ACEA COMMENTS ON THE DRAFT VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES

INTRODUCTION

The European Automobile Manufacturers' Association (ACEA) generally welcomes the European Commission's proposal to revise the Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and the accompanying guidelines on vertical restraints as issued on 9 July 2021.

We believe the current VBER still is fundamentally fit for purpose and requires only targeted updating. In our view, most of the proposed modifications will serve to modernise the regulatory framework, improve clarity and legal certainty, and ensure greater efficiency and coherence. More specifically, we appreciate the updating of the rules regarding online and active sales restrictions as well as the guidance on agency agreements.

Nonetheless, we have major concerns regarding the proposed treatment of dual distribution agreements. We believe this could have serious unintended consequences for motor vehicle manufacturers. Similarly, the rules on fulfilment contracts appear inadequate for our sector. Finally, we think the new VBER should permit companies to use sustainability criteria in selective distribution systems.

DUAL DISTRIBUTION

We highly welcome the extension of the exemption for dual distribution agreements to agreements involving importers and wholesalers. In our view, the current limitation of this exemption to agreements involving manufacturers only is an anomaly that requires correction. We appreciate the Commission's intention to rectify this.

At the same time, **we are very concerned about four specific elements of the Commission's proposal for dual distribution agreements: the relevant market, the level of the market share threshold, the assessment of any information exchange between the parties, and the treatment of "hybrid platforms".**

Relevant market

We believe the retail market is not the appropriate market to assess dual distribution agreements.

We consider that defining market shares at retail level is very difficult and will create considerable uncertainty for businesses. As market shares vary from one region to another, a situation may very well arise where the aggregate market share of parties to a dual distribution agreement is below the threshold in some regions and above it in others. This would make it difficult for companies to apply a uniform distribution system across the EU or even within one country.

Moreover, it would greatly increase compliance costs since companies would need to make several market analyses, i.e., one at retail level for the specific 10% market share threshold for dual distribution agreements and another at purchasing level with regard to the general 30% market share threshold. The analysis at retail level would be particularly complex since it would require assessing 30 to 40 dealer groups in each of the larger Member States. Since market shares are not stable, the assessment would need to be repeated on a regular basis. In the worst case, manufacturers would need to change their contracts or practices back and forth. Even if a grace period were applied (see below), this would provide only temporary relief.

To ensure compliance, companies engaging in dual distribution might have to monitor sales of their distributors on a continuous basis. This monitoring would cover not only sales of products of the company's own brand but also sales by its distributors of products of other brands. The collection of the required data could be considered an information exchange. Thus, companies wishing to ensure compliance with EU competition rules on vertical agreements might be forced to engage in practices that are considered sensitive under EU competition rules on horizontal cooperation. That does not make sense in our view.

We think it would be more appropriate to define the market share at purchasing level. This would be consistent with the application of the general 30% threshold in the VBER, which equally applies purchasing level. We understand the European Commission made a conscious decision when adopting Regulation 330/2010 to define the market at purchasing level for some of the reasons mentioned above. We do not see any compelling reasons to reverse this decision.

Market share threshold

We believe the market share threshold should be set at a level higher than the 10% proposed by the Commission.

Since agreements between parties whose aggregate share of the relevant market does not exceed 10% do not appreciably restrict competition according to the Commission's "de minimis" Notice, the VBER does not contribute to increasing legal certainty at all.

Moreover, commercialization agreements between competitors whose aggregate share of the relevant market does not exceed 15% are presumed to comply with EU competition rules according to the Commission's guidelines on horizontal cooperation. Paragraph 240 of these Guidelines says that "commercialization agreements between competitors can only have restrictive effects on competition if the parties have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 15%. In any event, if the parties' combined market share does not exceed 15%, it is likely that the conditions of Article 101 (3) are fulfilled."

The Horizontal Guidelines specifically refer to "limited agreements that only address one specific commercialization function, such as distribution, after-sales service, or advertising". This implies they cover dual distribution agreements of the type addressed in the VBER.

To ensure legal certainty as well as coherence between the various EU competition law instruments, we submit that the market share threshold for dual distribution agreements in Article 2 (4) of the VBER should therefore be set at a level not lower than 15%.

One additional aspect that should be considered specifically with respect to Article 2 (5) for the auto sector is that "quantitative selective distribution will generally satisfy the conditions laid down in Article 101 (3) of the Treaty if the parties' market shares do not exceed 40%" according to the Commission's supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles. To ensure consistency, we believe the VBER and the Guidelines should therefore provide that any sector specific rules regarding market shares used for assuming compliance with the conditions laid down in article 101 (3) of the Treaty should apply also with respect to dual distribution agreements.

Finally, we suggest that the Commission use the grace period laid down in Article 7 (d) not only for the application of the general market share threshold referred to in

Article 3 but also to the specific market share threshold for dual distribution agreements included in Article 2. We believe it is fair also in this case to provide companies whose market share is below the threshold initially and then exceeds it with a reasonable period to adapt their distribution systems where required.

Information exchange

We see contradictions between the Regulation and the Guidelines regarding the scope of the exemption for dual distribution agreements.

On the one hand, Article 2 (5) of the Regulation exempts dual distribution agreements if the aggregate market share of the parties does not exceed 30% except for any information exchange between the parties, which must be assessed under the Horizontal Guidelines if the parties' aggregate retail market share is above 10%. This suggests that any potential incompatibility of this information exchange with the Horizontal Guidelines would not affect the exemption of the dual distribution agreement. On the other hand, § 90 of the Vertical Guidelines stipulates that compliance of the information exchange with the Horizontal Guidelines is a condition for the exemption of the agreement.

We believe issues regarding vertical and horizontal competition should be assessed separately under the respective EU regulations and guidelines. Compliance in one area should not be a condition for compliance in another area. Similarly, the lack of compliance in one area should not automatically result in a lack of compliance in another area.

Another contradiction concerns Article 2 (7) of the Regulation and § 91 of the Vertical Guidelines: Article 2 (7) of the Regulation stipulates that "the exceptions of Article 2(4)(a) and (b) shall not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking" which leaves the exception of Article 2(5) unaffected. In contrast, § 91 of the Vertical Guidelines states that suppliers of online intermediation services "cannot benefit from the exceptions for dual distribution" at all which would also exclude the exception according to Article 2 (5).

We therefore suggest amending § 90-91 of the Vertical Guidelines to reflect the wording of Articles 2 (5) and 2 (7) respectively.

In addition, we believe the Horizontal Guidelines should be updated to include clear and specific guidance for information exchanges linked to vertical agreements. While we understand that the review of these Guidelines follows another timetable than that of the VBER, we invite the Commission to issue this guidance as soon as possible to provide legal certainty for companies engaging in dual distribution.

Hybrid platforms

We believe the proposed treatment of “hybrid platforms” could have very serious unintended consequences for the auto sector.

The rules regarding hybrid platforms appear designed for large online platforms with significant market power. However, they could also apply to various other companies including vehicle manufacturers. When vehicle manufacturers offer an online platform to their dealers to sell vehicles and in parallel sell vehicles directly themselves, whether online or offline, they could be considered to fall within the scope of Article 2 (7). In that case, their agreements would not benefit from the exemption. This appears unjustified.

We think online platforms operated by brand owners such as vehicle manufacturers are fundamentally different from the large online platforms targeted by the new provisions in the VBER.

This is because online platforms operated by a brand owner complement the distribution agreements that exist between the manufacturer and its authorized dealers. They serve mostly to support, and complement dealers’ marketing, advertising, and sales activities. By contrast, all large online platform operators are first and foremost providers of online intermediation services.

Also, online platforms operated by a brand owner for the sale of its products tend to be brand specific and thus do not affect inter-brand competition. This means the main reason for excluding dual distribution agreements involving hybrid platform operators from the benefit of the block exemption does not apply to them. This reason is spelled out in Recital 12, which says that “providers of online intermediation services should not benefit from the block exemption established by this Regulation where they have a hybrid function, that is where they sell goods or services in competition with undertakings to which they provide online intermediation services. This is because the retail activities of online intermediation services that have such a hybrid function typically affect inter-brand competition and may therefore raise non-negligible horizontal concerns.”

Consequently, we believe a distinction should be made in Article 2 and the Guidelines between companies for which online intermediation is the main activity (large online platforms) and those for which it is a tool for promoting the saleof their own products within their retail network in the framework of a distribution agreement (vehicle manufacturers and other sectors). The latter should not fall under Article 2 (7) and be able to claim the benefit of the exemption for their dual distribution agreements for the reasons mentioned above.

In any event, we believe the concept of “hybrid platform” should be restricted to companies that provide online intermediation services and sell goods or services *on the* *same platform* in competition with undertakings to which they provide such services. § 91 of the Guidelines should be amended accordingly. This would exclude from this concept companies that sell goods *offline* in competition with undertakings to which they provide an online platform. This is common practice in various other sectors including ours. In the auto sector, direct sales occur typically because certain customers such as leasing or rental car companies or, more generally, buyers of commercial vehicles request to negotiate the purchase conditions directly with the vehicle manufacturer. In other cases, they occur through manufacturers' wholly owned subsidiaries to serve major metropolitan areas where real estate and operating costs are often too high for independent dealers. They are therefore fundamentally pro-competitive. To the best of our knowledge, this practice has never raised competition law concerns.

Article 2(6)

On a separate point, we are greatly concerned that Article 2 (6) stipulates that dual distribution agreements will not be exempted if they, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object to restrict competition between the competing supplier and buyer. We think this broadly worded provision will cause significant legal uncertainty and is redundant since agreements fulfilling the conditions of the VBER should not be subject to any further restrictions. We therefore suggest deleting Article 2 (6).

OTHER ISSUES

Fulfilment contracts & RPM

We welcome the clarification in § 178 of the Guidelines that fulfilment contracts do not constitute retail price maintenance (RPM) under certain conditions but feel that these conditions are unnecessarily strict.

In the auto industry, fulfilment contracts are used traditionally for dealing with multinational corporate customers. Manufacturers often agree centrally on certain discount levels with such customers while the corporate customers' employees go to a dealership of their choice to order their company car (under the previously agreed conditions).

Our issue with the proposed treatment of such contracts is the requirement that the end user should waive the right to choose the undertaking that should execute the agreement.

In practice, this is feasible only in a situation where the supplier assigns certain geographical areas to specific 'fulfilment' retailers. In our case, however, this would restrict the possibility for corporate customers' employees to choose their preferred dealership, not so much in terms of pricing (since the agreed corporate customer rates will apply), but rather in terms of convenience (accessibility, after-sales service).

We think restricting 'fulfilment contracts' to cases where the end user has waived its right to choose the undertaking which should execute the agreement is excessive and overly burdensome. This would make an increased flexibility on the supplier side dependent on an even stronger restriction of the end user who must waive its right to choose a fulfilment retailer to benefit from uniform discounts agreed with the manufacturer.

Such an approach ignores the fact that there may be good reasons – apart from pricing – for an end user to choose the best suitable retailer for fulfilling the agreed conditions which are taken away from the parties' discretion to benefit from the 'fulfilment contract' privilege.

Therefore, we consider that the qualification of fulfilment contracts as not constituting RPM should not be made dependent on the end user waiving its right to choose the undertaking that should execute the agreement. In our view, the waiver should relate only to the right to negotiate the terms of the main agreement (which were set previously between the corporate customer and the vehicle manufacturer in our case).

Sustainability

Considering that companies are increasingly measured on their sustainability performance, we believe the VBER should explicitly permit the use of sustainability criteria, for example in selective distribution systems.

All around the world, companies are increasingly required to improve their environmental performance and to make greater efforts to reduce their greenhouse gas emissions. In the EU, the Green Deal comprises a wide variety of such measures including stricter CO_2 targets for vehicle manufacturers.

In this light, we believe it would make sense for the new VBER explicitly to permit companies to use sustainability criteria within selective distribution systems, for example.

Active sales restrictions

There appears to be a drafting error in Article 4 (c) (iii), where a reference to the third hyphen of Article 4 (c) (i) is missing.

The current version of Article 4 (c) in Regulation 330/2010 prohibits the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

The modified provision in Article 4 (c) (i) of the new VBER, which applies specifically to selective distribution systems, provides for a similar exception in the third hyphen regarding the restriction of territory or customer groups ("except […] the restriction of the place of establishment of the members of the selective distribution system"). However, there is no such exception in Article 4 (c) (iii) regarding the restriction of active or passive sales to end users by members of a selective distribution system.

By contrast, § 220 of the Guidelines explicitly allows for such a restriction where it says that "the hardcore restriction set out in Article 4 (c) (iii) VBER excludes the restriction of active or passive sales by members of a selective distribution network to end users, whether professional end users or consumers, without prejudice to the possibility of prohibiting a member of the network from operating out of an unauthorised place of establishment (see the third exception to Article 4 (c) (i) and paragraph (217) of these Guidelines). This means that authorised distributors cannot be restricted in the choice of end users, or purchasing agents acting on behalf of those end users, to whom they may sell, except to protect an exclusive distribution system operated in another territory (see the first exception to Article 4 (c) (i) and paragraph (215) of these Guidelines). Within a selective distribution system, the authorised distributors should be free to sell to all end users, both actively and passively."

We therefore suggest modifying the text of Article 4 (c) (iii) as follows:

(iii) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, except in the situation set out in the first <u>*or third*</u> hyphen of Article 4(c)(i).
