

FACONAUTO: VBER CONSULTATION POSITION PAPER

In the framework of the ongoing public consultation of the European Commission (“**Commission**”) on Vertical Block Exemption Regulation (“**VBER**”) and the guidelines on the VBER (“**Guidelines**”) that will end on 17th September 2021, FACONAUTO, the Federation of Spanish Automobile Dealers, would like to provide, with this position paper (“**PP**”), its view on the draft of the VBER and the Guidelines published on 9th July 2021 (“**DRAFTS**”).

First of all, we must clarify that FACONAUTO as well as other European federations shares the fact that the DRAFTS do not provide a clear guidance to the existing conflicts between the dealers and the manufacturers in the automotive sector, including those which have previously been brought to the Commission’s attention.

From our point of view, the DRAFTS do not protect the primary characteristics of the dealership contract, which is the most common relation in the automotive sector nowadays. As a result of this, OEMs and dealers hold an unequal relationship in the current trend towards the Agency contract.

However, the Commission did envisage particular solutions to these problems and proposed, in its different reports after both public consultations, to give legal certainty to all possible relations from the perspective of the VBER. FACONAUTO considers that none of these proposals, with which FACONAUTO agreed, as stated in our different reports, crystallised in the current DRAFTS.

The abovementioned are the reasons why the DRAFTS do not fit the minimum requirements for the automotive sector. On the other hand, the following lines develop, succinctly, the main problems that need to be solved, according to FACONAUTO.

i. Direct sales

First of all, in a model of dual distribution, a manufacturer sells the product directly to the final customer, making it a direct sale and competing directly with its dealers. In this scenario, whilst dealers must comply with severe rules and standards to be on the market based on the conditions set forth by the manufacturer, the latter, having a double role of supplier and competitor, is selling the product without these limitations.

In particular, page 156 of the SWD 2020, paragraph 4.2.4 states that “*Article 2(4) of the VBER sets out the general rule that the VBER does not cover vertical agreements entered into between competitors as defined in Article 1(1)(c) of the VBER. However, it makes certain exceptions to this general rule for non-*

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reciprocal agreements between competitors. These are agreements where the parties act in different economic roles and do not act on the same level of trade (i.e. agreements where only one party distributes for the other). Such non-reciprocal agreements can benefit from the VBER if the supplier is a manufacturer of goods who also acts as a distributor for these goods or a service provider who operates at several levels of trade, whereas the buyer is only a distributor (i.e. it does not compete with the supplier at manufacturing level) or only operates at the retail level (i.e. it does not compete with the supplier at the level of trade at which it purchases the contract services). These situations are typically referred to as dual distribution. At the time of the adoption of the VBER, taking into account that dual distribution was rather limited in scope back then, the potential impact of the competitive relationship between the parties at retail level was considered to be of lesser importance than the potential impact of the vertical agreement on competition in the supply or distribution of the goods or services concerned.¹⁷⁰ Paragraphs 27 and 28 of the Vertical Guidelines provide additional guidance on the application of Article 2(4) of the VBER”.

The exponential growth of direct sales in many European states makes it difficult for many car dealers in certain markets to continue in business. As can be seen from reports in response to the Commission’s public consultations, and specifically in the reports sent by FACONAUTO itself, in certain European countries, such as Germany and Spain, direct sales already exceed 50% of total sales.

This conflicts with the principles of selective distribution, as products should be reserved for resellers meeting certain criteria; and it is contrary to the most basic principles of the contractual relationship to discriminate against those that have invested in supporting a brand by selling through channels that are not required to make the same investments. This type of free-riding empties selective distribution of its value.

The Commission, aware of the problems that this situation creates for competitors and consumers, raised the possibility of regulating direct sales in one way or another, but omits any regulation on this topic; nor does it allude to the acute problems that this issue presents in terms of driving investment, quality and service (which are also important parameters of competition, alongside price).

In light of the new market trends – of which the Commission appears to be fully aware – the DRAFTS should have therefore also assessed the specific impact of dual distribution in the motor-vehicle sector at retail level.

ii. Online sales

It is our mutual understanding that the current market is increasingly moving towards a model based on online sales and this evolutionary market process cannot be stopped.

At the same time, however, we believe, in compliance with the core of competition law rules, that the evolution of the market must ultimately be for the benefit for the consumer. To this

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end, the proposed uniform distribution rules are not suitable for particularly valuable, complex and important products such as vehicles.

In fact, the peculiarity of the automotive sector cannot be overlooked and therefore, we believe that motor vehicle distribution cannot be regulated in the same way as the distribution of other products.

FACONAUTO firmly believes that, in the automotive sector, consumer protection, which should be at the heart of any review, is likely to be achieved only through the preservation of the competitive dynamic between manufacturers and distributors. To achieve this goal, specific rules for the automotive sector are needed.

In particular, we draw the Commission's attention to the fact that, without careful intervention or more tailored regulation, dealership (including agency) contracts for the resale of motor vehicles will allow manufacturers to disintermediate dealers, not only cutting them off from consumers and the market, but increasingly and rapidly eroding the reference market, on which the dealers have based their investments.

In the automotive sector, selective distribution schemes are based on prescriptive standards that dealers must comply with. Conversely, through online sales, manufacturers operate at the same level as their own dealers (*i.e.*, in competition with them), albeit through a different channel. The same manufacturers sell vehicles without having to comply with the constraints (in terms of investments, facilities, equipment, training costs, financial cost, organization, warehouse) which, as suppliers, they do impose on the dealers, who are contractually bound to respect them in order to continue to be engaged in the sale of cars, avoiding the risk of a contract termination. As a consequence, dealers are cut off from the market not as a result of a fair competitive challenge but because of the dual role of manufacturers, who, as suppliers, impose on competitors at the retail level costs in terms of premises, showrooms, organization, training, warehouse and financials, to which, conversely, they are not subject to while selling directly online.

Thousands of dealers have previously entered one or more dealership contracts with respective manufacturers basing their business plan on the evaluation of the significant investments that they were required to make versus the market potential they had estimated at that time. However, manufacturers have now chosen to change the landscape: first, by entering the final-consumer market either directly or by means of resale platforms, which has unilaterally reduced the dealer's market potential, while forcing dealers to subsidise direct distribution; second, by imposing increasingly onerous controls on dealers which limit their competitive offering (ultimately resulting in fewer dealers)

The SWD 2020 took into consideration some of the issues that the undersigned parties consider important for dealers. However, as mentioned earlier in the text, these issues were not sufficiently considered in the DRAFTS.

iii. Sales concession agreement/Agency agreement

FACONAUTO considers that the DRAFTS offer an important value when considering the basic characteristics and limits of the definition of genuine and non-genuine agency agreements. However, the DRAFTS do not help providing legal certainty for the sales concession agreement, which is the most important type of relationship in the automotive sector nowadays and which led to more important results, such as the investments that a dealer need to face in the framework of this relationship.

We note that the role of a dealer does not fit with the characteristics of the Agent as defined in the DRAFTS, whose legislation clearly has a perspective aimed at contents and dimensions very different from those of a distributor in the automotive sector. With reference to Agency, several national federations in the automotive sector have been informed that many manufacturers intend to propose (or, more likely, impose) on dealers a transformation of the dealership contract into an agency contract, a fact which is not only increasingly reported by the press, but which already happened in several countries like Sweden and Germany.

As matters stand, the dealer acts in its own name and entirely bears the commercial risk, purchasing the vehicles directly from the manufacturer and reselling them to the customers. The agent, on the other hand, acts on behalf and as a collaborator (more precisely a sales consultant or introducer) of the principal, promoting the conclusion of sales contracts with third parties in the name of the principal.

Although it may seem that the agent and the dealer perform a very similar function in terms of sales process, there is no comparison between the two roles in terms of complexity, legal responsibility and liability towards the customer, or the investments, processes and standards that need to be complied with, as well as the financial effort and commitment needed. A dealer relationship implies strict contractual obligations, both towards the manufacturer and the customer. Liabilities are shared by the dealer with the manufacturer, alongside duties which, to be properly performed, require specialized skills and workforce, as well as ongoing and long-term investments.

Furthermore, the genuine agent will not be allowed to sell ancillary products, such as financial plans, guarantee extensions, insurances or long-term rental plans, thus cutting out a truly relevant part of customized customer services, as well as a relevant source of business and profitability, if compared to current dealer contracts in force. In this respect, the standards do not apply in the same way to all actors involved in the distribution chain. The aforementioned ancillary products, for instance, have traditionally been one of the formulas to make the distribution activity profitable. In recent years, the sale of these products by dealers has been declining due to the appearance of third actors, such as the manufacturers' financial entities, which have been usurping the business without the obligation to make investments or comply with standards. There is no mention of such problems in the DRAFTS.

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Having said that, a wholesale shift from selective distribution to agency contract would cause further damage if all relevant actors proceed abruptly due to the lack of proper protection of all options from the future Regulation. For dealers, they would be exposed to the risk of being unable to amortize huge investments to comply with manufacturer standards; they would also be subject to even greater control, which could reduce turnover, as well as a loss of their customer base.

With regard to the loss of the dealer's customer base, which is the dealer's revenue generating business base, manufacturers will use the database (belonging formerly to the dealer, but conceded to the manufacturer under an agency arrangement) to pursue direct sales, since these effects are equally not protected by the DRAFTS. The manufacturer will manage all the marketing and promotion functions in the place of the agent, who will no longer have the financial means to sustain these tasks. As a consequence of revenue and margin reductions, the agent will also need to right size and streamline his own organization, thus reducing the possibility to interact with his market. Further to this, not being able to finalize the sale with the consumer, the genuine agent would lose a major stake of his used car business due to the missing revenues generated by used cars trade-ins. To be well noted: the latter aspect will represent a major hurdle for the European Union in pursuing the challenging goals set by the European Green Deal, namely the timely replacement of the aged and polluting car park with more modern and less-to-zero polluting vehicles.

At the same time, without a proper and clearly regulated compensation, the transition from dealer to agent contract would mean a clear and straight forwarded expropriation of the dealers' core business levers by the manufacturer, including the non-rewarded use of their facilities as customers showcase and for test drive purposes.

The DRAFTS should have provided more certainty and set clear rules for manufacturers in order to mitigate their market strength towards distributors. Indeed, only legislative certainty can ensure a level playing field in the automotive industry. A clear jurisdictional framework is required. In the absence of legislative certainty, the effect will be the disintermediation of dealers and subsequently consumer harm.

FACONAUTO understands and appreciates the Commission's efforts to provide greater legal certainty to the VBER. However, absent further refinements, such regulatory changes still do not protect the most basic interests of the majority of actors in the automotive sector or consumers.

However, we also have the opportunity to study and provide solutions to the specific problems of one of the most important industries of the Continent (more than 7% of GDP, well over 10% in some of the larger economies). The Commission is currently considering

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the renewal of Regulation 461/2010, on the automotive aftermarket. We urge the Commission to start a study and hearing process that will result in a general regulation for the automotive sector, including sales and after-sales, and that will provide a solution to the problems raised in this document and the reports sent by all parties after every public consultation so far.