



European Commission consultation on the draft new section dealing with information exchange in dual distribution, which is intended to be included in the Vertical Guidelines

Feedback of the Alliance of European Car Dealers and Repairers (AECDR)

About AECDR

The Alliance of European Car Dealers and Repairers with 10 national automotive trade associations and 5 European brand dealer associations represents and promotes the interests of 57.500 franchised dealers and authorized repairers. In total these companies employ 1.175,000 people.

Introduction

On 17 September 2021 AECDR contributed to the public consultation on the draft revised texts of the Vertical Block Exemption Regulation and Guidelines. AECDR provided the EC with some additional background comments and specific feedback on draft guidelines. One of the comments in that document referred to dual distribution and information exchange. AECDR pointed out that simply exempting dual distribution below a market share threshold would not be adequate in automotive retail as most OEMs and their respective retail networks have national market shares below 10 %. Nonetheless, most OEMs have a huge competitive advantage over their dealers as a result of

- the dealer's significant investments in the OEM's franchise and the resulting dealer's economic dependence on the OEM; and
- the substantial controls that the OEM has over the dealer arising from the prescriptive dealer agreements.

In AECDRs view, the blanket exemption of arrangements where this advantage would be reinforced , for example by allowing the OEMs to gather customer data from dealers and then use it for their own retail operations, should not benefit from automatic exemption as a result of the 10% safe-harbour.

Feedback

On this background AECDR welcomes the initiative of the Commission to gather further evidence on this topic which is highly relevant (not only) for the automotive sector and to launch another public consultation on the draft new section dealing with information exchange in dual distribution, which is intended to be included in the Vertical Guidelines. AECDR appreciates that the additional market share threshold of 10% - as we understand it – will be removed from the final VBER. The proposed new approach of the Commission seems to be

much simpler and clearer for the market participants. It is very helpful to have lists of those types of information that will be regarded as necessary for the optimization of production or distribution of contract goods and services and those that are not necessary.

Nonetheless we would like to draw the Commission's attention to a few points which might need further clarification. In para 14 (b) it is written: "*Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless this is necessary for the supplier or the retailer to adapt the goods/services to the customer's requirements, or to provide warranty or after sales services.*" For further clarification it should be added that the OEM recipient must continue to use the granular data it obtains in this way only for the narrow purpose for which it was obtained.

Regarding customer data which the OEM recipient receives from the dealer it should be added that any restriction imposed by the OEM on the dealer's independent use of that data (subject to data protection laws) would not be regarded as necessary to improve the production or distribution of the contract goods or services by the parties.

It goes without saying that the restrictions regarding the possible sharing of customer data do not release the supplier from his contractual obligations and his duties of good faith, fair dealing and loyalty against the retailer.

Moreover, expecting a complete transition of the whole automotive value chain in the coming years, AECDR would ask the Commission to consider the following suggestions:

- to introduce a monitoring process in order to observe the deployment of the new guidance and assess whether it could be necessary in the future to issue specific or new guidelines on the exchange of information in dual distribution;
- to introduce a specific list of examples of potential exchanges of information that can result in anticompetitive practices or effects in every circumstance (i.e. black list);
- to propose a set of principles or a code of conduct for commercial information exchange between OEMs and dealers which would grant more legal certainty to all involved parties.

This might be a proposal merely for the automotive sector but keeping in mind that according to DG COMP the actual MVBBER might be prolonged by 5 years while the accompanying guidelines will be amended this could be an opportunity to ensure further clarification for OEMs, importers and dealers. Regarding a proposed Code of Conduct AECDR would like to emphasize that a sector specific Code has already existed since more than 10 years. That Code was agreed upon with the support of the Commission after the former Motor Block Exemption Regulation 1400/2002 elapsed in 2010.

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signed Antje Woltermann

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