

RESPONSE TO THE
AUSTRALIAN COMPETITION & CONSUMER COMMISSION

INTERNATIONAL REGULATORY AND INDUSTRY FRAMEWORKS FOR ACCESSING REPAIR AND SERVICE INFORMATION

Australian Automotive Aftermarket Association
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FOR FURTHER INFORMATION

Ms Lesley Yates

Senior Manager – Government
Relations and Advocacy
lyates@aaaa.com.au

AAAA National Office

Suite 16, Building 3
195 Wellington Road
Clayton VIC 3168

03 9545 3333
www.aaaa.com.au

WHO WE ARE

The Australian Automotive Aftermarket Association (AAAA) is the national industry association representing manufacturers, distributors, wholesalers, importers and retailers of automotive parts and accessories, tools and equipment, and providers of vehicle service and repair, and modification services in Australia.

2,250



Member companies represented by the association in all categories of the Australian automotive aftermarket

Members include major national and multi-national corporations as well as a large number of independent small and medium size businesses

\$1b



AAAA member companies export over \$1 billion worth of Australian-manufactured product each year



The parts and maintenance sector is a large and critical component of Australia's \$200 billion automotive industry

40k



AAAA member companies employ more than 40,000 people



Member companies are located in metropolitan, regional and rural Australia

AAAA MEMBERS MANUFACTURE, DISTRIBUTE AND FIT MOTOR VEHICLE COMPONENTS THAT:

Are replaced regularly throughout the life of the vehicle because of normal wear and tear – e.g. oil, filters, tyres, wiper blades, spark plugs, bulbs, batteries and brake pads.

1

Last the life of the vehicle or are replaced irregularly during the life of the vehicle, usually as the result of a crash or a major mechanical failure – e.g. seats, instrument panels, engines, and transmission.

2

Are manufactured and distributed to service and maintain or enhance the appearance and performance of vehicles, including accessories, safety, comfort, appearance, entertainment and information, functional performance, body components, tools and equipment, mechanical, lubricants, additives and chemicals.

3

INTRODUCTION

Consumers win when independent repairers and OEM dealers compete for parts and service sales, delivering improved service and lower prices to motorists. Society's goals for safer, cleaner and more fuel efficient vehicles are also advanced by making vehicle service and repair information accessible and affordable.

At the present time, Australia does not have the appropriate regulatory framework to protect competition in the vehicle repair and service sector: Vehicle manufacturers and importers/distributors are not obliged to make technical and diagnostic information available to repairers outside of their authorised dealer networks.

Issues relating to access to vehicle repair and service information is a global phenomenon: America, Canada and Europe have determined that access to repair and service information by the independent aftermarket is a pre-requisite to fair competition, transport affordability, road safety, and clean air. There are a range of regulatory tools available and depending upon the history and the origins of each public policy debate, each jurisdiction has addressed this matter with a blend of mandatory regulations and voluntary codes. Whilst this document is focussed on the EU and US journey, it is important to note that significant competition reform is also currently in progress in South Korea, South Africa, China and Brazil. There are different solutions employed by different countries to address what is essentially a failure of the market to ensure that price, quality, supply and demand can find the equilibrium that occurs within markets that do not have unfair competition produced by the abuse of technological and market power and supply chain dominance:

1. The EU approach is to address this issue as an anticompetitive practice produced from vertical integration/misuse of market power. As a result the EU employs three interconnecting instruments to mandate specific anti vertical integration and competition policy for automotive repair, tools and parts. This is a similar approach to the current deliberations in China¹. This

¹. Refer to Appendix 1: Auto Components Working Group Position Paper 2016/2017, European Union Chamber of Commerce in China.

approach necessitates the itemisation of activities that are prohibited and a list of the diagnostic, service and repair information that is to be made available on fair and reasonable terms.

2. The American approach is to utilise State Right to Repair legislation combined with industry agreements. Whilst the current national industry agreement is a voluntary framework, this MOU was generated from a combination of the 2000 Clean Air Act (California) and the 2012 Massachusetts Law. The American legislative and industry agreement architecture does not rely on an exhaustive list of information that must be disclosed. The Massachusetts Law simply states that everything that is made available to new car dealers must also be made available to the independent aftermarket on fair and reasonable commercial terms; similar terminology to that used in the Australian Heads of Agreement².

The Australian Heads of Agreement has failed to produce fair and open competition in the domestic market.

Accessing information from the EU and US sites from an Australian workshop has always been problematic due to differences in vehicle configuration for the Australian market. However, there are some repair jobs where it is appropriate to source information from overseas data sources particularly in America and Europe that have a legislative framework in place. However, in recent years these sites are increasingly 'geo-blocked' to prohibit the use of Australian credit cards or Australian Vehicle Identification Numbers.

Despite the fact that the car industry is global and the same multinational car companies that operate in Australia also operate in the US and EU, the arguments against regulations in this market are remarkably similar to the rhetoric used in both of these key international jurisdictions prior to Government intervention: The European and American deliberations on repair and maintenance information disclosure encountered all of the same arguments that are frequently proffered in the Australian market.

². The Australian Heads of Agreement stated that repairers should be able to access all repair and service information that is provided to the dealerships. The car manufacturers subsequently released a code that contradicted the principles statements and allowed for non-disclosure of repair and service information by each manufacturer, allowed manufacturers to withdraw from the voluntary agreement, and stated that information would only be shared if repairers were fitting car company branded components ('genuine' parts).

In the US and Canada, the motor vehicle manufacturers strenuously claimed that much of the required information was available via the internet³. In Australia, the 'nothing to see here' argument is also frequently employed by the car industry. According to this line of argument, all of the required data is available - if the repairer is willing to pay for it. Interestingly, this is the exact same argument that immediately preceded legislated solutions in other comparable markets.

Similar to the current Australian narrative, there was also a great deal of discussion about skills and training. Apparently certain types of information should not be disclosed to independent repairers because there is a lack of confidence in the training, skill, qualifications and specialist tools employed in the independent sector and as a result, only the dealerships linked to the manufacturer have the relevant skill to repair vehicles. Linked to this assertion is the argument that if the data is made available, the independent repairer will attempt to undertake jobs that they are neither skilled for, nor have the appropriate tools and equipment. Interestingly this argument also directly contradicts the car industry position (above) stating that all the information required to service and maintain vehicles is already available.

A similar contention is that the technology is now so sophisticated that the information cannot be shared without specialist training. In fact, such technology is easy to use when technicians have access to the software used to decode and interpret the information. For some models in the Australian market, independent repairers are not able to access the basic data and codes required for component replacement, battery installation and oil change. These are routine maintenance jobs that every reputable repair workshop should be able to undertake. It is hard to see how the argument of 'sophisticated technology that the independent market doesn't understand' can stand up to scrutiny when the jobs that are being affected are basic maintenance tasks.

3. In the United States a 2006 survey of 1,000 aftermarket repair shops performed by Opinion Research found that despite OEM claims that all information was being provided, over \$5.8 billion in service and parts sales was being lost annually (based on 5.6% average productivity loss per month), due independent repair shops inability to readily access the necessary repair information and tools from car manufacturers to properly diagnose and repair vehicles. The survey also found that independent shops turned away 1.8 million consumers each year because they did not have the information and tools to complete the repair job successfully.

We also note that, very similar to the American journey, a common outcry in Australia is that the dealerships have invested significant funds into the dealership fit-out, parts, tools, equipment and training and they deserve to have a return on that investment. We would not deny the dealerships a return on investment, but not by any means, and certainly not by sanctioning uncompetitive practices that come at considerable consumer detriment.

The vehicle manufacturers in the US advocated strongly against 'Right to Repair' legislation using the argument of intellectual property as their main focus. Former National Automotive Service Task Force⁴ (NASTF) director and current NASTF board member Charles Gorman in a March 2011 opinion piece⁵ shared his thoughts on the Right to Repair debate in the US addressing the OEMs' arguments that Right to Repair (R2R) legislation would enable the independent aftermarket to steal OEMs' intellectual property:

Are the vehicle manufacturers right when they say this is about parts companies robbing trade secrets and intellectual property? No. The R2R proponents have said over and over that they are not interested in trade secrets and the language in the proposed legislation clearly exempts trade secrets from the information they are requesting. There is no conspiracy here. This is just the so-called "level playing field" everyone says they want.

A further argument offered by manufacturers is that information relating to the safety or security of the vehicle should not be accessible to independent repairers, and that these items are of such importance that only a dealership is qualified to handle them. However, every single auto repair job could be characterised as relating to safety or security.

4. The National Automotive Service Task Force is a not-for-profit, task force established to facilitate the identification and correction of gaps in the availability and accessibility of automotive service information, service training, diagnostic tools and equipment, and communications for the benefit of automotive service professionals. NASTF is a voluntary, cooperative effort among the automotive service industry, the equipment and tool industry, and automotive manufacturers.

5. Gorman, C 2011, 'It's "Right to Repair" Season Again, ETI Industry Update, A Publication of the Equipment & Tool Institute (US).

A door handle is about security – but consumers should not be forced to go to a dealer to replace a door handle on a ten-year-old car. The windscreen wipers are a safety item, but the consumer should be able to choose whether the dealer fits these, whether an independent repairer or retailer fits them, or if they choose, to buy and fit these items themselves. In addition both the US and EU data sharing models have proven systems in place to protect the security and integrity of vehicle repair and service information. This security and safety argument is simply an excuse used to justify the withholding of information for the lifetime of the car.

All of these arguments and the strenuous defence of manufacturers' refusal to share dealer level information were finally all rejected in Europe, in North America and Canada.

The independent repair sector does indeed want more, not less competition. When consumers have full and free choice of repairers, our markets operate efficiently, and will reward the best OEMs, independents, suppliers, and service providers.

Lee Kadrich: former Vice President Government Affairs and Trade, US Automotive Aftermarket Industry Association (AAIA)

Car manufacturers like to represent that the dealership is the best option, and it may be for some, but this should be the customer's choice, not a result of anti-competitive practices by the car manufacturers.

The following examination of the US and the EU is provided in order to explain the legislative framework and the information that is provided in each of these jurisdictions.

INTERNATIONAL APPROACHES: EUROPEAN UNION

SHARED TECHNICAL INFORMATION CONTENT IN EUROPE

Technical Information to be shared under Article 6(2) of European Commission Regulation (EC) No. 715/2007 .

- Unequivocal vehicle identification
- Service handbooks
- Technical manuals
- Component and diagnosis information
- Wiring diagrams
- Diagnostic trouble codes (including manufacturer specific codes)
- Software calibration identification number applicable to a vehicle type.

Information provided concerning and delivered by means of proprietary tools and equipment.

- Data record information and two-directional monitoring and test data

Further specific examples of technical information that required under competition law in addition to the above.

- Software.
- Fault codes and other parameters, together with updates, which are required to work on electronic control units with a view to introducing or restoring settings recommended by the supplier.
- Repair and maintenance procedures

Reference: International Federation of Automotive Aftermarket Distributors (FIGIEFA) Brochure "The new competition law framework for the automotive aftermarket" July 2010. Full brochure may be found at Appendix 2.

EU BACKGROUND

On 1 October 2002, the European Commission entered into force the Automotive Block Exemption Regulation (BER) 1400/2002/EC: A legislative framework for motor vehicle distribution and servicing agreements. Following a review launched in 2007, the Commission adopted a communication (EU commission Memo 10/217 of 27 May 2010) to set out the basic competition policy orientations for the future legal framework applying to motor vehicle distribution and after sales services agreements after expiry of the motor vehicle block exemption in May 2010. A clear and concise explanation of the BER appears at Appendix 2: the New Competition Law Framework for the Automotive Aftermarket.

The new block exemption applied from 1 June 2010 and will be valid until 2023. The new EU regulations cover aftermarket repair and maintenance services and are a decade-long regulatory evolution committed to effective enforcement and monitoring. These regulations have proven very effective as measured by the European Economic Commission (EEC).

The rules are intended to make sure that independent repairers operate on a level playing field with the car company-authorized networks, and in particular that they can access all of the technical information they need to repair today's complex vehicles. Technical information must be made available in a way that is proportionate to independent repairers' needs.

The Commission's 1st June 2010 launch of the new regulations underscore its commitment to pro-consumer policy that ensures competition in after sales markets. European Economic Commission, Vice President and Competition Commissioner, Joaquin Almunia stated:

"I strongly believe the new framework will bring tangible benefits for consumers by bringing down the cost of repairs and maintenance that represent an excessive share of the total cost of a car over its lifetime."

The new rules cross-reference Euro V Type-Approval legislation, Regulation (EC) No 715/2007, and make it easier to deal with practices such as failures to release technical information to independent garages or the misuse of warranties.

A valuable assessment of the new regulations is provided in a 2010 report by the International Federation of Automotive Aftermarket Distributors (FIGIEFA), the leading advocate for the regulations. The report states:

With the adoption of sector specific Guidelines, the European Commission has emphasized the importance of “Independent Operators.” It has recognised that the independent aftermarket increases choice for consumers and keeps the price of repairs competitive by putting pressure on car manufacturers’ authorised repair networks.

In order to achieve effective competition in the aftersales services, it is essential that all operators can get the technical information necessary to do the repairs and maintenance on increasingly sophisticated vehicles. To that end the keystone of the European competition framework is that withholding technical information will be dealt with directly under Treaty rules on restraints of competitions. Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (EU No 461/2010 may be found at Appendix 3).

FIGIEFA adds that:

Compared to the former Motor Vehicle Block Exemption Regulation 1400/2002, granting access to technical information is no longer viewed as a mere prerequisite for vehicle manufacturers wishing to enjoy an exemption from the normal competition rules. The new competition framework recognizes that access to technical information, tools and training continues to be a prerequisite for effective competition in the automotive aftermarket.

A second major initiative that further strengthens the new competition law framework is the Commission’s cross-referencing between 2007 vehicle type approval legislation Regulation EC No 715/2007, and the competition law rules. In other words, in order to know whether a piece of information should be made available to the independent aftermarket operators, reference should be made to the provisions on access to repair and maintenance information in the type-approval instruments.

Any information communicated to the members of the authorised networks should be made available to independent operators.

This applies to the entire vehicle fleet of all self-propelled vehicles with 3 or more wheels. Regulation EC No 715/2007 generic definition

of technical information provides a summary of what is meant by “technical information for the repair and maintenance of vehicle”.

This is significant in that the strong provisions governing the type approval or new vehicles apply to the entire vehicle fleet. In addition to this clear reference to Type-Approval legislation, the Commission has provided further specific examples of technical information to be shared, as detailed in the introduction to this section. The information/tools/training confirmed for independent access must also be provided in a non-discriminatory manner and **at a fair price and in useable form**. A third major improvement made by new competition law framework over BER 1400/2002 involves warranties. According to FIGIEFA:

In BER 1400/2002, the EC had clarified that independent repairers may carry out regular maintenance and repairs during the warranty period. Nonetheless, many OEMs continued to make warranty coverage conditioned on all service and repair work being carried out by OE dealers and with the exclusive use of the OEM’s parts. In the new rules, the EC clarifies that “vehicle manufacturers may not make the warranties conditional on the repair and servicing of a vehicle within their network, or on the use of their own branded spare parts.” Under the new rules, consumers have the right to use any repair shop for non-warranty work, during both the statutory period (two years in most EU member states) and any extended warranty period. Statutory liability requires anyone who damages a vehicle as a result of negligent work or use of defective parts is liable for it.

EC EFFORTS TO ENSURE EFFECTIVENESS

Since implementing the earlier BER 1400/2002, the EC has provided monitoring and enforcement to ensure effectiveness. In 2004, the EC commissioned a study that demonstrated the importance of independent outlets to European consumers, because of their competitive pricing pressure on OE dealers. The EC stressed that “Independent repairers, depend crucially on access to technical repair information to be able to compete against authorised repairers.”

The EC followed the 2004 report with an investigation into the provision of technical repair information by OEMs, which in 2007 produced four decisions that legally bound DaimlerChrysler AG, Fiat, Toyota and General Motors to provide technical information to all

EU independent garages. All four manufacturers accepted a defined arbitration or mediation mechanism for disputes. The Commission found that the inadequacies cited could force independent repairers from the markets, resulting in considerable consumer harm. A core element of the Commission decisions was that it defined technical information and provided that **“all such information provided to authorised repairers must also be made available to independent repairers on a non-discriminatory basis.”** Another ruling also assists the regulations to be robust by ensuring that “independent repairers can obtain information that is both unbundled and priced in a way that takes into account the extent to which they use it,” i.e. access to OEM websites will be based on time slots, with the price for one hour set at a level which ensures equality between independent and authorised repairers.

ENFORCEMENT BY NATIONAL COMPETITION AUTHORITIES

The EC also measured the enforcement experiences of the national competition authorities (NCAs) in all EU Member States, in implementing the 2002 competition regulation (BER 1400/2002). If common competition problems occur in one or two Member States, those NCAs would handle enforcement. For common problems involving three or more Member States, the EC generally handles the investigation. NCAs provide for formal and informal complaints, with formal complaints involving inquiries, leading to remedial action by the defendant or case dismissal. The EC found that the overall view of the majority of NCAs regarding the impact of Regulation 1400/2002 on the market was fairly positive with several NCAs pointing to an increased level of competition in the aftermarket.

IMPORTANT LESSONS

The successful consumer-centred EU regulatory effort starts with the top-level commitment to ensuring that the independent repair markets can access the information needed to operate efficiently, thus providing consumers with the wider choice of competitive repair outlets, better service and prices. The EC regulatory approach excels in several ways as a possible model for Australia: its dedication to shaping regulations that meet the needs of complex and evolving service markets, its results-oriented approach to effective enforcement actions and measurement of their results, and high-profile press outreach

on how effectively the competition policy is serving its purpose of benefiting consumers.

Another positive factor in the EU regulatory process has been the involvement of EU OEMs in the regulatory process. Represented by ACEA, the European manufacturers offered constructive approaches to the 2010 regulations.

The principles on which the Block Exemption, Type Approval and Treaty on Vertical Agreements are sound. However, our view is that as each of these documents play an interconnected role, it can lead to a complicated landscape with multiple legislative instruments. By comparison the North American model is an industry managed program supported by the mandatory instrument (Massachusetts Law) which ensures ongoing cooperation from the Vehicle Manufacturers.

INTERNATIONAL APPROACHES: NORTH AMERICA

SHARED TECHNICAL INFORMATION IN AMERICA

Section (2)(a) Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system.

All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system.

Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

(2)(c)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

(2)(c)(iii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems.

Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

(2)(d)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and:

(i) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or,

(ii) an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or (iii) a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc.

Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph.

Nothing in this subsection (2)(d)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(d)(i).

(2)(e) Manufacturers of motor vehicles sold in the commonwealth may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

USA REGULATORY ROADMAP

1990 & 2000 Clean Air Act & Clean Air Act Amendments

- Requires on-board diagnostics for emissions systems from model year 94 onwards.
- Service information amendments.
- Access to repair information must be standard and uniform and available to “anyone who works on vehicles or vehicle engines.”
- Data must be generic; no encrypted code lockouts.

US Environmental Protection Agency (38428 Federal Register Vol. 68 No.124, Friday June 27 2003, Rules and Regulations EPA 40 CFR Part 86 FRL 7509 8)

- Requires vehicle manufacturers to present repair information on their websites with detailed cost and performance criteria. The required information includes emission-related service information, training material, manuals, technical service bulletins, diagrams and charts, details of OBD monitors and associated codes. Manufacturers are required to share enhanced diagnostic information with manufacturers of generic diagnostic tools. They are also required to provide information to enable the re-starting of a vehicle fitted with anti-theft devices after repair. In practice this information is provided via the National Automotive Service Task Force (NASTF) website.

2012 Massachusetts Law

- Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities **the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers** through the manufacturer’s internet-based diagnostic and repair information system or other electronically accessible manufacturer’s repair information system. All content in any such manufacturer’s repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same

extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer’s diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

- Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the commonwealth shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.
- Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems.
- Commencing in Model Year 2018, manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and: (i) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534.

2014 National Memorandum of Understanding

- On 15th January 2014, the Automotive Aftermarket Industry Association, Coalition for Auto Repair Equality, Association of Global Automakers and the Alliance of Automobile Manufacturers signed a national MOU which mirrored the operative provisions of the Massachusetts Law.

Automakers agree to 'right to repair' deal

WASHINGTON -- The long fight over "right to repair" seems to be nearing an end.

For more than a decade, independent car repair chains such as Jiffy Lube and parts retailers such as AutoZone have been lobbying for laws that would give them standardized access to the diagnostic tools that automakers give their franchised dealers.

Automakers have resisted, citing the cost of software changes required to make the information more accessible. But when Massachusetts legislators passed a law last year that automakers saw as a decent compromise, they decided to cut their losses.

Last week, two trade groups representing automakers -- the Alliance of Automobile Manufacturers and the Association of Global Automakers -- announced an agreement with independent garages and retailers to make Massachusetts' law a national standard.

"A patchwork of 50 differing state bills, each with its own interpretations and compliance parameters, doesn't make sense," says Mike Stanton, president of the Association of Global Automakers. "This agreement provides the uniform clarity our industry needs."

Under the deal, all auto companies would make their diagnostic codes and repair data available in a common format by the 2018 model year, as the Massachusetts law requires. In return, lobbying groups for repair shops and parts retailers would refrain from pursuing state-by-state legislation.

Supporters of right-to-repair legislation say it will give owners more choices and lower repair costs by fostering competition.

"This agreement will ensure vehicle owners will have competitive and quality choices in their repairs," says Ray Pohlman, the leader of the group Coalition for Auto Repair Equality.

But it may pose a risk to franchised dealers. Out-of-warranty service jobs have grown scarcer at many dealerships in recent years as the quality of cars has improved. Under the new pact, independent repair shops may have an easier time capturing dealers' service business.

Stanton said automakers are still getting feedback from dealers: "We're trying to make this a living, cooperative document that addresses all the concerns from the aftermarket folks and the automakers and the dealers."

All garages being equal

Automakers and repair shops have agreed to adopt a Massachusetts law as a national standard. The law, enacted last year, will

- Require automakers to make available to repair shops the same vehicle repair information they give to dealers
- Allow repair shops to purchase that data with an ordinary computer over a standardized, Internet-based service
- Require automakers to offer a nonproprietary interface for diagnosing problems with vehicles, starting in the 2018 model year

Source: Nelson G 2014, Automakers agree to 'right to repair' deal, Automotive News, <http://www.autonews.com/article/20140125/RETAIL05/301279936/automakers-agree-to-right-to-repair-deal>

TIMELINE SUMMARY

- 1990** 1990 Clean Air Act (CAA) OBD emissions systems for model year (MY) 1994 vehicles.
- OEMs' resisted compliance with the 1990 CAA Amendments.
- Claimed independent aftermarket would "steal" their proprietary information, and untrained technicians would damage vehicle systems.
- Environmental Protection Agency accepted their case, and rewrote the rules to accommodate the OEMs.
- 2000** In 2000, California passed Senate Bill 1146, mandating full access to all emissions related information, enhanced diagnostic tools and reprogramming capabilities.
- SB 1146 is passed, mandating full independent aftermarket access to all emissions related information, enhanced diagnostic tools and reprogramming capabilities.
- Allows OEMs to petition the court for trade secret protection. Prohibits use of encryption or defeat devices that would prevent use of non-OE parts.
- SB 1146 proves to be an unmitigated success - no proprietary information violations, damaged vehicles or other negative consequences.
- EPA reverses itself, rewriting the rules, mandating OEM's release emissions repair information nationwide by mid-2003. To date: Zero reported cases of tampering, theft or damage by California or U.S. aftermarket
- California reports on OBD repairs tout SB 1146's contribution to competitive repair pricing and cleaner air.
- The EPA final rule and a summary of SB 1146 may be found at Appendix 5.
- 2000** The National Automotive Service Task Force (NASTF) was formed to facilitate open communications between the aftermarket and the original equipment vehicle manufacturers (OEMs) to ensure the same service information, tools and training materials available to franchised dealers were available to the independent service technicians.
- 2002** Creation of the USA Voluntary Agreement. However, some OEMs never signed letters of agreement, and those who did were free to leave at any time.
- 2003** US Environmental Protection Agency (38428 Federal Register Vol. 68 No.124, Friday June 27 2003, Rules and Regulations EPA 40 CFR Part 86 FRL 7509 8) requires vehicle manufacturers to present repair information on their websites with detailed cost and performance criteria
- 2006** Incorporation of NASTF as a not-for-profit organization and the election of a Board of Directors where 9 of the 12 board seats are held by the aftermarket.
- 2006** Right to Repair legislation was adopted by the House Commerce Subcommittee, and Committee chairman and bill sponsor, Rep. Joe Barton (R-TX) brought the parties to the table. Parties failed to agree on dispute resolution and sanctions to enforce the agreement and other key issues.
- 2008** NASTF establishes a Secure Data Release Model (SDRM) as a mechanism for security technicians seeking to service vehicle key, immobilizer and theft-related parts. A summary of the SDRM and how it works may be found at Appendix 6.
- 2012** Massachusetts Legislation H4362, An Act protecting motor vehicle owners and small businesses in repairing motor vehicles, which was signed into state law on August 7, 2012. (Appendix 4)
- 2015** USA Memorandum of Understanding signed - a national industry wide agreement which mirrors the Massachusetts Legislation. The MOU may be found at Appendix 7.
- 2018** Automakers to offer a non-proprietary interface for diagnosing problems with vehicles, starting in the 2018 model year.

USA HISTORY & BACKGROUND

America's auto repair sectors have flourished under pro-consumer, pro-competition policies and today the majority of consumers have choice and competition in their post-warranty parts and service purchases and a growing percentage of their vehicle service needs in warranty years. As is true in other competitive markets, such as the EU, consumers win when independent repairers and OEM dealers compete for parts and service sales, delivering improved service and lower prices to motorists. Society's goals for safer, cleaner and more fuel efficient vehicles also are advanced by making vehicle service and repair information accessible and affordable.

In America the prevailing view was that competition was being threatened by OEMs' use of technology to monopolise vehicle service markets. Independent parts and service businesses should not continue to be denied fair access to the information and tools needed to repair vehicles.

The United States offers a unique perspective, in that a voluntary agreement has operated in tandem with regulations first implemented via the 1990 Clean Air Act (CAA) OBD emissions systems for vehicles since MY 1994. Concerned that the servicing and repairs of these newly mandated emissions systems would be monopolised by the OEMs, Congress enacted service amendments that required access to repair information be standard, uniform, and available to "anyone who works on vehicles or vehicle engines." It required the data be generic and disallowed encrypted code lockouts. The OEMs resisted compliance with the regulations proposed by the Environmental Protection Administration (EPA), arguing that the independent repairer would "steal" their proprietary information and untrained technicians would damage vehicle systems. Based on their comments EPA rewrote the rules to accommodate the OEMs.

In 2000, California, which has its own mobile source emissions rules, passed Senate Bill 1146, mandating full access to all emissions related information, enhanced diagnostic tools and reprogramming capabilities. The law prohibits use of encryption or defeat devices that would prevent use of non-OE parts. SB 1146 proved to be extremely effective, with no proprietary information violations, or other negative consequences.

EPA reversed itself, and rewrote the rules, mandating OEM's release emissions repair information nationwide by mid-2003. There have been no reported cases of tampering, theft or damage by independent repair shops in California or the US. SB 1146 has contributed significantly to more competitive repair pricing and cleaner air.

While the OBD emissions systems issue had been resolved, the independents lacked repair information to service the ongoing sweep of new technologies. In 2001, a broad coalition of independent organisations developed the first Motor Vehicle Owners' Right to Repair Act legislation (HR 2049), drawing on the successful CAA and SB 1146 provisions, to ensure that all vehicle systems would be open to repair by all repairers willing to make the necessary investments. The OEM's opposed HR 2049 with the same arguments used against the CAA Amendments and SB 1146. Having lost the prior regulatory battles, the OEMs offered a voluntary solution to stave off the expansion of right to repair to cover all vehicle systems. In 2002, the Automotive Service Association (ASA) left the Right to Repair coalition and signed a cooperative agreement with two OEM groups to provide repair information to independent repairers. The groups chose the National Automotive Service Task Force (NASTF) as their platform for information sharing and to help resolve problems obtaining information.

In the 2002 in a letter to the Senate Commerce Committee, the OEMs pledged to make emissions and non-emissions related information available to independents. Had these commitments been compulsory, and enforceable with sanctions, they could have met the objectives of HR 2049. However, in circumstances that were repeated following the implementation of the 2014 Australian Heads of Agreement: **some OEMs never signed letters of agreement, and those who did were free to leave at any time.**

With the lack of any regulations that govern information access for non-emissions systems, NASTF addressed this void, with a platform for new information sharing opportunities and an important forum for identifying gaps in information availability. However, the voluntary approach was no substitute for regulation, and a strong independent coalition continued to push for legislation.

The overall effectiveness of NASTF as an alternative to regulation was studied in a 2006 Opinion Research survey commissioned by the Automotive Aftermarket Industry Association (AAIA, later the Auto Care Association). The research findings demonstrated significant information access problems four years into the OEMs agreements.

A US survey of 1,000 aftermarket repair shops revealed that seventy percent of respondents expressed no confidence that OEMs will always provide them with the necessary information and tools required for repair. The researchers noted a broad spectrum of independent repairers' experiences with OEM cooperation. It was only the impact of the pending Right to Repair legislation that was a deciding factor in obtaining even these small reported levels of cooperation.

While same day vehicle service is a hallmark of independent competitiveness, information resolution can take days if not weeks. Without a regulatory framework – there were simply no penalties if OEMs did not comply. AAIA, together with the Coalition for Auto Repair Equality (CARE) and the growing number of leading aftermarket, consumer and business groups active in the Right to Repair Coalition, detailed a wide range of problems being experienced by independent technicians.

While the problems experienced by independent technicians were wide ranging, the following three major issues were faced by independent repair shops in attempting to obtain the information and tools needed to work on vehicles:

- Codes needed to reinitialise vehicle computer systems were not made available. Independent shops were able to perform many repairs only to be stymied at the end when they could not obtain the code to reinitialise the vehicle's computers and thus complete the repair.
- A great deal of diagnostic and repair data was provided to car company franchised dealerships over "hotlines" that were not accessible to independent repair shops or consumers. Information available through these dealer-only networks provided valuable diagnostic assistance for hard to solve problems, and might also have information regarding safety related repairs that needed to be completed, but which an

independent shop and car owner might not be aware of until a technical service bulletin or recall was released, a process that can take months if not years.

VOLUNTARY AGREEMENT FAILURE

Nothing in the history leading up to the creation of the 2002 Voluntary Agreement indicated a serious OEM interest in sharing information. The OEMs fiercely resisted the emission related information sharing requirements of the Clean Air Act and California's SB 1146. When compelled under regulation to provide information to U.S. repairers, the OEMs chose not to make that same information voluntarily available to interested Canadian repairers. Without any Canadian regulatory pressure, they could make that choice (refer Appendix 8: summary of the Canadian Automotive Service Information Standard).

Given this past experience, it is doubtful that OEMs would have pursued the NASTF voluntary alternative, had not the HR 2049 Right to Repair legislation been introduced. Even under NASTF, OEMs retained the right to choose whether to be under the agreement, and they retained the choice over what non-emission information and tools they would share. Without the persistent legislative pressure at the federal and state levels, NASTF would not have been effective.

The contrast of information sharing experience under US and California statutory provisions, versus a voluntary approach, demonstrates that regulation can ensure effective market competition and benefits for consumers. Left unchecked by regulations, OEMs can, and will exploit their monopoly advantage as the sole source for their customers to obtain complete service and repairs.

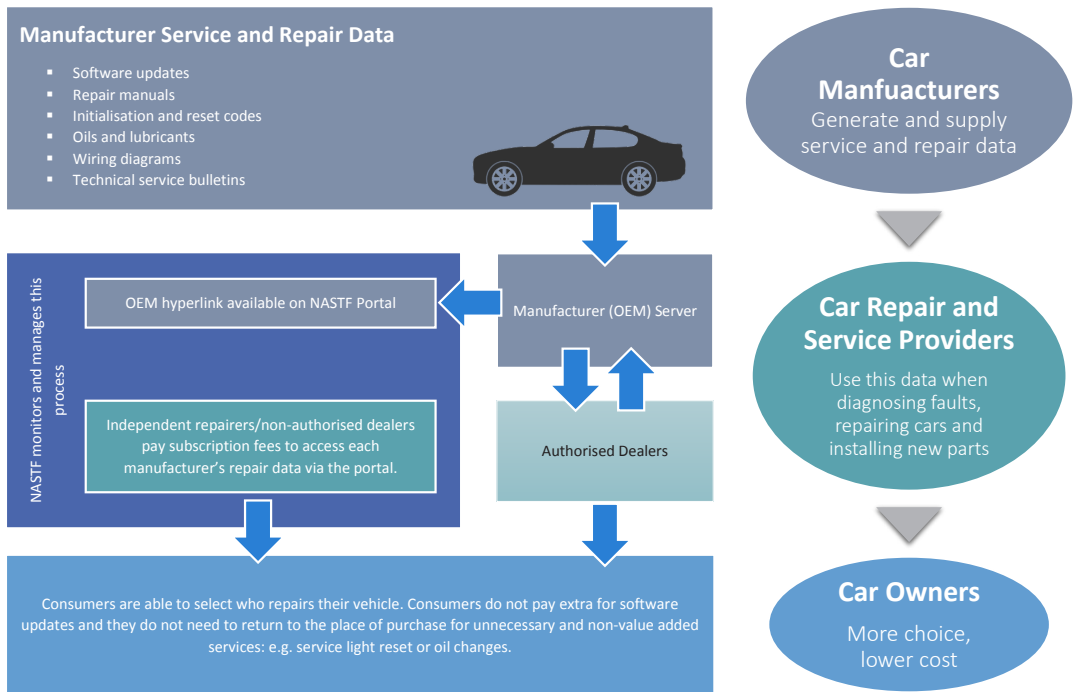
NASTF

In 2000, the National Automotive Service Task Force (NASTF) was formed to facilitate open communications between the aftermarket and the original equipment vehicle manufacturers (OEMs) to ensure the same service information, tools and training materials available to franchised dealers were available to the independent service technicians. This was reinforced in 2006 with the incorporation of NASTF as a not-for-profit organization and the election of a Board of Directors where 9 of the 12 board seats are held by the aftermarket. Today NASTF’s role is recognized in the text of Massachusetts legislation H4362:, An Act protecting motor vehicle owners and small businesses in repairing motor vehicles, which was signed into state law on August 7, 2012.

Section (6)(b) of the Massachusetts law expressly recognizes the NASTF Service Information Request (SIR) Internet-based problem resolution service as a mechanism for addressing information access and tool availability questions prior to enforcement actions being pursued.

Section (2)(e) of the law recognizes the NASTF Secure Data Release Model (SDRM) (refer Appendix 6), as a mechanism for security technicians seeking to service vehicle key, immobilizer and theft-related parts. Since its inception in 2008 almost 750,000 transactions have been processed through the SDRM.

National Automotive Service Task Force Portal



CONCLUDING REMARKS

We are able to learn from the experience of the European and American regulatory frameworks. Indeed, we can learn from the ends and the means. We can draw conclusions from both the journey to competition reform and the final destination which is represented by the current EU and the US regulatory models:

1. For large and mature automotive markets, the assumption that underpinned all actions from the regulating bodies was that competition between dealerships and independent repairers provides for better consumer outcomes and efficient markets. In order for fair competition to occur, vehicle manufacturers must disclose critical service and repair information on fair and reasonable terms to all repairers. Without regulatory intervention, this market does not, and will not, self-correct to achieve fair and open competition.
2. The OEM arguments against sharing dealer level repair and service with independents (lack of training, intellectual property, security, dealership ROI) have been used in these mature markets and finally rejected for what they are: arguments that are driven by commercial self-interest and lacking in consistency, logic and evidence.
3. The dealership business model has changed and car service volumes are required to produce satisfactory earnings and the vehicle manufacturers are similarly, increasingly reliant upon 'genuine' parts sales. The market is therefore predisposed to fortify increased vertical integration, capturing the customers' aftersales business for the first 4-7 years of ownership.
4. The consumer does not factor aftersales vertical integration in their purchasing decision. Vehicle manufacturers do not disclose the restriction of aftersales repair and service information to consumers. Withholding service information does not jeopardise vehicle sales for any brand and capturing the consumer's aftersales can offset a lower vehicle purchase price. The consumer is not aware of such offsets. It is not our contention that there is a conspiracy here - it is simply an observation of how the Australian market operates today and under the current regulatory environment, is likely to operate in the future. There is simply no commercial imperative for car manufacturers or new car retailers to allow the consumer to have a choice in aftersales repair and service.
5. No international market operates with a framework of full repair and service information disclosure based on a purely voluntary agreement. America and Europe have legislative foundations to their respective 'voluntary' frameworks.
6. The experience of both of these markets is that a mandatory foundation is required because voluntary, industry-led solutions do not work and do not create competitive markets because the OEMs can (and do) opt in and out of voluntary frameworks and can do so without commercial or community sanction.
7. A large number of interlocking instruments is difficult to monitor and administer. The long history of campaigning for repair and service consumer choice in the US and in Europe has led to a complicated mix of instruments and this can result in gaps and moreover, difficulty in minoring effectiveness and outcomes.
8. There is evidence to suggest that it is more effective to have a mandatory regime that requires that everything that is made available to dealerships must be made available to independent repairers on fair and reasonable terms. Trying to itemize the information required to be shared results in the OEMs finding and exploiting gaps. Attempting to list each and every requirement may not produce optimal outcomes for consumers.
9. The value of any regulatory framework is only as useful as the dispute mechanism. Same-day automotive servicing requires same-day dispute resolution. Penalties for non-disclosure should be designed to encourage a culture of compliance and real time dispute resolution should be mandatory. Both the US and EU markets would concede that effective dispute resolution requires a robust framework.

The current Australian debate is clearly healthy, even though there is a sense that we have been having the same debate for about eight years. Questions about the nature of the problem and the size of the problem, these are both necessary pre requisites to finding the right solution for our customers and for our economy.

But it is foolhardy and wasteful to ignore the lessons of our international counterparts. Some would argue that each of the legislative and regulatory frameworks in these jurisdictions have their issues and problems. We would agree. But perfection should not be the enemy of reform.

We owe it to the millions of Australian households trying to manage their weekly expenditure, relying on their vehicles every single day to get to work and to meet family obligations. We owe them a better deal. To look to Europe and America and say 'their systems don't work to 100% efficiency therefore we should not consider them' is simply not good enough. What we should do - is to look to the best of both of these markets - we can create the best competitive environment for Australia's economy and we can do this with a regulatory framework supported by robust monitoring and enforcement.

APPENDIX 1:
AUTO COMPONENTS
WORKING GROUP POSITION
PAPER 2016/2017

EUROPEAN UNION CHAMBER OF
COMMERCE IN CHINA

SEPTEMBER 2016



Auto Components Working Group

Key Recommendations

1. Strengthen Policy Enforcement in the Automotive Independent Aftermarket (IAM) and the Disclosure of Vehicle Technical Information and Data

1.1 Accelerate and Enforce Existing Policies to Allow Access to the Automotive Independent Aftermarket Business

- Promulgate the *Auto Sales Management Methods* and the *Anti-Monopoly Guideline in the Automotive Industry* to ensure free and balanced market competition in the vehicle aftermarket service sector.
- Introduce a 'repair clause' in the Chinese Patent Law, such as a provision that excludes design patent rights for visible spare parts that are intended to restore the initial appearance of the vehicle.
- Create a statutory obligation for original equipment manufacturers (OEMs) to allow the use of production tools owned by them for the manufacture of products for the IAM against payment of a non-discriminatory and reasonable fee.
- Declare invalid agreements that restrict the right of a supplier to use OEM-owned tools for the manufacture of products for the IAM.

1.2 Define Standards on Access to Repair and Maintenance Information (RMI) Clearly, and Ensure Data Security

- Provide further guidance on pricing to ensure that IAM operators obtain RMI at an affordable price.
- Offer a clear explanation on standards for third-party institutions having access to RMI, and manage data in order to guarantee the efficiency and accuracy of RMI disclosure.

1.3 Expand End Consumer Choices During Both the Statutory Warranty Period and Any Extended Warranty Period

- Strengthen enforcement of regulations that permit independent operators' access to the end consumer for non-warranty work during both the statutory warranty period and any extended warranty period.



2. Improve the Legislative Framework of Anti-counterfeiting Laws and Regulations and Strengthen Relevant Enforcement to Protect the Legitimate Interests of Intellectual Property Rights (IPR) Owners

- Lower the threshold for filing auto components criminal cases and introduce more severe punishments such as punitive damages for safety-related parts.
- Enforce existing regulations more strictly in cases of counterfeiting registered trademarks.
- Promulgate regulations for handling confiscated counterfeits to ensure they do not re-enter the market.
- Promulgate the E-commerce Law and make corresponding amendments to relevant regulations such as the Civil Procedure for Evidence Collection to make it viable for brand owners to pursue civil or criminal remedies for online infringements.

The icons represent recommendations that relate to the following key development themes of the 13th Five-Year Plan:



Balancing the economy





3. Apply National Treatment to Automobile Repair Chain or Franchised Stores of Foreign-invested Companies and Ensure Its Implementation at the Local Level

- Apply national treatment to auto repair chain or franchised stores of foreign-invested companies and issue the master licence in accordance with Article 17 of The *Regulations for Motor Vehicle Maintenance and Management*.

Introduction to the Working Group

The Auto Components Working Group was created in 2000. It consists of over 80 European and other foreign companies involved in the manufacture of auto components, machine tools for production of auto components and automotive assembly lines. They also import and distribute auto components and provide after-sales services. An independent aftermarket (IAM) Desk was established in October 2014, by Auto Components Working Group members, which pledges to explore the possibilities of applying a European Union (EU) *Motor Vehicle Block Exemption Regulation* (MVBBER) to improve the accessibility of the IAM business to suppliers through advocating the improvement of existing laws and regulations,¹ which includes the *Access to the Vehicle Repair and Maintenance Information Methods (RMI Methods)*, *Auto Sales Management Methods (Sales Methods)* and the *Anti-Monopoly Guideline in the Automotive Industry (AML Guideline)*.

The working group has fostered ties with various relevant organisations and government bodies in Europe and China.

Recent Developments

On 22nd June, 2016, the European Commission and the high representative of the Union for Foreign Affairs and Security Policy adopted a Joint Communication, entitled *Elements for a New EU Strategy on China*. It maps out the EU's relationship with China for the next five years and identifies major opportunities, with the particular aim of vigorously promoting a greater opening up of the Chinese market to European business.²

In the Chinese automotive market, European companies play a key role in introducing best practices with regards to rule-based behaviour, which benefits all stakeholders in the industry and is an integral part of market-led reform. This is exactly what the 13th Five-Year Plan (13FYP) advocates – the encouragement of establishing fair competition and erasing market barriers.

However, due to inadequate enforcement of rules and regulations, especially when it comes to state-owned market players, the recognition of equal market access has not yet been realised. Great efforts have been made by various ministries, particularly the National Development and Reform Commission (NDRC) with its recent release of the *draft AML Guideline*, which represents a very innovative and positive approach. Although there is reticence among Chinese automotive state-owned enterprises (SOEs) to adjust to these modern and progressive reforms, the Auto Components Working Group still hopes that best practices of European OEMs in both Europe and China will be widely adopted by the auto components industry.

Access to the Vehicle Repair and Maintenance Information (RMI)

In order to encourage a fair and full competition environment in the IAM, the *RMI Methods* were jointly released by the Ministry of Transport (MOT) and seven other ministries on 29th September, 2015. Taking effect on 1st January, 2016, the *RMI Methods* requires vehicle manufacturers to disclose information on repair and maintenance technology through authorised channels.³

Subsequently, the MOT issued the notice *Registration*

¹ Commission Regulation (EU) No 461/2010 of 27 May 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreement and Concerted Practices in the Motor Vehicle Sector, European Parliament, 1st June, 2010, viewed 4th May 2016, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0461&from=EN>>

² The European Union sets its sights high on ambitions with China, European Commission, 22nd June, 2016, viewed 6th July, 2016, <http://europa.eu/rapid/press-release_IP-16-2259_en.htm>





Guideline of Access to the Vehicle Repair and Maintenance Information on 7th December, 2015, as a follow-up guideline for implementation.⁴

Access to RMI, if properly implemented and supervised in the future, will give consumers more choices, thereby liberalising the IAM. However, once third-party maintenance institutions have the same access to RMI from OEMs, without any delay or discrimination, the authorised network (4S shops) will be impacted and will need to rethink how they can improve their services in order to optimise the customer experience.

Joint Efforts by Chinese Ministries to Improve Access to the IAM

Since 2014, Chinese authorities have been aware of a huge demand for better regulation of the whole automotive market and have shown strong determination through the issuance of a series of guidelines and specific methods.

The Ministry of Commerce (MOFCOM) issued a discussion paper on *Sales Methods* on 6th January, 2016, which addressed concerns about improving access to the IAM.⁵ In addition, the NDRC led the collection of comments for the discussion paper on the *AML Guideline*, which was issued on 23rd March, 2016. The *AML Guideline* intends to clarify how the Anti-Monopoly Law (AML) will be applied to anticompetitive agreements and abuse of market dominance, in relation to China's automotive sector.⁶

13th Five-Year Plan (13FYP)

What's in the 13FYP

1. The 13FYP, encourages maintaining fair competition, removing industry monopolies, erasing market barriers and abolishing various regulations and practices which obstruct a single market and fair competition. Another important, overarching guideline is the reinforcement of the rule of law and its strict enforcement.
2. The 13FYP encourages deepening the reform of administration and management systems. It intends to hasten government function transformation, continue to advance administrative streamlining and the delegation of power, combine empowerment and regulation, improve administrative effectiveness, and stimulate market

The *AML Guideline* will be China's first sector-specific antitrust guideline applicable to all enforcement authorities in China. It will impact litigation and will serve as an industry example for the enforcement and implementation of the AML in China. It is anticipated that both the *Sales Methods* and the *AML Guideline* will be promulgated by the end of 2016.

Innovation in Autonomous Driving Vehicles

The automotive industry is paying more and more attention to innovation in autonomous driving vehicles (ADVs). It is also believed that ADVs will have an influence on the IAM once the technology becomes mature enough. While high levels of uncertainty currently surround the issue, the ultimate role that ADVs could play regarding mobility, the economy and society as a whole could be wide reaching. The widespread use of ADVs could profoundly affect a variety of industrial sectors. It is expected that by 2030:⁷

- the after-sales service landscape will be reshaped;
- business models of auto insurers will shift from covering individuals to covering technical failures; and
- supply chain and logistics will be redefined.

Even though many OEMs have initiated their ADV programmes with Internet giants, their potential impact remains hazy, especially when considering how to address the ambiguities concerning liability and risk.

3 *Implementation Measures for the Management of Information Disclosure of Vehicle Maintenance and Repair Technology*, MOT, Ministry of Environmental Protection, MOFCOM, State Administration for Industry and Commerce (SAIC), Administration of Quality Supervision, Inspection and Quarantine, Certification and Accreditation Administration of China, State Intellectual Property Office, China Insurance Regulatory Commission, 29th September, 2015, viewed 4th May, 2016, <http://www.moc.gov.cn/zfxqgk/bnssj/dlyss/201509/20150929_1883437.html>

4 *Registration Guideline of Access to the Vehicle Repair and Maintenance Information*, MOT, 7th December, 2015, viewed 4th May, 2016, <http://www.moc.gov.cn/zfxqgk/bnssj/dlyss/201512/20151207_1943081.html?from=groupmessage&isappinstalled=0>

5 *Discussion Paper on Auto Sales Management Methods*, MOFCOM, 6th January, 2016, viewed 4th May, 2016, <<http://ifs.mofcom.gov.cn/article/as/201601/20160101227922.shtml>>

6 *Discussion Paper on Antitrust Guidelines on the Auto Industry*, NDRC, 23rd March, 2016, viewed 4th May, 2016, <http://www.sdpc.gov.cn/gzdt/201603/20160323_795743.html>

7 *Ten ways autonomous driving could redefine the automotive world*, McKinsey & Company, June 2015, viewed 25th May, 2016, <<http://www.mckinsey.com/industries/automotive-and-assembly/our-insights/ten-ways-autonomous-driving-could-redefine-the-automotive-world>>





vitality and social inventiveness.

3. While aiming for an overall technological upgrade and placing an emphasis on key areas such as new energy vehicles (NEVs), the 13FYP also encourages optimising government participation, creating new space for the development of emerging industries and that the added value created by strategic emerging industries should reach 15 per cent of the country's gross domestic product (GDP).

Evaluation of Existing Measures

1. China plans to implement an examination system for fair competition in order to:
 - relax market access and strengthen the market exit mechanism;
 - strengthen market supervision and establish an AML enforcement system that is just and effective, has unified regulations, clarified responsibilities and legal safeguards;
 - strengthen the socialisation of regulatory mechanisms including smooth complaint and reporting channels;
 - crack down on production and sales of counterfeits;
 - strengthen the legal protection of trademarks; and
 - protect the lawful rights and interests of foreign enterprises.
2. In order to improve the effectiveness and capacity of government supervision, China is aiming to transform the scope of supervision; strengthen supervision at all stages; produce scientific and effective market supervisory regulations, procedures and standards; perfect the supervisory responsibility system; and promote the modernisation of supervision. It also plans to innovate the supervisory mechanism and methods; advance comprehensive law enforcement and mega data supervision; coordinate supervision throughout the market; and enhance creditability.
3. In order to create a series of new growth drivers, the supportive role of emerging industries will be enhanced (see more details on implementation of plans to develop the NEV industry in the following China Manufacturing 2025 box).

Industry Stance

1. The auto components industry notes that there has been a drive for reforms, a deeper evaluation of monopoly conditions, the aim to create and foster competition and the possibility of allowing the market to have more choice and greater availability of better products. The ongoing work on the *AML Guideline* by the NDRC is perfectly in line with these aims.

In addition, it is important to note the statement related to better protection for intellectual property rights (IPR) and the greater awareness of counterfeit production and sales.

2. The importance given to rule of law in the 13FYP is an encouraging signal for foreign companies operating in China or those planning investments.
3. The Auto Components Working Group hopes that there will be focus on both sustainable production and consumption, as well as continued changes to China's energy mix and infrastructure.

China Manufacturing 2025

What's in China Manufacturing 2025? ⁸

Following a thorough analysis of the status quo of China's automotive industry, China Manufacturing 2025 makes forward-looking predictions about certain industry-specific development trends, featuring pure electric vehicles and plug-in hybrid electric vehicles, fuel cell vehicles, energy-saving vehicles and smart Internet-connected vehicles.

⁸ Interpretation of Made in China 2025: Promoting the Development of Energy Saving and New Energy Vehicles, MIIT, 22nd May, 2015, viewed 4th May, 2016, <<http://www.miit.gov.cn/n11293472/n11295142/n11299123/16604739.html>>





For pure electric vehicles and plug-in hybrid electric vehicles, domestic brands should gradually gain competitiveness and reach the sales target of one million (corresponding to 70 per cent domestic new-energy market share) by 2020. By 2025, the sales of new-energy vehicles at an international, advanced level should reach three million, covering 80 per cent of domestic new-energy market share.⁹

For fuel cell vehicles, 1,000 fuel cell vehicles should be trial produced and operated by 2020. By 2025, key materials and parts should be supplied domestically. Also, the performance and reliability of fuel cell systems should be greatly improved by that year. Furthermore, the supporting infrastructure such as hydrogen production and hydrogenation shall be in place to ensure small-scale operation of fuel cell vehicles in the same year.

For energy-saving vehicles, the fuel consumption of passenger cars (including NEVs) should be lowered to five litres per 100 kilometres by 2020, and four litres per 100 kilometres by 2025.

For intelligent-connected vehicles, it is recommended that the general and key technologies regarding smart auxiliary driving shall be acquired by 2020, and an independent R&D system together with a (supporting) production system shall be preliminarily established. By 2025, the following shall be established to complete the process of automotive industrial upgrading: an R&D system, a production system and an industrial cluster.

Specific Implementation

Starting 2015, many laws and regulations on NEVs have been enacted to echo the initiative by different ministries, including:

General Office of the State Council:

1. *General Office of the State Council's Recommendations for Accelerating Construction of Charging Stations for Electric Vehicles* (9th October, 2015)

Ministry of Transport (MOT):

1. *Suggestions for Facilitating the Promotion of NEVs in the Transportation Industry* (18th March, 2015)
2. *Circular on the Preferential Tax Policies for Energy-Saving New-Energy Vehicles* (7th May, 2015)
3. *Regulation on the Technical Management of Road Transport Vehicles* (22nd January, 2016)

Ministry of Environmental Protection (MEP) and the MIIT:

1. *Proclamation on Implementing the Fifth Phase of Motor Vehicle Emissions Standards* (14th January, 2016)

Industry Stance

China's central government has realised that the growth reliance upon heavy industry and fixed asset investment is unsustainable. This old model resulted in inefficient investments and led to severe environmental and ecological degradation.

Emphasising green development, particularly supporting the development of NEVs, should increase the opportunities for foreign companies, as the central government will encourage foreign companies to invest and deploy more global leading environmental products and solutions in China.

⁹ The MIIT Explaining the Development Goals of New-Energy Vehicles in 2025, Sohu, 25th May, 2015, viewed on 17th June, 2016, <<http://auto.sohu.com/20150525/n413693117.shtml>>





Key Recommendations

1. Strengthen Policy Enforcement in the Automotive Independent Aftermarket (IAM) and the Disclosure of Vehicle Technical Information and Data

1.1 Accelerate and Enforce Existing Policies to Allow Access to the Automotive Independent Aftermarket Business

Concern

Original part suppliers (OPS) are often blocked by OEMs (usually with appreciable market power) from selling in the IAM the same authorised auto components supplied by OPSs to OEMs for the first installation on the vehicles, through various restrictions such as contractual arrangements, intellectual property (IP) and tooling ownership.

Assessment

Frequent restrictions imposed on OPSs selling to the automotive IAM clearly limit consumers. Technically, the kind of direct or indirect restrictions often imposed by OEMs on OPSs, constitute a 'monopoly agreement/arrangement', which restricts free competition, and therefore, to the working group's understanding, should be prohibited under the current AML.

With Chinese antitrust authorities' recent series of actions against OEMs, distributors as well as OPSs, China's automotive market has matured and is ready for greater liberalisation. The draft *AML Guideline* is clearly a milestone for OPS in terms of opening up the IAM in China, especially in relation to the following two issues:

1. Definition of 'relevant market' in relation to the IAM

Article 1.2 of the draft *AML Guideline* confirms that brand is an important factor when defining the automotive aftermarket. Therefore, OEMs can be considered to be dominant in the aftermarket (which could potentially only consist of one brand) even if it has no dominant position in the new vehicle market. This is in line with EU practice.

The definition of 'relevant market' is very helpful to recognise the fact that OEMs do have the dominant market power when they conduct business with OPSs. In particular, OEMs use such position during contract

negotiations and usually have the power to conclude the contract with OPSs on favourable terms.

Once the draft *AML Guideline* becomes effective, OPSs should have the legal grounds (such as customer restrictions, tooling and IP restrictions) to protect their own positions by claiming OEMs' abuse of its dominance.

2. Territorial and Customer Restrictions

Article 2.3.4 of the draft *AML Guideline* provides four 'hardcore' restrictions, according to which presumed exemptions won't be available even if the relevant market shares fall under 25–30 per cent. These situations include: (i) a restriction on passive sales; (ii) a restriction on cross-supplies between distributors; (iii) restricting distributors and repairers from selling parts to end-users; and (iv) restricting suppliers of parts, repair tools, testing equipment or other equipment from selling the products they manufacture to distributors, repairers or end users, except for situations where a pure subcontracting agreement is involved.

The draft *AML Guideline* clearly stipulates that OEMs cannot prohibit or restrict OPSs from selling parts into the IAM, except in instances where an OEM has a pure subcontracting agreement with an OPS.

As a general concern, under the Motor Vehicle Block Exemption Regulation (MVBBER), the following restrictions imposed on OPSs regarding access to the automotive aftermarket are prohibited and automatically void, as they violate EU competition law:

- Article 5(b): "The restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users."

While the *AML Guideline* is expected to provide clearer antitrust guidance for businesses operating in the auto industry once they become effective, there are still a number of areas which lack implementation details, one of which is the issue on subcontracting agreements (tooling and IP restrictions).

In practice, OEMs greatly prohibit OPSs from producing and selling dual branding parts in the IAM by using OEM-owned tooling and IPR, as OEMs usually use





these conditions to claim that the supply agreement is a subcontracting agreement between OEMs and OPSs.

Article 6.1 of the draft *AML Guideline* provides that a subcontracting agreement is one under which an OEM must provide necessary/essential IPR, equipment/tooling and know-how for an OPS to produce car parts based on its requirements. However, such equipment/tooling, IP and know-how in most cases can be developed by the OPS independently under reasonable terms, they are not 'necessary' for the agreement, which will then not be considered as a genuine subcontracting agreement. The *AML Guideline* further provides that the subcontracting agreement needs to be determined on a case-by-case basis.

Regarding the tooling, the EU 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* (Text with EEA relevance) (2010/C 138/05) (*Supplementary Guidelines*), explains the EU Commission's perception of the EU rules:¹⁰

- Paragraph 23: "Article 5(b) of the *Motor Vehicle Block Exemption* concerns any direct or indirect restriction agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, which limits the supplier's ability to sell these goods to authorised and/or independent distributors and repairers. So-called 'tooling arrangements' between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type. Reference should be made in this respect to the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (the Sub-contracting Notice). Normally, Article 101(1) of the Treaty does not apply to an arrangement whereby a motor vehicle manufacturer provides a tool to a component manufacturer which is necessary for the production of certain components, shares in the product development costs, or contributes necessary intellectual property rights, or know-how, and does not allow this contribution to be used for the production of parts to be sold

¹⁰ Commission Notice (EU) (2010/C 138/05) on the *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*, European Commission, issued 28th May, 2010, effective 1st June, 2013, viewed 4th May, 2016, <[<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:E2012C1011\(01\)>](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:E2012C1011(01))

directly in the aftermarket. On the other hand, if a motor vehicle manufacturer obliges a component supplier to transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how, the agreement at issue will not be considered to be a genuine sub-contracting arrangement.¹¹ Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations."

As illustrated by provisions quoted above, the purchasing terms should take OEMs' obligations into consideration (under the MVER and the *Supplementary Guidelines*) to allow the use of OEM-owned tools for supplies to the IAM in the EU.

However, parts suppliers that seek to use OEM-owned tools to manufacture parts for the IAM face significant obstacles nonetheless.

One of the main obstacles is the supplier's obligation to pay a fee to OEMs for the use of the tools. Like in other cases where competition law requires the owner of an 'essential facility' (e.g. a railway network, an electricity grid or a standard essential patent) to allow third parties the use of his property, the owner can charge users a fee, which must be non-discriminatory and reasonable.

Any OEMs that seek to prevent their suppliers from selling in the IAM often demand an unreasonably high fee for the use of their tools and then protract the fee negotiations as long as possible. While no agreement has been reached on fees, the supplier is, in principle, not entitled to use the tools. Under EU competition law, there are arguments to consider that a supplier should be allowed to use the tools even before an agreement has been reached, provided the supplier pays a fee that it deems reasonable to the OEM (or into an escrow account).¹² For instance, the fee must not cover more than the OEM's marginal costs of the tool in question, including any expenses due to the increased utilisation

¹¹ Where the motor vehicle manufacturer provides a tool, IPR and/or know-how to a component supplier, this arrangement will not benefit from the Sub-contracting Notice if the component supplier already has this tool, IPR or know-how at its disposal, or could, under reasonable conditions obtain them, since under these circumstances the contribution would not be necessary.

¹² If the OEM disagrees with the amount, the adequate amount can subsequently be set by a court or arbitral tribunal.





of the tool (higher maintenance and repair costs), plus a reasonable return on investment. However, few suppliers will dare to rely on such an argument given the legal uncertainty and the risk of damaging their relationship with OEMs.

Regarding IPR, the use by OEMs of alleged design rights to restrict original OPSs sales to the IAM appears to be all the more groundless in light of OPSs' significant contribution to the design, development and innovation of such products. Numerous countries, mainly in the EU but outside the EU as well, have thus adopted regulations whereby an OEM cannot use its patent design rights on visible parts to restrict the spare parts used to repair or restore the initial appearance of a complex product (the so-called 'repair clause') as listed above. These provisions are respected by European vehicle manufacturers; as a matter of fact, with the cooperation of European OEMs, the EU enjoys the presence of the IAM as a reliable source for repair and maintenance. As a result, there are several important benefits, such as the creation of qualified jobs in the IAM, the promotion of healthy competition between the authorised networks and the IAM, a wider range of choices for consumers for service and repair and a market-driven price for such services.

Under the *Supplementary Guidelines*:

- Paragraph 24: "Article 5(c) of the *Motor Vehicle Block Exemption* relates to the restriction agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, which limits the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts. In order to improve consumer choice, repairers and consumers should be able to identify which spare parts from alternative suppliers match a given motor vehicle, other than those bearing the car manufacturer's brand. Putting the trade mark or logo on the components and on spare parts facilitates the identification of compatible replacement parts which can be obtained from original equipment suppliers (OES). By not allowing this, motor vehicle manufacturers can restrict the marketing of OES parts and limit consumers' choice in a manner that runs counter to the provisions of Article 101 of the Treaty."

In fact, without the official legislation in place, restrictions still exist and OPSs must comply with the provisions included in binding agreements which are usually favourable to OEMs.

There are notable cases in which some OEMs, through contract, prohibit the OPS from mentioning the OEM's brand name, engine types and even part numbers even in a descriptive way to inform the customers on the possible applications of the parts. These situations still occur despite the fact that the draft of the *AML Guideline* as been disclosed to the general public and can be assumed to become effective in a short time.

Case Study

The following case refers to an actual occurrence of an OEM (Company A) using its dominant position towards a subsidiary of an auto supplier (Company B).

Company B is an authorised supplier of original parts to Company A.

Company A has requested Company B to sign a supply contract whereby any use of Company B's trademarks, logos and proprietary names is prohibited. In addition, Company B has the obligation of assuring that no other subsidiary of Company B uses those trademarks, logos and proprietary names.

Another subsidiary of Company B has replicated products based on reverse engineering of the original product and manufactured these products in a different factory with a different set of tooling.

Company A has found such products sold in the independent aftermarket and has threatened Company B with breach of contract and cancellation of the status of 'preferred supplier', together with a claim for damages.

The clauses included in the contract by Company A prohibiting Company B and all the subsidiaries of Company's B group from using in any way trademarks, logos and proprietary names as a matter of fact exclude any possibility for Company



B to participate with its product in the IAM.

All the above violate the *Provisions on Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition*, which was issued by the SAIC, whereby a vehicle manufacturer could not use its IPR, especially its design rights on visible parts, to restrict the OPS's ability to sell spare parts for vehicle repair which will eliminate and/or restrict free competition.

Recommendations

- Promulgate the *Auto Sales Management Methods* and the *Anti-Monopoly Guideline in the Automotive Industry* to ensure free and balanced market competition in the vehicle aftermarket service sector.
- Introduce a 'repair clause' in the Chinese Patent Law, such as a provision that excludes design patent rights for visible spare parts that are intended to restore the initial appearance of the vehicle.
- Create a statutory obligation for OEMs to allow the use of production tools owned by them for the manufacture of products for the IAM against payment of a non-discriminatory and reasonable fee.
- Declare invalid agreements that restrict the right of a supplier to use OEM-owned tools for the manufacture of products for the IAM.

1.2 Define Standards on Access to RMI Clearly and Ensure Data Security

Concern

Although the *RMI Methods* has been in effect since 1st January, 2016, some IAM operators have difficulty accessing certain information due to a lack of implementation details, which may lead to the occurrence of unauthentic RMI, and damage to both vehicles and consumer safety.

Assessment

The *RMI Methods* require all OEMs to publish repair and maintenance technology information to all independent IAM operators on a non-differentiated, non-discriminative and non-delayed basis.

In addition, the draft *AML Guideline* also emphasises the importance of ensuring the availability of technical

information to the IAM, with a view to stimulating and enhancing competition.

According to the *RMI Methods*, the RMI includes without limitation to the following nine categories:

- Coding standards for vehicles identification codes.
- Vehicles repair and maintenance manuals.
- Parts catalogues.
- Identification codes for the applicable software and hardware versions of the electronic control system.
- Information required for the re-programming of vehicles' electronic control systems.
- Information for the specific tools and equipment used for the diagnoses, examination and repair of the vehicles.
- Information for the certification of vehicles.
- Notification for technical services.
- Information and measures to be applied during vehicles recalls.

However, as certain provisions are not clear enough, independent IAM operators may have difficulties accessing RMI, including:

- Definition of Reasonable Price

Article 3 provides that independent IAM operators need to pay a reasonable price to get access to RMI. It is not clear how this price payment arrangement should be negotiated and executed in practice. If OEMs have the final say on the price, it means that they may use it as an actual barrier to prevent independent IAM operations from accessing the RMI. Especially for agreements between OEMs and authorised third-party institutions, those institutions have more advantages than public users in terms of information integration. Article 17 encourages OEMs to entrust institutions to offer repair and maintenance training for all kinds of operators in order to improve their ability to efficiently access RMI and use them correctly. Therefore, whether the price is reasonable or not will significantly influence the effectiveness of it being disclosed via multiple channels.

- Regulations on Authorised Third-Party Institutions

Article 10 points out that RMI will be disclosed via the Internet. Entrusted third-party institutions should disclose information in a timely, accurate and thorough basis to guarantee users' acquisition and usage of RMI in compliance with the agreement. More clarification should be given on the above





agreement. For example, if OEMs provide editable RMI to those institutions (in compliance with national IPR laws to avoid any kind of copyright infringement, see Article 21 of the *RMI Methods*), it will greatly enhance the quality of disclosed information and avoid faulty repair and maintenance or even accidents resulted from typos or inauthentic information. In the meantime, the working group suggests that the *RMI Methods* should clearly define 'third-party institutions' and clarify what qualifications they are required to have.

- Explanation on Exemptions

Article 9 provides that OEMs will be exempted from publishing RMI if it relates to OEMs' trade secrets or utilises its IPR. This is vague, and lacks detailed rules on such exemption. As a matter of practice, OEMs may claim all the RMI related to its vehicles as confidential information or trade secrets, which in essence still blocks the independent operators' access to the RMI. The State Intellectual Property Office shall provide further clarification as to what kind of RMI will be identified as trade secrets or IPR. Based on the current practice in the automotive industry, general information such as interface data, which connects the different components of a vehicle, shall not be included as OEMs' trade secrets or IPR.

- Additional Information Needs to be Disclosed

The *Parts Catalogue* in the *RMI Publishing Catalogue* provides that OEMs shall provide the name, trademark and part number of the original parts. This information is not sufficient because a large number of part manufacturers often sell to the IAM the parts which are exactly the same as the original parts provided to OEMs (except that OEMs' trademarks are not on such parts). The *Parts Catalogue* shall also include the name and trademark of the parts' manufacturers, and their part numbers which matches the OEMs' part number, so that IAM operators and end consumers are able to identify the parts sold in the IAM by parts manufacturers that provide original parts to OEMs at the same time.

Recommendations

- Provide further guidance on pricing to ensure that IAM operators obtain RMI at an affordable price.
- Offer a clear explanation on standards for third-party institutions having access to RMI, and manage data

in order to guarantee the efficiency and accuracy of RMI disclosure.

1.3 Expand End Consumer Choices During Both the Statutory Warranty Period and Any Extended Warranty Period

Concern

During the Auto Warranty Period (repair, replacement and refund), all services and repairs must be carried out by the vehicle manufacturers' network, otherwise it will not conform to the *Three Guarantees* regulation (*3R Regulations*), thereby limiting consumers' choice in servicing and repairing of non-statutory auto components and parts in the automotive aftermarket.

Assessment

It is currently required by the *3R¹³ Regulations*, with respect to stipulated responsibilities on the part of vehicle sellers, for the repair, replacement and refund of private cars manufactured and sold in China during the auto warranty period, that all services and repairs must be carried out by the vehicle manufacturers' network, otherwise it will be considered as not conforming.

The new regulation protects the rights of consumers to a large extent. However, the *3R Regulations* affect the development of repair shops outside of the vehicle manufacturers' network, which limits consumer choice in the servicing and repairing of non-statutory, auto warranty-period components and parts in the automotive aftermarket. Referencing experience from the EU, one of the major improvements in the new European competition law framework is that vehicle manufacturers may not make the warranties conditional on the repair and servicing of a vehicle within their network, or on the use of their own branded spare parts. According to the new set of rules, consumers have the right to use any repair shop for non-warranty work, during both the statutory warranty period and any extended warranty period. Of course, every operator is subject to statutory product and service liability. Thus, anyone who damages a vehicle as a result of negligent work or use of defective parts is responsible for it. This improvement could be considered and adopted in China.

13 3R: repair, replacement and refund





Recommendation

- Strengthen enforcement of regulations that permit independent operators' access to the end consumer for non-warranty work during both the statutory warranty period and any extended warranty period.



2. Improve the Legislative Framework of Anti-counterfeiting Laws and Regulations and Strengthen Relevant Enforcement to Protect the Legitimate Interests of IPR Owners

Concern

China's automotive IAM has been heavily disrupted by widespread counterfeits, which has resulted in consumers' preference for choosing authorised networks for repair, service and maintenance.

Assessment

The current legislative structure provides a framework that allows right owners to fight counterfeit goods through different methods—administrative, civil and criminal proceedings—based on the differences in the quantity and value of the illegal items. However, according to members' practical experiences, the existing framework does not thoroughly solve the problems OPSs, as brand owners, are facing.

As new technologies are evolving at a rapid pace, more platforms and new channels are being developed to facilitate online transactions, such as big e-commerce stores as well as social media applications through private and public accounts. However, the circulation of counterfeits is taking place among them, perhaps in part due to the fact that the separate regulation on e-commerce is yet to be promulgated while the existing legal framework does not regulate such activities. The gap between the current market situation and legislative regulations makes it more difficult for OPSs to fight counterfeiting.

Knowing that the law and the administrative regulations differentiate counterfeiting activities based on the quantity and value of counterfeit items, counterfeiters have adopted methods to dodge criminal liabilities by manufacturing and distributing small quantities of fake goods, so that even if they get caught by a local Administration for Industry and Commerce (AIC), the punishment usually would be a minor fine and simple confiscation. Considering the unit price of spare parts is usually quite inexpensive, it is very easy for the

counterfeiters to follow this scheme. In this way, the number of counterfeiters has multiplied while the overall presence of fake products has maintained its status quo.

Regarding the difficulties imposed on OPSs in terms of burden of proof, acquisition of evidence, and even identification of counterfeiters, it is tough to pursue a civil lawsuit. Especially now that a lot of counterfeiters are spotted on e-commerce platforms, it is extremely hard to acquire genuine data of the counterfeiters' actual identities, location of business and the quantity and value of illegal transactions because of the 'safe-harbour' rule for online service providers, unless the OPS could actually make a case and present a police or court order.¹⁴ Even for traditional offline counterfeiters, OPSs face high costs if they wish to investigate, locate warehouses or even to transport and store the seized counterfeits, which leads to most OPSs surrendering efforts to file a case. Furthermore, there is no regulation on circulation of the confiscated items. If the OPS does not pay for storage or destruction, the items mostly end up back on the market.

Even if the OPS could bring a successful civil case or criminal prosecution against a major counterfeiter, the OPS will find it difficult recover from its damages, either tangibly or intangibly according to the existing legal framework. Repetitive investigations are not at all sustainable in the long run, because, since counterfeiters are only facing lenient punishments, it does not necessarily deter them from engaging again in the same illegal activities. Therefore, it is of utmost importance for OPSs that the bar to enter a criminal prosecution for counterfeits of automotive components be lowered. At the same time, more severe punishment should be introduced to deter counterfeiters from engaging in such illegal activities.

The crucial factor of safety must be considered above all. Counterfeit auto parts often raise concerns regarding their ability to meet safety requirements imposed by the authorities. With the potential to cause serious consequences to users, fatal risks involved in the use of counterfeit parts should be taken into consideration in fighting against counterfeit auto components. A punitive damage system should be adopted in such cases, similar to the rule regulating fake food and drugs that

¹⁴ Safe-harbour rule: in normal cases, online platforms do not disclose their clients' information until being placed as a case on file.





may affect health and safety.

The intangible value of brand—the most important assets a company possesses—must be secured if the market is to be open to fair competition and innovation. It is the view of the working group that the counterfeiting should be controlled in interests of both manufacturers and consumers.

Recommendations

- Lower the threshold for filing auto components criminal cases and introduce more severe punishments such as punitive damages for safety-related parts.
- Enforce existing regulations more strictly in cases of counterfeiting registered trademarks.
- Promulgate regulations for handling confiscated counterfeits to ensure they do not re-enter the market.
- Promulgate the E-commerce Law and make corresponding amendments to relevant regulations such as the Civil Procedure for Evidence Collection to make it viable for brand owners to pursue civil or criminal remedies for online infringements.



3. Apply National Treatment to Automobile Repair Chain or Franchised Stores of Foreign-invested Companies and Ensure Its Implementation at the Local Level

Concern

The *Regulations for Motor Vehicle Maintenance and Management (Regulations)* issued by the MOT encourages the chain or franchised stores model for auto repair services, but foreign-invested companies have problems when applying for a nationwide master licence, which is necessary for licence applications for all their chain or franchised stores.

Assessment

With the rapid development of the automobile industry and the increase of numbers of private cars in China over the past decade, the auto repair industry is enjoying a prosperous period, with a current market size of nearly Chinese yuan (CNY) one trillion.¹⁵ During this time different problems have emerged, such as the limited size of auto repair shops, uncertainty over service quality, low technical levels across the market,

the general competency of employees in the industry and the existence of counterfeit auto components.

With the opening of the IAM, consumers now have many more choices than before. Foreign-invested auto components companies with capability and experience will also be able to enter the auto repair market, and bring higher quality service and a different customer experience.

In 2014, 10 Chinese ministries issued the *Guideline of Promoting Transformation and Upgrade and Improving Service Quality of the Automotive Repairing Industry*, which clearly indicated the aim “to encourage the chain operation in order to optimise the market structure”. Also, Article 5 of the *Regulations* states: “Any entity or individual is not allowed to be omnipresent in the auto repair market. Auto repair enterprises are encouraged to process intensive, specialised and chain operations, in order to boost the rationalisation and the harmonious development of the auto repair industry.”

Indeed, operation of auto repair chain stores could contribute to the elimination of the problems caused by non-qualified entrepreneurs operating in the auto repair market, leading to a general upgrading of the auto repair industry.

Article 17 of the *Regulations* also mentions: “If a chain store applies for its certificate, the head company can submit the application to the local-level road and transportation authority...If the application materials are complete and valid, the local-level road and transportation authority should approve it the same day or within five days, and issue the relevant permission or certificate.”

According to this article, if an enterprise headquarters has a nationwide master licence for automobile repair, it can apply for licences for all of its shops or chain or franchised stores. The application materials are easy to prepare and the approval period is short. This is a measure that has the potential to really boost auto repair chain operations.

Unfortunately, in practice, this article is currently neither well implemented at the local level nor is it clearly defined in the *Regulation* which is the authorisation body that needs to approve the master licence. Auto Components Working Group members who have

¹⁵ *Auto after-sale market will keep growing in 2016*, Hexun, 26th February, 2016, viewed 17th May, 2016, <<http://www.caam.org.cn/shichang/20160226/1105185940.html>>





received pre-approval and have been permitted to carry out auto repair business are fully aware of this – they have not been able to get their master licences approved. If a foreign-invested company in the auto repair business intends to open a shop in another city other than another headquarters, the approval process is complicated and will take around one year. Furthermore, rules, regulations, practices and designations in the auto repair industry vary from city to city: one city may issue ‘quick’ repair licences, while another city issues ‘light’ repair licences, and the business scope is not exactly the same from one licence to another. It is therefore almost impossible for a foreign-invested company to apply for a master licence, which is essential for its shops, chain or franchised stores to operate nationally.

By comparison, a domestic company with a master licence can get its chain or franchised stores properly certified in around five days. For foreign-invested companies without the master licence, the process will take anywhere from one month to a year, or sometimes even more.

Recommendation

- Apply national treatment to auto repair chain or franchised stores of foreign-invested companies and issue the master licence in accordance with Article 17 of *The Regulations for Motor Vehicle Maintenance and Management*.

Abbreviations

13FYP	13 th Five-Year Plan
ADV	Autonomous Driving Vehicle
AIC	Administration for Industry and Commerce
AML	Anti-Monopoly Law
AQSIQ	Administration of Quality Supervision, Inspection and Quarantine
CNY	Chinese Yuan
EU	European Union
GDP	Gross Domestic Product
IAM	Independent Aftermarket
IP	Intellectual Property
IPR	Intellectual Property Rights
MIIT	Ministry of Industry and Information Technology
MOFCOM	Ministry of Commerce
MOT	Ministry of Transportation
MVBER	Motor Vehicle Block Exemption Regulation

NDRC	National Development and Reform Commission
NEV	New-Energy Vehicles
OEM	Original Equipment Manufacturer
OES	Original Equipment Supplier
OPS	Original Part Supplier
R&D	Research and Development
RMI	Repair and Maintenance Information
SAIC	State Administration for Industry and Commerce
SOE	Stated-owned Enterprise



APPENDIX 2: THE NEW COMPETITION LAW FRAMEWORK FOR THE AUTOMOTIVE AFTERMARKET

INTERNATIONAL FEDERATION OF
AUTOMOTIVE AFTERMARKET DISTRIBUTORS
(FIGIEFA)

JULY 2010



The **new**
competition law
framework for
the automotive
aftermarket



FOREWORD

Following the expiry of the Block Exemption Regulation No. 1400/2002 on 31st May 2010, the European Commission has introduced a new competition law framework for the automotive sector focusing on aftermarket issues.

Applied in the market since the 1st June 2010, these new rules are enacted in four key legal instruments:

- the Automotive Block Exemption Regulation (EU) No. 461/2010
- the sector-specific Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles
- the Vertical Restraints Block Exemption Regulation (EU) No. 330/2010
- the general Guidelines on vertical agreements

These rules will apply until the 31st May 2023. They cover the trade in spare parts for and the repair and maintenance of all self propelled vehicles with more than 3 wheels (e.g. passenger cars, light commercial vehicles and heavy duty vehicles). While the new rules are particularly important to illustrate what vehicle manufacturers may or may not do, they also affect the agreements concluded between independent aftermarket operators.

The purpose of this brochure is to provide market operators with an overview of their opportunities when it comes to effective competition in the vehicle spare parts, repair and maintenance sector.

This brochure is addressed to all the actors of the aftermarket chain: independent and authorised repairers, parts suppliers and parts distributors, publisher of technical information, tools and garage equipment manufacturers, roadside rescue services as well as all the many other independent operators who contribute to the efficient repair and maintenance of motor vehicles across Europe.

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The mechanism behind the rules

Since the 1st June 2010, four key texts designed to ensure effective competition apply in the automotive aftermarket. Two of these contain sector specific rules, whereas the two others contain general rules applicable to all industry sectors:

The sector-specific rules:

- The Automotive Block Exemption Regulation (EU) No. 461/2010
- The Sector-specific Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

The generic rules:

- The Vertical Restraints Block Exemption Regulation (EU) No. 330/2010
- The general Guidelines on vertical agreements

The Block Exemption Regulations (BERs)

Block Exemption Regulations exempt an entire category of agreements (block exemption) from the normal application of competition law. Based on the prerequisite that neither the market share of the supplier, nor of the purchaser, exceed 30%, the Block Exemption Regulations confer a «safe harbour» within which companies can be certain that their agreements comply with the requirements of competition law. Of course, the beneficiaries of the exemption must

abide by specific provisions contained in the Regulations.

This is particularly true for the so called “hardcore restrictions” or “black clauses” – **these should be observed regardless of market shares, as violations can only be justified in most exceptional circumstances.**



For the automotive sector, the Block Exemption Regulations are complementary. Companies hoping to benefit from the «safe harbour» will need to comply with the requirements of the general rules on vertical restraints, as well as the sector-specific rules. This applies to agreements with vehicle manufacturers, as well as to parts distribution agreements in the aftermarket.

The general rules on vertical restraints

The general Vertical Restraints Block Exemption Regulation contains essential rules that need to be considered by anyone trading in goods or services. It provides for several hardcore restrictions, i.e. clauses that should be avoided in distribution agreements, as they would give rise to issues under competition law. A vehicle manufacturer selling parts to authorised repairers will need to observe these limits, as well as a parts supplier selling its products to an independent wholesaler.

Most notably, the general Vertical Restraints Block Exemption Regulation states that a supplier may not normally require its customer to resell the product at a fixed or minimum price. As a general rule (to which few exceptions apply), the customer may determine the resale price on its own, without being pressured by the supplier. The supplier may however issue non-binding recommendations.

Similarly, the general Vertical Restraints Block Exemption Regulation describes limits on customer and territory allocation, the ability of the supplier to require the distributor to operate out of an agreed place of establishment, or the right of members of a distribution system to cross-sell goods between them.

All sectors incl. automotive	Article 101 TFEU* (Former 81 EC)	
	Vertical Restraints BER N° 330/2010 & Guidelines	
Automotive sector only	Guidelines for the automotive sector	
	Automotive BER N° 461/2010	

*Treaty on the Functioning of the European Union

A photograph of a silver sedan on a hydraulic lift in a well-lit garage. The car is viewed from the rear, showing its taillights and trunk. The lift is a two-post system. In the background, there are blue toolboxes and a person's hand is visible near the rear wheel. The scene is brightly lit by overhead fluorescent lights.

The sector-specific Guidelines

The strength of the Guidelines

The Guidelines complete the set of competition law instruments for the automotive sector. By complementing the general guidelines on vertical restraints, the sector-specific Guidelines serve to explain the Automotive Block Exemption Regulation and convey the Commission's view on competition law applied to the sale of new vehicles, the distribution of spare parts and the repair of motor vehicles. These are not mere explanations of the content of the Automotive Block Exemption Regulation 461/2010, as it was the case for the Explanatory Brochure on the application of the Motor Vehicle Block Exemption Regulation 1400/2002. In practice, **Guidelines are very important**. Although technically they are only binding upon the European Commission (and on the National Competition Authorities) no undertaking can afford to ignore them: they interpret, explain and somehow expand the provisions of binding regulations. In case of litigation, courts of law will take them into account. The European Court of Justice has on numerous occasions pointed out the importance of Guidelines: they are part of the "acquis communautaire" and they shape essential Union policies and consequently the development of the European Union itself.

The Guidelines applied to the Automotive Aftermarket

For the aftermarket, they explain in detail 1) how to understand the provisions of the Block Exemption Regulations and 2) how to ensure effective competition in situations falling outside the scope of the Block Exemption Regulations, notably in light of the above-mentioned 30% threshold above which no exemption will be granted.

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Trade in spare parts and equipment

original parts and parts of matching quality

Definitions

Ensuring effective competition in the markets for spare parts and equipment is the primary aim of the definitions of «original parts» and «parts of matching quality» contained in the Guidelines.

According to the wording adopted by the European Commission, “**original parts or equipment**” are parts or equipment manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of parts or equipment for the assembly of its vehicles.

This means that ‘**original parts**’, if they fulfill the above conditions, may be:

- parts produced “in-house” by the vehicle manufacturers
- parts manufactured by parts producers and which are supplied to the vehicle manufacturers for the assembly of vehicles or for distribution to the members of their authorised networks.
- parts manufactured by independent parts producers and which are supplied to the independent aftermarket, provided that they are manufactured according to the vehicle manufacturer’s specifications.

This might happen for example when a parts producer is or was manufacturing parts for a vehicle manufacturer.

These parts only bear the parts producer’s trademark.

Vehicle manufacturers supply their authorised network with their own branded spare parts although most of the time produced by original equipment suppliers.

In such cases, the spare parts producer, however, may not be hindered from placing its own trademark on the part (either exclusively or in parallel as “double branding”).

In order to be considered as being of “**matching quality**”, parts must be of a sufficiently high quality that their use does not, according to the EU Commission, “endanger the reputation of the authorised repair network”. The burden to prove that a part does not fulfil this requirement falls upon the vehicle manufacturer who must bring evidence to that effect in case it wants to discourage authorised repairers from using such parts.

Following this new definition, a part of matching quality does not refer per se to the quality of the part originally fitted into the vehicle. It may match the quality of the spare parts of a specific range supplied by the vehicle manufacturers to its authorised network, including spare parts from a vehicle manufacturer’s “economy line”.

Certification requirements

The members of the vehicle manufacturers’ authorised network have the obligation to use parts that are at least of matching quality. It is worth noting that independent repairers, as they are not members of the ‘franchised’ network, are of course not subject to such obligations. As explained above, if vehicle manufacturers want to contest the use of a specific part by the members of the authorised repair network, they have to prove that the spare part used does not fulfil the requirements of the definitions of “original part” or “part of matching quality”. Even though vehicle manufacturers bear this burden of proof, in order to facilitate sales from independent distributors to the members of the authorised networks and to avoid possible legal challenges from the vehicle manufacturers, parts suppliers are invited to issue – on demand – a (self-) certificate for the quality of their parts (e.g. in the packaging, as a separate declaration, or a notice on the Internet).





Freedom to supply spare parts and equipment to the aftermarket

The concept

Following the former Block Exemption Regulation 1400/2002, the new competition law framework confirms that **vehicle manufacturers may not hinder their original equipment suppliers from also supplying their products as spare parts to independent distributors** or directly to independent or authorised repairers.

As a direct consequence, and for logistic efficiency, independent parts distributors are of course free to supply independent and authorised repairers with the parts supplied by the parts suppliers.

To satisfy consumer demand, part producers also supply the independent aftermarket with spare parts of higher quality than the original equipment, or with parts ‘fit for purpose’ and adapted to the age of the vehicle; these should of course fulfil all legal requirements, notably those contained in the product safety and environmental legislations.

The new regime on “tooling arrangements”

In its evaluation of the functioning of the former MVBBER 1400/2002, the European Commission found that on many occasions vehicle manufacturers abused their bargaining power to restrict the ability of their original equipment manufacturers to sell the parts in the independent aftermarket, thus rendering the part de facto captive.

This was achieved by obliging the supplier to transfer the title to industrial property rights or tooling to the vehicle manufacturer. Once these had become the property of the vehicle manufacturer, the supplier found itself unable to use such tooling or industrial property rights for producing parts that otherwise could have been sold directly to the aftermarket.

In this area, the new guidelines contain important clarifications. First, the European Commission conveys that an agreement between a vehicle manufacturer and a parts supplier is normally subject to competition law. Automotive parts suppliers mostly have own expertise which is necessary to develop and manufacture components.

They are not merely “extended workbench”, which would need to rely on essential input from the vehicle manufacturer. In these cases, they are potential competitors as aftermarket parts suppliers, and the vehicle manufacturer can restrict their access to the aftermarket in exceptional circumstances only. Where a vehicle manufacturer provides a tool, or pays for it up front, the supplier may be prevented from using this tool to manufacture parts for any third parties (aftermarket or other OEM customers). In that event, the supplier will need to pay a royalty or purchase a second set of tools for IAM production.

If a vehicle manufacturer obliges its OE parts supplier to transfer the ownership of a tool, intellectual property rights, or know-how back to it, or if the vehicle manufacturer bears only an insignificant part of the product development costs, or does not contribute any necessary tools¹, intellectual property rights, or know-how, the agreement at stake will not be considered to be a genuine sub-contracting arrangement. As consequence the vehicle manufacturer will not be allowed to forbid its parts suppliers to sell parts directly in the aftermarket.

Freedom to purchase parts and equipment

Independent repairers

As they do not depend on vehicle manufacturers, **independent repairers are free to purchase and to use any parts or equipment for the repair and maintenance of vehicles**, as long as these fulfil the legal requirements, notably those contained in the product safety and environmental legislations. Independent repairers may source “original parts”, “parts of matching quality” as well as other quality parts from independent parts producers and independent parts distributors.

Authorised repairers

In practice, authorised repairers usually source spare parts from the vehicle manufacturers with whom they have an agreement. Nevertheless, in order to stimulate competition in the spare

¹ The Guidelines clearly state that where the vehicle manufacturer provide a tool, IPR or know-how to a supplier, this arrangement will not benefit from the Sub-contracting Notice if the supplier already has this tool, IPR or know-how at its disposal, or could reasonably obtain them, since under these circumstances the contribution would not be necessary.

parts market, **the new legislative framework continues to provide for the possibility of authorised repairers to source “original parts” or “parts of matching quality” from parts suppliers or independent parts distributors.**

This freedom may however be subject to an obligation to source a minimum quantity of spare parts from the vehicle manufacturer. **This obligation is nonetheless limited.** As pointed out by the European Commission, in most cases vehicle manufacturers will enjoy such a position in the market that **this minimum sourcing requirement should be as low as not to endanger competition in the market.** In the past, the Motor Vehicle Block Exemption Regulation 1400/2002 provided that vehicle manufacturers could require their authorised repairers to source at least 30% of their requirements in spare parts for vehicles of the respective brand from the vehicle manufacturer or its authorised network.

This threshold does not exist anymore in the new legal texts. One general principle of competition law still remains though: the higher the market share of the vehicle manufacturer in the market for spare parts suitable for the repair and maintenance of vehicles of its own brands in a given national territory, the lower the percentage of minimum spare parts sourcing it will be allowed to impose on the members of its authorised repair network.

Furthermore, since authorised repairers may also have to carry out repair or maintenance services on vehicle of other brands, they also need to purchase parts from other sources. In this situation, they are to be considered as “independent/multibrand” repairers and therefore may source any spare parts from independent parts producers or spare parts distributors, as long as these fulfil legal requirements, notably those contained in the product safety and environmental legislations.

Access to the vehicle manufacturers’ “captive” parts

For independent repairers

Some parts are exclusively produced by vehicle manufacturers themselves (e.g. chassis, engine blocks or certain body parts) or are parts on which vehicle manufacturers hold a

valid industrial property right. These are only supplied to the aftermarket by the vehicle manufacturers themselves. However, access to these is indispensable in order to allow independent repairers to properly maintain and repair vehicles and to compete with the authorised repair networks. Therefore, the legal framework continues to state that a vehicle manufacturer may not prevent its authorised repairer from selling spare parts to an independent repairer requiring these for the repair or maintenance of a specific customer vehicle.

However, this does not represent an ideal solution, as independent repairers should be able to source any part, including “captive” parts, from the wholesale level (and not from their direct competitors) and at wholesale price in order to truly compete with the authorised repair network.

For independent parts distributors

The new competition law framework follows the same approach as the expired MVER 1400/2002. It differentiates between motor vehicle sales channels, the trade in spare parts and the repair and maintenance services. As a consequence, vehicle manufacturers have the option to offer to the members of their authorised network three separate contracts whereby their contractual partner can carry out all three functions, two functions or just one of the three functions:

- distribution contract for new vehicles (official dealer)
- distribution contract for replacement parts (“authorised” parts distributor)
- contract for service, maintenance and repair (“authorised” repairer)

Concerning the distribution of the vehicle manufacturers’ original spare parts, the vehicle manufacturers will usually opt for a distribution system with clear qualitative selection criteria. Therefore, if an independent parts distributor fulfils the qualitative criteria of the vehicle manufacturer (with regard e.g. to possible stock keeping requirements or the qualification of the personnel), he could be a candidate for an “authorised parts distribution contract”.



3/

Service, maintenance and repair during the warranty period

The key concept

In its Explanatory Brochure on the MVBBER 1400/2002, the European Commission had introduced an important clarification that independent repairers may carry out regular maintenance service and repair jobs during the warranty period. Despite this clarification many vehicle manufacturers continued to make warranty claims of vehicle owners universally dependent upon the condition that all services and repairs had been carried out by the authorised network, and with the exclusive use of the vehicle manufacturer's spare parts.

One of the major improvements in the new competition law framework in comparison with the expired Motor Vehicle Block Exemption Regulation 1400/2002 is the clarification by the European Commission that **vehicle manufacturers may not make the warranties conditional on the repair and servicing of a vehicle within their network, or on the use of their own branded spare parts.**

According to the new set of rules, **consumers have the right to use any repair shop for non warranty work, during both the statutory warranty period (2 years in most EU member states) and any extended warranty period.**

Of course, every operator is subject to statutory product and service liability. Thus, anyone who damages a vehicle as a result of negligent work or use of defective parts is responsible for it.

Recall actions, free servicing and warranty work

Within the warranty period, any defect originating from the car manufacturing process must be corrected by the vehicle manufacturer. Normally, the network of authorised repairers will execute the work on behalf of the vehicle manufacturer,

and at its expense. In such cases paid for by the manufacturer, i.e. recall actions or free servicing or warranty works etc., the works must be carried out where specified by the manufacturer. Where it pays the repairer, the manufacturer may also determine which parts are to be used.

Insurance policies and warranty contracts

These rights to choose during the warranty period apply to warranties forming an integral part of the purchase of the vehicle. However, warranties which are in fact insurance policies, purchased separately, may not be covered. Leasing or financing contracts may also provide for additional limitations.





4/

Access to technical information

With the adoption of sector-specific Guidelines, the European Commission has emphasised the importance of “Independent Operators”. It has recognised that the independent aftermarket increases choice for consumers and keeps the price of repairs competitive by putting pressure on car manufacturers’ authorised repair networks².

In order to truly achieve effective competition in the after-sales services, it is essential that all operators can get the technical information necessary to do the repairs and maintenance on increasingly sophisticated vehicles. To that end, the keystone of the new competition law framework is that **withholding technical information will be dealt with directly under Treaty rules on restraints of competition.**

Compared to the former Motor Vehicle Block Exemption Regulation 1400/2002, granting access to technical information is no longer viewed as a mere prerequisite for vehicle manufacturers wishing to enjoy an exemption from the normal competition rules. The new competition framework recognises that access to technical information, tools and training continues to be a prerequisite for effective competition in the automotive aftermarket.

Key definitions

Independent operators

The definition of independent operators is based on the definition which already exists in the Euro 5/6 Type-Approval legislation³. It includes independent repairers, spare parts manufacturers and distributors, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services and operators offering

training for repairers. This list is however non-exhaustive.

The scope of technical information

On the issue of access to technical information, several technical European Type-Approval Regulations already contain key provisions on the access to vehicle repair and maintenance information for independent operators⁴.

The novelty brought by the European Commission in the new competition law framework is the cross-referencing between the type-approval legislation and the competition law rules. In other words, in order to know whether a piece of information should be made available to the independent aftermarket operators, reference should be made to the provisions on access to repair and maintenance information in the type-approval instruments. Any information communicated to the members of the authorised networks should be made available to independent operators. This applies to the entire vehicle park of all self-propelled vehicles with 3 or more wheels.

Regulation (EC) No 715/2007 contains a generic definition of technical information which gives a good summary of what “technical information for the repair and maintenance of vehicles” means:

‘vehicle repair and maintenance information’ means all information required for diagnosis, servicing, inspection, periodic monitoring, repair, re-programming or re-initialising of the vehicle and which the manufacturers provide for their authorised dealers and repairers, including all subsequent amendments and supplements to such information. This information includes all information required for fitting parts or equipment on vehicles;

In order to bring clarity on this matter, the European

² European Commission’s Memo n° 10/217 of 27/05/2010 – Antitrust: Commission adopts revised competition rules for the motor vehicle sector: frequently asked questions.

³ Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information.

⁴ These are:

- Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information
- Regulation (EC) No 692/2008 which implements and amends Regulation (EC) No 715/2007
- Regulation (EC) No 595/2009 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
- the ensuing implementing measures for the Regulation 595/2009 still to be adopted.



Commission also pointed out that the lists of items set out in Article 6(2) of Regulation (EC) No 715/2007 and Regulation (EC) No 595/2009 should also be used as a guide to assess what could be considered as technical information for the purposes of competition law. This list includes:

- unequivocal vehicle identification
- service handbooks
- technical manuals
- component and diagnosis information
- wiring diagrams
- diagnostic trouble codes (including manufacturer specific codes)
- software calibration identification number applicable to a vehicle type
- information provided concerning, and delivered by means of, proprietary tools and equipment
- data record information and two-directional monitoring and test data

Further to this clear reference to the Type-Approval legislation, **the new competition law instrument** also contains further specific examples.

- software
- fault codes and other parameters, together with updates, which are required to work on electronic control units 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
- recall notices
- notices identifying repairs that may be carried out without charge within the authorised repair network.

For the **parts identification**, the European Commission's Guidelines explicitly state that parts codes and any other information necessary to identify the correct car manufacturer-branded spare part to fit a given individual motor vehicle should be made available to independent operators if it is made available to the authorised network.

The technical information assessment "test"

The concept

The overarching principle under this competition law angle is that all the information for the repair and maintenance of vehicles made available to members of the relevant authorised repair network shall also be communicated to the independent operators.

If the lists and examples provided by the European Commission in the Guidelines bring clarity on what could be considered as technical information for the repair and maintenance of vehicles, it is non exhaustive. As such, if an item is not explicitly enumerated in the list, this does not mean that a vehicle manufacturer may withhold this piece of information. The European Commission pointed out that technological

progress in vehicle and in parts manufacturing implies that the notion of technical information is fluid. As such, if advances in vehicle technology engender new techniques in the repair or maintenance of vehicles or require new pieces of technical information, access to this information must be given to independent operators.

The test and the limits

The European Commission has elaborated a “test” in order to assess at any moment in time if a particular item of information should be made available to independent operators. Some information provided to the authorised repair network may not be considered as “true” technical information for “the repair and maintenance of vehicles” and could therefore be withheld by vehicle manufacturers. These limits cover purely commercial information (e.g. hourly tariffs of the authorised repairers) or the genuine information necessary for the manufacturing of spare parts or tools, such as the information on the design, production process or the materials used for manufacturing of a spare part. However, the Commission pointed out that in cases where the information can be used for a “double purpose” - such as information showing the interconnection of parts - the information should be made available as it is a necessary information in order to maintain and repair a vehicle.

One important notion must be kept in mind though: withholding information shall not have an appreciable impact on the ability of independent operators to carry out their tasks in the market.

It is also worth noting that in contrast to the expired MVBBER 1400/2002, the new competition law framework does not contain any reference to the possibility for vehicle manufacturers to withhold information by e.g. simply referring to the anti-theft or anti-tampering system of the vehicle or in general to “industrial and intellectual property rights” (IPRs).

The availability of the information

The way in which technical information is supplied is also important. The European Commission has emphasised that **access should be given** upon request and **without undue delay**, in a usable form, and **the price charged should not discourage access** to it by failing to take into account the extent to which the independent operator uses the information⁵.

For new vehicles on the market, **vehicle manufacturers are asked to give independent operators access to technical information** at the same time as to its authorised repairers. They should not oblige independent operators to purchase more than the information necessary.

⁵ It is important to underline that for the vehicles type-approved according to the Euro 5 or Euro VI Regulations, the list of information contained in these respective legislations (including specific OBD information for the manufacturing of parts and tools) will have to be provided to independent operators even though these might not be communicated, in the strict sense, to the members of the authorised networks.



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International Federation of
Engine Remanufacturers
and Rebuilders



Right to Repair Campaign (R2RC)

Bd de la Woluwe 42 bte 5
BE – 1200 Brussels
Tel.: +32 2 761 95 10
Fax: +32 2 762 12 55
secretariat@r2rc.eu
www.r2rc.eu

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APPENDIX 3:
COMMISSION REGULATION
(EU) NO 461/2010

THE EUROPEAN COMMISSION

27 MAY 2010

COMMISSION REGULATION (EU) No 461/2010**of 27 May 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 in the motor vehicle sector****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices ⁽¹⁾, and in particular Article 1 thereof,

Having published a draft of this Regulation,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation No 19/65/EEC empowers the Commission to apply Article 101(3) of the Treaty on the Functioning of the European Union (*) by regulation to certain categories of vertical agreements and corresponding concerted practices falling within Article 101(1) of the Treaty. Block exemption regulations apply to vertical agreements which fulfil certain conditions and may be general or sector-specific.
- (2) The Commission has defined a category of vertical agreements which it regards as normally satisfying the conditions laid down in Article 101(3) of the Treaty and to this end has adopted 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 ⁽²⁾, which replaces Commission Regulation (EC) No 2790/1999 ⁽³⁾.

- (3) The motor vehicle sector, which includes both passenger cars and commercial vehicles, has been subject to specific block exemption regulations since 1985, the most recent being Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector ⁽⁴⁾. Regulation (EC) No 2790/1999 expressly stated that it did not apply to vertical agreements the subject matter of which fell within the scope of any other block exemption regulation. The motor vehicle sector therefore fell outside the scope of that Regulation.
- (4) Regulation (EC) No 1400/2002 expires on 31 May 2010. However, the motor vehicle sector should continue to benefit from a block exemption in order to simplify administration and reduce compliance costs for the undertakings concerned, while ensuring effective supervision of markets in accordance with Article 103(2)(b) of the Treaty.
- (5) Experience acquired since 2002 regarding the distribution of new motor vehicles, the distribution of spare parts and the provision of repair and maintenance services for motor vehicles, makes it possible to define a category of vertical agreements in the motor vehicle sector which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty.
- (6) This category includes vertical agreements for the purchase, sale or resale of new motor vehicles, vertical agreements for the purchase, sale or resale of spare parts for motor vehicles and vertical agreements for the provision of repair and maintenance services for such vehicles, where those agreements are concluded between non-competing undertakings, between certain competitors, or by certain associations of retailers or repairers. It also includes vertical agreements containing ancillary provisions on the assignment or use of intellectual property rights. The term 'vertical agreements' should be defined accordingly to include both such agreements and the corresponding concerted practices.

⁽¹⁾ OJ 36, 6.3.1965, p. 533/65.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union. The two Articles are, in substance, identical. For the purposes of this Regulation, references to Article 101 of the Treaty on the Functioning of the European Union should be understood as references to Article 81 of the EC Treaty where appropriate.

⁽²⁾ OJ L 102, 23.4.2010, p. 1.

⁽³⁾ OJ L 336, 29.12.1999, p. 21.

⁽⁴⁾ OJ L 203, 1.8.2002, p. 30.

- (7) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.
- (8) The likelihood that such efficiency-enhancing effects will outweigh any anticompetitive effects due to restrictions contained in vertical agreements depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use. Vertical agreements containing restrictions which are likely to restrict competition and harm consumers, or which are not indispensable to the attainment of the efficiency-enhancing effects, should be excluded from the benefit of the block exemption.
- (9) In order to define the appropriate scope of a block exemption regulation, the Commission must take into account the competitive conditions in the relevant sector. In this respect, the conclusions of the in-depth monitoring of the motor vehicle sector set out in the Evaluation Report on the operation of Commission Regulation (EC) No 1400/2002 of 28 May 2008 ⁽¹⁾ and in the Commission Communication on The Future Competition Law Framework applicable to the Motor Vehicle sector of 22 July 2009 ⁽²⁾ have shown that a distinction should be drawn between agreements for the distribution of new motor vehicles and agreements for the provision of repair and maintenance services and distribution of spare parts.
- (10) As regards the distribution of new motor vehicles, there do not appear to be any significant competition shortcomings which would distinguish this sector from other economic sectors and which could require the application of rules different from and stricter than those set out in Regulation (EU) No 330/2010. The market-share threshold, the non-exemption of certain vertical agreements and the other conditions laid down in that Regulation normally ensure that vertical agreements for the distribution of new motor vehicles comply with the requirements of Article 101(3) of the Treaty. Therefore, such agreements should benefit from the exemption granted by Regulation (EU) No 330/2010, subject to all the conditions laid down therein.
- (11) As regards agreements for the distribution of spare parts and for the provision of repair and maintenance services, certain specific characteristics of the motor vehicle aftermarket should be taken into account. In particular, the experience acquired by the Commission in applying Regulation (EC) No 1400/2002 shows that price increases for individual repair jobs are only partially reflected in increased reliability of modern cars and lengthening of service intervals. These latter trends are linked to technological evolution and to the increasing complexity and reliability of automotive components that the vehicle manufacturers purchase from original equipment suppliers. Such 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 motor vehicle aftermarket. The costs borne on average by consumers in the Union for motor vehicle repair and maintenance services represent a very high proportion of total consumer expenditure on motor vehicles.
- (12) Competitive conditions in the motor vehicle aftermarket also have a direct bearing on public safety, in that vehicles may be driven in an unsafe manner if they have been repaired incorrectly, as well as on public health and the environment, as emissions of carbon dioxide and other air pollutants may be higher from vehicles which have not undergone regular maintenance work.
- (13) In so far as a separate aftermarket can be defined, effective competition on the markets for the purchase and sale of spare parts, as well as for the provision of repair and maintenance services for motor vehicles, depends on the degree of competitive interaction between authorised repairers, that is to say those operating within repair networks established directly or indirectly by vehicle manufacturers, as well as between authorised and independent operators, including independent spare parts suppliers and repairers. The latter's ability to compete depends on unrestricted access to essential inputs such as spare parts and technical information.
- (14) Having regard to those specificities, the rules in Regulation (EU) No 330/2010, including the uniform market share threshold of 30 %, are necessary but are not sufficient to ensure that the benefit of the block exemption is reserved only to those vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services for which it can be assumed with sufficient certainty that the conditions of Article 101(3) of the Treaty are satisfied.

⁽¹⁾ SEC(2008) 1946.

⁽²⁾ COM(2009) 388.

- (15) Therefore, vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services should benefit from the block exemption only if, in addition to the conditions for exemption set out in Regulation (EU) No 330/2010, they comply with stricter requirements concerning certain types of severe restrictions of competition that may limit the supply and use of spare parts in the motor vehicle aftermarket.
- (16) In particular, the benefit of the block exemption should not be granted to agreements that restrict the sale of spare parts by members of the selective distribution system of a vehicle manufacturer to independent repairers, which use them for the provision of repair or maintenance services. Without access to such spare parts, independent repairers would not be able to compete effectively with authorised repairers, since they could not provide consumers with good quality services which contribute to the safe and reliable functioning of motor vehicles.
- (17) Moreover, in order to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts, the block exemption should not cover vertical agreements which, although they comply with Regulation (EU) No 330/2010, nonetheless restrict the ability of a producer of spare parts to sell such parts to authorised repairers within the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users. This does not affect the liability of producers of spare parts under civil law, or the ability of vehicle manufacturers to require the authorised repairers within their distribution system to only use spare parts that match the quality of the components used for the assembly of a certain motor vehicle. Moreover, in view of the vehicle manufacturers' direct contractual involvement in repairs under warranty, free servicing, and recall operations, agreements containing obligations on authorised repairers to use only spare parts supplied by the vehicle manufacturer for those repairs should be covered by the exemption.
- (18) Finally, in order to allow authorised and independent repairers and end users to identify the manufacturer of motor vehicle components or of spare parts and to choose between alternative parts, the block exemption should not cover agreements by which a manufacturer of motor vehicles limits the ability of a manufacturer of components or original spare parts to place its trade mark or logo on those parts effectively and in a visible manner.
- (19) In order to allow all operators time to adapt to this Regulation, it is appropriate to extend the period of application of the provisions of Regulation (EC) No 1400/2002 relating to vertical agreements for the purchase, sale and resale of new motor vehicles until 31 May 2013. As regards vertical agreements for the distribution of spare parts and for the provision of repair and maintenance services, this Regulation should apply from 1 June 2010 so as to continue to ensure adequate protection of competition on the motor vehicle aftermarkets.
- (20) The Commission will, on a continuous basis, monitor developments in the motor vehicle sector and will take appropriate remedial action if competition shortcomings arise which may lead to consumer harm on the market for the distribution of new motor vehicles or the supply of spare parts or after-sales services for motor vehicles.
- (21) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁽¹⁾, where it finds in a particular case that an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
- (22) The competition authority of a Member State may withdraw the benefit of this Regulation pursuant to Article 29(2) of Regulation (EC) No 1/2003 in respect of the territory of that Member State, or a part thereof where, in a particular case, an agreement to which the exemption provided for in this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (23) In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects which significantly restrict access to a relevant market or competition therein are of particular importance. Such cumulative effects may, for example, arise in the case of selective distribution or non-compete obligations.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

- (24) In order to strengthen supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements.
- (25) In order to assess the effects of this Regulation on competition in motor vehicle retailing, in the supply of spare parts and in after sales servicing for motor vehicles in the internal market, it is appropriate to draw up an evaluation report on the operation of this Regulation,

HAS ADOPTED THIS REGULATION:

CHAPTER I

COMMON PROVISIONS

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

- (a) 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services;
- (b) 'vertical restraint' means a restriction of competition in a vertical agreement falling within the scope of Article 101(1) of the Treaty;
- (c) 'authorised repairer' means a provider of repair and maintenance services for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;
- (d) 'authorised distributor' means a distributor of spare parts for motor vehicles operating within the distribution system set up by a supplier of motor vehicles;
- (e) 'independent repairer' means:
- (i) a provider of repair and maintenance services for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it provides repair or maintenance;
- (ii) an authorised repairer within the distribution system of a given supplier, to the extent that it provides repair or

maintenance services for motor vehicles in respect of which it is not a member of the respective supplier's distribution system;

(f) 'independent distributor' means:

- (i) a distributor of spare parts for motor vehicles not operating within the distribution system set up by the supplier of the motor vehicles for which it distributes spare parts;
- (ii) an authorised distributor within the distribution system of a given supplier, to the extent that it distributes spare parts for motor vehicles in respect of which it is not a member of the respective supplier's distribution system;

(g) 'motor vehicle' means a self-propelled vehicle intended for use on public roads and having three or more road wheels;

(h) 'spare parts' means goods which are to be installed in or upon a motor vehicle so as to replace components of that vehicle, including goods such as lubricants which are necessary for the use of a motor vehicle, with the exception of fuel;

(i) 'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

2. For the purposes of this Regulation, the terms 'undertaking', 'supplier', 'manufacturer' and 'buyer' shall include their respective connected undertakings.

'Connected undertakings' means:

- (a) undertakings in which a party to the agreement, directly or indirectly:
- (i) has the power to exercise more than half the voting rights; or
- (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
- (iii) has the right to manage the undertaking's affairs;
- (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);

- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
- (i) parties to the agreement or their respective connected undertakings referred to in points (a) to (d); or
- (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

CHAPTER II

VERTICAL AGREEMENTS RELATING TO THE PURCHASE, SALE OR RESALE OF NEW MOTOR VEHICLES

Article 2

Application of Regulation (EC) No 1400/2002

Pursuant to Article 101(3) of the Treaty, from 1 June 2010 until 31 May 2013, Article 101(1) of the Treaty shall not apply to vertical agreements relating to the conditions under which the parties may purchase, sell or resell new motor vehicles, which fulfil the requirements for an exemption under Regulation (EC) No 1400/2002 that relate specifically to vertical agreements for the purchase, sale or resale of new motor vehicles.

Article 3

Application of Regulation (EU) No 330/2010

With effect from 1 June 2013, Regulation (EU) No 330/2010 shall apply to vertical agreements relating to the purchase, sale or resale of new motor vehicles.

CHAPTER III

VERTICAL AGREEMENTS RELATING TO THE MOTOR VEHICLE AFTERMARKET

Article 4

Exemption

Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation Article 101(1) of the Treaty shall not apply to vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles or provide repair and maintenance services for motor vehicles, which fulfil the requirements for an exemption under Regulation (EU) No 330/2010 and do not

contain any of the hardcore clauses listed in Article 5 of this Regulation.

This exemption shall apply to the extent that such agreements contain vertical restraints.

Article 5

Restrictions that remove the benefit of the block exemption — hardcore restrictions

The exemption provided for in Article 4 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle;
- (b) the restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors or to authorised or independent repairers or end users;
- (c) the restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

CHAPTER IV

FINAL PROVISIONS

Article 6

Non-application of this Regulation

Pursuant to Article 1a of Regulation No 19/65/EEC, the Commission may by regulation declare that, where parallel networks of similar vertical restraints cover more than 50 % of a relevant market, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

Article 7

Monitoring and evaluation report

The Commission will monitor the operation of this Regulation and draw up a report on its operation by 31 May 2021 at the latest, having regard in particular to the conditions set out in Article 101(3) of the Treaty.

*Article 8***Period of validity**

This Regulation shall enter into force on 1 June 2010.

It shall expire on 31 May 2023.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 May 2010.

For the Commission
The President
José Manuel BARROSO

APPENDIX 4:
MASSACHUSETTS RIGHT TO
REPAIR LAW H. 4362

THE COMMONWEALTH OF MASSACHUSETTS
JULY 2012

HOUSE No. 04362

The Commonwealth of Massachusetts

HOUSE, July 31, 2012

The committee on Consumer Protection and Professional Licensure to whom were recommitted the petition (accompanied by bill, Senate, No. 104) of John Hart, Jr., Michael R. Knapik, Jennifer L. Flanagan, Robert L. Hedlund and other members of the Senate for legislation to protect motor vehicle owners' and small businesses in repairing motor vehicles, and recommitted the petition (accompanied by bill, House, No. 102) of Garrett J. Bradley, Kathi-Anne Reinstein and others for legislation to ensure that independent repair facilities in the Commonwealth have access to information related to the proper and complete diagnosis, service and repair of motor vehicles, and the petition (accompanied by resolve, House, No. 1016) of Kevin J. Murphy and Thomas A. Golden, Jr. for an investigation by a special commission (including members of the General Court) relative to the ability of independent auto repair businesses to repair automobiles after the expiration of any warranty, reports recommending that the accompanying bill (House, No. 4362) ought to pass.

For the committee,

THEODORE C. SPELIOTIS.

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

An Act protecting motor vehicle owners and small businesses in repairing motor vehicles.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after chapter 93I the following chapter:-

2 CHAPTER 93J

3 Section (1) As used in this chapter, the following words shall, unless the context clearly indicates
4 a different meaning, have the following meanings:

5 “Dealer”, any person or business who, in the ordinary course of its business, is engaged in the
6 business of selling or leasing new motor vehicles to consumers or other end users pursuant to a
7 franchise agreement and who has obtained a class 1 license pursuant to the provisions of section
8 58 and 59 of chapter 140 and is engaged in the diagnosis, service, maintenance or repair of motor
9 vehicles or motor vehicle engines pursuant to said franchise agreement.

10 “Franchise agreement”, an oral or written arrangement for a definite or indefinite period in which
11 a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name,
12 service mark or related characteristic and in which there is a community of interest in the

13 marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or
14 otherwise.

15 “Fair and Reasonable Terms”. In determining whether a price is on “fair and reasonable terms,”
16 consideration may be given to relevant factors, including, but not limited to, the following:

17 (i) The net cost to the manufacturer franchised dealerships for similar information obtained
18 from manufacturers, less any discounts, rebates, or other incentive programs.

19 (ii) The cost to the manufacturer for preparing and distributing the information, excluding
20 any research and development costs incurred in designing and implementing, upgrading or
21 altering the onboard computer and its software or any other vehicle part or component.
22 Amortized capital costs for the preparation and distribution of the information may be included.

23 (iii) The price charged by other manufacturers for similar information.

24 (iv) The price charged by manufacturers for similar information prior to the launch of
25 manufacturer web sites.

26 (v) The ability of aftermarket technicians or shops to afford the information.

27 (vi) The means by which the information is distributed.

28 (vii) The extent to which the information is used, which includes the number of users, and
29 frequency, duration, and volume of use.

30 (viii) Inflation.

31 "Immobilizer system", an electronic device designed for the sole purpose of preventing the theft
32 of a motor vehicle by preventing the motor vehicle in which it is installed from starting without
33 the correct activation or authorization code.

34 "Independent repair facility", a person or business operating in the commonwealth that is not
35 affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is
36 engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle
37 engines; provided, however, that, for the purposes of this chapter, a dealer, notwithstanding its
38 affiliation with any manufacturer, shall be considered an independent repair facility for purposes
39 of those instances when said dealer engages in the diagnosis, service, maintenance or repair of
40 motor vehicles or motor vehicle engines that are not affiliated with the dealer's franchise
41 manufacturer.

42 "Manufacturer", any person or business engaged in the business of manufacturing or assembling
43 new motor vehicles.

44 "Motor vehicle", a vehicle, originally manufactured for distribution and sale in the United States,
45 driven or drawn by mechanical power and manufactured primarily for use on public streets,
46 roads and highways, but excluding: (i) a vehicle that may be operated only on a rail line; (ii) a
47 recreational vehicle or auto home equipped for habitation; (iii) an ambulance; (iv) a bus, motor
48 coach or trackless trolley designed for the carriage of persons for hire or for school-related
49 purposes; (v) vehicles used exclusively for the building, repair and maintenance of highways or
50 designed primarily for use elsewhere than on the traveled part of ways; (vi) any vehicle with a
51 gross vehicle weight rating of more than 10,000 pounds; (vii) any vehicle excluded from the

52 definition of “motor vehicle” in chapter 90; and (viii) a motorcycle, as defined in section 1 of
53 chapter 90.

54 “Owner”, a person or business who owns or leases a motor vehicle registered in the
55 commonwealth.

56 "Trade secret", anything, tangible or intangible or electronically stored or kept, which
57 constitutes, represents, evidences or records intellectual property including secret or
58 confidentially held designs, processes, procedures, formulas, inventions, or improvements, or
59 secret or confidentially held scientific, technical, merchandising, production, financial, business
60 or management information, or anything within the definition of 18 U.S.C. § 1839(3).

61 Section (2)(a) Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and
62 thereafter, a manufacturer of motor vehicles sold in the commonwealth shall make available for
63 purchase by owners of motor vehicles manufactured by such manufacturer and by independent
64 repair facilities the same diagnostic and repair information, including repair technical updates,
65 that such manufacturer makes available to its dealers through the manufacturer's internet-based
66 diagnostic and repair information system or other electronically accessible manufacturer’s repair
67 information system. All content in any such manufacturer’s repair information system shall be
68 made available to owners and to independent repair facilities in the same form and manner and to
69 the same extent as is made available to dealers utilizing such diagnostic and repair information
70 system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair
71 information system for purchase by owners and independent repair facilities on a daily, monthly
72 and yearly subscription basis and upon fair and reasonable terms.

73 (2)(b) Any manufacturer that sells any diagnostic, service, or repair information to any
74 independent repair facility or other third party provider in a format that is standardized with other
75 manufacturers, and on terms and conditions more favorable than the manner and the terms and
76 conditions pursuant to which the dealer obtains the same diagnostic, service or repair
77 information, shall be prohibited from requiring any dealer to continue purchasing diagnostic,
78 service, or repair information in a proprietary format, unless such proprietary format includes
79 diagnostic, service, repair or dealership operations information or functionality that is not
80 available in such standardized format.

81 (2)(c)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor
82 vehicles sold in the commonwealth shall make available for purchase by owners and independent
83 repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless
84 capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate
85 the same functional repair capabilities that such manufacturer makes available to dealers. Each
86 manufacturer shall offer such tools for sale to owners and to independent repair facilities upon
87 fair and reasonable terms.

88 (2)(c)(ii) Any diagnostic tool or information necessary to diagnose, service or repair a motor
89 vehicle that a manufacturer sells to any independent repair facility in a manner and on terms and
90 conditions more favorable than the manner and the terms and conditions pursuant to which the
91 dealer obtains the same diagnostic tool or information necessary to diagnose, service or repair a
92 motor vehicle, shall also be offered to the dealer in the same manner and on the same terms and
93 conditions as provided to such independent repair facility.

94 Any manufacturer that sells to any independent repair facility any diagnostic tool necessary to
95 diagnose, service or repair a motor vehicle and such diagnostic tool communicates with the
96 vehicle using the same non-proprietary interface used by other manufacturers, the manufacturer
97 delivering such a diagnostic tool shall be prohibited from requiring any dealer from continuing to
98 purchase that manufacturer's proprietary tool and interface unless such proprietary interface has
99 a capability not available in the non-proprietary interface.

100 (2)(c)(iii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan
101 tool company and each third party service information provider with whom the manufacturer has
102 appropriate licensing, contractual or confidentiality agreements for the sole purpose of building
103 aftermarket diagnostic tools and third party service information publications and systems. Once a
104 manufacturer makes such information available pursuant to this section, the manufacturer will
105 have fully satisfied its obligations under this section and thereafter not be responsible for the
106 content and functionality of aftermarket diagnostic tools or service information systems.

107 (2)(d)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e),
108 manufacturers of motor vehicles sold in the commonwealth shall provide access to their onboard
109 diagnostic and repair information system, as required under this section, using an off-the-shelf
110 personal computer with sufficient memory, processor speed, connectivity and other capabilities
111 as specified by the vehicle manufacturer and: (i) a non-proprietary vehicle interface device that
112 complies with the Society of Automotive Engineers SAE J2534, the International Standards
113 Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or
114 published by the Society of Automotive Engineers or the International Standards Organizations;
115 or, (ii) an on-board diagnostic and repair information system integrated and entirely self-
116 contained within the vehicle including, but not limited to, service information systems integrated

117 into an onboard display, or (iii) a system that provides direct access to on-board diagnostic and
118 repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial
119 Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board
120 diagnostic and repair information available to their dealers, including technical updates to such
121 on-board systems, through such non-proprietary interfaces as referenced in this paragraph.

122 Nothing in this Chapter shall be construed to require a dealer to use the non-proprietary vehicle
123 interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor
124 shall this Chapter be construed to prohibit a manufacturer from developing a proprietary vehicle
125 diagnostic and reprogramming device, provided that (i) the manufacturer also complies with
126 Section 2(d)(i), and (ii) the manufacturer also makes this device available to independent repair
127 facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

128 (2)(d)(ii) No manufacturer shall be prohibited from making proprietary tools available to dealers
129 if such tools are for a specific specialized diagnostic or repair procedure developed for the sole
130 purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or
131 performance of a specific technical service bulletin or recall after the vehicle was produced, and
132 where original vehicle design was not originally intended for direct interface through the non-
133 proprietary interface set out in (2)(d)(i). Provision of such proprietary tools under this paragraph
134 shall not constitute a violation of this chapter even if such tools provide functions not available
135 through the interface set forth in (2)(d)(i), provided such proprietary tools are also available to
136 the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(d)(ii) authorizes
137 manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as
138 set forth in (2)(d)(i), for diagnostic or repair procedures that fall outside the provisions of
139 (2)(d)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(d)(i).

140 (2)(e) Manufacturers of motor vehicles sold in the commonwealth may exclude diagnostic,
141 service and repair information necessary to reset an immobilizer system or security-related
142 electronic modules from information provided to owners and independent repair facilities. If
143 excluded under this paragraph, the information necessary to reset an immobilizer system or
144 security-related electronic modules shall be obtained by owners and independent repair facilities
145 through the secure data release model system as currently used by the National Automotive
146 Service Task Force or other known, reliable and accepted systems.

147 (2)(f) With the exception of telematics diagnostic and repair information that is provided to
148 dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an
149 independent repair facility via the tools specified in 2(c)(i) and 2(d)(i) above, nothing in this
150 chapter shall apply to telematics services or any other remote or information service, diagnostic
151 or otherwise, delivered to or derived from the vehicle by mobile communications; provided,
152 however, that nothing in this chapter shall be construed to abrogate a telematics services or other
153 contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a
154 dealer. For purposes of this chapter, telematics services include but are not limited to automatic
155 airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location,
156 remote door unlock, transmitting emergency and vehicle location information to public safety
157 answering points as well as any other service integrating vehicle location technology and
158 wireless communications. Nothing in this chapter shall require a manufacturer or a dealer to
159 disclose to any person the identity of existing customers or customer lists.

160 Section (3) Nothing in this chapter shall be construed to require a manufacturer to divulge a trade
161 secret.

162 Section (4) Notwithstanding any general or special law or any rule or regulation to the contrary,
163 no provision in this chapter shall be read, interpreted or construed to abrogate, interfere with,
164 contradict or alter the terms of any provision of chapter 93B or the terms of any franchise
165 agreement executed and in force between a dealer and a manufacturer including, but not limited
166 to, the performance or provision of warranty or recall repair work by a dealer on behalf of a
167 manufacturer pursuant to such franchise agreement; provided, however, that any provision in
168 such a franchise agreement that purports to waive, avoid, restrict or limit a manufacturer's
169 compliance with this chapter shall be void and unenforceable.

170 Section (5) Nothing in this chapter shall be construed to require manufacturers or dealers to
171 provide an owner or independent repair facility access to non-diagnostic and repair information
172 provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of
173 a franchise agreement.

174 Section (6)(a) In addition to any other remedies that may be available under law, a violation of
175 this chapter shall be deemed to be an unfair method of competition and an unfair or deceptive act
176 or practice in the conduct of trade or commerce in violation of section 2 of chapter 93A.

177 Section (6)(b) An independent repair facility or owner who believes that a manufacturer has
178 failed to provide information or a tool required by this chapter must notify the manufacturer in
179 writing through the National Automotive Service Task Force (NASTF) Service Information
180 Request process or its successor organization or process, and give the manufacturer thirty (30)
181 days from the time the manufacturer receives the complaint to cure the failure. If the
182 manufacturer cures said complaint within the cure period, damages shall be limited to actual
183 damages in any subsequent 93A litigation.

184 Section (6)(c) If the manufacturer fails to respond to the notice provided pursuant to (6)(b), or if
185 an independent repair facility or owner is not satisfied with the manufacturer's cure, the
186 independent repair facility or owner may file a complaint in the superior court, or if applicable in
187 the federal district court for the district of Massachusetts. Such complaint shall include, but not
188 be limited to the following: (i) written information confirming that the complainant has visited
189 the relevant manufacturer website and attempted to effect a proper repair utilizing information
190 provided on such website, including communication with customer assistance via the
191 manufacturer's toll-free call-in assistance, if made available by such manufacturer; (ii) written
192 information confirming that the complainant has obtained and utilized the relevant
193 manufacturer's scan or diagnostic tool necessary for such repair; and (iii) evidence of
194 manufacturer notification as set out in (6)(b).

195 Section (6)(d) Except in the instance of a dispute arising between a franchisor manufacturer and
196 its franchisee dealer related to either party's compliance with an existing franchise agreement,
197 which is required to be resolved pursuant to chapter 93B, a dealer shall have all the rights and
198 remedies provided in this chapter, including, but not limited to, in the instance when exercising
199 rights and remedies as allowed as an independent repair facility under chapter 93B.



APPENDIX 5:
EPA (US) FINAL RULE AND
DISCUSSION ON CARB
SB 1146

INFORMATION TO BE MADE AVAILABLE TO OEMs UNDER EPA (US) -- FINAL RULE

OEMs are required to make available to any person engaged in the servicing and repair of motor vehicles or motor vehicle engines all information necessary to make use of OBD systems and any information for making emission-related repairs, including any emission-related information that is provided by OEM to franchised dealers. This information includes, but is not limited to, the following:

Manuals, technical service bulletins (TSBs), diagrams, and charts (the provisions for training materials, including videos and other media are discussed in Section III B).

A general description of the operation of each monitor, including a description of the parameter that is being monitored.

A listing of all typical OBD diagnostic trouble codes associated with each monitor.

A description of the typical enabling conditions for each monitor to execute during vehicle operation, including, but not limited to, minimum and maximum intake air and engine coolant temperature, vehicle speed range, and time after engine start-up.

A listing of each monitor, sequence, execution frequency and typical duration.

A listing of typical malfunction thresholds for each monitor.

For OBD parameters that deviate from the typical parameters, the OBD description shall indicate the deviation for the vehicles it applies to and provide a separate listing of the typical values for those vehicles.

Identification and scaling information necessary to interpret and understand data available to a generic scan tool through "mode 6," pursuant to Society of Automotive Engineers SAE J1979, EE Diagnostic Test Modes.

Any information related to the service, repair, installation or replacement of parts or systems developed by third party (Tier 1) suppliers for OEMs, to the extent they are made available to franchise dealerships.

Any information on other systems that can directly affect the emission system within a multiplexed system (including how information is sent between emission-related system modules and other modules on a multiplexed bus)

Any information regarding any system, component, or part of a vehicle monitored by the OBD system that could in a failure mode cause the OBD system to illuminate the malfunction indicator light (MIL).

Any other information relevant to the diagnosis and completion of an emissions-related repair. This information includes, but is not limited to, information needed to start the vehicle when the vehicle is equipped with an anti-theft or similar system that disables the engine described below in paragraph (13). This information also includes any OEM-specific emissions-related diagnostic trouble codes (DTCs) and any related service bulletins, troubleshooting guides, and/or repair procedures associated with these OEM specific DTCs.

OEMs shall make available computer or anti-theft system initialization information necessary for the proper installation of on-board computers on motor vehicles that employ integral vehicle security systems or the repair or replacement of any other emission-related part. OEMs are not required to make this information available on the OEM's Web site unless they choose to do so. However, the OEM's Web site shall contain information on alternate means for obtaining the information and/or ability to perform re-initialization. Beginning with the 2008 model year, we require that all OEM systems will be designed in such a way that no special tools or processes will be necessary to perform re-initialization. In other words, EPA expects that the re-initialization of vehicles can be completed with generic aftermarket tools, a pass-through device, or an inexpensive OEM-specific cable.

This model year cut-off is consistent with the requirement to complete the phase-in of the SAE J2284-3 CAN requirement as discussed in section 18 of this document. An OEM may request Administrator approval for an alternative means to re-initialize vehicles for some or all model years through the 2007 model year. The complete regulatory requirements for requesting approval can be found in Sections 86.096-38(g) (6) and 86.1808- 01(f) (6).

Reference: 38430 Federal Register / Vol. 68, No. 124 / Friday, June 27, 2003 / Rules and Regulations.

The California Air Resources Board (CARB) implementation of the SB 1146 provisions mandating the sharing of repair information for emissions-related systems, offers an example of relevant factors for the consideration in determining a fair price.

The regulation requires that all covered information and diagnostic tools be:

- Offered for sale at “fair, reasonable, and non-discriminatory prices” in order to
- Stimulate competition between franchised dealerships and the aftermarket, and to ensure equal access to service information and tools.

Factors for consideration in evaluating OEM compliance with the pricing requirement include:

- The net cost to the motor vehicle manufacturers’ franchised dealerships for similar information obtained from motor vehicle manufacturers after considering any discounts, rebates or other incentive programs;
- The cost to the motor vehicle manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing, implementing, upgrading or altering the on-board computer and its software or any other vehicle component. Amortized capital costs may be included;
- the price charged by other motor vehicle manufacturers for similar information;
- The price charged by the motor vehicle manufacturer for similar information immediately prior to 1 January 2000;
- The ability of an average covered person to afford the information;
- The means by which the information is distributed;
- The extent the information is used in general and by specific users, which includes the number of users, and the frequency, duration, and volume of use;

- Inflation; and,
- Any additional criteria or factors considered by the United States Environmental Protection Agency (US EPA) for the determination of service information costs under federal regulations.

The CARB staff consider all relevant regulatory factors in making any determination that an OEM’s set prices are not fair, reasonable, and non-discriminatory. OEMs must provide its pricing structures to the CARB, and periodic audits are conducted by the CARB to monitor OEM pricing policies.

The California Air Resources Board (CARB) regulations implementing SB 1146 offer a practical and equitable model approach. CARB staff prefers to resolve any disputes informally and the practice has proven successful. Additionally, as a pro-active measure to avoid pricing disputes, CARB periodically audits OEMs’ websites to determine compliance.

A repairer may also request that CARB conduct an audit. Agency staff will conduct the audit if: (1) the request, on its face, establishes reasonable cause to believe that the OEM is in noncompliance with the regulation, and (2) the covered person has made reasonable efforts to resolve the matter informally with the OEM. In conducting audits, the CARB reviews all pertinent information provided by the covered person and the OEM. At the conclusion of the audit, the CARB issue a written determination as to whether the OEM is in compliance.

If non-compliance is determined, CARB issues a notice ordering the OEM to remedy the non-compliance. The OEM has 30 days to either submit a compliance plan or request an administrative hearing to contest the notice. Also, should an OEM’s compliance plan be rejected, the agency’s determination must be reviewed by an administrative hearing officer. The hearing officer’s decision is considered the final decision of the CARB, subject to review by the state superior court.

There also are penalties for non-compliance. The hearing officer may assess civil penalties if the OEM fails to come into compliance within 30 days from the date of a compliance order. Penalties can range as high as \$25,000 per violation per day that the violation continues.

By mandating that OEMs provide the same non-proprietary information to independent repairers that they provide their authorised dealers, innovation in vehicle aftermarket products and service should flourish.

Free of such a mandate to supply this data would see the OEMs gain a market-distorting and unearned competitive advantage over their independent competitors, and could wield monopoly pricing power over consumers' service and repair purchases. Robust competition between the independent and OEM repair channels has delivered better services, products and prices for Australia's car owners.

Competitors must constantly strive to be better, but monopolists have no incentive to innovate or improve.

APPENDIX 6: NASTF SECURE DATA RELEASE MODEL (SDRM)

NATIONAL AUTOMOTIVE SERVICE
TASK FORCE (US)

NASTF SECURE DATA RELEASE MODEL (SDRM)

What is the VSP Registry?

The NASTF Vehicle Security Professional (VSP) Registry is a service created from the NASTF Secure Data Release Model (SDRM), a project of the NASTF Vehicle Security Committee. SDRM is a data exchange system (see graphic below) conceived and designed cooperatively by automakers, the independent repair, insurance and law enforcement communities; it allows the aftermarket to access security sensitive information related to automobiles, i.e. key codes, PIN numbers, immobilizer reset information, and similar types of information. The NASTF VSP Registry program allows access to security-related information while protecting the safety and security of consumers and the integrity of automobile security systems.

Who should use the NASTF VSP Registry and why?

USA-resident* locksmiths and service technicians qualified in vehicle security system repairs need a subscription to the NASTF VSP Registry in order to purchase security codes and VIN-specific computer files directly from the OEM/automaker. Most automakers/OEMs make this information available instantly from their websites 24/7/365.

*Canadian VSPs may be eligible to participate in the Canadian program. NASTF is unaware of any similar registry in other countries.

Parties Responsible for SDRM and the VSP Registry

There are four parties involved in SDRM and the VSP Registry:

NASTF: responsible for industry outreach, systems development, and dispute resolution. Through leadership from the NASTF Vehicle Security Committee (VSC), NASTF is responsible for bringing the parties together to identify and prioritize security information gaps and to help the Industry build and modify the systems necessary to close the gaps. The NASTF VSC has a standing Security Review Committee to manage disputes regarding enrollment in the Registry and access to security-related service information.

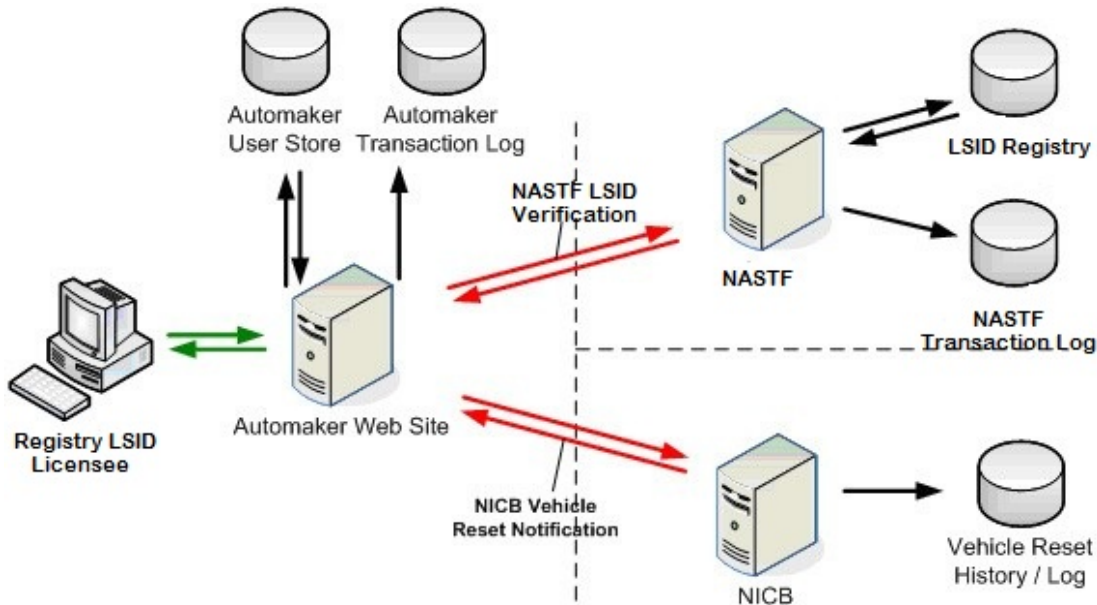
Automakers: responsible to host service information websites and/or call centers that serve as the portal to security-related service information.

ASA: Under contract with NASTF, ASA is responsible for management of the VSP Registry website, database, applications, background screening, user support and registry audits.

NICB: responsible to log transactions with automakers that involve security-related information. The National Insurance Crime Bureau protects consumers and automakers and also represents the insurance and law enforcement communities. NICB maintains transaction logs for all security-related information and provides forensic evidence to law enforcement to investigate automotive related crimes.

How the VSP Registry and SDRM Works

The basic SDRM architecture is designed to provide system separation between automakers, NASTF and NICB through well defined simple interfaces. Each automaker website uses standard web services to communicate with NASTF and NICB. Communication of required data and responses are done conforming to Industry specified web protocols.



Benefits of the NASTF VSP Registry

The NASTF VSP Registry provides safeguards to automakers and their customers to allow a change in the historic/customary practice of strict limitation of access to security-related service information, tools, and components to the aftermarket.

NASTF VSP Registry provides:

- Consumer choice by ensuring that vehicle owners can choose aftermarket service providers who have access to security-related information, tools and components.
- Control of security-related information and tools by the owners of these resources - the automaker and the consumer. No outside entity has access to or control of the manufacturer's/consumer's data without strict security protocol and oversight.
- Improved indemnity (compared to many current practices) for automakers from legal actions resulting from the unauthorized use, misuse, or illegal use of any security-related information.

The NASTF VSP Registry ensures that responsibility for governance of independent repairers falls on the independent aftermarket service industry, not automakers. The NASTF VSP Registry also meets insurance industry expectations for security with respect to release of security-related information.

APPENDIX 7: US RIGHT TO REPAIR MEMORANDUM OF UNDERSTANDING

AUTOMOTIVE AFTERMARKET INDUSTRY
ASSOCIATION (US) ET AL.

JANUARY 2014



AUTO ALLIANCE
DRIVING INNOVATION®

AAIA®
Automotive Aftermarket
Industry Association

GlobalAutomakers

CARE

MEMORANDUM of UNDERSTANDING

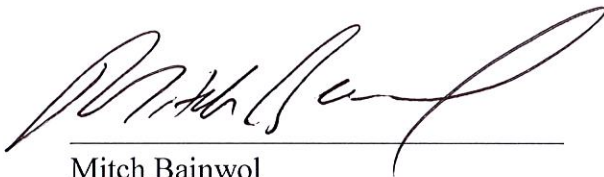
The Automotive Aftermarket Industry Association (“AAIA”), Coalition for Auto Repair Equality (“CARE”), Alliance of Automobile Manufacturers (“Alliance”) and Association of Global Automakers (“Global Automakers”) (“the Original Parties”) enter into this Memorandum of Understanding (MOU) on this Fifteenth (15th) day of January, 2014 and voluntarily agree as follows:

1. The Original Parties fully support this MOU and attached “Right to Repair” (R2R) agreement (“R2R Agreement”). Automobile manufacturer members of the Alliance and Global Automakers indicate their individual company’s agreement to comply with the MOU and R2R Agreement in all fifty (50) States and the District of Columbia through their individual letters of endorsement.
2. Until such time as the provisions of Section 2(c)(i) (common interface device) of the R2R Agreement have been fully implemented, with respect to model year 2018 and newer vehicles, for two years or January 2, 2019, whichever is earlier, and provided the OEMs comply with the MOU during this period, CARE and AAIA agree to continue to work with other Original Parties to fully implement the MOU and to oppose and not to fund or otherwise support, directly or indirectly, any new state R2R legislation.
3. The Original Parties agree to work to strongly encourage any new entrants to the U.S. automotive market or to R2R issues to become signatories to the MOU.
4. The Original Parties agree to work together to resolve any future or related R2R issues that might otherwise be the subject of state legislation and, subject to the mutual consent of the Original parties, amend the MOU and R2R Agreement to include these additional matters.
5. Once the Original Parties have signed on to the MOU, additional parties may join but any amendments or revisions to the terms of the MOU and R2R Agreement, triggered by admission of additional participants, shall require consent of the Original Parties.
6. The Original Parties agree to meet as needed and at least semi-annually, to assess how the MOU is operating, address operational concerns and discuss any other matters relevant to R2R or the MOU or future amendments or parties to the MOU. In the event that one of

the Original Parties concludes that, due to changed circumstances, the MOU or R2R Agreement may no longer be viable, that party shall, upon thirty (30) days written notice to the other three Original Parties, call a meeting to discuss the need for the MOU and R2R Agreement to continue.

7. The Original Parties agree that should a state(s) pass a law relating to issues covered by this MOU and R2R Agreement, after the effective date of the MOU and R2R Agreement, any automobile manufacturer member of the Alliance and Global Automakers may elect to withdraw its letter of endorsement for the MOU and R2R Agreement partially or entirely for the impacted state(s).

Signed on this 15th day of January, 2014:



Mitch Bainwol
President & CEO
Alliance of Automobile Manufacturers



Michael Stanton
President & CEO
Association of Global Automakers



Kathleen Schmatz
President & CEO
Automotive Aftermarket Industry Association



Ray Pohlman
President
Coalition for Auto Repair Equality

R2R AGREEMENT

Section 1. As used in this agreement, the following words shall, unless the context clearly indicates otherwise, have the following meanings:

“Dealer”, any person or business who, in the ordinary course of its business, is engaged in the business of selling or leasing new motor vehicles to consumers or other end users pursuant to a franchise agreement and who has obtained a license, as required under applicable law, and is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines pursuant to said franchise agreement.

“Franchise agreement”, a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of new motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

“Fair and Reasonable Terms” Provided that nothing in this MOU and R2R Agreement precludes an automaker and an owner or independent repair shop who is subject to the agreement from agreeing to the sale of information and tools on any other terms on which they agree, in determining whether a price is on “fair and reasonable terms,” consideration may be given to relevant factors, including, but not limited to, the following:

- (i) The net cost to the manufacturer’s franchised dealerships for similar information obtained from manufacturers, less any discounts, rebates, or other incentive programs.
- (ii) The cost to the manufacturer for preparing and distributing the information, excluding any research and development costs incurred in designing and implementing, upgrading or altering the onboard computer and its software or any other vehicle part or component. Amortized capital costs for the preparation and distribution of the information may be included.
- (iii) The price charged by other manufacturers for similar information.
- (iv) The price charged by manufacturers for similar information prior to the launch of manufacturer web sites.
- (v) The ability of aftermarket technicians or shops to afford the information.
- (vi) The means by which the information is distributed.
- (vii) The extent to which the information is used, which includes the number of users, and frequency, duration, and volume of use.
- (viii) Inflation.

“Immobilizer system”, an electronic device designed for the sole purpose of preventing the theft of a motor vehicle by preventing the motor vehicle in which it is installed from starting without the correct activation or authorization code.

"Independent repair facility", a person or business that is not affiliated with a manufacturer or manufacturer's authorized dealer of motor vehicles, which is engaged in the diagnosis, service, maintenance or repair of motor vehicles or motor vehicle engines;

"Manufacturer", any person or business engaged in the business of manufacturing or assembling new motor vehicles.

"Dispute Resolution Panel (DRP)", a 5-person panel established by the Original Parties comprised of the following: one Alliance representative, Alliance member or Alliance designee, one Global Automakers representative, Global Automakers' manufacturer member or Global Automakers designee, two representatives of the independent vehicle repair industry to be selected and mutually agreed upon by AAIA and CARE, and one DRP Chair. The DRP Chair shall be an independent professional mediator with no affiliation to any of the Original Parties, shall be selected by unanimous consent of the Original Parties and shall be funded in equal amounts by each of the Original Parties. The Original Parties shall, at one of the two annual meetings, have an opportunity to revisit their respective representative or ask the Original Parties to revisit the person acting as DRP Chair.

"Motor vehicle", any vehicle that is designed for transporting persons or property on a street or highway and that is certified by the manufacturer under all applicable federal safety and emissions standards and requirements for distribution and sale in the United States, but excluding (i) a motorcycle; (ii) a vehicle with a gross vehicle weight over 14,000 pounds; or (iii) a recreational vehicle or an auto home equipped for habitation.

"Owner", a person or business who owns or leases a registered motor vehicle.

"Trade secret", anything, tangible or intangible or electronically stored or kept, which constitutes, represents, evidences or records intellectual property including secret or confidentially held designs, processes, procedures, formulas, inventions, or improvements, or secret or confidentially held scientific, technical, merchandising, production, financial, business or management information, or anything within the definition of 18 U.S.C. § 1839(3).

Section 2.

(2)(a). Except as provided in subsection (2)(e), for Model Year 2002 motor vehicles and thereafter, a manufacturer of motor vehicles sold in United States shall make available for purchase by owners of motor vehicles manufactured by such manufacturer and by independent repair facilities the same diagnostic and repair information, including repair technical updates, that such manufacturer makes available to its dealers through the manufacturer's internet-based diagnostic and repair information system or other electronically accessible manufacturer's repair information system. All content in any such manufacturer's repair information system shall be made available to owners and to independent repair facilities in the same form and manner and to the same extent as is made available to dealers utilizing such diagnostic and repair information system. Each manufacturer shall provide access to such manufacturer's diagnostic and repair information system for purchase by owners and independent repair facilities on a daily, monthly and yearly subscription basis and upon fair and reasonable terms.

(2)(b)(i) For Model Year 2002 motor vehicles and thereafter, each manufacturer of motor vehicles sold in the United States shall make available for purchase by owners and independent repair facilities all diagnostic repair tools incorporating the same diagnostic, repair and wireless capabilities that such manufacturer makes available to its dealers. Such tools shall incorporate the same functional repair capabilities that such manufacturer makes available to dealers. Each manufacturer shall offer such tools for sale to owners and to independent repair facilities upon fair and reasonable terms.

(ii) Each manufacturer shall provide diagnostic repair information to each aftermarket scan tool company and each third party service information provider with whom the manufacturer has appropriate licensing, contractual or confidentiality agreements for the sole purpose of building aftermarket diagnostic tools and third party service information publications and systems. Once a manufacturer makes such information available pursuant to this section, the manufacturer will have fully satisfied its obligations under this section and thereafter not be responsible for the content and functionality of aftermarket diagnostic tools or service information systems.

(2)(c)(i) Commencing in Model Year 2018, except as provided in subsection (2)(e), manufacturers of motor vehicles sold in the United States shall provide access to their onboard diagnostic and repair information system, as required under this section, using an off-the-shelf personal computer with sufficient memory, processor speed, connectivity and other capabilities as specified by the vehicle manufacturer and:

(a) a non-proprietary vehicle interface device that complies with the Society of Automotive Engineers SAE J2534, the International Standards Organizations ISO 22900 or any successor to SAE J2534 or ISO 22900 as may be accepted or published by the Society of Automotive Engineers or the International Standards Organizations; or,

(b) an on-board diagnostic and repair information system integrated and entirely self-contained within the vehicle including, but not limited to, service information systems integrated into an onboard display, or

(c) a system that provides direct access to on-board diagnostic and repair information through a non-proprietary vehicle interface such as Ethernet, Universal Serial Bus or Digital Versatile Disc. Each manufacturer shall provide access to the same on-board diagnostic and repair information available to their dealers, including technical updates to such on-board systems, through such non-proprietary interfaces as referenced in this paragraph. Nothing in this agreement shall be construed to require a dealer to use the non-proprietary vehicle interface (i.e., SAE J2534 or ISO 22900 vehicle interface device) specified in this subsection, nor shall this agreement be construed to prohibit a manufacturer from developing a proprietary vehicle diagnostic and reprogramming device, provided that the manufacturer also complies with Section 2(c)(i) and the manufacturer also makes this device available to independent repair facilities upon fair and reasonable terms, and otherwise complies with Section 2(a).

(2)(c)(ii) No manufacturer shall be prohibited from making proprietary tools available to dealers if such tools are for a specific specialized diagnostic or repair procedure developed for

the sole purpose of a customer service campaign meeting the requirements set out in 49 CFR 579.5, or performance of a specific technical service bulletin or recall after the vehicle was produced, and where original vehicle design was not originally intended for direct interface through the non-proprietary interface set out in (2)(c)(i). Provision of such proprietary tools under this paragraph shall not constitute a violation of this agreement even if such tools provide functions not available through the interface set forth in (2)(c)(i), provided such proprietary tools are also available to the aftermarket upon fair and reasonable terms. Nothing in this subsection (2)(c)(ii) authorizes manufacturers to exclusively develop proprietary tools, without a non-proprietary equivalent as set forth in (2)(c)(i), for diagnostic or repair procedures that fall outside the provisions of (2)(c)(ii) or to otherwise operate in a manner inconsistent with the requirements of (2)(c)(i).

(2)(d) Manufacturers of motor vehicles sold in the United States may exclude diagnostic, service and repair information necessary to reset an immobilizer system or security-related electronic modules from information provided to owners and independent repair facilities. If excluded under this paragraph, the information necessary to reset an immobilizer system or security-related electronic modules shall be obtained by owners and independent repair facilities through the secure data release model system as currently used by the National Automotive Service Task Force or other known, reliable and accepted systems.

(2)(e) With the exception of telematics diagnostic and repair information that is provided to dealers, necessary to diagnose and repair a customer's vehicle, and not otherwise available to an independent repair facility via the tools specified in 2(c)(i) above, nothing in this agreement shall apply to telematics services or any other remote or information service, diagnostic or otherwise, delivered to or derived from the vehicle by mobile communications; provided, however, that nothing in this agreement shall be construed to abrogate a telematics services or other contract that exists between a manufacturer or service provider, a motor vehicle owner, and/or a dealer. For purposes of this agreement, telematics services include but are not limited to automatic airbag deployment and crash notification, remote diagnostics, navigation, stolen vehicle location, remote door unlock, transmitting emergency and vehicle location information to public safety answering points as well as any other service integrating vehicle location technology and wireless communications. Nothing in this agreement shall require a manufacturer or a dealer to disclose to any person the identity of existing customers or customer lists.

Section 3. Nothing in this agreement shall be construed to require a manufacturer to divulge a trade secret.

Section 4. Notwithstanding any general or special law or any rule or regulation to the contrary, no provision in this agreement shall be read, interpreted or construed to abrogate, interfere with, contradict or alter the terms of any franchise agreement executed and in force between a dealer and a manufacturer including, but not limited to, the performance or provision of warranty or recall repair work by a dealer on behalf of a manufacturer pursuant to such franchise agreement.

Section 5. Nothing in this agreement shall be construed to require manufacturers or dealers to provide an owner or independent repair facility access to non-diagnostic and repair information

provided by a manufacturer to a dealer, or by a dealer to a manufacturer pursuant to the terms of a franchise agreement.

Section 6. If an independent repair facility or owner believes that a manufacturer has failed to provide the information or tool required by this MOU, he may challenge the manufacturer's actions by first notifying the manufacturer in writing. The manufacturer has thirty (30) days from the time it receives the reasonably clear and specific complaint to cure the failure, unless the parties otherwise agree. If the complainant is not satisfied, he has thirty (30) days to appeal the manufacturer's decision to the DRP. The DRP shall be convened by the Chair within thirty (30) days of receipt of the appeal of the manufacturer's decision. The DRP will attempt to reach agreement between the parties. If unsuccessful, the DRP shall convene and issue its decision. The decision must be issued within 30 days of receipt of the appeal of the manufacturer's decision, unless otherwise agreed to by the parties. The DRP decision shall be disseminated to the complainant, the manufacturer, and the Original Parties. If the manufacturer and complainant still cannot reach agreement, the complainant may take whatever legal measures are available to it.



APPENDIX 8:
SUMMARY OF THE CANADIAN
AUTOMOTIVE SERVICE
INFORMATION STANDARD

CANADA AUTOMOTIVE SERVICE INFORMATION STANDARD

The **Canadian Automotive Service Information Standard (CASIS)** is an agreement of the Canadian Motor Vehicle Manufacturers' Association (CVMA), the Association of International Automobile Manufacturers of Canada (AIAMC) and the National Automotive Trades Association (NATA). CASIS is tailored after the NASTF approach to information sharing and protocols for resolving gaps in the information and tools provided.

As was the case with NASTF in the US, OEMs pressed CASIS as a better approach than Canadian Right to Repair legislation, C-273. The legislation, which had developed considerable support in Parliament, would have amended the Competition Act to clarify that "product" includes technical information that is required by a person in order to provide a service to a customer. This would ensure that the Competition Tribunal is able to require a supplier to provide this information to a customer in cases where the supplier previously refused to do so.

C-273 also would have amended the Canadian Environmental Protection Act to provide that companies that manufacture motor vehicles in Canada or import motor vehicles into Canada are required to make available to Canadian motor vehicle owners and repair facilities the information and diagnostic tools and capabilities necessary to diagnose, service and repair those motor vehicles.

CASIS has a relationship with the Government of Canada, which was involved with its formation, and formally notified the Minister of Industry of their commitment to implement the Agreement. Like NASTF, CASIS limits the information made available, by excluding hot lines, warranty and recall information. Also like NASTF, CASIS cannot address information and tool pricing issues.

One major difference with NASTF is that CASIS succeeded in ending the push for Right to Repair legislation. History lends some insight in projecting how successful CASIS will be as a policy option. Canadian independent repairers could not access the same emission-related OBD information that OEMs provided US independent counterparts under EPA regulations implementing the 1990 Clean Air Act Amendments. Without the pressure of a similar Canadian regulation, there was no reason for OEMs to surrender their competitive advantage.

The Right to Repair policy paper published by the Association of International Automobile Manufacturers of Canada (AIAMC) in September 2007 dismissed the need for Canadian Right to Repair legislation and offers some important perspective. They also stated that:

To assure that the Aftermarket has the necessary information and diagnostic equipment to perform emissions-related repairs on vehicles equipped with On-Board Diagnostics (OBD) the Environmental Protection Agency (EPA) requires manufacturers to disclose OBD codes to the Aftermarket.

Yet in spite of this collaborative, voluntary effort aimed at addressing the information needs identified by the Aftermarket, regulatory intervention continues to be pursued by the Aftermarket at both the same state and federal levels of government.

AIAMC is correct that the EPA regulations worked well – for US independent repairers. But, unlike non-emissions repair information shared by NASTF on OEMs websites, the emissions repair information was not shared on a voluntary basis.

