ACEA European Automobile Manufacturers Association

ACEA COMMENTS ON DG COMP WORKING PAPER "DISTRIBUTORS THAT ALSO ACT AS AGENTS FOR CERTAIN PRODUCTS FOR THE SAME SUPPLIER"

We welcome the Commission's efforts to give additional guidance on the application of Article 101 TFEU on so-called "dual-role" agents, i.e. undertakings active on a downstream market which act both as a genuine agent and as an independent distributor for different products of the same supplier. Such distribution models may also become relevant for the automotive industry, in particular with regard to technological developments which cannot be easily assigned to constitute a differentiated product market or to be mere refinements of products within the same product market (e.g. in the field of electrified drivetrains, autonomous driving, etc.).

The differentiation logic set forth in the Commission's Working Paper may thus result in legal uncertainties which are even more burdensome with regard to the necessity for the principal to cover all commercial risks linked to the sale of goods under the agency agreement. In this context, it must be recalled that – in accordance with the case law of the ECJ referenced in para. 11 of the Working Paper – the economic reality of the situation has to be taken into account when assessing which costs are market-specific investments to be reimbursed. The Working Paper stipulates that, 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 (para. 20). Moreover, the Working Paper proposes that in practice, to establish the level of reimbursement, the principal should consider the hypothetical situation of a distributor who is not yet active in the relevant market (either as agent or independent distributor) to assess which investments are relevant for the type of activity for which the genuine agent will be appointed.

Such hypothetical consideration does, however, not reflect the economic reality of the situation as it is required by the ECJ's case law. A distributor who is already active in the market as an independent distributor usually has amortized his prior investments, at least if he is doing business for more than just a short period (e.g. > 5 yrs.). If the principal who wants to appoint such distributor – in addition to the existing business relationship – as an agent were forced to reimburse the distributor for market-specific investments made in the past on a hypothetical basis and without adequate consideration of the actual economic situation (i.e. the amortization of

these costs through past sales as an independent distributor), such reimbursement would lead to a windfall profit for the distributor.

The position of interests is comparable to the situation described in para. 107 lit. (d) of the Commission's Guidelines on Vertical Restraints: As long as an investment has not yet been depreciated, a vertical restraint may be tolerable in a "hold-up problem" situation. This means that the interests of the investing party need to be protected (only) for the period until the investment is fully depreciated. Compared to the situation of an agent who is already active as an independent distributor for a significant period this would mean that only such market-specific investments can be relevant for assessing the agent's commercial risks which have not been amortized before (i.e. through sales made as an independent distributor). A hypothetical consideration ignoring these previous revenues as an independent distributor would not adequately reflect the economic reality of the situation. The above considerations would, incidentally, also apply to situations in which a person who in the past acted as an independent distributor shall subsequently solely act as an agent of the principal.

We therefore suggest that the Commission reconsiders its approach to a hypothetical consideration and leaves room for an appropriate treatment of market-specific costs that have already been amortized and/or depreciated through the distributor's prior independent sales of products of the supplier regardless of whether these belong to the same or a different product market. To avoid transaction costs and uncertainties, reference should be made to objective criteria of accounting amortization.

Moreover, we believe that the principal should not be obliged to bear certain costs of the agent (e.g. signage, logos) if he supported these costs already for the independent distributor.
