

11 March 2019

**CLEPA FEEDBACK TO THE COMMISSION'S EVALUATION EU AUTOMOTIVE SECTOR
EXEMPTION FROM ANTI-TRUST RULES
THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION (EU) No. 461/2010**

CLEPA welcomes the Commission's evaluation of the Motor Vehicle Block Exemption Regulation (set to expire on 31 May 2023), to comment on its effectiveness, efficiencies and consistencies with other EU and national rules, and how this has impacted OE-Suppliers agreements and practices.

In general, the MVBER is of major importance to automotive component suppliers, in that it legally secures the supplier's ability to sell spare parts to authorized repairers, to independent distributors, to repairers or to the end users. It further protects supplier's rights to place its Trade Marks or logos on spare parts sold to the independent aftermarket (IAM).

However, since the Regulation's entry into force, in 2010, it has been noted that the rights granted by the MVBER, intended to benefit the automotive suppliers to gain access to the IAM, have been effectively circumvented, in a variety of limiting restrictions, applied by the OEMs.

Such limitations can be legal restrictions e.g. the increasing request to suppliers to transfer tooling rights or Intellectual Property (IP) titles to OEMs which usually end in commercial restrictions in case suppliers have to bear often substantial costs for either additional tooling, de-branding or license fees. In some cases OEM do not even offer licenses allowing parts distribution to the independent market. Increasingly we observe also technical restrictions on parts which can no longer be sold to the independent channel because necessary software to make the product work is not made available by an OEM or special software, authorized by OEMs is needed for the installation and matching the component to a specific vehicle.

Conclusion:

Within the revision of the MVBER, CLEPA would like to see common business practices and the latest technical developments to be considered. Together with the right to sell parts to thirds parties, also all other obstacles working against this approach discussed and covered by the revised regulation.

Examples for restrictions for automotive suppliers

Market access restrictions:

- **Misuse of warranty**
Warranty terms are being misused due to the longer vehicle warranty periods on offer, coupled by the condition that services may only be carried out in the authorized networks, to the exclusion of independent workshops, repairers. Our position is that EU end-users and consumers should have a wide choice of service providers and repairers available on the EU market over the entire lifespan of a vehicle.
- **Access to in-vehicle data and resources**
With the rapid pace of the introduction of connectivity in new vehicles which currently is routed only via the OEM back end servers, vehicle manufacturers have preferred access to in-vehicle data and resources to interact with the end-user or consumer by providing service offers. This gives OEMs a substantially better market access compared to third parties, like independent repairers. Such a possibility is clearly in favour of the authorized networks and works against the basic intention of the MVBBER.
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Legal restrictions:

“Transfer of suppliers’ IP title to OEMs” section:

- **Transfer of suppliers’ IP title to OEMs**
OEMs apply very broad definitions of IP rights: “drawings, specifications, know how, patents, copyrights, design rights, software or any other IP rights”, which may be developed and paid for by the supplier but shall become the IP of the OEM and may only be sold to the IAM, upon approval of the OEM. This is often subject to the payment of an onerous license fee, in compensation for “lost sales”, which exceeds standard royalty rates and are based on a % of the projected suppliers’ IAM business. Our position is that the cost of such a license fee must be proportionate to the actual usage of the tooling, only for the IAM and based on Fair and Non-Discriminatory (FRAND) principles.
Suppliers normally own 100% of the design of their products, along with 99% of know-how and 99% of other IP but suppliers are always forced to transfer this IP to the OEM or in a best case, to grant a perpetual, irrevocable, non-exclusive, royalty free, have-made license to the OEM. If the supplier does not accept this, it will not be nominated. In practice, suppliers are used as the “outsourced engineering and manufacturing group” due to which suppliers are requested to transfer the IP or license their background-IP which may lead to the situation where suppliers are not able to accept another OEM RFQ.

Furthermore, OEMs are inserting their own visible brandings (markings, proprietary names, logos and or Trade Marks) on visible parts of a vehicle, e.g. lighting systems. However, the OEMs are preventing the suppliers from using the OE’s visible branding when replacing these lighting systems, sold onto the IAM, by not giving their consent to use their design rights. This creates a differentiation between the lighting systems sold in the dealer’s networks and those sold in the

IAM channel.

Therefore, preventing the suppliers from using the OEs visible brandings on parts sold to the IAM clearly amounts to a restriction on suppliers' ability to access the IAM. End users and IAM distributors legitimately request the replacement part to be strictly the same as the original part, including the original visible branding.

From an intellectual property perspective, the use of a trademark is normally subject to a trademark license. However, this consent should be part of the consent made by OEM to use their design right if the design right incorporates a branding with graphic elements. From an antitrust perspective, the requirements imposed by car manufacturers to have their brand marked on the visible part of lighting systems should be analysed as an anticompetitive restriction practice under Article 101(1) TFEU, as they have the effect of distorting competition between authorized dealers within the service network of the car manufacturer and independent repairers.

In general we see an increasing number of parts and vehicle segments under Visible Branding agreements which full effect will be observed in the coming 4 to 5 years in the independent channel. The situation where car manufacturers use Visible Brandings and refuse to give their consent for the use of Visible Branding by the original car equipment supplier on parts sold to the IAM is likely to end in a new monopoly situation in favour of the OEMs in the aftermarket.

In light of the above, CLEPA calls for these rights to be explicitly reflected in the Commission's Notice on Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles.

- **Transfer of suppliers' tooling rights to OEMS**

This practice is applied either on all tools or the most relevant ones. Automotive component suppliers are typically **forced** to transfer their tooling ownership rights to the OEMs, granting them exclusivity. If suppliers want to sell their products to the IAM, again exorbitant fees for using OEM tooling are demanded. OEMs may target a key tooling element, without which the assembly of the complete component is not possible. In some cases, suppliers may be forced to finance a second piece of tooling, just to serve the IAM. **In addition to the costs of procuring a second set of tooling, the supplier has to bear all maintenance, insurance, risk of loss, damage or theft costs for tooling which is owned by the OEM.**

- **Placing of Supplier's Part Number**

Typically, the OEM prevents the supplier from placing, their own Part Numbers onto the products sold to the IAM. And this obligation is sometimes reflected in OE-Supplier contracts.

For such reason, it should be explicitly stated in the Commission's Supplementary Guidelines that this practice is prohibited. That Part Numbers are not subject to any special IP protection and as such, OEMs cannot draw up contracts preventing the suppliers from using their Part Numbers on IAM products.

Technical restrictions:

- **Branding restrictions:**

In many cases, e.g. small electronic components like sensors, the branding of products with supplier's logo is not possible due to limited space and the presence of the OEM logo, TM, PNs, brands, engraved in the tools for the OES channel. Having both the OEMs and the Supplier's brands on the component part, identifies the manufacturers of the original component and thereby facilitates competition in parts markets. Repairers should be able to identify suitable replacement parts – this intention of the legislator corresponds to the practice of applying OES

logo AND order numbers on the OE part.

- **Logo design:**
OEM logos are often designed in a way to make it difficult to remove them in most manual de-branding processed.
- **Tooling specifications:**
OEM reject tooling which allow the use of interchangeable logo inserts, e.g. one for the OEM and another one for the supplier logo.
- **Access to OEM software:**
Automotive spare parts increasingly depend on software for full functionality. In case of such software is provided by the OEM, suppliers must have the possibility to purchase the software on FRAND principles to be able to offer a ready to use product to the independent repair channel.
- **Installation restrictions:**
An increasing number of spare parts will require after installation additional electronic matching and adjustment processes. For these additional authorization and software is needed.

Commercial restrictions:

- Prohibitive pricing for in-vehicle data prevent beside technical limitations a fully competitive access the end-users or consumers.
- De-branding measures, IP licenses or separate tooling create additional costs for suppliers which reduce their competitiveness in the IAM and are limiting sales opportunities. Especially for technical spare parts with lower sales volumes suppliers hesitate to make such investments to supply parts to the independent channel due to low expectations on a return of investment.

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- OEMs in some cases do not grant licenses to suppliers for the use of the tooling.