


**Opinion no. 12-A-21 of 8 October 2012
on competition in the vehicle repair and maintenance sector and the
spare parts manufacturing and distribution sector**

English version 

of the Avis n°12-A-21 du 8 octobre 2012 relatif au fonctionnement concurrentiel des secteurs de la réparation et de l'entretien de véhicules et de la fabrication et de la distribution de pièces de rechange

The Autorité de la concurrence (Permanent Commission),

Considering the Decision 11-SOA-01 of 30 June 2011 relative to the self-referral for an opinion concerning competition in the car repair and maintenance sector and in the spare parts manufacturing and distribution sector, registered under number 11/0048 A;

Considering Articles 101 and 102 of the Treaty on the Functioning of the European Union;

Considering Book IV of the Commercial Code on freedom of prices and competition, and more specifically its Article L462-4;

Considering the evidence collected;

Considering the public consultation document published by the Autorité de la concurrence on 11 April 2012;

Considering the contributions received until 24 May 2012;

The Case Officers, the Deputy General Rapporteur, the General Rapporteur and the Government Commissioner, heard at the meeting held on 6 September 2012;

The representatives of AXA, Mobivia, Renault, the PSA Peugeot Citroën companies, Bosch, *UFC Que Choisir* (consumer association), *Groupement des entreprises mutuelles d'assurances* (Professional Association for Mutualist Insurance Companies – hereinafter GEMA), the *Fédération des industries des équipements pour véhicules* (Federation of French Vehicle equipment industries – hereinafter FIEV), the *Fédération des syndicats de la distribution automobile* (Federation of Associations for Vehicle Distributors – hereinafter FEDA), the European Campaign for the Freedom of Automobile Parts and the Repair Market (hereinafter ECAR), the *Comité des constructeurs français d'automobiles* (Professional Association for Automobile Manufacturers – hereinafter CCFA), the *Chambre syndicale internationale de l'automobile et du motorcycle* (Professional Association for French Subsidiaries of Foreign Automobile and Motorcycle Manufacturers – hereinafter CSIAM), heard pursuant to Article L. 463-7 of the Commercial Code;

Adopts the following opinion;

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SUMMARY	5
INTRODUCTION	12
SECTION 1	14
DESCRIPTION OF THE MOTOR VEHICLE AFTERMARKET AND FINDINGS	14
I. The motor vehicle repairs and maintenance sector	15
A. PRESENTATION OF THE VARIOUS SEGMENTS	16
B. PRESENTATION OF THE STAKEHOLDERS AND MARKET POSITIONS	20
C. CHANGING DEMAND – PRICE TRENDS	27
II. Presentation of the spare parts manufacturing and distribution sector	32
A. THE SPARE PARTS OFFER: VEHICLE MANUFACTURERS AND EQUIPMENT SUPPLIERS	33
B. THE INTENSITY OF "INTERBRAND" COMPETITION BETWEEN MANUFACTURERS OF THE SAME SPARE PART	38
C. INTENSITY OF COMPETITION WITHIN EACH DISTRIBUTION CHANNEL	42
D. CHANGING DEMAND – PRICE TRENDS	44
E. COMPARATIVE ANALYSIS OF OVERSEAS DÉPARTEMENTS AND MAINLAND FRANCE	48
CONCLUSION	60
SECTION 2	63
POTENTIAL OBSTACLES TO A GREATER LEVEL OF COMPETITION IN THE MOTOR VEHICLE REPAIR AND MAINTENANCE SECTOR AND THE SPARE PARTS MANUFACTURE AND DISTRIBUTION SECTOR	63
I. Regulatory framework	63
A. SPECIFIC REGULATIONS	63
B. ALLOWING INDEPENDENT REPAIRERS TO COMPETE WITH THE VEHICLE MANUFACTURERS' NETWORKS OF AUTHORISED REPAIRERS	64
C. PRESERVING COMPETITION WITHIN AUTHORISED NETWORKS	65
D. FACILITATING ACCESS TO THE AFTERMARKET FOR SPARE PARTS MANUFACTURERS	66
E. PERMITTING DISTRIBUTION OF THE VEHICLE MANUFACTURERS' TECHNICAL INFORMATION NEEDED TO CARRY OUT REPAIR AND MAINTENANCE WORKS TO INDEPENDENT REPAIRERS	67
II. Design protection for visible parts	70
A. LEGAL AND ECONOMIC FRAMEWORK	70
B. ANALYSIS OF ARGUMENTS SUBMITTED IN SUPPORT OF THE MAINTENANCE OF PROTECTION FOR VISIBLE SPARE PARTS	77
C. THE EXPECTED IMPACT OF THE OPENING-UP OF THE VISIBLE SPARE PARTS MARKET	82
D. THE MANNER IN WHICH THE VISIBLE PARTS MARKET COULD BE OPENED UP ..	95

III. Impediments to the sale of spare parts by equipment suppliers	105
A. AVAILABILITY OF SPARE PARTS IN THE INDEPENDENT CHANNEL	106
B. REASONS FOR THE UNAVAILABILITY OF CERTAIN SPARE PARTS IN THE INDEPENDENT CHANNEL	113
IV. Availability of technical information needed for repair and maintenance works	126
A. OBSTACLES IMPEDING ACCESS TO TECHNICAL INFORMATION BY INDEPENDENT REPAIRERS AND SPECIALIST INTERMEDIARIES	127
B. PROBLEMS ENCOUNTERED BY INDEPENDENT REPAIRERS	143
C. POTENTIAL ADDITIONAL MEASURES	148
V. Warranty contracts and warranty extensions	160
A. OBSERVATIONS	160
B. DISCUSSION	164
VI. Use of recommended sale prices by all operators in the motor vehicle aftermarket	167
A. COMMUNICATION OF RECOMMENDED RETAIL SALE PRICES	167
B. PROS AND CONS OF RECOMMENDED RETAIL PRICES	169
C. DISCUSSION	177
CONCLUSION	182
ANNEX	187
INFORMATION ON THE TREATMENT OF VISIBLE SPARE PARTS IN GERMANY AND THE USA	187
A. GERMANY	187
B. UNITED STATES	193
GLOSSARY	196

SUMMARY

1. Pursuant to Decision 11-SOA-01 of 30 June 2011, and within the framework of *ex-officio* proceedings, the Autorité de la concurrence decided to examine and issue an opinion on the operation of competition in the car repair and maintenance and the spare parts manufacturing and distribution sectors. In view of the issues at stake, the Autorité de la concurrence published a public consultation document on 11 April 2012 – an exceptional measure in the context of an opinion procedure – in which it asked interested parties, including both private individuals and professionals, to submit their observations by 24 May 2012. This opinion, which differs from a decision issued following “litigation” proceedings in that it does not seek to assess or characterise any specific individual conduct, and more particularly does not record any breach of competition rules, sets out the Autorité de la concurrence's general analysis of the operation of competition in the sector.
2. In France, the motor vehicle aftermarket generates sales of €30 billion, excluding VAT, every year. It also represents 37% of vehicle-related household expenditure in France, which in turn accounts for 12% of the total budget. Although the first decade of this century saw a fall in demand for maintenance and repair services, due essentially to the increased reliability of vehicles and improved road safety measures, prices rose sharply (+55% in nominal terms or 28% when adjusted for inflation between 2000 and 2011) (section 1- part I-C).
3. The operation of competition in the sector is very specific, particularly when it is compared to vehicle sales. Although competition between vehicle manufacturers is fierce in the “primary” market of car sales, manufacturers are no longer in direct competition in the “secondary” market or aftermarket, in other words, once the vehicle has been purchased. When a consumer buys a vehicle, he is not usually in possession of the necessary information to factor in the repair and maintenance costs for each vehicle. This means that the main competitive pressure on manufacturers and repairers within their networks (the “manufacturer channel”) is exerted by operators of the “independent channel”: essentially equipment suppliers, independent distributors and wholesalers, independent repairers and specialist intermediaries.
4. However, several factors may restrict competition between these two channels. Firstly, the equipment suppliers – who manufacture approximately 80% of the original assembly parts assembled by vehicle manufacturers – may be reluctant to, or find it difficult to, compete with manufacturers and supply independent operators with spare parts, given that the manufacturers are their main customers (section 1 - part II and section 2 - part III). Furthermore, the size of the market is often relatively limited for each part, which means that the number of suppliers potentially in competition with each other is limited and in some cases consists only of the vehicle manufacturer and the equipment supplier (known as the “OES” or “original equipment supplier”), or even just the manufacturer. Furthermore, because the vehicle manufacturer is also the assembler, it has exclusive access to the most recent and comprehensive “technical information” on vehicles. The increased importance of on-board electronics has made vehicles much more complex, meaning that access to technical information relating to vehicle repair and maintenance is increasingly strategic. Technical information is used, for example, to diagnose a defect,

identify the spare parts that need to be replaced, estimate the fitting time or read and interpret the wiring diagrams (section 2 - part IV). Lastly, further downstream, private individuals, who represent the majority of demand (92% of all vehicles) are ill-equipped to compare repair prices, in particular those that are not for standard services such as the replacement of tyres. This means that repairers, and therefore their suppliers upstream, have only a limited incentive to reduce their prices in order to increase sales volumes. However, there are exceptions, such as the collision repair market segment, where demand is dictated by insurers, or the vehicle fleets market (section 1- part I).

5. In order to enhance competition between the manufacturer channel and the independent channel in the car aftermarket, the European Commission has adopted specific regulations to ensure independent repairers are able to compete efficiently with the authorised networks, in particular by ensuring adequate access to spare parts and the technical information needed to carry out repair and maintenance works (section 2- part I). The authorised networks currently hold significant market shares in France on the repair and maintenance and the spare parts manufacturing and distribution sectors, ranging from 45% to 55%. More specifically, vehicle manufacturers' authorised networks hold a much larger market share for repairs on recent vehicles than they do for repairs on older vehicles (approximately 80% in terms of value for vehicles less than two years of age, and approximately 70% for vehicles that are 3 to 4 years old). In addition, it is unlikely that the observed increase in the price of car repair and maintenance works in France is due solely to rising costs.
6. The significance of this sector in household expenditure, its particularities and recent developments fully justify the decision of the Autorité de la concurrence to examine the sector. The Autorité has identified five specific potential obstacles to greater competition, in light of which it will make several general proposals.

1. PROTECTION OF VISIBLE PARTS UNDER DESIGN LAW AND COPYRIGHT LAW (SECTION 2 - PART II)

7. In France, visible parts (body parts, windscreens and windows, lights, mirrors, etc.) can be protected by design rights or copyright. When applied to spare parts, these intellectual property rights prevent the manufacture and/or sale on the French territory of parts competing with those sold by the vehicle manufacturer. Vehicle manufacturers hold a legal monopoly over approximately 70% of the market for visible parts (and are in a duopoly with the original equipment suppliers for the remaining 30%). The estimated worth of the market in 2010 was between €1.8 billion and €2.6 billion, excluding VAT.
8. Eleven Member States of the European Union and the European Parliament accordingly decided to limit protection by design rights and copyright to visible original assembly parts and to exclude visible spare parts intended to restore the initial appearance of the vehicle, which can therefore be freely manufactured and sold by original spare parts manufacturers. Moreover, the United States and Germany do not protect visible spare parts in practice (see Annex to this Opinion).
9. The Autorité de la concurrence has considered the pros and cons of such a policy (known as the "repair clause"). A number of corroborating studies, including one by the European Commission, suggest that the withdrawal of protection for visible spare parts would result in a drop of between 6% and 15% in average prices for visible parts. In a market worth between €1.8 billion and €2.6 billion, the withdrawal of protection for visible spare parts

would therefore generate an average saving for consumers of approximately €200 million: on the one hand, cheaper offers would emerge while, on the other hand, the prices charged for parts sold by manufacturers would fall because of competition from alternative parts. The prices of non-visible and unprotected parts sold in connection with bodywork could also fall, as the car body shop would be able to place the manufacturer in competition with the independent distributors for all the parts needed in the collision repair process. The potential savings could therefore concern a much wider market, estimated at €3.3 billion, excluding VAT. The opening-up of the market for visible spare parts would also allow the car aftermarket to operate more efficiently by reducing the compartmentalisation between the manufacturer channel and the independent channel. Furthermore, equipment suppliers established in France could produce visible spare parts for the French market and also for foreign markets that have already been liberalised, especially European markets. Lastly, such a reform would increase competition in the distribution of spare parts in French *départements d'outre mer* (French overseas *départements*), where there is currently only a single authorised spare parts distributor per make of vehicle and per *département d'outre mer*.

10. At the same time, the analyses conducted for the purpose of this Opinion show that the introduction of a repair clause would affect neither investment in design nor the quality, availability or safety of the parts. The concerns voiced by French vehicle manufacturers, with regard to risks to competitiveness and employment, clearly seem exaggerated. It should be borne in mind that between 60% and 70% of visible spare parts are already manufactured by original spare parts manufacturers for vehicle manufacturers. The main parties to benefit from the manufacturers' loss of market shares would very probably be the original spare parts manufacturers, as has been the case in the United Kingdom, and the impact on employment would be neutral as the original spare parts manufacturers would continue to manufacture the parts but would also be able to sell them directly. Lastly, the limited loss of employment in the manufacturer channel should be considered in conjunction with the creation, by original spare parts manufacturers established in France, of jobs manufacturing visible parts for both the domestic and export markets. Generally, the manufacturers' current economic model, which is essentially based on the generation of profit from the aftermarket as vehicles are sold at a loss or with very low profit margins, is not desirable, particularly as improved vehicle reliability and reduced vehicle mileage will result in the long term in a fall-off in the volume of activity in this sector.
11. Following a public consultation which allowed the Autorité de la concurrence to conduct an in-depth review of the risks and benefits of reforming protection of visible parts, the Autorité recommends that a repair clause be introduced into French law to allow more efficient operation of the car aftermarket. It is, however, aware of the problems currently facing French vehicle manufacturers, who will need time to adjust their economic models. Furthermore, original spare parts manufacturers established in France also need to prepare themselves for the opening-up of the market for visible parts in order to benefit from this development.
12. A transition period prior to the full opening-up of the market for visible parts therefore seems essential. After comparing the various possible scenarios (*de facto* or *de jure* relaxation, gradual opening-up based on the age of the vehicle, the type of original spare parts manufacturer or the type of part), the Autorité de la concurrence recommends opening up the market progressively by family of parts, with the principle being enshrined in law and the timeframe being established by decree. For example, the market could be opened up for windscreens, windows and lights in the first year (approximately 30% of the market), for mirrors and bumpers in the second year (approximately two-thirds of the

market) and then, two to three years after this second stage, for all visible parts, including sheet metal parts. This gradual opening-up of the market by type of part would allow all original spare parts manufacturers, regardless of their relationship with the manufacturers in the vehicle manufacture market, to produce visible parts for the spare parts market: by increasing the number of potential market operators, the purchasing power gains expected as a result of the reform would also be increased. At the same time, the adoption of such a gradual and controlled reform in law would create a deadline that would encourage undertakings to make the necessary investments and create new jobs, while also giving them sufficient time to explore the different opportunities associated with the opening-up of the market.

2. OBSTACLES IMPEDING THE SALE OF PARTS BY ORIGINAL SPARE PARTS MANUFACTURERS (SECTION 2 – PART III)

13. Competition in the spare parts manufacturing and distribution sector depends on the number of operators offering spare parts upstream: the greater the offer, the more likely it is that prices for parts will fall and that prices for repairs will be competitive. Although a vehicle manufacturer only directly manufactures 20% of its parts, it markets and sells all the spare parts designed for its vehicles under its own brand. Its main potential competitor is the equipment supplier (or equipment suppliers) who manufacture(s) the spare parts for the former. If demand is sufficient, other original spare parts manufacturers may also choose to manufacture the part, although this requires them to create specific tooling, which is one of the main market entry barriers and represents a significant cost (section 1 - part II). In practice, as a part tends to be used for one vehicle model only, demand for that part is usually limited or very limited, in particular for recent vehicles. As a result, the original spare parts manufacturer is the manufacturer's only potential competitor.
14. It is crucial that original spare parts manufacturers, who are the best positioned to enter the aftermarket, be free to sell the spare parts they manufacture for their own account. Accordingly, the European Commission considers that "*the restriction, agreed between a supplier of spare parts [...] and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors, repairers or end users*" is a hard-core restriction (section 2 - part I and part III).
15. Certain contractual clauses in contracts between manufacturers and equipment suppliers could, however, restrict or delay the presence of the original spare parts manufacturers in the aftermarket by, for example, not authorising the original spare parts manufacturers to use, for its own account, the tools designed to manufacture parts for vehicle manufacturers. There is some doubt as to whether, as the manufacturers claim, these contracts can systematically be analysed as subcontracts, which are not therefore subject to competition law (Commission notice of 1978 concerning its assessment of certain subcontracting agreements). The various clauses that might limit the presence of the original spare parts manufacturer in the aftermarket require a case-by-case analysis, in particular when the vehicle manufacturer required the original spare parts manufacturer to transfer its property rights on tooling to it, or if the manufacturer's contribution to the design and production of the parts or to the financing of investments is limited or unjustified in light of the restriction. Such an analysis is all the more important given that the original spare parts manufacturer is often the only supplier in a position to compete with the vehicle manufacturer.

16. Furthermore, in some cases, the vehicle manufacturer prohibits the original spare parts manufacturer from displaying the manufacturer's logo on the parts it sells, which would seem to be legitimate. However, the OES is also prohibited from removing the logo, as this would constitute a “trademark removal” offence, pursuant to Article L713-2 of the *Code de la propriété intellectuelle* (Intellectual Property Code). These two obligations, at times irreconcilable, may result in the OES having to create further tooling if it wishes to sell the spare parts directly, which may dissuade it from selling the spare parts on its own behalf. Moreover, such a clause would not appear to be essential for trademark protection within the context of the relationship between an OES and a vehicle manufacturer as its customer, given that Article 217-2 of the *Code de la consommation* (Consumer Code) already punishes the removal of a trademark when this is done *fraudulently*, which is not the case here. This Opinion therefore recommends that Article L713-2 of the Intellectual Property Code be amended to prevent it from restricting the original spare parts manufacturers’ ability to sell spare parts on their own behalf.

3. INDEPENDENT OPERATORS HAVE LIMITED ACCESS TO TECHNICAL INFORMATION (SECTION 2 - PART IV)

17. Only the vehicle manufacturers possess comprehensive and up-to-date "*technical information*" on their vehicles, although this is becoming increasingly essential for vehicle repair and maintenance, and in order to identify the references of the spare parts used as replacements. Access to technical information by independent operators is defined by European technical regulations, and by the Commission regulation providing for a block exemption for the motor vehicle sector (Regulation 461/2010). More specifically, manufacturers must make technical information available on dedicated websites (known as "Euro5 websites").
18. In practice, independent repairers rarely visit these websites. They have stated that this is due to the non-exhaustive nature of the information displayed, the cost of accessing the sites and the fact that content is not standardised. In order to diagnose breakdowns or upgrade on-board electronics, independent repairers prefer multi-make solutions produced by "*specialist intermediaries*" (publishers of technical information or manufacturers of diagnostic tools).
19. However, these "*specialist intermediaries*" also report that they have difficulty accessing technical information that they consider to be satisfactory in view of the prices charged by the vehicle manufacturers. In practice, the publishers of technical information obtain their information from the manufacturers, despite the obstacles they have reported. The developers of diagnostic tools, however, generally prefer to acquire the information independently, by producing artificial vehicle breakdowns (a practice known as "*reverse engineering*"). However, the process is lengthy and expensive, and does not always produce comprehensive and up-to-date information.
20. Without wishing to pre-empt any detailed analysis it may make within the framework of litigation proceedings, the Autorité observes that the restrictions that can be placed on access to technical information by vehicle manufacturers could limit the competitive pressure exerted by independent repairers on authorised repairers. Such limitation would occur if access was made difficult as regards information held solely by the manufacturers; if problems accessing information were recurrent, thus placing independent repairers at a disadvantage compared to authorised repairers; and if the prices charged for this

information were such that they constituted an obstacle to competition between the independent repairers and the authorised repairers. Such obstacles are more likely to arise in the first few years following a model's commercial launch. Competition law is not designed to deal with occasional access denials or difficulties, but it can tackle them when the obstacles are significant and impede competition downstream. Nevertheless, in some cases, application of the technical regulations may be more suitable in order to solve problems faced by independent operators, given that the standard of proof is not as strict because the obligation to provide access to information is imposed by the technical regulations. However, the efficiency of such technical regulations is subject to the existence of a monitoring system and penalties that are sufficiently dissuasive and credible, which is not the case at present. Furthermore, to ensure such provisions are fully effective and are implemented, the relevant operators (manufacturers, independent repairers and specialist intermediaries) must agree on detailed, practical transfer procedures and on the content of the information, thus echoing the standardisation work currently being carried out on the format of technical information communicated by vehicle manufacturers on their Euro5 websites. The relevant type-approval authorities must also penalise any non-compliance with the technical regulations.

4. WARRANTY CONTRACTS AND WARRANTY EXTENSIONS (SECTION 2-PART V)

21. Given the current trend for longer warranty periods and, in particular, warranty extension contracts, there is a need for vigilance to ensure that authorised repairers do not obstruct competition from independent repairers for the repair and maintenance of vehicles under warranty, through contractual clauses concerning the vehicle's warranty. This is all the more important given that consumers already seem unwilling to use the services of independent repairers to carry out repairs that are not covered by a warranty.
22. The applicable regulatory framework is very strict. Agreements between vehicle manufacturers and members of their authorised networks could fall within the scope of Article 101(1) of the TFEU because of contractual clauses requiring car owners have their cars serviced or repaired only by members of the manufacturer's authorised network during the warranty period. Case-by-case assessments would also be necessary to establish whether the criteria for exemption set out in Article 101(3), are satisfied, as this is by no means obvious. This also applies to warranty extension contracts entered into at the time of sale or shortly thereafter. Certain contractual clauses might limit the consumers' ability to use independent repairers for maintenance and repair works that are not covered by the warranty. Such clauses include those requiring the consumer to provide proof that the fault or breakdown was not caused by repair or maintenance works previously carried out by an independent repairer; those that void the warranty without any obligation to establish a clear causal link between the observed fault or breakdown and the work carried out by an independent repairer, and recommendations that the consumer arrange for maintenance and repair works that are not covered by the warranty to be carried out by a member of the authorised network, depending on how they are worded or where they are inserted.

**5. THE USE OF RECOMMENDED PRICES BY ALL OPERATORS IN THE CAR AFTERMARKET
(SECTION 2 - PART VI)**

23. In the car aftermarket, vehicle manufacturers and spare parts manufacturers circulate recommended retail prices, which are also used as a reference for the pricing of parts sold to distributors and then to repairers. In practice, spare parts are sold to distributors at the recommended price minus a discount, and distributors then sell the parts to repairers at the recommended price minus a discount. Although discounts may vary from one distributor to another or from one repairer to another, it appears that the recommended prices are generally passed on by distributors when they sell parts to repairers, in a situation where a repairer selling a part on to an end user has very little incentive to offer a price below the recommended retail price because of the large number of catalogue references and the low elasticity of demand. It is therefore likely that the recommended prices are applied downstream by authorised and independent repairers, as shown by certain observations and statements collected from independent repairers for the purpose of this Opinion. Furthermore, it seems that manufacturers and spare parts manufacturers exchange information about the recommended retail prices for certain parts. This means that spare parts manufacturers are regularly kept informed of the prices recommended by manufacturers, and may, furthermore, also receive information on prices recommended by competing spare parts manufacturers.
24. In view of the hundreds of thousands of catalogue references and the fact that many of the parts are sold in very small quantities, the generalised circulation of recommended prices may result in efficiency-enhancing effects, in particular when these are maximum prices, as it may prevent double marginalisation or facilitate the pricing position of repairers. Nevertheless, the circulation of recommended prices could also distort price competition by providing a focal point around which all the operators distributing the parts of a spare parts manufacturer or vehicle manufacturer might converge. The exchange of information on recommended prices between vehicle manufacturers and spare parts manufacturers could also encourage the manufacturers and spare parts manufacturers, and subsequently all the authorised and independent repairers, to align their prices.
25. The Guidelines to Regulation 330/2010 on vertical restraints provide for a block exemption for recommended prices when none of the parties to the transaction hold a market share of more than 30%. However, if any operator's market share is greater than 30%, or if the operators using the recommended price system collectively hold a market share of more than 50%, such practices may be qualified as anticompetitive if sufficient evidence of their anticompetitive effect is produced. Moreover, because the recommended price plays an important role in the sale price of the part, the information exchanged is sufficiently accurate and up-to-date, and is exchanged on a regular basis, and the market is an oligopolistic market in which tacit acquiescence is probable, the exchange of recommended prices between equipment suppliers and manufacturers may also be found to harm competition. On balance, the interaction between the two mechanisms (recommended prices and exchange of information) may in certain circumstances have a negative effect on competition that outweighs the potential resulting efficiency-enhancing effects.

INTRODUCTION

1. Article L462-4 of the Commercial Code provides that "*the Autorité de la concurrence may take the initiative to issue an opinion on any competition-related matter. This opinion will be made public. It may also recommend that the Minister of the Economy or the Minister responsible for the relevant sector introduce measures necessary to improve the competitive operation of the markets*".
2. Noting, in particular, a significant increase in the price of spare parts and vehicle repairs and maintenance services since the late 1990s, the Autorité de la concurrence announced, by virtue of self-referral decision 11-S0A-01, that it intended to examine the competitive operation of the vehicle repair and maintenance and the spare parts manufacturing and distribution sectors.
3. The Autorité's first objective was to establish whether independent repairers are in a position to compete genuinely and effectively with repairers who are members of a vehicle manufacturer's authorised network, in view of the conditions under which they can access spare parts and technical information on the vehicles.
4. The Autorité's second objective was to form a view of the extent to which authorised or independent repairers can effectively place the different types of suppliers of spare parts for vehicles (vehicle manufacturers, original assembly suppliers and alternative suppliers, secondary equipment suppliers) in competition with each other.
5. The Autorité's final objective was to study the impact of the protection provided to vehicle manufacturers distributing "*visible*" parts on the sale prices, on the availability of parts and on incentives to innovate.
6. As part of its inquiry and in view of the specific issues at stake, the Autorité took the unusual step, in the context of an opinion procedure, of launching a public consultation on 11 April 2012. The public consultation document contained an initial general analysis of the competitive operation of the aftermarket, and asked all interested parties (private individuals and professionals) to submit their observations by 24 May 2012 concerning its findings to date and possible actions. Approximately fifty contributions from all sorts of stakeholders in the sector were received and analysed, and have been factored into this final opinion. Contributors confirmed the Autorité's initial diagnosis, provided additional perspective on the scope of certain problems identified and helped refine potential solutions.
7. The first part of this document describes the vehicle repair and maintenance sector, the spare parts manufacturing and distribution sector and the main developments over the past decade.
8. The second part examines, in light of the new regulatory framework governing the motor vehicle sector, the main obstacles to genuine and effective competition between stakeholders at every level of the value chain that were identified in the course of the general review conducted for the purpose of this Opinion.
9. By way of an introduction, the Autorité de la concurrence reminds the readers of this Opinion that its role in the self-referral procedure is not to qualify the specific conduct of a given economic actor in a market, in light of Articles 101 and 102 of the TFEU and

Articles L420-1 and L420-2 of the Commercial Code. Any such assessment and judgement is only possible following a procedure involving the hearing of all the parties organised pursuant to Article L463-1 of the Commercial Code. However, when the Autorité looks at the general functioning of an economic sector, as in this case, it can – and indeed must – formulate general observations enabling it to effectively make known its opinion and, if necessary, make proposals. It may also need to remind readers of the main points to emerge from case-law and decisional practice, in order to provide a useful analysis of the sector.

SECTION 1

DESCRIPTION OF THE MOTOR VEHICLE AFTERMARKET AND FINDINGS

10. The motor vehicle aftermarket covers all goods and services intended to maintain a vehicle¹ in good condition after its purchase and throughout its useful life. In France, the motor vehicle aftermarket generates turnover of slightly more than €30 billion in terms of retail sales². In France, vehicle-related expenditure represents 12% of the household budget³. When this expenditure is broken down, the largest item consists in maintenance and repair services and the purchase of spare parts (37%), followed by fuel and lubricants (28%), vehicle purchases (24%) and car insurance (4.5%). 7% of expenditure corresponds to other individual vehicles-related services⁴.
11. Half of the turnover generated by vehicle repair and maintenance works corresponds to servicing, as specialist labour is increasingly required to repair and maintain a vehicle, and also more commonly to diagnosing the causes of faults or breakdowns and to preventing future problems. The other half corresponds to the purchase of spare parts⁵ to replace damaged parts or, in the case of lubricants for example, to ensure that the vehicle's internal components such as the engine operate correctly.
12. Part I contains a description of the motor vehicle repair and maintenance sector, while part II describes the spare parts manufacturing and distribution sector.

¹ This Opinion only concerns four-wheeled light motor vehicles weighing less than 3.5 t, including light commercial vehicles.

² Source: TCG Conseil.

³ Source: study by Insee Première "*Le budget des ménages s'adapte au prix des carburants*" [Household budgets adapt to the cost of fuel], October 2007.

⁴ Tolls, car parks, driving schools, car rental. Source: *ibid.*

⁵ European Commission Regulation 461/2010 defines spare parts as follows: "*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*" (Article 1.1.h).

I. The motor vehicle repairs and maintenance sector

13. In 2010, the motor vehicle repairs and maintenance sector generated a turnover of €31.2 billion, excluding VAT, 45% of which corresponded to the sale of spare parts and 55% to labour. The offer in this sector is highly fragmented and varied, with approximately 35,000 very small repairers⁶, the majority of which are members of manufacturers' networks, while demand can be broken down into three segments: private individuals, fleet owners and insurance companies.
14. Private individuals own for 92% of all motor vehicles and accordingly constitute the main source of demand in the repair and maintenance sector. These consumers often give priority to the geographic proximity of the repairer and a long-standing relationship and are reluctant to compare offers⁷. Fleet owners⁸, who represent approximately 8% of all cars in France, and 40% of new registrations⁹, are informed purchasers who compare offers, including through calls for tender, and who may consider vehicle purchases in combination with after-sales services in order to extend the intense competition between vehicle manufacturers to the aftermarket. Lastly, insurers constitute the main source of demand for bodywork, which represents approximately 30% of the repair and maintenance sector. They are informed consumers who create strong competition between repairers, but who are also faced with the vehicle manufacturers' monopoly on visible parts (see Box 1).
15. Below are descriptions of the different sector segments (A), the stakeholders (B) and their position (C), followed by an account of recent developments in terms of demand and prices (D).

⁶ More than three quarters have less than five employees. (Source: "*Entretien, réparation et distribution d'équipements automobile*" [motor vehicle equipment maintenance, repair and distribution], Xerfi 2011, page 31).

⁷ Demand is more or less capable of creating competition between repairers, depending on the type of services required and the age of the vehicle. For instance, it is harder to create competition and compare prices for mechanical repairs, which are not usually standard, and which in some cases may need to be carried out urgently and without any forward planning, than it is for more standard, regular and foreseeable vehicle servicing. Although 50% of drivers questioned by the French market research company GIPA stated that they compare prices sometimes (29%) or always (21%), 88% of these price comparisons concerned standard work, such as tyre changes, oil changes, brake work and seasonal or manufacturer services (source: GIPA 2011 Study of drivers, pages 126 and 129).

⁸ These may be long-term car lease firms, short-term car rental firms, major accounts or public authorities.

⁹ The number of registrations provides a good indication of the number of new vehicles sold. There are twice as many second-hand vehicle sales as sales of new vehicles. Given that fleets essentially purchase new vehicles, they account for a much greater proportion of new registrations.

A. PRESENTATION OF THE VARIOUS SEGMENTS

16. The motor vehicle repair and maintenance sector encompasses a wide range of activities and trades which satisfy specific needs. This means that several relatively compartmentalised segments coexist, that are generally not substitutable from the point of view of demand and also, in some cases, of offer. However, all types of operator tend to diversify the services they offer, giving rise to slightly more direct competition.
17. The repair and maintenance sector is segmented in two ways: by type of services and by vehicle age.

1. SEGMENTATION ACCORDING TO SERVICES PROVIDED

18. Although some repairers offer general services to all customers, others specialise in a particular area of work and therefore only compete with the generalist repairers for this type of service. Table 1 below lists the different types of services¹⁰ and estimated turnover¹¹ in 2010.

¹⁰ Paragraphs 19 to 22 of the public consultation document dated 11 April 2012 describe each of these segments.

¹¹ The estimated size of the various segments can vary depending on the source. This can be explained by the large number of operators in the repair and maintenance market and the fragmented nature of the offer, and also by the fact that they offer several types of services and do not always clearly differentiate between the services falling under the categories listed in the table.

Table 1 – Breakdown of types of services in 2010

	Turnover in €billion, excluding VAT	%
Maintenance and mechanical repairs	18.99	61 %
1. Servicing (maintenance/wear and tear)	8.80	28 %
2. Unscheduled mechanical repairs, including breakdowns	6.67	21 %
Tyre replacements	3.52	11 %
Bodywork	8.50	27 %
Collision repair	7.49	24 %
Windscreen and window damage	1.01	3 %
3. Services covered by the manufacturer's warranty¹²	0.90	3 %
Do-It-Yourself and accessories	2.83	9 %
TOTAL	31.22	100 %

Source : TCG Conseil – Turnover, excluding VAT, on the downstream market, passenger vehicles and light commercial vehicles.

19. The bodywork segment, which is affected by the design protection afforded to vehicle manufacturers on the spare parts market (see developments in section 2, part II), is described in detail in Box 1 below.

Box 1 – The role of insurers in the bodywork segment

"Bodywork", required following accidents, represented a turnover of almost €9 billion, excluding VAT, in 2010 (almost 30% of the entire repair and maintenance sector). This segment accounts for almost all the demand for visible parts protected by design rights. In most cases, these parts are sold by vehicle manufacturers in a monopoly position, and account for almost 70% of the total demand for spare parts in the segment, i.e., total turnover of approximately €4 billion, including VAT (€3.3 billion, excluding VAT) in 2010¹³.

In the bodywork sector, insurers account for a major part of the demand for spare parts from repairers and, through them, from spare part manufacturers and distributors. Approximately 85% of turnover comes from vehicle insurance¹⁴. Insurers are particularly vigilant as to the cost and quality of services provided by repairers, and therefore place repairers in competition with each other. They usually do this by approving a set number of body shops in each catchment area, on the basis of their needs, and by then encouraging

¹² This also includes services covered by extended warranties.

¹³ Source: SRA, *Les sinistres matériels en 2010* [property damage claims in 2010].

¹⁴ The role of insurers is particularly important in France, which reports a far greater number of comprehensive insurance policies than neighbouring countries (62%).

insureds to use their network of approved repairers¹⁵ – while respecting their freedom of choice¹⁶.

This means insurers can negotiate hourly rates that are well below the hourly rates charged in the other repair and maintenance segments¹⁷. They can also negotiate discounts or business finder fees based on the repairer's turnover generated through the insurer. However, insurers are still faced with the vehicle manufacturers' monopoly on parts protected by design rights, as discussed in section 2, part II, which discusses the protection of visible parts in France. This monopoly prevents them from placing suppliers of spare parts in competition with each other in order to obtain lower priced parts.

However, given the fluidity of the vehicle insurance market and the intensity of competition on that market¹⁸, it is very likely that a significant proportion of the cost savings that insurers can obtain on the price of spare parts are passed on to consumers through lower insurance premiums or excesses. In January 2011 the Directorate General for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF) published a report on trends in vehicle and home insurance premiums, in which it observed that many of the

¹⁵ The rate of use of an insurer-approved network, which can vary significantly between insurers, was 55% on average for collision repairs and 65% for windscreen and window breakage in 2010. After providing a policyholder with the list of local approved repairers, insurers use incentives, such as direct payments, the loan of a vehicle and guarantees as to the technical quality of the insurer's authorised network. Note that approved repairers often only request payment of their bills after the policyholder has received payment from his insurance company. This mitigates the 'direct payment' incentive to use the insurer-approved network.

¹⁶ Opinion 08-02 issued by the *Commission d'examen des pratiques commerciales* ("CEPC" – government business practices watchdog) on business practices observed between insurers and body shops recommended, in Article 1.3 of the corresponding charter, "*a basic principle of the relationship between insurers, policyholders and repairers should be that the policyholder is free to use any repairer of his choice. This principle is applicable to the relationship between an insurer and its policyholder*". It has been observed that policyholders prefer to choose their own repairer, which means that their choice of insurer may also take into account the repairers approved by it. Some insurers also prefer to approve repairers frequently requested by policyholders, even if their services are more expensive than some of their competitors, in order to remain competitive with regard to other insurers while limiting repair costs.

¹⁷ Excluding the hourly rates for paintwork, which are approximately half the hourly rates for repairs; the hourly rates for "T1" repairs negotiated by insurers, which correspond to the least technical type of repairs, are between 20% (for independent repairers) and 50% (for level 1 authorised repairers) lower than the average hourly rates charged in the market. The T1 hourly rate negotiated by insurers is approximately €40 (source: insurers). By way of comparison, according to the GIPA 2011 study on repairers ("*Etude réparateurs 2011*"), the T1 hourly rate for the market as a whole is €49 on average for independent repairers, €55 for level 2 authorised repairers and €72 for level 1 authorised repairers. The September 2006 study carried out by Autopolis on the consequences for the security of consumers and third parties of the proposal to amend Directive 98/71/EC on legal protection of designs and models (page 52) also observed a 3-to-1 ratio between hourly rates charged by UK dealers for maintenance and mechanical repairs and hourly rates reimbursed. Like France, the UK is a country in which comprehensive insurance is well-developed, and where insurers therefore have greater purchasing power when dealing with repairers than in other countries where fewer comprehensive insurance policies are taken out.

¹⁸ Diagnosis by the Autorité de la concurrence in Decision 10-DCC-52 of 2 June 2010 authorising the creation of the mutual insurance group SFEREN and by the DGCCRF report of January 2011 on trends in car and home insurance premiums. In its conclusion, the DGCCRF states that "*in the past, insurers have shown that they were capable of passing on rate reductions to policyholders, which is a sign of healthy competition*".

changes in the cost of vehicle insurance observed in the first decade of this century could be explained by the equilibrium between insurance income and expenditure.

2. VEHICLE AGE AFFECTS THE NATURE OF THE DEMAND AND THE TYPE OF REPAIRER SELECTED BY THE CONSUMER

20. The older the vehicle, the more cost-aware the owner is and the more likely is he to use a network of independent repairers¹⁹ (see Graph 3 below), whose services are often cheaper than those provided by a manufacturer's network of authorised repairers. Conversely, owners of new vehicles (one third of all vehicle sales) usually want to preserve their value with a view to reselling it in the second-hand market. They want to be able to trust their repairer²⁰ and in most cases will use the dealer that sold them the vehicle, who they can also ask to resell the vehicle in the second-hand market²¹. Furthermore, fear that the warranty will be voided seems to be the main reason²² why owners of vehicles under warranty use the manufacturer's network, despite the European regulation and advertising campaigns organised by various independent repair chains (see discussions on this topic, section 2, part V: "Warranty contracts and warranty extensions").
21. Globally, the repair and maintenance market can be broken down according to vehicle age as follows: vehicles aged under two years represent 11% of the sector's turnover, 3-4 years: 15%, 5-6 years: 18%, 7-9 years: 28%, and vehicles aged 10 years or over: 29%²³.

¹⁹ The residual value of a vehicle decreases with age. In addition, owners of second-hand vehicles may, by nature, be more cost-aware than owners of new vehicles. The older the vehicle, the more likely it is to have been purchased second-hand.

²⁰ Vehicle repair and maintenance works can be described as "confidence goods", the quality of which can never be exactly assessed by the consumer, for whom the *intuitu personae*, in other words, the consumer's previous experience and confidence in the repairer, is a primordial factor in the consumer's choice. This key criterion when selecting competing repairers gives a natural advantage to manufacturers' authorised networks, because of the relationship formed at the time of the purchase or sale of the vehicle, and also because of the associated brand image. This characteristic of the repair and maintenance market suggests that the obstacles associated with availability of parts, access to technical information and wording of warranty and extended warranty contracts need to be considered carefully as they could harm the image of independent repairers and delay the moment at which the drivers are willing to use the independent channel on the basis of vehicle age.

²¹ At the other end of the market, luxury cars are usually serviced by authorised networks, and their owners are usually relatively impervious to price, prioritising quality and confidence in the repairer.

²² Source: GIPA 2011 Drivers' Study, pages 346 and 352. This study shows that 57% of drivers of vehicles aged two years or less believe that the warranty will be voided if they service their car outside of the manufacturer's network.

²³ Source: "*Panorama du marché de la réparation automobile*" [overview of the car repair market], Roland Berger, 2010.

B. PRESENTATION OF THE STAKEHOLDERS AND MARKET POSITIONS

22. The structure of the repair and maintenance sector is based on the fundamental distinction between the "*manufacturer channel*"²⁴, consisting of repairers authorised by vehicle manufacturers, and the "*independent channel*"²⁵, consisting of a variety of independent repairers, who may or may not belong to independent franchises²⁶.
23. These two channels have different economic models, which reflect in part the different economic models of the vehicle manufacturers and equipment suppliers upstream (see discussions in part II). The relative compartmentalisation between the two channels, despite an increasing tendency for more head-on competition, is illustrated by the average repair and maintenance prices in the independent channel, which are between 15% and 30% lower than in the manufacturer channel (see Table 2 below)²⁷. For standard services such as oil changes, routine servicing or tyre replacements, there are also significant price differences between the manufacturer and independent channels. Furthermore, price differences between the manufacturer channel and the independent channel are particularly marked for routine manufacturer services; this observation has been corroborated by a recent study conducted by the consumer association UFC Que Choisir²⁸.
24. Evidence of the relative compartmentalisation between the manufacturer channel and the independent channel can also be found by looking at market shares, which vary tremendously depending on whether the market is segmented according to type of service or vehicle age (see Graph 3 , page 27 below).

²⁴ The "manufacturer channel" consists of repairers who are members of manufacturers' networks. As a general rule, these fall into two functional categories: level 1 authorised repairers, who tend to be dealers who distribute spare parts and often also sell new vehicles, and level 2 authorised repairers, who only carry out repair and maintenance works and are not authorised by the manufacturer to distribute parts. Not all manufacturers have level 2 authorised repairers.

²⁵ The "*independent channel*" consists of a variety of operators. Independent repairers can carry out work on any make of vehicle, but may specialise in certain types of services. Different areas of specialisation can be found: collision repairs (independent body shops), tyres, windscreens and windows, servicing, diagnostics. Such specialisation is related to the economic model of the equipment suppliers, which can supply a multi-make range of spare parts dedicated to certain very specific vehicle functions, and also to the productivity gains that can be made through specialisation as compared to a more general activity.

²⁶ A detailed presentation of stakeholders can be found in paragraphs 29 to 33, and also in Box 2 in the public consultation document dated 11 April 2012.

²⁷ It may be the case, as the manufacturers observed in their contributions to the public consultation, that the content of services differs between the manufacturer channel and the independent channel, although they were unable to produce any clear evidence of this. However, whether or not the marked price differences between the two channels are due to different service content, they do illustrate a definite segmentation of the repair and maintenance sector. Furthermore, significant price differences have also been observed for relatively standard services. Lastly, the hourly rates are substantially higher in manufacturer networks (see §25).

²⁸ UFC Que Choisir study published in September 2012, entitled "*Réparation et entretien automobile: la concurrence en panne*" [vehicle repairs and maintenance: a breakdown in competition].

Table 2 – Average prices per type of operator and reason for garage entry

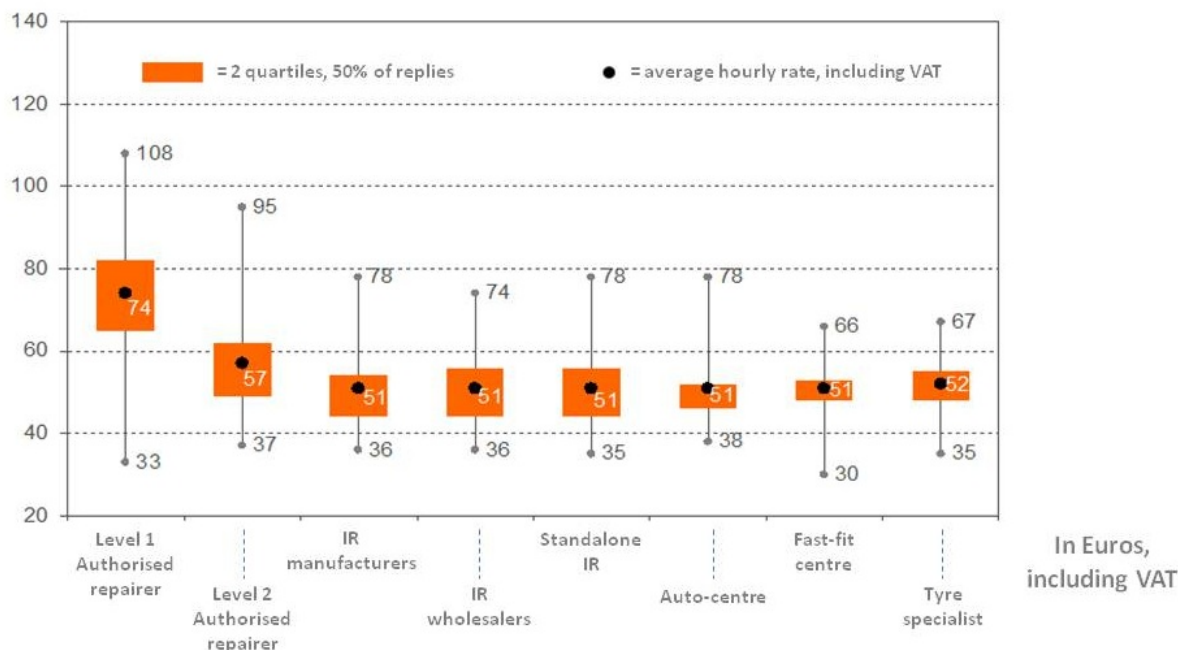
	Level 1 + level 2 authorised repairers	Independent repairer		Auto-centre		Fast-fit centre		Tyre specialist	
	€	€	vs. vehicle manufacturer in %	€	vs. vehicle manufacturer in %	€	vs. vehicle manufacturer in %	€	vs. vehicle manufacturer in %
Routine manufacturer service	320	238	-26 %	243	-24 %	172	-46 %		
Seasonal service	275	274	0 %	199	-28 %				
Additional oil changes	188	153	-19 %	133	-29 %	139	-26 %	147	-22 %
Tyres	352	238	-32 %	278	-21 %	325	-8 %	253	-28 %
Specific problems	394	357	-9 %	291	-26 %	270	-31 %		
Breakdown	350	367	5 %	159	-55 %				
Average garage entry cost	320	269	-16 %	228	-29 %	224	-30 %	268	-16 %

Source : GIPA 2011 Drivers' Study 2011, page 270

25. Differences in the hourly labour rates charged by authorised repairers and independent repairers are also significant²⁹. The law requires garages to display their hourly rates, which will vary depending on the technical complexity of the work: T1 corresponds to the simplest work and T3 corresponds to the most technically complex work. Graph 1 below compares T1 rates (minimum, average, maximum, spread between the first and third quartile) par type of repairer.

Graph 1 – Comparison of T1 rates according to type of repairer

²⁹ The aforementioned September 2012 UFC Que Choisir study also reported significant differences in hourly rates between the manufacturer channel and the independent channel for T1, T2, and T3 repair and maintenance works.



Source : GIPA – 2011 Repairers Study, page 93

26. In its Guidelines on the application of Regulation 461/2010, the European Commission observes that "insofar as a market exists for repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific"³⁰. Accordingly, authorised repairers for a given make of vehicle tend not to be in competition with authorised repairers for another make of vehicle. The only source of competition comes from the independent channel and, to a lesser degree and more rarely, from authorised repairers in the same manufacturer network, when they are located in the same catchment area and do not belong to the same group of dealers³¹.
27. Most studies tend to limit themselves to a presentation of market shares for each main category of operator at a national level, without distinguishing between service segments (1). However, the Autorité has been able to identify operators' positions according to vehicle age and certain service segments (2).

³⁰ Source: paragraph 57 of the Guidelines. See description of the regulatory framework in section 2, part I.

³¹ In order to establish the level of competitive constraint between the different types of operator, any analysis must factor in both vehicle age and type of service, as the segments defined on the basis of these two criteria are more or less substitutable from the point of view of offer and demand. Lastly, a description of the position of operators nationally does not reflect differences in competitive constraint in local markets, as this may vary according to catchment areas. However, due to the fragmented nature of the repair offer and the large number of repairers, who also often offer several different types of services, information with this level of detail is difficult to obtain.

1. GLOBAL PRESENTATION OF MARKET POSITIONS

28. In 2010, the vehicle manufacturers' networks held 45% of market shares in terms of volume³² and 53% in terms of value for the entire repair and maintenance sector (excluding "DIY"). They are in competition with a fragmented offer from independent operators, who are also in competition with each other. Vehicle manufacturers' networks of authorised repairers therefore occupy an important position on the vehicle repair and maintenance sector for their specific brand, as they hold an average market share in terms of value in excess of 50% and compete with operators that are much smaller³³. Table 3 below contains a breakdown of market shares for the main categories of operators defined above.

³² Number of vehicle entries.

³³ Although these market share figures were submitted by the manufacturers themselves, they disputed them in their contributions to the public consultation. They put forward the 2012 GIPA Drivers' Study, according to which the manufacturers' networks hold a market share of 37% in terms of volume and 45% in terms of value. However, these figures were not retained for the purpose of the public consultation document, as the market share in terms of volume is not consistent with the market shares suggested in most other studies submitted by the manufacturers during the inquiry (Boston Consulting Group study: 48% in terms of value, TCG Conseil studies: figures as per the table, CAP studies: 47% in terms of volume, and are based on a survey of 3,897 drivers only, while the other studies are based on data that is more comprehensive and more reliable (source: Datamonitor). Although the findings of the GIPA survey are instructive concerning drivers' choices and the characteristics of the market (which is why they are frequently quoted in this Opinion) and useful in mapping trends, they cannot be used as a reliable basis for a rigorous analysis of market shares. Moreover, in this sector, market shares in terms of value are more useful than market shares in terms of volume when assessing the respective positions of the various operators and their weight in the most profitable segments.

Furthermore, the fact that TCG Conseil's market share figures do not include the bodywork segment does not affect the relevance of these figures. Figures produced by insurers in the course of the inquiry and the estimates in the BCG Study and the CAP Study all confirm that repairers authorised by vehicle manufacturers have a market share in terms of value in the bodywork segment of between 52% and 55%.

Table 3 – Global market shares per type of operator in 2010 and number of garage entries³⁴

	In terms of volume (no. of garage entries)	In terms of value (turnover)	No. of garage entries
Manufacturer channel	45 %	53 %	15,205
Dealers	27 %	34 %	4,575
Authorised agents	18 %	19 %	10,630
Independent channel	55 %		18,880³⁵
Standalone independent repairer	10 %	47 %	6,700
Franchised independent repairer	14 %		7,900
Auto-centres and fast-fit centres	17 %		2,080
Other independent operators	14 %		Tyre specialists: 2,200

Source: TCG Conseil

29. In Germany, authorised networks hold an even greater market share than in France, i.e., 58% in terms of volume in 2010. The situation in the Netherlands is comparable to that in France, with authorised repairers holding 42% of the market share. However, authorised repairers only represent 29% of the market in the UK and 32% in Italy³⁶.
30. Moreover, although foreign vehicle manufacturers in France have authorised repairer networks that are much less dense than those of the French vehicle manufacturers³⁷, their market shares for the repair and maintenance of their vehicles is relatively high³⁸. Toyota holds approximately [55; 65]% of the market shares in terms of volume and Volkswagen holds [45; 55]%. This can be compared with the [40; 50]% of the market held by French vehicle manufacturers on the basis of the same sample. Ford, Opel and Fiat hold the lowest market shares: [30; 40]%.

³⁴ Market shares in terms of value per different type of independent operator are not available. The DIY segment is not included. In addition, body shops are not listed separately, and are included in the "standalone independent repairer" and "franchised independent repairer" categories.

³⁵ Within the independent channel, auto-centres and fast-fit centres are much more significant in terms of volume of vehicle entries than in terms of the number of centres. Furthermore, the three main manufacturer "soft-franchises" - Motrio, Motocraft and Eurorepar - represent approximately 7% of the 34,085 repair and maintenance garages. Source: manufacturers. This corresponds to approximately 2,500 garages/centres in 2010.

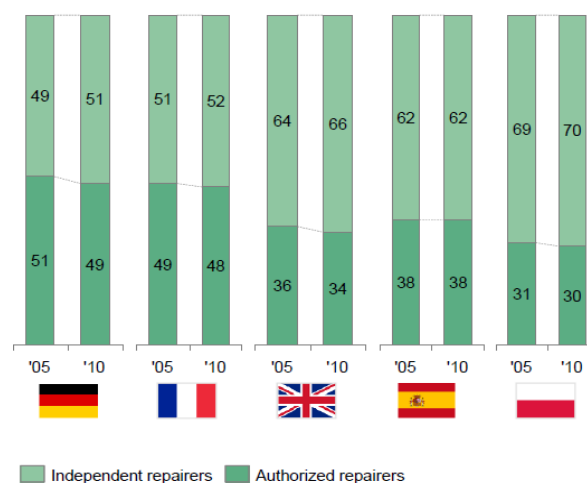
³⁶ Source: TCG Conseil. Compared to Germany, Italy and the UK, standalone independent repairers occupy a fairly small position within the independent channel in France, whereas this type of repairer is very common and represents a very large market share in Italy (source: ICDP report of September 2007, "[Evolution of the independent repairer sector](#)", page 18). At the same time, franchised independent repairers hold a larger market share in France than in the other three countries. France and, to a lesser extent, the UK also have a larger number of auto-centres and fast-fit chains. It is clear that the independent channel in France is more structured than in other European countries.

³⁷ According to the report, Renault has 20 times more authorised repairers than Toyota.

³⁸ Source: 2010 CAP study (Car After-Sales Performance). Vehicles aged less than 10 years represent 70% of repair and maintenance turnover in terms of value.

31. The market shares of most authorised networks have decreased slightly since the middle of the last decade, and the same trend has been noted in other European countries, as shown in Graph 2 below³⁹. This is essentially due to the general ageing of vehicles, which is beneficial to the independent channel as it has a stronger market share for older vehicles. Another reason for this trend is the rise in the market shares held by independent repairers for each vehicle age and in particular for vehicles aged 3-4 years, where competition between the manufacturer channel and the independent channel seems to have increased⁴⁰.
32. Graph 2 below shows that market shares of authorised repairers in France in terms of value fell from 49% to 48% between 2005 and 2010⁴¹. They fell from 51% to 49% in Germany, and from 36% to 34% in the United Kingdom. Market shares remained unchanged in Spain (38%)⁴².

Graph 2 – Market shares in terms of value held by independent repairers and authorised repairers in 2005 and 2010



Source : BCG (Datamonitor, interviews of specialists and analyses conducted by BCG)

³⁹ The differences in market share data compared to figures mentioned in paragraph 29 may be due to different category definitions and margins of error in this sector, where the repair offer is very fragmented.

⁴⁰ Source: 2010 CAP study (Car After-Sales Performance). This data suggests a drop in the retention rate, in other words, the percentage of customers for whom a routine service is scheduled in the year and who use the services of an authorised network. This rate does not exactly match the market shares of the manufacturer network, as it does not take into account all types of work (repairs in particular), but it does serve as an indicator for the routine service segment.

⁴¹ In their contributions to the public consultation the manufacturers also disputed these figures, despite having submitted the underlying study themselves. In terms of the level of market share, the manufacturers put forward the findings of the 2012 GIPA Drivers' Study (page 65), which suggest that market shares in terms of volume held by authorised networks fell by eight points between 2007 and 2011. The manufacturers have also criticised the fact that the BCG data is expressed in terms of value, rather than volume. Although it is true that the public consultation document dated 11 April incorrectly referred to market shares expressed in terms of volume, the fact that the figures are actually expressed in terms of value does not detract in any way from the interpretation made. On the contrary, it is more appropriate to base a diagnosis of competition in this market on turnover rather than on the number of vehicle entries, particularly as there are very wide variations in average prices per vehicle entry.

⁴² Average vehicle age rose from 8 years in 2005 to 8.2 years in 2010 (source: CCFA).

2. POSITION OF PLAYERS IN THE VARIOUS MARKET SEGMENTS

33. In view of the fragmented nature of the repair market, the large number of repairers and the fact that they propose several different types of services without differentiating between them in their accounting records in most cases, it is difficult to accurately estimate the position of operators in the different service segments presented in part A.1. However, it is possible to estimate the market shares of the vehicle manufacturers' authorised networks in the following three service segments⁴³:
- collision repairs: estimated market share of approximately 55%⁴⁴;
 - window and windscreen damages: estimated 20% market share⁴⁵;
 - tyres: estimated 20% market share⁴⁶.
34. These estimates show significant disparities between positions in the manufacturer channel according to service segments, confirming that the sector is compartmentalised and head-on competition between the various types of operators is limited. This observation is supported by the respective market shares of the dealers, authorised agents and independent operators according to vehicle age (Graph 3 below).
35. This graph very clearly shows the market segmentation according to vehicle age. While the manufacturer channel holds an 83% market share for vehicles aged under 2 years⁴⁷, 70% of which is held by dealers, it only holds a 28% share in the repair and maintenance market for vehicles aged 10 years or more. The 5-6 year segment (approximately 20% of the market) is the one on which market shares are the most balanced⁴⁸.

⁴³ The 2011 CAP study estimates that in France in 2010 the authorised networks had a 54% market share in the "maintenance/routine" segment, a 41% share in the "wear and tear" repairs segment, a 61% share in the breakdown segment, a 35% share in the tyre segment and a 52% share in the bodywork segment.

⁴⁴ Estimated by the Autorité de la concurrence on the basis of data received from insurers. Market share in terms of value.

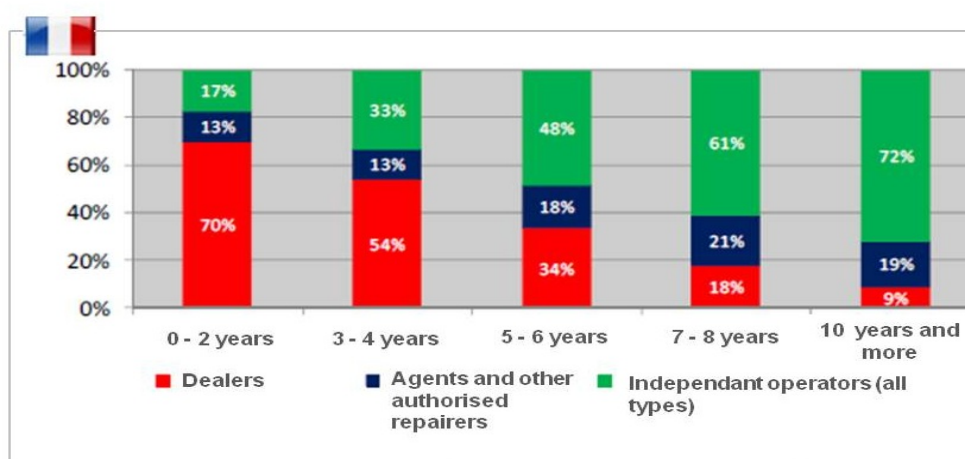
⁴⁵ Source: TCG Conseil. Market share in terms of volume.

⁴⁶ Sources: BCG and Roland Berger. Market share in terms of volume.

⁴⁷ This represents slightly more than 10% of all repair and maintenance works for all vehicles in terms of value (source: Roland Berger).

⁴⁸ In their contributions the manufacturers once again contested this, citing the findings of the GIPA 2012 drivers' study, which suggest that independent repairers hold a majority market share (52%) for vehicles aged 3-4 years. However, the GIPA data, which is based on a survey of 3,897 drivers, would appear to be less reliable than the data compiled by TCG Conseil (also submitted by the manufacturers). The December 2010 CAP report estimated the market share held by authorised networks at 63% for the 3-4 year old vehicle segment.

Graph 3 – Market shares in terms of volume per vehicle age in 2010



Source : TCG Conseil – “Do-It-Yourself” excluded

C. CHANGING DEMAND – PRICE TRENDS

1. FALLING DEMAND

36. After peaking in 2000, the number of repairs and maintenance services carried out declined steadily, falling by 15% between 2000 and 2010. This is true for all segments, with the exception of windscreen and window damages⁴⁹.
37. The decline can be explained by several factors: the fall in average mileage⁵⁰, increased vehicle reliability, extension of the "pace of maintenance works", in other words, the recommended time period or mileage between two vehicle services, the fall in insurance claims (with the exception of windscreen and window damages), which is in turn due to lower average traffic speed and lower average mileage, the effectiveness of the road safety policy and greater vehicle reliability. As a result, the rise in the total number of vehicles – although this is now slowing down – and the ageing of vehicles⁵¹ are not sufficient to compensate for the other factors that cause demand to fall.
38. In their contributions, the vehicle manufacturers stated that a vehicle's repair and maintenance costs over the first seven years of its life fell by 17% between 2002 and 2010,

⁴⁹ The number of "windscreen and window breakages" fell until 2007, in which year the trend was reversed, due to bad weather conditions and communication efforts by specialist windscreen chains.

⁵⁰ The main reasons for this are the development of public transfer networks, increased fuel prices, increased tolls and the increase in multi-vehicle households.

⁵¹ Average vehicle age increased steadily in France between 1990 and 2008, rising from 5.7 years to 8.2 years. A slight downturn was observed from 2008 due to the introduction of incentives to purchase greener vehicles and to trade in old vehicles for new (the "prime à la casse" campaign).

and by 28% between 1991 and 2010. In turn, repair and maintenance turnover per vehicle⁵² also fell by 17% in real terms between 2000 and 2010.

2. PRICE INCREASES

39. At the same time, repair and maintenance costs increased significantly in France, meaning that the market increased in nominal terms (no adjustment for inflation) and only decreased slightly in real terms (adjustment for inflation), falling from €33.1 billion in 2000 (in 2010 euro value) to €31.2 billion in 2010. The average price charged per garage entry rose from €456 in 2000 (in 2010 euro value) to €506 in 2010, which is a 10% increase after adjustment for inflation.
40. The increase in repair and maintenance prices, which takes account of changes to the content of services⁵³, is all the more pronounced given the increase in the average cost per service, as shown in the Insee indexes replicated in Graph 4 below (indexes adjusted for inflation, 2000 = 100 base). The repair and maintenance index (real prices) rose by 28% between 2000 and 2011⁵⁴. Over the same period, maintenance rose by 17% and repair by 36%⁵⁵. Although the repair index rose steadily over the period, the maintenance index rose sharply from 2006, levelling off in 2009.

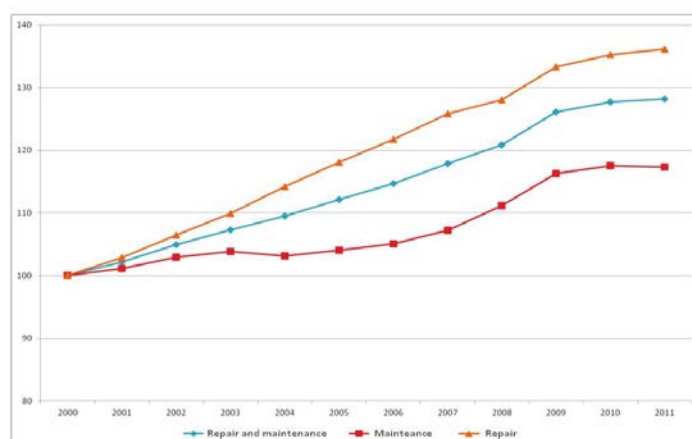
⁵² Repair and maintenance turnover (source: CCG) compared to the number of individual and light commercial vehicles in France.

⁵³ In their contributions, manufacturers suggested an increase in the number of tasks carried out per vehicle entry due to extended maintenance periods between 2008 and 2011. However, the data on which these figures are based does not correspond to the number of tasks per entry. When two manufacturers were questioned orally at a hearing they expressed contrasting opinions.

⁵⁴ Moreover, repair and maintenance price indexes have risen constantly since 1990, whereas the repair index experienced a sharp upturn from 2000, unlike the maintenance index.

⁵⁵ These three indexes increased by 55%, 42% and 65% respectively in nominal terms (no adjustment for inflation).

Graph 4 – Changes in real price indexes for repairs and maintenance, combined for individual vehicles



Source : Insee (consumer price indexes adjusted for inflation, 2000 = 100 base; Mainland France and overseas départements)

41. According to the vehicle manufacturers, these changes can be explained by the increase in labour costs and, to a lesser extent, the increase in the price of spare parts (the increase in spare parts prices did not match the increase in repair and maintenance prices). Insee observed a sharp increase in hourly labour costs for repairs (44% in real terms between 2000 and 2011), due in part to technological developments that require more highly qualified labour and additional technical and training investments. Although vehicle manufacturers have spoken of a shortage of specialist labour in the sector, it would seem, on the contrary, that there are 2 to 3 times fewer vacant positions than there are newly qualified mechanics every year⁵⁶. Accordingly, although it is true that the rise in labour rates seems to have weighed more heavily than the rise in spare parts prices on the overall increase of repair and maintenance prices, the factors contributing to the increase in labour rates do not seem to be exogenous to the competition situation in the sector.

⁵⁶ Source: Autofocus, "*Approche prospective des besoins de recrutement dans le commerce et la réparation automobile à l'horizon 2015*" [A forward-looking approach to recruitment needs in the motor vehicle trade and repair sector from 2015], *La lettre de l'observatoire l'ANFA*. This document notes, in particular, that the actual annual recruitment needs for specialist labour in the motor vehicle trade and repair sector range from 5,500 to 8,000, whereas 17,000 young people complete relevant training courses every year (in schools and apprentice training centres). It concludes that "*the main reason for the low level of integration in the sector is linked more to structural weaknesses and the number of available positions, rather than the desire of young people to leave the trade or sector*". Two contributions to the public consultation stated that the specialist labour shortage was felt more keenly with regard to specialist employees with several years' experience, and that between 30% and 40% of young people completing repair and maintenance courses leave the sector every year. This does not in itself prove the existence of a shortage. As suggested by ANFA, the reason why this young and specialised potential workforce leaves the sector may be a lack of available positions. If this were not the case, there would be a large number of available positions for recently qualified young people.

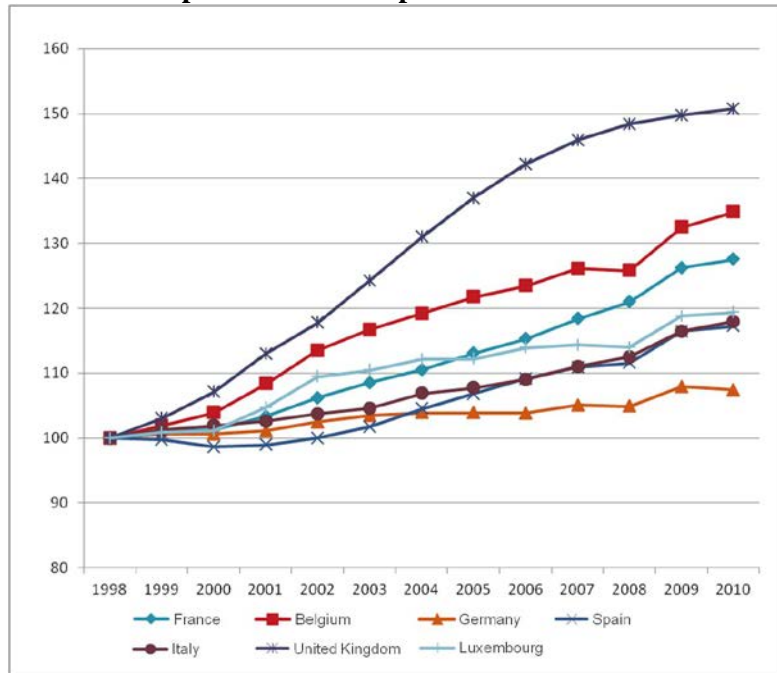
42. The possibility has been suggested⁵⁷ that, in response to a declining aftermarket and a stagnant and highly competitive vehicle sale market, the segments that are protected from competition increase their prices in order to compensate for the fall in turnover and profits recorded by dealers and repairers⁵⁸. The fact that the repair index has risen twice as fast as the maintenance index can be seen as symptomatic of the fact that the better a segment is protected from competition the more likely it is to experience price increases. Generally speaking, the repair segment is less competitive than the maintenance segment.
43. Furthermore, although the technological developments cited by the manufacturers affect all countries⁵⁹, France is one of the countries that have recorded the greatest increases in the repair and maintenance price indexes. Only six of the 27 countries in the European Union have experienced higher price increases: the UK, Portugal, Sweden, Belgium, Ireland and Finland. Graph 5 below compares price trends in France and neighbouring countries. Prices have risen sharply in the UK, which can perhaps be explained in part by the impact of exchange rates. France ranks just behind Belgium in terms of repair and maintenance price increases, with prices increasing four times faster than in Germany over the period from 1998 to 2010. Contrary to the vehicle manufacturers' claims that some countries include parts fitted by garages in the repair and maintenance index, whereas other countries do not, in actual fact, all EU countries include parts fitted by garages in this price index. The Autorité de la concurrence has received confirmation of this directly from Insee. Therefore, the comparative changes in the repair and maintenance indexes presented below have a bearing on the matter.

⁵⁷ This explanation has been put forward in a large number of articles in the specialist motor vehicle press. It has also been suggested by many of the operators questioned within the framework of this inquiry. Lastly, a report issued in February 2010 by Xerfi entitled "Entretien, réparation et distribution d'équipements automobiles" [motor vehicle equipment maintenance, repair and distribution] (page 8) also observed that "*professionals, and especially manufacturers and their distribution networks, will once again opt for significant price increases in order to offset the fall in volumes*".

⁵⁸ Accordingly, although vehicle prices have fallen constantly, repair and maintenance prices have increased significantly. Within the repair and maintenance sector, the repair segment has experienced much higher price increases than the maintenance sector, which is more competitive.

⁵⁹ The differences in changes to labour costs can also be explained in part by these changes. One contributor stated that average labour costs rose by 39.2% in France and by only 19.4% in Germany over the past 10 years. Note, however, that these figures concern average labour costs for all sectors.

Graph 5 – Changes in real price indexes for private vehicle repair and maintenance in France



and neighbouring countries

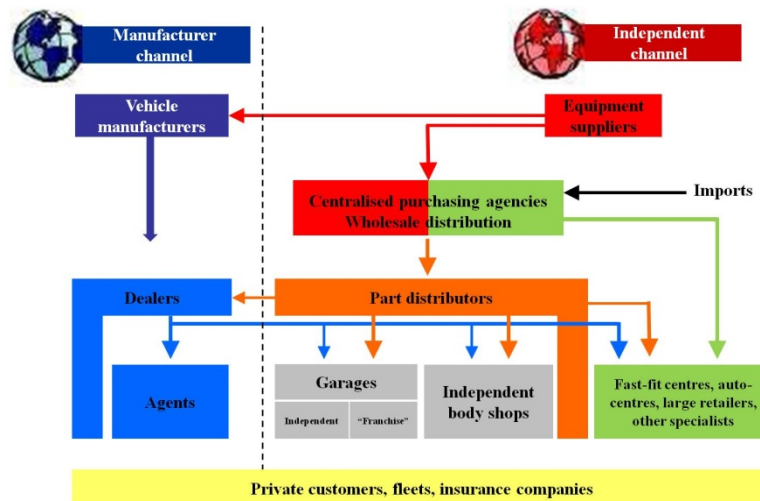
Source : Eurostat (consumer price indexes adjusted for inflation, 1998= 100 base)

II. Presentation of the spare parts manufacturing and distribution sector

44. The sale of spare parts in the retail market represented €13.9 billion, excluding VAT, in 2010⁶⁰, i.e. almost 45% of the total turnover generated by the repair and maintenance sector. Motor vehicles contain a very large number of spare parts (approximately 10,000 per vehicle) and there are approximately 200,000 part references in a manufacturer's catalogue for each make of vehicle.
45. Although the repair and maintenance sector brings together an offer by repairers and demand from private individuals, insurers and vehicle fleets, and is therefore situated downstream in the chain, an analysis of the spare parts distribution sector needs to look at the value chain as a whole, from the manufacture of the spare parts to their sale to the end consumer, usually as part of repair or maintenance works. Given that it is the repairers who generally select the spare parts, such parts tend to serve as an input for repair and maintenance activities rather than as the end product sold to and selected by consumers. Demand for spare parts therefore originates essentially from repairers, as described in the previous section.
46. The following diagram depicts the general structure of the spare parts manufacturing and distribution sector. The sector is organised around two relatively compartmentalised channels; in the first, the suppliers are the manufacturers, who only sell their parts to their authorised network ("manufacturer channel"), in the second, the suppliers are the equipment suppliers, who can sell manufactured parts to the vehicle manufacturers and also to independent distributors and, to a lesser degree, to the vehicle manufacturers' authorised networks. Independent distributors sell the parts on to the authorised networks and, first and foremost, to independent repairers ("independent channel"). The independent repairers can also obtain spare parts from the authorised repairers.

⁶⁰ Source: FEDA.

Diagram 1 – Organisation of the spare part distribution chain



Source : TCG Conseil

47. Competition in the spare parts manufacturing and distribution sector depends on the number of suppliers upstream who are capable of offering the parts (A), the ability of the various operators to place the upstream suppliers in competition with each other ("interbrand" competition – B), and the ability of the repairers to put parts distributors in competition with each other ("intra-brand" competition – C). Observed changes in prices and margins (D) can also be used to assess the degree of competition within the sector. Lastly, the differences between part prices and profit margins observed in the overseas *départements* and mainland France provide an indication of the degree to which competition is lacking in the overseas *départements* as compared to mainland France (E).

A. THE SPARE PARTS OFFER: VEHICLE MANUFACTURERS AND EQUIPMENT SUPPLIERS

48. There are three types of possible suppliers of spare parts upstream, who may be in competition with each other⁶¹: vehicle manufacturers, original equipment suppliers and secondary equipment suppliers. However, the number and type of suppliers present in a specific market will depend on the type of parts.

⁶¹ "Interbrand competition" does not mean competition between parts for vehicles produced by different manufacturers, as parts are usually designed solely for a specific make of vehicle. Accordingly, with the exception of interchangeable parts such as tyres or lubricants, competition between manufacturers for spare parts for their vehicles is impossible. Interbrand competition is therefore competition between suppliers of parts upstream and, more specifically, between the manufacturer channel and the independent channel, as defined in the previous section presenting the repair and maintenance sector.

1. THE DIFFERENT TYPES OF SUPPLIER

a) Vehicle manufacturers

49. Vehicle manufacturers only produce approximately 20% in terms of value of the spare parts they assemble. These are essentially sheet metal body parts and engines. They purchase the remaining 80% from equipment suppliers⁶² before assembling them to produce new vehicles. Likewise, vehicle manufacturers only produce a small number of the spare parts they sell. They purchase most of them from equipment suppliers, usually "original equipment suppliers" ("OES"), who manufacture parts for new cars⁶³. All spare parts distributed by vehicle manufacturers display the manufacturer's logo, irrespective of whether they were manufactured by the vehicle manufacturer itself or purchased from an equipment supplier. These parts are often referred to as "OEM parts"⁶⁴ or "manufacturer-branded parts".
50. It is generally in the vehicle manufacturers' interest to negotiate the terms and conditions of supply of spare parts with the equipment suppliers at the original assembly stage, when competition between equipment suppliers is intense⁶⁵. Moreover, the spare parts are often manufactured at the same time as the original assembly parts. The spare parts may be needed during the production cycle or the model's "series production". Vehicle manufacturers can also hold parts manufactured during series production in stock. Due to this twofold negotiation for original parts and spare parts, vehicle manufacturers can obtain much lower prices than those proposed by the equipment suppliers in the independent channel, as observed in the 2006 Autopolis study⁶⁶. Spare parts represent approximately 10% of vehicle manufacturers' turnover and 30% of their profit margins⁶⁷.

⁶² Due to the quantity of parts needed to assemble a new vehicle, there exists a large number of equipment suppliers of very varying sizes. As stated by the European Commission in cases involving the vehicle spare parts sector, the original assembly and OEM spare parts markets are European, and indeed global, markets, whereas the Independent Aftermarkets are national markets (see, for example, Valeo/Labinal (COMP/M.2036 of 4 August 2000) and Johnson Controls/Robert Bosch/Delphi Sli (COMP/M.3789 of 26 June 2005). The ten largest international equipment suppliers, which include Bosch, Delphi, Denso, Veleo and Faurecia, all report annual turnover in excess of €10 billion.

⁶³ Vehicle manufacturers sometimes use different equipment suppliers for the production of spare parts and original assembly parts.

⁶⁴ Original Equipment Manufacturer.

⁶⁵ Competition between equipment suppliers for original assembly contracts is often fierce as such contracts represent 80% of their turnover on average and can place them at an advantage for the spare parts contracts.

⁶⁶ The Autopolis study of September 2006, carried out by the certifying body Thatcham on the consequences for the security of consumers and third parties of the proposal to amend Directive 98/71/EC on legal protection of designs and models, observes that "the factory margin is very low for original assembly parts, moderate for OEM spare parts and high for independent spare parts". This is supported by figures submitted by equipment suppliers in the course of the inquiry.

⁶⁷ Sources: replies received from manufacturers in the course of the inquiry and AUTO-INFOS no. 1282, December 2009.

b) Original equipment suppliers

51. Equipment suppliers who produce parts to be fitted to new vehicles can also sell spare parts to the vehicle manufacturers to be sold on, and can directly supply wholesalers in the independent channel (often referred to as the "IAM" or Independent Aftermarket"), who sell them on to repairers, most of whom are independent. European Commission Regulation 461/2010 requires manufacturers not to prohibit co-branding of parts intended for new vehicles (see description of the regulatory framework in section 2, part I). OEM parts manufactured by an equipment supplier therefore usually display the logos of the vehicle manufacturer and the OES. Spare parts sold by equipment suppliers usually display only the equipment supplier's logo, so that downstream operators know that the part is "original"⁶⁸. Parts manufactured and sold by original equipment suppliers are also known as "OES parts"⁶⁹.
52. In most cases, an original equipment supplier's turnover from spare parts can be broken down into one-third from the manufacturer channel and two-thirds from the independent channel⁷⁰. Although spare parts only represent 20% of original equipment suppliers' turnover, they represent 50% of their profit margins⁷¹. Despite the fact that the sale of spare parts to independent distributors is often very profitable, some very large equipment suppliers decided not to supply spare parts to the IAM (see discussions on the unavailability of parts in the Independent Aftermarket, in section 2, part II).

c) Secondary equipment suppliers

53. Lastly, the so-called "secondary" equipment suppliers only manufacture parts to be used as spare parts and only supply wholesalers in the Independent Aftermarket (who may then sell the parts on to repairers in the vehicle manufacturers' approved networks). A secondary equipment supplier for a specific part may also be the original equipment supplier of another part. Although the original equipment suppliers already have the tooling necessary to produce spare parts, the secondary equipment suppliers need to first manufacture the tooling. The importance of this entry barrier varies from part to part; the manufacture of a specific spare part will only be profitable for a secondary equipment supplier above a certain volume of demand.
54. Reputation is another barrier. Potential customers downstream know that parts bearing the original equipment supplier's logo are identical to the original parts fitted on the vehicle.

⁶⁸ In its Guidelines on the application of Regulation 461/2010 (§19), the European Commission defines "original parts" as follows: "*original parts or equipment*' means parts or equipment which are manufactured according to the specifications and production standards provided by the motor vehicle manufacturer for the production of parts or equipment for the assembly of the motor vehicle in question. This includes parts or equipment which are manufactured on the same production line as those parts or equipment." This definition therefore goes well beyond the concept of parts manufactured by original equipment suppliers.

⁶⁹ Original Equipment Supplier.

⁷⁰ Source: London Economics report for the European Commission's Directorates General for Competition, June 2006, page 255.

⁷¹ Source: *ibid*, page 200.

This is not the case for parts manufactured by secondary equipment suppliers. This is why the European Commission introduced the concept of "matching quality" parts, in other words, parts that "*must be of a sufficiently high quality that their use does not endanger the reputation of the authorised network in question*". It is the equipment supplier who determines whether a part it manufactures is of "matching quality" or not, although the European Commission provides that "*as with any other selection standard, the motor vehicle manufacturer may bring evidence that a given spare part does not meet this requirement*"⁷².

55. Three other types of parts may also be used by repairers, although their use remains fairly limited: so-called "adaptable" parts, the quality of which does not match (and may be superior to⁷³) the quality of the original parts, but which satisfy the "assembly feasibility" criteria for the vehicle; "reconditioned" parts, also referred to as "like-for-like replacement parts", which have been reconditioned by changing certain components or worn parts⁷⁴; and parts known as "second-hand" parts, which were previously fitted on one vehicle and are used for another vehicle, after reconditioning, if necessary.
56. According to the independent distribution franchises questioned, matching quality parts account for between 10% and 40% of their catalogue references. However, they admit that these figures are very approximate and difficult to calculate. A survey of 300 repairers conducted by ICDP in March 2012 suggests that 80% of the parts used by repairers are original parts and 5% are second-hand parts⁷⁵.

2. THE NUMBER OF SUPPLIERS DEPENDS ON THE TYPE OF PART

57. The number of suppliers varies depending on the part. Possible situations include a manufacturer's monopoly, a duopoly between the vehicle manufacturer and the original equipment supplier, an oligopoly between the vehicle manufacturer and several original equipment suppliers (if the vehicle manufacturer uses several original equipment suppliers), or an oligopoly between the manufacturer, one or more original equipment suppliers and one or more secondary equipment suppliers (this may be the case for interchangeable parts that can be used on vehicles produced by different manufacturers⁷⁶).

⁷² Paragraph 20 of the Guidelines on the application of Regulation 461/2010.

⁷³ Essentially used for tuning.

⁷⁴ Reconditioned parts can include: alternators /starter motors, compressors, clutches, engines, etc.

⁷⁵ With regard to the other two categories of parts, the survey does not differentiate between matching quality parts and adaptable parts, as it does not use the definition given in the European regulations. The survey found that 12% of the remaining 15% of parts correspond to "*parts that do not necessarily comply with the manufacturer's specifications*" (which the survey refers to as "*adaptable parts*"), whereas 3% correspond to "*low price parts*", which the survey defines as parts for which "*price is more important than quality*".

See the article (in French) at: <http://www.apres-vente-auto.com/actualite/4480-exclusif-etude-icdp-la-piece-dorigine-resiste-bien>.

⁷⁶ Such as tyres, most lubricants and batteries.

58. However, this last situation is rare. Spare parts usually tend to be specific to a make and also to a particular model, or even to a particular production series, despite certain vehicle manufacturers' efforts to standardise, or '*commonalise*'⁷⁷.
59. The number of suppliers capable of supplying a specific part will depend on the volume of demand for spare parts. Potential demand depends on the type of part (some are changed frequently, others very rarely) and the number of vehicles on which the part is fitted. Accordingly, given that parts are often specific to a particular model, the multiplication of models since the start of the century has greatly inflated the number of referenced parts⁷⁸. This has led to a reduction in the size of the markets for spare parts corresponding to each part reference. Secondary equipment suppliers may therefore have less incentive to manufacture parts, resulting in a reduction in the number of downstream suppliers. However, the extent of this phenomenon is difficult to ascertain because of the very large number of parts referenced and the number of possible configurations for each part reference.
60. The number of suppliers of a spare part will not only depend on market opportunities and the volume of demand. Regulatory and contractual provisions may also reduce the number of suppliers for certain types of parts.
61. In France, manufacturers hold a legal monopoly over visible spare parts, which they protect by design rights and copyright, even if they have been manufactured by equipment suppliers (see section 2, part II). In some cases, the vehicle manufacturer will authorise an original equipment supplier to distribute the visible parts it manufactures in the independent channel. These so-called "semi-captive" parts are essentially windscreens, windows and lights. This means no matching quality parts can be distributed in France as a substitute for visible parts protected by design rights.
62. Vehicle manufacturers also have a *de facto* monopoly over certain parts which cannot be reprogrammed for security reasons in order to prevent theft, such as on-board computers.
63. Lastly, the manufacture of parts by equipment suppliers under subcontracts⁷⁹ may also lead to a reduction in the number of suppliers. The vehicle manufacturer, as the owner of the tooling, can prohibit an equipment supplier from using the tooling to produce spare parts for the independent channel. Under this type of contract, which is often referred to as "a tooling arrangement", the vehicle manufacturer may authorise the equipment supplier to

⁷⁷ In other words, to use common spare parts for several different makes of vehicle.

⁷⁸ The number of part references increased by 10% every year during the noughties (source: TCG Conseil).

⁷⁹ Under which "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 directly in the aftermarket". See Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the treaty introducing the European Economic Community (OJ C 1 of 3.1.1979, page 2), and the European Commission's Guidelines on vertical restraints in agreement for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (§23). The European Commission states that so-called "tooling arrangements" between suppliers of components and vehicle manufacturers constitute a possible indirect restriction corresponding to a hard-core restriction as defined in Article 5 b) of Regulation 461/2010.

sell parts in exchange for the payment of royalties. It is very difficult to estimate the proportion of spare part references concerned by such tooling contracts. However, section 2, part III, which contains a detailed analysis of the reasons for the unavailability of parts in the independent channel, demonstrates that the existence of such contracts may result in the unavailability of spare parts in the independent channel.

B. THE INTENSITY OF "INTERBRAND" COMPETITION BETWEEN MANUFACTURERS OF THE SAME SPARE PART

64. There are two main distribution channels for spare parts: the "manufacturer channel" and the "independent channel". As shown in Diagram 1 on page 33 above, the "manufacturer channel" and the "independent channel" remain quite separate at every stage of the value chain.
65. This means that although vehicle manufacturers and equipment suppliers hold relatively balanced market shares in France – approximately 55% and 45% of the market shares in terms of value, respectively⁸⁰ – competition is limited between the two types of supplier, as they do not supply the same demand. Reasons that may explain the low level of interaction between the manufacturer channel and the independent channel are set out below.

1. SUPPLYING AUTHORISED REPAIRERS FROM THE INDEPENDENT CHANNEL

66. Vehicle manufacturers directly supply their networks of authorised distributors, corresponding to the "level 1 authorised repairers"⁸¹ described in the previous section on the repair and maintenance sector. In France, such authorised distributors use vehicle manufacturers for more than 90-95% of their supply needs. Level 2 authorised repairers obtain 80% of their supplies from level 1 authorised repairers⁸². According to the European

⁸⁰ Source: European Commission Evaluation Report on the operation of Regulation 1400/2002 (Staff Working Document no. 2), although it is stated on page 34 that in France in 2006 manufacturers held 55% of the market share for spare parts, according to CNPA. If we disregard parts used for collision repairs (essentially visible parts), the manufacturers' market share falls to 45% (source: TCG Conseil). On the same basis, i.e., excluding parts used for collision repairs, the manufacturers' market share is much higher in Germany (56%) and much lower in the UK (40%), Spain (35%) and Italy (32%). These figures remain relatively constant over time. They increased in France by 0.5% between 2004 and 2007, with a similar increase in Germany, Spain and the United Kingdom (source: aforementioned ICDP report, page 23).

⁸¹ Usually dealers or, in some cases, branches.

⁸² Sources: London Economics report for the European Commission, page 204. In 2004, level 1 authorised repairers had a market share of 97% in France, 85% in Germany, 95% in Italy and 90% in the UK; in the same year, level 2 authorised repairers had a market share of 85% in Germany and 65% in Italy. The GIPA marketing sheets per family of parts confirmed that these figures remained relatively stable in France between 2004 and 2010. The GIPA marketing sheets for those families of parts that register very high sales (windscreen wipers, glow plugs, clutches, oil filters, shock absorbers, batteries, timing belts, air filters and brake pads), for which competition should theoretically be strong between vehicle manufacturers and equipment suppliers, show that level 2 authorised repairers obtained between 79% and 84% of these items from the manufacturer channel, with an average of 82%, and that level 1 authorised repairers obtained

Commission, parts purchased from the independent channel consist essentially of branded parts produced by competing vehicle manufacturers⁸³, as well as tyres and lubricants, which are not specific to a given make of vehicle.

67. However, European Regulation 1400/2002 provides that vehicle manufacturers cannot oblige dealers to obtain more than 30%⁸⁴ of their supply needs from them. The reason why, despite this provision, dealers purchase almost all their parts from vehicle manufacturers may be due to the different economic models of the vehicle manufacturers and the equipment suppliers⁸⁵. However, certain reports and surveys have suggested the following three explanations⁸⁶:

- discount and end-of-year rebate systems, as well as the segmentation of families of parts, might discourage authorised distributors from purchasing from other suppliers⁸⁷;
- the systems used to order parts, such as the DMS⁸⁸ system, are not fully compatible with other ordering systems;

between 85% and 95% of such items from manufacturers, with an average of 91%. The figures submitted by manufacturers, which could be used for comparative purposes, appear to be fairly approximate. When questioned at the hearing, the manufacturers stated that they were not aware of the supply rates for supplies obtained by level 2 authorised repairers from level 1 authorised repairers. Only one foreign manufacturer stated that it estimated this supply rate at between 50% and 60%. Furthermore, in their contributions the manufacturers cited a rate of 50% to 70%, based on an estimate by TCG, although neither the source nor the calculation method were supplied.

⁸³ Note that none of the competing brand parts needed to repair competitors' vehicles in the authorised network are supplied by the independent channel. A certain number of manufacturers have developed their own range of multi-make parts (Motrio for Renault, Eurorepar for PSA, etc.), which they sell directly through the authorised network of distributors. This range consists of parts purchased directly from equipment suppliers by the vehicle manufacturers.

⁸⁴ Regulation 1400/2002, Article 1.1.b. This hard-core restriction defined in Regulation 1400/2002 does not appear in Regulation 461/2010, but given that the relevant markets for the distribution of spare parts are defined at the level of the manufacturers' brands, they hold more than 30% of the market share and therefore are automatically excluded from the scope of the block exemption.

⁸⁵ A dealer needs access to the full range for a given make of vehicle, whereas independent distributors tend to offer multi-make ranges for a more limited number of part references. This means the manufacturer is naturally better placed than independent distributors to meet the needs of dealers.

⁸⁶ Source: aforementioned ICDP report, page 27.

⁸⁷ The European Commission covered this point in its Evaluation Report on the operation of Regulation 1400/2002 (page 9): "*whether such schemes [bonus and rebate schemes that may have a fidelity-enhancing effect] constitute a form of competition on the merits, or are so constructed as to unduly foreclose competing parts producers by enhancing the fidelity of authorised repairers is a question that can be answered only on a case-by-case basis, by taking into account the economic context surrounding such practices and by weighing any potentially anticompetitive effect against possible efficiency-enhancing effects*".

⁸⁸ Dealer Management System, which is used essentially for orders.

- the balance of power between the vehicle manufacturer and its dealers weighs heavily in favour of the manufacturer, which might dissuade the dealers from setting up alternative supply sources.

68. In its Evaluation Report on the operation of Regulation 1400/2002, the European Commission also observed that level 1 authorised repairers can obtain a certain volume of parts solely from vehicle manufacturers; namely, parts used to carry out repairs under warranty and captive parts, covered by intellectual property rights or subcontracts⁸⁹. This means that, as the European Commission pointed out in its Guidelines on the application of Regulation 461/2010⁹⁰, "*so-called "tooling arrangements" between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions*". Tooling arrangements are examined in greater detail in section 2, part III.
69. Lastly, the European Commission has observed that equipment suppliers, who have everything to gain by retaining good long-term relationships with vehicle manufacturers⁹¹, who award original assembly contracts, are reluctant to compete directly with vehicle manufacturers⁹².
70. Nevertheless, the two channels are not completely compartmentalised: competition does exist for certain families of parts for which demand is high (batteries, tyres, brake pads and timing belts, in particular). The vehicle manufacturers grant dealers much larger discounts for this type of part than for other parts, even though the dealers do ultimately obtain the majority of their supplies from the vehicle manufacturers.
71. Further downstream, the level 2 authorised repairers can obtain supplies from level 1 authorised repairers or independent distributors. The fact that level 2 authorised repairers obtain 80% of their supplies from level 1 authorised repairers may also be due to the discounts offered by level 1 authorised repairers and the separate economic models of vehicle manufacturers and equipment suppliers. In addition, repairers place great value on the ability to obtain all their supplies from one supplier (the "one-stop shop" concept), which allows them to make commercial and logistical savings. This is particularly important given that repairers receive several deliveries of spare parts every day. As with level 1 authorised repairers, the parts ordered by level 2 authorised repairers from the independent channel consist essentially of parts needed for the repair or maintenance of competitors' vehicles or non-specific parts such as tyres.

⁸⁹ Evaluation Report on the operation of Regulation 1400/2002 (pages 9 and 10).

⁹⁰ With regard to the hard-core restriction defined in Article 5 b) of the Regulation: "*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*".

⁹¹ The original assembly market represents in aggregate 80% of the equipment suppliers' business.

⁹² Speech by Neelie Kroes on 25 September 2006 at the conference organised by the CECRA (European Council for Motor Trades and Repairs): "*in practice, however, authorised repairers still obtain between 87% and 95% of their spare parts from vehicle manufacturers. On the supply side, little has changed either. Spare parts manufacturers have not greatly expanded their aftermarket operations, perhaps because they fear that this would jeopardise their long-term dealings with vehicle manufacturers*" (emphasis added).

2. SUPPLYING INDEPENDANT REPAIRERS FROM THE MANUFACTURER CHANNEL

72. Conversely, independent repairers obtain most of their supplies (70% on average) from independent distributors. This rate is as high as 95%⁹³ for repair chains (auto-centres and fast-fit centres). The remaining 30% that are obtained from the manufacturer channel consist essentially of parts that are not available in the independent channel: captive parts and, to a lesser degree, rare parts for which vehicle manufacturers hold a natural monopoly. There may also be knock-on effects, in that independent repairers may also order non-captive parts from level 1 authorised repairers at the same time as captive parts. This has been observed in particular in the case of independent body shops⁹⁴.
73. The fact that flows from the manufacturer channel to the independent channel are limited is also due to the vehicle manufacturers' economic model, which is not as well suited to the needs of independent repairers for multi-make parts as the equipment suppliers' economic model. As with level 2 repairers, independent repairers prefer to obtain all their supplies from one single distributor who is able to provide most of the parts they need.
74. Furthermore, it would be easier to place vehicle manufacturers and equipment suppliers in competition with each other in the absence of a selective distribution system that prevents competition at an intermediary level. The qualitative selective distribution system, which is prevalent in Europe in the manufacturer channel, tends to prohibit authorised distributors from selling parts for resale outside of the authorised network. In other words, dealers can only sell parts to level 2 authorised repairers or independent repairers, but not to independent distributors. As a result, only the independent repairers can place level 1 authorised repairers and independent distributors in competition with each other for the supply of spare parts. However, unlike independent distributors, for whom this is their principal activity, repairers prioritise uncomplicated deliveries and logistics over and above the price of parts, and have less negotiating power than distributors with the level 1 repairers because they tend to be highly fragmented and very small in size.
75. In its Guidelines on Regulation 461/2010, the European Commission acknowledges that qualitative selective distribution, which is very common in the aftermarket, should not result in harm to competition, provided independent repairers offer consumers an alternative solution⁹⁵. Nevertheless, in an FAQ document relating to Regulation 461/2010, published on 27 August 2012, the European Commission stated that when an independent distributor acts as an intermediary between an authorised distributor and an independent repairer, in other words, when it receives instructions from an independent repairers to fill

⁹³ Source: TCG Conseil.

⁹⁴ See on this topic paragraphs 178 and 179 of the public consultation document dated 11 April 2012.

⁹⁵ Footnote on page 22 of the European Commission's Guidelines on the application of Regulation 461/2010. Paragraph 43 of the Guidelines also reiterates the three conditions under which purely qualitative selective distribution is considered to fall outside Article 101(1): "*First, the nature of the product in question must necessitate the use of selective distribution, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Second, distributors or repairers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory manner. Third, the criteria laid down must not go beyond what is necessary*".

an order placed, a vehicle manufacturer cannot prevent an authorised distributor from selling its spare parts to the independent repairer through this intermediary⁹⁶. This clarification should facilitate the purchase of parts from the manufacturer channel and go some way to counter the compartmentalisation of the two channels.

C. INTENSITY OF COMPETITION WITHIN EACH DISTRIBUTION CHANNEL

1. MANUFACTURER CHANNEL

76. In order to enhance intrabrand competition within vehicle manufacturers' authorised networks, and in particular between authorised spare parts distributors, Regulation 1400/2002 introduced a requirement that authorised networks be defined according to purely qualitative criteria when the supplier's market share is in excess of 30%; in other words, in most cases, because the relevant markets for spare parts are usually defined at brand level. With effect from 2003, vehicle manufacturers have been unable to limit the number of authorised distributors per geographic area, which should have increased the number of authorised distributors and, therefore, enhanced competition between them.
77. However, this requirement of Regulation 1400/2002 had mixed results in France. The total number of authorised repairers in Europe fell by 22% between 1997 and 2008, with a marked downturn in 2002⁹⁷. In some cases, the number of repairers authorised directly by vehicle manufacturers increased, as several level 2 authorised repairers who had previously been authorised by level 1 authorised repairers entered into direct agreements with the vehicle manufacturers, although numbers also dropped for other vehicle manufacturers⁹⁸. However, Regulation 1400/2002 also provided vehicle manufacturers with an opportunity to reorganise the level 2 authorised repairer networks, which French vehicle manufacturers were quick to act on⁹⁹. The number of repairers fell sharply and certain vehicle manufacturers no longer have any level 2 authorised repairers. The consequence of this is that vehicle manufacturers have greater control over their networks, without any increase in intrabrand competition between spare parts distributors. Furthermore, the fall in the total number of authorised repairers suggests that very few new repairers have entered the vehicle manufacturers' authorised networks as a result of the 2002 Regulation. The final

⁹⁶ Answer to question 12 in the document published by the European Commission "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012.

⁹⁷ Aforementioned ICDP report, page 12.

Although the London Economics report notes an increase in the number of authorised repairer contracts since Regulation 1400/2002 (page 138), the number of sales outlets has fallen in most cases, including in France (page 139); certain sales outlets may have signed more than one contract.

⁹⁸ Changes in the number of repairers directly authorised by manufacturers vary depending on the manufacturer.

⁹⁹ Evaluation Report on the operation of Regulation 1400/2002 by the European Commission. Staff Working Document no. 2, pages 31-32.

outcome has been a reduction in the density of vehicle manufacturers' authorised networks, as observed by the London Economics report covering the period from 1997 to 2004¹⁰⁰.

78. However, the European Commission has observed that the ban on quantitative selective distribution systems and exclusive distribution systems has raised the standards of quality that the vehicle manufacturers' authorised networks are expected to provide, and that this has had a knock-on effect in the independent channel¹⁰¹.
79. The line between qualitative and quantitative criteria is not always clear. Certain qualitative criteria could be classified as quantitative criteria in some cases, and have the effect of limiting the number of authorised distributors present in a given catchment area¹⁰². In practice, the denser a network, the easier it is for a repairer (level 2 authorised repairer or independent repairer) to place several level 1 authorised repairers in competition with each other. This means that intrabrand competition should logically be stronger within the Renault, Peugeot and Citroen networks, which have a much denser geographic coverage than the foreign brands. However, the concentration of dealers in local or regional clusters, bringing together competing competitors, could weaken intrabrand competition. In practice, a repairer will prioritise proximity as well as delivery and supply conditions, and has limited negotiating power, which means that intrabrand competition within authorised networks is unlikely to make up for the absence of interbrand competition.

2. INDEPENDENT CHANNEL

80. As illustrated in Diagram 1 on page 33 above there is a direct distribution channel within the independent channel for the distribution of parts to fast-fit centres, auto-centres and large retailers, as well as a supply channel for standalone or franchised independent repairers and independent body shops, which is made up of more levels and more intermediaries. The market share of these two sub-channels in 2007 in terms of sales of spare parts downstream was 28% and 27%, respectively¹⁰³.
81. The service distribution networks, and in particular, auto-centres and fast-fit centres, are highly integrated. Their main supply source is the warehouse managed by the franchisor, which acts as a centralised purchasing agency. These chains obtain 80% of their supplies from the franchisor, 15% from independent distributors and only 5% from the manufacturer channel. In addition to the sale of spare parts for repairs carried out by repair

¹⁰⁰ London Economics Report, page 141.

¹⁰¹ Evaluation Report on the operation of Regulation (EC) 1400/2002 concerning motor vehicle distribution and servicing, "While vehicle manufacturers have set more demanding quality standards for their networks of authorised repairers, this does not seem to have operated against consumers' interests. The new standards have not only increased the quality of service provision, but have also had an influence on the independent sector, which has reacted by setting up competing networks and franchised chains with common standards, so as to better respond to consumers' demand for high quality, efficient and reliable services".

¹⁰² Minimum results or bonus systems, for example.

¹⁰³ Source: TCG Conseil.

chains, auto-centres are also very well-positioned for the sale of accessories and parts to end consumers.

82. The traditional independent distribution circuit is based on a multi-tiered organisation in which wholesalers and centralised purchasing agencies buy parts from the various equipment suppliers and stock them before selling them on to local distributors, who in turn supply independent repairers, with deliveries up to six times a day¹⁰⁴. The ever-increasing number of part references and the resulting storage and logistics problems led to the creation of "regional platforms" in 2006, which serve as an intermediary between the centralised purchasing agencies and/or the equipment suppliers on the one hand, and the distributors-stockists on the other. Their main purpose is to stock parts with a low turnover, while the distributors-stockists manage the high-demand part references. This segmentation enables distributors-stockists to provide a high level of service while limiting the increase in inventory volumes.
83. There are eight main centralised purchasing agencies in France¹⁰⁵, which are affiliated to just over 900 distributors, representing 1,630 sales outlets. Some of the centralised purchasing agencies are owned by international groups, such as Autodistribution, which is present in approximately 25 countries and recorded turnover of €5.5 billion in 2008¹⁰⁶. Furthermore, distribution channel integration levels vary. Whereas some distributors are only responsible for deliveries, storage and logistics, others operate under a franchise system, the flexibility and organisation of which may vary.

D. CHANGING DEMAND – PRICE TRENDS

84. The fall in demand in the repair and maintenance sector has led to a fall in the sale of spare parts, which has been exacerbated by the fact that parts now account for a smaller proportion of repair and maintenance bills¹⁰⁷: sales of spare parts fell by 10% in terms of real value (adjusted for inflation) between 2000 and 2010¹⁰⁸.
85. At the same time, several indicators suggest a substantial increase in spare part prices over the first decade of this century.
86. Consumer price indexes for parts and accessories produced by Insee only concern parts and accessories purchased in the retail market by private customers that are not fitted by a garage. However, when parts are purchased as part of a service that includes parts and labour, and are therefore supplies used by a garage, they are included in a "repair and maintenance" index, which also includes the price of labour, and which is described in section 1, part I. Given that the DIY segment only represents 10% of the repair and maintenance sector, the "parts and accessories" price index is not necessarily representative

¹⁰⁴ Source: TCG Conseil.

¹⁰⁵ Autodistribution, Groupe Auto Union France, Starexcel, Partner's, Gefa, Doyen, Autofit and Flauraud.

¹⁰⁶ Source: aforementioned ICDP report, page 30.

¹⁰⁷ Source: TCG Conseil.

¹⁰⁸ Source: TCG Conseil – excluding parts used for bodywork, DIY included.

of the price of all spare parts. However, it does provide an initial indication of changes in prices charged for parts. There is no obvious reason why changes in prices of all spare parts should be fundamentally any different from changes in prices of parts used in the DIY segment. Table 4 below shows price increases in the "spare parts and accessories" price index between 2000 and 2011, broken down according to sub-index. These changes are also compared to changes in the price indexes for new and second-hand vehicles and for repair and maintenance services.

Table 4 – Price increases for parts and accessories used for DIY compared to price increases for vehicles and repair and maintenance between 2000 and 2011

	Nominal prices	Real prices
Parts and accessories (7.2.1)	36 %	13 %
of which, tyres (072111)	-1 %	-18 %
of which, "other large vehicle spare parts" (072121)	40 %	16 %
of which, "accessories and small vehicle spare parts" (072122)	33 %	10 %
New and second-hand cars (7.1.1)	11 %	-8 %
individual vehicle repair and maintenance (7.2.3)	55 %	28 %

Source : Insee – consumer price indexes

87. Although the real price (adjusted for inflation) of tyres sold directly to private individuals fell by 18% in real terms between 2000 and 2011, the price of "large spare parts" rose by 16%, while the price of "accessories and small spare parts" rose by 10%. Although the prices of spare parts and accessories on the DIY segment matched the downward trend of vehicle prices until 2003, they then rose steadily from that year onwards.
88. Furthermore, the Insee consumer price indexes per type of product, which are not therefore restricted to the DIY segment, suggest comparable price increases to those shown in Table 4¹⁰⁹.
89. According to data from SRA (*Sécurité et Réparation automobile* – Motor Vehicle Safety and Repair Association – hereinafter SRA), part prices charged to insurers in connection with collision repairs – essentially visible parts protected by design rights – have increased

¹⁰⁹ In nominal terms, between 2000 and 2011, the "vehicle equipment production" index (GC29B) rose by 40%, the "like-for-like engine replacement" index (HC29A1C) rose by 40%, the "new and re-capped tyre" index (HC22A1) fell by 1%, the "lubricants" index (HC19Z2I) rose by 28% and the "car batteries and other rechargeable batteries" (HCB3A B) index rose by 38%.

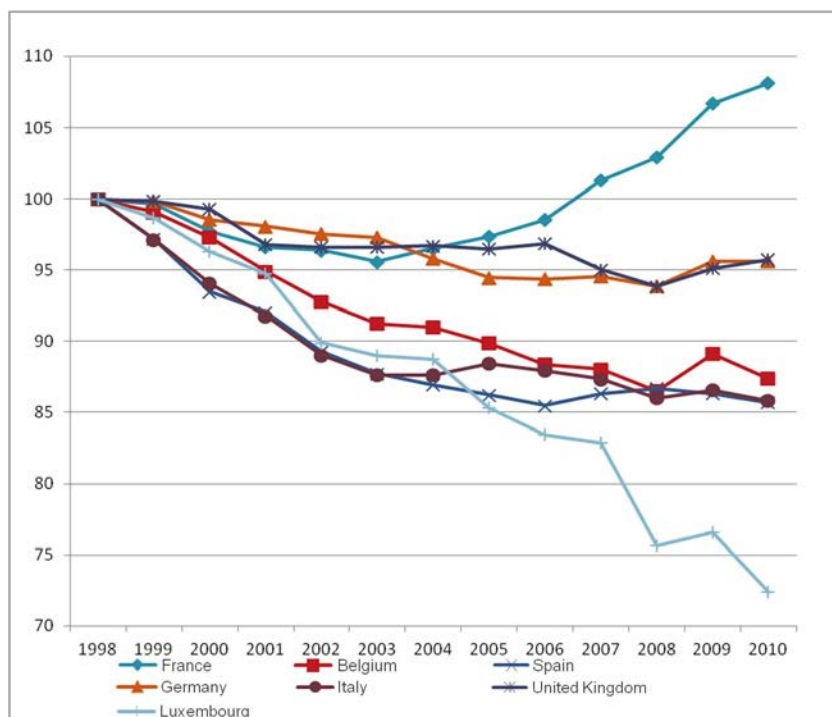
in recent years. Between 2005 and 2011 the price of spare parts used in bodywork rose by 30.5% in nominal terms and 18.5% in real terms.

90. Data on vehicle manufacturers' recommended sale prices confirms this observation. Four vehicle manufacturers (five brands) provided the Autorité de la concurrence with data on average changes in recommended prices for OEM spare parts between 2006 and 2010, weighted according to quantities sold. The average price increase for the five brands was 19% between 2006 and 2010 (i.e., a 12% increase in real terms).
91. Although this recent data on recommended prices in the manufacturer channel suggests relatively comparable price increases, data concerning equipment suppliers is much more disparate, with prices per family of part varying greatly from one equipment supplier to another. Accordingly, although increases in recommended sale prices for spare parts in the Independent Aftermarket are relatively moderate for certain equipment suppliers compared to the changes in nominal prices observed above – with average increases of between 5% and 10% between 2006 and 2010 –, increases were much more pronounced for other equipment suppliers, and closer to the increases in the price of OEM parts.
92. The vehicle manufacturers have explained this substantial increase in the price of spare parts by the improved quality, the increase in the price of raw materials, the increase in transport costs because of increased fuel costs, the significant increase in labour costs in Eastern European countries (where some of these parts are manufactured), and the increased storage and distribution costs due to the multiplication in the number of referenced parts. Shorter series production times due to the large number of new model launches in the first decade of the century pushed production costs for spare parts upwards, as they are either held in stock for longer or are produced more frequently in small batches.
93. These factors may all contribute to pushing costs, and therefore the price of spare parts, upwards. Nevertheless, vehicle manufacturers have been unable to produce information on changing profit margins in support of this analysis. Data that were received for the entire period from 2000 to 2010 (although most vehicle manufacturers have not provided any data for the period before 2008) show a sharp increase (between [30%; 60%]) in pre-tax profit margins on spare parts distributed in France, and a simultaneous drop in profit margins on the sale of new vehicles (which are negative in some cases). One vehicle manufacturer reported an increase in gross profit margins on spare parts in France of [2; 5] points between 2006 and 2010, i.e., a [5; 10]% increase in profit margins in four years. Data for the period since to 2008 shows a slight increase in net profit margins on spare parts between 2008 and 2010, rather than a fall, despite the economic crisis.
94. Within the same families of parts, changes in prices charged by equipment suppliers to vehicle manufacturers for OEM spare parts are often unrelated to changes in recommended prices in the independent channel. The price of spare parts supplied to vehicle manufacturers rose only slightly (below inflation), and even fell for certain families of parts.
95. Eurostat data suggest that France is a European exception with regard to spare parts sold on the DIY segment, as it is the only one of the 27 countries where prices for spare parts increased in real terms between 1998 and 2010. Contrary to the vehicle manufacturers' claims that some countries, such as France, include parts fitted by garages in this index, while other countries do not, the scope of the parts and accessories covered by this index is identical for all EU countries. The Autorité de la concurrence has received direct confirmation of this from Insee. However, this index only includes parts and accessories purchased by private individuals in order to carry out repairs themselves, and is not therefore necessarily representative of all spare parts and accessories. The public

consultation provided some perspective on the relevance of this index. Although Insee also monitors prices of spare parts paid by consumers, irrespective of the distribution method (in other words, including parts fitted by garages and parts purchased by consumers for self-fitting), the Autorité recommends that Eurostat create an index to record the price of spare parts sold to consumers.

96. Graph 6 below shows changes in the "parts and accessories" price indexes (which only include parts and accessories purchased by private individuals in order to carry out repairs themselves) in France and neighbouring countries. Although a downward trend in the price of spare parts and accessories used for DIY is observed in all other European countries, prices have risen significantly in France since 2003.

Graph 6 – Changes in the price of spare parts and accessories used for DIY (real price index) in France and neighbouring countries



Source : Eurostat – consumer price indexes for spare parts and accessories – 1998 = 100 base

97. The vehicle manufacturers have claimed that, on the contrary, the increase in the price of the spare parts they sell matches increases in the other countries in which they are established and that France is not an exception. However, in addition to the fact that the data submitted by the vehicle manufacturers concern OEM parts only (of the manufacturer's brand), the figures also suggest that this claim does not apply to all the vehicle manufacturers. Although it seems to be the case for one of the vehicle manufacturers, the recommended sale prices of another vehicle manufacturer are much

higher in France than in Italy, Spain and Germany¹¹⁰. Another vehicle manufacturer failed to supply data on comparative price changes for spare parts, but has shown through average price indexes per family of parts that its position was in line with its competitors, in particular its foreign competitors, in France, Spain, Belgium and the Netherlands. The data submitted by the other vehicle manufacturers is not sufficiently detailed to allow an assessment of price changes in different countries¹¹¹.

E. COMPARATIVE ANALYSIS OF OVERSEAS *DÉPARTEMENTS* AND MAINLAND FRANCE

98. In its Opinion no. 09-A-45 on the import and marketing mechanisms for consumer goods in the overseas *départements* (hereinafter DOMs), the Autorité de la concurrence found that several specific features of the DOMs have resulted in consumers in the DOMs paying higher prices: such as the cost of transportation from mainland France, the small size of the markets and the absence of any resulting economies of scale, as well as the taxes levied on imports from mainland France. The same obstacles apply to the import of spare parts for vehicles. More specifically, the large number of spare parts, their bulky nature, the difficulty in predicting needs and the need to obtain certain parts urgently are all factors contributing to cost increases that particularly affect the vehicle spare parts distribution sector.
99. Moreover, the small size of the markets means that only a very limited number of distributors are present on the territory. Accordingly, in each of the four DOMs studied¹¹², there is only one authorised spare parts distributor per manufacturer and per DOM¹¹³, who competes with several independent spare parts distributors¹¹⁴. The isolated position of the DOMs and the transport costs are such that the possibility of obtaining supplies from distributors located in mainland France does not constitute any real competition for the distributors¹¹⁵. Contrary to sparsely populated areas of mainland France, where the number

¹¹⁰ Compared to an increase of 100 in France between 2006 and 2010 (all parts), Germany recorded an increase of 53, Spain, a fall of 35 and Italy, an increase of 71.

¹¹¹ Data submitted by one manufacturer concerns net prices charged to importers. Data submitted by another consists solely of a comparison of prices of the 100 best-selling part references in France, Germany, the UK, Italy and Spain.

¹¹² Guadeloupe, French Guiana, Martinique and Réunion

¹¹³ The vehicle manufacturers explain this situation by the small size of the markets and their geographic distance, fostering natural monopolies. The manufacturers tend to opt for a qualitative and selective distribution model, which does not place any restrictions on the number of operators present in a given area.

¹¹⁴ The manufacturers, on the one hand, and three DOM authorised distributors, on the other, stressed in their respective contributions the strength of competition from independent distributors, which consist essentially of a few large and well-established groups. However, for the reasons discussed in paragraphs 64 to 83, as in mainland France, competition in the DOMs between the manufacturer channel and the independent channel is limited for the distribution of spare parts, and the channels remain relatively compartmentalised.

¹¹⁵ The Internet does not seem to have enhanced competition in the DOMs, and this can be explained by the small role played by this distribution channel, which represents scarcely 3.5% of spare parts sales in terms of

of distributors may also be limited, the lack of geographic continuity and the high transport costs make any competition between distributors located in neighbouring catchment areas impossible.

100. With the help of local DGCCRF (*Direction générale de la concurrence, de la consommation et de la répression des fraudes* – Directorate-General for Competition, Consumer Affairs and Prevention of Fraud – hereinafter DGCCRF) agents, the Autorité de la concurrence examined price differences for parts sold in the retail market in the DOMs and in mainland France, considering the extent to which the price differences observed reflect differences in costs borne by overseas distributors compared to mainland distributors.

1. PRESENTATION OF COSTS SPECIFIC TO OVERSEAS DÉPARTEMENTS

101. *Purchase prices.* As a general rule, parts are sold to dealers in the DOMs at a lower net price than in mainland France. According to information collected, these net purchase prices range from 60% to 96% of the net purchase price in mainland France, depending on the manufacturer¹¹⁶. However, although in mainland France distributors receive supplies from the vehicle manufacturer, who bears all the logistics and transportation costs, in overseas departments the shipping costs and various taxes tend to be paid by the distributor.
102. *Shipping costs (transportation and dock duties).* Most local operators questioned obtain supplies from mainland France, with some of the lesser known brands forming rare exceptions. Shipping costs (including dock duties¹¹⁷) represent on average 30% of the purchase price of spare parts: 25% for maritime freight (used for 60% of parts) and 40%

value in mainland France, and also by the obstacles impeding its use in connection with overseas markets. These obstacles include the management of returned parts purchased, the refusal of certain dealers to accept "buy and fit" arrangements (using parts provided by the customer to carry out repairs), and the refusal of 8 of the 11 main Internet websites to deliver to overseas *départements*, as stated in their general terms of sale.

¹¹⁶ Three authorised distributors in the DOM have stated in a joint contribution that these differences in purchase prices are averages only, and that purchase prices for distributors located in the DOMs are uncorrelated to purchase prices for distributors located in mainland France. Accordingly, although purchase prices are lower on average in the DOMs, some parts are much more expensive.

However, given that the purchase prices in the sample reflect average differences in purchase prices between the DOMs and mainland France, there is no need to consider exact figures concerning purchase price differences for each part reference. Average purchase price differences are sufficient. Moreover, the analyses presented in the public consultation document do not factor in the purchase price differences that weigh in favour of DOM distributors. The document merely observes that the recorded price differences tend to underestimate differences in gross profit margins, because the differences in purchase prices are not factored into the calculation.

¹¹⁷ Dock duties correspond on average to between 10% and 20% of the purchase price, and are charged on all spare parts although the amount charged varies from part to part, despite the fact that there are no parts manufacturers in the DOMs. For example, the mere presence of two mirror manufacturers in Martinique, who specialise exclusively in cutting glass and mirrors for the construction industry, explains why dock duties are charged on wing mirrors, corresponding to 40% of the purchase price.

for air freight (used for 40% of parts)¹¹⁸. Given the large number of part references and the small size of the local markets and although distributors stock more parts than distributors in mainland France, they are not able to keep all the catalogue references in stock. In order to carry out repairs within a reasonable timeframe, parts sometimes need to be imported by air, in which case transit time is only seven days, as compared to an average of two months for maritime freight.

103. *Storage and destruction costs.* In view of the high approach costs, particularly when goods transit by air, and the long delivery times, local distributors often hold a greater number of parts in stock than mainland distributors, particularly as authorised distributors in the DOMs also tend to operate as importers. This means storage costs are higher, and have been estimated by the DGCCRF at approximately 2% of the retail price, compared to 0.7% in mainland France. The overseas vehicle manufacturers and authorised distributors who submitted contributions to the public consultation are of the opinion that this figure has been overestimated. If we factor in the data received from the authorised distributors, storage costs in the DOMs correspond to 3% of turnover¹¹⁹. Moreover, the large number of items in stock means that some of the parts will not be used and will deteriorate. The cost of sending them back to mainland France or to other DOMs means that it is often more economical to destroy part of the stocks on site. Destruction costs represent on average 1% of the turnover of local dealers, but can rise to 4% for some distributors, whereas it is close to zero in mainland France. Information submitted by three authorised overseas distributors suggests that destruction costs may represent on average 1.8% of turnover.
104. *Other costs.* Information received from the DGCCRF indicates that the aggregate amount of payment defaults is three times greater in the DOMs than in mainland France and represents an average cost of 2.3% of the turnover; this figure has not been contested by

¹¹⁸ According to contributions submitted, approach costs (including duties) are much higher in French Guiana than in other DOMs. Information received nevertheless indicates that approach costs for French Guiana are comparable to approach costs for the other overseas *départements*, confirming the level of approach costs initially indicated in the public consultation document.

Contributors to the public consultation also felt that a global analysis of all the overseas *départements* which did not take into consideration the specificities of each individual *département* was not appropriate. The specificities of each of the overseas *départements* should be taken into consideration whenever possible. This has been done in the public consultation document with regard to approach costs, as the specific costs incurred for each part reference have been deducted from the sales prices (see paragraph 115 of the public consultation document). Moreover, Opinion 09-A-45 observed a certain degree of homogeneity in price differences between overseas *départements*, and found that "*this tends to indicate the existence of common factors applying to all the overseas départements, which determine the magnitude of the divergences between each DOM and the mainland, although this does not prevent these factors from playing a role of varying importance depending on the département and therefore affecting the magnitude of the divergences between the DOMs*". This suggests that a global analysis of all the DOMs does have its uses, although whenever possible it is better to examine the specificities of each DOM separately.

¹¹⁹ Manufacturers and overseas authorised distributors consider that the cost differences associated with stocks have been underestimated in the public consultation document, because of a failure to take into account different rental costs due to the surface areas required to stock parts, as well as the cost of insuring stocks, which is much higher than in mainland France. Information submitted by the three overseas authorised distributors suggests that if all these factors are taken into consideration the median stock cost would be 3% of turnover. To the extent that these additional costs are not taken into consideration for mainland distributors, the resulting cost variance is a maximum variance.

any of the contributors. According to information received, this is probably a maximum cost. Personnel costs are also higher, as are local advertising costs, which are paid by the distributors and repairers, whereas in mainland France they are financed by the vehicle manufacturer. These additional costs represent 0.8% of turnover, according to the DGCCRF data. Information submitted by DOMs distributors within the framework of the public consultation suggests that local advertising costs correspond to 1% of turnover¹²⁰. However, they stressed that personnel costs are much higher in the DOMs than in mainland France¹²¹.

105. Lastly, the cost of providing courtesy vehicles is much higher in the DOMs than in mainland France, because repair times are much longer. Information received from the aforementioned DOM distributors suggests that these costs represent on average 1.15% of turnover. As the Autorité has not received data on these costs in mainland France, it cannot calculate the corresponding additional costs. The additional cost calculated on the basis of this data should therefore be viewed as the maximum price difference between the DOMs and mainland France.
106. To conclude, the additional costs over and above the sale price incurred as a result of the specificities of the spare part sale sector in the overseas *départements* were adjusted to reflect costs that had not been taken into account in the public consultation document (labour, courtesy vehicles) and costs that had only partially been taken into consideration (storage). In the absence of more comprehensive and accurate information, the Autorité de la concurrence has adjusted upwards the cost differences initially communicated on the basis of surveys conducted by the DGCCRF, in order to take into account the information received from the authorised distributors in their contributions to the public consultation¹²². Table 5 below shows maximum estimated cost variances between the overseas *départements* and mainland France per cost item.
107. Given that costs incurred by operators located in the DOMs are expressed as a proportion of turnover generated in these *départements*, while costs incurred by operators located in

¹²⁰ Median figure observed for the five subsidiaries for which advertising cost figures were submitted.

¹²¹ Overseas authorised distributors stated in their contributions that a dealership of an equivalent size in terms of turnover would have twice the wage bill of a mainland dealership, due to the lower productivity levels in the DOMs and the need to pay for air travel to and from mainland France, so that employees can attend training courses. One authorised distributor who operates both in mainland France and in the DOMs stated in its contribution to the public consultation that personnel cost differences between mainland France and the DOMs were in the order of six margin points. An examination of its tax returns shows that the actual difference is smaller.

Furthermore, these cost differences do not correspond to the spare parts distribution activity alone, as they also include the labour used for the sale of new vehicles and for repair and maintenance works. It would be more logical for labour costs to be passed on in the hourly labour rates rather than in the price of spare parts. The productivity discrepancy might also suggest, in itself, the existence of insufficient competition (particularly as in fairly small companies profits may be reflected to a certain degree in the salaries paid to senior management). The consideration of this cost difference as an exogenous factor affecting competition could be open to criticism. As a result, the price variance measured using this data should be seen as a maximum variance.

¹²² The figures shown in Table 5 correspond to median costs reported by the subsidiaries of the overseas authorised distributors who contributed to the public consultation.

mainland France are expressed as a proportion of turnover generated in mainland France, a ratio needs to be applied to the DOMs turnover and mainland France turnover, so that costs in the DOMs and costs in mainland France are expressed on a like-for-like basis. Two studies by overseas authorised distributors, described in paragraphs 114 to 119 of this Opinion, show that for an identical basket of parts sold in the DOMs, the average weighted variance in retail sale prices is 14% and 22%, respectively. These estimates can be used to express costs in the DOMs in proportion to turnover generated in mainland France¹²³.

¹²³ Assuming that for an identical basket of parts the DOM turnover is 18% higher than the mainland turnover (given that 18% is the midpoint between 14% and 22%), DOM costs expressed as a proportion of mainland turnover will be equal to DOM costs expressed as a proportion of DOM turnover multiplied by 1.18.

The arithmetic averages of the sale price differences should not be used. Only variances expressed as a weighted average can be used to measure variances in turnover for an identical basket of parts. However, the DGCCRF data, presented in the public consultation document and in paragraphs 110 to 112 of this Opinion, that does not permit the weighting of price variances according to volumes sold, is of little use for this calculation.

Table 5 – Weight of the various additional costs attributable to the specificities of the DOMs spare parts sale sector in proportion to sale prices

	DOMs (% of DOMs turnover)	Mainland France (% of mainland turnover)	DOMs (% of mainland turnover)¹²⁴	Variance (% of mainland turnover)
Approach costs [transport + duties]	11.5 % ¹²⁵	0,00 %	13.6 %	13.6 %
Stocks	3.0 %	0.7 %	3.5 %	2.8 %
Stock destruction	1.8 %	0.0 %	2.2 %	2.2 %
Payment defaults	2.3 %	0.8 %	2.7 %	1.9 %
Labour	10.9 %	6.0 %	12.9 %	6.9 %
Advertising costs	1.0 %	0.0 %	1.2 %	1.2 %
Courtesy vehicles	1.15 %	0.0 %	1.4 %	1.4 %
Total	31.7 %	7.5 %	37.4 %	29.9 %
Total excluding approach costs	20.2 %	7.5 %	23.8 %	16.3 %

Source: DGCCRF and contributions to the public consultation – analyses by the Autorité de la concurrence

108. To conclude, all other factors being equal, the additional costs incurred by overseas distributors should result in an additional price, expressed as a proportion of the mainland sale price, of around 30%, or slightly more than 16% excluding approach costs. Given that the prices at which overseas operators purchase parts tend to be lower than those paid by mainland distributors, this additional price is higher than the theoretical additional price which should be observed¹²⁶.

2. PRICE DIFFERENTIALS WITH MAINLAND FRANCE EXCEED COST DIFFERENCES OBSERVED

109. The following pages contain an analysis based on DGCCRF data (a), followed by two analyses based on breakdowns of spare parts sales reported by two authorised distributors located in Martinique (b).

¹²⁴ The percentages in this column correspond to the percentages in the first column multiplied by 1.18 (see explanation in §107).

¹²⁵ Although the average approach costs correspond to approximately 30% of the purchase prices, they also correspond to 11.5% of sales prices, according to information collected during the inquiry and used for the analysis based on DGCCRF data, described below. This percentage is more or less consistent with the data received from the three overseas authorised distributors in the contribution to the consultation.

¹²⁶ See footnote 116.

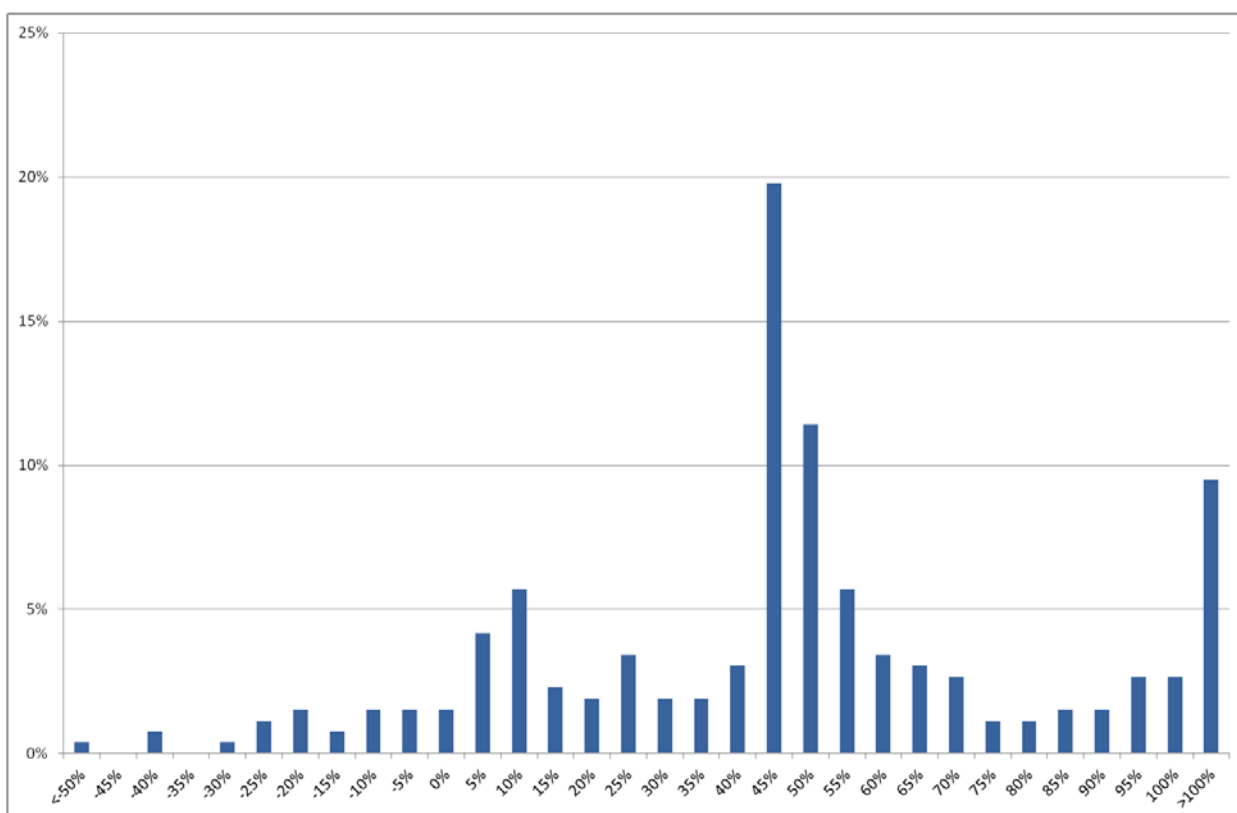
a) Presentation of the study based on DGCCRF data

110. The public consultation document presents the results of an analysis of price differences carried out for the purpose of this Opinion in conjunction with the local DGCCRF agents. This analysis suggests that average retail sale prices in the DOMs, net of approach costs, are 45.5% higher than recommended retail prices on the mainland. Even when we factor in the maximum cost variances identified during the public consultation (see Table 5 above) and exclude the differences in spare part purchase prices – which can be considerable for certain vehicle manufacturers – this variance seems too high to be explained by storage costs, destruction costs, labour costs, payment defaults, advertising costs and courtesy vehicle costs, which represent an additional cost of no more than 16% of the sale prices.
111. As the vehicle manufacturers and overseas authorised distributors rightly pointed out in their contributions, the small size of the sample (263 observations) given the number of parts held in stock by overseas distributors (approximately 15,000 part references), and the fact that the data only concerns two vehicle manufacturers in two of the overseas *départements*¹²⁷, limits the relevance and representativeness of the price differences observed.
112. It should be noted, however, that this analysis takes account of approach costs, which is an important factor in sale price increases and which may vary from one part reference to another and from one overseas *département* to another. The analysis compares retail sale prices in the DOMs, net of approach costs (transport and duties), with recommended retail prices on the mainland¹²⁸. This means that although demand for certain part references of the sample is not sufficiently high for them to be stocked permanently in the DOMs and although they have to be flown over to satisfy occasional demand, the fact that these parts are more expensive because of the associated air freight costs has no impact on the comparisons made, as the approach costs have been deducted from sales prices charged in the DOMs. Furthermore, the analysis shows that the distribution of price differentials in the DOMs as compared to the mainland is highly concentrated around the median point (see Graph 7 below). This means that the average variances presented in the public consultation document were observed for most of the sample.

¹²⁷ Guadeloupe and Martinique. It has not been possible to extend the analysis to the other DOMs for the purpose of this Opinion.

¹²⁸ $P_{\text{DOM}} = P_{\text{SALE}} - P_{\text{PRODUCTION}} + P_{\text{PURCHASE}}$, where P_{DOM} is the retail sale price in the DOMs in Q4 2011, P_{SALE} is the manufacturers' recommended sale price in mainland France in August 2011 and $(P_{\text{PRODUCTION}} - P_{\text{PURCHASE}})$ corresponds to the approach costs.

Graph 7 – Distribution of price differentials between DOMs and mainland France in proportion to mainland prices, net of approach costs



Source: DGCCRF data – analysed by Autorité de la concurrence

Key: for 20% of the observations, the retail sale prices net of approach costs in the DOMs are between 40% and 45% (40% exclusive and 45% inclusive) higher than retail sale prices in mainland France.

b) Presentation of three studies by authorised distributors submitted in connection with the public consultation

113. In response to the public consultation document three authorised distributors located in Martinique stated that the differences described in the analysis did not correspond to the price differences they observed on the basis of their own sales data¹²⁹. The Autorité de la

¹²⁹ The manufacturers and overseas distributors also consider that the price variances presented in the public consultation document are excessive if they are compared to the price variances measured by Insee in a survey conducted in July 2010, comparing 2010 prices in the DOMs and mainland France. This study suggests that the largest price variances (Fisher’s test) were observed in the food sector, with a maximum variance of 38.5% observed in French Guiana, which is not included in the Autorité de la concurrence’s analysis of price variances. Average price variances for a standard market basket ranged from 6.2% in the Réunion to 13% in French Guiana.

Although the Insee study includes a "transport" category and an "other manufactured products" category, they cover a much broader range of goods than spare parts which means that it would not be appropriate to assess the price variances measured by the Autorité de la concurrence in light of the variances assessed by

concurrency asked them to submit the databases used for these studies. The Autorité was unable to examine one of them, but the contributor claims that it shows that (i) for approximately 100 products, representing more than 25% of the quantities sold by the group's subsidiary in Martinique, the sale prices, including VAT, are lower than those charged in mainland France; (ii) several thousand part references, corresponding to between 20% and 25% of the company's sales, have catalogue sale prices (over-the-counter sales), including VAT, that are up to 40% higher than those recommended by the vehicle manufacturer for its distribution network in mainland France; (iii) the sale prices of all the other products, representing less than 50% of sales, are more than 40% higher than the recommended prices in mainland France.

114. The other two databases contain all the part references sold in 2010 and in the first six months of 2011, respectively, i.e., approximately 8,000 observations per database. In addition to the comprehensive nature of these databases, they are interesting in that they tell us about actual consumption patterns in Martinique, to the extent that the part references were physically sold in Martinique by these two authorised distributors¹³⁰. For each part reference, the databases contain the retail sale price in Martinique, the recommended sale price in mainland France and the quantities sold. However, the approach costs for each part reference are not stated, unlike the DGCCRF data. This means comparisons cannot be made by eliminating the impact of approach costs. Moreover, each study only covers one manufacturer brand. Both vehicle manufacturers informed the Autorité that the prices they charge in the DOMs are 40% lower than purchase prices for distributors located in mainland France.
115. The first study shows that when price differentials are weighted according to quantities sold, sale prices are 14% higher in Martinique than in mainland France. This means that the average bill will only be 14% higher in Martinique than in mainland France, even though the approach costs have not been deducted from the sale prices charged in Martinique. However, only 0.5% of the part references in the sample (43 part references) were sold more than 250 times, representing 29% of the total parts sold.

Insee in other sectors. In addition, the possibility that certain products within the consumer goods categories presented in the Insee study experienced even greater variances cannot be dismissed.

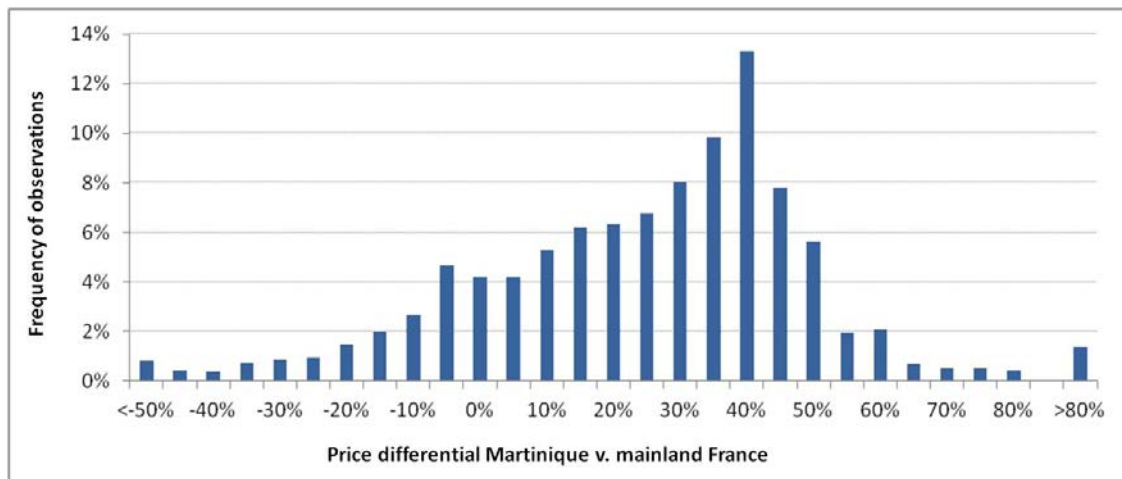
In Opinion 09-A-45 of 8 September 2009 on the import and marketing mechanisms for consumer goods in the overseas *départements* (DOMs), the Autorité de la concurrence observed median price variances of 65% in Guadeloupe, 70% in Martinique and French Guiana and 55% in the Réunion (§28 of the Opinion) on the basis of a sample of 100 consumer goods products. The variances observed vary greatly depending on product category, and by more than 100% in some cases.

Likewise, the retail sale price variances for visible parts charged in the Réunion, Mayotte and mainland France as measured by the Comité des assureurs de La Réunion, an association of insurers, suggest comparable figures. This study was based on 266 observations and 14 visible parts for 13 vehicle models in Réunion and Mayotte (although some data is missing for Mayotte). It reported average price differences between Réunion and mainland France (including approach costs) of 70% in proportion to mainland prices, with a median of slightly more than 70% (see article dated 11 July 2012, published in Le Quotidien de la Réunion et de l'Océan indien).

¹³⁰ One of the studies also gives sale prices net of discounts in Martinique. However, it would not be appropriate to compare this variable with recommended sale prices in mainland France. In addition, the discounts are often offered for sales to repairers. This means prices net of discounts are of little relevance when considering retail sale prices.

116. In this situation, where a very limited number of parts weighs heavily on the results, there is also a need to examine whether the price differentials for these parts are representative of the price differentials for other parts in the sample, corresponding to 99.5% of the part references. The price differentials observed between Martinique and mainland France suggest a high concentration of sale price differentials around the 35% to 40% mark (see Graph 8 below). 37% of the part references in the sample have sale price differentials of between 30% and 50%. At the same time, for 19% of the parts in the sample, sale prices in Martinique are lower than the recommended retail prices in mainland France.

Graph 8 – Distribution of price differentials between Martinique and mainland France in proportion to mainland prices – first distributor

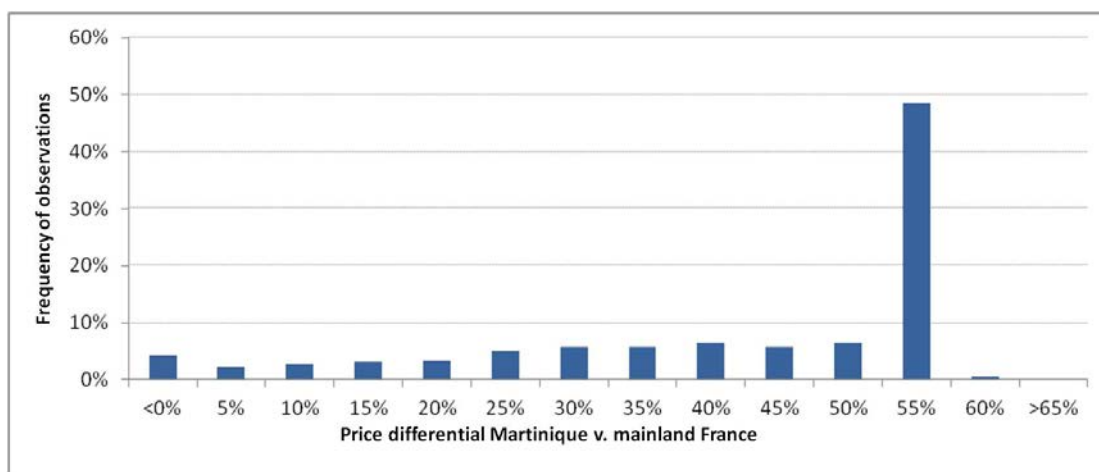


Source: data collected by one authorised distributor in Martinique, corresponding to parts sold by this distributor in 2010 – analysed by the Autorité de la concurrence.

Key: for 13% of the observations, the retail sale prices in Martinique are approximately 35% or 40% higher than the retail sale prices in mainland France.

117. The second study shows that when price differentials are weighted according to quantities sold, sale prices in Martinique (including approach costs) are 22% higher than in mainland France. The spread of price differentials observed between Martinique and mainland France suggest, however, that there is a very high concentration of sale price differentials around the 55% mark (see Graph 9 below). Half the part references in the sample have sale prices that are almost 55% higher than retail prices in mainland France. The remainder of the sample shows a more or less uniform spread with differences of between 0% and 50%. Very few of the parts have price differentials in excess of 55%.

Graph 9 – Distribution of price differentials between Martinique and mainland France in proportion to mainland prices – second distributor



Source: data collected by an authorised distributor in Martinique, corresponding to parts sold by this distributor in 2010 – analysed by the Autorité de la concurrence.

Key: for 50% of the observations, the retail sale prices in Martinique are approximately 50% or 55% higher than the retail sale prices in mainland France.

118. In both studies, the weighted average additional prices observed (14% and 22%, respectively) are less than the 30% cost differentials shown in Table 5 above. However, unlike the vehicle manufacturers examined in the analysis based on DGCCRF data, the vehicle manufacturers concerned by these two analyses sell parts to the DOMs for an average price that is 40% cheaper than the price charged to distributors in mainland France. If this purchase price differential is factored in, the cost differential between the DOMs and mainland France for these authorised distributors only represents approximately 6% of the mainland sale price¹³¹. This means that the additional prices observed are very much higher than the maximum cost differences shown in Table 5.
119. The significant weight of a very limited number of high demand parts also affects these figures. Sale price differentials are in actual fact highly concentrated around the 40% mark in the first study and 55% in the second study. These sale price differentials are far higher than the cost differences between the DOMs and mainland France for these two distributors, estimated at approximately 6%.

¹³¹ The purchase price difference for these manufacturers is 40% of the mainland purchase price. According to DGCCRF data, the gross margin is also approximately 40% in mainland France, which means that the "recommended sale price in mainland France / purchase price in mainland France" ratio is 1.67. This means that the purchase price expressed as a percentage of the recommended sale price in mainland France rather than in proportion to the purchase price in mainland France is equal to $-40\%/1.67 = -24\%$. Table 5 shows that, without taking into consideration the purchase price difference, costs in the DOMs are approximately 30% higher than in mainland France. Accordingly, if the 24% purchase price differential in favour of the DOMs is factored in, the cost variance falls to just 6%.

3. CONCLUSION WITH REGARD TO THE COMPARATIVE ANALYSIS BETWEEN THE DOMS AND MAINLAND FRANCE

120. The public consultation has enabled the Autorité to improve the analysis presented in the public consultation document through the addition of more detailed data supplied by authorised distributors located in the DOMs. This data suggests that the maximum differential in costs between the DOMs and mainland France represents 30% of the recommended sale price in mainland France, including approach costs, and 16% of the recommended sale price in mainland France, excluding approach costs. The additional costs borne by overseas distributors are therefore an initial factor in the higher sale prices. However, the retail sale price differentials exceed the cost differentials, although the figures are more uniform for the parts in highest demand. These are the findings of three separate studies, one of which was based on the prices of 263 part references compiled by the DGCCRF, while the other two were based on sales reported by two authorised parts distributors in Martinique (approximately 8,000 observations per study). The first study suggests significant price differentials, averaging 45%, excluding approach costs and 64%, including approach costs. The two other studies report more modest price differences of 14% and 22%, respectively (including approach costs) when part prices are weighted according to quantities sold, albeit with a high concentration of price variances of 40% and 55%, respectively, despite the fact that the distributors pay purchase prices that are on average 40% less than purchase prices in mainland France. If we factor in this considerable differential in the purchase prices in favour of the overseas authorised distributors, the weighted sale price differentials are higher than the cost differential.
121. These results would seem to confirm that competition is inadequate in the DOMs. In response to the question asked as part of the public consultation, the vehicle manufacturers and the three aforementioned overseas authorised distributors were critical of the proposal to create a common, centralised supply centre in order to share supply costs. They believe this would homogenise supply costs between competitors, which could result in price alignment. However, this risk would not exist if a common centralised logistics centre were created for the sole purpose of sharing part storage facilities. However, given that these companies frequently experience labour-management conflicts, a centralised supply centre or single logistics centre could create additional risks for the continuity of supply. It would create a bottleneck that could easily be blocked, with significant consequences for the entire motor vehicle sector in the DOMs.
122. Overseas distributors have suggested that reducing taxes would make it possible to reduce prices¹³². Such a reduction in taxes would have little impact on local employment in the parts manufacturing sector, which is very small. However, its impact on prices would be all the greater given the strength of competition between local distributors, on the one hand, and between equipment suppliers and vehicle manufacturers in mainland France, on the other hand. The removal of some of the obstacles identified in section 2 could also have a significant impact on the DOMs (see in particular §209 and 210 below on the protection of visible parts).

¹³² Opinion 09-A-45, aforementioned, also suggests the gradual phasing out of dock duties (§178 and 183).

CONCLUSION

FINDINGS CONCERNING THE OPERATION OF THE MOTOR VEHICLE AFTERMARKET

123. **The motor vehicle repair and maintenance sector** in France is characterised by the leadership of networks of vehicle manufacturers' authorised repairers, who hold 53% of the market in terms of value and 45% in terms of volume. Their competitors consist of a wide range of independent operators offering multi-make services, who may offer general repair and maintenance services or specialise in a particular type of service, and who are increasingly operating within franchises, meaning they are better equipped to handle technological developments and to cope with the increased logistics and training requirements. On the repair and maintenance sector for recent vehicles (under 5 years), the vehicle manufacturers' networks seem relatively resistant to competition from the independent channel. They hold over 80% of the market share for vehicles aged less than 2 years and almost 70% of the market share for vehicles aged 3 to 4 years. Conversely, they have a much smaller market presence on certain specific segments such as tyre replacements or windscreen and window breakages, and also on the repair and maintenance segment for older vehicles. More specifically, they only hold 30% of the market share for vehicles aged over 10.
124. The fall in demand is likely to cause the different types of operators to diversify, which will in turn boost competition. Furthermore, the general ageing of vehicles should work in favour of independent repairers. However, the market shares held by authorised repairers have only decreased slightly since 2005, although figures vary depending on the source. In addition, given the fall in demand and fiercer competition in the vehicle sales markets, operators seem to be trying to compensate for lost sales and profits by increasing the prices they charge for services in the segments that are the least affected by competition. Accordingly, although technological developments have caused repairers' costs to increase, in particular due to the need for more specialised labour than in the past, price increases have not been uniform, with the sharpest rises observed in the segments that are least exposed to competition. Note also that the increases in repair and maintenance price indexes in France are some of the highest in Europe.
125. **The spare parts manufacturing and distribution sector** was marked in the first decade of the century by a huge increase in the number of part references, due to the increase in the number of new car models. Despite the vehicle manufacturers' efforts to "communalise" them, spare parts usually tend to be specific to a particular model, and even to a particular production series. In addition, the core components are becoming increasingly sophisticated. These developments tend to push up part production costs and logistics costs, such as storage and, to a lesser degree, transportation. Furthermore, demand is increasingly fragmented, with a very small spare parts market for each part reference, which only allows a limited number of suppliers to enter the market. It is very difficult to estimate the average number of suppliers of spare parts per part reference, because each situation is very different and because of the number of part references, with each vehicle manufacturer having approximately 200,000 part references in their catalogue. Nevertheless, vehicle manufacturers often have a natural monopoly or a natural duopoly with the original equipment supplier, in particular for technical parts with a low turnover. Part references supplied to the independent channel by equipment suppliers who do not manufacture the original assembly parts represent, very approximately, between 10% and

40% of all part references sold in this channel¹³³, and could represent approximately 20% of parts sold in the retail market¹³⁴.

126. In addition, the number of potential suppliers for certain types of parts may be limited contractually or by law. Vehicle manufacturers tend to have a monopoly over their visible parts that are protected by design rights, although in some cases the vehicle manufacturer authorises the original equipment supplier to also distribute spare parts. For non-visible parts, when the contract between the vehicle manufacturer and the original equipment supplier is a subcontract, the vehicle manufacturer can also stipulate that the associated tooling be used exclusively for its production purposes, or require the equipment supplier to pay royalties, which will automatically push up the cost of the parts.
127. Competition between vehicle manufacturers and equipment suppliers seems to be limited, with the exception of high volume parts. Not only do authorised repairers obtain most of their supplies from the vehicle manufacturers, the independent repairers tend to obtain their supplies from the independent channel, unless the parts are not available. This is due to the separate economic models of the manufacturer channel and the independent channel, as described in part I, and the fact that repairers prefer to obtain all their supplies from a sole supplier. Other factors also contribute to compartmentalising the two channels. In particular, the extensive use of selective distribution systems in the manufacturer channel prevents independent distributors from purchasing parts from Level 1 authorised repairers unless they are acting as an "intermediary" for a specific order between an independent repairer and the authorised repairer; this limits intrabrand competition between Level 1 authorised repairers, and also reduces the competitive constraint exerted by the vehicle manufacturers on equipment suppliers. At the same time, equipment suppliers may be reluctant to compete head-on with vehicle manufacturers, who constitute the primary outlet for their products.
128. To conclude, spare part prices have risen by approximately 10% in real terms in France since the start of the century. With regard to parts purchased by consumers in order to fit them themselves, which are the only parts for which the price trends as measured by Eurostat are comparable with other countries, France is the only one of the 27 European Union Member States in which prices increased in real terms between 1998 and 2010. These price increases do not seem to be due to cost increases. In particular, the – admittedly fragmented – data submitted by vehicle manufacturers tends to show an increase in the manufacturers' net margins.
129. These developments in the motor vehicle aftermarket – which represents a significant expense in household budgets and an important segment of French industry, as it generates upstream turnover of €30 billion, excluding taxes – combined with the existence of several natural obstacles to competition, have caused the Autorité de la concurrence to look more closely at the operation of competition in the sector in France.

¹³³ Source: independent distribution chains.

¹³⁴ Source: ICDP survey mentioned in §56.

The next section first summarises the European regulatory framework and then describes the various obstacles identified in the course of this inquiry and proposes several possible remedies.

SECTION 2

POTENTIAL OBSTACLES TO A GREATER LEVEL OF COMPETITION IN THE MOTOR VEHICLE REPAIR AND MAINTENANCE SECTOR AND THE SPARE PARTS MANUFACTURE AND DISTRIBUTION SECTOR

130. Following a summary of the regulatory framework applying to the motor vehicle aftermarket (I), this section will consider a number of general factors that might limit competition in the sector in France. The following factors will be examined: protection of visible spare parts (II), the availability of parts in the independent channel (III), access to technical information (IV), use of the manufacturer's warranty and warranty extension (V), and the widespread practice of imposing recommended sale prices (VI).

I. Regulatory framework

131. The reasons why the motor vehicle aftermarket requires a specific regulatory framework are set out below, followed by a presentation of the European Commission's main regulatory objectives (subsections B, C, D and E).

A. SPECIFIC REGULATIONS

132. Regulations providing for block exemptions in the motor vehicle sector include more detailed texts than the general regulation on vertical agreements. The European Commission's Evaluation Report on the operation of Regulation (EC) 1400/2002 concerning motor vehicle distribution and servicing dated 31 July 2009 provides that: "*more detailed provisions [than those in the general Block Exemption Regulation] were introduced into the BER, in order to narrow the application of the block exemption in view of a number of competition problems specific to the sector, including persistent attempts by certain vehicle manufacturers to segment the EU single market, forecasts of growing concentration among vehicle manufacturers, and risks of reduced competition on the aftermarkets*" (emphasis added).
133. Competition in aftermarkets is likely to be weaker than in the vehicle sale market. The Guidelines on the application of Regulation 461/2010 provide: "*insofar as a market exists for repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific*".
134. Firstly, consumers tend to be more or less captive in the aftermarket, as most spare parts are specific to a brand of vehicle, or even to a model or production series. This means that once a vehicle has been purchased, competition in the motor vehicle aftermarket takes place solely within the same brand. Secondly, it is unlikely that the resulting limitation of

competition in the aftermarket can be offset by stronger competition in the vehicle sale market: information on the prices of after-sales services is currently too disparate and complicated to process for an individual consumer to factor it in when choosing a vehicle, with a few rare exceptions, and as motor vehicles are expensive and durable goods, the consumer will not replace a vehicle, for which repair and maintenance services are expensive, by another vehicle¹³⁵.

135. Ultimately, the risk that operators are able to distance themselves from competition is greater in the aftermarkets than in the vehicle sale market. In view of this, the European Commission has supplemented the general regulation 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 by specific regulations applying to the motor vehicle sector. However, the review of the aforementioned Regulation 1400/2002 has reduced the number of texts specifically relating to the motor vehicle sector. Vertical agreements concerning the purchase, sale or resale of new motor vehicles will be governed entirely by the Block Exemption Regulation applying to vertical agreements (Regulation (EU) 330/2010), with effect from 1 June 2013. Only the aftermarket will continue to be governed by a separate and more restrictive regime, which will entail the maintenance, in Article 5 of Regulation (EU) 461/2010, of three hard-core restrictions that will apply specifically to the sector. The European Commission's actions with regard to the motor vehicle aftermarket are based on the four objectives that are described below, along with the main regulatory tools:

- to allow independent repairers to compete with the vehicle manufacturers' networks of authorised repairers (B);
- to preserve competition within the authorised networks (C);
- to facilitate access to the aftermarkets for spare parts manufacturers (D);
- to permit distribution of the vehicle manufacturers' technical information needed to carry out repair and maintenance works to independent repairers (E).

B. ALLOWING INDEPENDENT REPAIRERS TO COMPETE WITH THE VEHICLE MANUFACTURERS' NETWORKS OF AUTHORISED REPAIRERS

136. The Commission is particularly concerned about practices that could exclude independent repairers from the repair market.

137. Independent repairers should have identical access to the input needed to compete effectively with authorised repairers in the vehicle manufacturers' networks. Firstly, they

¹³⁵ The European Commission has nevertheless stated that in some cases a single market "system" comprising both sales and after sales can be defined. This is the case, for example, for certain vehicle fleets (vehicle rental companies, major accounts, public authorities) which, given the amounts at stake and their experience in the sector, can assess the after-sales costs with a sufficient degree of accuracy when they decide to purchase a vehicle or, in some cases, can negotiate repair and maintenance contracts with the vehicle manufacturer at the time of purchase.

should have access to the spare parts they use to repair and service motor vehicles, which are sold by the members of a selective distribution system¹³⁶. This is particularly important in order to guarantee access for independent repairers to so-called "captive" parts (see §141 à 143), which are only sold by the vehicle manufacturers' authorised distributors. Next, the independent repairers should also have access to technical information, for which specific technical regulations have been adopted (see §144 à 147).

138. Furthermore, in its Guidelines on the application of Regulation 461/2010, the European Commission provides that the use of warranties that are subject to the condition that repair and maintenance work is carried out exclusively by authorised repairers may prevent the selective distribution network from being eligible for the block exemption¹³⁷.

C. PRESERVING COMPETITION WITHIN AUTHORISED NETWORKS

139. In order to preserve competition within the authorised networks, the Commission considers it essential that the networks of authorised repairers remain open to all operators meeting the quality criteria defined by the manufacturer. It has stated that imposing quantitative selection criteria on authorised repairers could mean that the agreement falls within the scope of Article 101(1) of the TFEU¹³⁸. The European Commission has more specifically warned against more indirect forms of quantitative selective distribution, resulting, for instance, from a combination of selection criteria that are purely qualitative and an obligation that distributors make a minimum volume of purchases each year, which could in certain conditions be tantamount to a quantitative criterion¹³⁹.

¹³⁶ See Article 5 of Regulation 461/2010: the hard-core restrictions include "*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*", and also paragraph 22 of the Guidelines on the application of Regulation 461/2010.

¹³⁷ "*Qualitative selective distribution agreements may also be caught by Article 101 (1) of the Treaty if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks. [...] It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception in Article 101 (3) of the Treaty*" (see paragraph 69 of the Guidelines on the application of Regulation 461/2010, see also answers 1 to 6 in the document "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012).

¹³⁸ See paragraph 70 of the Guidelines on the application of Regulation 461/2010.

¹³⁹ See paragraph 179 of the Guidelines on the application of Regulation 330/2010: "*More indirect forms of quantitative selective distribution, resulting for instance from the combination of purely qualitative selection criteria with the requirement imposed on the dealers to achieve a minimum amount of annual purchases, are less likely to produce net negative effects, if such an amount does not represent a significant proportion of the dealer's total turnover achieved with the type of products in question and it does not go beyond what is necessary for the supplier to recoup its relationship-specific investment and/or realise economies of scale in distribution*".

140. Furthermore, contracts authorising repairers must not require authorised repairers to also sell new vehicles, except in exceptional circumstances¹⁴⁰.

D. FACILITATING ACCESS TO THE AFTERMARKET FOR SPARE PARTS MANUFACTURERS

141. Block Exemption Regulation 330/2010 provides that a supplier of components (also called the "original equipment supplier") is free to sell its products in the form of spare parts¹⁴¹. Regulation 461/2010 more specifically provides that vehicle manufacturers cannot prohibit component manufacturers from selling their parts to authorised and/or independent distributors or repairers¹⁴². However, paragraph 23 of the Guidelines on the application of Regulation 461/2010 refers to the European Commission notice on subcontracting agreements¹⁴³ and provides that: "*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 directly in the aftermarket*"¹⁴⁴.

¹⁴⁰ See paragraph 71 of the Guidelines on the application of Regulation 461/2010.

¹⁴¹ See Article 4 of European Commission Regulation 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: "*The exemption provided for in Article 2 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: (...) The restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components of spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods*".

¹⁴² See Article 5, paragraph 3 of Regulation 461/2010: "*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: (...) the restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and the 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*" and paragraph 23 of the Guidelines on the application of Regulation 461/2010.

¹⁴³ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the treaty introducing the European Economic Community.

¹⁴⁴ However, the same paragraph also provides that: "*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. Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations*". More specifically, "*if the component supplier already has this tool, IPR or know-how at its disposal, or could, under reasonable condition, obtain them, [...] under these circumstances the contribution would not be necessary*". Footnote 2, page 19 of the Guidelines on the application of Regulation 461/2010.

142. Another hard-core restriction consists of the vehicle manufacturer prohibiting a component manufacturer from placing its logo on parts¹⁴⁵. Placing a logo facilitates the identification of original spare parts bearing the original equipment supplier's brand, and which are identical to the OEM parts, bearing the manufacturer's brand.
143. Lastly, non-compete obligations requiring a repairer in a network to use spare parts supplied by the vehicle manufacturer are governed by rules of common law, with the exception of repairs carried out under warranty, free servicing and vehicle recalls¹⁴⁶.

E. PERMITTING DISTRIBUTION OF THE VEHICLE MANUFACTURERS' TECHNICAL INFORMATION NEEDED TO CARRY OUT REPAIR AND MAINTENANCE WORKS TO INDEPENDENT REPAIRERS

144. Under Regulation 1400/2002, a vehicle manufacturer's refusal to allow independent operators to access technical information constitutes a hardcore restriction. Several cases have been brought against vehicle manufacturers, as a result of which they have entered into commitments¹⁴⁷.
145. Such access is now governed by more specific so-called "technical" regulations¹⁴⁸, which require vehicle manufacturers to provide independent repairers¹⁴⁹, and manufacturers of multi-make diagnostic tools¹⁵⁰ in particular, with the technical information needed to

¹⁴⁵Article 5, paragraph 3 of Regulation 461/ 2010 considers that the following is a hard-core restriction: "*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*" (see also paragraph 24 of the Guidelines on the application of Regulation 461/2010).

¹⁴⁶ See paragraph 39 of the Guidelines on the application of Regulation 461/2010.

¹⁴⁷ European Commission decisions dated 13 September 2007: COMP/E-2/39.140, Daimler Chrysler; COMP/E-2/39.141, Fiat ; COMP/E-2/39.143, Opel ; COMP/E-2/39.142, Toyota; Decision of the Conseil de la concurrence no. 07-D-31 of 9 October 2007 relative to practices implemented by Automobiles Citroën.

¹⁴⁸ Regulation 715/2007 (EEC) 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) 692/2008 implementing and amending Regulation 715/2007 (EEC) 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 (EU) 566-2011 amending Regulation (EEC) 715/2007 and Regulation (EC) 692/2008 as regards access to vehicle repair and maintenance information.

¹⁴⁹ "*Manufacturers shall provide unrestricted and standardised access to vehicle repair and maintenance information to independent operators through websites using a standardised format in a readily accessible and prompt manner, and in a manner which is non-discriminatory compared to the provision given or access granted to authorised dealers and repairers*" (emphasis added, see Article 6.1 of Regulation 715/2007).

¹⁵⁰ With regard to manufacturers of diagnostic tools, Article 6.5 of Regulation 715/2007 provides "*For the purposes of manufacture and servicing of OBD-compatible replacement or service parts and diagnostic tools and test equipment, manufacturers shall provide the relevant OBD and vehicle repair and maintenance information on a non-discriminatory basis to any interested component, diagnostic tools or test equipment manufacturer or repairer*" (emphasis added). However, access to technical information for technical

provide repair and maintenance services for their vehicles, failing which they will be unable to obtain type approval¹⁵¹. This obligation is one of the key points of (EC) Regulation 715/2007 of 20 June 2007¹⁵², known as "Euro 5", and applies to approved vehicles since September 2009¹⁵³. The Commission has stated in this connection that "*unrestricted access to vehicle repair information, via a standardised format [...] and effective competition on the market for vehicle repair and maintenance information services [are] necessary to improve the functioning of the internal market*"¹⁵⁴.

146. European competition authorities do not have the powers to monitor compliance with these technical regulations as such. However, they may take into consideration "*the list of items set out in Article 6(2) of Regulation (EC) 715/2007 and Regulation (EC) 595/2009 [as] a guide to what the Commission views as technical information for the purposes of applying Article 101 of the Treaty*"¹⁵⁵. More specifically, the Guidelines on Regulation 461/2010¹⁵⁶ differentiate between information "*used ultimately for the repair and maintenance of motor vehicles*" and information used "*for another purpose*". In the first case, withholding such information from independent operators may result in the manufacturer's selective distribution agreements falling under the scope of Article 101(1) of the TFEU¹⁵⁷ if withholding the information has an appreciable impact on the ability of the independent operators to carry out their tasks and exert a competitive constraint on the market, and if the information is made available to members of the authorised network. The Commission provides that "*in those circumstances, the efficiencies that might normally be expected to result from the authorised repair and parts distribution agreements would not be such as to offset these anticompetitive effects, and the agreements in question would consequently fail to satisfy the conditions laid down in Article 101(3) of the Treaty*"¹⁵⁸. The European Commission considers, with regard to other technical information, i.e., information used "*for another purpose*" than repairs and maintenance, that withholding such information would be unlikely to cause the selective distribution agreements to fall under the scope of

information publishers with a view to integration is not expressly mentioned in the technical regulations, but is covered in the Guidelines on the application of Regulation 461/2010.

¹⁵¹ The manufacturer provides the vehicle type approval authority with a certificate attesting that it has complied with all its obligations pertaining to access to technical information, and this certificate is therefore necessary in order to obtain new vehicle approval.

¹⁵² Regulation 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.

¹⁵³ Article 18 of Regulation 715/2007, given that "*the Commission will take those Regulations [Euro 5 and 6 technical regulations] into account when assessing cases of suspected withholding of technical repair and maintenance information concerning motor vehicles marketed before those dates*" (paragraph 65 of the Guidelines on the application of Regulation 461/2010).

¹⁵⁴ Recital 8 of Regulation 715/2007 (EC) of 20 June 2007.

¹⁵⁵ Paragraph 66 of the Guidelines on the application of Regulation 461/2010.

¹⁵⁶ Paragraphs 62 to 68 of the Guidelines on the application of Regulation 461/2010.

¹⁵⁷ Paragraph 65 of the aforementioned Guidelines.

¹⁵⁸ Paragraph 64 of the aforementioned Guidelines.

Article 101 (1) of the Treaty¹⁵⁹. The withholding of such information must therefore be analysed on the basis of general Regulation 330/2010 or Article 102 of the TFEU.

147. Lastly, with regard to limitations placed on access to data relating to vehicle safety and security, a possibility initially introduced by Regulation 1400/2002¹⁶⁰ and maintained in the Euro 5 and Euro 6 regulations¹⁶¹, the Commission recently reminded vehicle manufacturers that they could not obstruct the communication to independent operators of information relating to the security and safety of property and individuals: "*assuming that a vehicle manufacturer is likely to be the only source for the full range of technical information relating to vehicles of its brands [...] in such a case involving a (near) monopoly position, flat refusals to grant technical information for supposed reasons of security or safety will usually not be compatible with EU competition rules*"¹⁶². In such a case, the factors taken into consideration to assess the existence of an infringement of competition rules are, on the one hand, the scope of the information involved¹⁶³ and, on the other hand, whether or not less restrictive protection mechanisms could be implemented, which can be assessed differently depending on whether the information concerns the security of property or the safety of individuals¹⁶⁴.

¹⁵⁹ In such a case, the information would not satisfy the conditions listed in paragraph 65 of the aforementioned Guidelines for the selective distribution agreements to fall under the scope of Article 101(1) of the TFEU.

¹⁶⁰ Recital 26 of Regulation (EU) 1400/2002: "*It is, however, legitimate and proper for them to withhold access to technical information which might allow a third party to bypass or disarm on-board anti-theft devices, to recalibrate electronic devices or to tamper with devices which for instance limit the speed of a motor vehicle, unless protection against theft, re-calibration or tampering can be attained by other less restrictive means*".

¹⁶¹ "*Only features directly associated with emissions calibration or prevention of vehicle theft may be so protected*" (Article 2.3.1 Annex I of Regulation 692/2008), given that "*the independent operator shall be accredited and authorised for this purpose on the basis of documents demonstrating that they pursue a legitimate business activity and have not been convicted of relevant criminal activity*" (Article 2.2 Annex XIV of the aforementioned Regulation).

¹⁶² Question 15 in the document "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012.

¹⁶³ "*Independent garages are generally familiar with systems with safety implications, including tyres, steering, brakes and shock absorbers, and indeed have historically worked on them without demonstrable negative consequences for safety. Imposing restrictions that affect the provision of parts for such systems on the grounds that they are safety-related would be unlikely to be deemed as justified*" (ibid.).

¹⁶⁴ When the information concerns the safety of individuals "*where there is a need to restrict access to a safety-related part with which independent repairers are likely to be unfamiliar, such as a high-voltage electrical system that is specific to a particular model, or a technique for replacing carbon composite body panels, the vehicle manufacturer should adopt the least-restrictive means of achieving the desired result. One example might be to require independent repairers to attend training on the particular system or technique. Where the vehicle manufacturer or an undertaking acting on its behalf provides such training, the independent repairer should not be required to follow more training than it needs to work on the system or master the technique in respect of which the exception is invoked*". When the information concerns the security of property "*as regards security-related information, a criminal records check can often be seen as an appropriate, less restrictive means of ensuring protection*" (ibid.).

II. Design protection for visible parts

148. Visible parts are spare parts that, when they are novel and have a distinctive character, can be protected by design rights, giving the vehicle manufacturer a legal monopoly over their distribution. Unlike France, several countries have chosen to reform this protection by introducing a so-called "repair" clause, authorising the manufacture and distribution of the parts in the spare parts markets by third-party operators.
149. This section contains a description of the economic and legal framework governing the manufacture and distribution of visible parts (A). Factors that might justify the protection of visible spare parts are then discussed (B), followed by an examination of the opening-up of the market for visible spare parts (C), and the manner in which the market could be opened up (D).

A. LEGAL AND ECONOMIC FRAMEWORK

150. The visible parts market is described below (1), followed by a presentation of the legal framework applying to the protection of visible parts (2).

1. THE VISIBLE PARTS MARKET WITHIN THE MOTOR VEHICLE AFTERMARKET

151. Visible parts protected by design rights are so-called "exterior parts", which essentially belong to one of the following four categories of parts: body parts (steel metal parts and plastic bumpers), mirrors, lights (mainly headlights and tail lights) and windows (windcreens, rear and side windows). Not all visible parts meet the design protection criteria, namely that they are novel and have a distinctive character, but in practice vehicle manufacturers protect the majority of their visible parts¹⁶⁵ and there are no provisions for *ex-ante* monitoring to ensure protection is justified; only a court can decide that a design or model registered by a vehicle manufacturer is invalid.
152. Sales of such parts in 2010 represented retail sales of between €1.8 billion and €2.6 billion, excluding VAT¹⁶⁶, which is approximately 13% to 20% of the total spare parts distribution market. These parts are essentially used for repairs following material damage¹⁶⁷.

¹⁶⁵ Not all manufacturers protect their visible parts to the same extent: some foreign manufacturers only protect a few of their visible parts, whereas others systematically protect almost all parts. However, the manufacturers who only protect a limited number of their visible parts only account for a small proportion of vehicles in France. In addition, they have stated that the protection policy implemented by the other manufacturers in France restricts the number of non-OEM visible parts available in the independent channel for their vehicles. In order to attract body shops, independent distributors must offer parts for a sufficiently wide range of vehicles, including in particular the makes that hold large market shares.

¹⁶⁶ Contributions to the public consultation led us to adjust the initial estimated size of the market for visible spare parts of between €2 and €2.5 billion. The new, lower estimate is based on data from manufacturers concerning body parts and mirrors and SRA data ("material damage claims in 2010") for windows and lights.

a) The structure of the offer: vehicle manufacturer monopoly or vehicle manufacturer and original equipment supplier duopoly

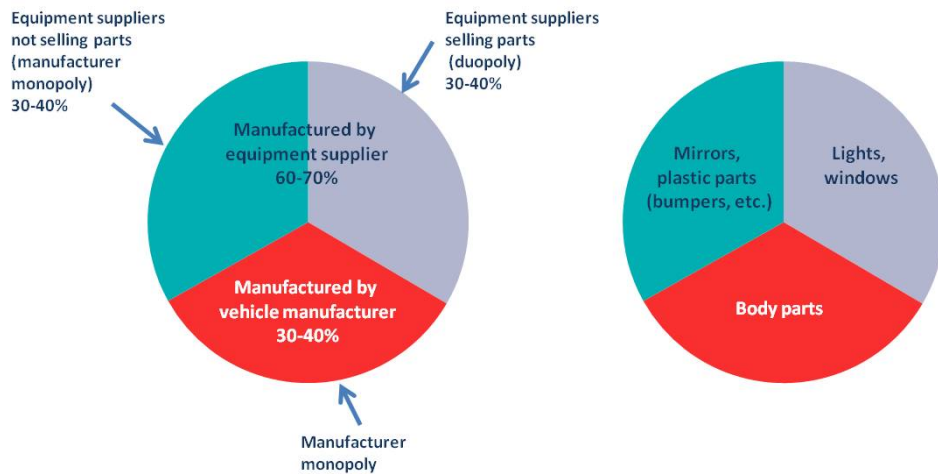
153. The majority of visible parts are "captive" parts, for which the vehicle manufacturers have a distribution monopoly. These tend to be sheet metal parts, bumpers and mirrors. Sheet metal parts (wings, hoods, etc.) are often manufactured by the vehicle manufacturers. In general terms, they manufacture on average between 30% and 40% of the visible parts they distribute through their authorised networks. Bumpers and mirrors are manufactured by the equipment suppliers for the vehicle manufacturers. However, equipment suppliers are not usually authorised to distribute these parts.
154. Lastly, certain visible parts, often referred to as "semi-captive" parts, are manufactured by the original equipment suppliers, who also negotiate the right to distribute them. These tend to be lighting (headlights, tail lights) and window glass (side windows, windscreens) parts, for which the equipment suppliers have greater negotiating power and can also contribute to aesthetic design investments. For these parts there is therefore a duopoly between the vehicle manufacturer and the original equipment supplier: approximately 60%¹⁶⁸ of lighting part references and 75% of window glass part references are marketed directly by the equipment suppliers. The equipment suppliers' global market share for lights and windows is slightly above 50%, which corresponds to approximately 15% of all sales of visible parts.
155. Graph 10 below depicts the structure of the offer, according to part type.

It does not factor in body parts and mirrors that do not pass through level 1 authorised repairers located in France. Mirrors and body parts that are not factored in include in particular: second-hand parts, imported OEM parts and infringing parts. The higher estimate is based on SRA data ("material damage claims in 2010"), and corresponds to the total amount paid by insurers. This data has been adjusted to exclude non-visible parts (for example, for a *front fascia* sales figure of €34 million, only €705 million corresponds to protectable visible parts), exclude VAT and include the proportion of the bill that is paid by consumers, which is estimated at 15% of sales.

¹⁶⁷ Accidents, claims following theft, adverse weather-related claims, etc.

¹⁶⁸ And not 40% of headlights and 3% of tail lights, as stated in §148 of the public consultation document.

Graph 1 – Structure of the visible spare parts offer



Source: Autorité de la concurrence

b) Demand from body shops, insurers and, ultimately, consumers

156. Most visible spare parts are used by the body work segment, as described in section 1, box 1. As this segment is very different from the other repair and maintenance segments, it is common, especially in the independent channel, for body shops to offer bodywork services only. Independent body shops may be tempted to place all orders with one supplier for logistical reasons. As body shops can only order protected visible parts from manufacturers' authorised repairers, the protection of the visible parts can have a kick-on effect on orders of unprotected parts needed for bodywork¹⁶⁹.
157. Downstream, insurers account for approximately 85% of bodywork sales. The consumer therefore tends to be unaware of the price of such parts, particularly as the insurer will often offer to pay the service provider directly. Nevertheless, this low awareness of prices concerns comprehensive risk policyholders (62% of all policyholders) rather than third party insurance policyholders (38%) who, when they are found to be liable, have to pay the full cost of repairs following a material damage claim. In addition, insurers reimburse repairers on the basis of the vehicle manufacturers' recommended sale prices and negotiate discounts or business finder fees in proportion to the turnover generated through their relationship with the repairer. However, changes in the prices of these parts will affect the insurance premiums paid by the consumer.

¹⁶⁹ See, on this subject, paragraphs 178 and 179 of the public consultation document dated 11 April 2012.

2. PROTECTION OF DESIGNS AND MODELS IN FRANCE

a) Legal framework

158. When considering the regulatory framework governing the sale of "visible" parts, two markets for visible parts can be identified: the 'original assembly' or new vehicle market, in which parts are systematically protected by intellectual property law, and the "second market", corresponding to the sale of parts for vehicle repairs, which has been liberalised in several Member States through the so-called "repair" clause.
159. More specifically in this second market, pursuant to Directive 98/71/EEC on legal protection of designs and models, Member States can only modify the provisions protecting visible parts "if the purpose is to liberalise the market for such parts" (Article 14 of the Directive implementing the so-called "status quo plus"). In 2002, Article 110 of Council Regulation (EC) 6/2002 on community designs provided that "visible" parts in the "second market" are not protected under community design rights, pursuant to a so-called "repair" clause.
160. However, national exceptions protecting such parts still exist today, and this situation is not likely to change unless it is harmonised as part of a review of Directive 98/71/EEC. The European Parliament adopted a draft amendment to the directive in 2007, but a final text has still not seen the light. This means that each Member State's national laws still govern protection in this area¹⁷⁰. Table 6 below lists the European Union countries that

¹⁷⁰ In the Volvo case (CJEC, decision 238/87 of 5 October 1988, Volvo/Erik Veng) and the Maxicar case (CJEC, decision 53/87 of 5 October 1988, Maxicar/Renault), the Court questioned whether the fact that a motor vehicle manufacturer holding design rights for body parts refuses to grant a third party a license to supply parts incorporating the protected design should be considered as abuse of a dominant position within the meaning of Article 82 EC. In its decision, the Court stated that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of this exclusive right (see paragraph 8 in the Volvo decision): "it follows that an obligation imposed upon the proprietor of a protected design to grant third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor being deprived of the substance of his exclusive rights, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position". The Court added, however, that "the exercise of an exclusive right by the proprietor of the registered design in respect of car body panels [could] be prohibited by Article [82 EC] if it [involved] on the part of an undertaking holding a dominant position certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce a part for a particular model, even though many cars of that model [were] still in circulation, provided that such conduct [was] liable to affect trade between Member States (paragraph 9 of the Volvo decision). Refusal to grant a licence for the supply of parts incorporating a protected design cannot therefore be considered to constitute abuse of a dominant position.

This does not affect the Member States' rights to introduce legislation to restrict the scope of these intellectual property rights after having considered the pros and cons of such a decision. As the Court pointed out in the Magill decision (CJEC decisions C-241/91 P and C-242/1 P of 6 April 1995, RTE and ITP versus Commission of the European Communities) on the topic of the scope of application of copyright: "the laws of the Member States on copyright need to balance the various considerations that need to be taken into account by the undertaking, including, on the one hand, those relating to the protection of the authors' interests and, on the other hand, those associated with the objective of undistorted competition" [unofficial translation].

have a repair clause and those that do not. The countries that do not protect visible spare parts actually represent 70% of all European vehicles and 70% of vehicle production in Europe¹⁷¹.

Table 6– Breakdown of the 27 EU Member States that do and do not have a repair clause¹⁷²

Countries with a repair clause	Countries without a repair clause
Belgium Spain Ireland Italy Luxembourg Netherlands Poland UK Hungary Latvia Greece ¹⁷³	Germany – but <i>de facto</i> application ¹⁷⁴ Austria Denmark Finland France Portugal Sweden Czech Republic Cyprus Estonia Lithuania Malta Slovakia Slovenia Bulgaria Romania ¹⁷⁵

161. France has chosen not to liberalise the market for visible spare parts, citing, in particular, the threat that such a step would represent to efforts to encourage companies to innovate, to

¹⁷¹ Source: ACEA report of July 2011, entitled "EU Economic Report", pages 27 and 28, for the motor vehicle production data (2010 data); Eurostat for data on the number of passenger vehicles (2010 date when available, or most recent data). Germany is counted as a country that does not protect visible spare parts in practice, and Greece is counted as a country that protects visible spare parts in practice.

¹⁷² Source: working document on the proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC on legal protection of designs and models – Committee on Legal Affairs – COM(2004) 582 final – 2004/0203(COD). Poland introduced the repair clause in 2007. It is now therefore one of the countries that do not protect visible spare parts.

¹⁷³ Greece proposed a repair clause combined with a five-year protection period and fair and reasonable remuneration. The remuneration system has never been implemented, because the vehicle manufacturers and the equipment suppliers have never been able to agree on the amount of royalties. (Source: proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC on legal protection of designs and models (SEC(2004) 1097).

¹⁷⁴ Although German legislation provides for the protection of visible spare parts, in practice it applies the repair clause (see Box below).

¹⁷⁵ In Romania, the national competition authority has recently proposed that a repair clause be introduced into national law.

the availability of less demanded visible parts and to consumer safety¹⁷⁶. In France, visible parts are design protected pursuant to Articles. L. 511-1 *et seq.* of the Intellectual Property Code.

162. The box below describes the specific cases of Germany and the USA.

Box 2 – Application of design rights to motor vehicle spare parts in Germany and the USA¹⁷⁷

In Germany, legislation providing for the protection of visible spare parts by design rights is still in force. However, within the context of the review of German laws in this area following the transposition of Directive 98/71/EEC, vehicle manufacturers made a commitment in 2003, through the intermediary of the VDA¹⁷⁸, not to use this protection to prevent the marketing of non-OEM visible parts, provided the current legislation remains in force.

The purpose of this undertaking was therefore to engineer a satisfactory form of coexistence between the different, competing distribution channels¹⁷⁹. In 2003, a vehicle manufacturer was compelled to waive the benefit of a court decision finding in its favour in cases relating to design rights, to satisfy a request by the Minister of Justice, who reminded the vehicle manufacturer of its commitment¹⁸⁰. As a result, none of the vehicle manufacturers questioned had taken any legal action in Germany since 2003 – with the exception of one case brought by a German manufacturer, but which concerned wheel rims¹⁸¹ – and a large number of non-OEM visible parts are sold through the independent circuit. This situation is in sharp contrast with France, where the two main French vehicle manufacturers have taken legal action in approximately 100 cases with respect to design rights since 2003. The vehicle manufacturers consider that the fact that operators do not exercise their rights before the courts does not mean that the law is not respected.

¹⁷⁶ Information based on the contribution from the Senate delegation for the European Union with regard to its examination of the proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC of November 2004, and the Reply by the Secretary of State for trade, small and medium businesses, tourism and services to the oral question without debate no. 0192S, published in the Senate Official Journal of 16 April 2008.

¹⁷⁷ The appendix to this Opinion contains more detailed information on the situation in Germany and the USA and responds to criticism voiced by manufacturers in their contribution to the public consultation.

¹⁷⁸ Verband der Automobilindustrie (German federation of vehicle manufacturers).

¹⁷⁹ Proposed Bundestag law dated 28 May 2003 to transpose Directive 98/71/EEC on legal protection of designs and models.

¹⁸⁰ Reply by the Minister of Justice to the German Federal Trade Association dated 30 July 2003, enclosing a statement by the VDA.

¹⁸¹ The legal proceedings were started by a German manufacturer after the 2003 commitment. The Autorité de la concurrence was only informed of it in June 2012, i.e., four months after the Investigation Services sent this German manufacturer a request for information. The case concerned wheel rims. Wheel rims are different to most other visible parts in that the spare part does not necessarily need to be identical in appearance to the faulty part. This means there is some leeway when selecting the spare part. Accordingly, the protection of spare parts by design rights will not necessarily result in a monopoly, which is not the case for most other visible parts.

Proof of the effectiveness of the commitment made by German vehicle manufacturers lies in the fact that independent body shops provide the independent channel with 70% of their body parts¹⁸². If independent operators were not entitled to distribute visible part, including in particular body parts, most of these parts would be supplied by the manufacturer channel.

In the United States, as in Germany, the market for visible spare parts is liberalised in practice, although the law does not specifically provide for a repair clause. Unlike Germany, this freedom is not based on a commitment by vehicle manufacturers, but instead on the fact that vehicle manufacturers in the US almost never exercise their rights. Nevertheless, although until recently vehicle manufacturers have refrained from exercising their design rights over spare parts, since 2003 some vehicle manufacturers have begun to protect their parts, and Ford has taken legal action on two occasions with regard to design rights and spare parts (in 2005 and 2008). The first case resulted in the International Trade Commission handing down an exclusion order in 2007 prohibiting the import of 7 of the 14 parts concerned by the dispute.

The two Ford cases appear to be isolated cases for the moment. However, fearing a generalisation of such protection and market foreclosure, many operators in the independent channel, insurers and consumer associations are campaigning, along with the American Antitrust Institute, for the freedom to sell visible spare parts to be enacted in law.

Although the freedom to sell visible parts in the US has been called into question by the Ford cases, it is still widespread at the current time, as was confirmed by a statement from the Automotive Aftermarket Industry Association on 25 June 2012.

b) Implementation

163. In order to benefit from design protection, a vehicle manufacturer must first register its part design with the INPI, the French intellectual property office. Once this has been done¹⁸³, the vehicle manufacturer will be the only party authorised to sell the part for repairs on its vehicles, unless it expressly agrees otherwise. Most agreements are entered into with original equipment suppliers (see §154 above).
164. Provided it has registered its design, a vehicle manufacturer can exercise its intellectual property rights through, firstly, seizures by customs officers on the grounds of infringement (in most cases this is done at trade fairs) or, secondly, by bringing legal action against infringers. In France, most cases involving design rights are brought by French vehicle manufacturers, because of their large market share¹⁸⁴, whereas the other vehicle manufacturers with a smaller market presence tend to prefer to avoid litigation. Several court decisions have enabled vehicle manufacturers to exercise their design

¹⁸² Source: GIPA "Professional Survey 2009", page 102.

¹⁸³ Designs and models are usually registered without any prior verification that the protection criteria laid down by law have been satisfied. This will only be verified by the courts *a posteriori* in the event of a dispute. Nevertheless, as French manufacturers tend to start criminal proceedings when they wish to protect their parts by design rights, the mere existence of the protection, even if it does not satisfy the criteria laid down in intellectual property law, acts as a strong deterrent to the manufacture and sale of parts that will compete with OEM parts.

¹⁸⁴ See footnote 165.

rights¹⁸⁵. Part manufacturers or distributors may be accused of infringement if they manufacture or sell, on French territory, spare parts that are design-protected, even if they are not intended for the French market. As a result, equipment suppliers are not entitled to manufacture non-OEM visible parts in France corresponding to part references that are protected in France, even if production is intended for other countries.

B. ANALYSIS OF ARGUMENTS SUBMITTED IN SUPPORT OF THE MAINTENANCE OF PROTECTION FOR VISIBLE SPARE PARTS

165. A vehicle manufacturer who protects its visible spare parts will have a monopoly. Firstly, in most cases, it is impossible to replace a damaged visible part by a spare part that is different in appearance¹⁸⁶. Secondly, a parts manufacturer can only offer consumers parts that have been conceptually designed by the manufacturer of the consumer's vehicle. However, the protection of visible original parts does not prevent other manufacturers from manufacturing their own parts, and the consumer is free to choose between competing vehicle models. The protection of visible spare parts therefore restricts competition much more significantly than the protection of visible original assembly parts. The protection of the aesthetic designs used in the spare part sector is not therefore the same as protection under intellectual property rights in other sectors¹⁸⁷, as it prevents any competition through substitution.
166. The protection under intellectual property rights of visible spare parts therefore grants a monopoly to the owner of the intellectual property rights, when in most other sectors competitors still have the possibility of designing and manufacturing a different and innovative product, which will be able to compete with the protected product.
167. The arguments put forward by vehicle manufacturers in support of the maintenance of these intellectual property rights, despite the fact that they restrict competition are examined below. The following subjects are considered in turn: the incentive to innovate and invest in aesthetic design (1), the quality and safety of parts (2), and the structurally asymmetric nature of the manufacturer channel and the independent channel (3).

1. THE INCENTIVE TO INNOVATE AND INVEST IN AESTHETIC DESIGN

168. The main objective of intellectual property law is to encourage innovation through two core mechanisms. Firstly, by guaranteeing that the creator will benefit from its creation,

¹⁸⁵ For example: Court of Cassation Criminal division, 9 September 2003 appeal 02-82822; Court of Cassation Criminal division, 6 June 1991, appeal 90-80755; CJEC case 53/87 Maxicar v. RNUR, 5 October 1988.

¹⁸⁶ With the possible exception of wheel rims, the shape of which must be identical to the original part, but which can look different.

¹⁸⁷ Such as the pharmaceutical sector, which was mentioned by one of the contributors.

while preventing the wrongful appropriation of the creation by an imitator¹⁸⁸; secondly, by encouraging competitors to attempt to create a novel and substitutable product to compete with the protected product. This second mechanism would not seem to apply to spare parts, as there is no room for innovation since damaged parts have to be replaced by identical parts. Protecting an aesthetic design cannot therefore encourage innovation "through substitution" in the spare parts market.

169. As regards the first mechanism – the guarantee that the creator will benefit from its investments in the design – motor vehicle manufacturers seek a return on their investments in a vehicle's aesthetic design throughout the life of the vehicle, both at the time of sale and when repairs are carried out. They do not accept that third-party equipment suppliers should be able to capitalise on the success of a certain vehicle model without participating in the aesthetic design investments made to create this model or any other models that were sold in low volumes.
170. Figures available concerning estimated aesthetic design investments vary considerably. According to the European Commission, aesthetic design investments represent no more than 0.7% of a vehicle manufacturer's aggregate turnover¹⁸⁹, i.e., between €50 and €60 per vehicle on average¹⁹⁰. However, the vehicle manufacturers consider that such investments are not limited to "drawing" costs, which they claim are the only costs taken into consideration by the European Commission in its analysis of the impact of the introduction of a repair clause applying to Member States, as they also include all conceptual design functions, such as research, development, studies and processes. However, although the conceptual design and associated technical considerations can fall under aesthetic design investments, not all conceptual design costs can be taken into consideration, despite the vehicle manufacturers' arguments and yet, according to the European Commission's aforementioned impact study, R&D associated with aesthetic design work usually represents 1.4% of turnover¹⁹¹, i.e., a cost of €100-€120 per vehicle¹⁹². According to

¹⁸⁸ Insofar as the visible parts combine to form the visual identity (the aesthetic design) of a vehicle, protection is particularly important at vehicle assembly level. The aesthetic design contributes added value to the investment made to launch a new vehicle, which is estimated at approximately €1 billion on average. Imitating visible original assembly parts in order to manufacture a competing vehicle could be considered as the appropriation of the model's intrinsic qualities, which would be particularly prejudicial to innovation in the motor vehicle sector.

¹⁸⁹ Commission staff working document: Proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC on the legal protection of designs – Extended impact assessment, COM(2004)582 Final, page 30.

¹⁹⁰ A document issued by FIGIEFA (International Federation and Political Representative in Brussels of Independent Automotive Aftermarket Distributors and National Trade Associations, such as FEDA in France) cites even lower investment costs, ranging from €50 per vehicle for luxury vehicles such as the Mercedes Class S, and only €10 for mass-produced vehicles such as a Renault Clio. These two figures taken together give a percentage of approximately 0.08% of the sale price of a new car.

¹⁹¹ R&D costs for all parts (visible and non-visible) correspond to approximately 4.2% of turnover, according to the European Commission's impact study.

¹⁹² The manufacturers have estimated the total amount spent on "pure design" at between €16 and €20 million, depending on the project. Given that total investments represent approximately €1 billion per vehicle model (source: manufacturers), the manufacturers' investments in "pure design" correspond to between

European Commission data, even if the risk associated with such investments is taken into consideration, they should be depreciated at the time of sale of the vehicle in a competitive market, rather than in the aftermarket, where the manufacturer's monopoly over visible parts is likely to result in high prices.

171. In their contributions, the vehicle manufacturers consider that it is unrealistic to expect them to achieve a return on their investments at the vehicle assembly stage and go as far as to claim that it is preferable to link the new vehicle sale market with the aftermarket because this encourages vehicle manufacturers to associate their brand image with the aftermarket to the same extent as the original assembly market. European regulations in the motor vehicle sector are based, however, on the belief that in most cases, the new vehicle sale market and the aftermarket do not form a "market system", for the reasons set out in paragraph 25 above.
172. In any event, although some uncertainty may remain as to the amount of aesthetic design-related investments, a vehicle's appearance is a major factor of its commercial success or failure, and the withdrawal of protection for visible spare parts should not therefore diminish vehicle manufacturers' motivation to invest in the aesthetic design of their vehicle models. In practice, in the many countries that have a repair clause there has not been any indication of poorer aesthetic design as a result¹⁹³.
173. In view of the foregoing, the protection of visible spare parts does not seem essential to encourage vehicle manufacturers to invest in the aesthetic design of vehicles. This observation is equally valid in cases where ownership pursuant to design rights is shared by the vehicle manufacturer and the original equipment supplier.

2. QUALITY OF PARTS AND VEHICLE SAFETY AND SECURITY

174. The vehicle manufacturers claim that protecting visible spare parts by design rights guarantees the quality of the parts and, therefore, consumer safety. They claim that the use of non-OEM visible parts would put consumers at considerable risk. Firstly, it should be noted that this is not the objective of design protection, which is based on appearance and not on production materials or performance. Consumer safety and the quality of both visible and non-visible parts derive from a legal framework defined by the European Union, which imposes a strict authorisation process¹⁹⁴ for parts that might constitute security or safety risks. Several specific directives associated with the framework Directive 70/156/EC of 6 February 1970, as amended by Directive 2003/102/EC of 17 November 2003, govern the sale of visible parts. Special authorisation must be obtained for windscreens, windows and lights, for example, while a directive specifically covers

approximately 1.6% and 2% of total investments in the model. However, the manufacturers were unable to estimate the proportion of conceptual design corresponding to aesthetic design parts. They claim that these parts represent a substantial investment, but cannot be identified or isolated.

¹⁹³ For example, Seat, the Spanish manufacturer, has just announced the launch of a new vehicle every quarter, despite the current economic crisis. Likewise, the Italian manufacturers Fiat, Alfa Romeo, Ferrari and Lancia do not seem to invest less in aesthetic design than PSA or Renault.

¹⁹⁴ This dates back to the 1970s, although the current directive in force is Directive 2007/46/EC.

pedestrian protection and defines the regulatory framework applying to impact-absorbing parts in order to minimise pedestrian's bodily injury.

175. Furthermore, the impact study carried out by the European Commission found that the repair clause has had no impact on vehicle safety or security¹⁹⁵. During the inquiry, none of the vehicle manufacturers reported any decrease in the safety of persons in those countries which no longer protect visible parts by design rights, including in countries such as the UK or Italy, which liberalised their markets more than 14 years ago.
176. In practice, as stated above (§153), vehicle manufacturers manufacture on average 30% to 40% of the visible parts they sell in their authorised networks, essentially sheet metal parts. This means that on average 60% to 70% of the visible parts sold are manufactured by original equipment suppliers. These parts comply with the original assembly specifications and do not present any risk for consumer safety. When spare parts are manufactured by secondary equipment suppliers, 'matching quality' parts comply with the original technical specifications, and nothing suggests that their use might compromise consumer safety, particularly as this has not been observed in the market for non-visible parts, many of which have been produced by secondary manufacturers for many years.
177. Furthermore, a number of organisations certify parts after they have been fitted (such as THATCHAM, TÜV and CENTRO ZARAGOZA), and they are capable of carrying out specific tests to ensure that non-OEM visible parts are compliant. This certification system provides insurers with the assurance that poor quality parts are not used. As a result, parts' quality and security requirements cannot justify any decision to limit the manufacture and sale of visible spare parts to original equipment suppliers.
178. Lastly, some operators have even suggested in their contributions that design protection might jeopardise vehicle security by discouraging certain vehicle owners from carrying out essential repairs, given that 40% of vehicle owners do not have comprehensive insurance policies, which means that they have to cover the cost of any repairs following a material damage claim.
179. To conclude, the protection of visible spare parts by design rights does not seem necessary in order to preserve the quality of parts and guarantee security and safety.

3. OFFSETTING STRUCTURAL IMBALANCES BETWEEN THE MANUFACTURER CHANNEL AND THE INDEPENDENT CHANNEL

180. From the manufacturers' point of view, the purpose of the after-sales market is to provide product follow-up for the primary product sold (the vehicle) and to guarantee it is fit for use throughout its life. Vehicle manufacturers have an obligation to guarantee the availability of all spare parts for the vehicles they assemble for at least 10 years after the model's production is ended. They therefore offer a full range of services and parts for the repair and maintenance of all vehicles they produce. Conversely, independent operators can focus on the most profitable segments of the aftermarket and avoid those segments that

¹⁹⁵ Aforementioned report COM(2004)582 Final, page 35.

are not as profitable or even loss-making, because they are under no obligation to sell all parts and because customer satisfaction is not key for future vehicle sales.

181. This means that for some vehicle manufacturers a small minority (6-7%) of visible part references represent a very large proportion of turnover from visible parts (80%). Moreover, 50% of visible part references in stock in 2011 were only sold once during that year: this means that storage costs were incurred without any sales being made. According to the vehicle manufacturers, opening up the market for visible spare parts would deprive them of the profits made on the 6-7% of visible parts with high turnover, which they claim is essential to enable them to guarantee acceptable prices for low turnover visible parts. According to the vehicle manufacturers, the costs (in particular storage costs) associated with low demand parts are high, and if the price reflected these actual costs it would be too high to be considered acceptable by consumers.
182. The introduction of a repair clause should not affect the vehicle manufacturers' policy of limiting prices charged for low demand spare parts to a level that is acceptable for consumers, as it will always be in a vehicle manufacturer's interest to preserve its brand image, whether visible parts are protected or not.
183. Although the vehicle manufacturers contest this, they have failed to produce any factual evidence or figures based, for example, on their experience in those countries that introduced a repair clause many years ago. The introduction of a repair clause in almost half of the Member States of the European Union does not seem to have had any adverse effect on the availability of low demand parts at reasonable prices.
184. Furthermore, the figures produced as evidence of the need to protect visible spare parts in order to establish a balance between high demand parts and low demand parts do not reveal the existence of any major financing constraints on low demand parts. As shown by the calculations presented in paragraphs 208 to 210 of the public consultation document dated 11 April 2012, one manufacturer reported a positive net margin on low demand parts. Each part sold resulted in a net profit, meaning that there is no financial offsetting between losses on low demand parts and profits on high demand parts. In the case of the other manufacturer who submitted data in support of this argument, the estimated profit margins on low demand parts and high demand parts, based on average margins disclosed elsewhere, do point to the existence of offsetting, but suggest that this is limited to 1%¹⁹⁶ of the total margin on the manufacturer's visible parts. It is therefore apparent that the gain derived from the monopoly over visible spare parts far outweighs the financing needs for the manufacturer's low demand parts. It is therefore unlikely that a fall in profit margins on the high demand parts would require the vehicle manufacturer to increase the prices it charges for the low demand parts.
185. Accordingly, there does not seem to be any reason to maintain protection for visible spare parts in order to enable vehicle manufacturers to offset losses on low demand spare parts against profits on high demand parts, whether they are visible or not. However, it may nevertheless be advantageous to maintain the current system for other economic or social reasons.

¹⁹⁶ And not one margin point, as stated in one of the contributions (see detailed calculation in paragraphs 208 and 209 of the public consultation document).

186. This finding should not be confused with the potential reduction in overall profitability that some vehicle manufacturers might experience if design protection of visible spare parts were to be abolished, in an economic context where their overall profitability is bordering zero or is, in some cases, negative. The vehicle manufacturers do not argue in their contributions that design protection compensates for structural imbalances between the various market operators (manufacturer channel versus independent channel), but it does result in French consumers paying more, because protection restricts competition.
187. Lastly, although the vehicle manufacturers' networks are disadvantaged in the aftermarket because they have an obligation to stock all spare parts, independent repairers need to earn the trust of individual customers, who are naturally more inclined to use the network of the manufacturer from whom they purchased the vehicle, whereas wholesalers have to cover the storage costs incurred to stock the wide range of products their multi-make activity requires them to offer.

C. THE EXPECTED IMPACT OF THE OPENING-UP OF THE VISIBLE SPARE PARTS MARKET

188. The opening-up of the market is expected to affect sale prices for parts and vehicle insurance premiums (1), and to also have an impact on the structure of the parts repair and manufacturing market (2). Concerns expressed by French vehicle manufacturers that this will have an adverse effect on their competitiveness (3) and on employment (4) need to be tempered. In the current situation, the immediate opening-up of the market does not seem advisable. The decision in principle lies with the public authorities, who will also decide on the most appropriate transition methods (see section D on the practicalities of opening up the visible spare parts market).

1. IMPACT ON PRICES PAID BY CONSUMERS

189. The opening-up of the market for visible spare parts would result, on the one hand, in the emergence of alternative, cheaper offers and, on the other hand, in a reduction in prices charged for OEM parts because of the competition from alternative parts. This could halt the constant increase in visible parts prices observed over recent years, which is harmful to consumers.
190. In their contributions, the vehicle manufacturers have criticised observations made in the public consultation document, maintaining that, on the contrary, a repair clause would not lead to a drop in prices and instead would simply result in a redistribution of value between the various downstream operators. In other words, prices would not fall (or would fall only slightly) due to a "price follower phenomenon", with equipment suppliers positioning themselves just slightly below the prices offered by vehicle manufacturers, with the price variances between the two channels ultimately being minimal. However, despite the small

price reductions, the vehicle manufacturers would lose market shares to the independent channel¹⁹⁷.

191. The Autorité de la concurrence notes that various obstacles to competition might restrict competition between vehicle manufacturers and equipment suppliers for spare part sales (see section 1, part II, and the description of other obstacles below).
192. However, in the highly competitive collision repair segment, insurers act as the main source of business¹⁹⁸ and are in a strong negotiating position, which stimulates competition between vehicle manufacturers and equipment suppliers. In addition, competition between insurers in the motor vehicle insurance market (see section 1 Box 1) should enable consumers to reap concrete benefits from the reduction in prices for visible spare parts, in the same way that they benefited from reductions in costs due to the fall in the number of insurance claims in the first decade of this century¹⁹⁹.
193. However, it is difficult to place a clear figure on the impact of the introduction of a repair clause on prices for visible spare parts. Several studies nevertheless suggest that the average price of visible parts is substantially lower in "liberalised" countries than in "non-liberalised" countries and that, in liberalised countries, prices charged for parts that do not display the manufacturer's logo ("non-OEM parts") are lower than prices for parts displaying the manufacturer's logo ("OEM parts").
194. The European Commission stated in its 2004 impact study²⁰⁰ that, all other things being equal²⁰¹, recommended sale prices for OEM visible parts according to family of visible

¹⁹⁷ One manufacturer stated, however, based on its experience in Spain and the United Kingdom, that when faced with competition from equipment suppliers in the visible parts market, it was able to retain a much higher market share by reducing prices than was possible by maintaining prices.

¹⁹⁸ See Box 1.

¹⁹⁹ In its impact study on the introduction of a repair clause, the European Commission came to a similar conclusion: "*moreover, insurers are interested in keeping their claims expenditures under control and the competition which exists in the insurance industry suggests that premiums, to the benefit of the consumer, will inevitably follow*" (page 27).

Conclusions cannot be drawn from comparisons of insurance premiums presented in certain contributions between countries that do and do not have a repair clause, as these contributions do not take into account other factors that might affect insurance premiums, such as claim rates or competition in the motor vehicle insurance market (visible parts represented approximately 13% of motor vehicle insurance expenditure in 2009). Likewise, it would not be relevant to compare the average amount of insurance premiums in Belgium before and after introduction of the repair clause into national law, without taking into consideration changes to other cost factors. It is possible that without the repair clause the insurance premiums would have risen even more sharply than they did with the repair clause. The extent to which insurers pass on the expected drop in visible parts prices should not be assessed in absolute terms, but instead by comparison with the counterfactual situation if the repair clause had not been introduced.

²⁰⁰ Commission staff working document: Proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC on the legal protection of designs – Extended impact assessment, COM(2004)582 Final, page 4.

²⁰¹ The manufacturers have criticised this study in their contribution, claiming that it suffers from "lack of objectivity" by using a price differential that incorporates just one factor, namely the protection of visible parts, whereas it could be affected by a number of factors. However, on the contrary, the study attempted to

parts were between 6.4% and 10.3% higher in non-liberalised countries than in liberalised countries²⁰². The study was based on data from the CEA report, which means that it only covered OEM part prices. The European Commission pointed out that this meant that the average price difference between non-liberalised and liberalised countries was underestimated, as non-OEM parts sold in liberalised countries, the price of which is lower than for OEM parts²⁰³, were not included. The Commission suggested, on the basis of an American study²⁰⁴, that the liberalisation of the spare parts market might ultimately contribute to reducing average prices for parts (OEM and non-OEM) by as much as 14% in two years²⁰⁵.

195. As observed by the vehicle manufacturers, univariate comparison of visible part prices in different countries does not allow us to isolate the 'protection for visible spare parts' factor from other factors, such as standard of living, vehicle type, etc. *The Eurotaxglass study* of December 2004, cited by the vehicle manufacturers in support of the argument that the liberalisation of prices would not have any consequences, would seem to be of limited relevance²⁰⁶. It is based on comparisons of arithmetic averages of visible part prices

isolate the factor relating to protection from other factors affecting price levels by controlling a certain number of variables (see explanations appended to the European Commission's impact study).

²⁰² Insofar as the study covered data from 2003, i.e., pre-dating the manufacturers' commitment, Germany was classified as a non-liberalised country. The European Commission has stated that if Germany had been classified as a "liberalised" country the results would have been the same.

²⁰³ Many operators and third parties have reported very significant price differences between OEM and non-OEM parts to the Autorité de la concurrence (in some cases as great as 70%), which suggests that price reductions could be substantial for some part references. However, these findings are based on isolated observations concerning specific part references. They cannot be used as a basis for an assessment of the average impact of the opening-up of the market on a visible spare parts prices. Any assessment would need to be based on a sufficient number of representative observations.

²⁰⁴ "Competitive Auto Replacement Parts" by the American National Association of Independent Insurers, quoted on page 26 of the 2004 impact study.

²⁰⁵ European Commission Evaluation Report on the operation of Regulation 1400/2002, Staff Working Document no. Two, page 38: "*Estimates based on prices prevailing in the US, where design protection does not exist, indicates that if market design protection in the EU were to be withdrawn, this would lead to a reduction in the average price of previously-protected spare parts of 14% within two years*".

Another study carried out by US insurers (Microeconomic Consulting & Research Associates on behalf of the National Association of Mutual Insurance Companies) compares reference prices for OEM parts for which there is competition and those for which no alternative to the vehicle manufacturers' offer is available. It concludes that the presence of competition causes OEM-part prices to fall by over 8%, but that non-OEM visible parts are still 26% cheaper than OEM parts. This study estimates the total savings for consumers if the visible parts markets were to be liberalised at \$1.5 billion, i.e., approximately 9.4% of the turnover in the US visible parts market. Vehicle manufacturers claim that this study is not representative as it is based on the prices charged by one distributor, Keystone, which allegedly distributed copies imported from Taiwan and lost against Ford in a court case for misleading advertising. Although it is impossible to confirm the allegations made by vehicle manufacturers, they do not alter the estimated impact of competition on prices and the +8% fall in OEM part prices. Not only is this study econometric, despite the claims of the vehicle manufacturers, but because it compares prices within the same federal state, there is less need to consider the exogenous factors that might affect prices than it would be in a comparison of prices in different countries.

²⁰⁶ It suggests that visible OEM parts are on average 7.6% cheaper in non-liberalised countries than in liberalised countries.

without any weighting to factor in volumes of sales of each type of part, and without controlling certain factors that explain price levels. Furthermore, its results were highly dependent on average price variances in three countries: Germany, where the market appears to have been liberalised in practice prior to the vehicle manufacturers' commitment in May 2003; Hungary, which is classified as a liberalised country, although it only introduced a repair clause in May 2004 and the data covers 2003; and lastly, the UK, which is not a member of the Eurozone, which means prices are affected by exchange rate fluctuations. For these reasons, the Autorité de la concurrence chose not to use this study in its public consultation document.

196. Although the analyses based on the CEA data presented in the public consultation document are not as relevant as the econometric analysis conducted by the European Commission, they are more reliable than the Eurotaxglass study, in that the part prices have been weighted to reflect rates of use for body repairs²⁰⁷, thus factoring actual sales of parts sampled into the calculation of savings for the consumer generated by the introduction of a repair clause. Moreover, although the sample is smaller (2,640 observations) than the Eurotaxglass study (4,898), it is more representative²⁰⁸. Lastly, the comparisons take into consideration various factors that explain price levels, such as vehicle categories or part types. However, as the vehicle manufacturers have correctly pointed out in their contributions, the fact that the Autorité de la concurrence limits its analysis to three countries – France, Spain and Germany – may raise questions as to the representative nature of the comparisons.
197. In the 2011 CEA study, for lack of weighting, prices in France are lower than in Italy and Spain, both of which are liberalised countries. However, even if we extend the analysis to all the countries in the CEA study, it appears that the average weighted prices are higher in non-liberalised countries than in liberalised countries. This observation is equally valid if we limit our analysis to the EU-15 countries, so as to look at countries that are comparable in terms of living standards. In the EU-15 countries, the non-liberalised countries report average prices that are approximately 6% higher than liberalised countries. The finding is the same irrespective of the family of parts (with variances ranging from 2.4% for optical compartments to 10.3% for rear wings) and irrespective of the vehicle category (with variances ranging from 3.5% for category D, corresponding to luxury vehicles, to 6.3% for categories B and C, corresponding to compact vehicles).
198. To conclude, it can be estimated on the basis of the various available studies that the introduction of a repair clause in France would cause average prices for visible parts to fall by between 6% and 15%. The lower limit of this range is a conservative estimate, as it corresponds to the lowest estimate by the European Commission of the impact of

²⁰⁷ Contrary to claims by the manufacturers, the purpose of weighting is not to reverse the results in order to demonstrate that liberalisation would result in a fall in prices. This approach is, quite simply, based on the following consideration: the parts in high demand are those that have the most impact on the budget for bodywork. In addition, repair costs are partially pooled and smoothed out in insurance contributions, which means that a comparison of arithmetic price averages would not give an accurate indication of the impact of liberalisation on household budgets.

²⁰⁸ Contrary to the CEA data, the Eurotaxglass study does not contain any references to rear vehicle parts or radiators.

liberalisation on OEM part prices only, and does not take into account the emergence of alternative offers for non-OEM parts at lower prices than those charged for OEM parts²⁰⁹. Average prices would fall as a result of the possibility of buying parts from the independent channel at a price that would very probably be substantially lower than prices for OEM parts, and also as a result of the reaction of vehicle manufacturers, who would then lower OEM part prices because of increased competition.

199. The likelihood of prices for visible spare parts falling in countries that have withdrawn design protection is consistent with the strengthening of competition that would result from the elimination of the vehicle manufacturers' legal monopoly over visible spare parts. Lastly, this is also supported by internal figures produced by a vehicle manufacturer on the impact of the repair clause on its turnover for "visible parts". The vehicle manufacturer observed that its level of profitability in a liberalised country in which it did not deploy any significant commercial efforts was higher than in another liberalised country in which it lowered its prices substantially, but that it lost a significant part of its market share. This experience shows that vehicle manufacturers will need to reduce their prices if they are to resist the increasing competitive constraints arising from the emergence of alternative offers.
200. Lastly, certain vehicle manufacturers have argued that any reduction in prices as a result of the opening-up of the market would not be particularly significant.
201. Firstly, they claim that the reduction in part prices would be offset in part by increased assembly times when using non-OEM parts. However, this argument does not appear credible, given that the assembly times are necessarily identical for matching quality parts²¹⁰. In the case of adaptable parts, assembly times may be longer, but the difference in the price would be such that it could still be much significantly cheaper to use such parts²¹¹.
202. Secondly, the vehicle manufacturers have estimated the "*possible and random*"²¹² reduction in insurance premiums per insured per annum at no more than five euros²¹³.

²⁰⁹ In addition, these price comparisons were made in a fragmented European market, where some countries are liberalised and others are not. The absence of a unified European market for visible spare parts could cause prices to rise to above those that would be charged if the entire European Union market was liberalised. This means that the impact of a large-scale opening-up of the market might have been underestimated in studies based on intra-European comparisons.

²¹⁰ Independent distributors such as Van Wezel Autoparts (under the Equiparts brand) have developed ranges of matching quality spare parts.

²¹¹ According to one study, even when longer assembly times for adaptable parts are factored in, the cost of repairs (cost of parts plus assembly time) remains 5.4% below the cost of repairs using OEM parts (Allianz study of collision repairs using non-OEM parts (1998), appendix 4 to the Autopolis report on the consequences for the security of consumers and third parties of the proposal to amend Directive 98/71/EC on legal protection of designs and models, September 2006 (pages 43-44).

²¹² This estimate, which is based on an average reduction in retail prices of 10% with insurers passing on the price reduction to consumers in full, seems feasible. The studies presented in paragraphs 163 to 173 of the public consultation document of 11 April 2012 suggest that average reductions in retail prices could exceed 10%. In addition, as pointed out in footnote 18, the proportion of the price reduction that might be passed on to consumers by the insurers could be very high, given that motor vehicle insurance is a loss leader.

However, such a reduction would represent a total amount of almost €200 million each year²¹⁴, to which should be added the impact of any reductions in the prices of non-visible parts used in bodywork²¹⁵ and savings made by households who only have a minimal third-party insurance cover (15% of the market for parts used in collision repairs). The impact on consumer purchasing power could therefore be far higher than this estimate.

2. IMPACT ON MARKET STRUCTURE

a) Reduction of the compartmentalisation of the manufacturer channel and the independent channel

203. The opening-up of the visible spare parts market would probably reduce the compartmentalisation of the spare parts manufacturing and distribution segment, which would in turn strengthen competition between the manufacturer networks and independent repairers, on the one hand, and also between vehicle manufacturers and equipment suppliers.
204. By allowing a greater number of operators to distribute visible parts, the opening-up of the market would enable independent repairers, and in particular body shops, to no longer be dependent for their supplies on authorised repairers, who are both suppliers and competitors.
205. Furthermore, authorised repairers could obtain supplies from the independent channel. In its Evaluation Report on the operation of Regulation 1400/2002, the European Commission observes that the very small percentage of supplies obtained by level 1 authorised repairers from the independent channel (approximately 5% of their needs only) could be partially explained by the vehicle manufacturers' monopoly over a certain number of parts, including visible parts²¹⁶.
206. Lastly, as stated above, competition between equipment suppliers and vehicle manufacturers is weakened by the subcontracting relationship existing between them. Increasing the possible outlets for parts manufactured by equipment suppliers would reduce their dependency on vehicle manufacturers and give them more incentive to compete for the sale of visible and non-visible parts.

²¹³ Memorandum contesting the plans to unilaterally withdraw protection of visible spare parts by design rights by CCFA-CSIA-CNPA, September 2011, page 22.

²¹⁴ The total number of vehicles in France is approximately 40 million.

²¹⁵ See paragraphs 178 and 179 of the public consultation document of 11 April 2012.

²¹⁶ European Commission Evaluation Report on the operation of Regulation 1400/2002, pages 9-10: "*the fact that the vehicle manufacturers are the only suppliers able to offer the whole range of parts constitutes an added attraction. This however is linked to the existence of IPRs held by vehicle manufacturers, or is the result of subcontracting agreements, which may fall outside Article 81(1)*".

b) Development of a European spare parts market

207. In its impact assessment of an amendment to Directive 98/71/EEC on the protection of designs, the European Commission observed that the spare parts manufacturing and distribution segment remained fragmented in Europe, essentially due to a lack of harmonisation of the laws on designs and models²¹⁷. However, as it also pointed out, the opening-up of the markets as a result of the cancellation of protection for visible parts would enable operators to increase the volumes produced and to therefore reduce their costs and prices²¹⁸.
208. Furthermore, in the event the repair clause is introduced in France, the reduction in the vehicle manufacturers' volumes might be relatively limited without considerable pricing efforts, whereas the introduction of a repair clause in France would facilitate the opening-up of other European markets for equipment suppliers located in France. France is one of the only countries in the European Union that has sufficient economic weight to still protect visible spare parts by law and in practice (see Table 6 page 74 above). Moreover, French equipment suppliers seem particularly well positioned to compete at a European level, as FAURECIA and VALEO are the second and third largest European equipment suppliers, respectively.

c) Stimulating the overseas motor vehicle aftermarket

209. The opening-up of the market would certainly have a particular impact on prices paid by consumers in the overseas *départements*, given that there is only one authorised distributor of spare parts in each DOMs per brand, and intrabrand competition is therefore practically inexistent.
210. If the visible spare parts market were to be opened up, all the independent distributors present in the DOMs could distribute visible parts. The result would not only be a substantial reduction in the prices of spare parts used for collision repairs in the DOMs, this would also speed up repairs as independent repairers would no longer have to depend on the single authorised distributor in the *département* and parts availability would improve. As with mainland France, the introduction of a repair clause would stimulate competition between authorised repairers and independent repairers, by reducing the dependency of independent repairers on visible parts sold through the manufacturer channel.

²¹⁷ "Extended impact assessment" COM(2004) 582 Final, page 4: "*in the automotive sector, which is the most affected one (see 1.2) there is a single market for new cars, but no single market for their spare parts. Automotive spare parts currently cannot be freely produced and traded within the Community. [...] For the same reason, parts producers cannot use the economies of scale offered by a single market as they are discouraged to generate investment and employment which they otherwise might do*".

²¹⁸ Staff Working Document no.2, page 38: "*Moreover, these price differences do not reveal the wider costs of design protection in terms of distorted trade patterns and inefficient allocation of resources: if design protection on spare parts were removed, increased economies of scale due to an increased number of open markets would decrease the producers' costs, resulting in further price decreases. The overall costs that the European consumer bears as a result of the design protection of spare parts can therefore be assumed to be higher than the bare figures suggest*".

211. For the purpose of this Opinion, the Autorité de la concurrence considered it necessary to examine certain arguments put forward by the vehicle manufacturers concerning industrial policy and employment, in the interests of a fair and objective discussion of the matter. Subsections 3 and 4 will consider the impact of the opening-up of the market on the competitiveness of French vehicle manufacturers and on employment in France, respectively.

3. IMPACT ON COMPETITIVENESS OF FRENCH VEHICLE MANUFACTURERS

212. Concerning the competitiveness of the French vehicle manufacturers, the public consultation document argued that the introduction of a repair clause should not result in any significant increase in the price of new vehicles sold by French vehicle manufacturers, even if the lost profit resulting from the opening-up of the visible spare parts market could not be recovered in other ways. This increase was estimated at just over €10 per vehicle sold²¹⁹.

213. The vehicle manufacturers dispute this viewpoint: they claim that the loss of competitiveness that they would suffer if the visible parts market were opened up would not be due to an increase in the price of new vehicles, as even the smallest increase would be impossible given the intense competition in the vehicle sale market.

214. The vehicle manufacturers believe that the withdrawal of design protection of visible parts would essentially deprive them in practice of the possibility of depreciating investments made to create new vehicle models in the aftermarket. This would harm the French vehicle manufacturers' competitiveness, as it would prevent them from investing sufficiently to create new models, contrary to other competitors whose domestic markets are protected. French vehicle manufacturers have also pointed out that the operating margin reported by German vehicle manufacturers is between two and four times greater than that of the French vehicle manufacturers²²⁰.

215. However, this argument is weakened when certain other factors are taken into consideration. Firstly, it should be noted that the maintenance of design protection of visible spare parts allows foreign vehicle manufacturers to generate substantial profit

²¹⁹ This estimate corresponds to the lost profit margin estimated by the French vehicle manufacturers as a result of the introduction of a repair clause divided by the number of new vehicles they sell worldwide.

²²⁰ Document by the CNPA, CCFA and CSIAM dated 19 September 2011, entitled "Avoiding a major economic and industrial mistake: Memorandum contesting the plans to unilaterally withdraw protection of visible spare parts by design rights," page 14: "*If, in addition, the legitimate protection of the investments they have made to create new vehicle models – including their component parts – were withdrawn, the vehicle manufacturers would no longer be able to depreciate them through the sale of the visible parts used on such models. The operational profits would fall accordingly, and would prevent French vehicle manufacturers from investing sufficiently to create new models – which are essential in order to be able to compete – in particular, and as previously stated, given that the profit margins reported by the German vehicle manufacturers are already between two and four times greater than those of the French vehicle manufacturers. Depriving French vehicle manufacturers of such legitimate protection, which contributes to novelty and innovation, and which is available to their German, Korean and Japanese competitors, would be counter-productive and senseless.*"

margins, affecting prices paid by French consumers, whereas in some cases their domestic visible spare parts market is open, which means consumers in that country benefit from lower prices (i.e., Germany and the US). In other words, these vehicle manufacturers benefit from the monopolies in the countries that protect visible spare parts²²¹, namely France, whereas the regulatory framework in place in their country of origin does not offer them the same facilities as in France.

216. The modification of intellectual property laws on designs and models in France in order to stimulate competition in the motor vehicle aftermarket should not therefore harm the competitiveness of French vehicle manufacturers, particularly as protection has already been withdrawn, by law or in practice, in the main European countries that manufacture and purchase motor vehicles. However, the harmonisation of regulations at the level of the G20²²² or, at the very least, at European level, creating a level playing field for all international vehicle manufacturers, would address the French vehicle manufacturers' concerns on this count, while enhancing the potential economies of scale to be made in the sector.
217. With regard to European harmonisation, given France's weight and the number of countries in the European Union who are already in favour of the repair clause, a vote by France in favour of the amendment of Directive 98/71/EEC introducing a repair clause could facilitate its adoption by the Council of the European Union. At the very least, a change in France's position would allow Europe to assess whether harmonisation at European level is a possibility.
218. In actual fact, the argument on competitiveness put forward by the French motor vehicle manufacturers is based on the fact that the sale of new vehicles is not sufficiently profitable and on their fears that the current source of profit in the aftermarket might disappear. In such circumstances, their increased competitiveness will not be achieved through regulatory protection, but rather by adapting their economic model.

4. IMPACT ON EMPLOYMENT

219. According to the French vehicle manufacturers, the introduction of a repair clause into French law would constitute a threat for employment in the motor vehicle industry in France.
220. The following analysis will put this risk into perspective and demonstrate that the opening-up of a market usually results in an increase in demand and therefore in activity (*a*), and that the potential job losses caused by imports of visible spare parts would be limited and could be offset by new production-related jobs created by the visible part equipment suppliers, to meet increased demand in both the export and domestic markets (*b*). Lastly,

²²¹ This could explain the equivocal position of the German government, which ensures that manufacturers do not protect visible spare parts on German territory, but which also stated in 2004 that it is not in favour of the application of a single repair clause applicable to the whole European Union.

²²² Solution proposed by vehicle manufacturers in their contributions.

although employment might be a consideration, the very poor profitability levels of the French vehicle manufacturers should also be considered (c).

a) The opening-up of a market usually results in an increase in demand and therefore in activity

221. Generally speaking, a competitive market is characterised by higher volumes of sales and a greater level of overall activity²²³. Although approximately 60% of vehicle owners can be considered relatively insensitive to prices, as they have comprehensive insurance and therefore only pay the excess in most cases, approximately 40% only have third party insurance, which means they have to pay for repairs following any material damage claim for which they are liable. Several contributors to the public consultation document dated 11 April 2012 pointed out in this connection that high parts prices discourage some vehicle owners from carrying out repairs on their vehicles²²⁴, and also encourage another section of vehicle owners to cross the border and purchase spare parts or carry out vehicle repairs in other countries.
222. Nevertheless, in view of the relatively small average reduction which is expected in the price of visible spare parts, the opening-up of the market may only have a moderate impact on demand, with the exception of demand for those parts whose prices fall the most. Overall, however, activity and employment in the downstream segments of the motor-vehicle aftermarket should benefit from the opening-up of the market, even if only in a relatively moderate manner.

b) Analysis of expected job losses and gains in the upstream industry

223. The impact of the opening-up of the visible spare parts market on employment in France needs to be analysed in light of the imports and exports that may result there from. Such an analysis will necessarily be limited to the upstream industry, in other words, the production of spare parts, as the downstream operations cannot be delocalised. This is the reason why the European Commission considers that "*although it is possible that some jobs will be lost in the authorised distribution networks, new jobs will be created in the independent market*".
224. The following paragraphs contain an analysis of job losses (i) followed by job gains (ii) that can be expected to result from the introduction of the repair clause.

Analysis of potential job losses

225. The vehicle manufacturers claim that the introduction of a repair clause would erode the market shares held by motor vehicle industry stakeholders located in France to the benefit of industrial stakeholders located outside of France, and potentially outside of Europe.

²²³ Although a monopoly situation provides higher profits for the monopolist, it reduces demand as compared to a competitive situation, resulting in a "net loss" for the economy overall.

²²⁴ Certain vehicles may also become unrepairable because part prices are too high, when the cost of repairs exceeds the vehicle's residual value.

Nevertheless, the suggested job loss figures seem to have been considerably overestimated and derive from two different approaches, both of which are based on questionable reasoning.

- The first approach consists of calculating the number of jobs corresponding to the expected loss of €230 million by French vehicle manufacturers following the introduction of a repair clause, assuming that each employee generates a turnover of €20,000. This suggests that 720 jobs may be lost within the French vehicle manufacturing industry. As one job with a French vehicle manufacturer corresponds to approximately 4 jobs downstream (including with equipment suppliers and other manufacturers), these 720 job losses within French vehicle manufacturers would result in more than 3,000 job losses in the downstream industry in France. However, as stated in paragraph 155, 70% of the parts sold by vehicle manufacturers are manufactured by equipment suppliers. The loss of turnover suffered by the vehicle manufacturers will essentially benefit these original equipment suppliers, who already manufacture parts for the vehicle manufacturers. In terms of employment, the transfer of turnover from the vehicle manufacturer to the original equipment supplier is neutral, whether the original equipment supplier is located in France or not.
- The second approach is based on the assumption that the repair clause would cause the sale price of each new French vehicle to increase by €150, in order to compensate for lost turnover in the visible parts sale market. As a result, vehicle manufacturers would lose market shares on the sale of new vehicles. A figure is then placed on the number of jobs corresponding to the reduction in the number of vehicles manufactured as a result of the increase in the price of new vehicles. The estimated increase in the price of new vehicles in order to compensate for lost profit margins in the aftermarket is too high. It corresponds to lost turnover (and not lost profit margin, the only relevant indicator that can be used in this type of calculation) divided by the number of vehicle registrations in France (and not worldwide). However, there is no reason to believe that losses on visible parts could only be offset by an increase in the price of new vehicles sold in France, which means that the increase in the price of new vehicles as assessed by the French vehicle manufacturers has been clearly overestimated²²⁵.

226. The French vehicle manufacturers claim that the turnover lost by the French motor vehicle industry as a whole would be four times greater than the turnover lost by French vehicle manufacturers directly as a result of liberalisation²²⁶, because of the knock-on effect of the

²²⁵ The Autorité de la concurrence estimates the increase in the price of new vehicles needed to compensate for losses suffered by French vehicle manufacturers as a result of the introduction of a repair clause at slightly more than €10, if it is impossible to recover such losses in any other way (see §215 of the public consultation document dated 11 April 2012). Accordingly, it is unlikely that the introduction of a repair clause would impact on the French vehicle manufacturers' market shares in the new vehicle sale market.

²²⁶ €230 million per annum, i.e., 40% of their turnover from visible spare parts.

reduced activity of the vehicle manufacturers on the equipment suppliers. However, most of the turnover lost by vehicle manufacturers in the event of market liberalisation should benefit original assembly suppliers²²⁷, who already manufacture between 60% and 70% of visible spare parts on behalf of vehicle manufacturers. In terms of employment, the impact of the transfer of turnover from the vehicle manufacturer to the equipment supplier is neutral, whether or not the original equipment supplier is located in France. Such a transfer simply means that the equipment suppliers would continue to manufacture the parts, but that they would sell a greater proportion of their production directly on their own account, while the proportion they supply to the vehicle manufacturers would decrease.

227. In view thereof, when assessing the number of jobs that could potentially be threatened by the opening-up of the French market, only market shares lost and gained by secondary equipment suppliers located outside of France, when the original equipment supplier is located in France, should be taken into consideration²²⁸. Any such transfers of market shares should be limited²²⁹.
228. Furthermore, the vehicle manufacturers are not expected to lose much of their market share for visible spare parts manufactured by vehicle manufacturers directly (30% to 40% of overall turnover for visible parts) to the equipment suppliers. Tooling is used essentially to manufacture original assembly parts, which means that unit production costs for spare

²²⁷ According to the 2006 Autopolis study and a recent survey by ICDP on all of vehicle parts (visible and non-visible), most spare parts sold through the independent channel are original parts.

According to the Autopolis report on the consequences for the security of consumers and third parties of the proposal to amend Directive 98/71/EC on legal protection of designs and models (Page 43), in the UK only 10% of turnover from visible parts corresponds to "non-original" parts, in other words, parts that have not been manufactured by the vehicle manufacturer or by the equipment supplier on behalf of the vehicle manufacturer. Although it is true that 70% of the parts certified by the Thatcham accreditation agency are manufactured in Asia (only six part manufacturers are listed, two of which are Asian), these certified parts represent no more than 10% of the turnover from visible parts sold in the UK, as they are included in the "non-original" parts category (which also includes matching quality parts and second-hand parts). According to the same study, the penetration rate of non-original parts in Spain was 15% in 2006.

Furthermore, a survey of 300 repairers carried out by ICDP in March 2012 suggests that 80% of parts used by repairers are original parts and 5% are second-hand parts (see article available in French at: <http://www.apres-vente-auto.com/actualite/4480-exclusif-etude-icdp-la-piece-dorigine-resiste-bien>). With regard to the other two categories of parts, the survey does not differentiate between matching quality parts and adaptable parts, as it does not use the definition given in the European regulations. The survey found that 12% of the remaining 15% of parts correspond to "*parts that do not necessarily comply with the manufacturer's specifications*" (which the survey refers to as "*adaptable parts*"), whereas 3% correspond to "*low price parts*", which the survey defines as parts for which "*price is more important than quality*".

²²⁸ If the original equipment supplier is already located outside France, a transfer of market shares to a secondary equipment supplier also located outside France will have no effect on employment in France.

²²⁹ See footnote 228. As the market share for non-original parts is already limited to between 10% and 15%, situations in which the non-original parts are manufactured outside of France, while the original equipment supplier is located in France, are few and far between. In addition, it should be noted that demand for spare parts originates essentially from Europe. Popular vehicle brands vary considerably from one country to another and, therefore, one continent to another, which means that demand for spare parts tends to be fairly localised. Managing long-distance supplies of small quantities of parts from a large number of varied and bulky part references intended solely as spare parts is extremely expensive. As a result, production of parts intended specifically as spare parts will need to be national or European in most cases.

parts are that much lower for the vehicle manufacturer. This gives the vehicle manufacturer a clear advantage in terms of cost and reputation over operators wishing to enter and compete in the market for spare parts corresponding to original assembly parts manufactured by the vehicle manufacturer. This observation is supported by the low penetration rates of secondary equipment suppliers in open markets²³⁰. Given this, and also in view of the highly automated manufacturing processes and the small number of jobs manufacturing spare parts compared to all types of parts, including original assembly parts, the impact of the opening-up of the market on jobs with vehicle manufacturers should be relatively limited²³¹.

Analysis of potential job creations

229. An analysis of the impact on employment of the opening-up of the visible spare parts market should also consider the new jobs that might be created as a result. It is likely that the repair clause will open up new outlets for equipment suppliers located in France, and therefore create potential sources of employment.

- Potential export outlets

230. New outlets should be created, in particular as a result of the possibility of manufacturing spare parts for export to countries that do not protect visible parts. At the current time, the protection of visible spare parts in France prevents equipment suppliers from producing protected visible spare parts in France to be used for any purpose other than as spare parts displaying the manufacturer's logo ("OEM parts"). If the market were to be opened up, equipment suppliers located in France could also export original parts displaying the equipment supplier's logo or matching quality parts (non-OEM parts) to compete with the OEM parts, original parts and matching quality parts offered in these foreign markets. The repair clause would therefore open up certain export markets to equipment suppliers located in France. The current performance of French equipment suppliers²³² in the export markets suggests that they are already well-positioned, which should facilitate their penetration of foreign markets for visible parts currently protected in France. Some equipment suppliers are considering expanding their product ranges, to include other makes of vehicle for which they are not the original equipment supplier, and also diversifying into the production of new families of parts.

- Outlets in France

231. Outlets could be created in France as a result of the modification of the current protection system for visible parts, meaning that matching quality spare parts could be manufactured to compete with OEM parts manufactured by foreign manufacturers. It should be noted that almost 40% of vehicles in circulation in France are foreign brand vehicles and most of

²³⁰ See footnote 228.

²³¹ Provided that vehicle manufacturers, who will normally lose sources of profit in the aftermarket if the market is opened, are capable of improving their overall profitability. If not, they might cut jobs, although it is hard to put any exact number on potential cutbacks (see discussions in paragraphs 233 and 234).

²³² Equipment suppliers established in France export 50% of their French production outside of France. Source: FIEV, key figures 2011.

the parts are manufactured outside of France. Withdrawal of protection would allow French equipment suppliers to manufacture in France matching quality spare parts for these vehicles, although the visible spare parts are currently manufactured outside of France.

232. All these outlets would allow equipment suppliers to diversify their operations at a time when the French vehicle manufacturers are placing fewer orders. For example, the French automotive plastic parts industry comprises approximately 200 companies (with more than 20 employees each), which generate a total turnover of €5.7 billion and employ 28,000 people (2007 figures).

c) A relatively small reduction in profits for the two main French vehicle manufacturers and their networks might nevertheless compromise their already low profitability

233. The vehicle manufacturers stated in their contributions that the lost profits suffered by the vehicle manufacturers and their networks as a result of the repair clause would have a global impact on employment in the manufacturer channel. The anticipated loss of €400 million in turnover for the French vehicle manufacturers and their networks (€230 million for the vehicle manufacturers alone) would have repercussions on the entire sector, in an economic context in which their overall profitability is bordering zero or is, in some cases, negative. The fall in profit margins in these markets could deprive vehicle manufacturers of the cash flow they need to maintain employment.
234. To conclude, the impact of cancelling the protection for visible spare parts on the competitiveness of vehicle manufacturers and on employment as described above needs to be put into perspective, as it will be limited as a result of the combination of factors explained above. It remains true, however, that the difficulties the French vehicle manufacturers are currently experiencing, for other reasons, also need to be taken into consideration by the public authorities within the framework of a comprehensive analysis in order to assess the impact of such a reform. It seems advisable to take the current difficulties into account and to give the French vehicle manufacturers sufficient time to adapt their economic model, instead of immediately depriving them of a source of profits, which could help them to reposition themselves successfully.

D. THE MANNER IN WHICH THE VISIBLE PARTS MARKET COULD BE OPENED UP

235. The above analysis has established that a status quo would not be desirable either for consumers or, in the long term, for any of the operators in the motor vehicle industry. The opening-up of the market could benefit consumers and also boost the spare parts manufacturing and sale market and the motor vehicle repair and maintenance market, without any adverse effect on vehicle manufacturers' incentives to invest, on their competitiveness, employment or, lastly, the security of spare parts. The maintenance of protection for visible spare parts would also entail long-term risks for motor vehicle industry operators, including vehicle manufacturers, who might be lulled into keeping an economic model that could ultimately be threatened by changes in European laws. The following paragraphs examine the various options for change in the medium term in order to determine the most appropriate line of action (1), the measures that will need to be put

into place to ensure the new system is fully successful (2), the need for a transition period (3) and the various transition methods, weighing the pros and cons of each solution (4).

1. ASSESSMENT OF THE AVAILABLE OPTIONS

236. The opening-up of the visible spare parts markets to competition could be achieved in several ways: alternatives to total liberalisation could include the maintenance of protection for a limited time (scenario 1), liberalisation subject to the payment of royalties by equipment suppliers to vehicle manufacturers (scenario 2), a combination of these two options (scenario 3), or limited liberalisation reserved for equipment suppliers manufacturing visible parts (scenario 4)²³³. The first three scenarios were analysed by the European Commission in 2004²³⁴. The fourth scenario was proposed as a transitional solution by FEDA in 2011²³⁵.

a) Scenario 1: protection of parts for a limited time

237. The maintenance of protection for visible parts for a limited time after the commercial launch of a vehicle model (scenario 1) would, firstly, mean the various negative effects of protection would persist during this protection period and, secondly, might discourage independent equipment suppliers from investing in order to produce such parts on expiry of the protection period, as the profitability of any such investment would necessarily be reduced in view of the protection period benefitting the vehicle manufacturer. The protection of parts for a set period of time for the benefit of the vehicle manufacturer would deprive equipment suppliers of part of the market. There is a potential demand for visible parts from day one of vehicle ownership, as they are used in repairs following accidents. The bodywork segment represents 55% of vehicle repairs and maintenance turnover for vehicles aged under two years and only 15% of vehicle repairs and maintenance turnover for vehicles aged over 10 years²³⁶. In addition, given that the average vehicle life is 13 years, the period during which equipment suppliers can compete with vehicle manufacturers is necessarily limited. Moreover, in a situation where vehicle production cycles ("production series") are becoming shorter, the protection period benefitting the vehicle manufacturer could cover most of the vehicle's production cycle,

²³³ Moreover, each French vehicle manufacturer has promised the Minister that it would be "*attentive to changes in the prices of the protected parts [...] and adopt a policy of moderation*" (letters sent to the Minister in September 2011 by Renault and PSA following the discussion regarding an amendment introducing a repair clause, proposed as part of the 2011 bill to reinforce consumers' rights, protection and information). However, this declaration of intent, as presented, is neither verifiable in practice nor is it coercive.

²³⁴ Commission staff working document: Proposal for a directive of the European Parliament and of the Council amending Directive 98/71/EEC on the legal protection of designs – Extended Impact Assessment – SEC (2004) 1097-3.2, page 16.

²³⁵ In connection with the second reading of the bill to reinforce consumers' rights, protection and information at the end of 2011.

²³⁶ Source: Roland Berger and FEDA.

meaning that original equipment suppliers wishing to distribute visible parts could not capitalise on the lower production costs for parts during the vehicle's production cycle, unlike the vehicle manufacturer.

b) Scenario 2: Right to manufacture and sell parts subject to payment of royalties to the vehicle manufacturer

238. Making the liberalisation of sales of visible parts conditional upon the payment of royalties to the vehicle manufacturer by the equipment supplier (scenario 2) would require the amount of royalties to be defined in advance to avoid a situation where the amount is decided by an operator in a monopoly situation, with the effect of discouraging the equipment supplier from manufacturing the visible parts and competing with the vehicle manufacturer. In view of the number of parts involved, this could entail significant administrative costs which would increase the aesthetic design investments (§168 to 173).

c) Scenario 3: a combination of scenarios (1) and (2)

239. A combination of scenarios (1) and (2) (i.e., scenario 3) would merely combine the disadvantages of each scenario.

d) Scenario 4: limited liberalisation reserved for original equipment suppliers

240. Lastly, a limited liberalisation reserved for equipment suppliers manufacturing the visible parts (scenario 4) could encourage the vehicle manufacturer to produce visible parts itself in order to avoid competition from original equipment suppliers, particularly given that vehicle manufacturers already produce between 30% and 40% of visible parts themselves. In addition, some original equipment suppliers, in particular those manufacturing visible parts, have deliberately chosen not to supply the independent channel, which means that the proportion of parts available only from the vehicle manufacturer could remain very high. This solution could therefore discourage body shops from obtaining supplies from the independent channel, with the manufacture channel remaining the sole supplier of a large majority of visible parts (at least 30% to 40% of visible parts). Lastly, the fairly limited competition between vehicle manufacturers and equipment suppliers in some cases, and the reluctance of original equipment suppliers to compete too directly with vehicle manufacturers, as has been observed for non-visible parts (see section 1, part II) suggests that the presence of secondary equipment suppliers and their capacity to enter the visible parts manufacturing market is essential to preserve adequate competitive constraints.

241. Accordingly, none of the alternative scenarios to the introduction of a repair clause analysed by the European Commission in its impact study, nor the limited opening-up on a long-term basis for original equipment suppliers, would seem to guarantee any genuine improvement in competition that would benefit consumers. Moreover, none of the reservations expressed by the vehicle manufacturers in connection with the repair clause would seem to justify any of these solutions. The public consultation process has confirmed the initial position adopted by the Autorité de la concurrence.

2. ACCOMPANYING MEASURES

242. Firstly, as a number of contributors to the public consultation have remarked, the introduction of a repair clause into design law may have no effect whatsoever unless copyright law is changed in the same way. In France, the courts apply the principle of artistic unity and therefore frequently apply copyright law to motor vehicle spare parts, combining reasoning based on design law and reasoning based on copyright law²³⁷, and claimants also tend to base their arguments on both. This situation seems to be specific to France and means that the repair clause would also need to be extended to copyright law in France, failing which any opening-up of the market would only be partial.
243. Furthermore, the removal of the other obstacles identified in this opinion (see section 2, parts III, IV, V and VI), and in particular the supply of information allowing independent operators to create reliable parts catalogues²³⁸, would render the liberalisation of the visible spare parts market fully effective²³⁹ by, for example, enabling the inclusion of non-OEM spare parts references in automotive repair estimation software²⁴⁰, which is extensively used by insurance assessors, insurers and repairers to estimate the cost of bodywork. At present, only OEM part references are included in this type of software, which means that a repairer cannot directly compare manufacturer prices with equipment supplier prices.
244. Generally, the obstacles impeding independent repairers' access to technical information need to be removed, to prevent a situation whereby independent body shops continue to be partially dependent on authorised repairers for technical information. In its contribution, the association *FFC Carrosserie*²⁴¹ suggested that this dependent relationship with regard to software might oblige body shops to purchase body parts from authorised repairers instead of independent distributors²⁴². Lastly, restrictions stipulated in contracts between vehicle manufacturers and equipment suppliers also need to be closely examined, to avoid the design protection of visible spare parts simply being replaced by contractual obstacles preventing equipment suppliers from operating effectively in the visible spare parts market.

²³⁷ Note that very few cases have concerned the luxury car segment.

²³⁸ See section 2, part IV.

²³⁹ The removal of the obstacles impeding full market competition between the manufacturer channel and the independent channel is, nevertheless, to be encouraged, whether or not the repair clause is introduced into national French law or not.

²⁴⁰ Although some automotive repair estimation software applications theoretically offer the possibility of entering non-OEM references, this option is rarely used.

²⁴¹ French vehicle body repair industry association.

²⁴² FFC Carrosserie stated in its contribution: "access to a vehicle manufacturers' technical information must be genuine (comprehensive information and immediate access) for independent repairers. If access is not genuine, the independent repairers will continue to obtain supplies from the vehicle manufacturers' networks in order to benefit from the "arrangements" that currently exist and that can be described as follows: "you buy the parts, I will give you with everything you need in connection with "fault codes" and to reset onboard computers". The absence of any genuine access to technical information will mean that the end of the monopoly currently enjoyed by manufacturers in the parts market would be completely theoretical and there would be no resulting fall in prices!".

3. THE NEED FOR A TRANSITIONAL PERIOD BEFORE THE INTRODUCTION OF A REPAIR CLAUSE

245. At this point, the previous analyses have established the benefits of introducing a repair clause in the French market and put into perspective the risks raised essentially by the vehicle manufacturers. However, a transitional period does seem appropriate for several reasons.

a) To avoid exacerbating French vehicle manufacturers' current difficulties

246. Given the difficulties currently facing French vehicle manufacturers and their networks, due to economic factors and also to structural factors relating to their commercial positioning²⁴³, the immediate introduction of a repair clause would deprive French vehicle manufacturers and their networks of significant profit margins. This would increase their deficits and this factor alone could jeopardise their competitiveness and threaten employment in the sector (see discussion in paragraphs 218 et 233-234).

247. However, an economic model based solely on profits made in the aftermarket, as vehicles are sold at a loss or with very low profit margins, is not desirable in the long term either for consumers²⁴⁴ or for the motor vehicle industry as a whole, as the aftermarket is a sector in decline and the market for visible spare parts might be liberalised at a European level.

248. There is therefore a need to plan for the opening-up of the visible parts market according to a set deadline, while adopting a pragmatic approach in the short term, and allowing French vehicle manufacturers some time in which to resolve their current difficulties and adapt their economic model to changing demand.

b) To enable the various stakeholders to prepare for the opening-up of the market

249. Like many of the contributors to the public consultation, the Autorité de la concurrence is aware of the need for a transition period prior to the introduction of a repair clause, in particular to allow the equipment suppliers present in France to prepare for the opening-up of the visible spare parts markets to competition. However, maintaining the current system could handicap the equipment suppliers present in France if their foreign competitors are already in a position to develop their activities in a more efficient manner within the framework of a national system that is less restrictive and that allows them to produce and market a greater number of spare parts. Some contributors have pointed out that French equipment suppliers could find themselves at a disadvantage compared to equipment suppliers present in countries that liberalised their market earlier, such as German equipment suppliers.

²⁴³ See also the report by Mr Sartorius dated 11 September 2012 to the Minister for Industrial Recovery on the situation of PSA Peugeot Citroën, which identified two structural difficulties facing the PSA group: its positioning in the highly competitive mid-range segments B and C, and insufficient internationalisation.

²⁴⁴ See discussion in paragraphs 189 to 202.

250. In this regard, certain observers have suggested that Germany or France would simply need to introduce the repair clause into their national law to result in a change at European level, and that the repair clause would then be adopted by the Council of the European Union. The possibility that France could therefore have liberalisation imposed upon it without sufficient time to prepare cannot be overlooked. The current German Ministers of Justice and Foreign Affairs have stated that they are in favour of the introduction of a repair clause into German law, and some observers have suggested that the liberalisation of the visible spare parts market could be brought about by Germany²⁴⁵. In such an event, liberalisation could be imposed upon the French visible spare parts market without allowing French market stakeholders any time to prepare. This could harm the French equipment suppliers present in France or, at the very least, deprive them of opportunities presented by liberalisation at a European level.
251. In view thereof, the Autorité recommends the total opening-up of the visible spare parts market following a set deadline, while first allowing motor vehicle industry stakeholders sufficient time to prepare for this and to resolve their current difficulties. Although the decision in principle lies with the public authorities, as does the choice of the most appropriate transition method, the Autorité recommends that the opening-up be both gradual and controlled.
252. A four to five-year transitional period could be sufficient to enable the various stakeholders to prepare for the opening-up of the market. This would nevertheless be sufficiently short to forestall the risk that France should find itself unprepared for the possible opening-up of the market at a European level, and also to encourage the various stakeholders to make investments in anticipation of the opening-up of the market, which would be guaranteed to take place within a sufficiently short timeframe.

4. TRANSITION METHOD

253. Transition could be achieved in a number of different ways. A choice would first need to be made between *de facto* and *de jure* relaxation of visible part protection (a), and the scope of the relaxation would then need to be defined (b). For example, during the transition period, relaxation could apply only after expiry of a certain period of time following the vehicle's commercial launch, only to original equipment suppliers or only to certain families of parts²⁴⁶.

²⁴⁵ See article (in French) in Autoactu.com magazine dated 13 January 2012: "*La libéralisation des pièces de carrosserie pourrait venir de l'Allemagne*" [the liberalisation of body parts could be brought about by Germany]

²⁴⁶ Firstly, it should be noted that the vehicle manufacturers' proposal for relaxation which essentially entails them offering original equipment suppliers the right to sell windscreens, windows and lights in exchange for royalties paid to the vehicle manufacturer, would not result in any major change compared to the current situation: on the one hand, several window and light manufacturers already sell the visible parts they manufacture in the spare parts market without necessarily paying royalties to the vehicle manufacturers; on the other hand, unless the amount of the royalties were fixed by regulation – which would seem difficult – the payment of such licence fees could significantly limit the competitive constraints the equipment supplier could exert on the vehicle manufacturers (see discussion of "scenario 2", §238 of this opinion).

a) *De facto* versus *de jure* relaxation

254. The *de facto* relaxation of protection of visible spare parts under design law and copyright law (as opposed to *de jure* relaxation, i.e., enacted in law) would entail obtaining a commitment from vehicle manufacturers not to start any legal proceedings, whether in or out of the courts, in order to exercise their rights to visible spare parts under design law or copyright law, as has been done in Germany. If the vehicle manufacturers were to breach their commitments, the repair clause would be enacted in law.

i) The advantages of de facto relaxation

255. A commitment by vehicle manufacturers would have the following advantages:

- a commitment could be made quickly;
- it would test the effects of liberalisation;
- it would remove the threat of legal action against equipment suppliers and distributors, as the proprietors of the intellectual property rights would undertake not to exercise their rights in the courts;
- lastly, it would bring advantages in terms of reciprocity, by placing operators in the French motor vehicle aftermarket in an identical position to their German competitors, while authorising gradual modifications to adapt to the choices made by our trade partners, namely Germany.

ii) The limitations of de facto relaxation

256. However, *de facto* relaxation rather than *de jure* relaxation law would entail the following risks, bearing in mind that most of the advantages described above would also be obtained through *de jure* relaxation²⁴⁷:

- a return to the previous situation would be easier than following *de jure* relaxation, which means that the equipment suppliers – and in particular secondary equipment suppliers – might hesitate to make sufficient investments to penetrate the visible spare parts market in any significant way;
- likewise, the threat of *de jure* relaxation if vehicle manufacturers failed to abide by their commitments must be sufficiently credible for the vehicle manufacturers to keep their word.

257. Accordingly, a mere commitment by vehicle manufacturers that is not backed up by any legal basis could bring fewer benefits than a transition enacted in law.

²⁴⁷ The partial opening-up of the market by law would also allow the effects of liberalisation to be tested. A *de facto* relaxation would not prevent court cases relating to segments not covered by the commitment. Lastly, if France introduced the repair clause into law by a pre-determined deadline, it is likely that the European Council would adopt the introduction of a repair clause at European Union level by the same deadline.

b) Scope of relaxation during the transition period

258. The Autorité believes that *de jure* relaxation is preferable to *de facto* relaxation. With regard to the scope of the relaxation during the transition period, three solutions exist: the gradual opening-up of the market on the basis of the age of vehicle models (i), a limited opening-up reserved for original equipment suppliers during the transition period (ii), or a gradual opening-up according to part type (iii). In all three cases, making the manufacture and sale of parts conditional upon payment of royalties does not seem advisable. Such an approach could paralyse the opening-up of the market, for the reasons explained in the analysis of scenario 2 in paragraph 238.

i) A gradual relaxation based on the age of vehicle models does not seem feasible

259. The first solution mentioned in the public consultation document would consist of only opening up the visible spare parts market for vehicle models over a certain age, and then gradually decreasing the age from which other parts could compete with the vehicle manufacturer's visible parts. However, as some contributors to the public consultation have pointed out, such an approach has several disadvantages, but no clear advantage over the other solutions:

- As pointed out in paragraph a)237 (scenario 1), limiting the market on the basis of vehicle age would significantly reduce potential outlets, which would benefit equipment suppliers located in countries that have already liberalised the manufacture of visible parts for the motor vehicle spare parts market, to the detriment of equipment suppliers located in France. Also, even if the opening-up of the market is gradual, it must nevertheless be sufficiently broad in scope to encourage players to invest and enter the market.
- In addition, this solution would be difficult to implement in practice, as it would entail correctly identifying part references for vehicle models of the requisite age. Such uncertainty over the date from which visible parts could be sold by equipment suppliers would be a potential source of dispute with vehicle manufacturers, which would further discourage equipment suppliers from investing in the production of such parts and distributors from listing the parts in their catalogues.

ii) Limiting the opening-up of the market to original equipment suppliers during the transition period seems more appropriate, although not entirely satisfactory

260. Limiting the opening-up of the market for visible parts to original equipment suppliers would have several advantages:

- The transition would be neutral in terms of employment, as original equipment suppliers already manufacture parts on behalf of vehicle manufacturers.
- It would allow secondary equipment suppliers present in France to prepare for the opening-up of the market at the end of the transition period. This is in particular an advantage compared to solution i), which gives secondary equipment suppliers already present in liberalised markets the possibility of entering the French market during the transition period. This would give such foreign secondary equipment suppliers a competitive edge over secondary equipment suppliers located in France, who would not be prepared for the opening-up of the market.

261. However, several major disadvantages would mitigate the beneficial effects of such a transition:

- Although the original equipment suppliers would not be threatened by the entry into the visible spare parts market of secondary equipment suppliers within a set and relatively short time period, they would be reluctant to compete head-on with vehicle manufacturers, who are also their customers. This could mean that the opening-up of the limited visible spare parts market solely to original assembly suppliers might have very little impact on prices or on the intensity of competition²⁴⁸ (see discussion of scenario 4 in paragraphs 240-241).
- Distributors of parts who purchase visible parts produced by equipment suppliers might be reluctant to order parts from operators without knowing in advance whether they are original equipment suppliers. The fear of criminal prosecution if they purchase from a secondary equipment supplier could limit the expected benefits of this transitional period.

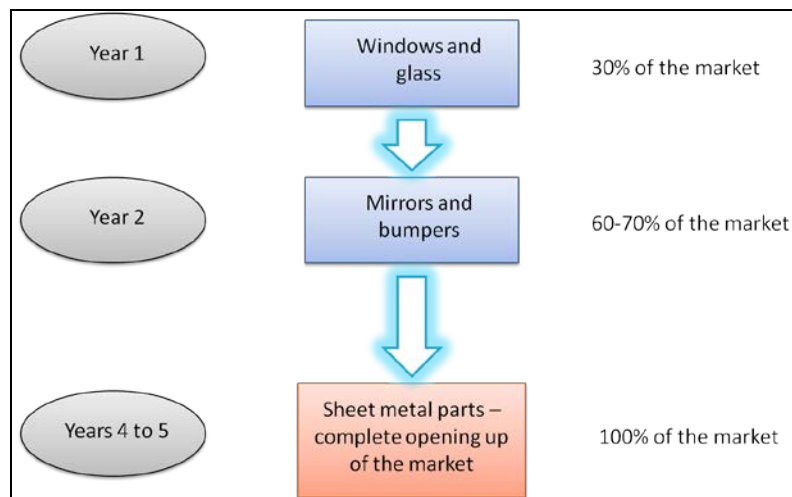
262. To conclude, limiting the transitional opening-up of the market to original equipment suppliers could only be considered if the entire market was opened to competition; this would have to be enacted in law, and to be achieved within a sufficiently short timeframe. Furthermore, it is a less attractive solution than the gradual opening-up of the market according to part type, as discussed below.

iii) A gradual opening-up of the market according to part type is the most suitable solution

263. The final solution would consist of withdrawing protection under design law and copyright law solely for certain categories of visible parts, and then gradually extending to other parts types. However, all the equipment suppliers (both original equipment suppliers and secondary equipment suppliers) would be authorised to compete with vehicle manufacturers for the manufacture and sale of these parts. The gradual relaxation of design protection according to type of part could be achieved, for example, in the manner illustrated in the following diagram:

²⁴⁸ The prices charged by these equipment suppliers could be relatively similar to those charged by vehicle manufacturers, particularly as the parts sold by the vehicle manufacturers are supplied by the same equipment suppliers, with whom they would then be in competition in the spare parts market. Moreover, as discussed in part III below, restrictions on the use of tooling included in original assembly contracts could restrict competition by original equipment suppliers.

Diagram 2 – Proposal for the gradual relaxation of protection according to part type



Source: Autorité de la concurrence

264. The process could begin, for example, with windscreens, windows and lights, as most of these parts can already be sold by original equipment suppliers. The market could then be opened up one year later to mirrors and bumpers, which also tend to be manufactured by equipment suppliers, although vehicle manufacturers currently have a monopoly over their sale. Lastly, the opening-up of the market could be extended to all visible parts, including in particular the sheet metal parts manufactured by vehicle manufacturers, another two or three years after the second stage.
265. In the absence of a clear deadline, which would have sufficient authority to encourage industry to make the necessary changes, the relaxation of protection would only have a limited impact on competition. As stated above (§156), body shops, which are the main purchasers of visible parts, tend to group orders and use one single supplier, essentially for logistics reasons. If some parts continue to be available from authorised networks only, this could encourage body shops to obtain most of their supplies from the networks, with the exception of windscreens and windows which are often replaced alone²⁴⁹.
266. However, this solution has several advantages over the other solutions:
- The market would be open to all potential manufacturers for a specific category of part: the original equipment suppliers would therefore have more incentive to compete with their customers in the aftermarket, as they would be concerned that over-high prices would facilitate the arrival and/or development of other equipment suppliers in the market. They would therefore have a greater incentive to reduce their prices than in the solution consisting of the limited opening-up of the market reserved for original equipment suppliers during the transition period;

²⁴⁹ This explains the development of windscreen specialists. Conversely, parts such as lights, mirrors and bumpers are often replaced at the same time as body parts, which would continue to be design protectable for several more years.

- It should be easy to identify the parts that can be manufactured and sold²⁵⁰. Distributors would not be reluctant to order such parts from equipment suppliers, as both the original equipment suppliers and their competitors would be allowed to manufacture and sell the parts;
- In addition, during the transition period, the opening-up of the market would only concern parts manufactured by equipment suppliers (windcreens and windows, lights, mirrors and bumpers) rather than by vehicle manufacturers. This would minimise the risk of job losses with vehicle manufacturers, given that the original equipment suppliers would be the best positioned to win market shares, and the impact on employment would therefore be neutral.

c) Conclusion

267. Following its examination of the various transition solutions, the Autorité recommends the introduction in law of a gradual withdrawal of protection of visible spare parts, given that the gradual applicability of the repair clause could be introduced by a series of decrees. With regard to the various transition methods, solution iii), namely the gradual opening-up of the market according to type of part, extended to all equipment suppliers, seems to be the most appropriate, as it would have the most beneficial effects for consumers and for the long-term vitality of the industry itself, while avoiding short-term risks to employment.

III. Impediments to the sale of spare parts by equipment suppliers

268. When they need spare parts, independent and authorised repairers can either buy so-called "OEM" parts from the manufacturer channel or spare parts that do not display the vehicle manufacturer's logo (usually original parts or matching quality parts, known as "non-OEM" parts) from the independent channel.
269. The European Commission Guidelines on the application of Regulation 461/2010 state that: *"one of the Commission's objectives as regards competition policy for the motor vehicle sector is to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers"* (§18). The availability of parts in the independent channel is a key factor ensuring competition in the motor vehicle aftermarket. Firstly, the fact that authorised and independent distributors can also obtain parts from the equipment suppliers means that the vehicle manufacturers are in competition with the equipment suppliers, which encourages lower pricing.

²⁵⁰ As visible parts are often made of several components, which may be sold separately, industry specialists would need to be consulted to draw up an exact list of parts opened to competition.

270. Secondly, the ability of independent repairers to exert competitive constraints on the network of authorised repairers will depend in particular on the quality of their access to spare parts supplied by equipment suppliers. If the parts needed for a repair are not available in the independent channel, independent repairers will have to use OEM parts supplied by (level 1) authorised distributors, who also tend to be their competitors²⁵¹. These parts are often purchased at higher prices, in particular due to the low volumes ordered. Furthermore, operators have stated that delivery times can be longer than those imposed by independent distributors. Accordingly, although the unavailability of parts supplied by equipment suppliers does not prevent independent repairers from carrying out repairs, it can result in them paying higher prices for parts. Lastly, in the DOM increased availability of non-OEM parts in the independent channel would enable repairers to use independent wholesalers and distributors, therefore placing them in competition with the local distributor authorised by the vehicle manufacturer.
271. Some spare parts are not available in the independent channel for reasons relating to intellectual property rights, including in particular design-protected visible spare parts. This issue is considered separately elsewhere in this document (see section 2, part II above, « Design protection for visible parts »). However, there are also availability problems affecting non-visible parts in the independent channel, in particular during the first few years after a model's commercial launch (A). Although the unavailability of certain parts can often be explained by lack of demand, a certain number of clauses in contracts between vehicle manufacturers and equipment suppliers, when considered overall, might increase the cost of parts sold in the independent channel and/or impede, delay or even prevent the sale of spare parts by the equipment suppliers in the independent channel (B).

A. AVAILABILITY OF SPARE PARTS IN THE INDEPENDENT CHANNEL

272. A non-negligible proportion of spare parts are unavailable in the independent channel, in particular during the first few years after a model's commercial launch. This has been pointed out by independent operators questioned by the Autorité de la concurrence (1) and has been confirmed by the data on parts availability (2).

²⁵¹ The qualitative-selective distribution system tends to prevent independent distributors from obtaining supplies directly from AR1 or vehicle manufacturers in order to sell parts on to independent repairers. The European Commission's answers to the "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012 nevertheless state that when an independent distributor acts as an intermediary between an authorised distributor and an independent repairer, i.e., when it receives instructions from an independent repairer to buy parts for a specific order, the vehicle manufacturer cannot prevent the authorised distributor from selling spare parts to the independent repairer through such an intermediary (see the answer to question 12 in the document published by the European Commission). This clarification should therefore facilitate the purchase of parts from the manufacturer channel.

1. THE EXPERIENCE OF INDEPENDENT OPERATORS

273. Independent distributors of spare parts have stated that they encounter problems obtaining supplies of spare parts during the first few years following a model's commercial launch, and that delays in the availability of spare parts can range from three months to several years²⁵². They have also said that the proportion of parts that are not available in the independent channel is significant and a variety of part types are concerned²⁵³. One operator also observed that the number of parts that cannot be obtained directly from equipment suppliers tends to increase.
274. For Europe as a whole, the FIGIEFA²⁵⁴ estimates that independent repairers obtain approximately 15% of non-visible parts from the manufacturer channel because they are not available elsewhere²⁵⁵. This figure has been confirmed by data supplied by a network of independent repairers.
275. The equipment suppliers have admitted that parts are not made immediately available to the independent channel, and that the delays may range from several months to several years. For some parts, it has been argued that delayed availability in the independent channel is due to insufficient demand from the independent channel during the first few years following a vehicle's commercial launch. It is true that the vast majority of vehicles are serviced by the authorised networks during the first two years of their life. Delays could also be due to capacity constraints in the first few years following a model's commercial launch, with manufactured parts being allocated in priority to the assembly of new vehicles. However, as several contributors have pointed out, the delays in parts availability could also be due to contractual obstacles imposed by the vehicle manufacturer, relating in particular to the use of specific tooling, intellectual property rights or the inability to remove the vehicle manufacturer's logo from the parts.

2. ANALYSIS OF DATA ON SPARE PARTS AVAILABILITY

a) Data on parts availability

276. The Autorité has tried to establish the scale of the unavailability of spare parts for recent vehicle models (launched between 2008 and 2010) in the independent channel by asking
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²⁵² Furthermore, some parts are never available in the independent channel, or only with much longer delivery times.

²⁵³ Including in particular, exhaust systems, technical components, lights, airbags, electronic parts (such as on-board computers, next generation injectors and commonrail injectors), special seals, high-pressure hoses, axle components, discs with integrated bearings, EGR valves, roof panels, pumps, shock absorbers, lock fittings, etc.

²⁵⁴ International Federation and Political Representative in Brussels of Independent Automotive Aftermarket Distributors and National Trade Associations

²⁵⁵ The parts unavailability rate would be higher than this 15% rate if it was expressed as a percentage of part references and not in terms of the volume of parts sold, because most unavailable parts are usually least frequently sold ones.

the three main independent distributors operating in the French market to examine a list of 1,969 part references belonging to "high demand" family parts ("sample 1")²⁵⁶, and identify those parts that are not available in their online catalogues. It also asked the eight largest independent distributors to indicate availability rates for "very high demand" parts ("sample 2")²⁵⁷ used in routine maintenance work for the 54 vehicle models launched in 2010 or 2011, corresponding to 18 different brands.

277. The availability rate for parts in sample 1 is 67%, and the rate rises with the model's age, as shown in the following table.

Table 7 – Availability rates of vehicle parts for vehicles launched in 2008, 2009 and 2010

	2008	2009	2010	2008-2010
Availability rates	75 %	67 %	56 %	67 %
Number of observations in the sample	640	868	461	1 969

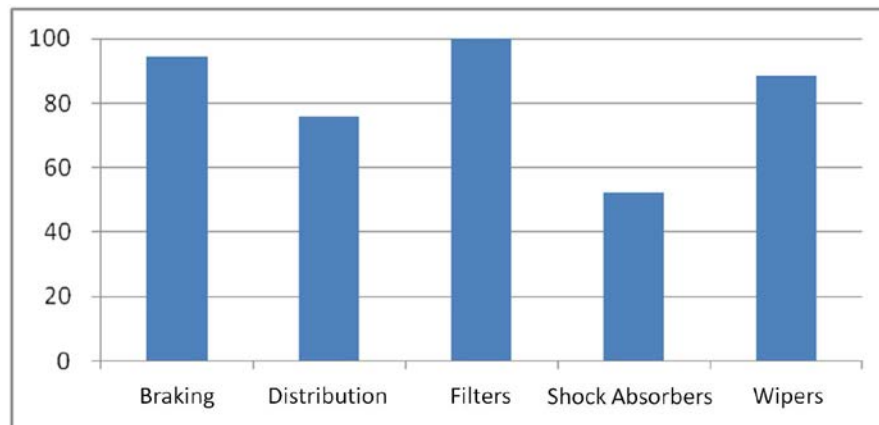
Source: Autorité de la concurrence, on the basis of data supplied by three independent distributors

278. The analysis of sample 2 shows that although oil filters are usually available, the same is not true for brake pads and windscreen wipers, and certainly not for timing belts and shock absorbers.

²⁵⁶ These 1,969 parts were selected from those families of parts that are changed most frequently (excluding filters, clutches, batteries and tyres), for the three top-selling new vehicle models in the first half of 2011, in the version launched commercially between 2008 and 2010 by the following vehicle manufacturers: Renault (and Dacia), PSA (Peugeot and Citroën), Ford, Fiat, Toyota and Volkswagen.

²⁵⁷ Brake pads (braking products), timing belts, oil filters (filters), shock absorbers and windscreen wipers.

Graph 11 – Average availability rates for very high demand parts²⁵⁸



Source: Autorité de la concurrence, based on data supplied by eight independent distributors.

Key: for the 54 models of shock absorbers in the sample, the average maximum availability rate per model for those distributors who supplied availability rates was 51%.

b) Unavailability rates due to low demand during the first few years following commercial launch

279. The vehicle manufacturers pointed out in their contribution to the public consultation that sales of a large proportion of the part references in these two samples are very low, and in some cases inexistent, during the first few years following the vehicle's commercial launch. Although the samples are made up of high demand parts and very high demand parts when vehicles of all age are taken into consideration, they are often only replaced several years after the sale of the vehicle. This is the case, for example, for wearing parts such as shock absorbers; on average these parts are only changed five years after the vehicle sale. Given that the samples only concern the first few years following a model's commercial launch, there tends to be very low demand for the corresponding reference parts.
280. Accordingly, two vehicle manufacturers, representing 55% of the parts in sample 1, have stated that the public consultation has demonstrated that 70% of the references in sample 1 were sold less than 250 times by these manufacturers in 2011 in France, and that 18% were not sold at all in 2011. According to the vehicle manufacturers, the observed unavailability rates are essentially due to the absence of an outlet for the parts in question. The two vehicle manufacturers claim that if we only look at parts sold more than 250 times in 2011 in France, the availability rate rises from 60% to 92%. If we only look at parts sold by these vehicle manufacturers more than 1,000 times in 2011 (201 parts), seven parts were unavailable, giving an availability rate of 96.5%. Likewise, for two vehicle brands in sample 2, each representing 29 part references (i.e., approximately 20% of sample 2), the

²⁵⁸ This rate corresponds to the arithmetic average, for all models in the sample, of maximum availability rates observed by the independent distributors who submitted answers for the parts category. Five distributors supplied data on braking products, three on timing belts, five on oil filters, three on shock absorbers and three on windscreen wipers.

availability rate rises to 100% in 2012 for each family of parts, if parts with a marginal sales volume in 2011 are removed from the sample²⁵⁹.

281. To conclude, the vehicle manufacturers believe that the examples of unavailability cited in the public consultation document can be explained essentially by low demand. Furthermore, given that the unavailable parts correspond in most cases to parts in lowest demand, the impact of their unavailability on competition is not material.

c) The data nevertheless points to the existence of problems in the availability of certain parts in the independent channel

282. Several findings tend to weaken the vehicle manufacturers' argument that the observed cases of unavailability are due solely to low demand for such parts and do not therefore adversely affect the spare parts sale market. Firstly, the marginal costs associated with the manufacture and distribution of parts are very low for original assembly suppliers, as the tooling is used essentially for the assembly of new vehicles. This means that although it is true that equipment suppliers already sell other parts in the independent channel, given that the additional overheads are practically zero it would be in their interest to supply a larger number of parts in the independent channel, even if there is little demand during the first few years after a model's commercial launch. In addition, insofar as production of spare parts is not limited to France, the low demand argued by the vehicle manufacturers needs to be put into perspective: European, and indeed global, demand for each part reference is logically much higher than the national demand referred to by the vehicle manufacturers²⁶⁰.
283. Secondly, the Autorité sent a questionnaire to equipment suppliers, which shows that at least 12.9%²⁶¹ of cases of parts unavailability were directly due to the fact that the vehicle manufacturer was the owner of the specific tooling needed to manufacture the parts in question. In addition, the vehicle manufacturer was the owner of tooling in 41.5% of the 25.8% of cases of unavailability due to "*too low demand*" and 17.2% of cases of unavailability due to "*the absence of the equipment supplier in the independent channel*"²⁶². The fact that the vehicle manufacturer is the owner of the tooling can limit sales of parts by the equipment supplier. In particular, the contractual clauses analysed below (see §298 to 315) raise the critical threshold of demand above which it would be profitable for the equipment suppliers to sell parts, although in some cases parts cannot be produced for the independent channel.

²⁵⁹ The availability rate estimated by the vehicle manufacturers could also have increased due to the difference in timing between the vehicle manufacturers' observations in April 2012 and the analysis by the Autorité de la concurrence based on findings dating back to August 2011.

²⁶⁰ Only 22% of the global production of passenger vehicles by these two French vehicle manufacturers was sold in France in 2011 (source: CCFA [association of French vehicle manufacturers] industry statistics for 2011).

²⁶¹ See Table 8.

²⁶² Note that in 50.5% of cases, the equipment supplier did not indicate who owned the tooling.

284. Thirdly, some of the parts in sample 1 for which there is significant demand are not available in the independent channel:

- For example, in the case of the two vehicle manufacturers who submitted a breakdown of their sales of each reference part in sample 1²⁶³, seven of the 201 references were sold more than 1,000 times in 2011, but are not available in the independent channel. In addition, eight references that are not available in this channel each generated upstream retail sales in excess of €100,000, excluding VAT, in 2011²⁶⁴, including four radiators, one injector and two "accessory drive kits"²⁶⁵.
- Unavailable radiators and injectors represent a considerable proportion of sales of radiators²⁶⁶ and injectors²⁶⁷ (approximately 20%). However, these parts appear among the 20 of the 58 part types in sample 1 that generated the highest turnover for the two vehicle manufacturers who supplied data on their sales of part references in sample 1.
- A certain number of family parts are never available. These include computers, irrespective of the year of commercial launch, although they represent a substantial amount of turnover²⁶⁸.
- Lastly, some families of parts have very high unavailability rates because the equipment suppliers who manufacture them do not sell any parts in the independent channel, despite their size and irrespective of the level of demand

²⁶³ Representing 55% of the sample.

²⁶⁴ Upstream turnover has been estimated by multiplying the sales volumes supplied by the manufacturers by the recommended sale prices, excluding VAT.

²⁶⁵ Drive belts, idler/tensioner pulleys and all parts it is advisable to replace along with the drive belt.

²⁶⁶ The observation concerning radiators has been confirmed by data supplied by an independent distributor, who is unable to obtain almost 25% of the radiators referenced in its catalogue from equipment suppliers. As these unavailable parts are essential if the independent distributor is to offer independent repairers a sufficiently broad range of parts, it tries to obtain them from the vehicle manufacturers' authorised networks, and more particularly from other countries, thus circumventing the selective distribution system adopted by the vehicle manufacturers. These "captive" parts can only be obtained in very small quantities and at prices that are less advantageous than those charged when the parts are available directly from the equipment suppliers, given that the vehicle manufacturers have a monopoly. This operator claims that the fact that a substantial proportion of such parts are not available in the independent channel is problematic, particularly given that the proportion of parts that are unavailable tends to increase due to "*additional restrictions on tooling*". Among the part references that this independent distributor claims were unavailable for vehicles manufactured by the six main vehicle manufacturers, seven were sold more than 750 times in 2011, which represents a retail sales figure of approximately €4.2 million in France.

²⁶⁷ 19 of the 32 cases of unavailable injectors in sample 1 were unavailable due to restrictions imposed in the tooling agreement.

²⁶⁸ Although the main vehicle manufacturers consider that computers are parts that need to be replaced very rarely, the unit price of a computer is very high, which means that they represent a significant proportion (approximately 1%) of vehicle manufacturers' aggregate "spare parts" turnover, meaning they rank at a similar level as clutches.

and the year of the vehicle's commercial launch (see §296 to 297). This is the case, for example, for catalytic converters, given that 80% of the part references in the sample (53 of 65 part references), representing approximately 45% of sales of catalytic converters in terms of volume and value, are unavailable.

285. Fourthly, even though the parts that are unavailable may include parts for which demand is low, such unavailability is likely to affect competition in the motor vehicle aftermarket, or at the very least in the markets for those spare parts particularly concerned by such unavailability. A very wide range of part references must be available for a repairer to select a distributor as its main supplier. This is why distributors list a large number of parts for which demand is low, or indeed very low, in their catalogues²⁶⁹. When questioned about this, one of the main independent distributors stated that 98% of the part references it had sold at least once in 2011 were sold less than 250 times in that year. Likewise, data concerning sales by the two authorised distributors in the DOM²⁷⁰ confirms that most of the parts in their catalogues are sold very infrequently. If we look at the parts sold at least once by these two distributors, approximately 40% were only sold once, approximately 85% were sold less than 100 times and only approximately 0.5% were sold more than 250 times. Independent wholesalers therefore place great value on the availability of large ranges of parts in the independent channel, including parts that are sold infrequently. The equipment suppliers could therefore offer parts in the independent channel, even if the actual outlets are limited.
286. Lastly, the low availability of parts during the first few years following a model's commercial launch affects independent repairers when competing for the repair and maintenance of vehicle fleets, for which parts need to be changed very rapidly due to wear²⁷¹. Likewise, it could limit the competitiveness of independent repairers on the repair and maintenance segments for recent vehicles belonging to private owners, thus creating a vicious circle: the fewer the number of recent vehicles serviced and repaired by independent repairers, the smaller the outlet for parts supplied by equipment suppliers, who will therefore further delay the date on which they will market spare parts in the independent channel.

²⁶⁹ 21% of the spare parts in sample 1 relating to the two vehicle manufacturers representing 55% of references were available in the independent channel but were sold less than 50 times by the manufacturers, with 4% not sold in 2011. This shows that it would be in the interest of equipment suppliers to include parts for which demand is low or inexistent in their catalogues, in order to offer a wide range of part references.

²⁷⁰ Samples of approximately 8,000 parts for each distributor. The data covers all sales in 2010 for one distributor, and all sales in the first half of 2011 for the other.

²⁷¹ Retail sales, excluding VAT, of timing belts and shock absorbers (right-hand side) in 2011 for models launched in 2010 are estimated at approximately €130,000 for each of the two vehicle manufacturers questioned with regard to sample 1. This suggests that there is a demand corresponding to worn parts, including during the first years following a model's commercial launch.

B. REASONS FOR THE UNAVAILABILITY OF CERTAIN SPARE PARTS IN THE INDEPENDENT CHANNEL

287. In order to establish the reasons for unavailability of parts in the independent channel, after the publication of the public consultation document, the Autorité de la concurrence sent a questionnaire to original assembly suppliers manufacturing, for the vehicle manufacturers, the parts that were found to be unavailable in sample 1. In addition, it also analysed 419 contracts between vehicle manufacturers and original assembly suppliers. These were essentially original assembly contracts²⁷² between 20 equipment suppliers and 11 vehicle manufacturers. For each part reference, the equipment suppliers stated whether they were selling such parts in the independent channel as at May 2012, and explain.
288. The main factors explaining the unavailability of certain spare parts in the independent channel are summarised in the following table. The left-hand column shows the reasons for unavailability of the parts in sample 1, while the right-hand column ("additional information") shows the unavailability of parts in the 240 contracts analysed, corresponding to spare parts not sold in the independent channel²⁷³.

²⁷² The analysis covered original assembly contracts that generated the most amount of turnover for the equipment suppliers in 2011 with the following vehicle manufacturers: Renault, PSA, Fiat, Ford, Volkswagen and Toyota. The number of contracts per equipment supplier varies and depends on the scope of their production in France, as not all equipment suppliers work with all the above vehicle manufacturers.

²⁷³ There was a potential demand for 342 of the 419 parts as spare parts, i.e., the corresponding vehicle had already been launched in the market. Of the 342 parts, 240 were not available in the independent channel.

Table 8 – Main reasons for unavailability of parts in the independent channel, according to equipment suppliers

Sample 1 ²⁷⁴	Reasons for unavailability of parts in the independent channel, according to equipment suppliers	Additional information (240 original assembly contracts)
11,7 %	Distributed by the equipment supplier ²⁷⁵	0 %
5,7 %	Will be available shortly	0 %
25,8 %	Demand too low	35,4 % ²⁷⁶
12,9 %	Impossible to use tooling	10,4 %
17,2 %	Equipment supplier not present in independent channel	48,3 %
26,7 %	Vehicle security – antitheft system	0 %
nd	Exclusivity, intellectual property rights	4 %
nd	Not stated	2 %

Source: replies received from original equipment suppliers to the questionnaire sent by the Autorité de la concurrence

289. The unavailability of parts may be due to economic or technical reasons (1), or to the contractual relations between the vehicle manufacturers and the original assembly suppliers, which in turn may affect the "economic" reasons for unavailability (2).

1. ECONOMIC OR TECHNICAL OBSTACLES IMPEDING THE SALE OF PARTS IN THE INDEPENDENT CHANNEL

290. According to replies received from the equipment suppliers, most cases of part unavailability²⁷⁷ are due to economic or technical obstacles, such as too low demand for the parts in question (a), the fact that the parts are directly or indirectly related to vehicle

²⁷⁴ Of the 645 unavailable references in sample 1, 226 could not be taken into consideration (essentially due to the original assembly supplier not having an address France, or not being identified), giving a final sample of 419 references.

²⁷⁵ In some cases, the equipment supplier does not sell the parts itself, but makes them available through a "range assembler" responsible for distributing various types of parts manufactured by different equipment suppliers. However, it is surprising that these parts are not available to any of the three main independent French distributors (see sample 1). For some of the parts, the fact that they are apparently available in practice can be explained by the four-month time lapse between the questioning of the independent distributors (August 2011) and the questioning of the equipment suppliers (December 2011).

²⁷⁶ For 62% of these contracts, the manufacturer owns the tooling and, for 75 % of them, the manufacturer's autorisation is required for the manufacture of parts for the independant channel..

²⁷⁷ 70% of the parts in sample 1 (85% if we exclude parts distributed by the equipment supplier and parts that will shortly be available), 84% of contracts received following the request for additional information.

safety or security (b) or the refusal of certain original assembly suppliers to manufacture parts for the aftermarket (c).

a) Poor economic returns on the manufacture of certain spare parts for the independent channel, essentially due to too low demand

291. In between one quarter and one third of all cases, the unavailability of parts appears to be due to limited demand. The higher the demand for a spare part, the more likely it is to be manufactured for the independent channel. As demand often increases with the passage of time since the model's commercial launch (up to a certain point, beyond which it falls because older models are withdrawn from the market), the availability of parts often increases with vehicle age. Accordingly, in sample 1, 5.7% of the unavailable parts were reported to be "*available shortly*", and some of the part references did indeed become available between August and December 2011²⁷⁸.
292. Nevertheless, as discussed below, the contractual relationship between a vehicle manufacturer and an equipment supplier may push up the critical demand threshold above which it is profitable for the original equipment supplier to sell parts in the independent channel. It is therefore apparent that low demand as a cause of unavailability can cover a wide range of situations²⁷⁹ (See §300 *et seq.*).

b) Unavailability of parts associated with vehicle safety and security

293. According to replies received, reasons relating to vehicle safety and security explain the unavailability of one quarter of the parts in sample 1 in the independent channel. This explanation was frequently given for computers²⁸⁰, as the module is usually connected to the vehicle's anti-start system. None of the computers in the sample are available in the independent channel, although sales of computers represent a considerable proportion of the vehicle manufacturers' spare parts sales. The low level of availability of such parts in the independent channel could therefore result in significant additional cost for consumers.
294. The European Commission has stated in a document published on 27 August 2012, that "*in such a case involving a (near) monopoly position, flat refusals to grant technical*

²⁷⁸ The independent distributors were questioned about availability of spare parts in August 2011, whereas the equipment suppliers were only asked to provide explanations for the unavailability of parts in the independent channel in December 2011.

²⁷⁹ In an extreme case scenario where the vehicle manufacturer does not authorise the equipment supplier to use the tooling created to manufacture the vehicle manufacturer-branded parts, the equipment supplier might consider that the demand threshold was not sufficient in view of the investments it would need to make to produce new tooling.

²⁸⁰ Note that one equipment supplier cited too low demand in the independent channel and not vehicle security as the reason for the unavailability of this type of part. It explained this lack of demand by the fact that not all independent operators have the necessary tools to carry out such work, essentially because of the cost.

*information for supposed reasons of security or safety will usually not be compatible with EU competition rules"*²⁸¹.

295. Furthermore, in July 2011, the vehicle manufacturers and repairers' representative bodies set up a joint structure, the SERMI²⁸², the purpose of which is to define a process to allow standardised access to information concerning security and safety through the accreditation of independent operators. Once the accreditation process has been defined, and in the event access to technical information becomes effective, parts associated with vehicle safety and security should become more easily available in the independent channel. It therefore seems that the industry is moving towards a greater accessibility of parts and information associated with vehicle safety and security, provided the SERMI's work shows concrete results in the short-term.

c) Strategic choices by certain equipment suppliers

296. Some very large equipment suppliers have chosen not to sell any parts in the independent channel, and to specialise exclusively in original assembly parts and vehicle manufacturers' spare parts.
297. Although profit margins in the independent channel are high (parts are often sold to independent distributors at higher prices than those charged to vehicle manufacturers), volumes are much lower than in the original assembly market. Furthermore, selling parts in the independent channel may require equipment suppliers to offer a wider range of spare parts and put in place a specific distribution system structure, involving, for example, promotional actions or the training of a network of distributors. However, given that most of the smaller equipment suppliers are present in the spare parts market, the absence of some of the large equipment suppliers is surprising.

2. OBSTACLES IMPEDING THE SALE OF SPARE PARTS RELATING TO CONTRACTUAL RELATIONSHIPS BETWEEN ORIGINAL EQUIPMENT SUPPLIERS AND VEHICLE MANUFACTURERS

298. The original equipment suppliers, who usually manufacture original assembly parts for new vehicles, are theoretically the best positioned to manufacture and sell original non-OEM spare parts in the independent market or to authorised repairers, as they should already have depreciated their various overheads through the sale of parts to the vehicle manufacturers (who account for between 80% and 90% of their business). The equipment suppliers could nevertheless have a limited interest in competing with the vehicle manufacturers, including within an authorised network, because of their dependent position on the original assembly parts market.

²⁸¹ Question 15 in the "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" published by the European Commission on 27 August 2012.

²⁸² The SERMI consists of two subgroups with equal voting rights, one of which represents independent operators, while the other represents the vehicle manufacturers.

299. This makes the removal of all the other obstacles hindering the sale of parts in the spare parts market, that are not justified by economic or technical reasons, all the more essential.

a) Obstacles relating to difficulties using tooling and the financing of development costs

Findings

300. As the vehicle manufacturers have pointed out, low demand for spare parts in the first few years following a vehicle's commercial launch can explain some of the cases of unavailability. However, the actual proportion is difficult to calculate, as even if demand is low it could be in the interests of an equipment supplier to sell parts in the independent channel, especially if it is the original equipment supplier for those parts. Furthermore, as illustrated in Table 8 above, between 10% and 13% of cases of unavailability are directly due to the fact that equipment suppliers are unable to use the specific tooling that was used to manufacture the original assembly parts. Lastly, as pointed out previously, some of the cases of unavailability explained by too low demand in the independent channel also coincide with the existence of contractual restrictions. The request for additional information sent to equipment suppliers established that approximately 35% of the 240 unavailable parts were not sold in the independent channel due to "too low demand". However, an analysis of the corresponding original equipment contracts has shown that, in a majority of cases, other features of the contract suggest that low demand is not necessarily the only reason preventing the equipment supplier from selling the parts in the independent channel. For example, in 75% of the 35% of contracts for which the equipment supplier explained unavailability by "low demand", the equipment supplier also stated that it had to obtain the vehicle manufacturer's prior written authorisation before selling the parts to independent operators.

301. In its contribution to the public consultation, the FIEV confirmed that the use by vehicle manufacturers of contractual restrictions relating to the use by equipment suppliers of specific tooling – which is often owned by the vehicle manufacturer – restricted the equipment suppliers' ability to produce parts for the independent channel. The following clauses relating to the use of tooling were identified in the course of the sector inquiry as likely to limit the presence of the contracting equipment supplier in the aftermarket²⁸³:

- Clause preventing the equipment supplier from using the specific tooling to manufacture non-OEM parts without the vehicle manufacturer's prior authorisation²⁸⁴ (the vehicle manufacturer can also make production of a second set of tooling subject to its express authorisation). The vehicle

²⁸³ Such a clause is not systematic: at least one vehicle manufacturer allows its equipment suppliers to use its specific tooling free of charge. However, the use of intellectual property rights financed alongside tooling requires prior authorisation from the vehicle manufacturer, without which the equipment supplier cannot sell parts in the independent channel.

²⁸⁴ In most contracts produced following the request for additional information that correspond to unavailable parts produced by an equipment supplier present in the aftermarket, the equipment supplier has to seek the vehicle manufacturer's authorisation before manufacturing said spare parts for its own account.

manufacturer could therefore prohibit the equipment supplier from using tooling (if it expressly refuses use or simply fails to authorise use²⁸⁵), or could delay its entry into the market, as the vehicle manufacturer could allow a certain amount of time to pass before granting authorisation²⁸⁶. The entry of the equipment supplier in the market will depend in particular on the level of demand and the cost of producing new tooling²⁸⁷. The effect of this clause could be to prevent an equipment supplier from entering the independent channel, to delay its entry, or to increase the cost of manufacturing spare parts and, therefore, the sale price of such parts.

- Clause making use of the tooling conditional upon expiry of the vehicle manufacturer's exclusive right to supply parts over a set period of time. Such a clause could delay the entry of the independent equipment supplier in the independent market²⁸⁸.
- Clause making use of the tooling conditional upon payment of royalties to the vehicle manufacturer. Such royalties tend to correspond to a flat amount calculated on the basis of the utilisation of the tooling and defined in advance by the vehicle manufacturer and the equipment supplier²⁸⁹. In such cases, the entry of the equipment supplier in the market will depend in practice on the level of demand and the amount of royalties. Such a clause could either prevent the equipment supplier from entering the independent market or delay its entry

²⁸⁵ According to the answers received from equipment suppliers following the request for additional information, 25 parts (i.e., 10.4% of the contracts) were not sold in the independent channel explicitly because the vehicle manufacturer had not authorised the equipment supplier to use the tooling in order to manufacture parts for this channel. Although such prior authorisation is generally based on the vehicle manufacturer's status as owner of the tooling and holder of the intellectual property rights, this is not always the case. At least one vehicle manufacturer makes access to the independent channel conditional upon its general authorisation, even when it does not hold the intellectual property rights. Moreover, the manufacture of 11 of the 240 parts that are unavailable in the independent channel (based on the request for additional information) requires the vehicle manufacturer's prior approval, even though no specific intellectual property rights are referred to in the contract.

²⁸⁶ 19% of the contracts corresponding to parts that are unavailable in the independent channel submitted following the request for additional information stipulate that the vehicle manufacturer's authorisation is a condition precedent to the sale of parts in the independent channel and that the vehicle manufacturer is the owner of the specific tooling.

²⁸⁷ The equipment suppliers have stated that the clauses that are problematic are not so much those that prohibit the reproduction of specific tooling, but rather those that limit their ability to use the initial tooling. Given the cost of producing such tooling, it is often difficult to recoup the cost of producing a second set of tooling in the independent channel.

²⁸⁸ This concerns 2% of the contracts analysed following the request for additional information. These contracts grant the vehicle manufacturers exclusive supply rights and involve equipment suppliers who sell parts in the independent channel. Moreover, in one case, there is no limit in time on the exclusivity.

²⁸⁹ Royalties = Cost of tooling x utilisation rate. For example, if the cost of the tooling is €100,000 and the utilisation rate to produce spare parts for the independent channel is 5%, the equipment supplier will pay €5,000.

or, in any event, increase the cost of manufacturing spare parts, and therefore the sale price of such parts.

- Clause making use of the tooling conditional upon an undertaking not to sell parts to authorised repairers. Such a clause restricts competition between vehicle manufacturers and equipment suppliers, as the equipment suppliers are prevented from competing with the vehicle manufacturers for supplies to authorised repairers. In addition, it restricts the potential outlets for equipment suppliers.

302. Furthermore, clauses relating to the financing of development costs for specific parts in the original assembly contracts can also limit an equipment supplier's capacity to produce parts for the independent channel, irrespective of whether the equipment supplier is the owner of the tooling²⁹⁰ or not²⁹¹, by making this conditional upon the vehicle manufacturer's authorisation or increasing the amount of any royalties to be paid²⁹². Development costs for specific parts are not always funded in full by the vehicle manufacturer, and tend to be written off through the price of a part²⁹³.

Discussion

303. Article 5 b) of Regulation 461/2010 provides that "*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*" is a hard-core restriction. The European Commission added in paragraph 23 of the Guidelines on the application of Regulation 461/2010 that "*so-called 'tooling arrangements' between component suppliers and motor vehicle manufacturers are one example of possible indirect restrictions of this type*".
304. In their contribution to the public consultation, the vehicle manufacturers consider that contractual clauses that are likely to limit sales by their equipment suppliers in the independent channel do not have any anticompetitive object or effect when the contracts in which they are found organise a subcontracting relationship and therefore fall within the

²⁹⁰ In 12 contracts (of the 240 contracts relating to unavailable parts supplied following the request for additional information) although the equipment supplier is the owner of the tooling, it cannot manufacture parts for the independent channel directly or even potentially, because the vehicle manufacturer is the holder of the intellectual property rights associated with the parts.

²⁹¹ Intellectual property rights constitute established or potential obstacles to the sale of parts in the independent channel in the case of 10 parts for which the vehicle manufacturer owns the tooling (of the 240 contracts relating to unavailable parts supplied following the request for additional information). There is no direct ban on using the tooling for these parts.

²⁹² One equipment supplier confirmed that royalty negotiations cover both the use of the vehicle manufacturer's tooling and use of the intellectual property rights, including when parts are not design-protected.

²⁹³ 228 of the 419 original assembly contracts analysed following the request for additional information specifically refer to development costs. In 88.6% of cases, the vehicle manufacturer's financing takes the form of piece price amortisation.

scope of application of the Commission Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements²⁹⁴. The Notice provides that "*The Commission considers that agreements under which one firm, called "the contractor", whether or not in consequence of a prior order from a third party, entrusts to another, called "the subcontractor", the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 85 (1)" (emphasis added). The Commission also emphasises in the same Notice that "*to carry out certain subcontracting agreements in accordance with the contractor's instructions, the subcontractor may have to make use of particular technology or equipment which the contractor will have to provide. In order to protect the economic value of such technology or equipment, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement" (emphasis added). More specifically, the Notice provides that "*Article 85 (1) does not apply to clauses whereby:***

- *technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement,*
- *technology or equipment provided by the contractor may not be made available to third parties,*
- *the goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf,*

provided that and in so far as this technology or equipment is necessary to enable the subcontractor under reasonable conditions to manufacture the goods, to supply the services or to carry out the work in accordance with the contractor's instructions. To that extent the subcontractor is providing goods, services or work in respect of which he is not an independent supplier in the market".

305. The Commission has therefore arbitrated between, on the one hand, upholding the principle of free competition between an equipment supplier and its vehicle manufacturer customer and, on the other hand, ensuring the vehicle manufacturer has sufficient incentive to invest. Within the framework of a subcontract, this may take the form of financial investments or the transfer of know-how to its subcontractor, which it might hesitate to do if the equipment supplier could then use its investments or know-how in order to enter into competition with it. The balance between the risk of restricting competition and the risk of free-riding is determined by the need for equipment and know-how provided by the vehicle manufacturer in order to manufacture the parts requested by the vehicle manufacturer. It would otherwise be far too easy for the supplier and its customer, who are also potential competitors in the spare parts markets, to enter into clauses that restrict competition by the supplier by organising a transfer of equipment or know-how that is not necessary for the performance of the services or that give minimum efficiency-enhancing effects in light of the restriction placed on competition.

²⁹⁴ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty.

306. The Commission has stated in the aforementioned Notice that *“the restrictions [...] are not justifiable where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work. Generally, this is the case when the contractor provides no more than general information which merely describes the work to be done. In such circumstances the restrictions could deprive the subcontractor of the possibility of developing his own business in the fields covered by the agreement”*. Paragraph 23 of the Guidelines on the application of Regulation 461/2010 develops this point: *“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 subcontracting arrangement. Therefore, it may be caught by Article 101(1) of the Treaty and be examined pursuant to the provisions of the Block Exemption Regulations”*, given that *“if the component supplier already has this tool, IPR or know-how at its disposal, or could, under reasonable conditions obtain them, [...]under these circumstances the contribution would not be necessary”*²⁹⁵ (emphasis added).
307. The great variety of contractual provisions, and of types of relationships between vehicle manufacturers and equipment suppliers, as well as the economic context in which they exist, clearly makes it impossible for the Autorité to carry out a general review of the original assembly contracts it has received. Only a case-by-case review would establish whether the conditions laid down by the 1978 Notice and Regulation 461/2010 are respected. In addition, the Autorité de la concurrence does not have the power within the framework of an opinion to qualify the specific conduct of a given economic actor in a market in light of Articles 101 and 102 of the TFEU and Articles L420-1 and L420-2 of the Commercial Code. Any such assessment and judgement is only possible following a procedure involving the hearing of all the parties organised pursuant to Article L463-1 of the Commercial Code.
308. Without wishing to pre-empt any detailed analysis it may make within the framework of litigation proceedings, the Autorité notes that in its contribution to the public consultation the FIEV estimated that in 99% of cases where a part is manufactured by an equipment supplier, it is the equipment supplier and not the vehicle manufacturer who is responsible for the development and initial financing of equipment and tooling, and this seems to be confirmed by our analysis of the 419 original assembly contracts²⁹⁶. However, as stated above, the vehicle manufacturer then gradually contributes to the financing of the equipment and the development costs, either through regular fixed payments made to the equipment supplier, which tend to end when the part is put into production, or through “piece price amortization”, in other words, through payments on each part purchased from the equipment supplier²⁹⁷, in which case the investment will be recouped long after the part

²⁹⁵ Footnote no. 2, page 19 of the Guidelines on the application of Regulation 461/2010.

²⁹⁶ Several years may lapse between the start of manufacture of the tooling or the initial R&D investment and its (total or partial) reimbursement by the vehicle manufacturer.

²⁹⁷ The vehicle manufacturers have stated that the practice of paying for tooling through piece price amortization paid to the equipment supplier, meaning that the equipment supplier is reimbursed several years

is put into production, and there is a risk that it will not be paid in full by the vehicle manufacturer if it does not enter into any commitments concerning volumes to be purchased (the reimbursement of the equipment supplier's investments will depend on the quantity of parts sold and, therefore, the model's commercial success).

309. On the basis of the fairly general examination that has been made of these contracts, it seems that in some cases, the vehicle manufacturer's contribution is not limited to "*providing [the equipment supplier] with no more than general information which merely describes the work to be done*" (in the words of the Commission's 1978 Notice). Moreover, in some cases "*the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work*". This might be the case, for example, when: the vehicle manufacturer's financing and/or risk-taking²⁹⁸ is limited; the vehicle manufacturer prevents the sale of the part, but is not the proprietor of specific intellectual property rights²⁹⁹; the vehicle manufacturer's ownership of the tooling results from constraints exerted by it on the equipment supplier³⁰⁰; and lastly, the know-how and equipment supplied by the vehicle

after its initial investment, is marginal, given the interprofessional agreements signed by French vehicle manufacturers and equipment suppliers in which they undertake, in particular, to pay the remaining balance owed for specific tooling by no later than the production start date (Code of best practices and competitive performance governing the customer-supplier relationship within the motor vehicle manufacturing industry dated 9 February 2009 by and between the CCFA and federations of equipment suppliers, and the Agreement on payment deadlines between customers and industrial subcontractors in the motor vehicle industry dated 24 January 2007). However, the FIEV's comments suggest that the scope of these agreements is somewhat limited: "*vehicle manufacturers often ask their suppliers not to charge a set price for specific tooling, but to integrate them ("amortise them") into the price of the parts through piece price amortisation*". The FIEV also added that these agreements only apply to French vehicle manufacturers and not to foreign vehicle manufacturers, and that some of the French manufacturers do not apply them *stricto sensu*, differentiating between specific tooling (payment of the balance on the production start date) and specific peripheral tooling (paid through piece price amortisation). Moreover, the aforementioned agreements introduce the possibility of paying for specific tooling through amortisation (Article 3-4 of the Code of good practices and competitive performance governing the customer-supplier relationship within the motor vehicle manufacturing industry dated 9 February 2009). Lastly, it has been observed in practice that in some cases certain vehicle manufacturers do finance specific tooling or part of it through piece price amortisation: in 18% of the 240 contracts analysed where parts are unavailable in the aftermarket, the specific tooling was financed partially or completely through piece price amortisation. It is therefore clear that this is not a marginal practice.

²⁹⁸ For example, if the vehicle manufacturer agrees to finance the investment after the equipment supplier's investment without any corresponding commitment to purchase a specific volume of parts. The reimbursement of the investment by the vehicle manufacturer might therefore depend on the commercial success of the vehicle model, and the equipment supplier would bear the associated risk. For 12.5% of the 240 unavailable parts (based on replies to the request for additional information), the property rights raised by the vehicle manufacturer or that could be raised by it to obstruct the production of parts for the independent channel were acquired through piece price amortisation.

²⁹⁹ For 4.6% of the 240 unavailable parts (based on replies to the request for additional information), the vehicle manufacturer's consent is needed even though it does not hold any intellectual property rights specifically identified by the equipment supplier and is not the owner of the tooling.

³⁰⁰ See paragraph 23 of the Guidelines on the application of Regulation 461/2010. This could also fall within the scope of Article L442-6-1-1 and 2 of the French Commercial Code, which provides that "*any producer, trader, industry operator or person registered in the register of trades and businesses will be liable for and required to compensate for harm caused [...] if it obtains or attempts to obtain from a business partner any benefit whatsoever that does not correspond to a genuine commercial service provided, or that is clearly*

manufacturer, and financed to a large extent by it, were already in the possession of or available to the equipment supplier or could have been obtained by it "*under reasonable conditions*" without the need for financing from the vehicle manufacturer in order to produce or acquire it.

310. Even in those cases where the vehicle manufacturer finances in full the tooling and/or development costs before the part is put into production and restricts the equipment supplier's access to the independent channel by way of consideration, the agreement could still fall within the scope of Article 101(1) if this method of financing was chosen artificially and solely for the purpose of justifying the restrictions placed upon the equipment supplier's access to the independent channel³⁰¹. In such a case, the agreement could be considered tantamount to the payment of an exclusivity bonus to the equipment supplier by the vehicle manufacturer in order to prevent it from competing in the aftermarket.
311. More generally, the application of the Notice on subcontracting to the motor vehicle sector requires careful analysis because, in some cases, it might remove all sources of potential competition for a vehicle manufacturer. Agreements limiting the equipment supplier's presence in the aftermarket that do not comply with the conditions laid down in the European texts would be particularly problematic in a market situation where no third-party equipment supplier was in a position to produce spare parts for the independent channel: the agreement would thus grant the vehicle manufacturer a monopoly for distribution of parts and require i) authorised repairers to obtain supplies of parts from the vehicle manufacturer, and ii) independent repairers to obtain supplies from the authorised repairers.
312. Lastly, independently of the subcontracting relationship that may be governed by agreements between vehicle manufacturers and equipment suppliers, restrictions limiting the presence of equipment suppliers in the aftermarket might generate only very limited efficiency-enhancing effects if there is sufficient competition between equipment suppliers in the original assembly market. When a vehicle manufacturer calls for tenders from equipment suppliers in the original assembly market, the price offered by each equipment supplier will be lower if it knows that it will also be able to sell the spare parts in the aftermarket. It is therefore unlikely that a vehicle manufacturer would finance 100% of the tooling, thus allowing its equipment supplier to free-ride and utilise tooling already financed by the vehicle manufacturer in order to manufacture and sell its own parts in the spare parts market without having made any investments or bearing any risks. The fierce competition between equipment suppliers for original assembly contracts could have the

disproportionate in view of the value of the service provided [...] or if it imposes or attempts to impose on a business partner obligations that create a material imbalance between the parties' rights and obligations".

³⁰¹ A vehicle manufacturer could choose to do business with an equipment supplier who undertakes not to sell parts in the independent channel in exchange for the financing of its development costs (tooling and/or R&D) by the vehicle manufacturer (or an equipment supplier who agrees to finance only a small proportion of the development costs and undertakes to limit its activities in the independent channel). In this way, the vehicle manufacturer would pay the equipment supplier an exclusivity bonus (by financing the development costs) in order to ensure that the equipment supplier would not compete against it in the independent channel.

reverse effect of efficiently allocating financing for tooling between vehicle manufacturers and equipment suppliers on the basis of their respective anticipated profits³⁰².

b) Priority supply clauses

313. The production of a part for the independent channel presupposes the existence of available production capacity. However, during the first year following a vehicle model's commercial launch, the equipment supplier has to allocate almost all its production resources to supplying the vehicle manufacturers with original assembly parts. Some subcontracts provide that the supply of original assembly parts and OEM spare parts must take precedence over supplies for the independent channel, and this may impact on the conditions under which the independent channel can access spare parts during the production series.
314. These clauses can be explained by the need to guarantee a continuous source of supplies for the assembly plants during a vehicle's life cycle. The equipment suppliers acknowledge that they need to supply parts for new vehicles to vehicle manufacturers as a priority, given the financial impact that any assembly line stoppage would have. The vehicle manufacturers have also stated that they must have spare parts in stock in order to carry out repairs covered by the warranty. As the independent repairers are not bound by the vehicle manufacturer's warranty, it seems fair that supplies to vehicle manufacturers take precedence over supplies to independent repairers.
315. Although these two explanations seem legitimate when a contract is not a subcontracting arrangement (see §303 to 311), clauses imposing priority supplies for the vehicle manufacturer should not be used to artificially postpone the sale of parts in the independent channel, as this could lessen the competitive constraints that the independent channel is in a position to exert over the manufacturer channel.

c) Constraints associated with the removal of the vehicle manufacturer's logo

316. Some vehicle manufacturers require that their logos or trademarks are moulded or engraved on parts during production. This requirement is not a technical necessity, insofar as other types of labelling or laser marking at the end of production would produce an equally indelible and permanent result. The vehicle manufacturer-branded products are then used by vehicle manufacturers for new vehicles and spare parts, and also to supply authorised dealers. However, the vehicle manufacturers do not allow their logos to be displayed on parts intended for the independent channel, which must display the equipment supplier's logo only.

³⁰² Let us assume that equipment supplier A proposes that the vehicle manufacturer will finance 100% of the tooling. Assuming that it knows in advance that it will be allowed to sell its parts in the independent channel, it will therefore anticipate a profit. In that case, equipment supplier B will propose to finance part of the tooling. Other equipment suppliers will make successive offers until an optimal balance is arrived at, as a result of competition between equipment suppliers, between the proportion to be financed by the vehicle manufacturer and the proportion to be financed by the equipment supplier, based on anticipated gains in the aftermarket.

317. In most cases, it is technically possible to install a removable block in the production tool so that when parts are produced for the independent channel they can be produced with the equipment supplier's logo, but not the vehicle manufacturer's logo. However, this system is not technically feasible for the production of some parts that would be weakened by the inclusion of a removable block in the production mould. In other cases, this solution is not financially viable as the additional cost could not be offset by sales in the independent channel, bearing in mind that the conceptual design and production of the removable blocks would ultimately increase the cost of producing spare parts. The vehicle manufacturers have confirmed in their contribution that this would not be possible in some cases.
318. The only alternative solutions to the use of removable blocks are various techniques for removing the vehicle manufacturer's logo: scraping, grinding, removal by laser, or application of a 'heating iron', for example. However, some vehicle manufacturers have objected to such processes on the basis of Articles L713-2 b) and L716-10 c) of the Intellectual Property Code which prohibit the removal of marks³⁰³, meaning in practice that the equipment suppliers are prohibited from selling these parts in the independent channel. As a result, the equipment suppliers have to comply with two contradictory obligations: the obligation not to display the vehicle manufacturer's logo on parts made for the independent channel and the obligation not to remove the vehicle manufacturer's logo from the same parts.
319. However, the ban on removing a mark, which constitutes a criminal offence, does not seem to correspond to any genuine necessity in the context of a relationship between an original assembly supplier and its customer, the vehicle manufacturer. In the case of spare parts manufactured by an original assembly supplier for an independent distributor, any claim based on the ban on removing marks would not be justified by technical considerations, relating to the quality or safety and security of the parts, as only two of the six vehicle manufacturers questioned impose such a ban. Despite the vehicle manufacturers' claims, nor does it seem justified in order to combat trademark infringement. Firstly, a claim based on the offence of removal of a mark³⁰⁴ pursuant to Articles L713-2 b) and L716-10 c) of

³⁰³ Article L713-2 b) of the Intellectual Property Code prohibits the removal of a mark from a product when it has been "duly affixed" thereon, and Article L716-10 c) of the same Code provides that such removal constitutes a criminal offence. Article L716-10 of the Intellectual Property Code punishes the removal of a mark with three years' imprisonment and a €300,000 fine, which may be increased to 5 years and €500,000 when the offence is perpetrated by an organised group, or when the case involves goods that are dangerous to health.

³⁰⁴ Some observers also consider that this could be contrary to the Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (the "Trademark Directive").

See in particular Sylviane Durrande, "*Marques – Dessins et modèles*" [Trademarks – Designs and models] JurisClasseur, Fasc. 7517: *Droit pénal de la contrefaçon* [criminal law and infringements], II.A.3° or Jérôme Passa, "*Droit de la propriété industrielle*" [Industrial property law], Tome 1, 2nd edition, no. 282 (he states on page 371: "by providing in Article L713-2 b) for a case of trademark infringement punishable by an action for infringement and not covered by the directive, the legislator has probably incorrectly interpreted France's community obligations").

the Intellectual Property Code seems unnecessary, given that the fraudulent removal of a mark by infringers could be punished by Article L217-2 of the Consumer Code. This provides that "*any person who has fraudulently deleted, masked, altered or modified in any way the names, signatures, monograms, letters, figures, serial numbers, emblems or signs of any kind affixed or included on in the goods and serving to identify it physically or electronically shall be punished in accordance with the penalties provided in Article L213-1*"³⁰⁵ (emphasis added). Traditionally, the fraudulent removal of marks was punished on this basis pursuant to the Act of 24 June 1928, prior to the entry into effect of the Act of 4 January 1991 introducing the offence of removal of a mark. Article L217-2 of the Consumer Code accordingly covers cases of fraudulent removal of marks and of any other signs affixed to products in order to identify them.

320. To conclude, the withdrawal of the offence of removal of a mark should not have any adverse effects on trademark protection in the motor vehicle sector. This could be achieved by amending the Intellectual Property Code as follows:

Article L713-2 "The following shall be prohibited, unless authorised by the owner: a) ... b) the suppression or modification of a duly affixed mark.

The provisions of point b) do not apply to equipment suppliers manufacturing spare parts for motor vehicles on behalf of the vehicle manufacturer, within the meaning of the Euro5 and Euro6 Regulations".

IV. Availability of technical information needed for repair and maintenance works

321. In order to be competitive, independent repairers need to be able to access the technical information necessary to repair vehicles under the same conditions as authorised repairers³⁰⁶. This technical information is usually in the possession of the vehicle manufacturers, and plays an increasingly important role in the repair and maintenance of vehicles. Repairers must be able to identify the part references, read and interpret the

Jérôme Passa (page 370) also states that "*these texts [Articles L713-2 b) and L716-10 c)] should, however, be considered not to be applicable when an operator has been compelled to remove the trademark to avoid legal action for unlawful use because the products, which were modified or impaired after they were put on the market with the proprietor's consent, cannot continue to be sold under the trademark without compromising its function as a guarantee of origin*".

³⁰⁵ The application of Article L217-2 of the Consumer Code implies that proof of the infringer's fraudulent intent must be produced and, more specifically, proof of an intent to mislead the consumer or unduly benefit from a manufacturer's reputation.

³⁰⁶ Access to technical information may also be an issue for other operators as well as independent repairers. For example, if a vehicle manufacturer introduces specific standards for certain products such as lubricants, the degree to which it communicates the technical specifications to product suppliers could impact their ability to compete with each other.

wiring diagrams and estimate the time needed to carry out the work. The information is becoming more complex because of the growing number of parts used to manufacture a vehicle³⁰⁷. In addition, the increase in on-board electronics³⁰⁸ means diagnostic tools need to be used for the majority of vehicle repair or maintenance works³⁰⁹. Lastly, notwithstanding the increasing importance of technical information in repair and maintenance works, the ability of independent operators to offer and carry out services of an equivalent quality to those provided by authorised repairers is a key factor in the consumers' decision to use independent repairers.

322. Independent repairers can access this information in different ways: either directly from the vehicle manufacturers, or through operators specialising in the provision of such information. However, the independent operators questioned have said that certain obstacles still impede access to this technical information, in varying degrees depending on the vehicle manufacturer (A), and are likely to weaken competition between authorised repairers and independent repairers based on merit (B). The current extension of the standardisation processes to include specific conditions governing the transfer and content of information displayed on vehicle manufacturers' websites and provided to specialist intermediaries, combined with the definition of an efficient control and disciplinary system to identify and sanction vehicle manufacturers who fail to release adequate technical information, would improve access to vehicle manufacturers' technical information by independent repairers (C).

A. OBSTACLES IMPEDING ACCESS TO TECHNICAL INFORMATION BY INDEPENDENT REPAIRERS AND SPECIALIST INTERMEDIARIES

323. There are several types of technical information and several access channels available to repairers (1). For a number of reasons, independent repairers very rarely use single-make information made available directly by the vehicle manufacturers (2). They tend to prefer multi-make information compiled by specialist intermediaries, even though these intermediaries also encounter a number of obstacles when trying to access the vehicle manufacturers' technical information (3). In addition, the technical information made available by the vehicle manufacturers does not enable independent operators –

³⁰⁷ One vehicle manufacturer has stated that the number of active spare part references for its vehicles rose from 109,000 in 2000 to 195,000 in 2010.

³⁰⁸ The cost of on-board electronics and software rose from 24% to 45% (estimate) of the aggregate vehicle production cost between 2000 and 2010 (ICDP study – "Evolution of the independent repairers sector", 2007, page 8).

³⁰⁹ Vehicle manufacturers consider that a diagnostic tool needs to be used for between 70% to 90% of vehicles taken to authorised repairers for repair or maintenance works. The same vehicle manufacturers have suggested that the figure is lower for independent repairers. However, the FNAA (National Federation of Automotive Trades) has stated that 80% of vehicle entries require the use of such a tool. This figure is confirmed by some manufacturers of multi-make tools, who believe the figure ranges from between 80% and 90%. Lastly, if the number of actual repairs made by independent repairers using this type of tool is slightly lower, this could be because they have limited access to such tools, which are essential in order to carry out certain repairs.

independent distributors and equipment suppliers, in particular – to build up catalogues of aftermarket parts that are easily identifiable using vehicles' VIN numbers (4).

1. DIFFERENT TYPES OF TECHNICAL INFORMATION

324. An initial distinction can be drawn between non-diagnostic information and information needed for vehicle diagnoses:

- ◆ *Non-diagnostic information* is described in Article 6 of Regulation 715/2007³¹⁰ and includes, in particular, information identifying the vehicle model, service handbooks and technical manuals, wiring diagrams, spare parts catalogues and estimated time required for each repair or maintenance task. Repairers can obtain this information either by visiting the vehicle manufacturer's "Euro5" website directly, or by using the services of a technical information publisher, who will have previously purchased the information from the vehicle manufacturer and included it in a multi-make solution. In practice, independent repairers almost always use a multi-make solution proposed by a technical information publisher.
- ◆ *Diagnostic technical information*³¹¹ is the information needed to interface with the on-board electronics systems, to interpret fault codes and to reset, remote-code and reprogram³¹² computers³¹³. Access to this type of data is necessary for more than 80% of vehicle entries. Special equipment is needed to utilise the information, namely a diagnostic tool. As with non-diagnostic information, in theory there are several ways in which an independent repairer can access this information. It can be obtained either by visiting the vehicle manufacturer's Euro5 website using a VCI³¹⁴, by using a multi-make diagnostic tool offline³¹⁵,

³¹⁰ Amended by Article 1 of Regulation 566/2011.

³¹¹ Defined in Article 1 of Regulation 566/2011 and in Annex I – Appendix 5 on information on OBD systems, Regulation 692/2008.

³¹² *Reprogramming* a computer consists in installing, in an onboard computer, the software that will run it. Once the software application is downloaded into the vehicle it will operate generically. *Remote coding* then needs to be carried out in order to send certain parameters to the computer so that it can identify the environment in which it will operate (for example: an injection computer must be matched with the engine).

³¹³ An on-board *computer* is an electronic system that manages the internal functions of modern motor vehicles. There are several types of specialised on-board computers designed to manage the engine, braking system, traction control, and even the alarms and air conditioning. In addition, onboard computers are generally all interconnected, which is known as multiplexing, enabling them to coordinate the operation of the different components of the vehicle.

³¹⁴ "*Vehicle Communication Interface*", which is used to establish a physical connection between the on-board electronics and the repairer's computer. The interface may be a standalone device or part of a multi-make diagnostic tool equipped with what is known as a "Passthru" function.

³¹⁵ In which case, the device will not be connected to the vehicle manufacturer's Euro5 website.

or by using the vehicle manufacturer's single-make diagnostic tool. In practice, independent repairers almost always use multi-make diagnostic tools.

325. As regards the access channels, single-make technical information in "read-only" mode needs to be differentiated from multi-make technical information compiled by specialist intermediaries:

- ◆ *"Read only" single-make technical information* is obtained directly from the vehicle manufacturers. Article 6-1 of Regulation 7155/2007 provides that the vehicle manufacturers must provide unrestricted access to independent operators via a website known as a "Euro5 website". The information can therefore be viewed, but cannot be imported and the independent operator will need to visit the site each time it requires information. The repairer may need to use a VCI³¹⁶ to connect to the vehicle manufacturer's website³¹⁷ and obtain certain information, in particular diagnostic information.
- ◆ *Multi-make technical information* is compiled by specialist intermediaries (technical information publishers for non-diagnostic information and multi-make diagnostic tool manufacturers for diagnostic information), who purchase the data from the vehicle manufacturers or obtain it through *reverse engineering*³¹⁸, and then compile it to create a multi-make solution.

326. In theory, irrespective of the type of information required, independent repairers can either contact the vehicle manufacturer directly or use a multi-make intermediary. However, in practice the most frequently used solution is the multi-make intermediary.

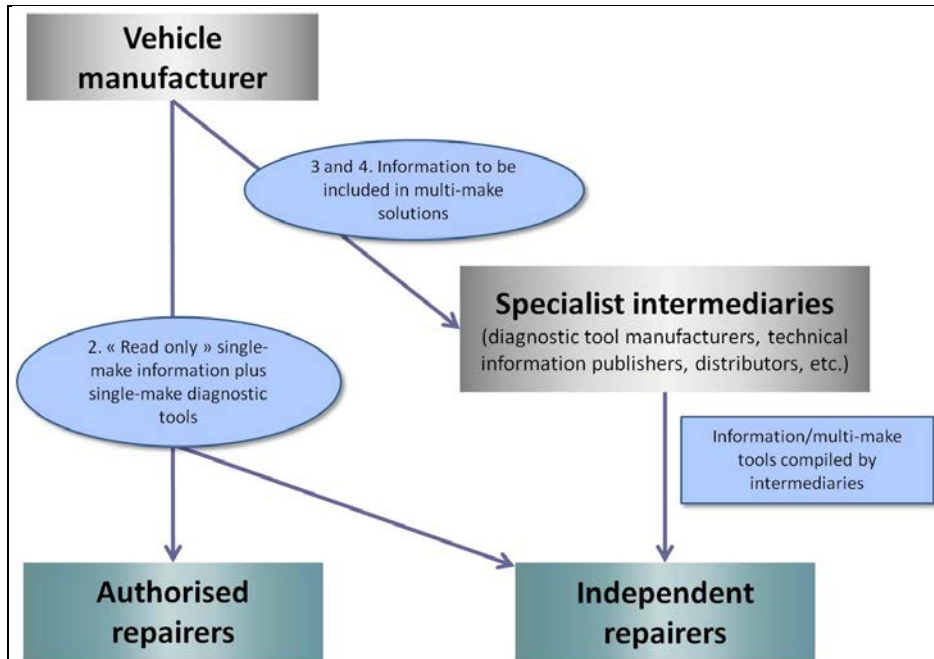
327. The following diagram shows the various channels for accessing technical information. This section looks at the conditions of access by independent repairers to vehicle manufacturers' single brand technical information (2), the conditions of access by specialist intermediaries to vehicle manufacturers' technical information in order to include it in their multi-make tools designed for independent repairers (3), and the conditions of access to technical information in order to identify parts present in a vehicle and the corresponding parts sold in the independent channel (4).

³¹⁶ It can also use a compatible multi-make tool, which will operate in exactly the same way as a VCI.

³¹⁷ Note that the single-make diagnostic tools used by authorised repairers can also be purchased by independent repairers. The price is the same for independent and authorised repairers. But, as explained in paragraphs 330 and 331, independent repairers almost never use single-make diagnostic tools.

³¹⁸ Operation consisting of artificially creating vehicle breakdowns in order to understand how the system interprets them, and then to create a diagnostic tool. However, the information is not as comprehensive and the processing times are longer than when technical information is purchased directly from vehicle manufacturers.

Diagram 3 – Presentation of the different channels for accessing technical information



Source : Autorité de la concurrence

2. ACCESS BY INDEPENDENT REPAIRERS TO SINGLE-MAKE TECHNICAL INFORMATION

a) Use of single-make technical information is practically nonexistent

Non-diagnostic technical information

328. Independent repairers can access this information via technical information publishers or via the vehicle manufacturers' Euro websites. However, these websites are used very rarely. Independent repairers' networks have stated that this is due to the fact that the vehicle manufacturers' websites are not standardised; to the likelihood that certain information will be missing, even though it is mandatory pursuant to the Euro5 Regulation (such as recall notices, fault code information, translated part lists and information in French); and to the cost of accessing such websites, which several representatives of independent repairers have stated is too high³¹⁹.

³¹⁹ By way of an example, the average minimum subscription for a one-hour connection to a vehicle manufacturer's Euro5 website was €[5-10] in 2010, and the monthly subscription was €[250-350] (average of the 2010 prices charged by six vehicle manufacturers), whereas the monthly subscription fee charged by a multi-make technical information publisher is approximately €[50-70]. If an independent repairer wished to subscribe to the websites of the seven vehicle brands representing 80% of the market, the corresponding annual subscription cost would be €[15,000-20,000], whereas an annual multi-make publisher subscription would be €[600-840]. However, it should be noted that these prices are not far from the commitments given to the European Commission by Daimler Chrysler, Fiat, Opel and Toyota. The vehicle manufacturers have stated that independent repairers and authorised repairers are charged the same prices, and the Autorité has seen no evidence to refute this.

329. In addition, the independent repairers have said that the system whereby parts needed for repairs are identified by entering the corresponding VIN number³²⁰ on the vehicle manufacturers' Euro5 websites does not meet their needs. If a repairer enters the vehicle's VIN number on a Euro5 website, it will access the information on the OEM parts of the vehicle to be repaired, but will not be able to identify the original parts or the matching quality parts available in the independent channel (non-OEM parts). However, independent repairers obtain most of their supplies from independent distributors. This means that in practice, independent operators are only offered a solution based on a limited number of vehicle characteristics³²¹, which is not always sufficient to enable them to properly identify the non-OEM spare parts needed for the vehicle and which, in any event, does not seem as efficient as the solution available to authorised repairers.

Diagnostic information and information relating to diagnostic tools

330. Independent repairers can access this information in three ways: via a single-make diagnostic tool, via an interface that connects with the vehicle manufacturer's Euro5 website (VCI or compatible multi-make diagnostic tool), or via a multi-make diagnostic tool.

331. As with non-diagnostic information, independent repairers rarely use single-brand tools. They would have to purchase seven separate single-brand diagnostic tools in order to cover 80% of the national market. As the price of these single-brand tools is substantially equivalent to that of multi-make tools, the purchase of a sufficient number of single-make tools is not a practical solution for independent repairers. Moreover, using a VCI or a compatible multi-make tool³²² to connect to the Euro5 website would be possible in theory, but in practice such a solution has its limitations, essentially associated with the lack of standardisation of vehicle manufacturers' websites (§328 above) and the difficulties involved in reprogramming computers³²³ and carrying out diagnoses in this way³²⁴. The very small number of reprogramming operations carried out via Euro5 websites, which has scarcely increased since the regulation came into force in 2010³²⁵, also suggests that there

³²⁰ "Vehicle Identification Number". This is the vehicle's sole identification number. It is the most reliable way of identifying a vehicle's component parts and, therefore, the corresponding spare parts.

³²¹ Usually based on the AAA's vehicle registration database.

³²² Equipped with a "Euro5" function, making it compatible with the vehicle manufacturer's communication protocols.

³²³ The March 2011 BOVAG report ("Euro5: a study of the technical information available on the motor vehicle manufacturers' websites"), found that in a test involving 16 vehicles none of them had been reprogrammed. However, information received from specialist intermediaries and vehicle manufacturers tends to play down this negative finding.

³²⁴ A specialist intermediary has explained that it is currently unable to use the Euro5 websites for diagnostic purposes, given the heterogeneity of the digital data made available by the vehicle manufacturers.

³²⁵ By way of an example, and contrary to the information provided by the vehicle manufacturers in their reply to the public consultation, the practices of resetting on-board computers and remote coding are relatively common in the authorised networks. Accordingly, in 2011 authorised repairers in one network carried out [100-120,000] reprogramming operations and [20-25,000] remote coding operations. A competing network performed [50-60,000] reprogramming operations in 2011. By way of a comparison,

is little interest in this access channel. Independent repairers clearly prefer using multi-make diagnostic tools.

b) Explanations provided by vehicle manufacturers – analysis by the Autorité de la concurrence

332. In their contribution to the public consultation, the vehicle manufacturers observed that neither European legislation nor France's national laws require the standardisation of the means used to communicate technical information and that, accordingly, the vehicle manufacturers, as independent entities, use separate procedures for disclosing their technical information. This means it will always be easier for an independent repairer to connect to a single multi-make site rather than to several single-make sites. The vehicle manufacturers also pointed out that it is inevitable that single-make repairers authorised by vehicle manufacturers will benefit from economies of specialisation and experience, arising in particular from their knowledge of how to best exploit the available technical information, which the multi-make independent repairers do not have. Likewise, the use of a single supplier, whether it be a technical information publisher or a manufacturer of diagnostic tools, will always be less expensive than using the separate solutions offered by vehicle manufacturers. Lastly, the vehicle manufacturers also observed that the cost of accessing technical information is identical for authorised repairers and independent repairers: if the vehicle manufacturers were obliged to sell access to their Euro5 websites to independent repairers at a lower price, this would be tantamount to obliging them to favour independent repairers over their authorised repairers.
333. The marginal use of Euro5 websites by independent repairers is therefore due in part to the irreconcilable differences between the manufacturer channel and the independent channel, as well as the presence of specialist intermediaries in the technical information markets³²⁶. Nevertheless, given the almost "structural" difficulties in accessing vehicle manufacturers' single-make information, the way in which specialist intermediaries access vehicle manufacturers' technical information requires close examination. The independent operators questioned by the Autorité de la concurrence have reported a large number of obstacles to access. Furthermore, the independent repairers have pointed out that access to all the information required by Euro5 and Euro6 does not always seem operational for all vehicle manufacturers (see §389).

3. ACCESS TO VEHICLE MANUFACTURERS' TECHNICAL INFORMATION BY TECHNICAL INFORMATION PUBLISHERS AND DIAGNOSTIC TOOL MANUFACTURERS

334. Independent repairers prefer using multi-make specialist intermediaries to access technical information. The most obvious way for specialist intermediaries to obtain technical
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independent repairs carried out just [10-20] reprogramming operations using the same vehicle manufacturer's Euro5 website in 2011. These figures are for Europe as a whole, which shows just how infrequently independent repairers use the Euro5 websites.

³²⁶ Their business operations necessarily require time for integration, as they compile technical information from different vehicle manufacturers in order to sell it on to independent repairers.

information would be to contact the various vehicle manufacturers in order to develop their multi-make solutions. Indeed, the vehicle manufacturers are the only stakeholders to possess all the technical information for all their vehicles, because of their function as assemblers. This does not entail any additional cost for them, and they already provide the information to the manufacturers of single-make diagnostic tools, most of which are sold to authorised repairers.

335. However, in practice, the manufacturers of multi-make diagnostic tools usually use reverse engineering³²⁷. This consists of artificially causing vehicle failures in order to identify how the system interprets them and to then develop a tool. However, the downsides of this technique are that the information is less comprehensive, processing times are longer and labour costs are considerable, particularly as the increased use of on-board electronics makes reverse engineering more difficult. Conversely, direct access to vehicle manufacturers' information is the only way publishers of non-diagnostic technical information can obtain the information needed for repair and maintenance works.
336. It is therefore apparent that both technical information publishers and diagnostic tool manufacturers are given inadequate access to technical information, which discourages the use of vehicle manufacturers' information or limits its value, and is ultimately likely to adversely affect the competitiveness of independent repairers. Inadequacies have been observed in: the contractual clauses included in the vehicle manufacturers' information-supply agreements (a), the quality of the information supplied (in terms of its format, timing and content) (b), and the price of the information (c). In addition, specific technical information regarding computers may be held by equipment suppliers, rather than vehicle manufacturers (d).

a) Clauses included in information-supply agreements between vehicle manufacturers and diagnostic tool manufacturers

Time limits placed on use of information: the termination clause

337. Several vehicle manufacturers' information-supply agreements stipulate that the information cannot be used after termination of the agreement; such clauses cover both non-diagnostic technical information and diagnostic information. Technical-information publishers and diagnostic-tool manufacturers are therefore faced with the risk that the vehicle manufacturer will increase the subscription price, obliging them to either accept the price increase or to cease using information already purchased, in which case they would need to obtain it again through reverse engineering, supposing this is possible. Some diagnostic-tool manufacturers have stated that this is the sole reason why they prefer using reverse engineering techniques³²⁸.

³²⁷ Only one of the six vehicle manufacturers questioned had signed an agreement to supply technical information to a multi-make diagnostic tool manufacturer in 2009.

³²⁸ One operator has stated that "*the obligation to extract purchased data at the end of the contractual term is sufficient to call into question the value of such agreements and once again highlights the interest of reverse engineering as compared to the purchase of information directly from vehicle manufacturers*". In all, two operators gave this as the reason why they have not contracted with certain vehicle manufacturers.

338. The vehicle manufacturers stated in their contribution to the public consultation that the Euro5 and Euro6 Regulations do not require the transfer of technical information to diagnostic-tool manufacturers, and merely require them to *provide access*. They claim that they are therefore entitled to provide such technical information in the form of license agreements for limited time periods, given that perpetual agreements are prohibited under French law³²⁹. They also claim that there is no risk that the price for obtaining updated technical information would rise excessively, because European regulations requires them to "*charge reasonable and proportionate fees for access to vehicle repair and maintenance information covered by this Regulation; [knowing that] a fee is not reasonable or proportionate if it discourages access by failing to take into account the extent to which the independent operator uses it*"³³⁰.
339. However, some vehicle manufacturers allow their customers to use information after termination of the agreement, whereas others allow it subject to payment of a flat fee. This shows that it is not strictly necessary to require intermediaries to delete all the data included in their diagnostic tools after termination of their agreement.

Geographic limitations placed on use of information: the territory clause

340. Most of the information-supply agreements entered into with diagnostic-tool manufacturers limit use of the information to the European Economic Area (EEA), extended in some cases to neighbouring countries, although most of the specialist intermediaries operate at an international level, within and beyond Europe. This territorial restriction might oblige diagnostic-tool manufacturers to use reverse engineering techniques for those tools sold in countries outside of the EEA, in which case there would be no point in them purchasing the corresponding information from the vehicle manufacturers³³¹. The specialist intermediaries therefore consider that, generally speaking, geographic restrictions limit the value of technical information purchased from vehicle manufacturers, whereas they operate at a pan-European or global level.
341. The vehicle manufacturers have stated in their contribution to the public consultation that these territorial restrictions are based on European regulations, and that they could not

³²⁹ Moreover, the vehicle manufacturers have argued that if a repairer has obsolete information (which has not been updated by re-subscribing), this could harm the consumers, in particular with regard to vehicle security and safety. However, in practice most specialist intermediaries currently offer tools containing information acquired through reverse engineering, and the fact that such information is not updated does not *a priori* seem to adversely affect the safety or security of the vehicles taken to independent repairers. In addition, at least one vehicle manufacturer allows the use of information after termination of its agreement: given its position at the top end of the market, it is unlikely that it would agree to this if there were any risks for its customers.

³³⁰ Article 7.1 of Regulation 715/2007 (see also recital 67 of the Guidelines on the application of Regulation 461/2010).

³³¹ Moreover, a technical information publisher has stated that some vehicle manufacturers impose even smaller geographic segments by proposing one-country contracts only. Their situation is the same as that of diagnostic tool manufacturers, in that, because they operate at a European level at least, this would oblige them to enter into a number of different contracts for several countries.

guarantee that the information is valid outside of the EEA³³². However, they have stated that case-by-case negotiations are always possible, provided the information is identical to information used elsewhere in the world.

b) The vehicle manufacturers' information is of limited value for diagnostic-tool manufacturers and technical-information publishers

342. Several features of the information supplied by vehicle manufacturers make its value limited and increase integration time both for diagnostic-tool manufacturers and for technical-information publishers.

Information format

343. In order to be effectively integrated into a multi-make electronic solution, the technical information purchased from each vehicle manufacturer needs to be received in a standard format. The technical regulation requires vehicle manufacturers to supply data in the ODX format if they use that format within their authorised network³³³. In practice, however, as the vehicle manufacturers have stated in their contribution to the public consultation, very few of them use this format for their authorised networks. This means that the cost of integrating the information is high for the specialist intermediaries. Although the vehicle manufacturers are not required to supply technical information to specialist intermediaries in ODX format if neither they nor their authorised repairers use that format, the Autorité de la concurrence has nevertheless observed that the format used to supply such information can have an impact on the assessment of the reasonable nature of the sale prices charged by vehicle manufacturers, as referred to in §67 of the Guidelines on the application of Regulation 461/2002 (see §383 to 387).

Timeframe for the supply and update of information

344. Information-supply agreements with specialist intermediaries may stipulate an initial deadline for the supply of information to ensure the information supplied is stabilised³³⁴. However, at least one intermediary has claimed that the information supplied by the vehicle manufacturer is not subsequently updated: in most cases, just one annual update is provided contractually, although some information-supply agreements do not make any provision for updates. This means that information may be supplied by vehicle manufacturers any time between six months and one year after the new vehicle launch date, and additional time is needed to integrate the technical information into the multi-

³³² It has, however, been observed that several technical information supply agreements with specialist intermediaries contain a clause that could exempt the vehicle manufacturer from all liability in the event that any of the information supplied under the agreement is found to be inaccurate or incorrect.

³³³ Pursuant to Article 13-8 of Regulation 692/2008: "for the purposes of point (b), where manufacturers use diagnostic and test tools in accordance with ISO 22900 Modular Vehicle Communication Interface (MVCI) and ISO 22901 Open Diagnostic Data Exchange (ODX) in their franchised networks, the ODX files shall be accessible to independent operators via the web site of the manufacturer".

³³⁴ Six months for at least two vehicle manufacturers.

make tool. Conversely, authorised repairers have tools that are capable of being used with new vehicles as soon as they come into the market.

345. The vehicle manufacturers have stated in their contribution that these delays are due to the time taken by specialist intermediaries to integrate the data, and that the vehicle manufacturers cannot be held responsible for the fact that independent repairers choose not to connect to their websites and instead prefer multi-make solutions, resulting in delays. Nevertheless, as stated previously, in view of the marginal use of vehicle manufacturers' websites by independent repairers due to the obstacles identified in part 1 above, and the inevitable delays due to the time needed for the intermediaries to integrate the information, it is essential that the technical information supplied to the specialist intermediaries is as up-to-date as possible.
346. Now, vehicle manufacturers take any time from six months to one year to supply the technical information downstream; this initial time period cannot be reduced and is independent of the time needed to integrate information, but it is not imposed upon authorised repairers. European Regulation 715/2007 provides that information must be made available within six months maximum³³⁵, which should be considered as a maximum time period and not as the default time period. In addition, specialist intermediaries who manufacture single-make tools have access to this information at least three months before the model launch date. Lastly, the agreements usually only provide for the supply of annual or half-year updates, further increasing the time required for the specialist intermediaries to obtain the information and create multi-make solutions.

Content of technical information

347. The information sold by the vehicle manufacturers does not systematically correspond to the information that is mandatory pursuant to the Euro5 and Euro6 Regulations³³⁶, due to different interpretations of the European regulations, the combination of the obligations resulting from the earlier Regulation 1400/2002 with those resulting from the Euro5 Regulations³³⁷, security-related reasons relating to antitheft systems³³⁸, or for no specific

³³⁵ Article 6.7 of Regulation 715/2007 provides that "when applying for EC type approval or national type approval, the manufacturer shall provide the type approval authority with proof of compliance with this Regulation relating to access to vehicle repair and maintenance information and to the information referred to in paragraph 5. In the event that such information is not yet available, or does not yet conform to this Regulation and its implementing measures at that point in time, the manufacturer shall provide it within six months from the date of type approval. If such proof of compliance is not provided within that period, the approval authority shall take appropriate measures to ensure compliance" (emphasis added).

³³⁶ The vehicle manufacturers seem to suggest in their contribution that only one operator has complained of inadequate access to technical information, which is not the case. Several operators (equipment suppliers, specialist intermediaries, distributors and independent repairers) reported problems accessing adequate technical information during the inquiry, and this has been confirmed by contributions to the public consultation.

³³⁷ The supply of certain clearly identified technical information was made mandatory by the Euro5 and Euro6 Regulations, specifically with effect from September 2009. Previously, the supply of technical information was more generally governed by the existence of a hard-core restriction defined in the Block Exemption Regulation 461/2010. As a result, some vehicle manufacturers consider that they do not have a duty to supply information for vehicles dating from before 2009. However, the Guidelines on the application

reason³³⁹. In such cases, the missing technical information cannot necessarily be obtained through reverse engineering, particularly when it corresponds to service reports or security-related information. Ultimately, diagnostic tool manufacturers usually have to supplement the purchase of information from the manufacturers by reverse engineering³⁴⁰.

c) The price of technical information

348. A multi-make diagnostic tool manufacturer needs to enter into contracts with several different vehicle manufacturers in order to cover a sufficient proportion of the vehicles available in the French market. It will therefore be very aware of the cost of the technical information supplied by the vehicle manufacturers, its quality (timing, type of format, comprehensiveness, etc.) and the vehicle manufacturer's market share. As stated above, diagnostic-tool manufacturers tend to prefer to use reverse engineering techniques rather than obtain vehicle manufacturer information directly: the specialist intermediaries often consider that the price charged by vehicle manufacturers for diagnostic or non-diagnostic technical information is too high, particularly given its limited value, as discussed above (see §337 to 347).
349. Technical-information publishers usually enter into contracts with most of the vehicle manufacturers in order to obtain the information they need to be able to offer multi-make solutions to independent repairers. Contractual restrictions or restrictions concerning the information itself (timing, format, content) might nevertheless increase the time needed to integrate the information into their products or, at the very least, increase the information integration costs.

d) Sharing information between vehicle manufacturers and original assembly suppliers

350. Contracts between vehicle manufacturers and original assembly suppliers often stipulate that the vehicle manufacturer is the owner of the intellectual property rights associated with the manufacture of the parts, although at least one vehicle manufacturer provides that some of its equipment suppliers retain the intellectual property rights associated with technical information relating to computers. However, information on computers is essential in order to manufacture diagnostic tools if reverse engineering is not used. Specialist intermediaries (including in particular multi-make diagnostic tool manufacturers) who wish to obtain this specific information therefore need to contact both the vehicle manufacturer and its various equipment suppliers. This renders the process more complex, which increases negotiation costs and the time required to obtain

of Regulation 461/2010 states that "*the Commission will take those Regulations into account when assessing cases of suspected withholding of technical repair and maintenance information concerning motor vehicles marketed before those dates*" (Recital 65).

³³⁸ Coupling of the ABS with the anti-start system, for example.

³³⁹ Some vehicle manufacturers have supplied very little information, apparently for no specific reason.

³⁴⁰ At least one diagnostic tool manufacturer has stated that it has to supplement information purchased from a vehicle manufacturer under an information supply agreement with reverse engineering.

information, in particular as none of the regulations require equipment suppliers to supply technical information to diagnostic-tool manufacturers.

351. The vehicle manufacturers have stated in their public contribution that they cannot provide independent operators with information they do not own themselves, without infringing the equipment suppliers' intellectual property rights.
352. However, the fact that some equipment suppliers possess specific intellectual property rights associated with computers seems to be unusual within the industry and contrary to the practices of the majority of vehicle manufacturers, who own the intellectual property rights associated with computers directly. Moreover, the technical information relating to computers is supplied to authorised repairers in the single-make diagnostic tools or via the Euro5 websites. There does not therefore seem to be any justification for limiting access to such information by specialist intermediaries.
353. On this topic, recital 13 of the technical regulation 566/2011 provides that "*considering the proportionality principle, while vehicle manufacturers should not be forced to collect data on modifications of individual vehicles from third parties exclusively for the purposes of Regulation (EC) No 715/2007 and its implementing acts, in order to ensure a competitive repair and maintenance market, independent operators should receive updates to vehicle component data to the extent the updates are available to authorised dealers and repairers*" (emphasis added).

4. ACCESS TO INFORMATION ENABLING THE IDENTIFICATION OF SPARE PARTS BY TECHNICAL INFORMATION PUBLISHERS OR SPARE PARTS DISTRIBUTORS OFFERING PARTS CATALOGUES

354. In order to be able to offer independent repairers a catalogue of aftermarket spare parts that are easily and reliably identifiable from the vehicles' VIN³⁴¹ number, independent operators (particularly equipment suppliers and distributors, but also automotive repair estimation software publishers and other specialist intermediaries) need to access the databases exclusively owned by the vehicle manufacturers (a). Access under the conditions currently proposed by the vehicle manufacturers does not allow them to build up this type of catalogue (b). The Euro5 and Euro6 Regulations appear to be sufficiently explicit on this point (c).

a) The need to provide independent operators with a database

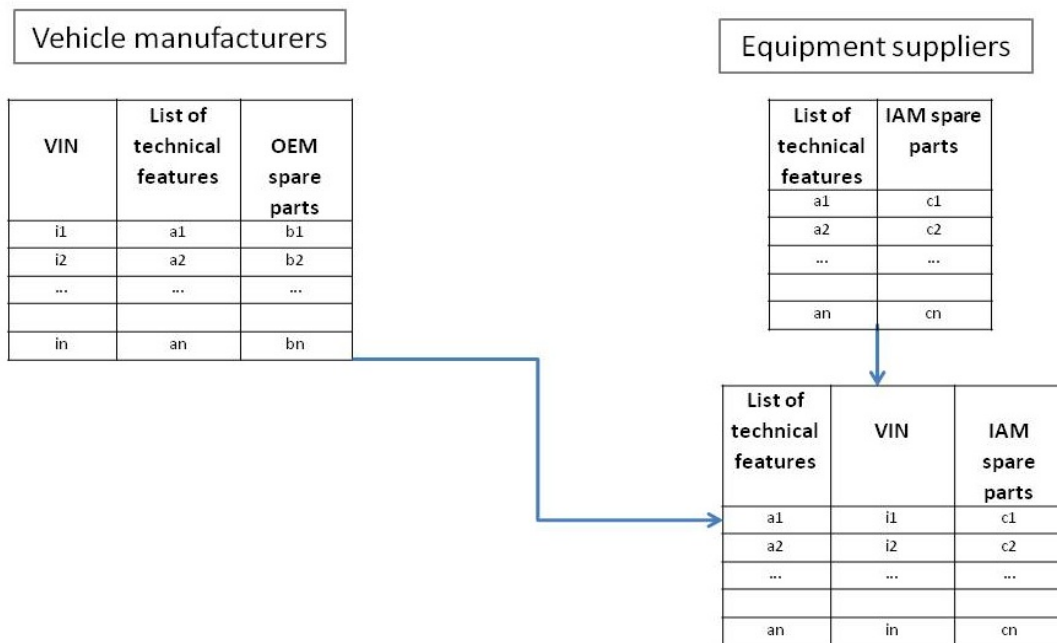
355. In order to repair a vehicle, an independent repairer needs to identify the references for the spare parts corresponding to that vehicle. Specialist intermediaries prepare part reference catalogues for equipment supplier parts ("non-OEM parts") and therefore need to reliably indicate the spare parts corresponding to each vehicle.
356. Different part references can be fitted on a given model of vehicle. This means simply knowing the model of the vehicle is not always sufficient to be able to identify the suitable

³⁴¹ Vehicle Identification Number

part references. The most reliable way of identifying parts is the VIN, which is an identification number specific to each vehicle. As vehicle assemblers, the vehicle manufacturers are aware of the references of the original assembly parts fitted on each vehicle and, therefore, the references for each VIN. They therefore prepare catalogues listing the OEM spare parts that correspond to each VIN.

357. Independent operators have explained that in order to have access to a solution that is equivalent to that available to authorised repairers, they need a list of the technical features of the vehicle corresponding to the VIN, which would allow them to accurately identify the non-OEM parts corresponding to the vehicle with that VIN. Each original equipment supplier has access to the list of technical features of the new vehicle on which original assembly parts are fitted, to which the non-OEM spare parts that it manufactures correspond. However, it does not know on which vehicle exactly the original assembly parts it manufactures are fitted. It therefore needs to receive a list of technical features corresponding to each VIN in order to identify as accurately as possible the corresponding non-OEM reference. Once these parts have been matched with the information from each OES, the specialist intermediaries or distributors can create a catalogue to reliably identify the non-OEM spare parts corresponding to each VIN, and therefore to each vehicle. The following diagram summarises the process:

Diagram 4 –match VIN to IAM parts



Key: if the vehicle manufacturers allow specialist intermediaries or distributors to access the left-hand database, they can match this with the database on the right, which is already in their possession because of their relations with equipment suppliers, using the common variable, known as the "list of technical features", in order to build up a comprehensive and reliable catalogue matching the non-OEM parts they offer to each VIN.

358. If they do not have the database needed to correctly match the VIN to non-OEM part references, the specialised intermediaries have to create their own catalogues on the basis of a limited number of vehicle features³⁴², using databases which they will improve over time, on the basis of customer feedback. The cost of creating such catalogues is considerable, and the result is not perfect, as it does not enable independent repairers to identify with sufficient certainty the non-OEM spare parts they need. Independent repairers are therefore often obliged to order several parts to be sure that they have the one they need³⁴³. This increases logistics costs for the distributors, who need to manage part returns, and can also increase repair times³⁴⁴.
359. At the end of the day, as with the technical information relating to diagnostic systems, the specialist intermediaries are compelled to compile the information they need themselves, which gives results that are incomplete and far from perfect at a considerable cost, because they do not have access to all the vehicle manufacturers' technical information in a format that allows them to utilise it and integrate it.

b) Current access to the VIN is not sufficient to build up a catalogue of non-OEM part references in order to reliably identify the parts needed by repairers

360. The vehicle manufacturers have stated in their contribution that independent operators are guaranteed access to the VIN and the list of associated technical features through their Euro5 websites. However, this is only possible if the independent operator manually types in each VIN, and it only gives the vehicle manufacturer's OEM parts. Accordingly, access via the vehicle manufacturer's Euro5 websites does not allow independent repairers to identify the non-OEM references of the parts they need. Nor does it allow specialist intermediaries to build up catalogues of non-OEM parts so that they can reliably identify parts from the VIN. Manual access does not allow interoperability between systems, which could be used to identify non-OEM parts through an automated process.
361. Furthermore, some publishers of automotive repair estimation software used for collision repair claims³⁴⁵, who only propose OEM part references, have more flexible access to VIN through a "web service" solution proposed by some vehicle manufacturers, which enables them to accurately identify the OEM part references through an automated process³⁴⁶. Some vehicle manufacturers sell this solution through "VIN contracts", allowing the publisher to consult the vehicle manufacturer's database in a remote and automated manner

³⁴² Usually using AAA vehicle registration data.

³⁴³ All operators, including equipment suppliers and specialist intermediaries, have mentioned the recurrent problems encountered in identifying spare parts. This point has also been confirmed by the various public contributions received.

³⁴⁴ The consequences are multiplied in the DOMs because of their remoteness and isolation, with potential harmful effects for distributors selling online only, their logistic circuits thus being very different from the traditional distribution channels.

³⁴⁵ Software applications specifically used by body repairers or loss adjusters in connection with collision repairs to calculate the cost of the repairs needed to restore the vehicle's initial appearance.

³⁴⁶ A query is sent to the vehicle manufacturer's website indicating the VIN, and the website sends back a list of requested features.

in order to obtain the list of technical features for a given vehicle, and to therefore accurately identify the spare parts corresponding to the vehicle. It can use this to offer a multi-brand tool that identifies OEM spare parts from the VIN.

362. Nevertheless, only certain publishers of automotive repair estimation software used for collision repair claims have access to this solution, and they only propose vehicle manufacturer parts (essentially visible parts used in bodywork – see section 2, part II). The automotive repair estimation software publishers who also have multi-make catalogues and use mainly non-OEM part references do not seem to have access to this type of information³⁴⁷, which implies a significant margin of error when identifying the spare parts needed to repair vehicles³⁴⁸.
363. These examples suggest that vehicle manufacturers are reluctant to supply technical information relating to VIN, in particular when they enable independent operators to build up a catalogue of non-OEM spare parts so that they can accurately identify the parts needed for vehicle repairs and, therefore, compare OEM and non-OEM prices for the same part. However, independently of any access within the framework of a "web service", the independent operators have also stated that they need access to the vehicle manufacturers' raw databases.

c) Reminder of applicable regulations

364. The FIGIEFA³⁴⁹ has stated that, despite repeated requests from independent operators, the vehicle manufacturers have consistently refused to allow access to raw databases matching VIN with lists of technical features, and that some vehicle manufacturers also refused access to "web service" solutions, offering only manual access via their Euro5 websites.
365. The vehicle manufacturers consider that they comply with the obligations imposed upon them by the regulations, either by entering into "VIN contracts" which provide for the automated processing of queries sent to the vehicle manufacturers' websites as a "web service", or by providing independent repairers with manual access to their catalogue on their Euro5 website. However, neither the Euro5 websites nor the VIN contracts currently allow repairers to build up catalogues of non-OEM parts in order to identify the spare parts needed from the VIN. Firstly, manual access does not allow automated processing using a

³⁴⁷ More specifically, it seems that those publishers who operate in the independent channel encounter problems when negotiating with vehicle manufacturers, either because they do not receive any reply, or because the vehicle manufacturers claim that the only available solution is their Euro5 website, or because of the complex administrative procedures imposed by the vehicle manufacturers.

³⁴⁸ Although one vehicle manufacturer has contracted with a specialist intermediary who also operates a multi-make catalogue, it has contractually limited the scope of use of VIN to the quote application offered by the operator only, and has expressly prohibited any use of the electronic catalogue including competing IAM references, which would enable repairers and insurers downstream to optimise procurement, and would increase competition for the vehicle manufacturer on the spare parts market. Leaving aside such restrictions, not all vehicle manufacturers offer "VIN contracts" to publishers.

³⁴⁹ FIGIEFA : *Fédération Internationale des Grossistes Importateurs et Exportateurs en Fournitures Automobiles* – International Federation and Political Representative of Independent Wholesalers and Retailers of Automotive Replacement Parts.

multi-make tool. Secondly, although “web service” access allows automated processing, in some cases this seems to be available only to specialist intermediaries who use OEM parts only, meaning that this cannot currently be used to create a catalogue of non-OEM parts that are easily identifiable from the VIN.

366. However, Regulation 566/2011 (Euro5 and 6), which supplements and amends Annex XIV to Regulation 692/2008, provides that the following must be “made available” to independent operators in “a database [that is] easily accessible”:

“Information on all parts of the vehicle, with which the vehicle, as identified by the vehicle identification number (VIN) and any additional criteria such as wheelbase, engine output, trim level or options, is equipped by the vehicle manufacturer and which can be replaced by spare parts offered by the vehicle manufacturer to its authorised repairers or dealers or third parties by means of reference to original equipment (OE) parts number, shall be made available in a database easily accessible to independent operators.

This database shall comprise the VIN, OE parts numbers, OE naming of the parts, validity attributes (valid-from and valid-to dates), fitting attributes and where applicable structuring characteristics.

The information on the database shall be regularly updated. The updates shall include in particular all modifications to individual vehicles after their production if this information is available to authorised dealers.”³⁵⁰

367. In a speech at the CLEPA³⁵¹ Aftermarket Conference on 24 November 2011, the Head of the European Commission's Automotive Industry Unit explained that the regulation does not only provide that information necessary to identify spare parts must be made available, it also covers access to a database containing information that can be extracted in a structured format to enable both automatic processing and integration into multi-make applications so that spare parts can be identified as accurately as possible³⁵².

³⁵⁰ Modification of Appendix XIV to Regulation 692/2008 by Regulation 566/2011. Representatives of independent operators have referred cases to some foreign type approval authorities on the basis of this Regulation.

³⁵¹ European Association of Automotive Suppliers.

³⁵² The speech is available (in English) at: http://ec.europa.eu/enterprise/sectors/automotive/files/rmi/speech_clepa_en.pdf

After recalling the problems associated with manual data processing (“*In the past vehicle manufacturers had sometimes provided vehicle component information mostly in a way, via paper documents or unstructured electronic documents. Publishers had to process these data manually for preparing their multi-brand IT applications, what is a tedious, costly and error-prone task, potentially leading to incomplete data. In a world where vehicles contain more and more and highly integrated electronic components, what results in an ever more complex search for appropriate spare parts, this manual processing of parts data is not sustainable.*”), Mr Philippe Jean explained why there was a need for clarification of Regulation 715/2007 (“*After basic Regulation (EC) 715/2007 with its provisions on access to RMI was published in 2007, the controversy among stakeholders soon focused on the meaning of Article 6 of Regulation 715/2007, requiring vehicle manufacturers to provide access to vehicle component information " using a standardised + in a readily accessible and prompt manner" . It became soon obvious that further regulation was necessary to resolve this issue*”).

He then explained the substance of the amendment to Regulation 692/2008 (“The legislation as amended still does not require a specific format for exchanging vehicle component information, but the quality of such

B. PROBLEMS ENCOUNTERED BY INDEPENDENT REPAIRERS

368. Due in particular to the limited access to technical information available to specialist intermediaries, independent repairers have stated that they encounter a number of difficulties in obtaining the same quality of information as authorised repairers, relating to: delays before information is made available (1), the limited scope of the information (2) – the combined effect of which restricts the independent repairers' ability to compete with the authorised networks (3) –, and difficulties in identifying spare part references (4). In addition, the obstacles impeding the provision of technical information by vehicle manufacturers are likely to result in entry barriers in the multi-make technical information market and to therefore increase the cost of technical information for independent repairers (5).

1. DELAYS BEFORE INFORMATION IS MADE AVAILABLE

369. Independent research repairers have to wait between six months and two years before non-diagnostic technical information or information specifically related to diagnostic systems is available via multi-make solutions. The delay will vary depending on the information and the vehicle model. However, authorised networks have tools that can be used with new vehicles as soon as they come into the market. The delay is longer for more technical information and/or unpopular models. This is because technical information publishers and multi-make diagnostic tool manufacturers have a limited processing capacity and therefore prioritise the products that will enable independent repairers to carry out the greatest number of repair or maintenance works on the most common vehicles in their territory. In addition, the data integration time also depends on the time needed for it to be processed by the specialist intermediary, which may vary depending on the format in which the

format is now described by several provisions:

1) "*shall be made available in a database*": the term "database" is defined in Article 1(2) of the European database Directive (EC) 96/9, which says: "*database` shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*".

2) "*easily accessible to independent operators*": qualifies the access to be granted to the data base as not requiring any undue particular effort from the independent operator considering the intended use of the data. Given that the objective for granting access to vehicle component data is their use in IT applications, an "easy access" (to data provided in a database) means at least automatic access with appropriate performance.

3) "*...using a standardized format in a readily accessible and prompt manner*": this provision highlights the requirement that the data can be retrieved in a structured format, timely and without delay.

The amended legislation also ensures that regular updates of the vehicle component information are given to independent operators in the same way as they are given to authorized dealers.

In summary, the legislation mandates the access to vehicle component data to be provided in a way, which makes their automatic processing possible. It should therefore facilitate the efficient design and deployment of multi-brand IT applications permitting the identification of alternative spare parts by independent operators." (emphasis added).

information has been supplied by the vehicle manufacturer, and also on the time taken by the vehicle manufacturer to transmit technical information upstream, which may also vary³⁵³.

370. The specialist intermediaries have stated that such a delay before information is made available does not necessarily handicap them, as the information needed for basic servicing tends to be available within approximately six months, and the more advanced functions are usually covered by the vehicle manufacturer's warranty. However, an analysis of the availability of information for recent models shows that it is limited, even for basic servicing and even over one year after the vehicle launch³⁵⁴. Moreover, distributors and independent repairers have confirmed that this delay before information is made available is problematic.
371. In addition, the vehicles most concerned by this delay before transfer of information are those aged less than two years, which represent 20% of the overall collision repair market³⁵⁵ and approximately 15% of the maintenance market³⁵⁶. If independent operators were able to work on these vehicles during the first two years they would be able to win customer loyalty and build up good customer relations, which is a necessary prerequisite to being able to compete with authorised networks for the fleet market.

2. COVERAGE RATES OF DIAGNOSTIC TOOLS AND NON-DIAGNOSTIC TECHNICAL INFORMATION

a) Diagnostic tools

372. Multi-make diagnostic tools have a coverage rate of approximately 80%³⁵⁷. Problems essentially concern compatibility with certain vehicles (see §369 and 370), resetting³⁵⁸, remote coding and reprogramming of computers³⁵⁹, fault code interpretation³⁶⁰, linking of

³⁵³ For example, information supply contracts may provide for annual data updates.

³⁵⁴ In the course of the inquiry the Autorité asked two diagnostic tool manufacturers to indicate whether their multi-make tools covered a list of some of the top-selling vehicles launched in 2010 and 2011. The first manufacturer's diagnostic tool is only capable of resetting 54% of the listed models, and the second manufacturer's tool only covers 38%.

³⁵⁵ Source: "*Panorama du marché de la réparation automobile*" [Overview of the car repair market], Roland Berger, 2010.

³⁵⁶ Excluding collision repairs and DIY – maintenance only, source: TCG Conseil, "*L'après-vente en France: Evolution 2020 et comparatif européen*" [The French aftermarket: prospects for 2020 and pan-European comparison], June 2011.

³⁵⁷ Weighted average coverage of all cars in France.

³⁵⁸ When maintenance work is carried out the system often needs to be reset, in particular in order to clear the maintenance indicator, so that the vehicle can operate normally. However, multi-make diagnostic tools cannot always be used to reset all vehicles in circulation in France.

³⁵⁹ On-board computers need to be reprogrammed or remote-coded if the computer or certain other parts are changed, or if the software application is upgraded. An independent repairer is often unable to complete the work because he is not equipped to do this.

maintenance or repair data with protected data³⁶¹, and access to the electronic service manual³⁶².

373. Specialist intermediaries have stated that the more common the vehicle model in France, the quicker it is integrated into a diagnostic tool, as is illustrated by the following graph. However, in some cases, diagnostic tools contain little information about certain vehicle makes which nevertheless have quite a significant market share³⁶³. More generally, independent repairers rarely have access to a solution as comprehensive as the ones available to authorised repairers for their brand vehicles.

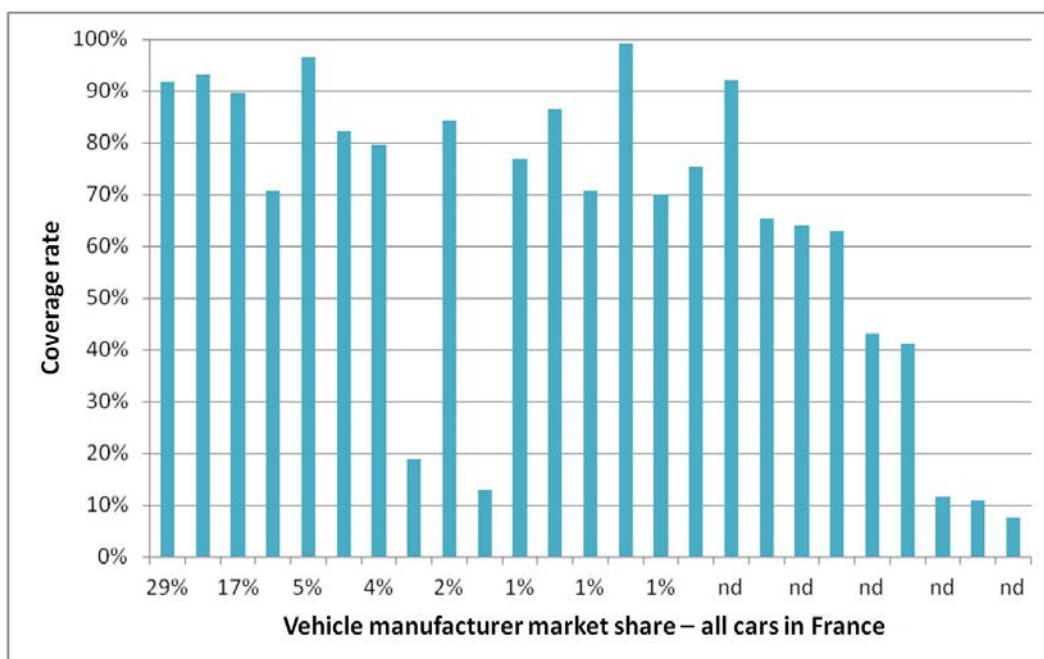
³⁶⁰If a computer is put into fault mode a specific code can be recovered during diagnosis. However, its translation by the tool is not always easily interpretable by the repairer, thus limiting his ability to carry out the necessary repairs.

³⁶¹ In some cases the data needed for work is combined with protected data, usually relating to security and safety; accordingly the ABS may be linked with the anti-start system. This has already been the subject of a referral to the Autorité de la concurrence, resulting in commitments by the vehicle manufacturer that it would make the data accessible (Decision 07-D-31 of 9 October 2007 concerning practices implemented by Automobiles Citroën).

³⁶²Some vehicle manufacturers equip their vehicles with electronic service manuals, which log all work carried out on the vehicle. The document needs to be regularly updated for two reasons: first, to establish whether the recommended work necessary for implementation of the manufacturer's warranty has been carried out and, secondly, in view of the vehicle's future sale, as it will have an impact on the vehicle's residual value. The service manual is either available on the Internet or integrated into the starter key, which means that it can only be accessed using a device specific to the vehicle make. In the case of some vehicle manufacturers, independent repairers cannot access these electronic service manuals online, as they do not have access to the relevant website, or using a specific device to read the key, as they are unable to purchase it.

³⁶³ The specialist intermediaries pointed out in their public contribution that the indicated coverage rate was for one tool manufacturer and the French market. Its coverage rate could therefore be substantially different in another European country. The choice of vehicle to be integrated into the tool therefore depends not only on the French market, but also on the European market and the market shares held by the multi-make tool manufacturer in each country.

Graph 12 – Coverage rate for one multi-make diagnostic-tool manufacturer according to the vehicle manufacturer market shares (all cars in France) in 2011



Source: diagnostic-tool manufacturer

Key: for a vehicle manufacturer representing 29% of all cars in France, the operator’s diagnostic tools have a coverage rate of 91%.

b) Technical information publishers

374. Likewise, observations based on information received from independent operators concerning non-diagnostic technical information supplied by publishers suggest that publishers only offer partial coverage and that certain types of information are less accessible to independent repairers. This may be the case, for instance, for recall notices, changes to servicing schedules, original values³⁶⁴, part removals and installation methods and instructions and explanatory notes facilitating the understanding of wiring diagrams.

3. THE CONSEQUENCES OF DELAYED TRANSMISSION OF INFORMATION AND OF THE COVERAGE RATES OF MULTI-MAKE TOOLS

375. If a repairer is not able to carry out works requiring technical information to which it does not have satisfactory access, it will have to refuse the vehicle or subcontract the work to an authorised repairer. However, working speed is a key criterion when selecting repairers: an independent repairer who has to use the services of an unauthorised repairer is clearly at the risk that his customer will contact the authorised repairer directly, particularly in the case of professional customers such as fleets (which represent 40% of new vehicle

³⁶⁴ Technical data required in order to determine target-setting values following work on the vehicle.

registrations every year). In addition, in order to maintain good relations with the authorised repairer in its catchment area, an independent repairer may be tempted to provide it with a constant flow of business (by, for example, buying spare parts)³⁶⁵. Lastly, the increased importance of on-board electronics has made vehicles much more complex, thus making access to technical information relating to vehicle repair and maintenance works increasingly strategic.

376. In their contribution to the public consultation, the vehicle manufacturers have stated that subcontracting between the authorised channel and the independent channel is an unavoidable reality due to the respective economic models of the authorised and independent repairers. They have also claimed that independent repairers are not dependent on authorised repairers: "*rather, they are complementary*". However, the vehicle manufacturers limited their observations to remarking that a single-make repairer will always be more specialised than a multi-make repairer, without addressing the effect of obstacles impeding the use of technical information which would otherwise allow independent repairers to compete efficiently with authorised repairers, including in particular the excessively high market shares held by authorised repairers in the recent vehicle repair and maintenance segment.

4. . IDENTIFICATION OF SPARE PARTS

377. In order to change a spare part an independent repairer needs to identify the vehicle model and the reference of the part to be changed. However, the multiplication of part references in vehicle manufacturers' catalogues makes the identification of suitable spare parts more difficult. The identification of spare parts using the VIN number is increasingly important for independent repairers to work efficiently. As discussed in paragraphs 355 to 363 above, independent repairers cannot reliably identify all non-OEM parts they need to repair a given vehicle because the specialist intermediaries do not have access to information on VIN numbers. This means independent repairers sometimes have to order several parts to be certain they will receive the right one, which increases logistic costs for independent distributors, who not only have to build up their own database on the basis of their experience, but also have to deliver a greater number of parts and handle part returns.
378. The impossibility of building up such a database might also limit independent repairers' capacity to exercise a competitive constraint on the vehicle manufacturer's authorised network in that, for instance, it may prevent the emergence of price comparison solutions integrated into automotive repair estimation software, which could match OEM purchase prices with the corresponding references available in the independent channel.

³⁶⁵ Several operators have reported that the dependency of independent repairers on technical information in the possession of authorised repairers is problematic.

5. INCREASED COST OF TECHNICAL INFORMATION FOR INDEPENDENT REPAIRERS

379. The first consequence of the fact that diagnostic tool manufacturers have to acquire the technical information they need to design multi-make tools through reverse engineering is that this limits their capacity to offer products that are as comprehensive as the single-make tools available to authorised repairers. Although the information exists and is available, the conditions for accessing such information that are currently proposed by some vehicle manufacturers incite diagnostic tool manufacturers to use reverse engineering techniques, which are time-consuming and expensive in terms of labour, making the cost of manufacturing the diagnostic tools higher than it would be if the information were easily accessible, which in turn increases the cost of accessing technical information for independent repairers and ultimately for consumers, and also means the information is less exhaustive. Further downstream in the vehicle repair and maintenance sector this could also impact on the competitive constraint independent repairers are able to exert on authorised repairers, especially during the first few years following a vehicle model's commercial launch.
380. This is also likely to raise the entry barriers to the multi-make diagnostic tool manufacture market. Newcomers will need to invest in reverse engineering in order to compete with the incumbent market operators. This limits the number of operators in the market and pushes up the price of diagnostic tools, which is contrary to the objectives of the European Commission, which has stated that: "*More flexibility should be given for the re-programming of vehicle control units and the data exchange between vehicle manufacturers and independent operators in order to allow for innovations and to save costs*"³⁶⁶.

C. POTENTIAL ADDITIONAL MEASURES

381. As discussed above, due to their economic model it is difficult for independent repairers to use single-make information disclosed by the vehicle manufacturers (§328 to 331 above), which means they essentially use technical information compiled by specialist intermediaries. However, these specialist intermediaries have also complained that access to vehicle manufacturer information is limited due, in particular, to certain contractual clauses, information format and content, transmission delays, cost and, lastly, the fact that some intellectual property rights relating to information are shared by vehicle manufacturers and original assembly suppliers (§337 to 353 above). By reducing the coverage rates of diagnostic tools and increasing the time lapse before technical information is available to independent repairers, these restrictions subsequently impair the quality of the services that independent repairers can provide, in particular for recent vehicle repairs – which represent a considerable proportion of the repair and maintenance

³⁶⁶ Recital 16 of the technical Regulation 566/2011.

segment³⁶⁷, of which networks of authorised repairers already have a very high market share. Lastly, the failure on the part of the vehicle manufacturers to supply information on vehicle VIN numbers in an exploitable form prevents specialist intermediaries and independent distributors from offering repairers parts catalogues that reliably match vehicle identities (VIN) with the non-OEM parts available in the independent channel (§354 to 363 above). Ultimately, repairers are restricted in their ability to order equivalent parts and to therefore place suppliers in competition with each other (§377 to 378 above).

1. COMPETITIVE ANALYSIS OF THE ALLEGED CONDUCT

382. It is not the aim of this Opinion to ascertain to what extent vehicle manufacturers comply or do not comply with the technical regulations governing the transmission of technical information, or to assess whether the alleged withholding of access by certain operators or, more generally, the conditions of access, can be qualified under competition law. As regards this latter point, only a detailed analysis within the framework of litigation proceedings involving the hearing of all concerned parties would be sufficient to establish this. This section of the Opinion therefore aims only to describe the competition rules that might apply.

a) The applicable competition rules

383. Although the withholding of technical information no longer constitutes a hard-core restriction³⁶⁸, the European Commission has continued to insist that selective distribution agreements entered into between vehicle manufacturers and their authorised networks might fall within the scope of Article 101(1) of the TFEU "*if, within the context of those agreements, one of the parties acts in a way that forecloses independent operators from the market, for instance by failing to release technical repair and maintenance information to them*"³⁶⁹, and the obligation to supply technical information remains a priority for the European Commission (see §145).

384. In the event a case of withholding of technical information made available to an authorised network is referred to the Autorité de la concurrence, its duty is to examine the object and – if it is not found to be anticompetitive – assess the effect on competition, more specifically analysing the impact of the withholding of information on the capacity of

³⁶⁷ Repair and maintenance works on vehicles aged 0 to 2 years represents slightly more than 10% (15% for vehicles aged 3 to 4 years) of aggregate repair and maintenance turnover (source: Roland Berger). Vehicle manufacturers' authorised networks hold market shares of 83% and 67% respectively in these two segments (source: TCG Conseil). Logically, vehicle manufacturers' authorised networks have an even larger market share for *vehicle models* launched within the last two years, or within the last four years, as compared to *vehicles* less than two years or less than four years old.

³⁶⁸ By definition, the effects of which no longer need to be established for such withholding to be qualified as anticompetitive and, depending on the type of information withheld, may mean the block exemption offered to motor vehicle manufacturers' selective distribution agreements will not apply.

³⁶⁹ §62 of the Guidelines on the application of Regulation 461/2010.

independent operators to conduct their business and exercise a competitive constraint in the market³⁷⁰.

385. Secondly, the scope of application of Regulation 461/2010 and the corresponding guidelines have been clarified on occasion, and in particular in the "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012, in the reply to question 14. The Guidelines on the application of Regulation 461/2010 differentiate between two types of information³⁷¹: on the one hand, information "*ultimately ... used for the repair and maintenance of motor vehicles*", which includes in particular information for repairers and technical information publishers³⁷², to which Regulation 461/2010 applies³⁷³, and information "*used... for another purpose*", which includes information on diagnostic systems supplied to diagnostic tool manufacturers³⁷⁴. As information "*used... for another purpose*" is not covered by Regulation 461/2010³⁷⁵, the withholding of such information can therefore only be analysed on the basis of Article 101 of the TFEU and more specifically, the general Regulation 330/2010, or Article 102 of the TFEU.
386. As regards this last point, the Communication from the European Commission on the application of Article 82 of the EEC treaty (now Article 102 of the TFEU) contains a useful framework of analysis for assessing the withholding of access or of technical information in the motor vehicle after sales sector. In the Communication, the Commission considers, firstly, that a refusal to supply creates competition problems when the dominant

³⁷⁰ §65 of the Guidelines on the application of Regulation 461/2010.

³⁷¹ §65-d of the Guidelines on the application of Regulation 461/2010.

³⁷² In reference to footnote 1 on page 26 of the Guidelines on the application of Regulation 461/2010, which explains that "*information [to be used] ultimately*" is, for example, "*information supplied to publishers for resupply to motor vehicle repairers*".

³⁷³ The obligation to provide technical information publishers with access to technical information must be assessed in light of the access effectively granted to independent repairers through Euro5 websites and their ability to compete efficiently with authorised repairers because of such access.

³⁷⁴ The European Commission considers that such information may include, in particular, diagnostic information (see footnote no. 2, page 26 of the aforementioned Guidelines). This position has been clarified in another document in which, in reply to the question "*Does the guidance on access to technical information set out in the Supplementary Guidelines also apply to tool manufacturers that wish to have access to such information in order to produce multi-make repair tools?*" the Commission stated "*No. When considering whether the withholding of technical information is likely to breach the EU competition rules, the Supplementary Guidelines make a distinction between technical information that will ultimately be used for the purpose of repair and maintenance of motor vehicles, as opposed to technical information used for another purpose, such as the manufacturing of tools.*" ("*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012, question 14). Accordingly, agreements entered into between vehicle manufacturers and equipment suppliers fall within the scope of general EU competition law insofar as they concern information "*used for another purpose*" as opposed to information "*that will ultimately be used for the purpose of repair and maintenance of motor vehicles*".

³⁷⁵ Answer to question 14 in "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012, and previous footnote.

undertaking upstream³⁷⁶ competes in the downstream market with the buyer whom it refuses to supply³⁷⁷. It subsequently provides that such practices will be considered as an enforcement priority if all of the following three conditions are satisfied: i) the refusal relates to a product or service that is necessary to be able to compete effectively in a downstream market³⁷⁸; ii) the refusal is likely to lead to the elimination of effective competition in the downstream market³⁷⁹; and iii) the refusal is likely to lead to consumer harm³⁸⁰. If the information withheld is protected by intellectual property rights, a fourth criterion must also be satisfied, pursuant to case law based on the Magill decision³⁸¹: the refusal to grant a licence prevents the emergence of a new product that is not offered by the proprietor of the intellectual property rights and for which there is a potential and currently unsatisfied consumer demand.

387. The European Commission also provides under paragraph 82 of the Communication that it may deviate from its examination of the first three conditions and only consider the likelihood of foreclosure "*where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply*".

b) Obstacles that might potentially impede access to information

388. The operators who have been heard in the course of the inquiry have described several types of obstacles impeding access to information, and it is clear that the combination of such obstacles might ultimately weaken the competitive constraint exerted by independent repairers on authorised networks, in particular during the first two years following a vehicle launch.

³⁷⁶ The European Commission notes in the aforementioned "Frequently Asked Questions" document (in reply to question 15) that it assumes "*that a vehicle manufacturer is likely to be the only source for the full range of technical information relating to vehicles of its brands*".

³⁷⁷ Paragraph 76 of the European Commission's Communication on the application of Article 82 of the EEC treaty.

³⁷⁸ This objective necessity criterion does not mean that no other competitor could ever enter or survive in the downstream market, rather that there is no actual or potential substitute for the product or service in demand (paragraph 83).

³⁷⁹ The Commission considers that this is usually the case if the input is essential and that, moreover, the likelihood is generally greater: the higher the market share of the dominant undertaking in the downstream market, the closer the substitutability between the dominant undertaking's products and those of its competitors on the downstream market, and the greater the amount of potential sales diverted from the foreclosed competitors to the dominant undertaking (paragraph 85).

³⁸⁰ i.e., if the competitors who risk foreclosure are not able to offer innovative products.

³⁸¹ CJEC decision C-241/91 P and C-424/91 P of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) versus Commission of the European Communities*.

The potential restrictions to access to single-make technical information in "read-only" mode by independent repairers

389. As explained above (§333), several independent repair chains have stated that the vehicle manufacturers' Euro5 websites do not always contain all the information required pursuant to the Euro5 and Euro6 Regulations. As a result, some of the larger manufacturers do not provide access to information such as: recall notices, fault code information, translated parts lists and information in French. An analysis of the compatibility of such practices with competition law would involve an assessment of the extent to which the withholding of information, assuming it is established, weakens the independent repairers' ability to compete with the authorised repairers.
390. In any event, many of the independent repairers currently use the services of specialist intermediaries to access vehicle manufacturer information. The Autorité de la concurrence has therefore decided to focus on whether this method of accessing technical information is effective.

The potential restrictions to access to technical information by technical information publishers

391. It has been observed that access is effectively provided to publishers and that contracts are effectively signed between publishers and vehicle manufacturers. The problems accessing information reported by the publishers therefore concern the content of the information supplied and the time taken to supply such information, which adds to the time needed to integrate the information into multi-make tools.
392. On this topic, it should be noted that paragraph 67 of the Guidelines on the application of Regulation 461/2010 provides: "*access should be given upon request and without undue delay, the information should be provided 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 information. A supplier of motor vehicles should be required to give independent operators access to technical information on new motor vehicles at the same time as such access is given to its authorised repairers and should not oblige independent operators to purchase more than the information necessary to carry out the work in question*". In view thereof, it is likely that the withholding of information from technical information publishers would cause the selective distribution agreements to be caught by Article 101 (1) of the TFEU³⁸².
393. The potentially discriminatory nature of the information provided – if the authorised repairers receive more recent and more comprehensive information more quickly – the specific focus of the Block Exemption Regulation on the motor vehicle sector, the fact that information can only be obtained from the vehicle manufacturers and that Euro5 websites are practically never used by independent repairers and, lastly, the very high market share held by the authorised networks during the first few years following a vehicle launch (as

³⁸² The withholding of information can also be analysed in light of Article 102 of the TFEU.

opposed to their market share in subsequent years), could constitute the first indications of "an appreciable impact"³⁸³ of restrictions on information, provided they are established.

The potential restrictions to access to technical information by diagnostic-tool manufacturers

394. Diagnostic-tool manufacturers believe that the conditions under which the vehicle manufacturers propose access to technical information are inadequate, in view of the information content, the time needed to obtain it, its format and cost. The diagnostic tool manufacturers are therefore obliged to use reverse engineering, which is a lengthy and expensive workaround solution that is, moreover, not entirely satisfactory.
395. In the case of information "*used for another purpose*" than repair and maintenance works, this information is not covered by the Guidelines on the application of Regulation 461/2010, which means that the withholding of such information would not have any consequences on any assessment of the selective distribution agreements entered into by vehicle manufacturers with their authorised repairers. However, agreements entered into between vehicle manufacturers and tool manufacturers fall within the scope of general European competition law, and therefore need to be assessed in the light of Articles 101 and 102 of the TFEU (see, more specifically, §383 to 387 above).
396. When examining an implicit refusal to supply technical information to diagnostic-tool manufacturers, several factors need to be taken into consideration.
- Firstly, the vehicle manufacturers might be the only parties holding the comprehensive and up-to-date technical information that the repairers or diagnostic-tool manufacturers consider necessary in order to compete effectively with the authorised networks, at least during the first few years following a vehicle launch. This might be the case, in particular, if the alternative solution, i.e. obtaining information through reverse engineering, is not sufficient to constitute an adequate substitute to the vehicle manufacturer's data, in a situation where independent repairers almost never use the Euro5 websites, and if the authorised repairers have access to such data.
 - Secondly, the potential effect of withholding access would be to place all networks of repairers competing with the vehicle manufacturer's authorised networks at a disadvantage in the downstream motor vehicle repair market. The proportion of consumers that would be likely to use the authorised networks instead of the independent networks could be fairly significant. The impact would be all the greater given that the authorised networks are extremely well positioned during the first few years of a vehicle's life cycle.
 - Thirdly, our initial examination suggests that the technical information that should be provided to diagnostic-tool manufacturers would not entail any particular investment on the part of the vehicle manufacturers, as such information is a by-product of their activities as assemblers and, moreover, is used by the vehicle

³⁸³ §65-b of the Guidelines on the application of Regulation 461/2010.

manufacturers for their own purposes and supplied to single-make tool manufacturers.

- Fourthly, assuming that such information is made available, there is a further possibility that the price charged combined with the quality of the information in terms of its format and the extent to which it is comprehensive or up-to-date would not allow independent repairers to compete efficiently with authorised repairers.
- Fifthly, refusing access to some types of technical information could prevent the emergence of new products that are not marketed by the vehicle manufacturers and for which there is a demand from independent repairers; namely, comprehensive and up-to-date multi-make diagnostic tools.
- Lastly, the fact that the European technical regulations impose an obligation to supply technical information that encompasses information to be supplied to diagnostic tool manufacturers³⁸⁴ could be interpreted as meaning that a competition authority would not need to establish the objective necessity of access to the information if potential or definite foreclosure was probable (see§387 above).

The potential restrictions to access to information on VIN

397. As recalled above, the Guidelines on the application of Regulation 461/2010, only cover information "*ultimately ... used for the repair and maintenance of motor vehicles*" and not information used "*for any other purpose*". The Commission explains in the Guidelines what it "*views as technical information for the purposes of applying Article 101 of the Treaty*", and refers, in particular to "*motor vehicle identification numbers or any other motor vehicle identification methods [...] The part code and any other information necessary to identify the correct car manufacturer-branded spare parts to fit a given individual motor vehicle (that is to say the part that the car manufacturer would generally supply to the members of its authorised repair networks to repair the motor vehicle in question) also constitute technical information*"³⁸⁵ given that "*the independent operator should not have to purchase the spare part in question to be able to obtain this information*"³⁸⁶. Information on VIN can therefore be assimilated to information ultimately used for repair and maintenance works, given that, firstly, it ultimately enables independent repairers to obtain the information needed to accurately identify the spare parts to fit the vehicle they are working on, and therefore to carry out repair or maintenance works, and secondly, such information is only available from the vehicle

³⁸⁴ The obligation to provide information to diagnostic-tool manufacturers is covered by the technical regulations. Article 6-5 of Regulation 715/2007 provides that "*for the purposes of manufacture and servicing of OBD-compatible replacement or service parts and diagnostic tools and test equipment, manufacturers shall provide the relevant OBD and vehicle repair and maintenance information on a non-discriminatory basis to any interested components, diagnostic tools or test equipment manufacturer or repairers*" Article 7-1 of the same Regulation also provides that the prices charged should not discourage access to information, by failing to take into account the extent to which the independent operator uses it. These regulations do not go so far as to provide that the price charged to acquire or access information should be based on incremental costs, or that the acquisition format should be standardised for all manufacturers.

³⁸⁵ §66 of the Guidelines to Regulation 461/2010.

³⁸⁶ Footnote no. 3, page 26 of the aforementioned Guidelines.

manufacturer, who is the only party who can know exactly which parts were fitted onto each vehicle³⁸⁷.

398. In any case, in the event of litigation proceedings the Autorité de la concurrence would be required to establish the probability of potential or definite foreclosure associated with the obstacles to information on VIN, which might be combined with other obstacles to information. On this topic, the following considerations need to be highlighted.

- Firstly, as stated in §357 to 359, if independent repairers do not receive VIN information in a satisfactory format they may be placed at a competitive disadvantage compared to authorised repairers, who are capable of accurately identifying spare part references for each of the vehicles in their brand. The extent of this disadvantage needs to be assessed in order to establish the impact on competition.
- Secondly, it appears that the information requested by intermediaries wishing to publish electronic parts catalogues is already provided to those publishers whose catalogues contain OEM parts only. The resulting discrimination suffered by operators also wishing to list non-OEM parts should also be taken into consideration when assessing the possible anticompetitive effects of such practices. Moreover, if such discrimination is established, it would also constitute proof that the information is available.
- Thirdly, the elaboration of catalogues containing both OEM part references and non-OEM part references could be assimilated to the creation of a new product or service, which would reinforce the competitive constraints existing in the repair and maintenance sector.
- Lastly, it should be noted that in the sector under review the introduction of an obligation to supply would very probably have little or no negative impact on incentives to innovate or invest, as information relating to the VIN is a by-product of the vehicle manufacturers' activity as assemblers.

c) Conclusion

399. As has been stated above, access to the vehicle manufacturers' information is governed by two sets of rules. Competition law qualifies the withholding of information or discriminatory information access conditions as anticompetitive when this is likely to eliminate effective competition and therefore harm consumers or, in some cases, when the withholding of information has a considerable impact on the capacity of independent operators to conduct their business and exercise competitive constraint in the market.

400. However, competition law can only apply to, correct or penalise such practices if they are likely to affect competition between potential users of the information. Problems accessing

³⁸⁷ The aforementioned answer to question 14 states that in the Guidelines to Regulation 461/2010, the Commission was referring to "*the provision of essential imports that are entirely under the vehicle manufacturer's control and that are not available from other sources*" (emphasis added).

the information must be significant and the information withheld must be sufficiently important for such an effect to be established.

401. This limitation on the scope of application of competition law, combined with the technical complexity and the multiplicity of the information that can be used in connection with repair works or when developing multi-make tools, pleads in favour of more direct regulations governing the potential information access problems encountered by repairers or specialist intermediaries. Moreover, independently of any impact on competition, improved supply of technical information to independent repairers and, in particular, to specialist intermediaries, including in particular diagnostic-tool manufacturers and parts-catalogue publishers, would reduce the costs of producing multi-make tools and, therefore, the cost of repairing vehicles.
402. In view of this, it is essential that an effective monitoring system is introduced for the monitoring of the application of the Euro5 and Euro6 technical regulations by the type approval authorities, combined with a dissuasive system of penalties to facilitate specialist intermediaries directly accessing such information from vehicle manufacturers (subsection 2 below). Alongside such a clearer monitoring and penalising system, the standardisation process that is currently on-going needs to be extended to include the content of the information supplied by vehicle manufacturers and to also encompass information supplied to specialist intermediaries, in order to remedy the inadequacies reported by the independent operators (section 3 below).

2. REINFORCING APPLICATION OF THE SO-CALLED "TECHNICAL" REGULATIONS

a) Reinforcing vehicle type approval authorities' supervisory powers

403. The body that has authority to apply the Euro5 and Euro6 Regulations is the CNRV, which is an administrative-type approval body, while the UTAC is responsible for technical inspections. In practice, the CNRV is not in a position at the current time to monitor the content of Euro5 websites or their technical compatibility (for online diagnostic purposes in particular³⁸⁸). Conditions under which technical information is transmitted to specialist intermediaries is not monitored either. These authorities rely solely on the forms filed by the vehicle manufacturers, and do not have any resources specifically dedicated to monitoring: moreover, no *ex ante* monitoring is provided by the European regulations within the framework of the type approval procedure³⁸⁹.
404. Independent operators (repairers and distributors) consider that the competent authority should verify the content of the information made available at the time of submission of a type approval application for a new vehicle and on expiry of the maximum six-month

³⁸⁸ Ensuring the vehicle manufacturer's website can interface with the VCI for diagnostic tasks, downloading or reprogramming (in reference to the SAE J2534 or ISO 22900 standards).

³⁸⁹ The UTAC has the necessary technical expertise, but only performs those inspections required by the Euro5 and Euro6 Regulations. Although it verifies the existence of Euro5 websites, it does not have the budget to monitor website content and, moreover, this is not required by the European regulations. The CNRV has stated that it does not have the necessary technical expertise to carry out this type of monitoring.

period within which all information must be made available pursuant to the regulations. However, any such reinforced monitoring would require the allocation of additional resources or additional penalties that could be imposed in the event of any infringement (see below). One way of minimising the costs associated with such monitoring would be to only carry out checks on the basis of complaints received from specialist intermediaries.

405. The introduction of such a system does seem to be the most suitable solution in terms of both processing times and appropriateness. The wide range of technical information that is updated several times a year raises a potential risk that a lot of information would fall through the net. However, most of the vehicle manufacturers allow access, albeit partial, to technical information relating to their vehicles, which means that actions brought for failure to provide access to technical information on the grounds of competition law would be extremely complex, and the time needed to investigate such a complaint should be weighed against the probability that vehicle manufacturers could rapidly supply the missing information. An administrative procedure to remedy infringement observed by industry stakeholders themselves would therefore seem to be the most appropriate solution.
406. More specifically on the topic of the interfacing of multi-make tools with the vehicle manufacturers' Euro5 websites, the specialist intermediaries have pointed out that in the USA various stakeholders in the vehicle repair market have defined, under the aegis of ETI³⁹⁰, a standard test to validate the electronic functionalities of data exchange systems. A similar system could therefore be put in place in order to define and control technical information made available by the vehicle manufacturers and the corresponding functionalities. The specialist intermediaries accordingly propose that a European test centre be set up, which would enable vehicle manufacturers to validate the functionality of their Euro5 websites and the multi-make diagnostic-tool manufacturers to validate the operation of their VCI when interfacing with the vehicle manufacturers' Euro5 websites. This solution would have several advantages in terms of the pooling of costs and the standard interpretation of the regulations: as the technical information is common to several Member States, creating national structures would result in the duplication of administrative costs. However, such a centre could only be set up under the aegis of the European Commission, which would necessarily require some time.

b) The introduction of suitable penalties

407. Initially, the technical regulation³⁹¹ provided that in the event of any infringement of its provisions the vehicle type approval authority could suspend or withdraw type approval. In practice, this would be too onerous to implement to be effective³⁹².

³⁹⁰ The ETI has developed a test based on standard SAE J 1699-3, which is carried out by another body, the CARB (California Air Resources Board).

³⁹¹ Article 14-3 of Regulation 692/2008.

³⁹² This means that although the current regulations provide for the possibility of referring a case to the vehicle type-approval authority in the event of observed non-compliance with the obligation to supply technical information, no such referrals have ever been made in France. However, the Autorité de la concurrence is aware of two complaints submitted to foreign type-approval authorities based on problems accessing technical information.

408. It was for this reason that the European regulation concomitantly provided for the introduction of additional penalties, which should theoretically have been adopted by the Member States and notified to the Commission by 2 January 2009. Article 13 of European Regulation 715/2007 accordingly provides that "*Member States shall lay down the provisions on penalties applicable for infringement by manufacturers of the provisions of this Regulation and shall take measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. [...] The types of infringements which are subject to a penalty shall include [...] refusal to provide access to information*".
409. However, no such provisions on penalties have been introduced in France to date, and the withdrawal or suspension of type approval is therefore the only available deterrent. In their respective contributions to the public consultation, several independent operators (distributors and repairers) and specialist intermediaries stated that in their opinion the French government should define applicable, proportionate penalties for infringements of the obligation to provide technical information at the time of type approval or during the commercial life of a vehicle, in accordance with above-mentioned Article 13.
410. It should be noted, however, that Article 14-2 of Regulation 692/2008 provides that the implementation of the penalties provided for in Article 13 of Regulation 715/2007 falls under the responsibility of the type approval authorities that granted the vehicle manufacturer type approval³⁹³. In other words, the penalties would only apply to vehicles for which the CNRV has given type approval in France, i.e., essentially vehicles produced by French manufacturers. Although the introduction of such penalties would facilitate access by independent repairers to technical information for the most common makes of vehicle they repair, the system could be circumvented by obtaining type approval for vehicles in another country that does not impose such penalties. For this reason, it would be advisable for such a system to be extended to all European Union Member States to ensure penalties could also be imposed on the basis of access to technical information held by foreign vehicle manufacturers.

3. EXTENDING THE SCOPE OF THE CURRENT STANDARDISATION PROCESS

411. The standardisation of technical information is currently on-going, under the aegis of the European Committee for Standardisation (CEN) and within the framework of ISO 18541, with a view to facilitating the transmission of information to independent operators. The current project addresses several obstacles to the exchange of information, including in particular the format of the information made available to independent repairers on the Euro5 websites and the compliance tests carried out to verify that the information is effectively accessible. Access to information relating to vehicle safety and security has also been integrated into the standardisation process in order to facilitate its transmission to

³⁹³ "*Where an approval authority finds that the manufacturer has failed to comply with its obligations regarding access to vehicle OBD and vehicle repair and maintenance information, the approval authority which granted the relevant type approval shall take appropriate steps to remedy the situation*" (emphasis added, Article 14-2 of Regulation 692/2008).

independent operators, in particular through the accreditation of independent operators³⁹⁴ wishing to access these protected functions. It seems unlikely that standardisation will be achieved by the end of 2013, as initially anticipated. This extended timeframe could allow issues and operators who are currently excluded from the process to be included. Failing that, a second standardisation process would be necessary in order to address the issues not covered by this standard.

a) Extending the scope of ISO 18541 to include concrete provisions relating to the transfer and content of information made available on Euro5 websites

412. The ISO 18541 standard, which is currently under discussion, will only define the format and presentation of information (data structure, tree and layout) and will not cover information content (reliability and comprehensiveness, associated functionalities). Moreover, the planned compliance test will only consist of verifying that the initially anticipated uses have been integrated into the website. However, the problems encountered by independent repairers and specialist intermediaries alike relate to both the format and the content of the information made available, their related functionalities (such as online diagnostics or reprogramming of computers, see §331) and the time lapse before information is made available.
413. The scope of the standard currently under discussion could therefore be extended to include concrete provisions relating to the transfer and content of information provided, whereas it is currently limited to the format of the information provided. An examination of information content could also integrate information relating to each vehicle VIN number, to enable the exchange of such information and the creation of reliable non-OEM parts catalogues by technical-information publishers or parts distributors. More generally, the standard should ultimately improve the effectiveness of the various European regulations relating to the exchange of technical information.

b) Including specialist intermediaries in the technical information standardisation process

414. In principle, the ISO 18541 standard only covers information provided directly to independent repairers via the vehicle manufacturers' Euro5 websites, although the problems identified also concern information provided to specialist intermediaries. The quality of the information provided to the specialist intermediaries is particularly important because, given their multi-make model and the problems accessing technical information via the Euro5 websites, it is likely that independent repairers will continue to prefer to use these intermediaries' multi-make tools.
415. An improvement in the quality of information provided to repairers would therefore encourage specialist intermediaries to develop high-performance tools. Facilitating access to directly utilisable information for these operators, given that it is in principle already available to authorised repairers, seems to be an even more immediate solution to the

³⁹⁴ Independent operators consist essentially of independent repairers and specialist intermediaries (technical information publishers and multi-make diagnostic-tool manufacturers).

problems encountered by independent repairers in accessing information. A standardisation process could be started for that purpose along the same lines of the process currently ongoing for information provided to repairers via the vehicle manufacturers' Euro5 websites.

V. Warranty contracts and warranty extensions

416. Some warranty contracts contain clauses that might limit the consumers' ability to use the services of independent repairers (A). This section contains a summary of the relevant provisions of competition law, followed by a discussion of the various arguments raised by the vehicle manufacturers and the independent networks in their responses to the public consultation (B).

A. OBSERVATIONS

417. Below is a discussion on the importance of the warranty in the consumers' choice between authorised repairers and independent repairers (1), followed by a presentation of the obstacles that might prevent implementation of the warranty, which might limit the consumers' choice of service provider to carry out repair and/or maintenance works (2).

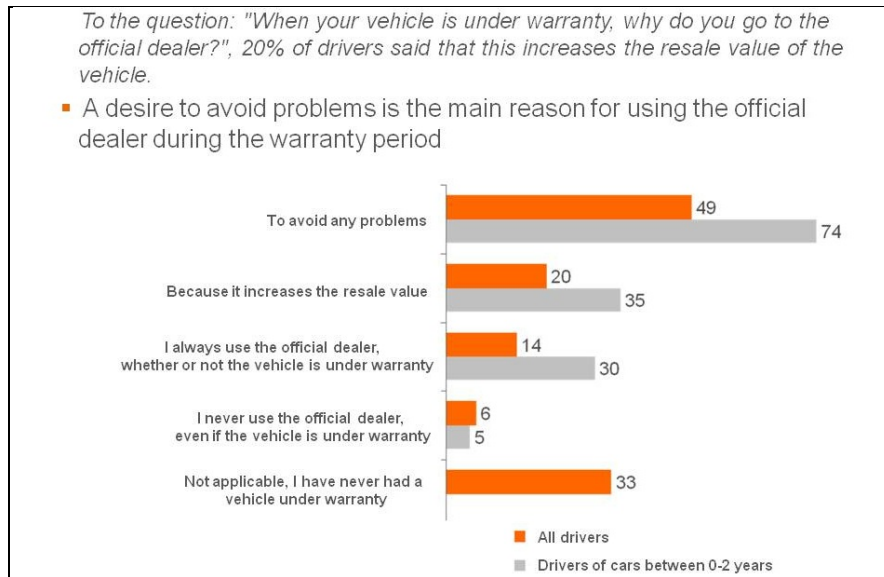
1. THE IMPORTANCE OF THE WARRANTY IN THE CONSUMERS' CHOICE BETWEEN AUTHORISED AND INDEPENDENT REPAIRERS

418. Section 1 of this Opinion demonstrates that the vehicle manufacturers' authorised networks hold very high market shares in the first few years of a vehicle's life, which also correspond to the term of the manufacturer's warranty. However, in a survey of drivers conducted by GIPA, when asked "*When your vehicle is under warranty, why do you go to the official dealer?*", 74%³⁹⁵ of drivers of vehicles aged under two years answered "*To avoid any problems*" (See Graph 13 below). Almost 60%³⁹⁶ of drivers of vehicles aged under two years believe that the warranty will be voided if they take their vehicle to a garage that is not part of the vehicle manufacturer's network for servicing. Accordingly, the main reason for using authorised networks during the warranty period, which corresponds on average to the first two years of a vehicle's life but may be longer, would seem to be the fear that the warranty will be voided if it does not use an authorised repairer for vehicle repair and maintenance works.

³⁹⁵ GIPA 2011 Drivers' Survey, section 5.15.

³⁹⁶ GIPA 2012 Drivers' Survey, section 5.13.

Graph 13 – Main reasons for using the vehicle manufacturer's network during the warranty period



Source: GIPA 2011 Drivers' Survey, page 352

419. In addition, in the GIPA Repairers' Survey, when asked "What do you do when a vehicle under warranty comes to you for servicing instead of going to the brand network?", 30%³⁹⁷ of independent repairers (standalone or franchised) said that they send the vehicle to the authorised network, while 70% accept it. These figures suggest that 30% of IR prefer to lose a customer rather than to service a vehicle under warranty.
420. Thus, there is clearly still a very strong link between maintaining the benefit of the warranty and the consumers' decision to use the vehicle manufacturer's authorised network to carry out repair and maintenance works that are not covered by the warranty.

2. REASONS FOR THE LINK BETWEEN THE WARRANTY CONTRACT OR WARRANTY EXTENSION AND THE CONSUMERS' CHOICE OF AUTHORISED OR UNAUTHORISED REPAIRERS

421. Several obstacles may explain why most consumers prefer to use authorised networks when their vehicle is under warranty.
422. Firstly, a warranty is usually valid only on condition the problem resulting in the claim under the warranty is not causally linked to work not covered by the warranty that was carried out outside of the authorised network³⁹⁸. However, independent repairers suffer

³⁹⁷ GIPA 2011 Repairers' Survey, section 4.3.

³⁹⁸ The European Commission has also pointed out in its Guidelines on the application of Regulation 461/2010: "however, if a supplier legitimately refuses to honour a warranty claim on the grounds that the situation leading to the claim in question is causally linked to a failure on the part of the repairer to carry out a particular repair or maintenance operation in the correct manner, or to the use of poor quality spare

from this situation on several counts: firstly, they are not systematically informed of vehicle manufacturer's recall campaigns asking authorised repairers to carry out electronic updates or other types of work³⁹⁹ and, secondly, they do not always possess updated technical information because of the obstacles impeding access to technical information identified in part IV. Such obstacles might explain why, as they are uncertain of their position and cannot control the work actually carried out on a vehicle, 74% of drivers prefer to use the authorised network during the warranty period "*to avoid any problems*", and why approximately 30% of IR prefer to send vehicles that are under warranty to the authorised network for work that is not covered by the warranty rather than doing it themselves. As they do not have access to comprehensive, up-to-date technical information, they may in some cases⁴⁰⁰ prefer to lose a customer rather than risking legal problems or compromising their reputation. Lastly, one insurer questioned also said that it advised policyholders under warranty to use the authorised network for bodywork, because of the upgrades they can carry out.

423. Secondly, consumers may also encounter contractual obstacles. The public consultation document referred to clauses identified by the DGCCRF that limit a consumer's ability to use the services of an independent repairer during the warranty period or warranty extension period⁴⁰¹. Such restrictions may explicitly link the benefit of the warranty or the warranty extension to the use of the vehicle manufacturer's authorised network to carry out the maintenance and servicing work for which the user is responsible, and to the use of the vehicle manufacturer's original parts during the warranty period. Such obligations may also be implicit, in which case the warranty may be voided without any obligation to establish a

parts, this will have no bearing on the compatibility of the supplier's repair agreements with the competition rules".

³⁹⁹ See, in particular, an article published in the *Argus de l'automobile* on 20 April 2010, entitled "Entretien automobile: faut-il sortir des réseaux conducteurs" [Maintenance work: should we look beyond the authorised networks?], "*Customers do not know that when a car goes into a garage various technical improvements and upgrades are carried out of which they are unaware. Contrary to what the vehicle manufacturers say, such upgrades do not only concern comfort-enhancing features, they may also concern crucial components such as the EGR valves, the braking system, the steering system, etc. What happens after the warranty period if this work has not been carried out? Particularly given that such so-called silent campaigns have become extremely common, but are limited in time to the term the warranty*". Accordingly, one vehicle manufacturer only decided to provide independent repairers with recall information from March 2012, after having "*adjusted its interpretation of the regulations*", despite the fact that the Euro5 Regulation came into effect in January 2009.

⁴⁰⁰ An independent repairer's refusal to work on a car may also be due to a lack of investment on its part, either in training or in multi-make solutions.

⁴⁰¹ The Autorité de la concurrence also identified approximately 30 complaints made by consumers to newspapers, independent operators and consumer associations in 2010 and 2011 concerning a vehicle manufacturer's refusal to implement a warranty on the grounds that repair or maintenance works had previously been carried out by independent repairers. In their contribution, the vehicle manufacturers stated that the number of such complaints is "microscopic" given the total number of vehicle owners, and is indicative of a healthy market. However, this was not an exhaustive survey of complaints and was provided for illustrative purposes only. The continued existence of restrictions limiting the consumers' capacity to benefit from free competition during the warranty period is also suggested in the article published in the *Argus de l'automobile* on 20 April 2010, entitled "Entretien automobile: faut-il sortir des réseaux conducteurs" [Maintenance work: should we look beyond the authorised networks?], which reports a large number of warranty-related complaints received from readers.

clear causal link between the identified problem and work carried out by an independent repairer, or the consumer may be required to provide proof that the problem is not causally linked to repair or maintenance works performed outside of the authorised network⁴⁰².

424. Moreover, the Autorité has also analysed the warranty and warranty extension contracts of six vehicle manufacturers that were still in effect in 2012. Table 9 below summarises the various clauses that are likely to limit validity of the warranty or warranty extension, as observed by the DGCCRF and/or the Autorité de la concurrence, and the types of contract in which they were found:

Table 9 – Summary of the contractual clauses likely to explicitly or implicitly link the validity of the warranty to the use of an authorised network to carry out work not covered by the warranty or to the use of OEM parts

Type of restriction		Vehicle manufacturer warranty ⁴⁰³	Corrosion warranty ⁴⁰⁴	Warranty extension
	Average term	2 years	8-12 years	4 years
Explicit	Warranty is valid, provided work not covered by the warranty is carried out within the authorised network	2011 (one contract)	2011 (one contract)	2011 (one contract)
	Warranty is valid, provided manufacturer-branded parts or parts recommended by the vehicle manufacturer are used			2011 (one contract)
Implicit	Recommendation that work not covered by the warranty is carried out within the authorised network			2012 (three contracts)
	Consumer must produce proof that the problem is not causally linked to work not covered by the warranty carried out outside the authorised network	2011 and 2012 (two contracts)		2011 and 2012 (two contracts)
	Ambiguous wording might discourage use of independent repairers or use of non-OEM spare parts ⁴⁰⁵	2011 and 2012 (two contracts)		2011 (two contracts)

⁴⁰² This reversal of the burden of proof is contrary to Article R. 132-1 of the Consumer Code. When examined in light of competition law, it could have the effect of encouraging consumers to use an authorised repairer to carry out repairs or maintenance work not covered by the warranty, which would weaken competition between authorised repairers and independent repairers.

⁴⁰³ This may have other names, such as "contractual warranty".

⁴⁰⁴ Also known as an "anti-perforation warranty" or a "corrosion perforation warranty".

⁴⁰⁵ For example, some contracts provide that "*the warranty will not be valid [...] if the problem is associated with [...] repairs [...] outside the authorised network*" or that it does not cover "*the consequences of repairs [...] by unauthorised companies*" (emphasis added). Accordingly, these clauses do not clearly establish the need for a direct causal link (using wording such as "*caused by*", for example) between the problem resulting in the warranty claim and the repair or maintenance works carried out outside the authorised network, which leaves a wide margin for interpretation.

Sources : 2011 and 2012 contracts of six vehicle manufacturers questioned by the Autorité de la concurrence (eight brands) – DGCCRF investigation report, 2011.

425. It can therefore be seen that of the six statutory warranty contracts in effect as at June 2012 analysed by the Autorité de la concurrence, one contract still requires the customer to produce proof of the absence of any causal link between the problem and the use of independent repairers for work not covered by the warranty; two of the contracts also contain clauses that do not refer to a clear link between the problem and the use of an independent repairer for work not covered by the warranty. Likewise, of the six warranty extensions analysed, one contract still places the burden of proof on the consumer, and three warranty extension contracts recommend that consumers use the network of authorised repairers for work not covered by the warranty.

B. DISCUSSION

426. The Autorité de la concurrence does not have authority within the framework of an opinion to characterise individual conduct in a market in view of Articles 101 and 102 of the TFEU and Articles L420-1 and L420-2 of the Commercial Code. Any such assessment and judgement is only possible following a procedure involving the hearing of all the parties organised pursuant to Article L463-1 of the Commercial Code.

427. It is accepted and justifiable that vehicle manufacturers and their networks exclude from the scope of their warranty problems caused by repair or maintenance works incorrectly carried out by an independent repairer⁴⁰⁶. It would be wrong to require vehicle manufacturers to cover under a warranty parts or works for which they are not responsible, as they were not carried out in their authorised network. However, clauses containing a general exclusion applying to all works not covered by the warranty that is carried out outside the authorised network could weaken the consumers' ability to freely choose between authorised and independent repairers. If the problem was not caused by works carried out outside of the authorised network, there would be no reason to withdraw the benefit of the warranty.

428. In their contribution to the public consultation, the vehicle manufacturers regretted the fact that the Autorité has put forward a problem which they believe was resolved by the modification in 2011 of the clauses judged to be problematic. However, the Autorité de la concurrence feels it is important to note the time lapse between the date of entry into force of Regulation 1400/2002 (September 2003) and the date on which the DGCCRF brought an end to the use of such problematic clauses (2011 or later), although the Explanatory Brochure on the Regulation stated back in 2002 that "*a general obligation to have the car maintained or repaired only within the authorised network during such a period would*

⁴⁰⁶ This is also true for parts sold outside the vehicle manufacturer's authorised network when the problem is caused by such parts, or by fuel or additives that do not comply with the vehicle manufacturer's recommendations, provided such recommendations are justified, do not result in the exclusion of third party operators for no reason, and the independent operators have been informed of them in accordance with the Euro5 and Euro6 Regulations.

*deprive consumers of their right to choose to have their vehicle maintained or repaired by an independent repairer and it would, especially in the case of "extended warranties", prevent such repairers from competing effectively with the authorised network"*⁴⁰⁷. This means that from this date onwards the vehicle manufacturers and their authorised repairers have not been entitled to explicitly link validity of the warranty to the fact that repair and maintenance works are carried out in their authorised network.

429. Moreover, with regard to the clauses identified by the Autorité in the warranty contracts and warranty extensions in effect as at June 2012, the Guidelines on the application of the new Regulation 461/2010 once again pointed out the importance of the wording in warranty contracts and warranty extensions, and stated⁴⁰⁸: "*Qualitative selective distribution agreements may also be caught by Article 101(1) of the Treaty if the supplier and the members of its authorised network explicitly or implicitly reserve repairs on certain categories of motor vehicles to the members of the authorised network. This might happen, for instance, if the manufacturer's warranty vis-à-vis the buyer, whether legal or extended, is made conditional on the end user having repair and maintenance work that is not covered by warranty carried out only within the authorised repair networks. The same applies to warranty conditions which require the use of the manufacturer's brand of spare parts in respect of replacements not covered by the warranty terms. It also seems doubtful that selective distribution agreements containing such practices could bring benefits to consumers in such a way as to allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty*" (emphasis added).
430. Although the contracts in effect in 2012 that were analysed do not contain any clauses explicitly linking validity of the warranty to the fact that maintenance and/or repair works on the vehicle are carried out in the vehicle manufacturer's authorised network and/or to the use of OEM parts, other clauses might implicitly restrict the consumer's choice during the warranty period, particularly in a context in which the consumer is already reluctant to use the services of independent repairers during the warranty period. For example, depending on the exact wording and where it is included in the contract, a recommendation by the vehicle manufacturer to carry out maintenance and repair works not covered by the warranty within the authorised network could cause the consumer to believe that the warranty will be voided if he uses the services of an independent repairer during the warranty period⁴⁰⁹. The same result could be achieved by a clause that places the burden of

⁴⁰⁷ Question 37 of the Explanatory Brochure on the application of Regulation 1400/2002.

Note that the national legislation has also addressed this risk under consumer law and, more specifically, through recommendation 79-01 of 24 February 1979 on unfair clauses included in warranty contracts, providing that clauses are invalid when they "*compel the consumer to have the faulty item repaired by the manufacturer or an authorised repairer on penalty of voiding the warranty, when such a clause is not justified for reasons relating to consumer safety or the technical complexity of the item, or when the repairer's network is not accessible under normal conditions*".

⁴⁰⁸ Recital 69 of the Guidelines on the application of Regulation 461/2010.

⁴⁰⁹ The Commission has stated: "*Irrespective of where the restriction is stipulated, it is likely to lead consumers to believe that the warranty will be invalidated if servicing work is carried out in independent garages or if alternative brands of spare parts are used. This, in turn, is likely to foreclose such operators or close alternative channels for spare parts' distribution*" (emphasis added – see answer to question 1 in the

proof that the problem resulting in the warranty claim was not caused by repairs carried out by an independent repairer upon the consumer and not on the authorised network⁴¹⁰, or a clause that is vague as to the conditions under which the vehicle owner may be denied the benefit of the warranty.

431. Lastly, vehicle manufacturers have expressed the opinion in their contributions that the concept of "*extended warranties*" as used in the aforementioned Guidelines does not cover "*warranty extensions*". They claim that warranty extensions should be differentiated from the statutory warranty: whereas "*extended warranties*" are general in scope, free of charge and associated with the sale of the new vehicle, "*warranty extensions*" are optional, give rise to payment, may be entered into after the purchase of a vehicle, and only concern a minority of vehicles. In addition, they claim that there is competition for this type of service, namely from guarantors⁴¹¹ and insurers⁴¹². Lastly, the vehicle manufacturers argue that warranty extensions that link the benefit of the warranty to use of the authorised network and/or use of OEM parts for work not covered by the warranty (so-called "closed" warranty extensions) enable the manufacturers to offer consumers lower prices than those charged for so-called "open" warranty extensions, which do not impose this condition.
432. However, the European Commission does not specify whether the expression "*extended warranties*" as used in paragraph 69 of its Guidelines only covers warranties that are "*general in scope, free of charge and associated with the sale of the new vehicle*". The "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012 and published by the European Commission clearly provide that the Guidelines do not restrict the concept of "*extended warranties*" to warranties that are general in scope, free of charge and linked to the sale of the vehicle⁴¹³. On the contrary, these terms cover in particular the "*extended warranty issued by the authorised network at the moment of the sale of the vehicle (or shortly thereafter)*"⁴¹⁴. However, most of the warranty extensions proposed by the vehicle manufacturers and their networks are issued at the time of purchase of the vehicle or shortly thereafter. The risk of pre-emption of the

document "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" dated 27 August 2012).

⁴¹⁰ Such clauses should be analysed in light of Article R. 132-1-12 of the Consumer Code, which provides that clauses are prohibited when "*their object or effect is [...] to place the burden of proof on the non-professional or consumer when the applicable laws dictate that it should normally be placed on the other contracting party*". Such clauses may be found in warranty contracts or extended warranty contracts.

⁴¹¹ Companies offering guarantees and related products.

⁴¹² The vehicle manufacturers have mentioned Icare, Mapfre Warranty, Opteven, insurance companies such as Groupama, Cardif assurance and CGI assurances, and independent operators such as Groupe Guilleminet and Groupe Pigeon.

⁴¹³ See answers to questions 2 and 3 in the document "*Frequently asked questions on the application of EU antitrust rules in the motor vehicle sector*" published by the European Commission on 27 August 2012.

⁴¹⁴ To the question "*Does the assessment of servicing or parts restrictions differ if they are set out in an extended warranty issued by the authorised network at the sale of the vehicle or shortly after?*" the Commission answered "*No. The fact that the servicing or parts restrictions are not set out in the vehicle supplier's warranty, but are instead found in an extended warranty issued by the authorised network at the moment of the sale of the vehicle (or shortly thereafter) will not generally alter the assessment of the said restrictions*" (emphasis added – see question 2 in the aforementioned FAQ).

repair and maintenance sector is all the more harmful because the fidelity-enhancing effect of the contract applies for an average period of four years and it concerns 20% of vehicle registrations on average, although this figure is on the increase.

433. In any event, consumers' reluctance to use the services of an independent repairer during the warranty period or warranty extension period is considerable, as has been established by a number of different studies and surveys (see §418 to 420), and it is therefore all the more essential that the clauses contained in all the documents proposed to consumers by vehicle manufacturers or members of their authorised networks are totally clear and explicit as to the consumer's right to use the services of an independent repairer without losing the benefit of the warranty. On this topic, some operators proposed in their responses to the public consultation document that warranty contracts and warranty extensions should contain a clear statement to this effect⁴¹⁵.

VI. Use of recommended sale prices by all operators in the motor vehicle aftermarket

434. The spare parts distribution sector, encompassing both the independent channel and the manufacturer channel, communicates recommended retail sale prices or maximum retail sale prices in various ways and at every level (A). Although such a practice has certain benefits, given the large number of part references and the repairers' potential market power, it may in some circumstances weaken the intensity of competition between operators (B).

A. COMMUNICATION OF RECOMMENDED RETAIL SALE PRICES

435. For each spare part sold in its network each vehicle manufacturer issues a recommended retail sale price, which is used as a reference price by dealers and secondary repairers (1). This recommended sale price system is also used in the independent channel (2).

1. TRANSMISSION OF RECOMMENDED RETAIL SALE PRICES IN THE MANUFACTURER CHANNEL

⁴¹⁵ More specifically, these operators proposed that warranty contracts expressly provide that the warranty cannot be voided if work is carried out by an independent repairer during the warranty period, unless the vehicle manufacturer can prove that the work was carried out incorrectly and was the cause of the subsequent problem. Such a requirement could be imposed for warranty contracts in the same way as the obligation contained in Article R211-4 of the Consumer Code relating to warranties covering latent defects, which requires professionals to state "clearly that the statutory warranty requiring a professional seller to hold the buyer harmless against all consequences of latent defects in the object sold or the service provided will apply in any event" (emphasis added).

436. Most of the vehicle manufacturers communicate recommended maximum retail prices⁴¹⁶ (known as "*manufacturer prices*") to their authorised distributors⁴¹⁷. These manufacturer prices are then circulated to all secondary authorised repairers in the manufacturer's network.
437. These prices form the basis for the prices charged by the vehicle manufacturer and subsequently by the authorised repairer. Accordingly, the vehicle manufacturer bills authorised distributors for the recommended maximum retail price and then applies a discount. These distributors then sell the parts to the repairers (both authorised and independent) and usually use the same recommended retail sale price as the basis for their prices, again applying specific discounts. In such cases, and in particular when the vehicle manufacturer has communicated maximum prices, the difference between the discount offered upstream by the vehicle manufacturer and the discount offered downstream to repairers will determine the authorised distributor's mark-up. The discount obtained by the repairer, as the end user, will determine its maximum mark-up on the parts it then sells to the consumer.
438. The manufacturer price is also used for collision repairs and, more specifically, when calculating the cost of the claim using specific automotive repair estimation software. Once the necessary parts have been identified the automotive repair estimation software can calculate the total cost of the spare parts that will be paid by the insurer (or the consumer, when applicable). The software does this on the basis of the manufacturer prices for the spare parts. However, insurers may negotiate annual global discounts based on turnover generated with each repairer (see Box 1), which can be considered equivalent to quantitative discounts on work obtained through the insurer.
439. The manufacturer's recommended maximum retail price is therefore used at every stage in the manufacturer channel, in the order management tools used by authorised operators (DMS⁴¹⁸), the bills for spare parts sold and also in specific software applications such as automotive repair estimation software. Furthermore, a number of equipment suppliers obtain the manufacturer prices and use them to determine their own prices (see §451). The "*manufacturer prices*" are therefore used as a reference point for all authorised distributors and their customers, insurers, authorised and independent repairers and the end consumers.

2. TRANSMISSION OF RECOMMENDED RETAIL SALE PRICES IN THE INDEPENDENT CHANNEL

440. The use of recommended retail sale prices in the independent channel began in the middle of the 1990s. Previously, independent distributors based their prices on a "net wholesale price": they purchased items from their suppliers, i.e., the equipment suppliers, on the basis of a net wholesale price, which they then used to calculate their downstream prices. Nowadays⁴¹⁹, most equipment suppliers provide their distributors with a recommended

⁴¹⁶ Of these six vehicle manufacturers studied, five communicate recommended maximum retail prices, while the sixth communicates recommended retail prices.

⁴¹⁷ The vehicle manufacturers stated in their replies to the public consultation that the members of their authorised networks are completely free to set their own prices and, in particular, to charge lower prices.

sale price, referred to hereinafter as the "equipment supplier price". This means each equipment supplier communicates one single price to all independent distributors.

441. The retail prices charged by independent repairers are therefore recommended by the equipment suppliers upstream, in the same way as in the "manufacturer price" system, in a context where equipment suppliers only sell to end consumers on an exceptional basis. However, although on the whole vehicle manufacturers communicate maximum prices, equipment suppliers only issue recommended retail prices. As with the manufacturer prices, the "equipment supplier prices" are therefore used as a basis for billing and for the electronic catalogues used by all operators in the independent channel.
442. Moreover, independent distributors and equipment suppliers have put in place structures to disseminate prices through platforms such as GOLDA⁴²⁰ in France or TECDOC⁴²¹ in Germany. These structures usually bring together equipment suppliers and independent distributors or their representatives, with the aim of optimising exchanges of information within the independent distribution sector. More specifically, they centralise all the "equipment supplier prices" of the listed equipment suppliers in order to subsequently disseminate them to independent distributors, either manually or using an automated CDE system⁴²². These platforms allow equipment suppliers and their distributors to synchronise their part files and therefore update the sale prices recommended by the equipment suppliers in the electronic catalogues used by the independent distributors. Independent distributors (who compete against each other) and independent repairers can obtain automatic access to the equipment suppliers' recommended prices by interfacing their tools with the platform. Moreover, it seems that some of the equipment suppliers can use the platform to obtain access to their competitors' recommended prices, either because access is unrestricted, or because it has been expressly authorised by the equipment supplier in question⁴²³.

B. PROS AND CONS OF RECOMMENDED RETAIL PRICES

443. The communication of recommended retail sale prices may have an efficiency-enhancing effect (1). However, in some cases it may have harmful effects on the operation of competition in the sector (2).

⁴¹⁸ Dealer Management System.

⁴¹⁹ Some equipment suppliers have only very recently adopted the recommended retail price system (in 2011 or 2012).

⁴²⁰ GOLDA: *Groupement pour l'optimisation des liaisons dans la distribution automobile (Grouping for the optimisation of network links in the automotive distribution)*.

⁴²¹ TECDOC Informations System GmbH.

⁴²² Computerised Data Exchange, consisting of systems that aim to improve the reliability and fluidity of information processing and exchange, particularly for ordering and billing processes.

⁴²³ Of the 129 price lists available in GOLDA, only 60 are protected – access to the others is completely unrestricted.

1. PROS: RECOMMENDED SALE PRICES AVOID DOUBLE MARGINALISATION AND FACILITATE THE PRICING POSITION OF REPAIRERS

444. From the vehicle manufacturers' viewpoint, the purpose of imposing maximum prices is to avoid an accumulation of mark-ups at every stage of the process that would result in an excessively high retail price, which would harm the vehicle manufacturer's brand image and have an adverse effect on the sale of motor vehicles. While confirming this reason certain vehicle manufacturers or their representatives also stated in their responses to the public consultation that the communication of maximum sale prices gave consumers a guarantee that the prices charged were competitive, and that the maximum sale prices could also be used as the basis of a price-focused communication policy.
445. The same line of thinking can be found in the independent channel, although the prices communicated by independent distributors are recommended prices only and not recommended maximum prices. The equipment suppliers' aim seems to be to recommend retail prices that are lower than or the same as the vehicle manufacturers' prices. Accordingly, some contracts to supply electronic catalogues to independent distributors provide for a warning mechanism when the equipment supplier's recommended retail price is higher than the vehicle manufacturer's price for a given part. However, in their responses to the public consultation the equipment suppliers also argued that any ban on communicating recommended sale prices would destabilise the market, as the equipment suppliers are the best placed to judge both demand for their products and the state of competition. The equipment suppliers have also stated that although a recommended price system does pose some competition concerns, only a case-by-case analysis would differentiate the pricing information that protects consumers from information intended to ossify the market.

446. The operators have stressed that it is difficult for authorised or independent repairers to calculate optimal sale prices because of the large number of part references and the other factors that need to be taken into consideration in order to identify an optimal price. It is also claimed that the communication of recommended prices by the various equipment suppliers in pooled databases used by distributors is justified, given the large number of part references and the complexity of the market, and moreover, results in gains in competitiveness by minimising the time and resources needed to ascertain appropriate prices.

2. RISKS ASSOCIATED WITH RECOMMENDED SALE PRICES

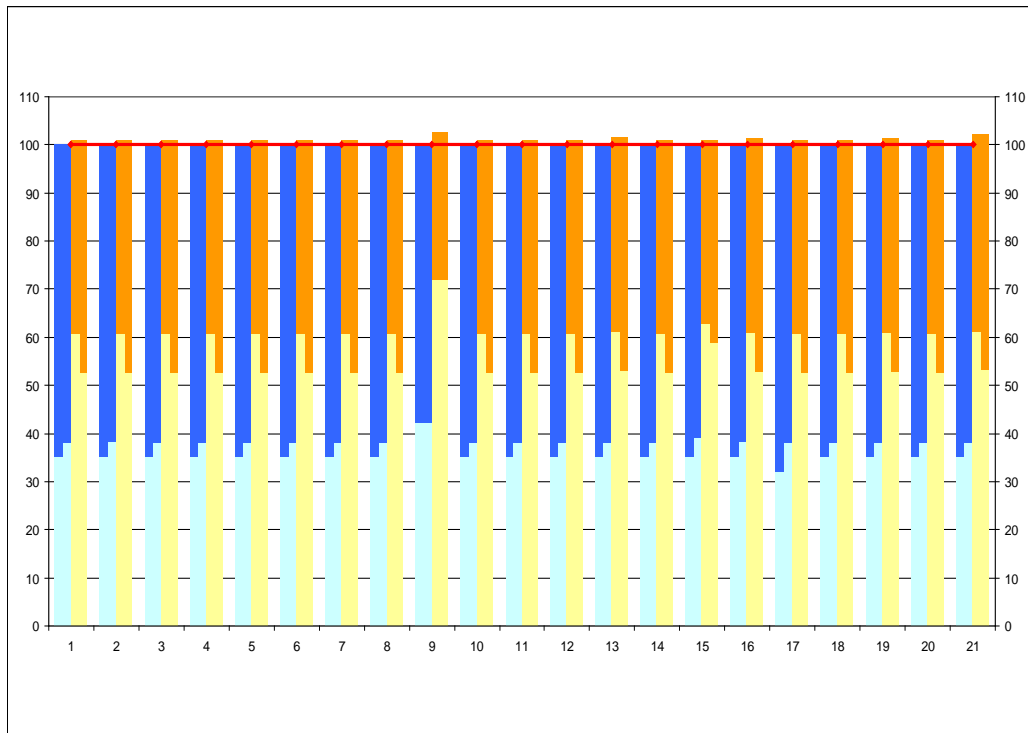
447. Within the independent channel the communication of recommended sale prices may encourage price uniformity, with one equipment supplier communicating identical recommended retail prices to all the competing independent distributors, who then pass them on to the independent repairers, who in turn have very little reason to deviate from them. Ultimately, although the independent channel consists of different and competing operators (distributors, repairers), price competition may be limited because of the existence of a focal point corresponding to the retail price recommended by the equipment supplier (1). This risk could be exacerbated if the equipment suppliers set their recommended sale prices on the basis of recommended sale prices determined by the vehicle manufacturers for the sale of their parts by authorised repairers (2).

a) Greater price uniformity within the independent networks

448. The following graph shows, for 21 parts sold by the same equipment supplier, the prices it charges to two wholesalers (in light blue: one of the two wholesalers benefits from more advantageous conditions), the prices for which two repairers can purchase the same parts from their respective main wholesaler (in yellow: one of the repairers benefits from more advantageous conditions) and, lastly, the retail prices paid by consumers (in dark blue: purchases from the wholesalers for DIY operations, in orange: purchases from the repairer). The equipment supplier's recommended sale price is shown by the horizontal red line, standardised at 100.

449. Despite the different purchase prices at every stage in the process (wholesalers, repairers), the retail sale prices effectively charged for the 21 parts are identical or very slightly higher than the "equipment supplier price" irrespective of whether the consumer buys from wholesalers or repairers.

Graph 14 – Purchase price, sale price and recommended sale price for 21 parts supplied by the same equipment supplier (100 = recommended sale price)



Source: DGCCRF survey, 2010

Key: light blue = purchase price from wholesalers; yellow = purchase price from repairers; dark blue and orange = retail price paid by consumer for parts purchased from wholesalers and repairers, respectively; red = equipment supplier's recommended sale price.

450. Likewise, an analysis of the sale prices recommended within their respective networks by distributor "1" (for 778 spare parts) and by distributor "2" (for 570 spare parts) shows that for 90% of observations the recommended retail price charged by the distributors is identical to or higher than the recommended retail price initially set by the equipment supplier, and is identical in 87% of the observations. In other words, the equipment suppliers' recommended retail prices are effectively passed on down the channel, despite the strong likelihood that the equipment suppliers charge distributors different prices and that distributors charge their respective customers different prices. This may result in a certain degree of uniformity of retail prices charged by distributors and by repairers despite the heterogeneous cost structures and customer bases, which will not have any impact on the recommended price. Lastly, repairers have little incentive to charge prices that are below the equipment suppliers' recommended prices, which tend to be passed on by distributors, because of the quantity and diversity of part references it can sell, and also because of its lack of knowledge of the price elasticity of demand.

Table 10 – Prices recommended by the equipment supplier (“equipment supplier price”) and prices recommended by distributors in the independent channel

	Distributor 1	Distributor 2	TOTAL
Distributor's recommended prices are higher than the "equipment supplier price"	73	11	84
Distributor's recommended prices are identical to the "equipment supplier price"	652	522	1174
Distributor's recommended prices are lower than the "equipment supplier price"	53	37	90
Total	778	570	1348
Percentage of distributor's recommended prices that are lower than the "equipment supplier price"	6.81 %	6.49 %	6.68 %

Source: Autorité de la concurrence, based on information received from independent distributors in August 2011

451. The findings of surveys supplied by the DGCCRF contain several statements by repairers confirming that independent repairers follow these recommended prices⁴²⁴.
452. In its contribution to the public consultation, the FEDA challenged the findings of the Autorité de la concurrence, claiming that there is genuine price competition between competing repairers and producing two comparative studies in support of its claim. However, one of these studies compares prices charged by different equipment suppliers, which means that the quality of the parts may differ (see results in Graph 15 below). The second study only covers brake pads, which are loss leaders, and the number of comparisons of sale prices for a given part sold by an equipment supplier is limited; moreover, the information is presented in such a way as to suggest that the part references

⁴²⁴ One IR has stated, "We use the [independent distributor] website for supplies and inform our customers of the catalogue prices for original parts. These prices are the same as the vehicle manufacturers's prices and the prices at which the customers themselves could obtain the parts. This website gives us our purchase price, the retail sale price and our mark-up". Similarly, a second IR stated, "each of these suppliers [independent distributors] communicate the equipment suppliers' catalogue prices and apply them. [...] We charge the sale prices recommended by our suppliers. We do not offer any discount to private customers." The manager of a fast-fit centre stated with regard to parts obtained from suppliers outside the scope of the franchise's central purchasing platform that "We generally charge the price stated on the delivery slip. If the part reference is not listed in our database [...] we apply the price stated on the delivery slip, i.e., the price before any discount. I have personally never charged any price that is different to the amount stated on the delivery slip". Lastly, one independent national purchasing agency provides its regional distributors with the following information: "when using [the order website] some repairers are surprised that for certain items the sale price (for the end customer/car owner) is not always indicated in the results table. [...] In most cases: retail sale price (equipment supplier price + discount + net price). In such cases, the retail price for the car owner is the same as the equipment supplier's price."

of certain equipment suppliers are identical, although they are, in actual fact, different⁴²⁵. The relevance of these comparative studies is therefore limited.

b) The risk of price convergence between the manufacturer channel and the independent channel

453. Both the manufacturer channel and the independent channel use recommended sale prices communicated throughout the distribution process in order to establish their own prices: authorised and independent repairers purchase parts for a billed price that is identical to the recommended sale price, and then benefit from discounts. The fact that this retail price is passed on throughout the independent channel might reduce competitive uncertainties within the channel, as all repairers, irrespective of their cost structures and respective customer bases, may sell a given equipment supplier's parts at an identical price.
454. According to information received from both the equipment suppliers and the vehicle manufacturers⁴²⁶, the vehicle manufacturers inform the equipment suppliers of the recommended prices through the parts reference catalogues provided by certain service providers. For example, one major equipment supplier has stated: "*the reference point for calculating prices is the vehicle manufacturer price, and we match any price increases or reductions. We therefore prepare a general catalogue once a year and then adjust prices to reflect changes decided by the vehicle manufacturers. We have access to the vehicle manufacturers' prices through [database suppliers]*". This means there is a risk that the communication of the manufacturer prices to the equipment suppliers will lead to uniform retail prices throughout the market, including in both the independent channel and the manufacturer channel (all the equipment manufacturers advise the same retail price for a given part, which is, moreover, very similar to the manufacturer price). As the European Commission has pointed out in its Guidelines. "*The possible competition risk of maximum and recommended prices is firstly that the maximum or recommended price will work as a focal point for the resellers and might be followed by most or all of them. A second competition risk is that maximum or recommended prices may facilitate collusion between suppliers.*"⁴²⁷.
455. As stated previously, the alleged purpose of communicating manufacturer prices to independent networks is to enable the independent channel to offer prices below the manufacturer prices. Accordingly, an analysis of the prices recommended, firstly, by equipment suppliers to two competing independent distributors and, secondly, by vehicle manufacturers to their respective networks, shows that, on average, the prices

⁴²⁵ In addition, at least 30% of the products in the graphs were sold online, which suggests the findings have little relevance given the small role played by this channel on the spare parts distribution market (approximately 3.5%).

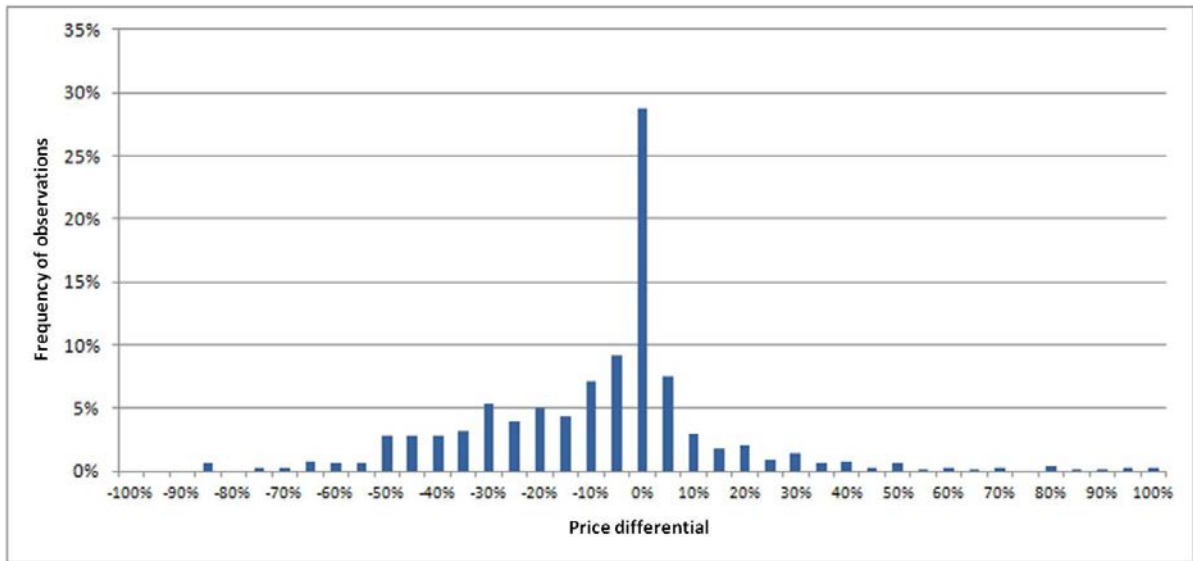
⁴²⁶ Several vehicle manufacturers and equipment suppliers commented on this. For example, one vehicle manufacturer stated that the retail price differential between matching quality parts produced by equipment suppliers for the independent channel and parts sold by the vehicle manufacturers are extremely small, essentially because the equipment suppliers "*systematically [follow] price changes introduced by vehicle manufacturers*".

⁴²⁷ Paragraph 227 of the Guidelines on Regulation 330/2010.

recommended by the independent channel are lower than those recommended by the manufacturer channel. Conversely, the sale price recommended by the equipment supplier is higher than the manufacturer price in only 15% of cases.

456. However, although prices recommended by the equipment suppliers tend to be lower than the manufacturer price, most of the part prices are close to the manufacturer prices, as can be seen in the following graph (1,299 observations⁴²⁸).

Graph 15 – Variances between prices recommended by equipment suppliers and prices recommended by vehicle manufacturers (as a percentage of the manufacturer prices, regardless of distributor)



Source: Autorité de la concurrence, on the basis of data received from independent distributors

Key: for 29% of observations in the sample the price recommended by the equipment supplier falls within a range of [-5%; 0%] below the manufacturer price.

457. In 36% of the observations, the price recommended by the equipment supplier falls between 95% and 105% of the price recommended by the manufacturer. Furthermore, when interpreting the differences between recommended prices in the manufacturer and independent channels, it should be borne in mind that the distributors have only indicated the lowest price for each part in the database; it is possible that such lower prices correspond to lower quality parts than that on which the price recommended by the equipment supplier is based.
458. Requests for additional information sent out after publication of the public consultation document have allowed the Autorité to create a larger database containing prices recommended by seven equipment suppliers and manufacturers for 28,705 spare part references and price changes over 2010 and 2011. An analysis of the data again shows that, on average, the prices recommended by equipment suppliers are below those recommended by manufacturers (see Table 11 below).

⁴²⁸ 1,357 observations at the outset, but 58 outliers were removed.

Table 11 – Proportion of parts for which the price recommended by the equipment supplier is lower than or equal to the price recommended by the manufacturer

Equipment supplier	1	2	3	4	5	6	7	Global
Weighted according to turnover	63.3 %	88.0 %	54.4 %	85.5 %	89.7 %	67.5 %	84.9 %	68.6 %
Not weighted	59.9 %	77.9 %	69.6 %	87.4 %	83.5 %	66.9 %	84.5 %	74.9 %

Source: Autorité de la concurrence, on the basis of data received from seven equipment suppliers

459. An analysis of this database also shows that the equipment suppliers' pricing behaviour is extremely variable. As illustrated in the table below, two of the seven equipment suppliers (suppliers 4 and 7) seem to align their prices with the retail prices recommended by the manufacturer, with between 65% and 80% of the prices recommended by the equipment suppliers falling within the range of 95% to 105% of the manufacturer price, with price alignment being most common for the parts in highest demand. Other equipment suppliers seem to follow manufacturer prices to a lesser extent, in particular for parts in highest demand.

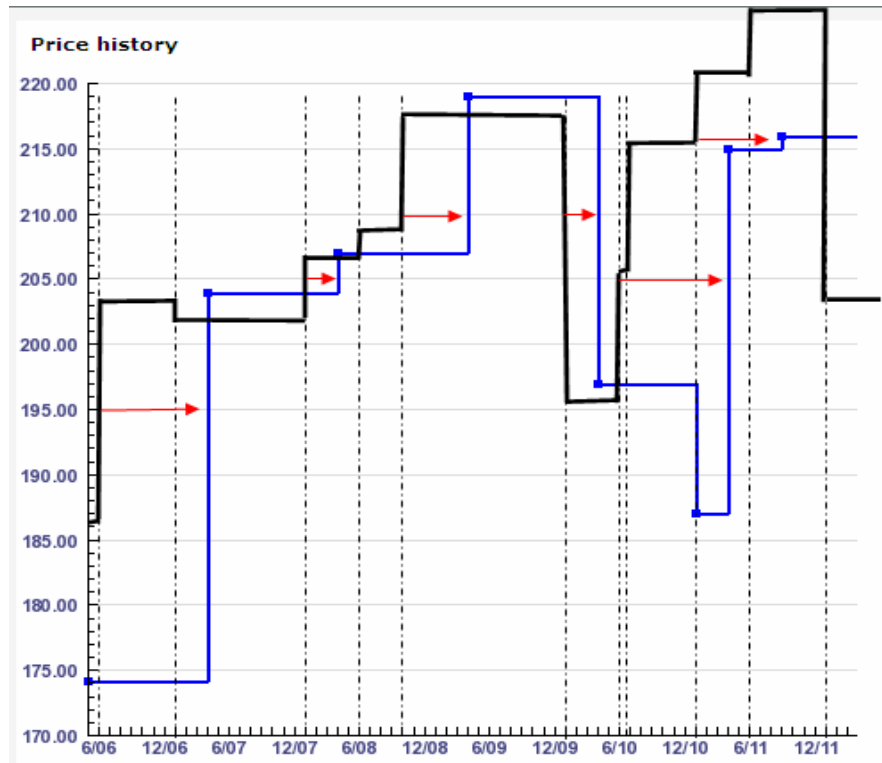
Table 12 – Proportion of parts in the sample with a recommended retail price that falls between 95% and 105% of the manufacturer's recommended sale price, per equipment supplier

Equipment supplier	1	2	3	4	5	6	7
Weighted according to turnover	43 %	7 %	39 %	82 %	51 %	12 %	75 %
Not weighted	52 %	15 %	47 %	74 %	40 %	18 %	65 %

Source: Autorité de la concurrence, on the basis of data received from seven equipment suppliers

460. Lastly, the price differences measure a variance at a given moment in time. In dynamic terms, the following graph detailing the price history of manufacturer recommended prices and equipment supplier recommended prices for a specific part shows parallel price fluctuations in the manufacturer channel and the independent channel.

Graph 16 – Fluctuations in manufacturer- and equipment-supplier prices for a given part (June 2006-December 2011)



Source: Vehicle manufacturer information (confidential) – In black, the manufacturer price; in blue, the equipment supplier price

Key: in April 2007, the manufacturer's recommended sale price for the part was €202 and the equipment supplier's recommended sale price rose from €174 to €204.

461. The relative price variation indexes created for manufacturer recommended prices and equipment supplier recommended prices for the 28,705 spare part references⁴²⁹ in the database confirm the existence of parallel pricing for a large number of parts. More specifically, the ratio of variations in manufacturer-recommended prices / variations in equipment supplier-recommended prices over the entire period ranges from 0.95 and 1.05 for 55% to 60% of the parts, depending on the method used (weighted according to part sales or not). In other words, variations in recommended prices in the manufacturer channel and the independent channel do not exceed 5% for approximately 55% to 60% of the parts in the sample.

C. DISCUSSION

462. The Autorité de la concurrence has identified two types of practice: firstly, the communication of recommended retail prices or recommended maximum prices by

⁴²⁹ Database for 7 equipment suppliers, referred to in paragraph 458.

equipment suppliers and vehicle manufacturers to distributors and repairers and, secondly, the exchange of information between equipment suppliers and vehicle manufacturers relating to these recommended retail prices, which are also used by each equipment supplier or vehicle manufacturer to determine their prices.

1. . RECOMMENDED PRICES

463. The definition of recommended prices or maximum prices may have certain benefits in a market situation where several hundred thousand part references coexist and where, in addition, retailers can have a certain market power. However, this must not result in uniform retail sale prices or discourage price competition by reducing the uncertainties to which economic operators are exposed, whether within authorised networks, within independent networks or between these networks.
464. In the market under consideration, the information collected suggests that the prices recommended by equipment suppliers are closely followed by distributors – who communicate them to retailers – and by retailers when they sell parts within the framework of repairs. Parts produced by a given equipment supplier tend to be sold at an identical price in the retail market (i.e., an identical price to the equipment supplier's recommended price) irrespective of the network or the purchase price. Repairers seem to have very little incentive to propose prices below the recommended price because of the diversity of part references they offer and the consumers' limited ability to shop around. The same might be true within authorised networks, with each secondary repairer applying the retail price determined by the vehicle manufacturer and not by its direct supplier (level 1 authorised repairer), meaning that recommended prices would be identical throughout the manufacturer network.
465. Article 4 of the Block Exemption Regulation 330/2010 provides in connection with recommended and maximum prices: "*The [block] exemption ... 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 buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties [...]*". The information received by the Autorité for the purpose of this Opinion does not suggest that any pressure is exerted on the vehicle manufacturers, equipment suppliers or distribution networks to maintain the recommended prices.
466. However, recommended prices are only eligible for block exemption if the market share of each of the parties does not exceed the 30% threshold defined in this regulation (paragraph 226 of the Guidelines on the Block Exemption Regulation 330/2010). Below this threshold, exemption may also be withdrawn in the event of a cumulative effect caused by the simultaneous use of the recommended prices by several suppliers. As a general rule, the Guidelines provide with regard to the effect of such recommended maximum prices that an "*important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or recommended retail price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market*" (Paragraph 228).
467. The degree to which the recommended price system is used in the spare parts market, the degree to which recommended prices are applied at every stage in the distribution process, the relative transparency of these prices in the market and the fact that, in the independent channel, the recommended prices are not determined directly by the wholesalers selling the parts to their repairer customers, but indirectly by equipment suppliers selling to

independent repairers, should also be taken into consideration⁴³⁰. The same analysis could be made with regard to a manufacturer's authorised channel if the use of recommended prices has a negative impact by restricting intrabrand competition.

468. Any efficiency-enhancing effects that might result from the communication of recommended prices would also need to be taken into consideration. In their responses to the public consultation, the independent distributors and their suppliers expressed the opinion that the equipment suppliers should be able to continue to determine the optimal sale prices for their products. The reason given is that as they design the products upstream they are in the best position to assess the competitive position. In addition, the distributors do not have the financial and technical capacity to calculate such prices, and more specifically to carry out the necessary comparative tests and analyses on the hundreds of thousands of part references in their catalogues. Lastly, when maximum prices are effectively applied by the vehicle manufacturer, this may also prevent repairers from harming the manufacturers' brand image or adversely affecting the volumes of parts sold as a result of their market power.

2. HORIZONTAL EXCHANGES OF INFORMATION

469. Depending on the extent to which this practice is implemented, the communication of the vehicle manufacturers' recommended retail prices and those of competing equipment suppliers to certain equipment suppliers within computerised databases (implying communication to certain vehicle manufacturers also) could constitute an exchange of information the legality of which would need to be assessed within the framework of litigation proceedings, in light of the provisions of competition law and case law on the exchange of information, the characteristics of the exchange of information and the structure of the relevant markets⁴³¹.
470. Accordingly, as confirmed by decision-making practice, although exchanges of information can in some cases stimulate competition between operators, they also present "*a risk for effective competition in that the undertakings receiving the information may use it to set their prices instead of referring to their own production and distribution costs*"⁴³². Moreover, the homogeneity of prices charged by different operators would not need to be proven in order to establish that such exchanges are anticompetitive.
471. It should also be noted that the recommended prices that are exchanged are used by equipment suppliers, vehicle manufacturers and their respective distributors as the basis to set part prices. If the general terms of sale applied by the various operators were found to be relatively stable, the recommended prices would constitute an important element when

⁴³⁰ In most cases, a supplier recommends prices to its distributor, who sells directly to the end user. In this sector, equipment suppliers communicating recommended prices are situated much further upstream, and at least two additional distribution phases may exist between the equipment supplier and the end consumer, as compared to the traditional situation described in the previous sentence.

⁴³¹ See, in particular, CJEC, 28 May 1998, John Deere, C-7/95P.

⁴³² Opinion of 6 June 2003 on a motor vehicle repair cost index (03-A-09, §22). See also the examination of exchanges of information included in the 2009 Annual Report of the Autorité de la concurrence.

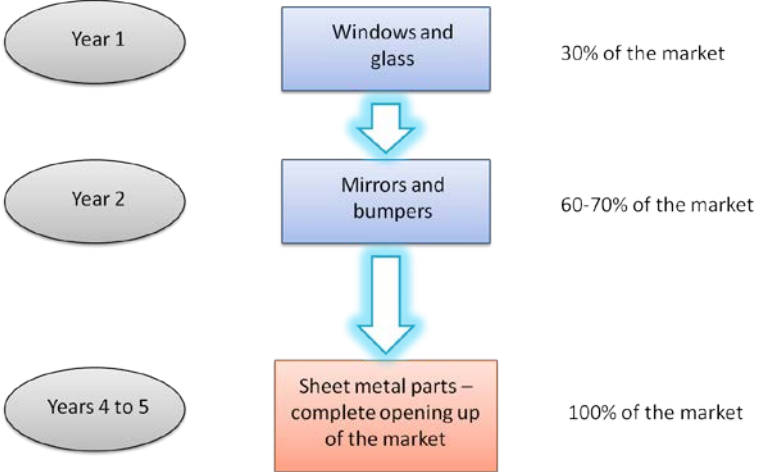
calculating the price at which a part is sold to a distributor customer. The oligopolistic nature of the market, the fact that such exchanges of information between competitors are recurrent, and the detailed nature of the information exchanged (itemised per product and per supplier, promptly updated to reflect changes) should then be taken into consideration in order to assess the risk of any anticompetitive effects. It cannot be ruled out that in some cases the interaction between the recommended price system and the information exchange system could have negative effects on competition that would outweigh the resulting efficiency-enhancing effects. The circumstances in which the distributors purchasing the parts also have access to the database might not be relevant if the database manager is able to restrict access to such information to equipment suppliers and vehicle manufacturers, and this currently seems to be the case for certain parts referenced in GOLDA. Furthermore, the distributors' ability to access information on recommended prices communicated by all equipment suppliers and vehicle manufacturers assumes that such communication of recommended prices by equipment suppliers and vehicle manufacturers is legitimate, which may not necessarily be the case in view of the foregoing.

CONCLUSION

472. The motor vehicle aftermarket generated turnover of more than €30 billion, excluding taxes, in 2010. It remains characterised by the dominance of vehicle manufacturers' authorised repairers networks, which hold between 45% and 55% of market shares, and which compete with a variety of standalone and franchised independent operators, who individually weigh much less than the authorised repairers in the repair and maintenance sector. The vehicle manufacturers' networks have a particularly large market share for repair and maintenance works on recent vehicles (over 80% for vehicles aged less than two years and almost 70% for vehicles aged 3-4 years). Furthermore, the repair and maintenance price index rose by 55% in nominal terms and 28% in real terms between 2000 and 2011, although information collected concerning factors contributing to the increase in costs was insufficient to explain the price increases observed.
473. The Autorité de la concurrence has also observed in this Opinion that several obstacles may restrict competition between operators in the motor vehicle aftermarket.
474. The protection of visible parts under design law and copyright law grants vehicle manufacturers a monopoly for the distribution of such parts. The Autorité de la concurrence proposes that France follow in the footsteps of other major European countries and ultimately remove the possibility of protection for visible spare parts used to restore vehicles to their initial appearance under design law and copyright law.
475. Generally speaking, the capacity of equipment suppliers to compete with vehicle manufacturers for the sale of spare parts may in some cases be impeded by certain types of contractual clauses included in contracts entered into by vehicle manufacturers with equipment suppliers, which may restrict the presence of original equipment suppliers in the aftermarket. Some subcontracting arrangements may fall outside the scope of competition law, because of the know-how or financing contributed to the equipment supplier by the vehicle manufacturer, whereas other arrangements may be found to be anticompetitive if they breach the Block Exemption Regulation applying to the motor vehicle sector, although only a case-by-case analysis could determine this. Furthermore, to enable equipment suppliers to manufacture spare parts that do not display the vehicle manufacturer's logo without incurring unacceptable additional costs, the Autorité de la concurrence proposes that the vehicle manufacturers should not be able to take action against their equipment suppliers on the ground of the offence of the removal of a mark (Article L713-2-b of the Intellectual Property Code).
476. Again, only a case-by-case analysis would establish whether problems encountered by independent operators trying to access the vehicle manufacturers' technical information (due in particular to certain contractual clauses relating to the use of technical data, and the format, content and price of this information) are compatible with competition law, more particularly, by ascertaining whether they have a sufficient negative impact on the capacity of independent repairers to effectively compete with repairers in the vehicle manufacturers' authorised networks. However, with regard to access problems that are covered or partially covered by European technical regulations applying to the sector, which the competition authorities do not have the authority to implement, the introduction of a credible monitoring and penalty system to identify and penalise infringements clearly needs to be introduced. At the same time, and in order to extend the effective scope of

these regulations, the on-going pan-European standardisation process which currently only covers information format could be extended to specialist intermediaries – diagnostic-tool manufacturers and technical-information publishers – and made to include practical terms and conditions governing the transfer and content of information.

477. Certain vehicle manufacturers are also asked to examine their warranty contracts and warranty extensions, as certain clauses might limit the capacity of consumers to use the services of independent repairers for repair and maintenance works not covered by a warranty, depending on the wording used and the position of such clauses in the contract.
478. Lastly, by reducing competitive uncertainty, the use of retail prices recommended by vehicle manufacturers and equipment suppliers throughout the sector and, in some cases, the exchange of information, could contribute to weakening price competition for the wholesale and retail sale of spare parts. Once again, a case-by-case assessment seems necessary to analyse the competitive impact.
479. The following table summarises the various proposals made by the Autorité de la concurrence in order to remedy the obstacles identified.

Obstacles	References in the Opinion	Proposals by the Autorité de la concurrence
<p>Obstacle no. 1: protection of visible spare parts by design rights and copyright</p>	<p>Section 2 - Part II – pages 70 à 105 (proposals analysed in § 235 to 267)</p>	<p>Legislative change to withdraw protection in France under design law and copyright law of visible spare parts intended to restore motor vehicles to their initial appearance, within four or five years.</p> <p>Protection could be withdrawn gradually before this deadline according to part type, as shown in the following diagram. This gradual relaxation should also be enacted in law.</p> 
<p>Obstacle no. 2: obstacles impeding the sale of parts by equipment suppliers</p>	<p>Section 2 - Part III – pages 105 to 114</p>	
<p>a) Use of tooling by equipment suppliers</p>	<p>§ 303 to 312</p>	<p>Possible examination of contractual clauses in light of competition law.</p>
<p>b) Priority supply clauses</p>	<p>§ 313 to 315</p>	<p>Possible examination in light of competition law.</p>
<p>c) Removal of vehicle manufacturer's logo</p>	<p>§ 316 to 320</p>	<p>Amendment of Article L713-2 of the Intellectual Property Code, in order to prohibit vehicle manufacturers from taking legal action on the ground of the offence of removal of a mark (Article L713-2-b) against their equipment suppliers who already produce the spare parts in question.</p>

Obstacles	References in the Opinion	Proposals by the Autorité de la concurrence	
Obstacle no. 3: obstacles impeding access to technical information by independent operators	Section 2- Part IV – pages 126 to 146 (proposals analysed in § 382 to 415)	Analysis under competition law	Reinforcement of the effective application of the technical regulations
a) Obstacles to independent repairers accessing single-make technical information in "read-only" mode	§ 389 to 390 and § 403 to 415	Possible examination in light of competition law	<ul style="list-style-type: none"> - Introduction of a system to monitor the content of information made available to independent operators, on the basis of complaints received. - Introduction of dissuasive and credible penalties to penalise infringements of the EURO5 and EURO6 technical regulations. - Extension of the on-going standardisation process to cover: <ul style="list-style-type: none"> ✓ technical information for specialist intermediaries, who should be invited to contribute to the standardisation process for the transmission of technical information; ✓ practical terms and conditions governing the transfer and content of information made available to independent repairers through Euro5 websites and also to specialist intermediaries through the creation of multi-make solutions.
b) Obstacles to technical information publishers accessing technical information	§ 391 to 393 and § 403 to 415		
c) Obstacles to diagnostic tool manufacturers accessing technical information	§ 394 to 396 and § 403 to 415		
d) Obstacles to accessing relevant information on vehicle identification numbers (VIN)	§ 397 to 398 and § 403 to 415		
Obstacle no. 4: clauses in warranty contracts and warranty extensions	Section 2 - Part V – pages 160, 164 (proposals analysed in § 426 to 433)	Possible examination of contractual clauses under competition law.	
Obstacle no. 5: generalised use of recommended sale prices by all stakeholders and exchange of information on recommended sale prices	Section 2 - Part VI – pages 177to 180 (proposals analysed in § 462 to 471)	Possible examination under competition law.	

Deliberations on the debriefing of Ms Laure Schulz and Mr Erwann Kerguelen, Case Officers, and the statements of Mr Etienne Pfister, Deputy General Rapporteur and Ms Virginie Beaumeunier, General Rapporteur, by Mr Bruno Lasserre, President, Chair, Ms Elisabeth Flüry-Héard, Vice-President and Mr Patrick Spilliaert, Vice-President.

The Meeting Officer,

The President, Chair

Béatrice Déry-Rosot

Bruno Lasserre

ANNEX

INFORMATION ON THE TREATMENT OF VISIBLE SPARE PARTS IN GERMANY AND THE USA

1. This Annex sets out the facts on which the Autorité de la concurrence based its observation, in the public consultation document, that in practice spare parts are not protected in Germany or the United States, despite the fact that a repair clause has not been enacted in law in these countries (see Box 2 in the Opinion). This document contains an analysis of the situation in Germany (A), and in the USA (B).

A. GERMANY

2. In Germany, legislation providing for the protection of visible spare parts under design law is still in force. However, within the context of the review of German laws in this area following the transposition of Directive 98/71/EC, the vehicle manufacturers made a commitment in 2003, through the intermediary of the VDA⁴³³, not to use this protection to prevent the marketing of non-OEM visible parts, provided the current legislation remains in force.
3. This Annex will demonstrate that the vehicle manufacturers' commitment consists of an undertaking not to exercise their rights with regard to visible spare parts (1), and that they have complied with this commitment, as evidenced by the existence of a free market for visible spare parts in Germany (2).

1- SUBSTANCE OF THE UNILATERAL COMMITMENT

4. In their contribution to the public consultation document, the vehicle manufacturers have contested the existence of an agreement between the German motor vehicle industry and the German government under which the vehicle manufacturers have agreed not to exercise their rights with regard to visible spare parts. They are of the opinion that the commitment made by the VDA is simply an assurance that in the future, as in the past, they will not improperly or abusively file designs or models. They claim this is "*a simple statement of intent that in no way modifies the law or current practice*".
5. However, although the commitment does not expressly state that the vehicle manufacturers will not exercise their rights with regard to visible spare parts, nor does it state that the

⁴³³ Verband der Automobilindustrie (German Federation of Vehicle Manufacturers).

vehicle manufacturers' commitment merely concerns abusive filing and excludes remedies in litigation (A). Despite the ambiguous wording of the commitment, its substance was defined and clarified by the German Minister of Justice very shortly after it was signed. The Minister refused to allow a vehicle manufacturer to enforce its design rights (B).

a) The wording of the 2003 commitment

6. The following excerpts are taken from the explanatory memorandum on the law set out in the bill on designs and models dated 28 May 2003, describing the substance of the vehicle manufacturers' commitment⁴³⁴. Although these excerpts refer to a status quo, this is in relation to the previous situation where independent channel operators (spare parts manufacturers, distributors and repairers) were able to operate freely in the market⁴³⁵. Furthermore, the document does not specify that the commitment applies only when there is no abusive design and model filing. On the contrary, the third excerpt below suggests that the manufacturers have undertaken not to "*increase the extent to which they exert their rights*", which suggests that the commitment also covers litigation.

"The vehicle manufacturers have expressly stated that they do wish to harm competition in the spare parts market, nor do they intend to dispute the market shares held by independent repairers and distributors through legal action on the ground of design protection. Accordingly, this commitment is made on the basis of the maintenance of currently applicable legislation and should not adversely affect the currently satisfactory coexistence of market operators."⁴³⁶ (emphasis added).

"Manufacturers of spare parts and independent repairers have been able to establish themselves in the market in the past. This should not change. The motor vehicle industry has clearly and unambiguously stated that it does not wish to harm competition or the spare parts market and thereby harm parts manufacturers and distributors. The maintenance of the status quo constitutes the basis for the proposed solution."⁴³⁷ (emphasis added).

"The status quo must therefore be preserved. Spare parts manufacturers and the corresponding distributors have held a significant economic position in the past. The proposed solution should not result in any adverse consequences in this matter. If it is found that vehicle manufacturers are protecting bodywork spare parts to a greater extent than in the past and seeking to influence the

⁴³⁴ Translation into English by the Autorité de la concurrence.

⁴³⁵ It may be the case that prior to 2003 the vehicle manufacturers only rarely made use of design rights to protect visible spare parts. When questioned on the number of cases it had started on the ground of its design rights between 1990 and 2003, one German vehicle manufacturer said that it had not started any such proceedings.

⁴³⁶ Explanatory memorandum of the bill, BT-Drucksache 15/1075, page 1: "*Die Automobilhersteller haben insoweit ausdrücklich versichert, dass sie den Wettbewerb im Ersatzteilhandel nicht beeinträchtigen und den freien Werkstätten und dem freien Teilehandel durch Inanspruchnahme von Schutzrechten Marktanteile nicht streitig machen wollen. Auch diese Zusage ist Grundlage für eine Beibehaltung der Rechtslage, die das bisherige auskömmliche Nebeneinander der Marktteilnehmer nicht beeinträchtigen soll*".

⁴³⁷ Explanatory memorandum of the bill, BT-Drucksache 15/1075, page 27: "*Freie Ersatzteilehersteller und Werkstätten konnten sich in der Vergangenheit auf dem Markt etablieren. Daran soll sich nichts ändern. Die Automobilindustrie hat insoweit klar und eindeutig erklärt, dass es ihr nicht darum geht, den Wettbewerb und den Ersatzteilmarkt zum Nachteil der Ersatzteilehersteller und des Handels zu beeinträchtigen. Die Beibehaltung des Status quo ist Grundlage der vorgeschlagenen Regelung*".

spare parts market by exerting their rights more strongly, the law will need to be changed."⁴³⁸ (emphasis added).

b) The substance of the commitment as clarified by the German Minister of Justice

7. The substance of the commitment made to the Bundestag by the vehicle manufacturers is defined and clarified in a letter sent by the German Minister of Justice to the Chairman of the German Federal Trade Association⁴³⁹, along with a statement from the VDA. These two letters clearly show that the manufacturers' commitment is not merely undertaking commitment not to abusively file designs or models, it is also undertaking commitment not to seek to protect spare parts under design law through litigation. In addition, these letters show that the Minister of Justice intends to monitor the situation and ensure that the manufacturers comply with their commitment.
8. The letters were written following court orders handed down in summary proceedings in which the court found in favour of the vehicle manufacturer and against the manufacturers and distributors of spare parts on the basis of an infringement of design rights. The letters postdate the commitment made to the Bundestag by the manufacturers, and refer to it⁴⁴⁰, stating that the vehicle manufacturer in question immediately waived its right to enforce the court orders. It also seems that the vehicle manufacturer apologised to the Minister of Justice, saying that the group's senior management had not been aware of the court proceedings. The letter sent to the Chairman of the German Federal Trade Association by the Minister of Justice is reproduced below⁴⁴¹:

"Dear Mr [], during a conversation with the Minister of Justice on 17 July 2003, Mr [] and yourself produced copies of three court orders finding in favour of [vehicle manufacturer] and against manufacturers and distributors of spare parts, in support of another request that a repair clause be introduced into the new law on designs and models. The Minister, Mrs Zypries, telephoned the board of directors of [vehicle manufacturer] on the same day. According to a statement by VDA (motor vehicle industry association) enclosed, these court proceedings were started without the knowledge of the [vehicle manufacturer]'s senior management. As a result of our actions, [vehicle manufacturer] immediately waived its right to enforce the court orders. This process shows that the motor vehicle industry is seriously committed and intends to keep its word.

⁴³⁸ Explanatory memorandum of the bill, BT-Drucksache 15/1075, page 66: "Dadurch soll der „Status quo“ erhalten bleiben. Die Ersatzteilehersteller und der entsprechende Handel haben in der Vergangenheit eine bedeutsame wirtschaftliche Stellung eingenommen. Die vorgeschlagene Regelung soll insoweit zu keinen Nachteilen führen. Sollte sich herausstellen, dass die Automobilhersteller in höherem Maße als bisher Einzelteile der Gesamtkarosserie eines Fahrzeuges schützen lassen und versuchen, vermehrt Rechte durchzusetzen, um auf diese Weise den Ersatzteilmarkt zu beeinflussen, wäre ein Einschreiten des Gesetzgebers erforderlich".

⁴³⁹ Bundesverbandes des Deutschen Gross-und Aussenhandels.

⁴⁴⁰ Contrary to the claim made by the vehicle manufacturers in their contribution to the public consultation document that the manufacturers' commitment was made after these letters were written. The letters are dated 21 July 2003 and 30 July 2003, whereas the commitment by the manufacturers is contained in the bill dated 28 May 2003.

⁴⁴¹ Translation into English by the Autorité de la concurrence.

*In view thereof, the government will respect and apply this draft law's "commercial basis"*⁴⁴² (emphasis added).

9. Moreover, the vehicle manufacturers have also referred to interpretations of the commitment set out in an affidavit of law drawn up by a German law firm, an extract from a thesis and a decision handed down by the Munich Court of Appeal in 2005. However, none of these documents are relevant when interpreting a commitment binding the vehicle manufacturers and the German government, whose position has been expressly stated in the above-mentioned letter⁴⁴³.

2- IMPLEMENTATION OF THE COMMITMENT IN GERMANY

10. The action of the Minister of Justice with regard to the vehicle manufacturer who took court action on the ground of the design protection of its spare parts shows that the German government intends to ensure that the vehicle manufacturers comply with their commitment in Germany.
11. Moreover, none of the vehicle manufacturers questioned have started any proceedings in Germany since 2003⁴⁴⁴. This is in contrast to France, where the two main French vehicle

⁴⁴² Letter from the German federal Minister of Justice to the German federal trade association dated 30 July 2003: "*Sehr geehrter Herr [], bei dem Gespräch mit der Bundesministerin der Justiz am 17. Juli 2003 haben Sie und Herr [] Abschriften von drei einstweiligen Verfügungen der [Automobilhersteller] gegen Ersatzteilehersteller und Händler vorgelegt und dies zum Anlass genommen, erneut die Aufnahme einer Reparaturklausel in das Geschmacksmustergesetz zu fordern.*

Frau Bundesministerin Zypries hat noch am selben Tag mit dem Vorstand der [Automobilhersteller] telefoniert. Nach der anliegenden Erklärung des VDA ist die Aktion ohne Wissen der Geschäftsleitung erfolgt. Die [Automobilhersteller] hat unsere Intervention sogleich auf die Rechte aus den gerichtlichen Beschlüssen verzichtet. Der Vorgang zeigt, dass es die Automobilindustrie mit ihrer Zusage ernst meint und ihr Wort halten will. Darauf wird auch die Bundesregierung achten und auf der Einhaltung dieser Geschäftsgrundlage des Gesetzentwurfs bestehen.[...]"

⁴⁴³ The fact that the German government informed the European Commission in September 2004 that it was against the introduction of a repair clause at European Union level does not prevent it from encouraging the *de facto* non-implementation of design protection in Germany. This equivocal position of the German government might be explained by the fact that vehicle manufacturers benefit from the existence of visible spare parts protection in other European countries, while German consumers and Germany's economy benefit from the lack of protection in Germany. Moreover, several German politicians have recently argued in favour of the introduction of a repair clause into German law, including the current Minister of Affairs and the current Minister of Justice.

⁴⁴⁴ The vehicle manufacturers' legal representatives only reported five decisions handed down after 2003 in Germany in cases involving design protection for spare parts. However, three of them had been started before the 2003 commitment: in 1998, 1999 and 2001, respectively. Two actions were started after 2003, but in one of them it was the equipment supplier who claimed protection. A German vehicle manufacturer allegedly filed another action after the 2003 commitment. The Autorité de la concurrence was only informed of this in June 2012, i.e., four months after the Investigation Services sent this manufacturer a request for information. The case concerned wheel rims. Wheel rims are different to most other visible parts in that the spare part does not necessarily need to be identical in appearance to the faulty part. This means that there is some

manufacturers filed approximately 100 legal actions on the ground of design protection over the same period.

12. In their contribution to the public consultation the vehicle manufacturers have stated that the fact that the operators have not exerted their rights before the courts does not mean that the law is not respected. They claim that, unlike France, vehicle manufacturers do not need to take legal action in Germany for the visible spare parts to be protected in practice, and that none of their competitors manufacture or sell the visible spare parts that are design protected.
13. This argument does not stand up to examination. In Germany, independent body shops obtain up to 70% of the body parts they need from the independent channel⁴⁴⁵. If the independent operators were not entitled to distribute visible parts, and in particular body parts, these operators would be obtaining most of their supplies from the manufacture channel. In their contribution to the public consultation the vehicle manufacturers have stated, without producing any evidence, that the non-OEM parts found in Germany in the independent channel are original parts which "*are the product of agreements entered into between the vehicle manufacturers and the equipment suppliers in compliance with design law*"⁴⁴⁶. When questioned on this point, a German vehicle manufacturer acknowledged that it did not grant any licences to third parties in connection with visible spare parts for which designs had been registered. Accordingly, there is no such type of agreement between this German vehicle manufacturer and its original equipment suppliers for visible spare parts. However, the independent channel offers a wide range of visible non-OEM spare parts for this manufacturer's brand in Germany. Moreover, the parts available in the independent channel in Germany are not always original parts, which proves that secondary equipment suppliers are also free to manufacture and sell visible spare parts in Germany⁴⁴⁷.
14. Lastly, the existence in Germany of active lobbying in favour of the introduction of a repair clause into German law, which, according to the vehicle manufacturers, is proof of the absence of liberalisation in practice, can be explained by the wish to follow up on the commitment made by the German vehicle manufacturers in 2003. The commitment has no legal value and, although it is respected at the present time, it is nevertheless dependent upon the extent to which successive governments decide to monitor its compliance and the

leeway when selecting the spare part. Accordingly, the protection of spare parts by design rights will not necessarily result in a monopoly, which is not the case for most other visible parts. Furthermore, in their joint contribution the vehicle manufacturers claimed that the Autorité de la concurrence "ignored" a decision by the Munich Court of Appeal dated 12 May 2005 in the public consultation document dated 11 April 2012. This decision concerns a case started in 1999, which is one of the three cases reported as having been started before 2003.

⁴⁴⁵ Source: GIPA Professional Survey 2009, page 102.

⁴⁴⁶ The contributors also state that "*vehicle manufacturers frequently enter into agreements with equipment suppliers under which the equipment suppliers are granted a licence/rights authorising them to produce and sell spare parts in exchange for payment of royalties and/or in exchange for their contribution to the development of the parts*".

⁴⁴⁷ For example, ISAM, an Italian manufacturer, supplies Renault Mégane and Citroen C4 front bumpers in Germany, as well as a wide range of visible parts for Toyota, Nissan and Hyundai.

credibility they wish to give to the threat of the introduction of a repair clause in the event of non-compliance. Lastly, the introduction of a repair clause into German law could have repercussions on the introduction of a repair clause at European level.

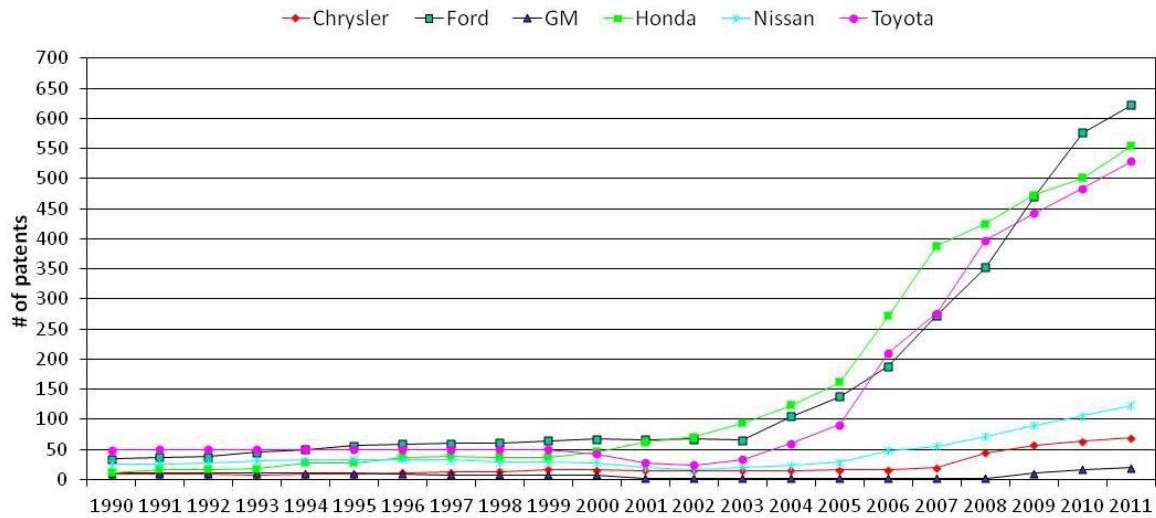
B. UNITED STATES

15. In the United States, the market for visible spare parts is liberalised in practice, although the law does not specifically provide for a repair clause⁴⁴⁸. Unlike Germany, this freedom is not based on a commitment by vehicle manufacturers, but instead on the fact that vehicle manufacturers in the US almost never exert their rights.
16. Nevertheless, although until recently vehicle manufacturers have refrained from exert their design rights over spare parts, since 2003 some vehicle manufacturers have begun to protect their parts (see graph below), and Ford took legal action on the ground of design protection in 2005. This case concerned 14 Ford parts for the Ford-150, and was brought before the International Trade Commission (ITC). For the first time, the ITC issued an exclusion order prohibiting the import of 7 of the 14 parts concerned by the dispute. The decision was appealed, but in May 2008 Ford once again filed a suit before the ITC concerning spare parts for the Ford Mustang. This case is currently pending, but at the same time Ford has negotiated a settlement with one equipment supplier, granting it an exclusive and temporary licence to distribute parts protected by Ford in exchange for the payment of royalties⁴⁴⁹.

⁴⁴⁸ The extent to which design rights are implemented will depend on how the national courts apply the law (and, in particular, the criteria for applying design law), and also on the checks made at the time a design is filed. This means that the fact that a repair clause has not been enacted in law does not mean that visible motor vehicle spare parts are necessarily protected in practice under design law.

⁴⁴⁹ See information displayed on the Quality Parts Coalition website, a lobbying group created in 2007 in response to the threat of foreclosure of the spare parts market and which is in favour of the introduction of a repair clause into American law. <http://www.keepautopartsaffordable.org/press/1%20-%20Fact%20Sheets/Seeking%20a%20Legislative%20Change%20-%20Major%20Milestones.pdf>

Graph 17 – Cumulative number of designs and models filed by six vehicle manufacturers in the United States between 1990 and 2011



Source : website of the *Quality Parts Coalition Association* –
http://www.keepautopartsaffordable.org/quality_parts/disttrend.html

17. The two Ford cases seem to be relatively isolated to date⁴⁵⁰. However, a large number of operators in the independent channel, insurers and consumer associations, along with the American Anti-trust Institute joined forces to enact the freedom to sell visible spare parts, fearing a generalisation of design protection and market foreclosure⁴⁵¹. On 13 March 2008 an initial draft law was put before the Senate (H.R.5638). On 12 February 2012 a second draft law was submitted (H.R.3889), which has not yet been examined.
18. The freedom to market visible parts in the United States, although it has been called into question by proceedings brought by Ford, is still widespread in the United States, and this has been confirmed in a statement by the Automated Aftermarket Industry Association sent to the Autorité de la concurrence on 25 June 2012⁴⁵².

⁴⁵⁰ The isolated nature of the Ford cases is confirmed by various affidavits given to the U.S. Patents and Trademark Office on Automotive Design Patents, which can be viewed on the following website: <http://www.keepautopartsaffordable.org/press/nupress.html>

In their contribution to the public consultation, the vehicle manufacturers suggest, on the contrary, that the manufacturers do exert their design rights in the US. They claim a large number of cases are settled out-of-court and that, when this is not possible, the manufacturers start proceedings in the courts or before the relevant authorities to exert their design rights.

However, when questioned on this they were only able to cite two disputes that were settled out-of-court, back in 1984 and 1986, and the Ford cases previously discussed.

⁴⁵¹ The name of this lobby – "Keep Autoparts Affordable" (emphasis added) – which is in favour of the introduction of a repair clause into American law, is interesting, and shows that the market has been open to date and is now threatened with foreclosure.

⁴⁵² There is no contradiction in the public consultation document regarding the situation of the US, contrary to criticism voiced by the vehicle manufacturers in their contribution to the public consultation. The study referred to in §168 of the public consultation document measures the benefits for consumers of the current liberalisation of the manufacture and sale of visible spare parts in the United States. This study is often cited

by US lobbying groups that are in favour of the enactment of a repair clause, in order to highlight the dangers for US consumers if the policy of protection recently put forward by certain vehicle manufacturers, and limited at present to two cases brought by Ford, is extended to the entire market. Contrary to the vehicle manufacturers' allegations, the study does not demonstrate that there is no *de jure* or *de facto* liberalisation in the US. The estimates included in the study would not have been possible if there was no competition on the visible spare parts market in the United States, as they are based on a comparison of prices charged by the various channels in the United States.

GLOSSARY

1. SPARE PARTS

Original parts: in its Guidelines on the application of Regulation 461/2010 (§19) the European Commission defines "original parts" as follows: "*'original parts or equipment' means parts or equipment which are manufactured according to the specifications and production standards provided by the motor vehicle manufacturer for the production of parts or equipment for the assembly of the motor vehicle in question. This includes parts or equipment which are manufactured on the same production line as those parts or equipment.*"

Matching quality parts: these are parts that "*must be of a sufficiently high quality that their use does not endanger the reputation of the authorised network in question*"

Visible parts: these are exterior parts, i.e., essentially bodywork parts (skin panels), windscreens and windows, lights and mirrors. These parts are visible, contribute to the visual identity of the vehicle, and can be protected under the laws on designs and models.

IAM: "Independent Aftermarket" means the independent channel, i.e., all market operators who are not members of a vehicle manufacturer's authorised network. IAM parts are parts displaying the equipment supplier's brand, as opposed to vehicle manufacturer-branded parts. They may also be referred to as "non-OEM" parts.

OEM: "Original Equipment Manufacturer" means the vehicle manufacturer. "OEM parts" are spare parts sold by the vehicle manufacturer displaying its brand.

OES: "Original Equipment Supplier" means the original supplier of parts. "OES parts" are original parts manufactured and distributed by original equipment suppliers that do not display the vehicle manufacturer's brand (they are also referred to as "non-OEM parts").

2. INDUSTRIAL PHASE

Original assembly: this is the initial assembly phase for new vehicles. An original assembly part is therefore a part that is fitted to a vehicle in production.

Series production: this is the period during which a vehicle make is in production. Given the quantity of parts that need to be fitted to new vehicles, this is the longest industrial phase, which provides the greatest opportunity for economies of scale. Parts to be used as spare parts can also be manufactured during series production.

3. SUPPLIERS

Original assembly supplier: means the equipment supplier who manufactures original assembly parts for a vehicle manufacturer (to be fitted to vehicles in production). In most cases, the original assembly supplier is also the equipment supplier who produces vehicle manufacturer-branded OEM spare parts.

Original equipment supplier (OES): means the equipment supplier who manufactures vehicle manufacturer-branded OEM spare parts. The OES is usually, but not always, also the original assembly supplier.

Secondary equipment supplier: means the equipment supplier who manufactures parts for the IAM, but who does not initially manufacture them for the vehicle manufacturer.

4. REPAIRERS

IR / Independent repairer: means a general garage that operates independently of the authorised networks and which may or may not operate within an independent franchise network.

Multi-make ‘soft’ franchises: means a repairer with a similar economic model to that of an independent repairer (i.e., multi-make), but who has a parts-supply contract with the manufacturer channel under which it purchases multi-make parts from vehicle manufacturers.

Authorised repairer: means a repairer who operates under the brand name of a vehicle manufacturer.

- **Level 1 authorised repairer:** means an authorised repairer who is directly authorised by a vehicle manufacturer and who is an authorised distributor of spare parts. A level 1 authorised repairer is usually a dealer (or may operate as a branch of the vehicle manufacturer), who may also operate in the new and second-hand vehicle sale market.
- **Level 2 authorised repairer:** means a repairer who provides repair and maintenance services only. They are not authorised to distribute of parts, contrary to level 1 authorised repairers.

Insurer authorised repairer: means a repairer who has been authorised by an insurer, who will encourage its insureds to use the repairer for any bodywork needed in connection with claims covered by the insurer.

5. PRICES

"Manufacturer" prices: means the recommended or maximum sale prices communicated by the vehicle manufacturers to the members of their authorised network for retail sales.

"IAM" prices: means the sale prices equipment suppliers recommend that their customers charge for retail sales.

"Net wholesale price": means the net purchase price at which a wholesaler purchases parts from equipment suppliers.

6. TECHNICAL INFORMATION

Euro5: this refers to Regulation (EC) 715/2007 of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro5 and Euro6) and on access to vehicle repair and maintenance information. This regulation

introduced a mandatory obligation to transmit technical information to independent operators and contains detailed provisions on its application.

On-board computer: refers to an electronic system that manages the internal functions of modern motor vehicles. There are several types of specialist computers designed to manage the engine, braking system, traction control, and even the alarms and air conditioning. In addition, on-board computers are generally all interconnected, which is known as multiplexing, enabling them to coordinate the operation of the different components of the vehicle.

Reprogramming a computer consists in installing, in an on-board computer, the software that will run it. Once the software application is downloaded into the vehicle it will operate generically.

Remote coding then needs to be carried out in order to send certain parameters to the computer so that it can identify the environment in which it will operate (for example: an injection computer must be matched with the engine).

Technical information publisher: these operators provide repairers with technical information, usually so that they can carry out vehicle maintenance and repair works. Technical information is defined in Article 1 of Regulation 566/2011 and consists in particular of information identifying the vehicle model, servicing handbooks and technical manuals, wiring diagrams, spare parts catalogues and the estimated times required for particular repair or maintenance tasks.

Diagnostic tool manufacturer: these operators manufacture single-make or multi-make diagnostic tools designed to communicate with on-board electronics systems, interpret fault codes and reset, remote-code and reprogram computers. This kind of tool is increasingly necessary for motor vehicle after-sales operations.