CEGAA
Conseil Européen des Groupements d'Agents de l'Automobile

COMMENTS ON THE DRAFT EXEMPTION REGULATION AND AND GUIDELINES OF JULY 9, 2021

The European Association of Automotive Agents (CEGAA) brings together various national groups of agents and repairers.

Groupement des Agents Renault	Groupement des Agents Automobiles Peugeot	Groupement des Agents Peugeot Espagnols
Groupement des Agents VW, Skoda, Audi Espagnols	Fédération Nationale des Agents Renault Espagnols	Association Nationale des Services Officiels Citroen Espagnols
Association Nationale des Revendeurs Nissan Espagnols	Association Nationale des Réparateurs et Agents Opel Espagnols	Association Nationale des agents SEAT Espagnols
Association Nationale de la Branche Automobile Portugaise	Association Espagnole des agents BMW et Mini	Association Espagnole des concessionnaires Piaggio
Association Nationale des Concessionnaires Isuzu	Association Espagnole des réparateurs multimarques	Groupement des Agents Renault Service Acheteurs Revendeurs

For sales, the agent is an element of the manufacturer's secondary network, the primary network being formed by the distributors.

The agent ensures the local networking of the manufacturer's network, in all the areas where the latter has not installed a distributor.

The agent is contractually bound to a distributor by a mandate contract: he concludes sales in the name and on behalf of the distributor.

In principle, his independence is not called into question by this mandate, as long as the business provider contract is conceived as an accessory to a main activity, which may be multi-brand.

For after-sales (maintenance/repair, spare parts, services, mobility), the agent holds an approved repairer contract, concluded with the manufacturer, on the same model as that subscribed to by the distributors.

Within this complex framework, the agent is subject to constraints comparable to those of the distributor, adapted to lower volumes, in terms of the obligation to respect selection criteria and to strictly apply the standards and methods defined by the licensor.

Agents are concerned by the Vertical Restraints Exemption Regulation for at least three essential reasons:

- their fate is closely linked to that of the distributors, to whose action they contribute;

- their repairer contract falls within the scope of the exemption regulation;

- the change envisaged by the manufacturers in the distribution of their products and services consists precisely in the generalization of the model hitherto reserved for agents (mandate for the sale + repairer contract), according to the modalities defined in the guidelines.

The Commission has disclosed a draft regulation on the exemption of vertical agreements and guidelines on July 9, 2021, which are intended to replace the EU regulation n° 330/2010 of April 20, 2010 and the guidelines of May 10, 2010.

The Commission has invited interested parties to send their comments by September 17, 2021.

In this context, this note will discuss the state of automobile distribution (I), the manufacturers' plans (II) and, in the light of these elements, the Commission's plan (III).

I - THE STATE OF CAR DISTRIBUTION

1) The exemption has protected a deficient model

a) Motor vehicle distribution has not fundamentally changed for at least forty years.

Since EC regulation 1400/2002 threatened to open up distribution to alternative models, practically all manufacturers opted for a selective distribution scheme in 2003, based on very high selection criteria.

These selection criteria are usually defined in an appendix to the distribution contract and detailed in circulars, to form a set that commonly represents several hundred pages (signage, exterior appearance, interior appearance, tiling, lighting, furniture, equipment, personnel, organization, inventory, etc.).

The definition of these selection criteria has two characteristics that must be taken into account: it tends towards the implementation of an exclusive representation and it is not indispensable.

Distribution contracts are generally established on the model of multi-brand contracts, which in principle authorize distributors to represent competing brands.

In practice, the selection criteria most often concern all the structures implemented by the distributor, including sometimes their architectural design, to an extent that mobilizes all its resources and excludes the possibility of representing other brands.


PEUGEOT
PEUGEOT


Audi
Audi


RENAULT
Renault Z.E.

In the same way, the agent obeys the selection criteria defined by the manufacturer, to an extent adjusted to a lower commercial potential.

This de facto exclusive representation allows manufacturers to develop a brand image, which enables them to distinguish products whose intrinsic qualities are in fact very close, sometimes similar (platforms, common engines).

In this perspective, the one-upmanship of manufacturers knows no limits and the selection criteria are constantly renewed and increased.

Article 101(3) of the Treaty excludes restrictions *"which are not indispensable"* for *"improving the production or distribution of goods or for promoting technical or economic progress"*.

In reality, however, the question of the legitimacy of the selection criteria is never raised.

EU Regulation 330/2010 states in this regard, that:

> *"Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular,*

they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels"[1].

At least as far as the sale of new vehicles is concerned, the efficiency gains expected from the structures required by the manufacturers are questionable, especially since sales through this channel represent less than half of all registrations and the sales process is now largely digital.

It should be added that, while manufacturers admit the need to adapt their production to the requirements of climate change, this constraint does not seem to affect distribution structures, which continue to be required without any regard for their environmental impact.

b) These practices have an impact on competition, which the Commission identified in its 2010 guidelines:

"The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition. All these restrictive effects have a direct impact on inter-brand competition"[2].

The cumulative effect of contracts imposing similar constraints naturally aggravates the restriction on free competition, by encouraging the erection of barriers to market entry[3] and by compromising the development of alternative, less costly business models:

"This makes selective distribution particularly well suited to avoid pressure by price discounters (whether offline or online-only distributors) on the margins of the manufacturer, as well as on the margins of the authorised dealers. Foreclosure of such distribution formats, whether resulting from the cumulative application of selective distribution or from the application by a single supplier with a market share exceeding 30%, reduces the possibilities for consumers to take advantage of the specific benefits offered by these formats such as lower prices, more transparency and wider access"[4].

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[1] EU Regulation n° 330/2010 of 20 April 2010, recital n° 6.
[2] Guidelines on vertical restraints of 10 May 2010, point n° 130, 2010/C 130/01.
[3] In this respect and in the context of the preparatory work for the adoption of the EU regulation n° 461/2010, the company KIA MOTOR EUROPE had sent a contribution to the Commission deploring unequivocally the consequences of the deployment of a de facto exclusive distribution: letter KIA MOTOR EUROPE of September 24th 2009.
[4] Guidelines on vertical restraints of 10 May 2010, point n° 178, 2010/C 130/01.

In fact, even though alternative distribution models exist, which have been developed by dealers and agents for more than twenty years, manufacturers have managed to prohibit their implementation in the market.

Here again, car distribution has consistently escaped critical scrutiny.

c) Under the terms of Article 101.3 of the Treaty on the Functioning of the European Union, the exemption of vertical agreements is conceived on the condition that *"(...) a fair share of the resulting benefit is reserved for users"*.

The model produced by the generalization of selective distribution, whose criteria are not controlled, has a cost.

This cost is advanced by the distributors, with the participation of the manufacturers, who arrange the conditions of a more or less sufficient remuneration to cover them.

Obviously, in the end, this cost is passed on to the consumer, charged to the public resale price: in the end, it is the consumer who pays.

A comparison between the prices reserved for French and American consumers shows that the system exempted by the Commission is paid for at full price.

Recommended prices *"starting at"*, in euros		
	France	USA
Volkswagen		
Golf	27.815	19.805
Passat	35.320	20.488
Tiguan Allspace	39.680	21.556
Honda		
HR-V	25.100	18.287
CR-V Hybrid	36.240	26.089
Toyota		
Prius Hybrid	27.950	20.937
Rav4 Hybrid	33.900	24.668
BMW		
M340i	66.850	46.690
X5 xDrive45e	90.050	55.819
Volvo		
XC40 Recharge électr.	56.150	46.060
S60 Recharge Hybride	59.750	40.658
Ford		
Mondeo Hybride	30.600	23.888
Mustang Mach-E	48.990	36.596
Hyundai		
Tucson Hybrid	32.300	24.791
Santa Fe Hybrid	36.900	28.718

It is also important to note that distribution in the United States, benefiting from less restrictive selection criteria, has achieved greater economic efficiency (concentration, critical size, profitability), guaranteeing stronger competition for the benefit of consumers.

2) The Internal Market is compartmentalized

Article 3 of the Treaty on European Union states that *"the Union shall establish an internal market"*.

Article 4(b) of EU Regulation 330/2010 provides that:

> *"The exemption (...) shall not apply to vertical agreements which (...) have as their object (...) the restriction of the territory into which (...) a buyer party to the agreement, may sell the contract goods or services (...)"*.

In contravention of this principle, manufacturers and importers are working to thwart the free movement of their products on the internal market, which they have undertaken to partition as much as possible, hindering parallel imports and occasionally exposing themselves to legal proceedings and convictions.

As a result, price differences persist, allowing manufacturers to make the most of the resources of each national market and accounting for more than 40% of the total.

Recommended prices *"starting at"* PEUGEOT 2008 Active							
Denmark	**28.910**	Belgium	21.829	Sweden	19.522	Italy	17.900
Netherlands	26.660	Finland	20.835	Poland	19.092	Hungary	17.084
Ireland	25.490	Greece	20.800	Croatia	18.809	Czech R.	17.074
France	22.700	Spain	20.700	Slovénia	18.690	Slovakia	16.990
Germany	22.100	Austria	19.910	Romania	18.207	Portugal	**16.690**

The European Commission had set up a system for monitoring price differentials within the Union (*"Car Price Report"*), which it abandoned in 2011, leaving it to the market players and especially to the intermediaries.

The action of the latter is thwarted by certain manufacturers, who seem to impose export quotas on their importers and distributors.

Cross-selling between distributors is - to our knowledge - non-existent.

The Commission's approach is illustrated by the decision refusing to investigate a complaint lodged against the company HYUNDAI Motor Europe, which excluded from its warranty vehicles acquired in another Member State.

In its Explanatory Brochure to EC Regulation 1400/2002, the Commission had expressed an unambiguous position:

> *"Question 34: Does a consumer have to take his vehicle back to the dealer he bought it from to have warranty work/servicing done?*
>
> *No. For the Regulation to apply the consumer should be able to take the vehicle to any authorised repairer within the supplier's network anywhere in the EU. The Regulation94 only exempts agreements with authorised repairers when the supplier imposes an obligation on all its authorised repairers to repair all vehicles of the brand in question, to*

honour warranties, perform free servicing and carry out recall work irrespective of where 44 the car was bough (…)"[5].

Position confirmed in the guidelines for automobile distribution of 28 May 2010:

"The Commission has brought several cases against motor vehicle manufacturers for impeding such trade, and its decisions have been largely confirmed by the European Courts. This experience shows that restrictions on parallel trade may take a number of forms. A supplier may, for instance, put pressure on distributors, threaten them with contract termination, fail to pay bonuses, refuse to honour warranties on motor vehicles imported by a consumer or cross-supplied between distributors established in different Member States, or make a distributor wait significantly longer for delivery of an identical motor vehicle when the consumer in question is resident in another Member State"[6].

The complaint was nevertheless rejected, as the Commission considered that the practice was covered by the block exemption:

"(…) to the extent that the Hyundai Factory Warranty is inextricably linked to Hyundai's selective distribution agreements, the terms of the Hyundai Factory Warranty do not preclude the agreements between Hyundai and its authorized distributors from being block exempted (…)"[7].

3) The exemption regulation has become a guarantee of impunity

The EU Regulation 330/2010 defines selective distribution as follows :

"'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system"[8].

[5] Explanatory brochure of the EC regulation n° 1400/2002, question n° 34.
[6] Supplementary Guidelines on Vertical Restraints of 28 May 2010, point 49, 2010/C 138/05.
[7] Décision Commission du 4 Décembre 2017, affaire AT 40495, Hyundai Garantie Constructeur, C (2017) 8319 final.
[8] EU Regulation n° 330/2010 of 20 April 2010, article 1.1.e).

This formula is in line with old case law, which makes the legality of selective distribution conditional on the selection of distributors on the basis of objective criteria of a qualitative nature[9].

The Commission has accepted that manufacturers add quantitative criteria to the qualitative criteria, which the consumer sees in the uniform presentation of the points of sale[10].

Therefore, the Commission has designated qualitative and quantitative selective distribution under the single term of quantitative selective distribution:

> *"(…) a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution"*[11].

In 2012, the French Court of Cassation referred a question to the Court of Justice for a preliminary ruling on whether the manufacturer must justify the objective nature of quantitative criteria:

> *" According to Auto 24, in a quantitative selective distribution system, the supplier must use quantitative selection criteria that are specific, objective, proportionate to the aim pursued and implemented in a non-discriminatory manner when selecting its distributors.*
>
> *In those circumstances, the Cour de cassation, having doubts as to the correct interpretation of the Regulation and, in particular, as to the requirements relating to selection criteria for quantitative selective distribution, decided to stay proceedings and to refer the following question to the Court:*
>
> *'What is to be understood by the words "specified criteria" in Article 1(1)(f) of Regulation No 1400/2002 as regards quantitative selective distribution?'"*[12].

The Court of Justice answered this question as follows:

> *"The term 'specified criteria', referred to in Article 1(1)(f) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, means, with respect to a quantitative selective distribution system within the meaning of that*

[9] ECJ, 25 October 1977, case 26/76, Metro v. Saba, ground no. 20.
[10] Supplementary Guidelines on Vertical Restraints of 28 May 2010, point 44, 2010/C 138/05.
[11] Supplementary Guidelines on Vertical Restraints of 28 May 2010, point n° 54, 2010/C 138/05.
[12] ECJ, 14 June 2012, case C-158/11, Auto 24 v. Jaguar Land-Rover, recital no. 20.

regulation, criteria the precise content of which may be verified. In order to benefit from the exemption provided for by that regulation, it is not necessary for such a system to be based on criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorisation"[13].

A superficial analysis suggests that quantitative selective distribution is not based on objective selection criteria applied in a non-discriminatory manner.

Ambiguity fostered by the judgment:

> *"(…) the case-law relied on by Auto 24 deriving from the judgment in Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875 is irrelevant in the present case. On that point, it is enough to note that, in the context of the Regulation, as is apparent from paragraphs 32 to 34 of the present judgment, a 'quantitative selective distribution system' may be distinguished, by definition, from the qualitative selection of distributors referred to in paragraph 20 of the judgment in Metro SB-Großmärkte* v *Commission"*[14].

The fact remains that "*Article 1(1)(f) of Commission Regulation (EC) No 1400/2002 of 31 July 2002*", expressly referred to in the judgment[15], does not concern quantitative selection, but qualitative selection:

> *"(f) "selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers <u>selected on the basis of specified criteria</u> (…)* ;
>
> *(g) "quantitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit their number"*[16].

It is understood that qualitative selection is the fundamental condition for the existence of selective distribution.

The Court seems to have noticed this flaw in its reasoning, only to evade it immediately:

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[13] ECJ, 14 June 2012, case C-158/11, Auto 24 v. Jaguar Land-Rover, recital no. 40.
[14] ECJ, 14 June 2012, case C-158/11, Auto 24 v. Jaguar Land-Rover, recital no. 38.
[15] ECJ, 14 June 2012, case C-158/11, Auto 24 v. Jaguar Land-Rover, recital no. 40.
[16] EC regulation n° 1400/2002 of July 31, 2002, article 1.1.f) and g).

"The fact that, in practice, distribution systems for new motor vehicles often [sic] include both quantitative and qualitative criteria is irrelevant in this respect (…)"[17].

While refusing to ask the preliminary question that would overcome the confusion arising from the June 14, 2012 ruling, the Paris Court of Appeal now holds that a quantitative selective distribution system is not governed by the principles governing selective distribution and that it is covered by the exemption:

- "It is in vain that Catia complains that FCA committed a fault (...), by not applying the criteria appearing in its distribution contract whereas the latter was free to choose the candidate of its choice within the framework of the implementation of its quantitative selective distribution network which constitutes the exercise of its own freedom as an economic operator, <u>without being obliged to determine and implement defined and objectively fixed qualitative selection criteria for its distributors and to apply them in a non-discriminatory manner</u>"[18];

- "A quantitative selective distribution system in which the network head refuses its approval <u>without having assessed the application on the basis of predefined qualitative criteria does not therefore lose the benefit of the exemption</u> conferred by the Vertical Agreements Regulation"[19].

The Paris Court of Appeal even dared to consider that the rules of selective distribution were not applicable to the selection of authorized repairers, even though their selection is based on purely qualitative criteria (no quantitative criteria for repairs):

"Therefore, SAS Mercedes-Benz France did not breach its duty of good faith by <u>refusing to consider the application</u> of SA Garage de Bretagne, (…) <u>regardless of whether or not it had fulfilled the conditions for a possible authorization</u>"[20].

[17] ECJ, 14 June 2012, case C-158/11, Auto 24 v. Jaguar Land-Rover, recital no. 34.
[18] Paris Court of Appeal, Pôle 5, Chamber 4, October 23, 2019, n° 19/07878, Catia Automobiles c/ FCA.
[19] Paris Court of Appeal, Pole 5, Chamber 4, 21 October 2020, No. 17/27620, Benmeleh v. Hyundai.
[20] Paris Court of Appeal, Pole 5, Chamber 4, November 27, 2019, n° 18/06901, Garage de Bretagne c/ Mercedes.

The Court of Cassation is on the same line:

> *- "Whereas, in order to declare that the refusal of approval of the company Catia constitutes a fault of the company FCA and to order the latter to pay the former an indemnity, the judgment, after having noted that the company FCA was at the head of a quantitative selective distribution network, states that the "licensor" is bound, the "licensor" is bound, as of the pre-contractual phase, to respect its general obligation of good faith in the choice of its co-contractor and deduces that the holder of the network must select its distributors on the basis of defined and objectively fixed criteria and apply them in a non-discriminatory manner;*
>
> *That in so ruling, whereas the requirement of good faith does not require, on the part of the head of a distribution network, the determination and implementation of such a selection process, the Court of Appeal violated the above-mentioned text and principle"*[21];
>
> *- "After stating that quantitative selective distribution agreements are exempt under Article 3(2) of Regulation (EC) No 1400/2002 if the supplier's market share is less than 40% on the relevant market, the judgment held that it was not disputed that, as regards the sale of new vehicles, Renault had, at the time of the facts, a market share well below 40%, even taking into account the other brands it distributed or with which it had links, that share being even below 30%. It concludes that the validity of the quantitative criterion criticized by SIAC and the circumstances in which Renault refrained from examining its application for sixteen months, without explicitly refusing it, are irrelevant in this case in view of Renault's market shares, so that its refusal to grant approval, to which antitrust law applies, must be considered as automatically exempted and lawful under the competition rules. It adds that, assuming that the distribution system in question was selective in terms of quality and that the qualitative criteria were applied in a discriminatory manner, since its market share was less than 30%, the refusal would also have been exempted. It further states that, since Union law applies, it takes precedence over national law by virtue of Article 3(2) of Regulation (EC) No 1/2003 of 16 December 2002"*[22].

In other words, in France, as soon as their market share does not exceed 30%, the courts consider that, by virtue of the exemption regulation, the constitution of networks is purely and simply exempt from the rules of

[21] Court of Cassation, Commercial Chamber, March 27, 2019, No. 17-22083, Catia Automobiles v. FCA.
[22] Court of Cassation, Commercial Chamber, May 12, 2021, n° 19-17580, Siac c/ Renault.

selective distribution (from all rules, in fact, since the courts invoke the prevalence of Community law to exclude the application of domestic law).

The exemption regulation is therefore not an instrument of regulation: it is a patent of impunity.

II – THE MANUFACTURERS' PROJECT

Without waiting for the definition, or the entry into force, of new regulations exempting vertical practices and practices specific to automobile distribution, manufacturers have undertaken the implementation of a new distribution model.

We will mention the STELLANTIS Group's project, pointing out from the outset that most manufacturers seem to be moving towards a similar scheme.

1) Direct sales by the manufacturer

In the indirect distribution scheme we know, the manufacturer's customer is the distributor, and the end-user is the distributor's customer, if necessary through the agent.

There is no direct link between the manufacturer and the end user.

The STELLANTIS Group has drafted an addendum to the distribution and repair contracts, which provides for the obligation of distributors and repairers to transmit to the manufacturer, on an ongoing basis, information on existing and prospective customers.

The manufacturer has refrained from any legal qualification of these actions.

a) Transfer of distributors' and repairers' customers

In French law[23], the customer base is an intangible asset of the distributor's goodwill and is therefore part of its commercial property.

[23] Article L 141-5 of the French Commercial Code.

Case law confirms this unambiguously:

> - *"(…) if a clientele exists at the national level and is linked to the reputation of the franchisor's brand, the local clientele only exists because of the means used by the franchisee, including the tangible elements of his business, equipment and stock, and the intangible element constituted by the lease, since this clientele is itself part of the franchisee's business even if the franchisee is not the owner of the trademark and the sign made available to him during the execution of the franchise agreement, it is created by his activity, with means that, contracting personally with his suppliers or lenders, he implements at his own risk* (…)"[24];
>
> - *"(…) goodwill is a set of elements likely to attract customers interested in the product sold or the service offered with a view to the enrichment of the person who assumes the risk of such a business, i.e. the loss of the investments he has made to acquire, maintain and develop it;*
>
> *(…) it follows from the above that NICOGI is the owner of a business composed of elements belonging to it, in particular the essential element of the clientele which is attached to it "*[25];
>
> - *"(…) it should be remembered that the exclusive concession contract does not constitute a contract of common interest and that the concessionaire, as the owner of his business, develops his own clientele for his own account and in his own name, thus excluding any possibility of receiving a clientele indemnity; that, while a customer base exists at the national level as a result of the reputation of the licensor's trademark, the local customer base only exists as a result of the means used by the licensee, including the tangible elements of his business and the intangible element constituted by the lease; that, moreover, this customer base is itself part of the licensee's business since, even if the licensee is not the owner of the trademark and sign made available to him during the performance of the concession contract, it is created by his activity"*[26].

The contract usually stipulates in the clearest possible way that the distributor and the repairer are independent traders and that they must not in any way be considered as the manufacturer's agent.

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[24] Court of Cassation, 3rd civil chamber, March 27, 2002, n° 00-20732.
[25] Paris Court of Appeal, October 4, 2000, Nicogi c/ Le Gan.
[26] Paris Court of Appeal, March 1, 2006, Opel v. Coroller Automobiles.

This organization allows the manufacturer to avoid compensation at the end of the contract, since the arrangement of a notice period allows the distributor or repairer to convert his customers to the representation of another brand.

The transfer[27] of information on existing customers, as it is now required by the manufacturer, differs from the communication and is analyzed as a pure and simple cession of customers.

That is, the operation by which the rights or obligations of one person are transferred to another, who becomes the holder in his place.
This transfer has the effect of making this data unavailable to the distributor.

At this stage, the manufacturer has not planned to grant any consideration for the transfer of the clientele of its distributors, which seems to be envisaged only on a free basis.

b) Orientation of prospects

The STELLANTIS Group project also envisages the obligation for distributors and repairers to transmit information on prospects to it.

The prospect is not a customer of the distributor or the repairer (a fortiori of the brand): it is a person with whom he has entered into a relationship and who is identified as a potential customer.

By agreeing to send the manufacturer the details of this prospect, whether he has expressed interest in a new vehicle, a used vehicle, an after-sales service or parts and accessories, the distributor or repairer:

- engages in the terms of an obligation to perform (as opposed to the obligation to give), which is analyzed as a mandate;

- as an agent, he is bound by an obligation of loyalty and refrains from directing the prospect towards a competing manufacturer or supplier.

This stipulation is a commitment of exclusivity which does not say its name.

[27] Gérard CORNU, Vocabulaire Juridique, PUF, 2018.

c) Direct sales

Initially presented as an adaptation of the contract to the constraints of the General Data Protection Regulation, the scope of this device was recently revealed, when in July 2021, the STELLANTIS Group disclosed its intention to sell the new vehicle directly to the end user.

The distributor would only be involved in the presentation and delivery of the vehicle, in return for a commission.

The details of this project are not known, but in practice, the direct sale from the manufacturer to the end user can be done online, from the customer's terminal, as well as at the dealer's premises, with the order being placed on a dealer's terminal using the manufacturer's interface.

In this context, the STELLANTIS Group has specified that the distributor will no longer act as an independent trader, but as an representative (the exact profile of this mandate is not known), thus adopting the status usually reserved for "*agents*".

The agent is not a trader and does not have his own clientele.

This is consistent with the fact that the distributor was previously stripped of his clientele and that he undertook to develop the manufacturer's clientele.

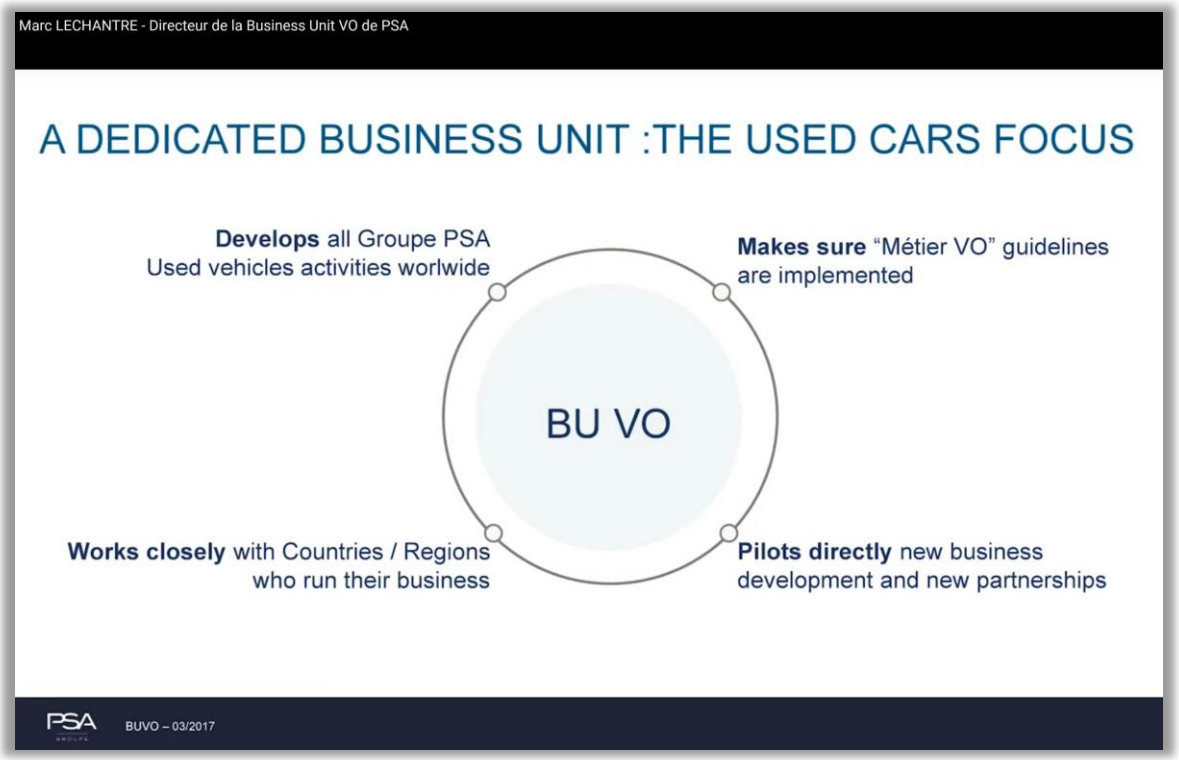
2) The appropriation of the distribution professions

a) Used cars

As early as 2016[28], PSA expressed its intention to sell used vehicles online and consequently, to integrate this trade into its business.

[28] PUSH TO PASS plan presented to PSA shareholders on April 5, 2016.

PSA has created a "*VO Business Unit*", in charge of implementing this program[29]:



[29] Intervention by Marc LECHANTRE, VO Business Unit Director, on March 23, 2017 : https://www.youtube.com/watch?v=NXzHKX1yX78

The manufacturer has acquired the necessary skills to complete this project[30]:

- 2016 : ARAMISAUTO (multi-brand Internet platform, reconditioning center and 31 agencies); supported by the PSA Group, ARAMIS GROUP took over the following businesses:

  . 2017: CLICARS (multi-brand used vehicles in Spain);

  . 2018: CARDOEN (multi-brand used vehicles in Belgium);

  . 2017 : AUTOBIZ (car quotation);

  . 2017: CARVENTURA (car price positioning);

  . 2021 : CARSUPERMAKET.COM (multi-brand used car in the UK);

- 2019: creation of a vehicle reconditioning plant in Donzère (Drôme);

- 2021: listing of ARAMISAUTO on the stock exchange in order to raise 250,000,000 euros and further support its investments in used vehicles.

In this context, the PSA Group has replaced the PEUGEOT OCCASIONS DU LION, CITROEN SELECT, etc... labels with a new, multi-brand label: SPOTICAR.

This contract is concluded with the manufacturer and is built on the model of a franchise contract.

Within this new framework, the transfer of margin is envisaged as follows:

- purchase of vehicles from the manufacturer;

- purchase of the POS material prescribed by the manufacturer;

- purchase of breakdown and assistance services from service providers selected by the manufacturer (on the basis of pricing conditions negotiated by the manufacturer);

- purchase of warranty contracts from the insurers selected by the manufacturer and at the price negotiated by it; it being noted that the

[30] PSA press releases; PSA press review.

distributor undertakes to carry out warranty repairs on all vehicles covered, including those sold by other members of the network, under the conditions negotiated by the manufacturer with the insurer;

- payment to the manufacturer of a quarterly fee;

- purchase from the manufacturer of a *"compulsory service"* for each vehicle sold, apparently consisting of the provision of a *"Customer Relations Department"*.

It is important to note that in the direct sales model that the STELLANTIS group plans to implement, the trade-in of used cars will in principle be ensured by the manufacturer itself, which will take control of the sourcing on this occasion.

The repossessed vehicles can be resold to the distributor or repairer under the SPOTICAR contract.

Although the SPOTICAR contract does not explicitly provide for any exclusivity commitment, it does require the exclusive use of part of the dealer's facilities and their compliance with the standards defined by the manufacturer.

In addition, and above all, the mandate to refer prospects to which the distributor is required to subscribe, includes used cars.

Thus, once they have subscribed to the terms of this mandate, distributors or repairers will no longer be able to maintain their own clientele for used vehicles, nor to supply their business by taking back used vehicles (which accounts for 80% of new vehicle sales).

In the long term, the manufacturer will therefore have the legal means to take over the trading of used vehicles, which is an activity traditionally undertaken independently by the distributor.

b) Financial services and mobility

Financial services, provided by financial subsidiaries, already represent a significant and sometimes even essential part of automakers' profits.

They cover a multitude of services (credit, leasing, leasing, LCD, insurance), which are destined to grow rapidly through an infinite number of variations (car-sharing, autonomous cab, autonomous car, car-pooling, electronic payment), now identified as mobility services.

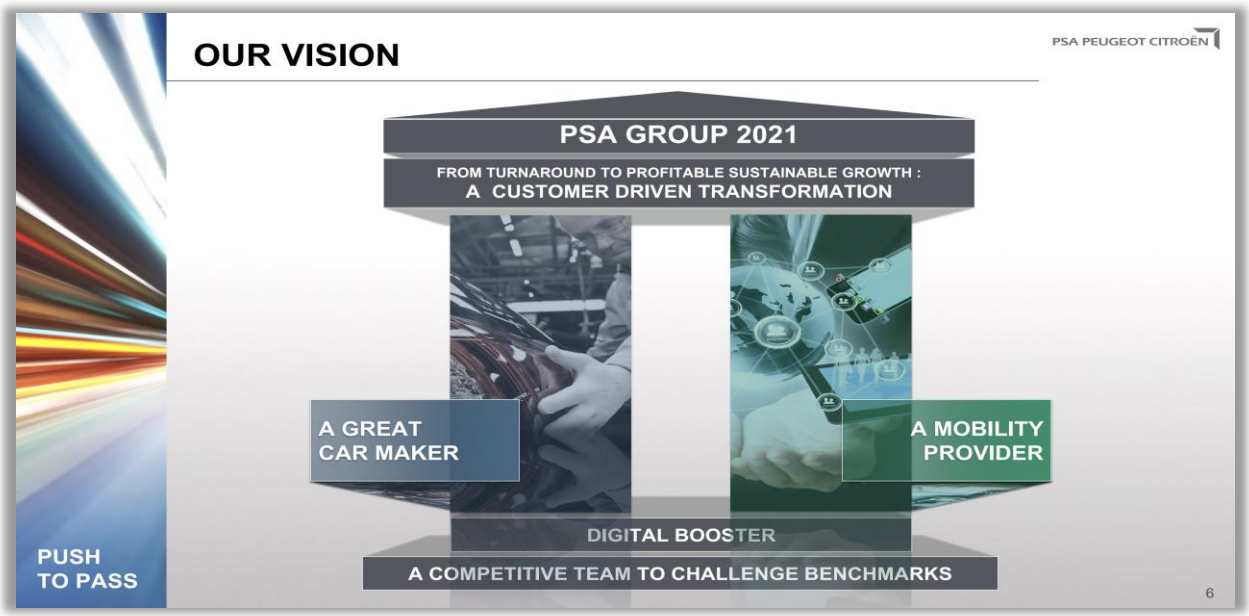
This development will be amplified by the implementation of a 5G telecommunication network and the full exploitation of data produced by vehicles (all pay-as-you-drive services...).

The disappearance of the independent dealer and its replacement by an agent, reserves this market to the manufacturer.

The agent will no longer be able to offer any other formula than those of the manufacturer for which he will be the representative.

In this respect, it is necessary to take the measure of a major change, under the terms of which the manufacturer would be seen less as the producer of a vehicle, than as the supplier of a mobility service.

To put it another way, the recurring revenue to be expected from the provision of a mobility service is likely to be of greater interest in the future than the margin currently derived from the manufacture and sale of a new vehicle.



31

[31] PUSH TO PASS plan presented to PSA shareholders on April 5, 2016.

c) The after-sales service

The manufacturer's plans in this area are not known.

At this stage, the initiatives taken by the PSA Group, which benefit the STELLANTIS Group today, show that the manufacturer has considerably developed this activity:

- expanding a range of spare parts under the EUROREPAR brand, intended for vehicles over three years old and complementing its range of original parts;

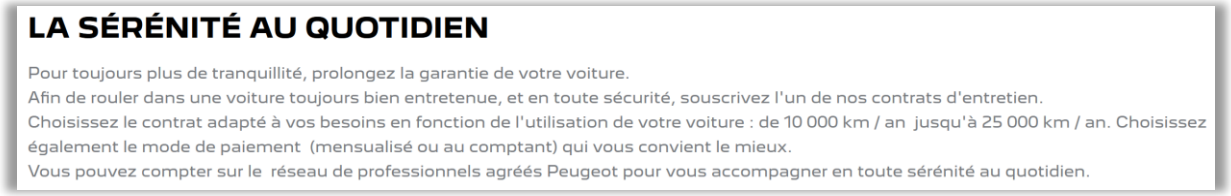
- creating an intermediation platform called AUTOBUTLER, which puts end-users in touch with repairers (authorized repairers and MRAs);

- acquiring the MISTER AUTO website, which distributes multi-brand spare parts online;

- developing a physical network of regional distributors of multi-brand spare parts under the DISTRIGO brand.

Since they will now be required to use and develop a customer database that will no longer be their own, repairers fear that they will lose the possibility of offering the manufacturer's customers parts and services that it does not supply or that it has not referenced.

In addition, it is feared that the manufacturer will increase the number of after-sales services offered in the form of extended warranties, maintenance contracts or rental contracts, including maintenance, taken out online by the end user and subcontracted to the approved repairer.



In such a scheme, the repairer is no longer able to offer an alternative formula, whether it comes from competitors or has been developed by himself.

The manufacturer would then be able to impose more expensive solutions for the end user, in particular by imposing the use of its own spare parts and by excluding the possibility of using parts of equivalent quality.

This threat has been mentioned by the Commission[32] in terms that do not take the full measure of the risk, which is not limited to the eviction of independent repairers or equipment manufacturers, but affects the competitive capacity - the economic initiative - of the members of the official network.

The risk is aggravated by the manufacturers' claims to have close control over the data produced by the vehicles, the dissemination of which will constitute an additional source of profit, as well as a competitive advantage.

Finally, it seems that in this field as well, no account is taken of the objectives of sustainable development, the pursuit of which requires that maintenance and repair methods be made accessible to all, including private individuals.

The reduction of the repair offer in the spirit of increasing the manufacturer's profits goes against the concerns expressed by the European Parliament:

> *"Facilitating repairs*
>
> *10. Calls for the following information on the availability of spare parts, software updates and the reparability of a product to be made available in a clear and easily legible manner at the time of purchase: estimated period of availability from date of purchase, average price of spare parts at the time of purchase, recommended approximate delivery and repair times, and information on repair and maintenance services, where relevant; asks, furthermore, for this information to be provided in the product documentation together with a summary of the most frequently encountered failures and how to repair them;*

[32] Supplementary Guidelines on Vertical Restraints of 28 May 2010, point n° 69, 2010/C 138/05.

11. Calls on the Commission to establish a consumers' 'right to repair' with a view to making repairs systematic, cost efficient and attractive, taking into account the specificities of different product categories along the lines of the measures already taken for several household appliances under the Ecodesign Directive (…)"[33].

3) The creation of an ecosystem

In the model envisaged, the ousting of distributors, or at least the neutralization of their status as economic players, leaves manufacturers as the sole operators in the mobility supply market.

Each manufacturer seeks to create an *"ecosystem"*, like APPLE/TESLA, which is all the more effective when the manufacturer, like STELLANTIS or VOLKSWAGEN, brings together several major brands.

The functioning of the ecosystem is based on the all-round control of data:

- personal data of the end user, collected by the manufacturer, by the distributor, by the repairer, by the suppliers...;

- data produced by the vehicle;

- vehicle technical data, naturally held by the manufacturer.

It requires the implementation of a digital marketplace, induced by the choice of direct sales, accessible from a computer, from a smartphone and from the vehicle itself, supported by the physical points of sale of the distributors.

The functioning of the ecosystem is also based on the integration of upstream and downstream activities:

- upstream: suppliers and subcontractors (banks, insurance companies, equipment manufacturers, application designers, all suppliers to distributors and repairers, including for used vehicle trading) pay the manufacturer for access to data and customers on the marketplace;

[33] European Parliament resolution of 25 November 2020: Towards a more sustainable single market for businesses and consumers:
https://www.europarl.europa.eu/doceo/document/TA-9-2020-0318_FR.html
On the same theme, see also the principle of a "right to repair" recently adopted by the American Federal Trade Commission:
https://www.wsj.com/articles/broken-iphone-stalled-tractor-ftc-wants-to-make-it-easier-to-fix-them-11626899876

- downstream: customers (end-users, leasers, used car dealers, authorized repairers) pay the manufacturer for the provision of products and/or services.

Control of the ecosystem is the assurance of a rent.

4) The problems

The scheme implemented by the STELLANTIS Group, and in the same way by most of the other manufacturers, poses various problems.

a) The transition from a vertical to a horizontal relation

Distribution has been consolidated and is largely carried out by multi-brand distribution groups (even if, within these groups, certain brands are represented in separate structures) and whose activities are diversified.

These groups have invested in very modern Internet sites, in the deployment of a wide range of services in financing, leasing, maintenance, repair and assistance, as well as in the development of a highly structured used vehicle trade, sometimes organized on an industrial basis.

These activities are directly threatened by the ambitions of manufacturers.

In order to measure the difficulty, it is necessary to move away from the traditional model, which opposed a manufacturer identified as an industrial manufacturer of vehicles, to a distributor/repairer identified as a trader, selling these vehicles to end users and providing their after-sales service.

In the near future, a carmaker providing mobility services and involved in all distribution activities (sales and after-sales, new and used) will be pitted against a distributor, also a mobility provider and a traditional player in all distribution activities.

These players are destined to enter into a relationship of horizontal competition.

b) The appropriation of other people's property

The implementation of the model developed by the manufacturer implies an appropriation of the assets of distributors and repairers (their clientele), without any compensation.

The data relating to customers and prospects, which constitute the distributor's sales file, are the company's primary asset, especially in a business that is destined to become essentially digital.

Needless to say, **no distributor or repairer is spontaneously willing to give up his commercial property without compensation**.

The implementation of this project seems to be accompanied by a form of constraint, insofar as the manufacturer has notified the termination of all contracts (distribution and repair) and specified to those who have received a letter of intent to conclude a new one, that this offer remains conditional.

To measure the effectiveness of this procedure and the relative sluggishness of distributors and repairers, it must be understood that the termination of the contract and the cessation of relations expose them to serious consequences:

- conversion is almost impossible for the distributor of a generalist brand, all of which are represented throughout the country; it being understood that the distributor established to market 2,000 vehicles per year cannot find an economically viable conversion in the representation of a brand which would represent an annual potential of 200 vehicles;

- the transfer is only conceivable on a basis that does not generally allow the liabilities to be covered; it is inaccessible to the distributor or repairer who has previously transferred his clientele to the manufacturer;

- the outright cessation of activity is often financially insurmountable: now deprived of income, the distributor or repairer cannot meet the payment of its debts (material structures and inventories) and the liabilities generated by the cessation of its activity (redundancy costs, lease termination indemnities, inventory liquidation costs).

In France, despite an abundance of litigation, the public authorities and the judiciary are usually conciliatory with the manufacturers and the distributors generally feel that they cannot be helped.

c) The introduction of an exclusivity obligation

In the new distribution model, multi-brand distribution groups are subject to contradictory injunctions, since each of the manufacturers they represent demands the exclusive allocation of their clientele and the exclusive orientation of their prospects.

These demands are incompatible with multi-brand representation.

This very concrete difficulty is for the moment ignored by the manufacturers.

d) The erection of new barriers to entry

The appropriation of the network members' clientele will have the effect of making it legally unavailable to those who have built it up.

This solution is all the more effective because the CRM tool (or DMS), whose use is prescribed to the distributor, records customer data directly on the manufacturer's server.

As soon as it is recorded, this data can be protected under articles L 112-3 and L 122-4 of the Intellectual Property Code.

Applied to all distributors and repairers in almost all networks, this system is likely to compromise the possibility for a new manufacturer to rely on distributors to enter the market.

The top three manufacturers alone[34], through their numerous brands, have a combined market share of more than 70% in France and are therefore able to remove the data of an equivalent proportion of end users from the competition.

Recent experience shows that a manufacturer - Tesla - can design and produce innovative vehicles in the manner of a start-up, without necessarily relying on the existence of an existing industrial tool.

The European market, tightly controlled as we have seen, has not allowed the emergence of such initiatives, which are born (with one exception) outside the borders of the Union:

[34] STELLANTIS, RENAULT, VOLKSWAGEN.

- United States: Rivian, Lucid, Fisker, Lordstown, Canoo, Faraday Future;

- China: Xpeng, Li Auto, Nio, Aiways, Xiaomi;

- Vietnam: VinFast;

- Turkey: Togg;

- Poland: Izera.

These manufacturers can obviously hope to enter the market by joining forces with the professionals who have always driven it.

This possibility will be forbidden to them by the confiscation of customer files and the transformation of distributors into agents.

The change of model clearly entails the erection of new barriers to entry, likely to deprive consumers of innovative products that will be available elsewhere, and to compromise the chances of seeing an alternative offer of European origin emerge.

e) The setting a unique price

The implementation of a direct sales model reserves the setting of the retail price to the manufacturer, in which the distributor is no longer involved.

Until now, the Commission has not seemed to make intra-brand competition a priority:

- *"(…) if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers"*[35];

- *"In a market where individual retailers distribute the brand(s) of only one supplier, a reduction of competition between the distributors of the same brand will lead to a reduction of intra-brand competition between these distributors, but may not have a negative effect on competition between distributors in general. In such a case, if inter-brand competition is strong, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers"*[36].

[35] Guidelines on vertical restraints of 10 May 2010, point n° 102, 2010/C 130/01.
[36] Draft guidelines of 9 July 2021, point n° 19, C (2021) 5038 final.

In the present context, however, the hypothesis is not that of a reduction in intra-brand price competition, which has already been reduced by the compartmentalization of national markets, but that of its pure and simple disappearance.

And insofar as most manufacturers are embracing this formula, there is obviously a great risk that inter-brand competition will be affected.

The objective shared for a very long time by manufacturers is to reintegrate into their margins the amount of the discount usually granted by distributors to their customers, which is traditionally considered as a loss of value attributable to the distributor and combated in all possible ways (essentially by reducing the fixed part of the remuneration of distributors in favour of the variable part).

The impact on consumers is obvious.

f) Contradiction with the requirements of the RGPD

The manufacturer claims the right to collect all customer and prospective customer data for its own benefit, whether it be data collected online, collected by its distributors and repairers, or data produced by end-user vehicles.

It also intends to communicate this data to all the entities that make up its group, whether they are responsible for the production of vehicles (under the various brands owned by the group) or the provision of services.

Even though they may operate on behalf of the manufacturer in the future, distributors and repairers remain responsible for the processing of the data they collect and guarantee the rights of the persons concerned: rectification, deletion, portability, opposition.

In this case, neither the distributor nor the repairer is able to communicate to the data subjects the legally required information (identity of the users, purposes of the processing, duration of the processing), for the reason that they are unknown to them.

And in the same way, they cannot guarantee the rights of the persons whose personal data they have collected, when they do not know the identity, nor the contact details, of the persons who will claim responsibility for the processing.

The question is all the more important, as the manufacturer reserves the right to transfer this data outside the European Union and in particular to the United States, to which their transfer is currently illegal.

g) The pure and simple eviction of the main market players

Finally, the change of model leads to the pure and simple eviction of the historical players of the market.

Distributors are the traditional players in the automotive retail sector.

The confiscation of their clientele and the pursuit of an agent activity for the manufacturer, will henceforth prohibit distributors from any independent commercial initiative.

Distributors will no longer be traders and will consequently lose their status as players in the retail distribution market, which will be instantly controlled by the manufacturers.

They will be excluded.

It is not known at this stage whether the current agents will be the manufacturer's agents or the sub-agents of the distributors who have become agents.

In any case, the confiscation of repairer data will probably have equivalent consequences for their independence and commercial freedom.

III – THE COMMISSION'S PROJECT

These changes are sudden, mainly because by refraining from effectively regulating the activity of manufacturers, the Commission has allowed the artificial maintenance of a distribution model that has gradually become detached from the reality of the market and the interests of consumers.

Following the adoption of the EC regulation 1400/2002, which claimed to promote the emergence of a more efficient model, in particular through provisions favoring multi-branding, manufacturers have formed under the

aegis of the Commission a *"high level group"* called CARS 21 (now GEAR 2030[37]), which was intended to better defend their interests.

In 2009, following the financial crisis that shook the automotive industry worldwide, the Commissioner in charge of competition made the following statement:

> *"I have not gone into detail about the current crisis today, but you can of course take for granted that we will not use competition policy to put unnecessary barriers in front of efforts to help the industry survive and adapt"*[38].

As a matter of fact, in 2010, the Commission put an end to the succession of regulations that set specific conditions for the exemption of car distribution agreements (EC regulations 123/85, 1475/95 and 1400/2002), considering that this sector no longer justified the application of specific rules and referring to the standards of the general regulation:

> *"With effect from 1 June 2013, Regulation (EU) No 330/2010 shall apply to vertical agreements relating to the purchase, sale or resale of new motor vehicles"*[39].

The time may have come for a change in approach.

In this perspective, the draft general regulation and its guidelines give rise to the following comments.

Before discussing them in detail, it should be recalled that the block exemption regulation has replaced the individual exemption.

This means that the compliance of agreements must be considered a priori by the parties themselves and no longer a posteriori by the regulatory authority.

In order to benefit fully from the safe harbor, the parties must not only find in the regulation and the guidelines an explanation of the Commission's approach, but also the legal tools to guarantee the security of their analysis.

In this perspective, the criteria for exemption must leave no room for interpretation.

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[37] https://ec.europa.eu/growth/content/high-level-group-gear-2030-report-on-automotive-competitiveness-and-sustainability_en

[38] Neelie KROES, Closing remarks at roundtable to discuss future of the Car Block Exemption, 9 Février 2009, SPEECH/09/45.

[39] EU exemption regulation n° 461/2010, article 3.

Because the margin of interpretation affects the effectiveness of the regulation.

1) The condition for efficiency gains

The relevant provisions of the Commission's draft are as follows.

Preamble, point 6:

> *"Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels"*.

Preamble, point 13 :

> *"This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects"*.

Guidelines, point 8 :

> *"The complementary nature of the activities of the parties to a vertical agreement in placing goods or services on the market also implies that vertical restraints may provide substantial scope for efficiencies, for example by optimising manufacturing or distribution processes and services"*.

For the record, Article 101(3) of the Treaty only allows for the exemption of distribution agreements if they :

- contribute to improving production ;

- contribute to improving the distribution of products ;

- contribute to promoting technical progress ;

- contribute to the promotion of economic progress.

  . while reserving for the users a fair share of the resulting profit ;

. and without imposing on the enterprises concerned restrictions which are not indispensable to the attainment of these objectives ;

. nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In practice, these last three conditions are not met.

The regulation and the guidelines should therefore define the criteria for ensuring that the agreements comply with the requirements of the Treaty, in terms of benefit to consumers, non-essential restrictions and the ability to eliminate part of the competition.

The improvement of distribution and the promotion of technical and economic progress must not be considered solely from the manufacturer's point of view, nor must it be reduced to the improvement of his profits.

They must consider in the same way and in a global approach, the progress sought by the distributor, whose initiatives and efforts should not be impeded.

Technical and economic progress must also integrate the requirements expressed by the Commission regarding the adaptation of the economy to climate change, in order to encourage an environmentally responsible model.

2) Access to the Internet

The repairer is concerned in the same way as the distributor itself, insofar as he is in principle free to present on the Internet the parts and used vehicles he sells, the services he provides and the new vehicles he helps to sell.

For the sake of convenience, he will be considered as a distributor in the following lines.

a) The manufacturer may prohibit the distributor from selling on a third party platform

The Commission's draft guidelines would exempt (allow) the clause by which the manufacturer prohibits the distributor from selling on a third-party platform:

> *- "Vertical agreements including a restriction on the use of a specific online sales channel, such as online marketplaces, or setting quality standards for selling online, can benefit from the block exemption, irrespective of the distribution system used by the supplier in as far as such restriction does not, directly or indirectly, in isolation or combination with other factors, have as its object, to prevent the buyers or their customers from effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels (…).*
>
> *(…) unless they have the indirect object of preventing the effective use of the internet for the purposes of selling online, such sales restrictions do not amount to a restriction of the territories into which or the customers to whom the distributors or their customers can sell the contract goods or services. Such block-exempted restrictions in principle include:*
>
> > *(a) a direct or indirect ban on sales on online marketplaces;*
> >
> > *(b) a requirement that the buyer operates one or more brick and mortar shops or showrooms as a condition for becoming a member of the supplier's distribution system"*[40];
>
> *- "(…) a restriction on the use of online marketplaces can generally benefit from the safe harbour of the VBER. (…), a restriction in the use of online marketplaces generally does not affect a group of online users which can be circumscribed within the group of online purchasers, and does not limit the buyer from selling the contract goods or services via its own website or from advertising under certain circumstances via the internet on third-party platforms and from using online search engines to attract customers to its website, and, therefore, does not constitute a hardcore restriction under Article 4(b) to (d) VBER, to the extent that it does not de facto prevent the effective use of the internet by the buyers or their customers to sell online"*[41].

[40] Draft guidelines of 9 July 2021, point n° 194, C (2021) 5038 final.
[41] Draft guidelines of 9 July 2021, point n° 317, C (2021) 5038 final.

This possibility is not new and is based on case law which considered that suppliers could oppose distribution on marketplaces (Amazon, Cdiscount, etc.) on the sole grounds of preserving their brand image (for example, in the case of high-end cosmetics)[42].

A difficulty may arise from the fact that distributors are often constituted as a distribution group, which brings together several companies, each signatory of a distribution contract per brand and/or per point of sale (one of the consequences of the exclusivity imposed de facto on distributors).

This distribution group has created an Internet site, which represents, under the group's banner, all the activities of the companies that make up the group and, where appropriate, links to the sites of each concession.

This website is managed and operated by a third party company, which provides an online intermediation service to the companies in the group that are party to a distribution contract.

The drafting of the guidelines should clearly provide that the portal developed by the distribution group itself does not fall within the definition of a third-party platform.

This clarification is all the more desirable as the draft regulation defines the provider of online intermediation services as a *"supplier"*, whereas the portal implemented by the distribution group cannot be considered as such.
Preamble, point 12:

> *"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 providers of online intermediation services that have such a hybrid function typically affect inter-brand competition and may therefore raise non-negligible horizontal concerns"*.

Article 1.1.d). - *Definitions*:

> *"'supplier' includes an undertaking that provides online intermediation services irrespectice of whether it is a party to the transaction it facilitates; 'online intermediation services' means services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such*

[42] CJEU, 6 December 2017, Case C-230/16, Coty v/ Akzente; Paris Court of Appeal, Pole 1, Chamber 8, July 13, 2018, No. 17/20787, Enova v. Caudalie.

undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council".

b) The manufacturer cannot prohibit the distributor from selling on the Internet

The manufacturer cannot prohibit the distributor from selling on the Internet. Article 1.1. - *Definitions*:

"(l) 'active' sales mean all forms of selling other than passive sales, including actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison tools or advertising on search engines targeting customers in specific territories or customer groups; offering on a website language options different than the ones commonly used on the territory in which the distributor is established is normally active selling; similarly, offering a website with a domain name corresponding to a territory other than the one in which the distributor is established constitutes active selling;

(m) 'passive' sales mean sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without having initiated the sale through advertising actively targeting the particular customer group or territory, and participating in public procurement;

(n) 'restriction of active or passive' sales means a restriction of active sales within the meaning of Article 1(l) or passive sales within the meaning of Article 1(m). As regards selling of goods and services online, a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object to prevent the buyers or their customers from effectively using the Internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels is a restriction of active or passive sales, which, directly or indirectly, in isolation or in combination with other factors controlled by either party, has as its object to restrict the territory into which or the customer group to whom the buyers may sell the contract goods or services or, in the case of selective distribution, to restrict active or passive sales to end users by members of the selective distribution system operating at the retail level of trade".

Article 4.(c).(iii) *Restrictions that remove the benefit of the block exemption - hardcore restrictions*:

> *"The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object (…) where the supplier operates a selective distribution system (…) the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade (…)"*[43].

The draft guidelines add that:

> *"A ban of online sales, as well as restrictions de facto banning or limiting online sales to the extent that these de facto deprive buyers and their customers from effectively using the Internet to sell their goods or services online, have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online. Therefore, a restriction capable of significantly diminishing the overall amount of online sales in the market constitutes a hardcore restriction of active or passive sales within the meaning of Article 4(b) to (d) VBER"*[44].

From this unclear set, we can probably retain that according to the Commission, the restriction of the commercial freedom of the distributor on the Internet would only be criticizable on the double condition:

> - to deprive de facto the distributors of the possibility to sell the contractual products on the Internet ;
>
> - if this deprivation would lead to a significant decrease in the total volume of online sales on the market[45].

The issue must be considered in the same terms, whether one considers the distributor itself or the repairer/business provider.

In practice, some contracts require the distributor to use the website and the online store made available by the manufacturer within its ecosystem.

Very schematically, the distributor's website consists of a dedicated page on the manufacturer's website.

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[43] Draft Regulation of 9 July 2021, C (2021) 5026 final.
[44] Draft guidelines of 9 July 2021, point n° 188, C (2021) 5038 final.
[45] This last condition is particularly troubling, in that it assesses a restriction *by object*, considering its effect on the market.

The manufacturer claims the recording of contacts made with customers.

It is still possible for the distributor to operate a second website of its own.

But it is complicated by the imposition of sometimes very heavy standards, a fortiori in the framework of a multi-brand operation.

It is also thwarted by the attraction of the site controlled by the manufacturer, which is often better referenced, and which sucks in some of the distributor's customers.

Finally, the coexistence of these different Internet sites naturally increases the cost of using this medium.

Under these conditions, the real problem is not so much the restriction of access to online sales as the obligation for the dealer to give up to the manufacturer part of the clientele that he should be retaining through this medium.

This system illustrates the fact that on the Internet, the distributor and the manufacturer find themselves in a relationship of horizontal competition.

The contractual framework of the distributor's online activity, more or less in line with the requirements of the exemption regulation, is then an opportunity for the manufacturer to appropriate part of the distributor's customers.

This is where the difficulty lies.

It does not seem to be taken into account by the Commission's project, which would benefit from clearly excluding the possibility for the supplier to take advantage of the contractual framework of the online commercial activity of its distributor to appropriate part of its clientele.

c) The danger of differential pricing

The Commission seems to have radically changed its approach to the issue of price differentiation, depending on whether the good is sold online or in a physical outlet.

In its 2010 guidelines, the Commission considered that:

> *"The Commission thus regards for instance the following as hardcore restrictions of passive selling in view of the capability of these restrictions to limit the distributor to reach more and different*

customers: (…) agreeing that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line (…)"[46].

She now believes that:

"A requirement that the same buyer pays a different price for products intended to be resold online than for products intended to be resold offline can benefit from the safe harbour of the VBER, in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline. Such difference in price should be related to the differences in the costs incurred in each channel by the distributors at retail level. To that end, the wholesale price difference should take into account the different investments and costs incurred by a hybrid distributor so as to incentivise or reward that hybrid distributor for the appropriate level of investments respectively made online and offline, as where the wholesale price difference is entirely unrelated to the difference in costs incurred in each channel, such price difference is unlikely to bring about efficiency-enhancing effects. Therefore, where the wholesale price difference has as its object to prevent the effective use of the internet for the purposes of selling online it amounts to a hardcore restriction, as set out in paragraph (188) of these Guidelines. This would, in particular, be the case where the price difference makes the effective use of the internet for the purposes of selling online unprofitable or financially not sustainable"[47].

In absolute terms, the concern to protect physical commerce in competition with online commerce seems commendable.

The fact remains that price differentiation would allow the supplier to give its distributor different margin conditions, depending on whether the product is resold online or on the Internet.

In this context, the supplier could give his distributor margin conditions that would discourage him from selling on the Internet, for example by selling him the same product at a higher price if it is intended for online sales.

The text adopted by the Commission seems to envisage this risk, without however proposing an objective evaluation criterion.

[46] Guidelines on vertical restraints of 10 May 2010, point n° 52, 2010/C 130/01.
[47] Draft guidelines of 9 July 2021, point n° 195, C (2021) 5038 final.

As the guidelines are drafted, it can be expected that the deployment of distributor's activities will be effectively thwarted by the implementation of a tariff differentiation that is unfavorable to it.

The argument of protection of physical distribution will probably play its role before the courts, as it seems to have played before the Commission.

This outcome is all the more objectionable as it is based on an irreducible opposition between online and physical sales, which no longer has any reason to exist, insofar as no distributor can seriously consider limiting his business to his physical establishment.

3) The direct sales

The Commission's draft regulation envisages the possibility of direct sales by the manufacturer, which would place him in horizontal competition with the distributor.

Article 1.1.c). - *Definitions*:

> *"'competing undertaking' means an actual or potential competitor; 'actual competitor' means an undertaking that is active on the same relevant market; 'potential competitor' means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely 4 OJ L 1, 4.1.2003, p. 1. EN 5 EN to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market".*

Article 2 – *Exemption*:

> *"The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, the exemption provided for in paragraph 1 shall apply to all aspects of a non-reciprocal vertical agreement between competing undertakings where:*
>
> > *(a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, and their aggregate market share in the relevant market at retail level does not exceed [10]%; or*

(b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at retail level does not exceed [10]%.

5. If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3, the exemption provided for in paragraph 1 shall apply, except for any exchange of information between the parties, which has to be assessed under the rules applicable to horizontal agreements.

6. The exceptions of Article 2(4)(a) and (b) and Article 2(5) shall not apply to vertical agreements which, 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.

7. 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 nonreciprocal vertical agreement with such a competing undertaking".

Thus, dual distribution:

- would be exempted, if the combined market share of the manufacturer and the distributor does not exceed 10%;

- could be exempted if this market share is between 10 and 30%, provided that any exchange of information (on customers, for example) is excluded.

In other words, and given the market share held by the main European manufacturers, the implementation of a dual distribution model, direct and indirect, does not seem to be generally exempted.

Moreover, the guidelines only consider direct sales within the limits of a traditionally incidental and minor activity:

"These are typically scenarios where the supplier is mainly active on the upstream market and has limited ancillary activities inthe retail market. In cases where the aggregate market share of the supplier and the

buyer in the relevant market at retail level does not exceed [10]%, horizontal concerns are unlikely to arise and any potential impact on horizontal competition between the parties at the retail level is considered of lesser importance than the potential impact of the parties' vertical agreement on general competition at the supply or distribution level"[48].

This approach seems to ignore the profound changes in the market to which the regulation is intended to apply.

It may explain the manufacturers' choice of a model in which the distributor, having become an agent, can no longer be considered a competitor.

Thus, an entire sector of distribution would be excluded from the scope of the regulation, an approach that could obviously inspire other sectors.

4) The intermediaries

The 2010 Guidelines provided that contracts with *"agents"*[49] who are not independent economic actors, are not likely to fall within the scope of the prohibition of vertical agreements[50].

The 2021 draft guidelines take up this idea:

"In certain circumstances, the relationship between an agent and its principal may be characterised as one in which the agent no longer acts as an independent economic operator. This applies where the agent does not bear any or only insignificant financial or commercial risk associated with the contracts concluded or negotiated on behalf of the principal (…). In that case, the agency agreement falls outside the scope of Article 101(1)"[51].

The terms of deployment of the mandate are now more detailed, to provide a legal framework for the approach adopted by manufacturers.

[48] Draft guidelines of 9 July 2021, point n° 86, C (2021) 5038 final.
[49] The term representative is preferred, since in French law the agent has specific characteristics which are not necessarily found in the definition used by the Commission.
[50] Guidelines on vertical restraints of 10 May 2010, point n° 18, 2010/C 130/01.
[51] Draft guidelines of 9 July 2021, point n° 28, C (2021) 5038 final.

a) The agent must not bear any of the risks that characterize the act of trading

The draft guidelines specify that, in order not to be considered as an independent trader, the agent must not bear any of the investments specifically required for this activity:

> *"(28) There are three types of financial or commercial risk that are material to the categorisation of an agreement as an agency agreement for the purpose of applying Article 101(1).*
>
> *- First, there are contract-specific risks, which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks.*
>
> *- Second, there are risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss.*
>
> *- Third, there are the risks related to other activities undertaken on the same product market, to the extent that the principal requires under the agency relationship that the agent undertakes such activities not as an agent on behalf of the principal, but at its own risk.*
>
> *(29) For the purposes of applying Article 101(1) TFEU, an agreement will be qualified as a agency agreement if the agent bears no, or only insignificant, risks of the three aforementioned types. (…).*
>
> *(31) In light of the above, for the purpose of applying Article 101(1), the following list provides examples of features generally found in agency agreements. This is the case where the agent:*
>
> *(a) does not acquire the property of the goods bought or sold under the agency agreement and does not itself supply the contract services. The fact that the agent may temporarily, for a very brief period of time, acquire the property of the contract goods while selling them on behalf of the principal does not preclude an agency agreement, provided the agent does not incur any costs or risks related to that transfer of property;*

(b) does not contribute to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal;

(c) does not maintain at its own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and can return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks);

(d) does not take responsibility for customers' non-performance of the contract (for instance for non-payments by the customer), with the exception of the loss of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability);

(e) does not assume responsibility towards customers or other third parties for loss or damage resulting from the supply of the contract goods or services, unless, as agent, it is liable for fault in this respect;

(f) is not, directly or indirectly, obliged to invest in sales promotion, including through contributions to the advertising budget of the principal or to advertising or promotional activities specifically relating to the contract goods or services;

(g) does not make market-specific investments in equipment, premises, training of personnel or advertising specific to the contract goods or services, such as for example the petrol storage tank in the case of petrol retailing, specific software to sell insurance policies in the case of insurance agents, or advertising relating to routes or destinations in the case of travel agents selling flights or hotel accommodation, unless these costs are fully reimbursed by the principal;

(h) does not undertake other activities within the same product market required by the principal under the agency relationship

(e.g. the delivery of the goods), unless these activities are fully reimbursed by the principal.

(32) Where the agent incurs one or more of the risks or costs mentioned in paragraphs (28) to (31) of these Guidelines, the agreement between the agent and principal will not be qualified as an agency agreement"[52].

The project recently described by STELLANTIS is clearly inspired by this list, confirming the manufacturer's intention to exempt the distribution of its products from the rules governing the constitution of networks.

The Commission stresses that these rules are to be interpreted strictly:

"Since they constitute an exception to the general applicability of Article 101 to agreements between undertakings, the conditions for categorising an agreement as an agency agreement for the purpose of applying Article 101(1) should be interpreted narrowly"[53].

In other words, a deviation by the manufacturer in the assumption of the risks attached to the distribution, could lead to the reclassification of the status of the agent as an independent distributor.

This would have the effect of bringing the network back within the scope of the prohibition in principle of Article 101 (1) of the Treaty and would make its legality conditional on the benefit of an exemption (on an individual basis for the STELLANTIS group, since its market share does not allow it to benefit from the block exemption).

b) The cost of distribution is covered by the manufacturer

Within certain limits, however.

Firstly, the draft guidelines provide that the costs of distribution may be borne by the manufacturer, provided that any costs borne by the agent are not significant:

"For example, a principal may choose to reimburse the precise costs incurred, or it may cover the costs by way of a fixed lump sum, or it may

[52] Draft guidelines of 9 July 2021, points n° 28, 29, 31, C (2021) 5038 final.
[53] Draft guidelines of 9 July 2021, point n° 28, C (2021) 5038 final.

pay the agent a fixed percentage of the revenues from the goods or services sold under the agency agreement"[54].

A clearer rule would be welcome, along the lines of, for example, Article 2000 of the French Civil Code:

"The principal must also indemnify the agent for losses incurred by the latter in the course of his management, without imprudence attributable to him."

Secondly, the manufacturer's assumption of responsibility for the agent's specific investments does not concern investments made for the joint exercise of an independent distributor's activity.

Apparently, the manufacturer is obliged to take charge of these investments, as long as they are required for the execution of the mandate, without taking into account the fact that they may be used in the context of an independent distribution

"To identify the market-specific investments to be reimbursed when entering into an agency agreement with one of its independent distributors that is already active on the relevant market, the principal should consider the hypothetical situation of an agent that is not yet active in the relevant market in order to assess which investments are relevant to the type of activity for which the agent is appointed. The only market-specific investments that the principal would not have to cover would be those that relate exclusively to the sale of differentiated products in the same product market that are not sold under the agency agreement but are distributed independently, by contrast to market-specific investments needed to operate in the relevant product market, which the principal would have to cover in all cases. This is because the agent would not incur the market-specific costs corresponding to the differentiated products if it did not also act as an independent distributor for those products in addition to the products it distributes as an agent, provided that it can operate on the relevant market without selling the former"[55].

Given its importance, the formula would certainly benefit from being more explicit.

Second, the cost of specific investments would be charged at their book value:

[54] Draft guidelines of 9 July 2021, point n° 33, C (2021) 5038 final.
[55] Draft guidelines of 9 July 2021, point n° 37, C (2021) 5038 final.

"To the extent that the relevant investments have already been depreciated (e.g. investments in activityspecific furniture), the reimbursement may be adjusted proportionately"[56].

c) The independent trader must freely adopt the status of agent

Commission conditions the benefits of network conversion on the distributor's freedom of consent:

"For the agreement to be considered an agency agreement for the purpose of applying Article 101, the independent distributor must be genuinely free to enter into the agency agreement (for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship) (…)"[57].

In itself, the contractual model developed by manufacturers does not seem likely to arouse opposition in principle from distributors, as it seems more rational than the model deployed on the basis of selective distribution, in that it should put an end to inflation in structural costs.

The problems that remain are those of illegitimate appropriation of distributors' data and exclusivity of their future activity.

Business introducers are in the same situation as distributors, insofar as their activity is carried out in an accessory manner to that of the repairer, which is undertaken independently.

These problems are not addressed by the draft guidelines.

The fact remains that under the current conditions, the consent of distributors is sought in a more or less constrained climate, since the choices made by manufacturers are not within the scope of any negotiation.

Clearly, network members who do not consent to the change will be exposed to the consequences of their eviction and the loss of their business, which we have seen above is rarely overcome.

It should also be noted on this point that manufacturers have already sought and obtained the signature of contracts and endorsements which, without clearly demonstrating a change of model, entail the transfer of the clientele

[56] Draft guidelines of 9 July 2021, point n° 37, C (2021) 5038 final.
[57] Draft guidelines of 9 July 2021, point n° 37, C (2021) 5038 final.

and organize from now on the activity of their partners under the conditions of a mandate (the obligatory orientation of all prospects enters into the qualification of the mandate).

The subscription to these acts, when it was obtained, was generally accompanied by letters of reservation, which testify both to the signatory's disagreement and the impossibility of refusing his signature.

The condition of "*genuinely free*" consent does not seem to be met, and it is to be feared that it cannot be.

Thus, it would undoubtedly be desirable for the Commission to add to its guidelines the clarification that the distributor must not only be free to consent, but also free not to consent, which is not obvious.

In this spirit, **it is imperative that an alternative exists**.

In practice, it should therefore be made clear that the legality of a distributor's adherence to the status of agent would also be conditioned by the distributor's actual ability:

> - to maintain a joint and competing activity as an independent distributor ;
>
> - and to keep its data, whether it be customer or prospect data, without prejudice to the possibility of agreeing to a loan for use to the manufacturer, for the duration of the contractual relationship and on the basis of a fair remuneration.

d) The risk of an early validation of the change of model

As far as the implementation of a network of agents is concerned, the draft guidelines are not intended to inform the draft regulation on the exemption of vertical restraints, since the activity of agents is outside its scope.

Chapter 3.2 of the draft guidelines, which details the hypothesis of the deployment of a network of agents, *de facto* organizes the block exemption of agreements in the form of a mandate, by providing that:

> *"In that case, the agency agreement falls outside the scope of Article 101(1)"*[58].

[58] Draft guidelines of 9 July 2021, point n° 28, C (2021) 5038 final.

This seems to be a rather hasty procedure for such an important subject.

In any case, it does not seem to comply with the provisions of Regulation No. 19/65, which stipulates that the block exemption shall be granted by regulation:

> *"(…) the Commission may by regulation declare that Article 85 (1) shall not apply to categories of agreements (…)"*[59].

This is all the more true since the conversion of existing networks and the consequences it entails, first and foremost the eviction of the main players in the retail distribution market, certainly deserve a more serious framework than the invocation of a *"genuine"* freedom of membership for distributors, the existence of which no one can believe.

However, it is to be feared that in its current state, chapter 3.2 of the draft guidelines will be held by manufacturers as the legal basis for the change of model implemented, under conditions that would allow them to escape criticism.

5) Selective distribution

Article 1.1(f) of the draft regulation defines selective distribution in the following terms:

> *"'selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system"*[60].

The draft guidelines state that:

> *"The criteria used by the supplier to select distributors can be qualitative and* ***or*** *quantitative in nature. Qualitative criteria are objective criteria required by the nature of the product, such as the training of sales personnel, the service provided at the point of sale, and the product range being sold. Quantitative criteria limit the*

[59] Council Regulation No. 19/65/EEC of 2 March 1965.
[60] Draft Regulation of 9 July 2021, C (2021) 5026 final.

potential number of dealers more directly by, for instance, requiring minimum or maximum sales or fixing the number of dealers"[61].

This formulation makes it possible to consider that selective distribution could be operated:

- on the basis of qualitative and quantitative criteria;

- as well as on the basis of qualitative or quantitative criteria.

This amounts to saying that selective distribution could be operated on the basis of quantitative criteria only, which the Court of Justice accepts as being discretionary on the part of the manufacturer[62].

This wording expresses a change with the terms of the 2010 guidelines, which more clearly considered that quantitative criteria were complementary to qualitative criteria, and therefore necessary:

"Whereas qualitative selective distribution involves the selection of distributors or repairers only on the basis of objective criteria required by the nature of the product or service, quantitative selection adds further criteria for selection that more directly limit the potential number of distributors or repairers either by directly fixing their number, or for instance, requiring a minimum level of sales. Networks based on quantitative criteria are generally held to be more restrictive than those that rely on qualitative selection alone, and are accordingly more likely to be caught by Article 101(1) of the Treaty"[63];

"(…) Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers (…)"[64].

Although the draft guidelines frequently refer to the conditions set out in Metro v. Saba[65], their ambiguity is maintained by the apparent opposition of the concepts of *"qualitative distribution"* and *"quantitative distribution"*.

Moreover, the Commission seems to accept that the agreement is exempted, without the selection of distributors being made on an objective basis, as long as the parties' market share does not exceed 30%:

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[61] Draft guidelines of 9 July 2021, point n° 130, C (2021) 5038 final.
[62] ECJ, 14 juin 2012, aff. C-158/11, Auto 24 v. Jaguar Land-Rover.
[63] Supplementary Guidelines on Vertical Restraints of 28 May 2010, point 44, 2010/C 138/05.
[64] Communication from the Commission: Guidelines on vertical restraints of 10 May 2010, point n° 175.
[65] ECJ, 25 October 1977, case 26/76, Metro v. Saba.

> *"Even if they do not meet the Metro criteria, qualitative and/or quantitative selective distribution systems can benefit from the safe harbour, provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restriction"*[66].

This analysis, which surreptitiously envisages that selection can be made on a discretionary basis, leads to the annihilation of the selective distribution system, which cannot be conceived outside of a selection based on objective criteria.

In effect, it would be sufficient for a manufacturer to invoke the implementation of a quantitative selective distribution system to free itself in practice from the rules governing selective distribution and to prohibit the resale of its products in a discretionary manner, without regard for the principles of freedom of trade and freedom of enterprise, nor for the restriction of competition.

This approach, which is not clearly claimed but which is sufficient to guide the case law of the civil courts in France, is not in line with the case law of the Court of Justice.

The 1977 judgment of the Court of Justice, which established selective distribution, states that:

> *"(…) the Commission was justified in recognizing that selectivedistribution systems constituted, together with others, an aspect of competition which accords with Article 85 (1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to thetechnical qualifications of the reseller and his staff and the suitability of histrading premises and that such conditions are laid down uniformly for allpotential resellers and are not applied in a discriminatory fashion"*[67].

This position has been consistently confirmed:

> *- "(…) selective distribution systems constitute an aspect of competition which accords with Article 85 (1) provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-seller and his staff and the suitability of his trading premises and that such conditions are laid down*

[66] Draft guidelines of 9 July 2021, point n° 136, C (2021) 5038 final.
[67] ECJ, 25 October 1977, case 26/76, Metro v. Saba, ground no. 20.

uniformly for all potential re-sellers and are not applied in a discriminatory fashion"[68];

- "So as to guarantee that selective distribution systems may be based on thataim alone and cannot be set up and used with a view to the attainment of objectives which are not in conformity with Community law, the Court specified in its judgment of 25 October 1977 (Metro v Commission, [1977] ECR 1875) that such systems are permissible, provided that re-sellers arechosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

It follows that the operation of a selective distribution system based oncriteria other than those mentioned above constitutes an infringement ofArticle 85 (1)"[69];

- "(…) the Court has already pointed out that the organisation of such a net-work is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, paragraph 20, and Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16)"[70];

- "(…) the Court has ruled that the organisation of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique, C-439/09, EU:C:2011:649, paragraph 41 and the case-law cited)"[71].

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[68] ECJ, 11 December 1980, aff. 31/80, L'Oréal, ground no. 15.
[69] ECJ, 25 October 1983, case 107/82, AEG Telefunken v. Commission, grounds n° 35, 36.
[70] EUCJ, 13 October 2011, case C-439/09, Pierre Fabre v. Autorité de la concurrence, ground n° 41.
[71] EUCJ, 6 December 2017, case C-230/16, Coty v/ Akzente, ground no. 24.

In France, the Competition Authority follows the analysis of the Court of Justice:

> *- " The assessment of the qualitative nature of the criteria for selecting resellers necessarily requires an examination of the properties of the product in question, in order to verify, on the one hand, that these properties require a selective distribution system in order to preserve the quality of the product and ensure its proper use, a selective distribution system and, secondly, that those objectives are not already satisfied by national legislation (judgments of the Court of Justice of the European Union of 11 December 1980 in Case 31/80 L'Oréal, paragraphs 15 and 16, and of 13 October 2011 in Case C 439/09 Pierre Fabre Dermo-Cosmétique, paragraph 41).*
>
> *In addition, it is important to ensure that the criteria imposed do not go beyond what is necessary (judgment of the Court of Justice of the Union of 11 December 1980, L'Oréal, 31/80, paragraphs 15 and 16; see also the judgments of 13 October 2011, Pierre Fabre Dermo-Cosmétique, C 439/09, paragraph 41, and of 6 December 2017, Coty Germany GmbH, C-230/16, paragraphs 24, 40 and 43)"*[72];
>
> *- "In order to assess the criteria for the lawfulness of a network as set out in case law (see ECJ, October 25, 1977, Metro SB-Grossmärkte GmbH & Co, aff. 26-76), the competition authorities must be able to verify, if necessary by accessing non-public information held by the network head, the conditions under which authorization has been refused to applicants. The objective is to ensure that the choice of authorized operators is made on the basis of objective criteria, relating in particular to the professional qualifications of the reseller, his staff and his facilities, and that these criteria are set in a uniform manner for all potential resellers and applied in a non-discriminatory manner"*[73];
>
> *- "Even if they "necessarily influence competition in the common market" (judgment of the Court of Justice of 25 October 1983, AEG-Telefunken v. Commission, 107/82, point 33), so-called selective distribution agreements, by which a producer chooses, in particular, to distribute its products or services via distributors selected in advance by it, may nevertheless comply with the requirements of Articles 101(1) TFEU and L. 420-1 of the French Commercial Code.*
>
> *Their legality, as well as that of their contractual clauses, is subject to compliance with certain conditions"*[74].

[72] ADLC, decision n° 18-D-23 of October 24, 2018, Stihl, grounds n° 140, 141.
[73] ADLC, decision n° 19-D-08 du May 9, 2019, Hyundai, ground n° 29.
[74] ADLC, decision n° 19-D-14 du July 1st, 2019, Trek, grounds n° 87, 88.

It therefore seems necessary for the Commission to reiterate as clearly as possible that the provisions of its guidelines are not intended to allocate the benefits of selective distribution to suppliers, while exempting them from complying with the conditions.

Selective distribution agreements are by nature restrictive of competition, which the Commission has precisely identified and which is the justification for the exemption regulation:

> *"The applicability of Article 85 (1) of the Treaty to distribution and servicing agreements in the motor vehicle industry stems in particular from the fact that the restrictions on competition and obligations agreed within the framework of a manufacturer's distribution system, and listed in Articles 1 to 4 of this Regulation, are generally imposed in the same or similar form throughout the common market. The motor vehicle manufacturers cover the whole common market or substantial parts of it by means of a cluster of agreements involving similar restrictions on competition and affect in this way not only distribution and servicing within Member States but also trade between them"*[75].

It should be added that the system implemented entails the partitioning of national markets and horizontal competition on the Internet, which constitute restrictions by object.
The first expected clarification would therefore tend to confirm that the conditions of selective distribution apply regardless of market share.

It should be recalled that selective distribution is block exempted, provided that the distributors are effectively selected on an objective basis and that the parties' market share does not exceed 30%.

The modest market share of a particular manufacturer should not allow the basic requirement of selective distribution to be waived, given that in practice the impact of the agreement is amplified by the cumulative effect.

The second clarification would tend to remind us clearly that quantitative distribution can only be conceived as selective distribution that is both qualitative and quantitative.

Thus, a network set up on the basis of quantitative criteria alone, and moreover implemented in a discriminatory manner, would not be able to benefit from the advantages reserved for selective distribution (failing, in fact, to have selected the distributors).

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[75] EC regulation n° 1475/95 of 28 June 1995, point 3, OJEC of 29 June 1995, L 145/25.

This should not pose any difficulty, since in practice, all manufacturers establish criteria for a qualitative selection.

These questions should not be raised by repairers, whose network is in principle governed by qualitative selection, to the exclusion of any quantitative criteria.

Unfortunately, they are necessary insofar as, as we have seen above, the Paris Court of Appeal resists the application of the rules governing selective distribution.

6) Withdrawal of the exemption

The draft regulation envisages the withdrawal of the exemption in the following terms:

> *"Where the Commission or the competition authority of a Member State withdraws the benefits of this Regulation, it has the burden of proving that the vertical agreement in question falls within the scope of Article 101(1) of the Treaty, and that this agreement fails to fulfil at least one of the four conditions of Article 101(3) of the Treaty"*[76].

This system seems open to criticism in several respects.

First, while it is conceivable to prove the existence of an efficiency gain, it is more difficult to imagine how to demonstrate, with sufficient certainty, that such gains would not exist.

Second, the draft guidelines refer to the first four conditions expressed in Article 101(3) of the Treaty on the Functioning of the European Union, but simply ignore the last three:

> - the agreement must reserve for the users a fair share of the resulting benefit;
>
> - the agreement must not impose restrictions that are not indispensable to achieve these objectives;
>
> - nor give companies the possibility, for a substantial part of the products in question, to eliminate competition.

[76] Draft regulation of July 9, 2021, point n° 17, C (2021) 5026 final.

The Commission's mechanism should provide for the withdrawal of the benefit of the exemption when these conditions are not fulfilled, since under the terms of Article 101 (3), these conditions are necessary for the exemption.

On this point, it should probably be recalled that Regulation 01/2003, from which the Commission derives its powers, clearly provides that, with regard to withdrawal of the benefit of the exemption, the Commission, and likewise the national authority, may:

> *"(…) withdraw the benefit of such an exemption Regulation when it finds that in any particular case an agreement, decision or concerted practice to which the exemption Regulation applies has certain effects which are incompatible with Article 81(3) of the Treaty"*[77].

There is therefore no need to set limits on the withdrawal procedure which are not provided for in the Regulation and which take only incomplete account of the provisions of Article 101(3) of the Treaty.

Thirdly, the arrangements for withdrawing the benefit of the exemption do not fit in well with the arrangements for punishing cumulative effect:

> *"In determining whether the benefit of this Regulation should be withdrawn pursuant to Article 29 of Regulation (EC) No 1/2003, the anti-competitive effects that may derive from the existence of parallel networks of vertical agreements that have similar effects, which significantly restrict access to a relevant market or competition therein, are of particular importance. Such cumulative effects may for example arise in the case of shared exclusivity, exclusive supply, selective distribution, parity obligations or non-compete obligations;*
>
> *In order to strengthen the supervision of parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50% of a given market, the Commission may by regulation declare this Regulation inapplicable to vertical agreements containing specific restraints relating to the market concerned, thereby restoring the full application of Article 101 of the Treaty to such agreements"*[78].

As it stands, there is some doubt as to the Commission's intention to make the withdrawal of the benefit of the exemption in the case of cumulative effect (points 18 and 19 of the draft regulation) subject to the procedures described

[77]Regulation (EC) No. 1/2003 of 16 December 2002, article 29, OJEC L 1/1 of 4 January 2003.
[78] Draft Regulation of 9 July 2021, § 18, 19, C (2021) 5026 final.

in point 17 above, which make withdrawal conditional on the demonstration of a complete absence of efficiencies.

Moreover, it seems that the effectiveness of this mechanism is questionable, since in automobile distribution, the cumulative effect of vertical agreements covering more than 50% of the market has been the norm for many years, contributing to the current disorder, without apparently having provoked any reaction.

Even though withdrawal can be pronounced *"ex officio"* by the Commission.

Paris, September 16, 2021.