

Renewal of European Regulation N°330/2021

Challenges within the automotive distribution and the European regulatory framework

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The European automotive distribution, services and mobility sector accounts for 336,000 companies offering 2,9 million jobs, most of the companies being SMEs.

In order to be able to sell new vehicles, automotive dealers must sign a distribution contract with their supplier. These 'authorised' dealers shall comply to the brand identity of its supplier as well as to respect the distribution and repair agreements. Significant investments are needed to comply to all these agreements. In addition, the distribution contract is accompanied by annual commercial policies, setting sales targets which are linked to remuneration systems. The relationship between the distributor and its supplier can only be in balance if, in return for the investments made, the distributor is not exposed to the risk of an abrupt termination of his contract.

The European Commission's exemption regulation N° 1400/2002, specific to motor vehicle distribution agreements, took into account the need for a balanced relationship. Suppliers were obliged to give reasons for terminating the contract and authorised dealers could freely transfer their business within the same network. However, in 2010, the Commission esteemed that inter-brand competition in the automotive sales markets had reached a sufficient level of intensity and that it was no longer necessary to maintain a sector-specific exemption regulation. The Commission decided not to renew it calling on the Member States to supplement provisions within their national law (in France for example, in the absence of remedial provisions the economic dependence of dealers increased over the last ten years).

The automotive distribution sector in Europe has been shook up by Chevrolet's withdrawal from the European market in 2013, and more recently by Stellantis' terminating its entire distribution network. In both cases, a simple two-year notice period has been given.

This imbalance in contractual relations between manufacturers and their networks has been further aggravated by increasingly aggressive commercial policies. We refer to the Austrian Cartel Court's decision of 22 March 2021 setting out in detail the outcome of their findings.

The Austrian Supreme Court condemned forms of market power abuses; banned Peugeot from tying the dealer's premium payments to customer satisfaction surveys; reducing the dealer's margin if they do not reach sales targets; banned from competing with dealers through subsidized vehicle prices; banned from passing on the costs of its mystery shopping and audit system to dealers; accused them from using a system for guarantee and warranty work and hourly rates that did not cover the dealers costs; etc.

In addition, and under the pretext of the GDPR rules, most manufacturers request their network to provide them with their customer data aiming to approach them directly. The objective would be to create a common database, allowing manufacturers to create a global customer file with updated data.

This transfer of data is imposed by the manufacturers. In addition, they request these data to be updated. In many cases, these obligations are not governed by an appropriate legal regime and often there is no economic compensation foreseen for the distributor. This raises legal questions regarding the responsibility and access to this data, as well as the essential economic issue of protecting the value of the distribution network, of which customer and prospect data are an essential element.

Gathering data seems to serve the manufacturers' objective to develop direct sales and thereby bypassing its distribution network. However, their network is requested to make massive investments to meet the standards to which now shall be added the costs of accessing the database which distributors themselves are supplying.

In-vehicle data or data generated by vehicle, either considered personal or not, are unchallenged controlled by OEMs. Predictive sales and repairs, remote diagnosis or new MaaS proposals, should be open to fair competition. Consumer data, but also the technical information generated by vehicle will have an impact on competition, and should therefore be included into the new Vertical Block Exemption Regulation.

Moreover, direct sale is in total contradiction with the use of a selective distribution system, both from a legal point of view (a selective distribution network implies that the products distributed are reserved for distributors which are selected on the basis of specific criteria) as well as from an economic point of view (with respect to the investments made by the distributors).

We are very concerned about the issue of financial services. In both models, agency or 'distributors', will they be free to offer the financial service of their choice or could the OEM impose their own one? To impose supplementary services will this be a hardcore restriction?

European regulation in preparation: renewal of Regulation N° 330/2010

Since 2013, the motor vehicle distribution has been governed by two European regulations: EU Regulation N° 330/2010 applicable to distribution agreements and EU Regulation N° 461/2010 concerning agreements relating to motor vehicle after-sales. These two regulations will expire respectively in May 2022 and May 2023. CECRA has participated in all the consultations carried out by the European Commission.

Concerning Regulation N° 330/2010, the European Commission assessed in September 2020 that the conditions of distribution have changed considerably in recent years, in particular due to the rise of online sales and new players such as online platforms. On 9 July 2021, the Commission published its draft regulation in which it proposes a number of changes and launched a public consultation.

CECRA's proposals regarding the renewal of the Commission Regulation (EU) N° 330/2010 of 20 April 2010

In the context of the draft regulation published by the European Commission on 9 July 2021, CECRA wishes to highlight the following points:

1. Concerning direct sales:

We had asked that direct sales should no longer be exempted above 20% of a manufacturer's total sales. The Commission proposes a mechanism based on two market share thresholds:

- if the combined market share of the supplier and the distributor on the retail market does not exceed 10%, direct sales and information exchanges remain exempted,
- if the same market share exceeds 10% but does not exceed 30%, direct sales remain exempted but not information exchanges.

This mechanism is more complex than the one we had proposed and gives rise to two main remarks:

- Exchanges of information can have, as the Commission points out, significant negative horizontal effects on competition, regardless of the market share of the companies involved. Moreover, in certain cases, exchanges of information constitute a restriction of competition by object (see Horizontal Guidelines, points 72 to 74). These exchanges should therefore not benefit from the exemption, even below a market share threshold of 10%.
- Direct sales should not benefit from the exemption above a market share threshold of 20%. The 30% threshold proposed by the Commission is the exemption threshold provided for in Regulation 330/2010 and the draft new regulation on vertical agreements. Since the Commission intends to prevent negative horizontal effects of direct sales, the 20% exemption threshold for horizontal agreements should be used.

2. Concerning dual pricing: the Commission proposes to allow suppliers to set different wholesale prices depending on whether the products are sold in a physical store or online. Dual pricing would therefore no longer be considered a hardcore restriction.

CECRA agrees with this approach as it will allow suppliers to remunerate physical stores for providing services to customers. However, we **request strongly that suppliers should by no means be able to set more advantageous prices online than those its distributors could offer online taking into account the conditions granted to them by the supplier for these same sales. Otherwise dealers would be excluded from the online sales market.**

3. **Regarding sales platforms:** In its draft, the Commission proposes to regulate platforms distributing goods and services. The text provides that a "hybrid" internet platform that is both an intermediary and a retailer will not benefit from the exemption. Manufacturers which are gathering data from their networks, whether or not subject to remuneration, could be assimilated to these hybrid providers of online intermediation services and therefore would not benefit from the exemption regulation.

CECRA attracts the Commission's attention to the problem of data collection requested by suppliers. A precise and adequate legal and economic framework should be defined for the transfer and sharing of customer data removing any ambiguity about the value of the data and consents transmitted, the access to this data, the use of the data, their management by a possible trusted third party and their fate at the end of the contract.

4. **Concerning the resale price maintenance:** the Commission intends to maintain the prohibition of minimum resale price as a hardcore restriction (black clause).

CECRA agrees. However, we **ask the Commission to clarify the notion of indirectly imposed resale price and its application within its Guidelines.** The development of the share of variable discounts to the detriment of basic discounts, as well as the increased promotional actions which distributors are called upon to apply its sales conditions, might lead to indirectly imposed resale prices.

5. Regarding **agency agreements**, CECRA informed already the Commission about his position as far as the working paper on "Distributors that also act as agents for certain products for the same supplier".

CECRA insists on the need that all specific investments and costs of the agent are covered by the supplier. We agree on the fact that the form of the compensation can be either in percentage either in a lump sum, but **the compensation must be completely separated from the commission.** This should be mentioned explicitly in the guidelines. When OEMs make use of previous investments (agents who were dealers), the investments should be reimbursed separately (see recital 37 of the Guidelines).
