European Commission Consultation on the draft revised texts of the Vertical Agreements Block Exemption Regulation and Guidelines

Additional background comments and specific feedback on draft guidelines

1. About AECDR

The Alliance of European Car Dealers and Repairers (AECDR) represents and promotes the interests of 57,500 franchised dealers and authorised repairers. In total these companies employ 1.175,000 people.

2. Background

The currently applicable Vertical Block Exemption Regulation 330/2010 (**VBER**) was adopted by the European Commission in 2010 along with accompanying vertical guidelines (**the Guidelines**). This VBER and the Guidelines are due to expire on 31 May 2022 and the Commission has published revised texts – the **Draft New VBER** and **Draft New Guidelines** (these terms are used for the purposes of this paper) – to replace them.

The Commission has invited comments on the Draft New VBER and Draft New Guidelines and the purpose of this AECDR document is to provide feedback. AECDR would ask the Commission to consider these comments against the sector/industry background information below and, in particular, trends towards greater manufacturer (OEM) consolidation and a potential transition to direct sales, which have been widely reported:

Automotive sector – potential trends and outcomes for consumers and employees

"Traditional manufacturers expect to increasingly copy Tesla, where prices are set by the company with dealers sidelined." FT, 'Carmakers launch direct internet sales', 16 August 2020

"If done successfully, the transition to direct sales can unleash immense financial potential. By exerting price control, OEMs can limit intra-brand competition." Accenture, 'The Future of Automotive Sales', 2019

"Direct sales will eliminate the intra-brand competition that currently puts downward pressure on retail prices." Deloitte (Germany), 'Future of Sales and Aftersales', September 2019

"From 2009 to 2019, new-car prices were several percentage points below their historical trend line, reflecting a structural break that resulted in persistently lower margins for the OEMs. In light of that lesson, the objective for recovery after the novel coronavirus outbreak is to reestablish OEMs' market positions without slashing prices, and thus sacrificing margins, in the process. A disciplined commitment to controlling discounts and avoiding price wars will help OEMs address the other significant challenges they face […]" Boston Consulting Group, How to Avoid the Auto Industry's Looming Price War, 6 May 2020

*"**Financial benefits of D2C** [direct sales] - Up to 4% reduction in cost of retail due to elimination of intra-brand competition, higher e-commerce share, and centralization of back-office processes. **Pricing benefits of D2C** - Full control*

of pricing from list to transaction price. This includes aligned discounts, stabilization of price levels, and end-to-end price governance" Accenture, Vehicle Pricing In the New Automotive Reality, August 2020

"Possibility for analytics-based pricing: OEMs gain access to data (e.g. customer, transaction, and stock data) that was previously held by the dealer, enabling data-driven pricing and end-to-end revenue management." Accenture, Vehicle Pricing In the New Automotive Reality, August 2020

"For OEMs, the agent model holds five major benefits: [… including the] ability to set a single price across all sales channel to eliminate intra-brand competition." Accenture, The Future of Automotive Sales – Direct: A New Way For OEMs and Dealers to Thrive in Times of Disruption, February 2021

3. Views from other markets on distribution trends

The Australian Automotive Dealers Association (AADA), which represents 3100 dealerships nationally in almost every electorate – who have approximately 60,000 employees – is concerned other car brands could adopt a fixed-price "agency" model.

Speaking outside the Senate Inquiry, James Voortman, the chief executive officer of the AADA, said: "The car companies who want to move to (a fixed-price "agency" model) will tell you they have research that shows most customers don't like to negotiate on price. However I am concerned prices may go up and am not convinced the consumer will always be better off."

Mr Voortman told the Senate Inquiry some dealerships may go out of business under the proposed fixed-price "agency" model, which would wipe out jobs in showrooms and service departments – and inconvenience car owners who may have chosen to buy a particular vehicle based on local servicing and support.

The fixed-price "agency" model "could have significant implications for commercial viability of dealers which do become agents," Mr Voortman told the Senate Inquiry.

AND

"As the Ford dealer will tell you his greatest competition is not necessarily the (General Motors) dealer or the Honda dealer, it's the Ford dealer down the street who is going to be his greatest competition," said Andrew Koblenz, executive vice president, legal and regulatory affairs, for NADA. […]

Mr Koblenz said the introduction of a process similar to a fixed-price agency model would remove the opportunity for customers to negotiate a better deal.

"(In the US) there are generally advertised prices, and no-one will ever prevent you from buying the car at that price," said Mr Koblenz. "But the system we have (in the US and Australia currently) is one where you can come in and obtain a discount, which obviously benefits the consumer." […]

Senator Deborah O'Neill then asked the NADA representative: "So, in the absence of the state legislatures coming in and providing a more level playing field by legislating to protect the dealer network, the cost of cars would rise? Is that it in a nutshell?

Mr Koblenz responded: "Yes, that's it in a nutshell."

Car Advice, Canberra debates Honda and Mercedes plan to introduce fixed new-car prices, 23 November 2020 - https://www.caradvice.com.au/903067/canberra-debates-honda-and-mercedes-plan-to-fix-new-car-prices/

4. The importance of the dealer model

"If you take away the dealers, you take away the competition, and prices will go up." Peter J. Ferrara, former Associate Deputy Attorney General of the United States, 'Auto Dealers Unambiguously Increase Competition'

"Significantly, for all but one automobile model we consider in our empirical analysis, we find that intra-brand competition does, in fact, lower new car prices for consumers […and] the price reductions resulting from intra-brand competition are substantial relative savings for new-car consumers. Moreover, we find that the price effects of intra-brand competition are relatively strong compared to inter-brand competition", 'The Price Effects of Intra-Brand Competition in the Automobile Industry: An Econometric Analysis', March 2015

Consumer research carried out for the Australian Automotive Dealer Association (AADA)

The AADA has recently commissioned a piece of research from Zing Insights to assist the AADA *"with understanding the current needs and priorities of the new car market buyer, and specifically to understand the potential impact on consumers of the agency model of buying a vehicle (as opposed to a dealer-led model)."*

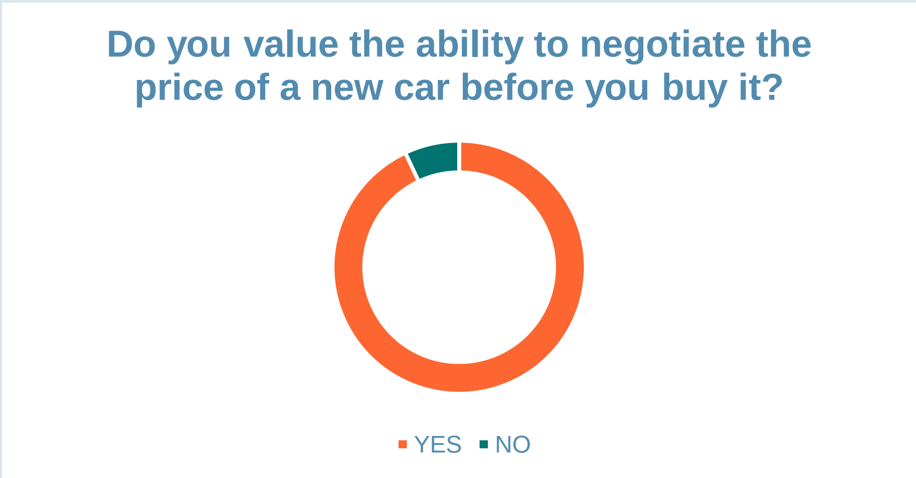
An online survey was completed by a sample of 500 Australian new car buyers/intenders, and the results emphasise the importance of car dealers to consumers.

For example, **91%** of consumers asked considered it important to be able to test drive a car before buying, and **90%** said that the ability to negotiate the price of a vehicle is *"very or quite important"* to them in context of the purchase process overall.

Consumers also value the ability to negotiate on add-ons/optional extras (**85%**) and the advice provided by sales staff (**79%**). This shows a strong preference towards the dealer model, as well as the ability to negotiate to get a better deal.

In addition, while consumers noted the simplicity and potential 'fairness' of the agency model (i.e. as all consumers would pay the same fixed price for the same car), there was a high level of concern (**52%**) that the agency model would drive the prices of new cars up for everyone.

VALUE PLACED ON NEGOCIATION [BY CONSUMERS]



Extract (slide 11) reproduced from Zing Insights Consumer Survey for AADA

5. How important is price competition in automotive retail sector?

To attempt to evaluate this question, AECDR invited views from its members, which included the UK's National Franchised Dealers Association (**NFDA**). While no longer a Member State, the UK comprises one of the larger automotive markets in Europe. The NFDA provided the following information:

Despite the COVID-19 pandemic, which had a significant adverse impact on new car sales, 1,631,064 new cars were registered in the UK in 2020.[1]

Even if one assumes (conservatively) that only private sales (which the UK's SMMT estimates for 2020 comprised 35.6% of sales or ~ 580,659 registrations) would be affected by a transition (admittedly market-wide) to agency, this would mean transferring a substantial amount of potential consumer savings out of the pockets of consumers and back to OEMs.

While only a rudimentary and highly conservative calculation, if one applies (against private registrations for 2020, which were substantially down on previous years) the average discount (£3,000) on a new car,[2] the potential for the total of savings that would be lost to consumers (annually and just on new car sales) exceeds **£1.74 billion**.

On a broader European basis, the savings that could potentially be lost to consumers are far more significant.

6. A Transition to Agency?

Parties will have different views on agency (including those within the automotive sector); indeed, it is not open to the Commission to prohibit or, indeed, endorse such a distribution model. That said, in the context of the analysis of any arrangement against the provisions of Article 101 TFEU, any competition law appraisal should also view the agreement through the lens of enhancing the welfare of consumers, who must receive a fair share of any resulting benefits.[3]

Competition law focuses on substance over form, which involves a far more complex analysis in the context of a transition from a previous (reseller) distribution model to one of agency. A decisive factor in separating a reseller arrangement from a genuine agency arrangement is the level of commercial risk assumed or retained by the reseller or agent as the case may be.

Thus, as per the Commission's approach, a "genuine agency" should, quite rightly, be one where the dealer/agent bears no non-significant risk in relation to *each of* any the contract-specific risks, the market-specific risks as well as any other activities it undertook on the same market for the principal. It is worth re-emphasising that an OEM will not be able to avoid such scrutiny by the simple device of either calling the arrangement an agency, **or by relying on an agency contract (even an otherwise genuine agency contract) in isolation, against a background of – say – legacy franchise arrangements and/or sales of stock to the same dealer**. **Competition law looks not at the individual contract but at the object and effect of the totality of the arrangements overall.**

Further, it seems obvious (and *de facto* recognised in the Draft New Guidelines, para. (29)) that in the specific context of transitioning from an existing franchise network to a form of agency arrangement, the

[1] Based on Society of Motor Manufacturers and Traders (**SMMT**) data. For comparison purposes, registrations over the previous five years (2015 – 2019 inclusive) were generally greater than 2.5 million units.
[2] According to Motoring Research (referencing What Car? data) the average discount on a new car in the UK is approximately £3,000 - https://www.motoringresearch.com/advice/best-new-car-discounts/ - around 10% of median annual pay for a full-time employee in the UK (based on ONS data).
[3] Commission *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.4.2004, p. 97–118 at (33)-(34).

market-specific risks, relevant to the changing, automotive retail market in question, will necessarily include 'sunk' investments already made in the franchise model.

As such, one is looking, by definition, not only at future risk: the assessment does not start afresh. Rather, looked at in the round, one must consider what the new agent's *actual* risks are. That must include risks resulting from any investments from which the dealer had expected to reap commensurate benefits, which will now no longer eventuate.

In other words, an OEM who – in transitioning to an agency – overlooks reimbursing the agent appropriately for market-specific investments already made by the agent (previously as a dealer), which will still be required in supporting agency sales, would be failing to address a critical part of the antitrust analysis. This could even extend to multi-million Euro investments in sites and premises, which were selected previously to satisfy the relevant OEM's stringent brand standards. By the same token, OEMs should also be required to reflect very carefully on partial agency arrangements where there is a real risk that agency activities rely on the use of shared investments for which the dealer (as agent) is not properly remunerated or at all.

Taking into account the different remuneration models set out in para. (33) of the Draft New Guidelines, the Commission should be wary of allowing OEMs to apportion a notional percentage of any agent's commission as appropriate remuneration for these investments. This is because such a model is difficult to verify and would, in reality, result in only the most marginal return (if any) on the significant risk and investment previously assumed by the dealer; it would allow OEM's to freeride on dealers' past investments and would not result in a true transfer of any market-specific investment risk from the dealer (as agent) to the OEM. It is also vital that any goodwill which the dealer had built up in the franchise itself, and which is now lost to the dealer upon becoming an agent, needs to be recognised as part of the analysis.

Thus, in order to achieve a genuine agency situation, the OEM – upon setting up any new arrangement – should be obliged to bear the relevant risks, and reimburse the dealer for any such sunk costs not already very obviously recovered **and** the value of goodwill lost respectively. The value of sunk costs (subject to depreciation, etc.) and goodwill may be assessed according to accepted principles prevailing in different Member States.[4]

Dual-role agents: Following the same steps, and in particular in relation to the third limb ("other activities"), it seems that where OEMs may be suggesting a "dual-role agent" scenario, this would fall to be considered as part of the overall economic situation of the relationship. Thus, it is being suggested that OEMs might seek to isolate the "genuine" agency contract for some sales activities, while keeping ordinary distribution arrangements for others within the same franchised dealer location. Such separation could involve separate brands, models or activities such as service, spare parts, etc., as well as the OEM involving itself in the used car operations carried on by the dealer.

Such scenarios would, in AECDR's view, carry at least a risk of rendering the overall arrangement far from risk-free. Thus, if the agent were obliged in its "other activities", e.g., to (i) hold property in the goods; (ii) invest in sales promotion, such as advertising (especially in such a way as to directly or indirectly promote the brand generally – which would capture the relevant agency goods and services), or (iii) make investments in the dealership site and premises, or training of personnel, in a way that may be inseparable from such costs for the agency, then the totality of the OEM/dealer arrangement should be considered as falling outside the ambit of genuine agency.

AECDR's view is broadly supported and reinforced by the existence and contents of the Commission's working paper produced in the course of the consultation around the renewal of the VBER ("**the Commission Paper**").[5] The Commission there identified the same legal principles as set out above, with similar conclusions. It concluded, for example as to sunk costs and dual-agent scenarios:[6]

[4] Which interpret the principles set out in Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

[5] https://ec.europa.eu/competition-policy/system/files/2021-04/working_paper_on_dual_role_agents.pdf

[6] At paras. 19-20

[…] where an undertaking on a downstream market acts in a dual role as genuine agent and independent distributor for the same supplier, market-specific investments should be understood as covering all investments necessary to enable an agent to negotiate or conclude contracts in the relevant market, including sunk investments that would be lost if the agent were to cease all activity in the relevant market (i.e. as agent or independent distributor). This includes, for example, investments in furnishing a shop or in training sales staff that are specifically required for selling products in the relevant market and that cannot be used commercially for activities in other product markets or only at a significant loss.

In a scenario where genuine agency agreements are entered into with existing independent distributors, it is DG Competition's current position that the fact that some of the market-specific investments may already have been incurred by the agent when acting as an independent distributor does not mean they do not have to be covered by the principal. In order for the agency agreement to fall outside the scope of Article 101(1) TFEU, all investments required for a genuine agent to negotiate or conclude contracts with third parties on the relevant market should be reimbursed, including market-specific investments, whether or not the agent is also acting as an independent distributor. […]

Where the Commission Paper currently draws the line is in relation to sales of products on a different product market. This is unsurprising and explained in the paper by reference to Case T-325/01 *DaimlerChrysler AG v Commission* [2005] II-3319. In this case, Daimler Chrysler successfully relied on the agency argument to annul the relevant part of the decision.

The Commission's approach in its paper reflects that 16 year old case-law. It is to be noted, however, that the Court's judgment both (i) pre-dates the existing VBER Guidelines (not to mention the Draft New Guidelines) and (ii) was given against a very different market background. Moreover, in *DaimlerChrysler* the focus of the case was on *product-specific* risks as opposed to wider *market-specific* risks. Finally, evidence and argument of cross-subsidising or leveraging of costs between non-agency activities and agency activities (i.e. from one market into adjacent markets) was missing from the decision. As such, it is now time – at this critical moment - to reflect on this case to determine whether:

- *DaimlerChrysler* could be distinguished in appropriate factual circumstances, most notably where a mixed agency/franchise arrangement may be said to be so clearly structured to avoid the consequences of Article 101(1) TFEU that it amounted to an "abuse of rights";[7] and
- there is a good case to revisit *DaimlerChrysler* in view of the profound changes in the legal and commercial environment since 2005, and in particular in the light of clearer market-specific arguments around mixed agency/franchise dealerships.

In AECDR's view there are compelling arguments (depending, of course, on the facts of each case) that cross-subsidy type arguments and the doctrine of leverage,[8] which are types of conduct where competitive effects are felt in a neighbouring market, ought to serve as arguments which can be adapted to extend the conclusions in the Commission Paper to – at least – adjacent markets, of the kind with which one would typically be concerned in the automotive dealership trade.

Taking the Commission's three-step test and approaching it from first principles, it would seem to be the better view that where "the economic reality of the situation" shows that in a case where different activities are inextricably linked (e.g. in a transition from franchise to agency or any kind of dual or mixed franchise/agency) there are market-specific risks that extend across activities on these adjacent (even closely adjacent) markets, so that the same are all to be taken into account in the competition law assessment.

[7] The principle of *abus de droit* is well established as a general principle of EU law (see e.g. Case C-110/99, *Emsland Stärke v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569, paras 52-53: "*A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.*")

[8] Most often found in abuse of dominance cases, the doctrine of leverage is nonetheless not a specific form of abuse of dominance but a general tool in antitrust law to describe the distortion of competition in a related market.

Comments on Specific Aspects of Draft new Guidelines[9]

Draft New Guidelines	
Para. (9)	*Undertakings with market power may try to use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers. Market power is the ability to maintain prices above competitive levels or to maintain output in terms of product…*
AECDR comment	AECDR would simply urge the Commission to recognise that 'market power' and 'market share' are not synonymous. In other words, in many Member States, OEMs often have market shares below any threshold above which market power is inferred; however, by virtue of the very substantial investments made by those who represent them and the prescriptive contractual terms to which they are bound, OEMs have enormous influence over these parties.
(17)(c)	*The softening of competition between the buyer and its competitors or the facilitation of (explicit or tacit) collusion among these buyers. However, a reduction of intra-brand competition (i.e. competition between distributors of the goods or services of the same supplier) is by itself, if marginal, unlikely to lead to negative effects for consumers if inter-brand competition (i.e. competition between distributors of the goods or services of different suppliers) is strong. However, a substantial reduction in intra-brand competition (absent a significant improvement in inter-brand competition) can produce serious adverse effects.*
(19)	*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, depending on the circumstances, 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 marginal reduction of intra-brand competition will have negative effects for consumers; however, this will not be the case where intra-brand competition is already strong itself and the reduction in intra-brand competition is significant.*
AECDR comment	These statements are too broad and complacent in their original form, moreover they ignore the fact that intra-brand competition may help drive more inter-brand competition too (as vigorous competition at the retail level for one particular brand may encourage other brands to improve their offerings). It follows that although the adverse effects of a <u>modest</u> reduction in intra-brand competition may be offset by vigorous inter-brand competition, where intra-brand competition, which already delivers substantial consumer benefits in a market, is significantly reduced or eliminated altogether, it is highly unlikely that such adverse effects will be compensated for at the inter-brand level. This is particularly the case in the absence of a radical increase in the number of competing brands and suppliers.[10] Proposed amendments in red.
(29)	*- 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 (including those previously made by the agent to represent the principal or to market or sell the principal's products or services in a different capacity), 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*

[9] AECDR assumes that the detailed provided against the Draft New Guidelines should be sufficient for the purposes of carrying over any amendments, if required, to the text of the Draft New VBER itself.
[10] See box 5 above – Research conducted by the Phoenix Centre for Advanced Legal & Economic Public Policy Studies.

	leaving that particular field of activity the investment cannot, without significant difficulty or re-investment, be used for other activities or sold other than at a significant loss.
AECDR comment	It is important that the Guidelines reflect the fact that an agency relationship between two parties may not start out as an agency relationship; it is not necessarily a 'clean slate' arrangement. On the contrary, the 'agent' might previously have made significant investments on behalf of the principal's brand as an authorised distributor/reseller for that principal. These market-specific investments must also be recognised, as well as the fact that even though investments might be able to be used for other purposes, such use may be sub-optimal (at least without further re-investment). For example in the context of a site that has previously been chosen to comply with a brand's mandated standards, while the site might be able to be adapted to serve other purposes or for the sale of other products, it may require significant re-investment. Proposed amendments in red.
(29)	*- Third, there are the risks related to other activities undertaken on the same or adjacent product markets, 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.*
AECDR comment	The guidance, as it stands, is not reflective of true market realities where, in order to represent a particular OEM's brand in one category, an agent may be required to undertake complementary activities in closely related categories. Proposed amendments in red.
(30)	*…However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel (which are not tailored to the principal's products or services) that could be used for any type of activity, are not material to this assessment.*
AECDR comment	See comments against para. (29) above. Proposed amendments in red.
(31)(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 or to the principal's brand(s);*
AECDR comment	The guidance needs to capture broader investments in the brand. Proposed amendments in red.
(31)(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; brand-specific showrooms and forecourts, tooling (including diagnostic equipment), software, corporate identity/signage, demonstrator vehicles and personnel in the case of a motor dealership; 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;*
AECDR comment	Given the investments required of dealers and the importance of the automotive sector generally, a motor industry-specific reference or example would be useful. Proposed amendments in red.

(31)(h)	*does not undertake other activities within the same or adjacent product market(s) required by the principal under the agency relationship (e.g. the delivery of the goods), unless these activities are fully reimbursed by the principal.*
AECDR comment	See comments against para. (29) above. Proposed amendments in red.
(33)	*A principal may use various methods to reimburse the relevant risks, as long as such methods ensure that the agent bears no, or only insignificant, risks of the types set out in paragraphs (28) to (31) of these Guidelines. 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 pay the agent a fixed percentage of the revenues from the goods or services sold under the agency agreement (provided this latter method does not disadvantage the agent in terms of ensuring that all such costs are reimbursed fully and promptly, and does not involve any cross-subsidy from the ordinary commission any agent would expect to earn in order to be profitable). To ensure that all relevant risks are covered, it may be necessary to provide a simple method for the agent to declare and request the reimbursement of any costs exceeding the agreed lump sum or fixed percentage. It may also be necessary for the principal to systematically monitor any changes to the relevant costs and to adapt the lump sum or fixed percentage accordingly. Where the relevant costs are reimbursed by way of a percentage of the price of the products sold under the agency agreement, the principal should also take into account that the agent may incur relevant market-specific investments costs even where it makes limited or no sales for a certain period of time. Such costs have to be reimbursed by the principal.*
AECDR comment	It is important to ensure (including in the case of investments already made) that an agent (including where it has previously operated as a distributor for the principal) is properly and fully reimbursed for investments made in support of the principal's brand(s). A principal should not be allowed to avoid this requirement simply by attributing a notional proportion of the agent's commission that the agent might earn against future sales (which are uncertain) to reimbursement of the investments to be made (or already made) by the agent. Any ambiguity or discretion in the guidelines will be interpreted to the detriment of the weaker negotiating party. Proposed amendments in red.
(34)	*An independent distributor of some goods or services of a supplier may also act as an agent for other goods or service of that same supplier, provided that the activities and risks covered by the agency agreement can be effectively delineated (for example because they concern goods or services presenting additional functionalities or new features). 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) and, as mentioned in paragraphs (28) to (31) of these Guidelines, all relevant risks linked to the sale of the goods or services covered by the agency agreement, including market-specific investments, must be borne by the principal.*
AECDR comment	How will this work in practice? In the automotive sector, agency agreements will be imposed by OEMs on dealers. Dealer's existing contracts will be terminated (or the OEM will indicate that it will not renew fixed term contracts) and those dealers that are invited to remain as representatives of the brand will be presented with new agency agreements on a 'take it or leave it' basis.

	This is precisely the scenario that the above paragraph seeks to address; however, the Commission's statement needs to be stronger and clearer if it is intended to have any real effect. What recourse would the Commission have in this scenario?
(35), (36) & (37)	*(35) Where an agent undertakes other activities for the same or other suppliers at its own risk, there is a significant risk that the conditions imposed on the agent for its agency activity will influence its incentives and limit its decision-making freedom when it sells products as an independent activity. In particular, there is a risk that the pricing policy of the principal for the products sold under the agency agreement will influence the incentives of the agent/distributor to price independently the products that it sells as an independent distributor. In addition, the combination of agency and independent distribution for the same supplier raises significant difficulties in distinguishing between investments and costs that relate to the agency function, including market-specific investments, and those only related to the independent activity. In such cases, the assessment of whether an agency relationship meets the conditions set out in paragraphs (28) to (31) of these Guidelines can therefore be particularly complex. It is very important that investments made (including those made previously) by the agent (including in its previous capacity as a distributor) are not, unless fully, properly and verifiably reimbursed by the supplier, used to support or subsidise agency sales (or ancillary activities) that the supplier requires the agent to conduct.* *(36) The risks described in paragraphs (28) to (31) of these Guidelines are of particular concern if the agent undertakes other activities as an independent distributor for the same principal in the same (or an adjacent) product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern a different product market (an entirely distinct product market). More generally, the less interchangeable the products are, the less likely are those risks to occur. In product markets comprising products not presenting objectively distinct characteristics, such as higher quality, novel features or additional functions, such delineation appears more difficult and there may therefore be a significant risk of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.* *(37) 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 (where there is no risk of cross-subsidy), 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. To the extent that the relevant investments have already been depreciated (e.g. investments in activity-specific furniture), the reimbursement may be adjusted proportionately.*
AECDR comment	See comments against para. (29) above. The Commission is asked to consider automotive retailing in the round where (commonly) a dealership's business may be comprised of new car sales activities, used car sales activities, part exchange services, the supply of spare parts and accessories, the provision of aftersales services (servicing, maintenance, repair and warranty/recall work) as well as the sale of financial and insurance products. Cross-subsidy issues aside, controls imposed over one or several of these elements (under an agency model) will (even if they comprise technically separate markets) inevitably have a knock-on effect in terms of the distributor's freedom (in its capacity as distributor rather than agent) to determine its competitive offering for other elements. For example, a dealer's ability to access stocks of used cars and to price them

	independently will be affected in circumstances where part exchange transactions (which represent an important source of used cars to many dealers) are controlled by suppliers imposing controls on new car transactions. Similarly, if an agent is only permitted to offer a supplier's captive finance products to a customer, the customer will not only be subject to the supplier controlling the retail price, but the customer will also experience less competition in accessing finance. Proposed amendments in red. Please also refer to comments on the valuation of 'goodwill' in the section A Transition to Agency? above.
(38)	*…However, the principal would not have to cover investments for the sale of product C, which does not belong to the same product market as products A and B (unless offering product C was commonly associated with or accepted as necessary to support the viability of a business offering products A and B).*
AECDR comment	See comments against paras. (35) to (37) above. When considering former franchise arrangements in the automotive sector, many activities are closely connected (and deliver essential synergies) even if they are regarded as separate markets. The relationship should therefore be looked at in the round. Proposed amendments in red.
(42)	*An agency agreement may also fall within the scope of Article 101(1), even if the principal bears all the relevant financial and commercial risks, where it facilitates collusion. That could, for instance, be the case when a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals. This could also arise where the principal attempts to restrict non-agency activities (outside the scope of its agency arrangements) or (in the context of a non-genuine agency) where the principal requires its 'non-genuine agents' to share sensitive market (including customer data) data with it, which it then shares with its own downstream retail offering or to coordinate the activities of its other 'non-genuine agents' downstream.*
AECDR comment	Proposed amendments in red.
(86) & (87)	*(86) The second sentence in Article 2(4) VBER contains two exceptions to the general rule that vertical agreements between competitors are excluded from the safe harbour provided by the VBER. Both exceptions, namely Article 2(4)(a) and (b) VBER, concern dual distribution agreements between a supplier of goods or services also active on the retail market and its distributors. These are typically scenarios where the supplier is mainly active on the upstream market and has limited ancillary activities in the 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.* *(87) Therefore, a vertical agreement between competitors falling under Article 2(4)(a) and (b) VBER is block exempted pursuant to Article 2(1) VBER if the following conditions are fulfilled:* *(a) the subject matter of the agreement does not fall within the scope of another block exemption regulation, as set out in Article 2(8) VBER;* *(b) the supplier's and the buyer's aggregate market share in the relevant market at retail level does not exceed [10]%, thus not appreciably restricting competition within the meaning of Article 101(1),46 and the agreement does not contain hardcore restrictions pursuant to Article 4 VBER;* *(c) the conditions of Article 2(4)(a) or (b) VBER are fulfilled; and*

	(d) the agreement does not include horizontal restrictions of competition by object, as set out in Article 2(6) VBER.
AECDR comments	As far as automotive retail is concerned, AECDR considers that simply exempting dual distribution below a market share threshold is not adequate to protect dealers or consumers from being exploited by OEMs that transition to a dual-distribution model, and risks reducing (or possibly eliminating) intra-brand (and some inter-brand) competition. Healthy intra-brand competition is at risk as a result of the greater proliferation of direct sales (including agency), which has the potential over time to marginalise or entirely supplant independent retail distribution. More specifically, in the automotive retail sector, most OEMs (and their retail networks) have national market shares below 10%. Most OEMs, nonetheless, have a huge competitive advantage over their dealers as a result of: • the dealer's significant investments in the OEM's franchise and the dealer's resulting economic dependence on the OEM; and • the substantial controls that the OEM has over the dealer arising from prescriptive and onerous dealer agreements (including over the disposal of the dealer's business). In AECDR's view, the blanket exemption of arrangements where this advantage would be reinforced (to the detriment of dealers and consumers), for example by allowing OEMs (in their supplier capacity) to gather customer data from dealers and then use it for their own, integrated retail operations, should not benefit from automatic exemption as a result of the generous (10%) safe-harbour. OEMs should have to self-assess such arrangements carefully and AECDR would recommend a much lower % threshold.
(90)	*The VBER applies to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles...*
AECDR comment	The Commission is invited to consider whether the automotive sector as a whole should be regulated under any expanded replacement to regulation 461/2010.
(129)	*As set out in Article 1(1)(h) VBER, in a selective distribution system, 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 these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system. When choosing to adopt a system of selective distribution in a particular market, the supplier should not circumvent that system by, for example, supplying large quantities of products direct to corporate customers (e.g. leasing companies) either on terms which are preferential to those made available to members of the selective distribution network or in circumstances where there is a verifiable risk that the corporate customer will resell those products while they are new or nearly new. This would include, for example, where the corporate customer supplies the relevant products under leasing contracts which involve a transfer of ownership or a purchase option prior to the expiry of the contract and which would allow the lessee to purchase the product from the leasing company at any moment, including while the product is still new or nearly new, as this does, in reality, turn the corporate customer into an independent reseller.*
AECDR comment	In circumstances where a supplier opts to apply a system of selective distribution, it is implicit in that system that selective distributors should be entitled to compete and operate on the basis of a level playing field.

	Proposed amendments in red.
(177)	*In the case of agency agreements, the principal normally establishes the sales price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see in particular paragraphs (40) to (43) of these Guidelines), an obligation preventing or restricting the agent from sharing its commission with the customer, irrespective of whether the commission is fixed or variable, or freely advertising or marketing such discounts, is a hardcore restriction under Article 4(a) VBER. To avoid the use of such a hardcore restriction, the agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal.*
AECDR comment	AECDR would recommend that in non-genuine agency scenarios, the Commission does not permit the application of restrictions (akin to MAP restrictions), which *de facto* undermine the 'agent's' ability to offer or communicate the savings that might be available. In other words, although in theory a dealer as a non-genuine 'agent' might be permitted to share their commission with a consumer (to discount the transaction price), it is important that this does not exempt arrangements that prevent the 'agent' from advertising discounts, so that consumers can only negotiate on price once through the dealership door; Proposed amendments in red. AECDR would also recommend further industry guidance on the question of indirect RPM. This would address scenarios where an OEM might: • apply complex and opaque margin and bonus structures, which make it difficult for the dealer to establish its own true wholesale (purchase) price, which in turn limits incentives for price competition at the retail level; or • seek to control other aspects of the transaction price (e.g. the centralised determination of part exchange values using an OEM-mandated third party valuer and the forced application of 'Approved Used Car' schemes).
(234)	*Non-compete obligations are not covered by the block exemption if their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period…*
AECDR comment	The purpose of excluding tacitly renewable (or >5 year) non-compete obligations from the benefit of block exemption is, in part, to reduce the likelihood of incumbent OEMs limiting access to important distribution channels, which might otherwise facilitate the new entry and expansion of new or smaller brands.[11] Moreover, the possibility of allowing an OEM – on whom a dealer is already heavily dependent – to impose an obligation (particularly on a more open-ended basis), which would prevent that dealer from representing other brands (including across its group and from other premises) will only increase that dependence. It will also potentially make the dealer even more vulnerable (and less able to adapt) to market and economic shocks, with knock-on adverse effects in terms of ensuring adequate coverage for customers and retail-level employment. It is important to recognise that within certain sectors – particularly those categorised by significant, brand-specific investments at the retail level – that the application of common market share thresholds for exemption (e.g. 30%) does not truly represent

[11] This position has already deteriorated following the removal of Regulation 1400/2002, which facilitated multi-branding in the automotive sector.

	the actual level of market power exercised by OEMs over retailers. This has been previously recognised in certain European jurisdictions, for example, the concept of 'relative dominance' in the Peugeot Austria case.[12] It follows that there are no obvious efficiencies arising from extending the scope of the exemption in this way (to longer term non-competes) that would offset the potentially restrictive impacts. Finally, it could be a backward step for innovation if dealers - who have over the last 12 months invested heavily in digital online supply platforms, which have the capacity to deliver even more brand choice and greater competition to consumers in a virtual environment - are prevented from optimising this efficient new service as a result of the imposition of more onerous, contractual non-compete obligations (with the result that consumers are increasingly restricted through that retailer or agent to one brand option, offering one price and one finance proposition).

ENDS

Contact person:

Antje Woltermann

Alliance of European Car Dealers and Repairers (AECDR)

Rue Jacques de Lalaing 4

B-1040 Brussels

phone +32 272 08296

mobile +49 173 277 9006

woltermann@aecdr.eu

[12] https://www.wko.at/branchen/sbg/handel/fahrzeughandel/PA-Buechl-20200526.pdf.