehicle Manufacturers, competing lubes may not exist on the market up to 18 months. During this period of time, independent operators will be out of the market and, by consequence, will lose market shares not only on one product but on a large range of products.

In addition, and as already indicated in UEIL's previous contribution, the approval of competing lubricants can be artificially delayed by assigning only a very small number of laboratories (only one or two) to realise tests for the qualification of a lubricant as one that meets the Vehicle Manufacturers specifications.

Furthermore, UEIL would like to draw to the Commission's attention the fact that some Vehicle Manufacturers require considerable payments in return for obtaining technical information or approval. Many companies, in particular SMEs, cannot afford such fees. UEIL believes that, in order to ensure open competition, such information should be provided for free (only limited fees to cover administrative costs for providing technical information) to all operators immediately after the specifications for lube oil have been defined. These cases are not isolated; it is a widespread practice that also affects other consumable products such as cooling liquids.

As already mentioned on UEIL's previous contribution, the wording of Regulation 715/2007 and of Regulation 595/2009 – aiming at obtaining access to technical information– is not clear enough and only applies to new type approvals from September 2009 for light passenger cars and commercial vehicles and from December 2012 for heavy duty vehicles.

In conclusion, **only a hardcore restriction relating to access to technical information –which complements Regulation 715/2007 and Regulation 595/2009– or alternatively a separate article in the Regulation will be able to stop these abusive practices and overcome the difficulties to access the technical information required to produce a matching quality product within a commercially relevant time frame.**

UEIL would propose:

Regulation

Article 5. Hardcore restrictions

(d) the restriction, by a supplier of motor vehicles, which refuses to give, without delay, independent operators full access to any technical information, diagnostic and other equipment, tools, including any relevant software, or training required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures.

Guidelines

(55) [...] 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 may also have to be made available to independent operators on a non-discriminatory basis; [...]

2. WARRANTIES

As indicated above, UEIL would like to point out that hardcore restrictions on misuse of warranties would be more effective and better understood by the industry and all the actors in the automotive sector than mere guidelines. Furthermore, UEIL would like to stress that in what refers to the guidelines, misuse of warranties only concerns repairs and not maintenance services, and hence applies only to repairers and not other independent operators. In this sense, UEIL would like to draw the attention to the fact that it is a widespread practice **to threaten consumers** and repairers **with an alleged breach of warranty** in the following cases:

- **If repairers and garages do not use original spare parts but spare parts of matching quality –** which are *de facto* compliant with the vehicle manufacturer's specifications;
- **If maintenance services are not carried out in the authorised network.**

This threat is actually effective enough as to discourage the sales of matching quality parts, and the servicing outside the agreed network, therefore foreclosing the market. A precision should be added in this sense in order to establish a fair playing field in the aftermarket whereby independent operators can also operate in the aftermarket. Such a precision is also essential to enhance consumers' freedom of choice.

We would like to recall that warranties refer only to repair works on broken and defective parts of a vehicle provided for free to the consumer. This has important implications on independent operators in general, and on lubricants manufacturers and distributors in particular:

- As regards the normal repair and maintenance of a vehicle, the vehicle supplier may not require from a repairer the use of original spare parts supplied by it or by a third undertaking. If this was the case, the repairer's freedom to use either original or matching quality spare parts from other suppliers would be restricted.
- As regards lubricants, they cannot be part of the vehicle's repair work: just as with the fuel, lubricants cannot be repaired but only replaced.

We are of the advice that such threats to honour the warranty solely respond to commercial interests and are not based on technical or safety grounds. Hence, UEIL's proposition would be:

Regulation

Article 5. Hardcore restrictions

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

Guidelines

(59) [...] exception in Article 101(3) of the Treaty. **Moreover, if a supplier of new motor vehicles unjustly threatens to refuse to honour a particular warranty claim because of the use of matching quality spare parts for repairs not covered by warranty or for maintenance, this will be caught by Article 101 (1). Specifically in the case of the use of matching quality spare parts, including lubricants, it will be up to the supplier of new motor vehicles to prove his claim that the spare parts are not of matching quality.** However, if a supplier [...]

3. NON-COMPETE OBLIGATIONS

As explained by the Commission in the guidelines, limiting the distributor's purchases of a competing brand to 20% is not viable (see guideline no. 34). This statement is of outermost importance when taking into account the fact that this limitation would severely impact the sales market of the independent operators, thus restricting independent actors' operability in the market, and sometimes even threatening its survival. This is for example, the case of the off-road sector.

As a result, the Commission establishes that "a minimum purchasing obligation may be regarded as anti-competitive even below the 80% ratio established in Article 1 (b) of the General Vertical Block Exemption Regulation".

The interpretation of guideline 34 can be ambiguous:

- One interpretation based on article 3 of EC Regulation 2790/1999 can be that if vehicle manufacturers force their distributors to sign a minimum purchase obligation of any kind while at the same time their market share in this relevant market (i.e. the entire spare parts market) is >30%, they will lose the coverage of other parts of the BER.
- Another interpretation could be that vehicle manufacturers could still be entitled to establish minimum purchasing obligations of <80%, in which case, this will lead to an even higher level of foreclosure of the market, since under the current BER, the minimum purchasing obligation is limited to 30%.

In light of this, UEIL would welcome a clarification on this point. If the first interpretation does not apply, UEIL would propose to amend guideline no.34 with a view to establish and maintain **a level playing field for all stakeholders in the automotive industry**. Such amendment could be phrased as follows:

(34) "Limiting the distributors' purchases of a competing brand to 20% could therefore amount to an artificial barrier to entry by raising rivals' cost of entry to a level, which makes entry economically not viable. In such a case, a minimum purchasing obligation may be regarded as anti-competitive even below the 80% ratio established in Article 1(b) of the General Vertical Block Exemption Regulation. The same principles apply to agreements on spare parts between vehicle manufacturers and repairers. **Particularly in the spare parts market, non-compete obligations committing the buyer to purchase more than 30% of the buyer's total purchases from one supplier or from one undertaking designated by the supplier will be reviewed for their compatibility under Article 101.**

IV. Conclusion:

UEIL believes there is room for improvement on the proposed legislation. With a view to specifically address abusive practices and in order to ensure a level playing field for all stakeholders involved in the automotive sector, UEIL believes that the Commission should:

- Add a clause in the definitions of Article 1 of the new Block Exemption Regulation that defines the **independent operator status**.
- Add **binding provisions** – in the form of a hardcore restriction under Article 5 of the new Block Exemption Regulation or as a separate article in the same Regulation– rather than guidelines, on the issues of access to technical repair and maintenance information and misuse of warranties that provide the legal certainty needed for market players to operate.
- Clarify –in the accompanying guidelines–how the provisions on access to technical information and warranties are to be understood by all operators and ensuring that **all operators (repair but also maintenance)** are taken into account as aftermarket players.
- Likewise, recognise throughout the text the importance of **matching quality spare parts** for the competition in the sector.
- Clarify the interpretation for non-compete agreements.