VBER CONSULTATION POSITION PAPER

Issued by[1]: **Faconauto**, **Federauto**, **VÖK**, **NFDA**

Together the "Undersigned Associations Spain, Austria, Italy plus UK" or, in short, the "UC[1]"

In the framework of the ongoing public consultation of the European Commission ("**Commission**") on Vertical Block Exemption Regulation ("**VBER**") and the guidelines on the VBER ("**Guidelines**") that will end on 17th September 2021, the undersigned parties would like to provide, with this position paper ("**PP**"), its view on the draft of the VBER and the Guidelines published on 9th July 2021 ("**DRAFTS**"). Additional background information, research and specific drafting suggestions are set out in Annex 1 of this PP (which supplement the **Additional Remarks on the Guidelines** set out at the end of this PP).

In this PP, the UC express their shared view on the issues dealt with in the Commission's consultation.

In particular, this PP shall focus on how the Drafts do not provide a clear guidance to the existing conflicts between the dealers and the manufacturers in the automotive sector, including those which have previously been brought to the Commission's attention.

We believe that VBER (or, rather, gaps in the VBER) has led to high levels of conflicts between the dealer and the manufacturer in the automotive market. For example, refer to the case decided by the Austrian Supreme Cartel Court on March 12, 2021 in the legal dispute between Austrian Peugeot dealer Buechl and Peugeot Austria (PSA). In this case, it was found that the general importer for Peugeot vehicles in Austria abused its market power vis-à-vis Buechl in violation of Austrian and European competition law (case no 16 Ok 4/20d). arisen under a more comprehensive block exemption framework for the automotive markets. As we are sure the Commission is aware, a number of similar cases are pending before national competition authorities and courts, notwithstanding the fact that judicial action is generally discouraged by the implicit or explicit threat of economic sanctions on the part of the manufacturers.

At the end of July this year, the Commission published (with the DRAFTS), the Explanatory Note on the Revision of the VBER ("**Ex Note**") listing the objectives of the VBER revision.

Firstly, we would like to underline that the "Objective 2", as defined in the Ex Note, has not been reached. Namely, the -DRAFTS, contrary to what was stated in the Ex Note) do not provide "*stakeholders with up-to-date guidance for a business environment reshaped by the growth of e-commerce and online platforms, ",* nor do/are they "*ensur[e]ing a more harmonized application of the vertical rules across the European Union*[1]".

Moreover, the undersigned parties would like to underline that the Staff Working Document of 8 September 2020 ("**SWD 2020**"), published by the Commission highlighted a series of critical issues that should have been addressed and resolved in the new provisions of VBER and in the Guidelines, much to its surprise, however, we found that the Drafts do not address any of such critical issues (see below).

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[1] UC stays for: Faconauto - representing the franchised car and commercial vehicle retailers in Spain; Federauto - representing the franchised car and commercial vehicle retailers in Italy; VÖK - representing the franchised car and commercial vehicle retailers in Austria; NFDA - representing the franchised car and commercial vehicle retailers in the UK

[2] Pag. 1 of the Ex Note.

Thus, we remain concerned as to why some issues that were highlighted as critical by the Commission itself, were not addressed fully in the DRAFTS after all.

The undersigned parties hope that, in the context of the ongoing consultation, the right weight will be given to issues that have been considered by the Commission itself as a source of potential anomalies in the automotive sector.

In this position paper, we will focus on the main areas that are of concern for the car dealers: a) the unbalanced contractual relationship between the manufacturer and the dealer; and b) manufacturers' direct competition with dealers. Finally, we will demonstrate how certain provisions of the DRAFTS remain to be in contrast with the consumers' interests.

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In detail, the undersigned parties would like to recall the concerns that have arisen so far with reference to:

i. Online sales

We take note of the arguments used by the Commission in the DRAFTS relating to the modification of the market which is increasingly moving towards online sales and that the evolutionary process of the market cannot be stopped.

At the same time, however, we believe, in compliance with the core of competition law rules, that the evolution of the market must ultimately be for the benefit for the consumer. To this end, the proposed uniform distribution rules are not suitable for particularly valuable, complex and important products such as vehicles.

In fact, the peculiarity of the automotive sector cannot be overlooked and therefore, we believe that motor vehicle distribution cannot be regulated in the same way as the distribution of other products.

The undersigned parties firmly believe that, in the automotive sector, consumer protection, which should be at the heart of any review, is likely to be achieved only through the preservation of the competitive dynamic between manufacturers and distributors. To achieve this goal, specific rules for the automotive sector are needed.

In particular, we draw the Commission's attention to the fact that, without careful intervention or more tailored regulation, dealership (including agency) contracts for the resale of motor vehicles will allow manufacturers to disintermediate dealers, not only cutting them off from consumers and the market, but increasingly and rapidly eroding the reference market, on which the dealers have based their investments.

In the automotive sector, selective distribution schemes are based on prescriptive standards that dealers must comply with. Conversely, through online sales, manufacturers operate at the same level as their own dealers (*i.e.*, in competition with them), albeit through a different channel. The same manufacturers sell vehicles without having to comply with the constraints (in terms of investments, facilities, equipment, training costs, financial cost, organization, warehouse) which, as suppliers, they do impose on the dealers, who are contractually bound to respect them in order to continue to be engaged in the sale of cars, avoiding the risk of a contract termination. As a consequence, dealers are cut off from the market not as a result of a fair competitive challenge but because of the dual role of manufacturers, who, as suppliers, impose on competitors at the retail level costs in terms of premises, showrooms, organization, training, warehouse and financials, to which, conversely, they are not subject to while selling directly online.

Thousands of dealers have previously entered one or more dealership contracts with respective manufacturers basing their business plan on the evaluation of the significant investments that they were required to make versus the market potential they had estimated at that time. However, manufacturers have now chosen to change the landscape: first, by entering the final-consumer market either directly or by means of resale platforms, which has unilaterally reduced the dealer's market potential, while forcing dealers to subsidise direct distribution; second, by imposing increasingly onerous controls on dealers which limit their competitive offering (ultimately resulting in fewer dealers and a likely transition to agency agreements).

The SWD 2020 took into consideration some of the issues that the undersigned parties consider important for dealers. However, as mentioned earlier in the text, these issues were not sufficiently considered in the DRAFTS.

We are referring, in particular to:

i) Page 14 of SWD 2020 stated that "*the review revealed that the use of the internet could result in free-riding concerns when consumers use the pre-sales services (e.g. showroom services and customer advice) offered in brick-and-mortar shops to inform their purchase decision, but then buy the product for a lower price on the internet from distributors who have not invested in such pre-sales services. It was considered that free-riding could lead to a sub-optimal provision of pre-sales services and a reduction in the performance of selective distribution systems. To address this issue, it was decided to clarify in the Vertical Guidelines that under the VBER, a supplier can require its distributors to have one or more brick-and-mortar shops in order to allow consumers to touch and feel and/or experience the product, thereby excluding internet-only distributors from its distribution network".* These agreeable remarks were completely neglected in the DRAFTS.

ii) Page 32 of the SWD 2020 mentions how on-line sales "*have significantly affected the distribution and pricing strategies of both manufacturers and retailers. As a reaction to notably the increased price transparency and price competition, manufacturers have sought greater control over their distribution networks, with a view to better controlling price and quality. To that end, manufacturers have started implementing in particular the following strategies:*

• A large proportion of manufacturers have started to sell their products directly to consumers through their own online retail shops, thereby competing increasingly with their distributors.

• Manufacturers have made increasing use of selective distribution systems, under which products and services can only be sold by pre-selected and explicitly authorized resellers, thus allowing manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price.

• Manufacturers have made increasing use of contractual restrictions to better control the distribution of goods. Depending on the manufacturer's business model and strategy, such restrictions may take various forms such as pricing restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks".

The DRAFTS do not contain any remarks on these topics.

iii) Page 43 of the SWD gave examples of some prohibition decisions "*providing examples of vertical restrictions imposed by suppliers with a view to reducing the competitive pressure from online sales (e.g. consumer electronics cases and Guess) and artificially segmenting markets to the detriment of consumers (e.g. Pioneer, Guess, licensed merchandise cases and Meliá). Moreover, the Guess case is illustrative of the increasing trend towards vertical integration on the supply side, which already figured among the findings of the Commission's e-commerce sector inquiry. The resulting direct competition with their distributors provides suppliers with incentives to limit competition at retail level, notably in the context of a selective distribution, e.g. by restricting authorized distributors from advertising and selling the contract products online in order to provide their own direct online sales channel with a distribution advantage. In addition, the consumer electronics cases show how the growing e-commerce environment allows manufacturers to easily monitor prices and to swiftly intervene to dampen price pressure".* These arguments were neglected in the DRAFTS.

iv) Pages 128 and 129 of the SWD offer points of reflection on the possible competition between manufacturers and distributors in the online space. Indeed, manufacturers will sell their products online at a fixed price (that is usually lower than the price at which car dealers purchase the vehicles), which dealers may not be able to match due to their fixed and operating costs, possibly leading in the short term to dealer disintermediation and a contraction of the distribution network. In the DRAFTS these considerations were overlooked.

The likely outcome of manufacturer behaviour on the market can be summarized as follows: i) customer price increases; ii) lack of transparency; iii) lack of pre-sale assistance to consumers, iv) reduced accessibility.

ii. Dual distribution

In dual distribution, a manufacturer sells the product directly to the final customer, competing directly with its dealers. In this scenario, whilst dealers must comply with severe rules and standards to be on the market based on the conditions set forth by the manufacturer, the latter, having a double role of supplier and competitor, is selling the product without these limitations.

In particular, page 156 of the SWD 2020, paragraph 4.2.4 states that "*Article 2(4) of the VBER sets out the general rule that the VBER does not cover vertical agreements entered into between competitors as defined in Article 1(1)(c) of the VBER. However, it makes certain exceptions to this general rule for non-reciprocal agreements between competitors. These are agreements where the parties act in different economic roles and do not act on the same level of trade (i.e. agreements where only one party distributes for the other). Such non-reciprocal agreements can benefit from the VBER if the supplier is a manufacturer of goods who also acts as a distributor for these goods or a service provider who operates at several levels of trade, whereas the buyer is only a distributor (i.e. it does not compete with the supplier at manufacturing level) or only operates at the retail level (i.e. it does not compete with the supplier at the level of trade at which it purchases the contract services). These situations are typically referred to as dual distribution. At the time of the adoption of the VBER, taking into account that dual distribution was rather limited in scope back then, the potential impact of the competitive relationship between the parties at retail level was considered to be of lesser importance than the potential impact of the vertical agreement on competition in the supply or distribution of the goods or services concerned.170 Paragraphs 27 and 28 of the Vertical Guidelines provide additional guidance on the application of Article 2(4) of the VBER*".

The exponential growth of direct sales in many European states makes it difficult for many car dealers in certain markets to continue in business. As can be seen from reports in response to the Commission's public consultations, in certain European countries, such as Germany and Spain, direct sales already exceed 50% of total sales.

This conflicts with the principles of selective distribution, as products should be reserved for resellers meeting certain criteria; and it is contrary to the most basic principles of the contractual relationship to discriminate against those that have invested in supporting a brand by selling through channels that are not required to make the same investments. This type of free-riding empties selective distribution of its value.

The Commission, aware of the problems that this situation creates for competitors and consumers, raised the possibility of regulating direct sales in one way or another, but omits any regulation on this topic; nor does it allude to the acute problems that this issue presents in terms of driving investment, quality and service (which are also important parameters of competition, alongside price).

In light of the new market trends – of which the Commission appears to be fully aware – the DRAFTS should have therefore also assessed the specific impact of dual distribution in the motor-vehicle sector at retail level.

iii. Sales concession agreement/Agency agreement

First of all, the undersigned parties would like to underline that the limit for the application of an agency contract (genuine agent) compared to the average turnover of the sector (> € 40 million for distributors / dealers) is not appropriate. In fact, the average turnover's figures are much more significant for suppliers/manufacturers.

Moreover, we note that the role of a dealer does not fit with the characteristics of the Agent as defined in the DRAFTS, whose legislation clearly has a perspective aimed at contents and dimensions very different from those of a distributor in the automotive sector. With reference to Agency, several national federations in the automotive sector have been informed that many manufacturers intend to propose (or, more likely, impose) on dealers a transformation of the dealership contract into an agency contract, a fact which is not only increasingly reported by the press, but which already happened in several countries like Sweden and Germany.

As matters stand, the dealer acts in its own name and entirely bears the commercial risk, purchasing the vehicles directly from the manufacturer and reselling them to the customers. The agent, on the other hand, acts on behalf and as a collaborator (more precisely a sales consultant or introducer) of the principal, promoting the conclusion of sales contracts with third parties in the name of the principal.

Although it may seem that the agent and the dealer perform a very similar function in terms of sales process, there is no comparison between the two roles in terms of complexity, responsibility and liability towards the customer, or the investments, processes and standards that need to be complied with, as well as the financial effort and commitment needed. A dealer relationship implies strict contractual obligations, both towards the manufacturer and the customer. Liabilities are shared by the dealer with the manufacturer, alongside duties which, to be properly performed, require specialized skills and workforce, as well as ongoing and long-term investments. Most importantly, however, the dealer injects a vital competitive dimension into the customer transaction as it is selling in its own right in competition with many other businesses (other dealers, whether or not of the same brand, and manufacturers selling directly).

Contrary to that, the agency contract fully empowers the principal (manufacturer) to exert direct control over the customer relationship, while the agent's role is often just to pass the customer's order to the principal. The agent has no scope to offer the customer a better deal. Furthermore, the genuine agent will not be allowed to sell ancillary products, such as financial plans, guarantee extensions, insurances or long-term rental plans, thus cutting out a truly relevant part of customized customer services, as well as a relevant source of business and profitability, if compared to current dealer contracts in force.

From a consumer's point of view, a switch to an agency system would imply a heavy loss in terms of price competition, service spectrum and quality, as well as reach (geographical).

In this respect, and by way of example, the severe margin reduction resulting from the standards imposed by the automotive manufacturers along with selective distribution systems have caused e.g. the failure of up to 43% of dealers over the past 10 years (70% over the past 20 years) in the Italian market (3rd market in size in the EU following Germany and France). In the same time frame, the average weighted car price – netted by inflation – has increased by 13,1% while the consumer net purchasing power has increased by just 6,1%, clearly showing a deficit to the detriment of the consumer.

Having said that, if not properly regulated, a wholesale shift from selective distribution to agency contract would cause further damage. For dealers, they would be exposed to the risk of being unable to amortize huge investments to comply with manufacturer standards; they would also be subject to even greater control, which could reduce turnover, as well as a loss of their customer base.

With regard to the loss of the dealer's customer base, which is the dealer's revenue generating business base, manufacturers will use the database (belonging formerly to the dealer, but conceded to the manufacturer under an agency arrangement) to pursue direct sales. The manufacturer will manage all the marketing and promotion functions in the place of the agent, who will no longer have the financial means to sustain these tasks. As a consequence of revenue and margin reductions, the agent will also need to right size and streamline his own organization, thus reducing the possibility to interact with his market. Further to this, not being able to finalize the sale with the consumer, the genuine agent will lose a major stake of his used car business due to the missing revenues generated by used cars trade-ins. To be well noted: the latter aspect will represent a major hurdle for the European Union in pursuing the challenging goals set by the European Green Deal, namely the timely replacement of the aged and polluting car park with more modern and less-to-zero polluting vehicles.

At the same time, without a proper and clearly regulated compensation, the transition from dealer to agent contract would mean a clear and straight forwarded expropriation of the dealers' core business levers by the manufacturer, including the non-rewarded use of their facilities as customers showcase and for test drive purposes.

The undersigned parties believe that the Working Paper issued by the European Commission in May 2021, is enlightening, as it indicates that the possible transition from the dealer/concession to the agency relationship would place dealers in an even more precarious position. This transition would constitute a form of definitive "demotion" with respect to the role traditionally played by dealers, as well as a visible and progressive demolition of the distribution system, with an estimated impact of approx. 40% of today's employment level. Simulations run by Federauto, clearly show that a mid-sized average to well performing dealer, selling 1.000 new cars and 600 used cars reaches a ROS of 1,8% car sales overall, besides the after sales and spare part business. In the case of a transition to a genuine agency contract, if not properly regulated, due to the effects mentioned above (market share erosion, customer base loss due to disintermediation, loss of sales productivity due to organization rightsizing, missing revenues from financing, leasing, rental and other services commissions), the ROS of the car sales will drop to -1,1%, generating a loss which will be possibly mitigated by the spare profitability to achieve breakeven.

We foresee severe consumer repercussions following a mere switch to the agency model as well. This is powerfully illustrated by the case of Stellantis, who intend to melt down networks from 869 to just 290 dealers to serve as commission agents in a new contract to be in force as early as 2023, following the termination of all dealer contracts earlier this year. As an immediate consequence and repercussion following the findings of abuse of a dominant position by the Austrian Supreme Cartel Court in the Buechl-case, Stellantis has radically terminated its dealer contracts and intends to impose new agency contracts in Austria already by 2023 (along with Belgium and the Netherlands, where comparable litigation is pending), while the rest of Europe shall follow suit only as of 2027. In fact, only 1/3 of – carefully selected – Austrian dealers (50 instead of currently 152 for the Peugeot brand, 290 instead of 869 for all Stellantis brands) shall be permitted to continue selling new cars as commission agents (dealers, including Buechl, critical of Stellantis' abusive contact are – quite bluntly – not among them). What is more, Stellantis publicly justifies these actions quoting "upcoming changes" to the EU block exemption rules, thereby abusing the Commission's legislative endeavours to further abuse its market power and punish dealers standing up for their rights under the Competition law rules.

In this respect it needs to be clarified, that dealers adhered to investments and obligations as required by manufacturers, and this was consciously based on a clear economic evaluation of the market potential, where the source of sales and the reference market played a fundamental and primary role, as well as the critical definition of their role as autonomous entrepreneurs and, previously, the only sales channel of the manufacturer.

The DRAFTS should have provided more certainty and set clear rules for manufacturers in order to mitigate their market strength towards distributors. Indeed, only legislative certainty can ensure a level playing field in the automotive industry. A clear jurisdictional framework is required. In the absence of legislative certainty, the effect will be the disintermediation of dealers and subsequently consumer harm.

Key reminders

- Proportionate and targeted competition regulation is vital to preserving the benefits that consumers have hitherto experienced in automotive retail markets across the EU.

- Any new regulation and guidelines should reflect the growing importance of intra-brand competition (and other market developments) as supplier markets consolidate.

- If these challenges are not addressed the effect will be to reduce legal certainty in terms of what kinds of vertical restrictions comply with competition law. This could in fact lead to more restrictions being placed on weaker parties.

- In terms of improvement, the focus needs to reflect emerging trends and to address a wider range of potentially restrictive practices. This will support innovation and result in better consumer outcomes; and the changes do not need to undermine the validity of existing distribution models.

- New rules need to recognise that OEMs often leverage their upstream market power to strengthen their downstream retail offering, increasingly at the expense of downstream competitors over whom they exercise significant control.

- Consideration must be given to ensuring that dealers remain able to compete against vertically-integrated supply chains and other platforms, and that OEMs do not assume an unfair advantage by virtue of unduly restricting dealers' activities while, at the same time, forcing the latter to concede control of key downstream assets (particularly data) to OEMs.

- We would urge the Commission to give careful thought to adopting measures **which preserve intra-brand**, and well as inter-brand, **competition**, particularly for sectors, such as automotive, which are experiencing significant consolidation at the OEM level, as well as the emergence of powerful online platforms and intermediaries.

- Competitive contractual relationships should be based on fair and objective criteria to ensure a level and predictable playing field, which supports investment. Dealers which make the relevant investments (within a selective distribution system) to deliver high-quality pre- and aftersales services should not be placed at a competitive disadvantage to third parties who choose not to or who do not need to.

- The Draft New VBER and Draft New Guidelines already seem to recognise that generous market share thresholds are not always appropriate (particularly in dual-distribution scenarios); however, more focus is needed where relationships are characterised by major differences in bargaining power.

- It is important to remember that in the automotive sector, the economic dependence of dealers on OEMs (and the sunk investments made by dealers in the OEM's brand) places OEMs in a particularly powerful bargaining position, one which far exceeds any wider market or traditional 'dominance' assessment based on that OEM's market share.

Finally, proper industry codes of conduct (separate to regulation) have a role to play. These should be fostered alongside effective/cost-effective dispute resolution processes.

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In conclusion, we understand and appreciate the Commission's efforts to provide greater legal certainty to the VBER. However, absent further refinements, such regulatory changes still do not protect the most basic interests of the majority of actors in the automotive sector or consumers.

However, we also have the opportunity to study and provide solutions to the specific problems of one of the most important industries of the Continent (more than 7% of GDP, well over 10% in some of the larger economies). The Commission is currently considering the renewal of Regulation 461/2010, on the automotive aftermarket. We urge the Commission to start a study and hearing process that will result in a general regulation for the automotive sector, including sales and after-sales, and that will provide a solution to the problems raised in this document and the reports sent by all parties after every public consultation so far.

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Additional remarks on the Guidelines (See also Annex 1)

The UCs believe that the following points of the VBER Guidelines could rise concern. In particular:

para. 2 VGL Pure self-assessment represents a problematic aspect of any market characterised by significant imbalances in the supply chain. In some respects, the VBER assumes that all parties in the supply chain will, in their negotiations, have the power and resources to be able to assess and resist the imposition of controls that stray very close to competition law boundaries. This is not always the case and – absent specific Commission assessment - may only be addressed fully throughthe adoption of detailed sector guidelines.

3.2 (28) Unclear, specially concerning the "narrow" interpretation of the application of the Art. 101(1).

(29) The risks addressed here represent preconditions of absolute relevance in defining the frame within which the agency agreement is applicable. Among the contract specific risks, the contractual liabilities (product, services, deliverables etc.) should be considered as well, and would in that case confirm that the dealer's role cannot fit into the agent's job.

(30) States that "For the purpose of applying Art. 101(1) an agreement will be qualified as an agency agreement if the agent bears no or insignificant risks of the three aforementioned types. … generally to be assessed by reference of the revenues generated by the agent …

In other terms, the assessment of the risk in terms of the specific investments and the deployment of dedicated personnel is of paramount importance. In the case of a dealer in the automotive industry, the investments (premises, structures, interior outfit, equipment etc.) as well as the personnel (including training) are clearly driven by the standards already imposed by the manufacturer.

(32) Despite the fact that only one of the 8 mentioned risk cases is sufficient to outplace the agency agreement, according to the Guidelines, the assessment should happen on a case-by-case basis, meaning that it can be initiated only by an action of one of the involved parties.

(33) The Guidelines consider compensation for risks assumed by the agent through reimbursement by the principal, but the methodology and the quantification remain unclear.

(34) The independent distributor is supposed to be genuinely free to enter an agency agreement, but which are the methods/institutions that can effectively allow a distributor to defend himself against pressure and extortion without compromising the relationship with the principal?

In this respect it is of absolute relevance that already today a dealer contract or a whole dealer network can be terminated by the supplier without any specific reason with a term of 24 months, and even less, meaning 12 months, in the case of a network restructuring process. These termination terms have no relation to the size of the investment required for an average dealer to start the business according to the manufacturer's standards, investments which have an amortization time which can go from 10 to even 30 years, often involving long time real estate leasing contracts.

Further, the above-mentioned termination terms do not address the value of the goodwill developed in the business (and the related taxation). Goodwill represents the results of years spent in the development of the local customer base. The goodwill value of an average performing dealer could reach above 9 million Euro, according to a recent estimation by Federauto.

(35/37) Point (35) clearly states the risk induced by the principal's pricing policy of substantially influencing the distributor's pricing policy and margins. Point (35) also admits the difficulty in distinguishing the general agent's investments vs the market specific investments, which is a major discriminating aspect in defining the agent's vs the dealer's role and agreement. Consequently, the Guidelines imply that the basics of the principal's reimbursement are fleeting and unstable. These aspects are of absolute relevance where a principal imposes (or a dealer agrees upon) a transition to the agency contract. A clear reference to the reimbursement of non-depreciated investments, as well as of the goodwill and the respective due taxation is missing, leaving ample room for (mis)interpretation.

(39/40) If the supplier bears all the described risks, the distributor will be an agent. This sets the principal free in defining unilaterally the pricing policy, the territorial limitations, the customer groups and other selling conditions. If the agent bears at least one (or more) risks described under 28÷30, according to the provisions of Art. 101(1) he is a buyer, meaning an independent distributor and not an agent.

(42) The exchange of sensitive market information – such as the (imposed) exchange of the distributor's customer data with the principal – represents an infringement of Art. 101(1). But today this is basically the case of the relationship between every car manufacturer with his dealer network.

(43/44) In the case of dual role, compliance needs to be assessed strictly. Moreover, undertakings providing online intermediation services cannot be qualified as agents. Such presence can significantly imbalance and substantially drive the pricing policy, significantly affecting the activity and profitability of the agents. The investments related to these undertakings' activities clearly do not qualify them as agents. Their strong presence (e.g. long-term leasing companies) is typically emerging within the car distribution scenario, limiting and endangering the dealers' role.

The fact that either the supplier (manufacturer) and/or new sales platforms (long-term rental or leasing companies), engaged by the manufacturer, are entering the market, while eroding the official distributors' market share, represents a clear territorial and customer base limitation.

4.2 (51/52) A general pre-agreement can determine the adoption of a unilateral binding policy where for tacit acquiescence the other party (distributor) will need to comply in practice. This might be the case of a pre-agreement or pre-consent expressed by a dealer association (e.g. AECDR or a national or brand-specific association). The Guidelines should clearly state that such a pre-agreement can only be valued in presence of a specific mandate of the interested parties.

59 The Commission clarifies that only vertical agreements on the sale of products, but not on leasing, are covered by the VBER. We see this as problematic under competition law. In competition law, it always depends on the consideration of substitutability from the buyer's point of view. In our opinion, this should also apply to purchase and leasing. In the automotive sector in particular, it is increasingly evident that new vehicles are no longer sold, but leased. For some brands, the quota of vehicles that are sold via a leasing model is over 50%. This is related to the changed consumer behavior, but in view of the fundamental change from vehicles with combustion engines to battery electric vehicles, this also results from risks that hardly anyone can assess (e.g. with regard to the service life and range of the batteries used, but also with regard to political and infrastructural framework). In this respect, it is obvious that consumers are relieved of the risks in order to motivate them to use the products. That is definitely positive, but it is again problematic that new leasing and usage formats (such as subscription models) are developed and implemented by manufacturers together with their own financial service providers, i.e. financial service providers belonging to the group, or with external third parties.

These specifications by the Guidelines may clarify how weak the distributor's contractual position is.

4.2.2(54)

4.4.3(83/84) The VBER excludes vertical agreements between undertakings operating in the same reference- and geographical market. It is our understanding therefore that VBER does not apply when a manufacturer directly sells online and is competing with his own official distribution network.

(86) Here the Guidelines refer to a joined supplier/buyer market share not above 10% of the reference market.

Now, considering the concept of market share, this should be reconducted under that of the "real reference market" e.g. in the case of a premium brand the market defined by the respective segments and not the general market.

This according to the Commission's definition of "reference market" (97/C 372/03): "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

A common sense application of this rule would immediately clarify that a mainstream car or even a city car can by no means belong to the same market like a premium car or a luxury product, which may shed new light on the founding concept of "market share", in our opinion in need to be revised.

(87/88) Dual distribution: here the regulation seems unclear. How is it possible to accept that a manufacturer enters the market selling directly (e.g. online) while this will as a matter of fact erode the market(share) of its own distribution network, which was obliged to heavily invest in standards, each distributor basing his business plan and long-term investments on a prior analyzed reference market *without the presence of the manufacturer and of other sales platforms*. The Guidelines should include provisions to foresee to compensate the distributors?

(91/94) According to the Guidelines, a supplier with a hybrid function in competition with his distributors (to which they provide such services) are not exempted. This aspect may impact the Interbrand competition induced by the manufacturers going online in conflict with their own distribution network.

In line with the above, vertical agreements are excluded from the scope of the VBER if concluded between competing companies. This as well seems to apply to the cases where the manufacturer goes directly on the market, either online or by alternative channels, and will be automatically excluded from the VBER.

4.6.1(102) Exclusive distribution systems. Here – tackling the number of appointed distributors, the Guidelines clearly refer to the need to find a sound relation to the respectively assigned territory or customer group so to "secure a certain volume of business that preserves their investment efforts."

4.6.2.2(134) Selective distribution criteria, meaning the need to represent the brand or product through a well-defined physical presence on the territory, are recognized as a coherent requirement specifically in relation to: the nature of the product concerned; high quality; high tech; luxury goods/luxury aura.

This can be considered the case in the automotive distribution, especially in the premium market.

(135) Here the *Coty case* to be reversed: if a supplier can impose a ban to the distributors preventing them to go online with certain (luxury) products in order to preserve their (luxury) aura, the same should be possible in a symmetrically reverse way, meaning that a supplier should not be enabled to go online thus jeopardizing the effort expressed by its distribution network aimed at granting a defined (luxury) customer experience at their premises.

(136) Here the Guidelines state that, where applicable/significant anticompetitive effects are shown, the benefits of the VBER will be withdrawn: this is exactly the case where, by going directly online and on specific customer groups, the manufacturers will be bundling part and shares of the market in their own hands, thus reducing the reference market initially agreed upon with the distributors, consequently the revenues, the pay-out of their investments and even in several cases the survival of the respective dealer companies, and this even more in the case of a transition from dealer to agent.

(139) All the above is questioned where it comes to considering transparency, accessibility and favorable pricing a clear advantage for the consumer resulting from a sound competition, which is not what an agency-based distribution system will favor.

(148) This example, taken on its contrary, may lead DG Comp to favor the online distribution, while generating the opposite effect, as mentioned under the previous points.

5. Market definition and market share calculation

According to the Commission's Notice on the definition of relevant market for the purposes of the Community competition law (97/C 372/03) the relevant product market is defined as follows:

"A relevant market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product's characteristics, their prices and their use."

In coherence with this definition, the car market cannot be considered as one, and here at least price segments should be considered: a premium product is by no means substitutable by and comparable with a cheap mainstream product.

6.1.1 Resale Price Maintenance (RPM)

(170) By entering the market directly by means of online sales (fixed or minimum resale price), RPM conditions will be imposed onto the distribution network, thus conflicting with the hardcore restriction as per Art. 4 (a) VBER.

That is one of the reasons why the manufacturers are trying to force the transition to the agency contracts.

In this case, the fixed price is imposed to the distribution network indirectly but implicitly, eliminating price competition at the retail level with immediate negative consequences for the consumer.

(172) Similarly, this applies for the distribution margin.

(174) Shouldn't Minimum Advertised Price (MAP), implicitly forcing retailers to comply with certain set prices, be considered out of the VBER provisions?

(177) Clearly distinguishing non-genuine and genuine agent is essential as according to the Guidelines it impacts the manufacturer's possibility of setting final consumer prices (hardcore restriction).

6.1.2 Hardcore Restrictions

(188) The Guidelines explain that restricting online sales is in breach of Art. 4(a) and (b) of the VBER.

Nevertheless, this is heavily conflicting with the different selling costs and the obligations related to both the brick-and-mortar physical outlets and the standards imposed by the manufacturers.

(189)b/h The supplier cannot differentiate conditions for the buyer (distributor) in online sales where online is a part of the market, in other words of the territory.

(195) Here it is implicitly admitted that online and offline sales imply different distribution costs. Even though here the point made concerns the possible low profitability of online sales, as a matter of fact and as discussed above, offline sales in a brick-and-mortar shop maybe not profitable as well, especially if executed under an agency contract with forcedly reduced margins.

(215/221) Both points refer to the fact that in the case of an agency contract, the supplier is unilaterally free to change over the time the customer groups assigned to a distributor (and to himself) as well as the possibility for the supplier to adopt different criteria for online and offline sales, thus showing once more that the Guidelines are characterized by several contradictions.

Conclusion

While aspects of the Draft New VBER and Draft New Guidelines provide some useful clarification over the previous regulation and guidance, more can be done to ensure that sectors undergoing radical change do not experience a very significant and potentially irreversible reduction in competition to the detriment of European consumers.

With this in mind, the UCs hopes that the Commission will find the above comments and industry insight useful, and re-affirms its commitment to working with the Commission on this review or, as the case may be, an expansion of the current sector-specific (MVBER) rules to ensure that competition in European vehicle markets is preserved going forward.

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