

# BLOCKED

The EU block exemptions covering the motor industry in the UK expire in May 2022 and May 2023, and are causing concern within the independent motor trade. Peter Shakespeare asks if this is justified

Since 2013, the UK's motor trade has been covered by EU vertical agreement block exemptions. Vertical agreements are those entered into between businesses operating at different levels of the production or distribution chain (manufacturers, wholesalers or retailers). Vertical agreements that meet certain conditions benefit from an exemption from the application of Chapter I of the Competition Act 1998, which prohibits anti-competitive agreements unless they create efficiencies and allow consumers a fair share of the benefits.

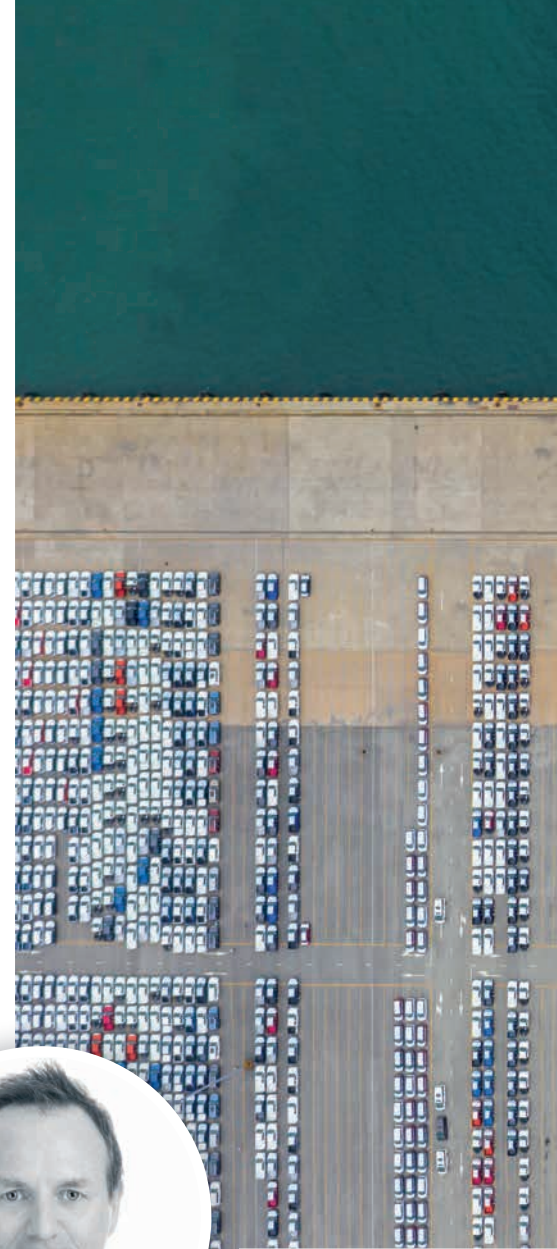
In terms of the distribution of motor vehicles and sale or resale of spare parts and the provision of maintenance services, by exempting certain types of agreements from competition law there have been significant benefits to the consumer. In addition to a level playing field in terms of vehicle purchasing, they have given consumers the right to have their vehicle serviced or repaired at any garage without invalidating their warranty and allow any garage to access a vehicle's digital service history and repair maintenance information. For the UK's owners and operators of motor vehicles, thanks to Brexit, these benefits are uncertain.

Exactly how the system works is explained by Tom Maple (inset), a partner at Reading-based law firm Field Seymour Parkes, who heads up the firm's automotive team. He provides the background to why there may be growing concerns within the UK's

independent motor trade and vehicle servicing and repair sectors (note this is not legal advice). Maple says: "In 2013, vertical agreements, such as those in place for the distribution of new motor vehicles, were placed into the existing general block exemption Regulation (EU) No 330/2010, known as VBER. Agreements relating to the sale or resale of spare parts for motor vehicles or the provision of repair and maintenance services for motor vehicles (Commission Regulation (EU) No 461/2010 (the MVBER)) remained subject to a specific exemption, which remains in force post-Brexit following the UK's adoption of EU laws as part of the European Union (Withdrawal) Act 2018. The MVBER will remain in force until it expires on 31 May 2023. In the case of VBER, the expiry date is 31 May 2022."

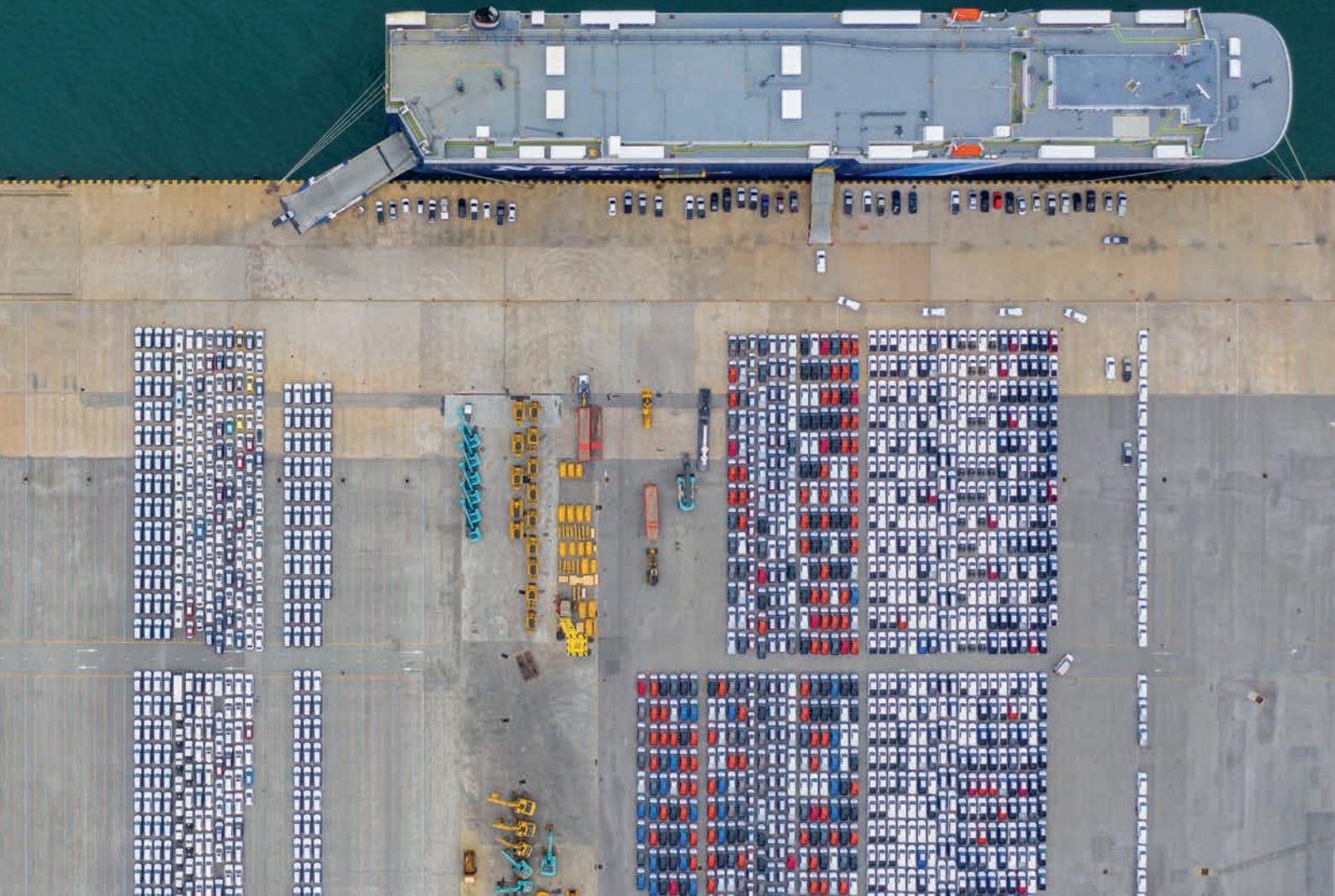
### THREE OPTIONS

Now, the UK government has three options, according to Maple. It could adopt revised EU Vertical Block Exemption Regulations into English law - the secretary of state has the power to do this without an act of parliament - or pass its own legislation; or do nothing, allowing the EU VBER and MVBER to expire. He says doing nothing could see a return to the 80s and early 90s, when disgruntled British customers started to obtain vehicles direct from cheaper EU jurisdictions, via car supermarkets and parallel



imports, harming the independent servicing and repair sectors. That latter option cannot be ruled out if, as many suspect, the British government follows a neo-liberal ideology in which the preference is to let markets regulate themselves.

However, the UK's Competition and Markets Authority (CMA) is recommending that the government creates its own block exemption, or 'Domestic Exemption Order' to replace VBER. The CMA has consulted with stakeholders for this purpose and says: "It would be appropriate to replace the retained VBER when it expires on 31 May 2022 with a UK VABEO [exclusion order] tailored to the needs of businesses operating in the UK, and UK consumers." Its decision is imminent. Also, it will be reviewing MVBER in due course in order to make a recommendation to the secretary of state.



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Given almost all the commercial vehicle manufacturers are controlled from within the EU, (and ship commercial vehicles to the UK, as pictured here and on p20), would they be compelled by law to adhere to any new UK regulations? Maple replies: "Yes, where the issue in question is one which relates to their operations in the UK, although it is worth noting that England and Wales have a distinct legal system from Scotland and Northern Ireland. To take a hypothetical example, if England and Wales and Scotland and Northern Ireland imposed a regulation that all urban buses had to have seat belts fitted to be sold or imported into these territories, then the fact that that is not the case in the EU would make no difference if a manufacturer wanted to sell its bus here.

"If say 'Truck Co Ltd' is manufacturing in Belgium, then the manufacturing operation is governed by EU laws as well as any relevant 'local' Belgian laws.

However, in order to sell trucks in the UK, it must comply with the relevant regulations in the UK, which may vary between England and Wales, Scotland and NI."

He continues: "Purchasers' rights may also differ between the EU and the UK, but the current English and Welsh legislation is based on the EU's Consumer Rights Directive, so is unlikely to change for a while, having only been put in place in 2015. However, since Brexit, it is more challenging [for the UK] to enforce redress rights when buying goods, services, or digital content online from an EU-based trader."

The CMA's consultation also reflects on whether the growth of e-commerce in the last few years means that online sales may well no longer be treated as 'passive' sales.

According to published EU guidance, 'active' sales involve approaching customers, whereas 'passive' sales

are ones that only respond to order enquiries. 'Active' sales can be restricted in vertical agreements according to Article 101(3); 'passive' sales are almost always allowed.

Under the CMA's proposal, restrictions can be placed on online and forecourt differential pricing to level the playing field due to the huge increases in e-commerce since the original block exemption regulations were introduced.

## OUTLOOK

It is also worth looking at how the EU views the future of the current block exemption, as this could influence what path the UK decides to take in terms of MVBBER, which covers spare parts and repair and maintenance. Maple explains: "Its evaluation has shown that, overall, the competitive environment in the motor vehicle markets has not significantly changed since the commission last evaluated these markets



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Tom Maple

in 2010.” Maple adds: “However, the commission observed that the sector is now under intense pressure to adapt to keep pace with the green and digital transformations in the motor sector. In the repair market, the commission’s evidence showed that many authorised repairers enjoy considerable local market power. Intra-brand competition within the authorised networks appears to be limited by strict and detailed quality criteria.

“Independent repairers will only be able to continue to exert vital competitive pressure if they have access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. The European Commission believes that whilst the current regime is suitable for these markets, it may require certain updating to take account of the increasing importance of data. It found that the motor vehicle spare parts markets are less flexible due to certain contractual arrangements between original equipment suppliers and vehicle manufacturers, which ultimately reduce the choice available to end-consumers. At this stage, the commission’s evaluation finds that the decision in 2010 to give special treatment to these markets was appropriate.”

### **SUPPORT FOR A UK MVBER**

Lobbying the government in favour of a UK version of MVBER is The Society of Motor Manufacturers and Traders, which represents more than 800 automotive companies in the UK. Chief executive Mike Hawes (inset), says that SMMT is engaged with the CMA’s forthcoming consultation on VBER provisions. He adds: “We are aware of the importance of access to repair and maintenance information to many of our members as well as the freedom to service vehicles within the warranty period.



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There are a variety of mechanisms which may be able to safeguard these provisions, and SMMT is working with government to make the existing type approval requirements on access to repair and maintenance information workable in a GB-only context.”

Manufacturer DAF Trucks - which does have a UK manufacturing base - declined to comment on which course it would like to see the UK government take. Meanwhile, Volvo’s legal director said: “The MVBER expires in 2023, but there is an ongoing consultation to replace it with something very similar. We do not expect any significant changes in our (or anyone else’s) business, but are monitoring [the situation].”

The truck manufacturers’ reluctance to indicate what outcome they would like to see is understandable. Brexit has given them huge headaches, both financially and operationally, thanks to the temporary nature of arrangements over imports, national type approvals, component sourcing - since components such as fuel injectors and brake callipers are manufactured in the UK for their European production plants - not to mention the impending

changes to powertrains driven by the climate agenda. Added to this, they have differing distribution models including, wholly-owned, franchised and independent dealers.

Maple goes along with Volvo’s position. He states: “Generally speaking, I do not think there will be wholesale changes in terms of the law. The CMA’s consultation document concludes that large-scale and fundamental changes to the current exemption are not appropriate at this time. However, the vehicle market is already changing to one where motor vehicle manufacturers are supplying vehicles direct to the end user via leasing deals, and this is putting additional pressure on independents.”

He concludes: “Independents will want to ensure a level playing field with the authorised dealers and the manufacturers. On the aftersales side, independent garages’ concerns will likely revolve around the issue of access to parts used by the OEMs and produced by original equipment suppliers, as well as wanting to ensure access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. MVBER is likely, in my view, to remain largely unchanged to ensure that the aftersales market remains competitive.” **TE**