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

Challenges for motor vehicle distribution

The motor vehicle distribution, servicing and mobility sector represents 150,000 businesses and 500,000 jobs for a total turnover of 140 billion Euros. Apprentices account for 7% of the workforce in this sector and it trains 60,000 young people every year. In total, 13,536 car brand sales outlets were listed in France on 1st January 2021 (including 5,776 dealerships and 7,352 brand agents), ensuring proximity and a territorial network that is invaluable to consumers.

To sell vehicles of a particular make, car dealers must sign a distribution contract with the manufacturer. They must comply with precise and demanding specifications which determine the way in which the brand is showcased and the distribution and servicing rules. Compliance with these specifications requires large investments amounting to millions of Euros because brand universes are liable to change regularly. The distribution contract is accompanied by annual business policies defining sales objectives and remuneration systems. The relationship between the manufacturer and its distributors can only be balanced if, in return for the investments made, the distributors are protected against the risk of sudden termination in the absence of any breach on their part of their contractual obligations.

The European Commission exemption regulation 1400/2002, specific to distribution agreements in the motor vehicle sector, took this need for a balanced relationship into account by providing in particular for an obligation to give reasons for termination of agreements and for freedom of sale within a given network. In 2010, however, the European Commission deemed that inter-brand competition in motor vehicle sales markets in Europe had reached a sufficient level of intensity for it to no longer be necessary to maintain an exemption regulation specific to this sector. It therefore decided to allow this regulation to expire without renewing it, calling on member States to supplement its provisions by national legislation. In France, in the absence of compensatory provisions, dealers' economic dependency on manufacturers has increased over the past ten years.

The economic fabric of motor vehicle distribution was in particular destabilised on the national level by Chevrolet's withdrawal from the European market in 2013, and more recently by Stellantis's sudden announcement in May 2021, without prior consultation, of the termination of the whole of its distribution network. Both of these moves were made simply with the granting of two years' prior notice.

This imbalance in contractual relationships between manufacturers and their networks was also aggravated by increasingly aggressive business policies. This is illustrated by Peugeot's conviction

by the Austrian Cartel Court under a ruling of the 17th of February 2020. The Austrian Court condemned in particular, as constituting forms of abuse of economic dependency, arrangements making a large part of distributors' margins dependent on imbalanced or non-transparent conditions: volume bonuses linked to excessive sales targets and quality bonuses conditional on satisfaction surveys which do not accurately reflect customers' opinions.

In parallel with these changes, and on the pretext of compliance with the GDPR, most manufacturers arrange for personal data of customers and prospects of their distributors and agent network to be transferred to them, through amendments to contracts. The manufacturers' stated objective is apparently to thus create a common database enabling them to have a global customer file with up-to-date data.

This transfer of data is imposed by the manufacturers, who combine this with an update obligation. In many cases, these obligations are not regulated by an appropriate legal system and frequently no economic compensation is provided for authorised distributors and repairers. This therefore raises legal questions of responsibility and access to these data and an essential economic issue of protection of the value of the distribution network, of which customer and prospect data constitute an essential element.

Obtaining of these data does indeed seem to serve the manufacturers' objective of developing direct sales to the end customer, bypassing a distribution network which must nevertheless make massive investments to meet the standards imposed by the brand, to which are now added additional investments to access the database even though they provide the data for this database themselves.

Such direct sales are incidentally in contradiction with the use of selective distribution networks, both from a legal point of view (a selective distribution network implying that the products distributed are reserved for distributors selected on the basis of criteria necessary for distribution in line with the quality and technical complexity of the products and guaranteeing the safety of their use) and in economic terms (the viability of the investments required to meet these criteria being called into question by the competition of direct sales).

The CNPA's proposals concerning the renewal of European Regulation 330 / 2010

In the context of the preliminary draft Regulation published by the European Commission on the 9th of July 2021, the CNPA wishes to highlight the following points:

1. Dual distribution

The Commission proposes to apply two thresholds to limit the exemption of dual distribution:
- exemption of direct sales and exchanges of information if the cumulative market share of the supplier and the distributor on the retail market does not exceed 10 %,
- exemption of direct sales alone above this cumulative market share but below a threshold of 30 %.

This system calls for the following observations on the CNPA's part.

- The draft Guidelines (points 155 to 160) detail the methods of calculation of the respective 30% market shares of the supplier and the distributor which constitute the general exemption threshold. However, the calculation of the cumulative market share of the supplier and the distributor on the retail market can raise specific questions, particularly when the supplier and/or the distributor are of a multi-brand nature, directly or via their affiliated companies. The Guidelines need to detail the way in which this cumulative market share on the retail market must be calculated.

- Exchanges of information can have considerable negative horizontal effects on competition, whatever the market share of the companies participating in them. In certain cases they constitute a restriction of competition by object (see horizontal Guidelines, points 72 to 74). Exchanges of information should not therefore benefit from the exemption, even below a 10 % market share threshold.

- Direct sales should not benefit from the exemption beyond a 20 % market share threshold. The 30 % threshold which the Commission proposes to use is the exemption threshold stipulated by regulation 330/2010 and the draft new regulation concerning **vertical** agreements. Given that the Commission intends to prevent the negative **horizontal** effects of direct sales, it is the 20 % exemption threshold applicable to horizontal agreements which should be used.

2. Dual prices

The Commission intends to no longer consider dual prices (application by the supplier of different wholesale prices for sales on physical sites or online sales of a given distributor) to be a hardcore restriction.

The CNPA approves point 195 of the draft Guidelines specifying that "the difference in the wholesale price should take into account the various costs and investments borne by a hybrid distributor in order to encourage it and reward it for the appropriate level of investment which it has made respectively online and offline".

However, it would be important for the Guidelines to expressly indicate that a supplier must not practise retail prices on the Internet which its distributors would not be able to offer themselves given the wholesale prices which would be granted to them by the same supplier for their online sales. Such a practice, *de facto* limiting distributors' online sales and depriving them of the possibility of making full and effective use of the Internet, would indeed constitute a hardcore restriction of active or passive online sales as defined by Article 4.b) to d) of the draft regulation.

3. Hybrid platforms

Article 2.7 of the draft regulation stipulates that suppliers of online intermediation services who sell goods or services in competition with the companies to which they supply intermediation services do not benefit from the exemption.

The CNPA approves of this approach and wishes to draw the Commission's attention to the importance of this point for the motor vehicle distribution sector.

Indeed, manufacturers intend to constitute ""ecosystems" around marketplaces offering not only new vehicles but also used vehicles, financing and mobility services places. To organise these "ecosystems", manufacturers appropriate the personal customer data whose transfer they impose on their distributors (at best in exchange for conditional payments defined on a discretionary basis). The data transfers which manufacturers demand of their distributors also provide them with strategic information on prices and discounts granted to customers, sales volumes, consumer preferences and purchase forecasts.

The effects which the development of these platforms is liable to have on intra-brand and inter-brand competition therefore need to be envisaged in the future general Guidelines or in future Guidelines specific to agreements in the motor vehicle sector.

4. Fixed sale prices

The Commission intends to maintain the ban on fixed retail sale prices as a hardcore restriction.

The CNPA approves of this position. However, it wishes to draw the Commission's attention to the concept of **indirectly** fixed sale prices, in view of the development of conditional discounts at the expense of distributors' basic discounts and the increasing numbers of promotional operations by manufacturers in the motor vehicle sector.

In its ruling of the 17th of February 2021, the Austrian Supreme Cartel Court questioned the compatibility of such operations with the provisions of Austrian law prohibiting abuse of relative economic dependence and asked the court of first instance to provide additional information on this point.

It would be advisable for the Guidelines to specify the extent to which the multiplication of such operations is liable to constitute a practice of indirectly fixed sale prices. This is because:

- such operations deprive distributors of their pricing autonomy, because they have to practise promotional prices on which manufacturers communicate nationally, compliance with which conditions the granting of retroactive discounts without which distributors would in most cases find themselves in a position of selling at a loss,

- participation in such promotional operations is indispensable because any distributors who did not participate in them would put themselves "out of the market" and would not be able to achieve their sales targets.

5. Agency agreements

Several motor vehicle manufacturers have already indicated that they wish to use this type of agreement, particularly Daimler, which is testing agent agreements for the distribution of MERCEDES vehicles in Sweden, Austria and Germany, and STELLANTIS, which has indicated that similar agreements will be offered as of 2023 for the distribution of PEUGEOT and FIAT utility vehicles and for the distribution of DS and ALFA ROMEO passenger vehicles.

The draft Guidelines recall that an agency agreement is not covered by Article 101 § 1 if the agent is an integral part of the principal's activities and if the latter bears the commercial and financial risks associated with the sale and purchase of the contractual goods and services.

Concerning coverage of these risks, point 33 of the Guidelines indicates that this coverage may be provided in various ways, particularly "*by means of a fixed amount or a fixed percentage of the income generated by the goods and services sold under the agency agreement*."

The CNPA considers that the Guidelines should specify that, whatever its form, the **coverage of the risks and costs associated with the sale of the contractual goods or services** must be **completely distinct from the Commission paid for the agent's intermediation services.**

Indeed, if no such distinction is made, checking of the principal's effective coverage of the risks and costs incumbent on it would be unreliable or even impossible, and the agent could end up bearing most of these risks and costs through the commissions supposed to remunerate the agent's intermediation activities.