The voice of European vehicle dealers and repairers

cecra.eu

Press Release

Brussels, 12 May 2022

New Vertical Block Exemption Regulation ('VBER') and its Vertical Guidelines

As CECRA indicated in its first press release published on 10 May, the day of the publication by the European Commission of its new Vertical Block Exemption Regulation as well as its Vertical Guidelines and explanatory note, a first analysis of all the texts could be made.

It should be recalled that the drafting of these texts was finalised after a long consultation process in which CECRA and its members took part, and after a draft published on 9 July 2021. "*The new rules will provide companies with up-to-date guidance that is fit for an even more digitalized decade ahead. The rules are important tools that will help all types of businesses, including small and medium enterprises, to assess their vertical agreements in their daily business*," said Margrethe Vestager, Executive Vice-President of the European Commission responsible for Competition Policy.

In the framework of the consultation, the draft has been amended and integrates the remarks of the different stakeholders. CECRA is pleased to have been heard on several of its key demands.

Firstly, this new regulation now regulates the **exchange of information in cases of "dual distribution**" by the supplier, i.e. when the supplier sells directly to the final customer and is in competition with its network. The Commission noted that the development of direct sales posed problems regarding exchange of information between competing companies. Admittedly, the framework was much tighter in the draft published in July 2021 since the *Commission had provided for a total exemption of the agreement only in the event of a combined market share on the local downstream market of less than 10%, which is exceeded in the case of most networks and is undoubtedly complicated to calculate*. Nevertheless, Article 2 (5) of the Regulation limits the exchange of information between the supplier and the distributor to that which is directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services. In this respect, the Guidelines state that "In a selective distribution system, it may be necessary for the distributor to share information with the supplier relating to its compliance with the selection criteria and with any restrictions on sales to unauthorised distributors. Point 99 of the Guidelines specifies examples of information that may improve the production or distribution of the contract goods or services (technical information, logistical information, customer preferences, etc) and point 100 examples of information that is unlikely to fulfil these conditions: information relating to future prices and information relating to identified end users. This last point, even with exceptions, is important for distributors since some manufacturers have recently been tempted to oblige their network to provide customer data, which is now regulated by the Guidelines.

Secondly, if in 2010 the European Commission was keen to encourage the development of the Internet, in 2022 it now considers that this is no longer necessary. This concerns **dual pricing** and translates into the possibility for the supplier to have a different wholesale price depending on whether the product is sold in a shop or on the Internet. In other words, suppliers will be able to adjust the network margin according to the sales channel. However, the dual pricing exemption remains subject to the twofold condition that the wholesale price differentiation is justified in view of the level of investment required to sell online or offline respectively, and that the price difference does not jeopardise the profitability or viability of online sales (point 209 of the Guidelines). Wholesale prices that would either not allow for an adequate return on the investments made in physical sites or would jeopardise the profitability of online sales would therefore not be exempted.

Thirdly, the **'hybrid' sales platforms**: Article 2 (6) of the new VBER excludes from the block exemption vertical agreements relating to the provision of online intermediation services ('OIS') where the OIS provider (the platform) also sells goods or services in competition with the firms to which it provides intermediation services (namely where it has a hybrid function). In the automotive sector, this provision is aimed at the supplier who hosts the sales of its network on its website. This supplier will therefore not benefit from the exemption of the new regulation. In concrete terms, a manufacturer will no longer be able to manage a website when it sells goods or services directly in competition with the companies to which it provides intermediation services if it wants to continue to benefit from the exemption.

This provision was already present in the draft. It is mainly aimed at the large Gafa platforms, notably Amazon, which are suspected of using the analysis of retailers' sales data to favour their own sales.

Although the New Vertical Guidelines state in Section 4.4. 4 that the Commission is unlikely to give priority to enforcement against vertical agreements concluded by hybrid platforms where the agreement does not contain restrictions by object and the platform does not have significant market power, CECRA welcomes the system retained because some manufacturers intended to organize their website in such a way as to offer not only new vehicles, but also used vehicles, financing and mobility services, and to organize the common website, they intended to rely in particular on the personal data of customers and strategic commercial information collected by their network.

CECRA has indicated since the beginning of the consultation process that while a central website common to a network can improve the visibility of a brand, it does not have to be controlled by the supplier and that the management of platforms common to a network by a trusted third party is perfectly possible.

Furthermore, the guidelines accompanying the Regulation provide a framework for **agency status.** Under competition law, this status does not need to be exempted since the agent is merely an auxiliary of the supplier for the sale of its products and is therefore no longer an independent undertaking.

However, in this case, all investments and risks relating to the marketing of the products must be borne by the supplier. The Commission details the costs that must be reimbursed to the agent: the Guidelines (points 23 to 45) make the recognition of the status of agent within the meaning of competition law conditional on the agent not having to bear all the costs specific to the contracts concluded and/or negotiated by the agent, the costs relating to the investments specific to the market as well as the risks relating to other activities carried out on the same product market when this independent activity is required by the supplier (or in the case of assumption of costs that it remains absolutely insignificant).

CECRA is particularly pleased to have been heard on the need to separate the assumption of costs from the remuneration of the agent : the draft allowed for the assumption of costs on a flat-rate basis or as a percentage of the turnover achieved, which opened the door to confusion between the reimbursement of costs which is the responsibility of the supplier and the commission which remunerates the intermediation service. It was essential that this be clearly separated, which is now the case as the Guidelines in point 35 state that while manufacturers may use different methods to reimburse an agent or commissionaire for their costs, "the method used by the principal should allow the agent to easily distinguish between the amount(s) intended to cover the relevant risks and costs and any other amount(s) paid to the agent, for example intended to remunerate the agent for providing the agency services".

A supplier/manufacturer may opt for a purchase/resale distribution system for part of the new vehicles in its ranges and for an agency or commission system for another part. In this case, however, all investments in new vehicles distributed on an agency or commission basis must be compensated by the supplier/manufacturer, even if they have been incurred by the distributor in

the course of its purchase/resale activity, as long as they have not been amortised by the date of implementation of the agency or commission system.

These last two clarifications have been incorporated into the final version of the Guidelines following comments made by CECRA and its members.

In conclusion, manufacturers who opt for this type of contract will have to compare the advantages they can gain from controlling the retail price of their vehicles with the costs they have to bear. This of course applies to genuine agency contracts and not to non-genuine agency contracts which would be used by manufacturers and for which CECRA had warned of the dangers - in terms of competition law - in its previous press release. The Commission itself clearly recalls in point 45 of its guidelines that resale price maintenance ('RPM') is a hardcore restriction and a restriction by object, "the agency relationship should not be misused by suppliers to circumvent the application of Article 101 (1) of the Treaty.

Finally, regarding the **automotive sector**, the Commission has planned to publish its **draft** future **specific regulation** (to replace the current Regulation 461/2010) in June 2022 for an entry into force on 1 June 2023. CECRA hopes that this future specific regulation will continue to allow for a balance between authorised and independent repairer networks and will also address the following two issues:

- the maintenance or not of the exemption of quantitative selective distribution systems (allowing manufacturers to control - numerus clausus - and the location of their distributor) at 40% market share, tolerated for the distribution of new vehicles, instead of the general exemption threshold of 30%,
- the introduction of provisions guaranteeing the possibility of being an authorised repairer "on their own"; in particular for dealers whose contracts have been terminated for the sale of new vehicles. The rule according to which an operator, who continues to meet the purely qualitative criteria required to be a repairer, should be able to be re-authorised if his previous contract has been terminated without fault, has indeed been challenged by various national courts in the name of contractual freedom.

Vertical Block Exemption Regulation ('VBER') and its Vertical Guidelines

For more information

Bernard Lycke
Director General

bernard.lycke@cecra.eu
Mobile: +32 475 932 693