LEGAL CHALLENGES FOR EUROPEAN OEMS FOR THE TRADE IN VEHICLE PARTS WORLDWIDE

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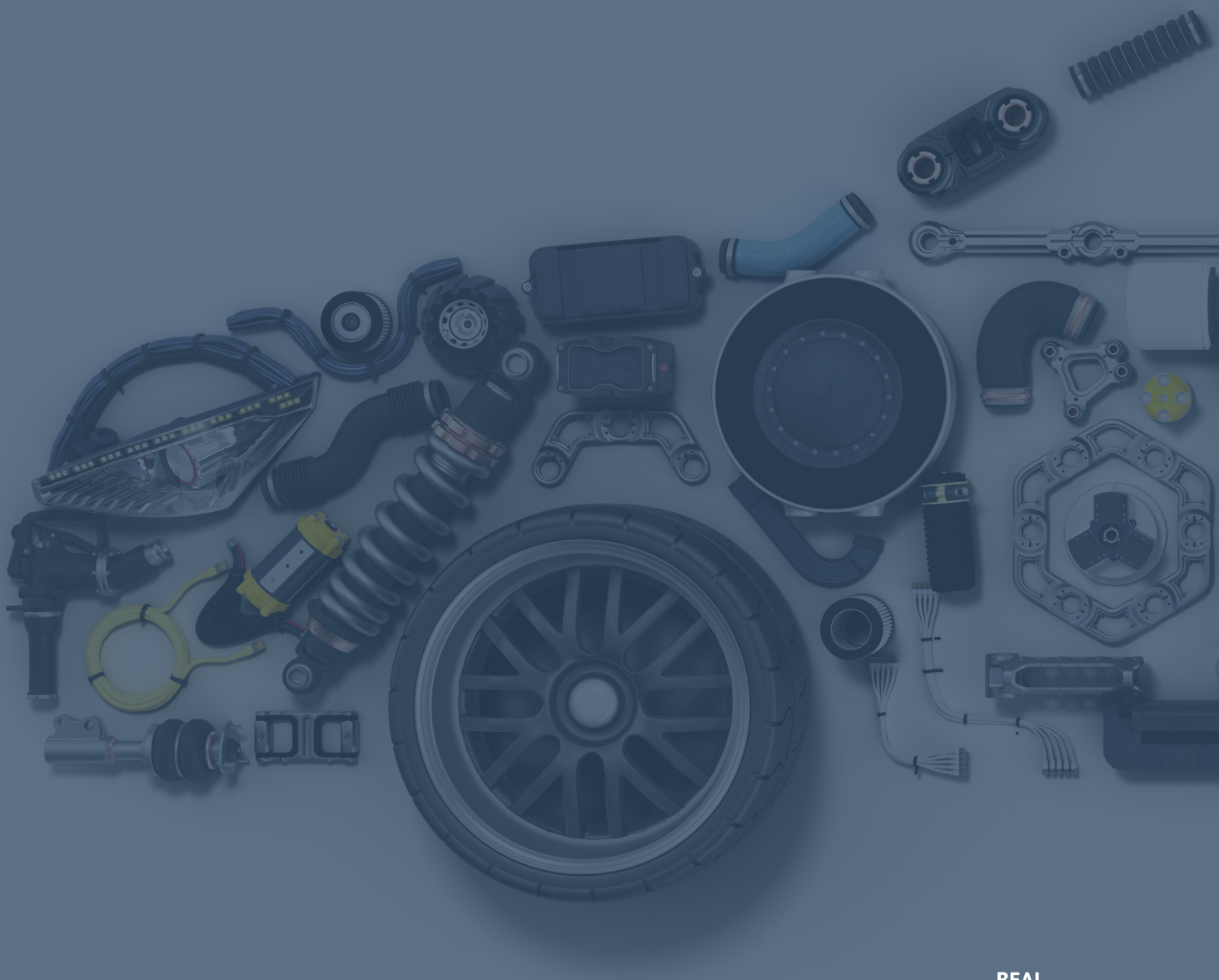

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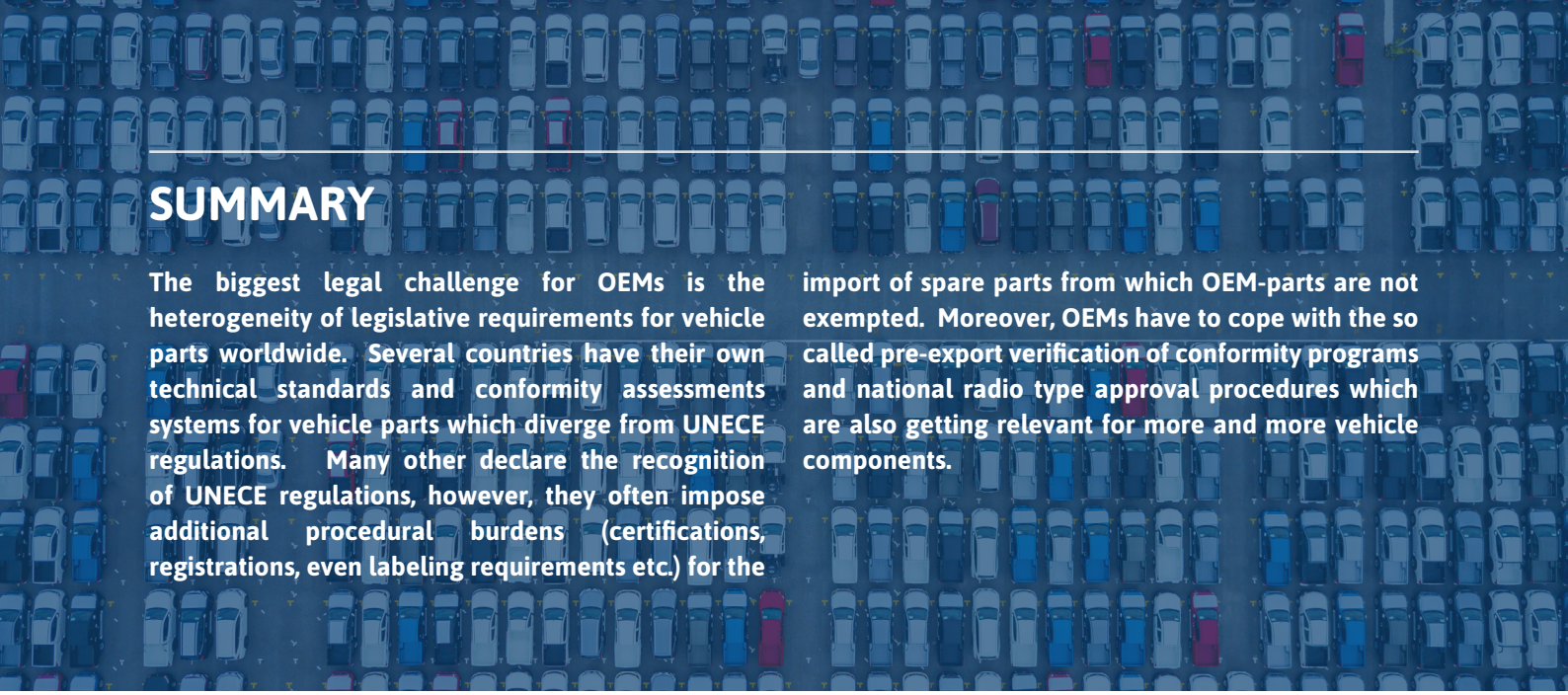

SUMMARY

The biggest legal challenge for OEMs is the heterogeneity of legislative requirements for vehicle parts worldwide. Several countries have their own technical standards and conformity assessments systems for vehicle parts which diverge from UNECE regulations. Many other declare the recognition of UNECE regulations, however, they often impose additional procedural burdens (certifications, registrations, even labeling requirements etc.) for the import of spare parts from which OEM-parts are not exempted. Moreover, OEMs have to cope with the so called pre-export verification of conformity programs and national radio type approval procedures which are also getting relevant for more and more vehicle components.

Legal challenges for European OEMs for the trade in vehicle parts worldwide

According to the data published by the World Trade Organization, the number of technical barriers to trade (known as TBTs) worldwide has been steadily growing.[1] TBTs can be understood as measures referring to technical regulations, and procedures for assessment of conformity of products with technical regulations and standards.[2]

Officially, these measures are implemented by states to ensure the safety of products sold on the national market and to protect consumers. The truth is, however, that TBTs can also be used as an excuse for protectionism and become an obstacle to free trade.[3] Very often they only create administrative burdens which do not necessarily contribute to higher safety standards, but which generate additional costs for exporters, making their products less competitive.

The trade in vehicle parts is also plagued by different, more or less justified, barriers. Vehicle components belong in many countries, understandably, to regulated products (similarly to e.g. electrical appliances, medical devices, machinery, toys, etc.), requiring some form of state control before they are placed on the market.

Very often they must be accompanied by conformity certificates, be registered, undergo a local conformity assessment procedure (including laboratory testing) and/or bear a national conformity label. The biggest challenge for OEMs (and independent component suppliers as well) is **the heterogeneity of legislative requirements for vehicle parts worldwide**.

Even though the technical standards for vehicles worldwide can be divided only in a couple of main groups (such as UNECE in Europe and several other countries, FMVSS in the USA or GB standards in China), the number of other requirements related to different conformity assessment systems, procedures and import formalities make the task of a legally compliant supply of vehicle parts worldwide quite a challenge.

Recognition of UNECE regulations

From the point of view of a European vehicle manufacturer, the most preferable situation is when third countries accept the so called UNECE regulations. This abbreviation stands for the United Nations Economic Commission for Europe whose working party WP.29 (World Forum for Harmonization of Vehicle Regulations) develops technical prescriptions for the construction and approval of wheeled vehicles for its participating countries. In other words, it is responsible for the regulatory frameworks regarding the safety and environmental performance of vehicles, their subsystems and parts.[4] The legal basis of the World Forum is the so called “1958 Agreement”.[5]

Basically, the parties of the 1958 Agreement (among which are e.g. the EU, Russia, Egypt, South Africa, Australia, New Zealand, Japan, South Korea, Thailand and Malaysia) develop together regulations covering different technical aspects of vehicles, their systems and

components. They are then free to declare to which of these regulations they adhere. For example, the EU lists on its website the UN regulations[6] to which it has acceded.[7]

UNECE contributes greatly to the worldwide harmonization of automotive technical standards. However, its regulations are not universal: for example, United States is a non-signatory to the 1958 Agreement - it has its own Federal Motor Vehicle Safety Standards (the FMVSS mentioned before) which diverge from the UN regulations. Likewise, China has its own GB (Guobiao) standards, which are not equivalent with UNECE regulations.

Diverging standards, national conformity assessments

If a country develops its own technical requirements for vehicles and their parts, it is a most classical example of a technical barrier to trade. In this case, foreign manufacturers are unable to sell their products unless they meet the foreign standards. They must either adapt the existing product (if it is possible at all) or develop two versions of the same product (for the domestic and the foreign market) from the very beginning, which, obviously, increases the costs. The best example of this situation is the gap between the UNECE regulations in the EU and the FMVSS standards in the US. Ever though they are said to offer a comparable high-level of safety performance, the fact of having to meet two different sets of safety standards significantly drives up costs for OEMs with no meaningful benefits for consumers.[8] The harmonization of US and EU vehicle regulations was even discussed in the negotiated Transatlantic Trade and Investment Partnership (which, as it is well known, have been stuck since 2016).

Other examples of markets which are challenging for European OEMs are China and Brazil. In both, not only technical requirements for vehicle parts diverge from UNECE regulations, but also vehicle parts are subject to national conformity assessment systems (called CCC and INMETRO respectively) consisting in, inter alia, local laboratory testing (in USA, at least, parts are self-certified by the manufacturer, which means that no testing by a third party is required), certification and labelling. Imaginably, such requirements significantly increase the costs of bringing the product to the market. Examples of other costly local certifications for vehicle parts are also SNI in Indonesia, BSMI in Taiwan or ISI in India (recently extended to several vehicle parts).

Exemptions for OEM-parts?

Unfortunately, even if a third country is a signatory to the 1958 Agreement or at least declares recognition of the UNECE regulations in its national legislation, this does not have to mean a free access to its market for European OEMs' parts. Besides the technical requirements for vehicle parts, which may be equivalent with UNECE, there is a plethora of other duties and formalities which must be fulfilled in order to import vehicle parts. Very often, these requirements apply to all imported vehicle parts **no matter if the parts come from an OEM and are covered by a whole vehicle type approval or if these are aftermarket parts coming from independent suppliers.**
To make this point clearer, a quote from EU regulations may be useful. According to the Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, spare parts placed on the market do not require any additional authorization by an approval authority if they are original parts "manufactured according to the specifications and production standards provided by the vehicle manufacturer for the assembly of the vehicle in question". In other words, OEM do not need any additional approval to sell original spare parts on the EU market. It seems reasonable if the parts are the same as those in the type-approved vehicle.[9]

Unfortunately, not all countries recognizing UNECE regulations show so much consideration for original parts coming from OEMs. Very often, contrary to the EU, states require some form of approval from a local authority. This approval may be based on UNECE certificates of conformity (which OEMs normally have) but nevertheless it means additional paperwork, administrative burdens and import formalities. Examples of such countries are Malaysia, Turkey and Vietnam. In Malaysia, according to the **Customs (Prohibition of Imports) Order 2017**, the importation of several categories of vehicle parts must be accompanied by an UNECE certificate of conformity. In Turkey, in spite of its close economic cooperation and the re-

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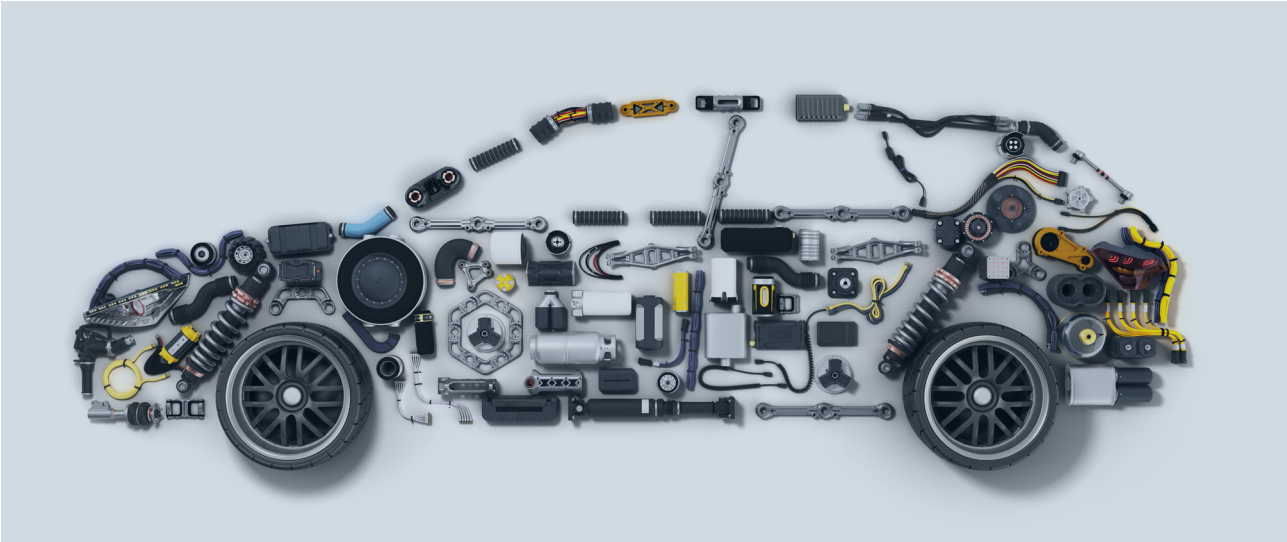


gulatory harmonization with the EU, UNECE certificates are also required for original OEM-parts. Vietnam often requests for the purpose of a local approval not only certificates, but also test reports. Colombia, in turn, does not ask for UNECE certificates but, for the purpose of importation, OEMs have to issue so called "certificates of performance", which are a kind of manufacturer's declaration of conformity of the imported vehicle parts. All this makes the import process more costly and difficult, without increasing the safety of vehicle parts for consumers.

Few are countries which, like the EU, have in their legislation an explicit exemption from the local conformity assessment or authorities' approval for original OEM-parts. Among them Argentina can be mentioned which clearly states in its **Resolución 91/2001** that its CHAS certification is only aimed at non-original spare parts (original parts must only be registered by the importer without further documentation requirements). Also in Saudi Arabia official distributors of OEM parts are exempted from the local SABER certification process. In many other countries legal provisions concerning the import of vehicle parts are imprecise – it is not clearly defined in the regulations if they only apply to non-original spare parts or to all. This is then often subject to authority's interpretation.

An additional problem resulting from countries requiring UNECE certificates for OEM parts covered by a whole vehicle type approval is that sometimes UNECE regulations explicitly exclude original OEM parts from its scope (which means that these parts do not have any UNECE certificates) but third countries ignore this exemption and require certificates anyway. It is the case of brake lining assemblies and drum brake linings. According to the UNECE Regulation No. 90, only **replacement** (meaning "not covered by vehicle type approval documentation, used as a suitable service replacement for an original part") brake lining assemblies and drum brake linings are in scope. This means that OEMs do not apply separately for a UNECE type approval for these products at all because they are covered by the whole vehicle type approval. Unfortunately, there are countries which seem not to know the scope of the UNECE Regulation No. 90 (and the exemption for OEM parts) and require it for all imported brakes, those coming from OEMs or not. It is all the more problematic that original OEM brake lining assemblies and drum brake linings do not have the E-mark required by the UNECE Regulation No. 90. As a result, third countries may see them as non-compliant and ban their import.

Pre-export verification of conformity programs

Among countries which (at least partly) accept UNECE regulations are those which resort to the so-called pre-export verification of conformity programs (PVoC). These countries (mostly developing ones) delegate the conformity assessment of imported products (including vehicle parts) to external companies accredited by the governments. The structure of PVoC programs is in most cases very similar. The regulated goods are subject to a pre-export inspection and require a Certificate of Conformity issued by the accredited agency for each shipment.

The certificates show that products comply with the applicable national standards, technical regulations, approved international standards or manufacturer's specifications. Here, however, the problem is that the detailed requirements (i.e. what standards must be met, what kind of documentation must be provided, etc.) for respective part categories are normally not publicly defined by the accredited agencies. They are rather communicated in a bilateral contact which makes the importation process a little bit obscure and susceptible to abuse.

Labeling

Besides the diverging technical requirements, local certifications and approvals or documentation requirements, one of the biggest obstacles to trade in vehicle parts are national labelling requirements. Very often, they apply no matter if a country recognizes UNECE regulations or not. Labelling requirements are understandable in countries with national technical standards for vehicle parts and national certification systems (such as China and its CCC certification and labelling). In this case, the label is a sign that the product was tested and meets the local safety standards. However, additional labelling requirements do not make much sense when a country basically recognizes UNECE regulations. Vehicle components tested according to UNECE normally bear the so-called E-mark, which is a type approval mark given by a certifying authority. What is then the use of requiring an additional national label to be put on the part?
The most striking example is South Korea which is a member party of UNECE WP. 29 and, moreover, has a Free Trade Agreement with the EU also covering the issue of mutual recognition of UNECE type-approved parts. It nevertheless requires 13 categories of imported vehicle parts to bear the local KC marking, which is viewed by EU vehicle manufacturers as unnecessary, since car parts made in the EU already receive the E-marking showing compliance with UNECE regulations. The EU has even approached the Korean government on this issue since the KC labelling requirement means a significant burden for EU exporters because "once parts arrive in Korea, they must be unpacked, marked and packed again, which requires extra facilities and personnel".[10] So far however, the KC labelling requirement persists.

Free Trade Agreements

The Free Trade Agreements (FTAs), like the one signed by the EU and South Korea, are generally aimed at reducing trade barriers, including technical barriers to trade, also for the automotive industry. Obviously, they are welcome by OEMs because they contribute to a greater regulatory harmonization between the UE and its trade partners. Currently, six FTAs addressing technical barriers to trade in the automotive sector are in force or are being negotiated (with South Korea, Japan, Singapore, Vietnam, Mexico and Mercosur). However, as the Korean example shows, they are not a magic solution to all obstacles. It all boils down to the wording of the legal texts: if the parties of the agreement commit to "*accepting on their market products [...] covered by a valid UNECE type-approval certificate as compliant with its domestic technical requirements or conformity assessment procedures,* ***without further testing or marking requirements***" (as it is the case e.g. in Singapore), European OEMs can be

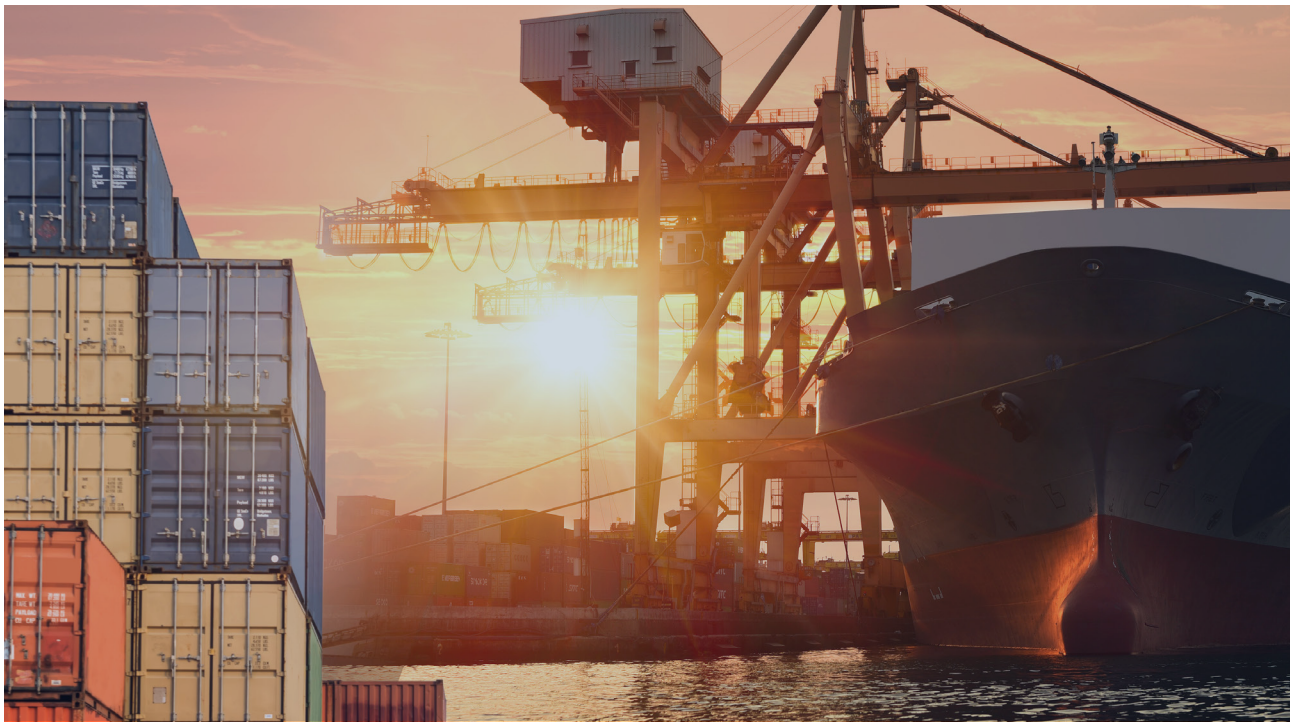
rather relieved. However, the lack of such provisions (like in the EU-Mercosur FTA, where parties only "*recognize UN Regulations of the WP.29 as a **useful reference for the preparation and adoption of domestic regulation***") does not bode well for a future reduction of TBTs and elimination of certification and labelling requirements in the mutual trade.

Radio components

The last but not least, vehicles are extremely complex products consisting of more or less 30 000 parts, many of which use radio spectrum and other ICT technologies. As a result, they may qualify for local radio type approvals in many countries (which are usually separate from the conformity assessment systems for regular products without radio technologies). Unfortunately, radio regulations of many countries ignore the fact that vehicles are full of **built-in radio components** and that OEMs may need to place these products on the market as spare parts as well. As a result, a radio type approval may not be required for built-in radio components (since they are covered by the *UNECE Regulation No 10 - Uniform provisions concerning the approval of vehicles with regard to electromagnetic compatibility*) but when exactly the same original components are supplied as spare parts, a local radio type approval (and a labelling!) may be required. Needless to say, such type approvals may drastically drive up costs for OEMs, negatively affecting their aftersales business or even preventing them from ensuring a market supply with spare parts. Regulations of only few countries address the issue of applicability of local radio type approval to vehicles and their radio components. The lack of clear statements unfortunately causes a lot of legal uncertainty.

Conclusion

On top of all aforementioned challenges, European OEMs must deal with the fact that the automotive regulatory landscape and regulations for automotive products are changing permanently. Countries keep issuing new laws containing new technical, certification, labelling and import requirements for vehicle parts. New conformity assessment systems are created, and existing ones are being modified. Product scopes affected by regulations are also regularly changed. Without a permanent monitoring of new requirements and timely analyses of new regulations affecting vehicle parts, European OEMs may very quickly fall out of compliance and end up unable to supply foreign markets and provide consumers with spare parts for their vehicles. The question is whether OEMs should build up manpower to deal with all these laborious tasks and requirements by themselves or whether to outsource at least some parts of these activities to reliable experts.



FOOTNOTES

[1] WTO, TBT Notification report, http://tbtims.wto.org/en/PredefinedReports/NotificationReport?Year=2019&YearFrom=1995&YearTo=2020&FilterType=0

[2] UNCTAD, International classification of non-tariff measures, Version 2012, https://unctad.org/system/files/official-document/ditctab20122_en.pdf

[3] WTO, Standards and safety, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS

[4] Moreover, it manages three Global Agreements on vehicles: 1958 Agreement (UN Regulations); 1998 Agreement (UN Global Technical Regulations); and 1997 Agreement (UN Rules on Periodic Technical Inspections).

[5] Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions

[6] Further referred to as UN regulations or, alternatively, UNECE regulations.

[7] See: European Commission, Status of translation and publication of UN Regulations in the area of vehicle approval, https://ec.europa.eu/docsroom/documents/43604

[8] Automotive Regulations and Certification Processes: Global Manufacturers' Perspective, U.S. Automotive Industry Coalition Meeting Andean/Mexico Delegation December 7, 2016, https://share.ansi.org/Shared%20Documents/Standards%20Activities/International%20Standardization/Standards%20Alliance/ANDEAN_Mexican%20Delegation%20Visit/Powerpoints/Day%203/MEMA/Presentation%20for%20Andean%20and%20Mexico%20Delegation%20draft%20v6.pdf

[9] In the UE, several vehicle components must receive a separate type approval in the whole vehicle type approval procedure

[10] European Commission, Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea, Final Report, May 2018, https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf, p. 464-465

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