

PUBLIC CONSULTATION OF REGULATION 330/2010 ON VERTICAL AGREEMENTS

Introduction:

Regulation 330/2010 regulates vertical agreements in the EU and expires in May 2022.

Since the EC decided that the automotive sector did not need specific competition regulations in the sales area, we lost the little protection that Regulation 1400/2002 granted to dealers, official agents and authorized workshops vis-à-vis manufacturers and only in the after-sales area, the EC kept Regulation 461/2010 specific to the engine.

The relationships between manufacturers and distributors and agents have always been unbalanced, with dealers, official agents and authorized workshops being the weak part of the contractual relationship, but now their economic dependence increases more and more. We no longer have the protection granted by art. 3 of Regulation 1400/2002 (motivation to cancel; freedom to transfer the business to a member of the network; possibility of going to an expert third party in case of dispute, etc.) and yet the sales objectives are imposed unilaterally, the Remuneration is mainly based on variable criteria, investments are very important and risk is not accompanied by adequate profitability or a safe and stable environment.

In addition, the MADE trends (Mobility, Automation, Digitization and Electrification) are causing a paradigm shift in distribution to which the 2010 regulations do not know how to respond.

The European Commission is in the evaluation and public consultation phase of Regulation 330/2010 and FAGENAUTO is providing its observations.

It is noteworthy that two transcendental events have occurred in this context: On the one hand, the Austrian Judgment in the Büchl Case, by which the Austrian Supreme Court condemns Peugeot for abuse of a dominant position and forces it to cease certain practices (link remuneration for customer satisfaction surveys; transferring costs of standards auditing, remunerating guarantees below cost or that its subsidiaries compete unfairly with the private network). And, on the other hand, the massive cancellation of all the contracts of the Stellantis Group brands, both sales and after-sales, when the future regulatory framework is not yet known as of May 2022.

FAGENAUTO wishes to forward to the EC the following observations on Regulation 330/2010:

1. Direct sales:

- We had asked that direct sales be limited to a maximum of 20% of the total market share.
- The Commission proposes two concepts:
 - i. Take as a reference the combined quota of the supplier and distributor and not that of the supplier.
 - ii. Differentiate two tiers of market share:
 - Below 10%, direct sales and information exchange would be allowed without limitation
 - Between 10-30% quota, direct sales allowed, but not the exchange of information.

- FAGENAUTO points out in this regard that, if the EC maintains this approach:
 - i. Reduce the threshold of the second step from 30% to 20%
 - ii. If what you want is to protect horizontal competition, Regulation 1218/2010 on horizontal agreements establishes the exemption threshold at 20% and not at 30%.
- Finally, if brands sell directly in the market, they should reduce the investments that they require from their distributors and official agents, or compensate them appropriately.

2. Duality of prices:

- The EC seems to want to allow different prices at the wholesale level depending on the final destination, whether online or physical channel (until now it would be prohibited).
- FAGENAUTO agrees in principle as long as the distributors and official agents have supply conditions that allow them to compete effectively in the online channel.
- Distributors and official agents who invest in facilities for physical sale and add value to the buyer, but must also be in a position to compete in the online channel.

3. Online sales platforms:

- The EC points out that a platform cannot be an intermediary and in turn operate in the retail channel. You would not benefit from the exemption.
- Manufacturers would be assimilated to this figure if they operate in the retail channel and also mediate in the online channel, collecting data from their networks, with or without remuneration.
- It should be noted that dealers, official agents and authorized workshops provide manufacturers with customer data in a systematic and routine way, so the purpose and sharing of said data between manufacturers, distributors, official agents and Authorized workshops.
- Aside from personal data, data on the vehicle or data generated by the vehicle, whether considered personal or not, are indisputably controlled by OEMs. Predictive sales and repairs, remote diagnostics, or new MaaS proposals should be open to fair competition.

4. Pricing policy:

- The EC wants to maintain the prohibition of fixed or minimum prices.
- FAGENAUTO considers that attention should be paid to the indirect imposition of resale prices. The practice of discounts and promotional campaigns obliges distributors to adhere to them if they want to be in the market, which means that they do not have room for maneuver to establish their own resale prices.

- This, together with the evolution of salary margins towards variable concepts that depend on customer satisfaction surveys and compliance with standards, may increase dependence on the manufacturer and indirectly imposed retail prices.
- The Austrian judgment in the Büchl case mentioned above, drew attention in this regard, stating that the dealer was not free to set its own prices and forcing the brand to change its pricing policy.

5. Distributors who also operate as agents:

- At FAGENAUTO we analyze the consequences of establishing a network of genuine agents using distributors or official agents who had already made investments when they belonged to the network of distributors and official agents of the same brand.
- FAGENAUTO considers that the distributor and the official agent should be adequately compensated. As the agent cannot bear any financial or commercial risk, if the agent is going to use investments made when he was a distributor or official agents, he must be compensated, and furthermore, that compensation must be expressly separated and differentiated from the remuneration or commission delivered as new agent (whether you were formerly a distributor or official agent of the distributor and the manufacturer as was the case up to now)

6. Current Agents:

- In relation to the above and the implications of competition law with the agency model, we also wonder about the situation of current agents. Traditionally, commercial networks are structured in a primary network of distributors who had a contract with the brand and a secondary network of agents who signed an agency contract with the dealer, while in the majority of manufacturers, in the after-sales area the contract of authorized workshop of the secondary network sign it directly with the brand.
- We wonder where the agents who belong to this secondary network and who have an agency contract with independent distributors are left if, in the future, these independent distributors become genuine agents. What implications, if any, may your current agency contract have in relation to Article 101 TFEU in relation to territorial limitation, clients, product, price, etc.? It is absolutely necessary to bear in mind that although the agency contracts were signed with the distributor, who set the selection criteria to be met, it was the manufacturers in all cases who in turn and through their own personnel, ensured compliance with them.

7. Customer and vehicle data

- FAGENAUTO wants to draw the attention of the European Commission to the importance of customer data and the data generated by the vehicle, both those that are considered technical and those classified as personal.
- The data generated by the vehicle is controlled by the manufacturers. Predictive sales and repairs, remote diagnostics or new mobility proposals must be open to fair competition.
- It is important to protect the privacy and personal data of the customer, but also the right of competition in access to technical information generated by the vehicle.

- Distributors, official agents and Authorized Workshops are obliged to transfer their customers' data on a daily basis, and yet they are not remunerated for this activity.

8. Authorized repair contract:

- Regulation 330/2010 applies to vertical agreements in the sales area. Authorized repair shops also specifically have their Regulation 461/2010.
- Stellantis has massively canceled all contracts, both sales and after sales.
- What is the link between sales and after sales when canceling all contracts? The brand indicates that it is going to offer authorized workshops a new contract. It will be necessary to check if it respects the criteria of qualitative selective distribution, with a network, the current one, which already enjoyed the trust of the brand. Likewise, it is absolutely necessary that the new selection criteria do not represent a tool in the hands of manufacturers to covertly restructure their current networks. In this sense, the new selection criteria that are proposed must be adapted to market demand. At this time, only a change in the selection criteria that affects the fleet of electric vehicles would be justified.

3. Financial services:

- In both the agency and independent distributor models, FAGENAUTO wants to draw attention to financial services and the freedom that distributors and official agents should have to offer the financial service of their choice to their clients, whether we talk about sale of vehicles, new, used or workshop activity in all its variants, maintenance, repair or bodywork.
- Will imposing ancillary services be a serious restriction of competition?