GANVAM'S CONTRIBUTION TO THE VERTICAL BLOCK EXEMPTION REGULATION DRAFT

Context:

After the European Commission (EC) decided that the automotive sector does not need a specific competition regulation in the area of sales, **dealers and repairers lost the little protection that Regulation 1400/2002 gave them** against manufacturers and fall under the scope of Regulation 330/2010 which regulates all vertical agreements in the EU. Only in the aftersales area did the EC maintain the automotive sector specific Regulation 461/2010.

The relationship between manufacturers and dealers has always been unbalanced, with official **dealers and repairers being the weaker party** in the contractual relationship, but now their economic dependence is increasing. We no longer have the protection afforded by article 3 of Regulation 1400/2002 (i.e., justification for cancellation; freedom to transfer the business to a member of the network; possibility to turn to an expert third party in case of dispute, etc.) and yet **sales targets** are imposed unilaterally, **remuneration** is mostly based on variable criteria, **investments** are very high, and **risk** is not accompanied by adequate **profitability** and a secure and stable environment

Moreover, MADE (Mobility, Automation, Digitalisation and Electrification) trends are causing a **paradigm shift** in distribution to which the 2010 regulation does not know how to respond.

Regulation 330/2010 expires in May 2022. **The European Commission has currently finished the draft for the new regulation that will replace Regulation 330/2010 and Ganvam will provide its comments on the draft in the following document.**

It is noteworthy that two transcendental events have occurred in this context. On the one hand, the **Austrian ruling in the Büchl case**, by which the Austrian Supreme Court sentences Peugeot for abuse of dominant position and forces it to cease certain practices (i.e., linking remuneration to customer satisfaction surveys; transferring costs of auditing standards, remunerating warranties below cost or its subsidiaries competing unfairly with the private network). And, on the other hand, **Stellantis Group has implemented the massive cancellation of all its brands' contracts**, both in sales and after-sales, when the future regulatory framework from May 2022 is not yet known.

Ganvam would like to provide the following comments to the EC on Regulation 330/2010:

1. **On direct sales:**

In our previous contributions during the drafting process, Ganvam proposed to **limit direct sales to a maximum of 20% of the total market share**.

Instead, the Commission proposes two ideas:

- Taking the **aggregate market share** of the supplier and distributor as a benchmark and not only that of the supplier.
- Differentiating between **two market share ranges**:
    - Below 10%, direct sales and exchange of information would be allowed without limitation.
    - Between 10-30% of market share, direct sales are allowed, but information exchange is not.

If this approach is to be maintained, Ganvam would like to propose the **reduction of the threshold for the second range from 30% to 20%**. If the reasoning behind this is to protect horizontal competition, then Regulation 1218/2010 on horizontal agreements sets the exemption threshold at 20% and not 30%.

Finally, if brands sell directly on the market, they should either **reduce the investments they impose on their distributors or compensate them adequately**.

2. **<u>On dual pricing:</u>**

If the EC wants to allow **different prices at the wholesale stage** depending on whether the destination is the online or physical channel, which has been forbidden until now. Ganvam agrees with this approach, however, dealers should then **be provided with sourcing conditions that allow them to compete effectively** in the online channel.

Dealers who invest in facilities for physical sales, **providing value to the buyer**, must also be able to compete in the online channel.

3. **<u>On online sales platforms:</u>**

Regarding platforms, the EC points out that it cannot be an intermediary and operate in the retail channel at the same time. Therefore, the exemption should not be applied to it. However, **manufacturers** who operate in the retail channel and simultaneously intermediate in the online channel -collecting data from their networks, with or without remuneration, **are not different from these platforms**.

Furthermore, it should be noted that **dealers and repairers provide manufacturers with customer data on a systematic and routine basis**. Therefore, it becomes crucial to **regulate the purpose and shared use of data between manufacturers and dealers**.

Additionally, besides personal data, **in-vehicle data or data generated by the vehicle**, whether considered personal or not, **are indisputably controlled by OEMs (Original Equipment Manufacturer)**. This situation needs to be changed, especially considering the development of **new technologies** such as predictive sales and repairs, remote diagnosis and innovative MaaS (Mobility as a Service) concepts. These new possibilities should be open to fair competition, but the **data control exercised by OEMs does not allow for it**.

4. **<u>On price policy:</u>**

The EC wants to **maintain the ban on fixed or minimum prices**.

Ganvam considers that attention should be paid to the **indirect setting of resale prices**. The practice of discounts and promotional campaigns forces dealers to join them if they want to be in the market, which means that they have **no room for manoeuvre to set their own resale prices**. Together with the evolution of profit margins towards variable concepts that depend on customer satisfaction surveys and compliance with standards, this can lead to increased dependence on the manufacturer and to indirectly imposed retail prices.

The Austrian sentence in the Büchl case mentioned above drew attention to this issue, stating that the dealer was not free to set its own prices and obliging the manufacturer to change its pricing policy.

5. **<u>On dealers who operate also as agents:</u>**

At Ganvam we analysed the consequences of establishing a genuine agent network using dealers who had already made investments when they belonged to the dealer network of the same brand.

This analysis has made us consider that **the dealer should be adequately compensated**. As the agent cannot bear any financial or commercial risk, if the agent is going to use investments made as a dealer, he must be compensated, and furthermore, this compensation must be separate and explicitly differentiated from the remuneration or commission paid as an agent.

6. **<u>Sub-agents:</u>**

Considering the above as well as the implications of competition law with the agency model, we are also concerned with the **status of sub-agents**. Traditionally, commercial networks are structured into a primary network of distributors who have a contract with the brand and a secondary network of agents who sign an agency contract with the dealer, while in most brands, in the after-sales area, the authorised workshop contract of the secondary network is signed directly with the brand. Given this, we wonder where the **agents who belong to this secondary network and who have an agency contract with the**

independent dealers stand if, in the future, these independent dealers become **genuine agents**. For instance, what implications, if any, might the sub-agency contract have in relation to Article 101 TFEU in relation to territorial limitation, customers, product, price, etc.?

7. **<u>On customer and vehicle data</u>**

Ganvam would like to draw the attention of the European Commission to the importance of **customer data and vehicle generated data**, both technical and personal data. Currently, the data generated by the vehicle is controlled by the manufacturers. To allow for a genuinely fair competition in new technologies such as predictive sales and repairs, remote diagnosis or new mobility developments, data access must be opened. The right of competition in accessing technical information generated by the vehicle is as important as protecting the customer's privacy and personal data.

Furthermore, dealers are obliged to transfer customer data on a daily basis, yet they are not remunerated for this activity.

8. **<u>On authorised repairer contract:</u>**

Regulation 330/2010 applies to vertical agreements in the sales area. Authorised repairers have in addition specifically Regulation 461/2010. This generates a different regulatory framework for the two areas. In this context, Stellantis has massively cancelled all contracts, both in sales and after-sales.

Hence, we would like to ask what the link between sales and after-sales is, when cancelling all contracts. The brand says it will offer authorised repairers a new contract. Therefore, it will be necessary to check whether it respects the criteria of qualitative selective distribution, with an existing network that already enjoyed the brand's trust.

9. **<u>On financial services:</u>**

In both the agency and independent dealer models, Ganvam would like to draw attention to financial services and the freedom dealers should have to offer the financial service of their choice. Given this, we need to ask if imposing complementary services could be a serious restriction of competition?