The Alliance of European Car Dealers and Repairers represents and promotes the interests of 57,500 franchised dealers and authorised repairers. These companies employ 1,175,000 people.

Brussels, 23 September 2022

Summary

AECDR acknowledges the European Commission's proposal to prolong the duration of the MVBER (Reg 461/2010) for five years. While this – together with some potential changes to the Supplementary Guidelines - provides a degree of legal certainty in challenging times, AECDR remains concerned that the narrow (aftersales-only) focus of this proposal will miss the more fundamental threat to competition that is rapidly materialising as a result of the complete transformation process currently affecting the automotive industry in Europe.

In July 2022, the Commission published for public feedback a draft Regulation extending the period of validity of Regulation 461/2010, together with a draft Communication amending the Commission Notice containing the Supplementary Guidelines. These two drafts reflect the changes that the Commission proposes to implement following its evaluation of the MVBER regime, the findings of which are set out in the Commission's Evaluation Report, together with the Commission Staff Working Document, both published on 28 May 2021.

The Commission's evaluation, which concluded on 28 May 2021, showed – according to the Commission - that the MVBER regime had been useful and remained relevant for stakeholders. The evaluation, or the Commission's reporting of it, also observed that while automotive markets were likely to evolve in the coming years, there had been no material developments in the last decade that would justify a major revision of the MVBER regime (other than an update to reflect the importance that access to vehicle-generated data was likely to have on competition).

In AECDR's view, the Commission's evaluation is flawed; it demonstrates a reluctance to act decisively and, as far as vehicle sales are concerned (which is a critical issue that the proposals avoid entirely), is based on out-of-date evidence/intelligence that does not reflect current market developments. The fact-finding study that the Commission conducted for the period 2007 to 2017 is not fit for purpose in light of the significant changes – for example ongoing OEM consolidation and the transition to direct distribution and agency models (genuine and pretend) - experienced in the automotive sector since then.

Put simply, without prejudice to the efficacy of the MVBER in offering some certainty in respect of its limited scope, simply prolonging and tweaking it fails to address the wider and imminent harms that the sector - or, rather, customers of the sector and European consumers - will experience in the near future. It follows that other measures are required to guard against the use of excessively restrictive distribution models (e.g. non-genuine agency models) to limit competition on price and other parameters, and to reinforce the competitive independence of dealers and repairers that have previously ensured that consumers benefit from a highly competitive automotive market. AECDR would be happy to engage further with the Commission on this issue before competition in the sector is compromised on a permanent basis to the detriment of businesses, employees and consumers at the retail level.

Without prejudice to the general observations set out above, AECDR comments as follows on specific aspects of the Commission's draft proposals published on July 6, 2022:

1. Draft for a Commission Regulation amending Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

As part of the revision of Article 7 of the Motor Vehicle Block Exemption Regulation, the Commission provides for a voluntary commitment to evaluate the regulation before it expires on May 31, 2028. From the point of view of AECDR, given the speed at which the sector is evolving and the nature of the changes, should outline a more concrete early evaluation) as follows:

“The Commission will monitor the application of this Regulation and the evolution of competition in the automotive sector generally on an ongoing basis and prepare a report no later than May 31, 2026.”

Such a formulation aligns broadly with the procedure provided for in Article 7 of the current regulation, however, it recognises the need to keep wider developments under ongoing review, without which competition in the sector may experience permanent harm.

2. Amendment of the Supplementary Guidelines

a) The Commission plans to make some adjustments to **Section 2 Selective Distribution**. These adjustments become necessary due to the new Vertical Block Exemption Regulation 720/2022 as well as the Guidelines supplementing this Regulation.

AECDR is of the opinion that further adjustments are necessary and reasonable. In the new Guidelines to the Vertical Block Exemption Regulation 720/2022, the Commission has dealt in greater detail with agency systems and dual-role systems (in section 3.2 Commercial Agency Agreements). However, these explanations, which are helpful in practice, focus largely on those systems in which genuine agency systems are used. This may be true for many industries, but in the distribution of new motor vehicles, a different development can be observed in some cases.

Although some OEMs appear to be attempting to convert their new vehicle sales models completely into genuine agency systems (e.g., Mercedes-Benz), other manufacturers, however, appear to be operating partial or non-genuine models, including dual-role systems consisting of an authorized dealer system for certain products (usually vehicles with internal combustion engines) and, in parallel, a non-genuine agency system for other products (usually electric vehicles). Such a constellation is problematic and raises many questions.

Both systems (the dealer system as well as the non-genuine agency system) are covered by the Vertical Block Exemption Regulation, provided that the market share of the OEM concerned does not exceed 30% (or 40%, if the wording in No 56 of the Guidelines to Regulation 461/2010 is retained). Thus, the question arises as to the reason why two systems, to which the same competition law framework applies, are operated in parallel.

It might be argued by relevant OEMs that the non-genuine agency system is introduced for the distribution of some products in order for the OEM to achieve a closer connection to customers. This might be true to some extent; however, in addition, this model gives the OEM an opportunity to influence the sales price for newer products. At the same time, unlike in a genuine agency system, the OEM does not have to assume all the financial or commercial risks as laid down in No. 31 of the SGL.

Of course, according to No. 192 of the SGL to the new Vertical Block Exemption Regulation, intra-brand price competition should still occur under a non-genuine agency model, and the SGL explain that the OEM may not prohibit the agent from sharing his commission with the customer; however, the dampening effect of non-genuine agency models on price competition (in a similar way to genuine agency models) should not be underestimated.

This is for several reasons:

As part of the changeover to agency distribution for some products, genuine and non-genuine, the commission for the agent is redefined. In practice, it turns out that this commission will be considerably lower than the comparable distribution margin of an authorized dealer. However, the investments, risks and resulting costs of a non-genuine agency distribution are little different to those of the authorized dealer. As a result, while the non-genuine agent can, in theory, share its commission with the customer, in fact, this is not possible because the commission is too low. Put simply, without assuming any commercial risk, the OEM recaptures the margin that the non-genuine agent would otherwise have used to compete against other retailers (whether of the same or different brands), which places both the non-genuine agent and the consumer in a worse position.

For completeness, AECDR would like to draw to the Commission’s attention the fact that the adverse impacts arising from the transition of the sector to systems of agency distribution (genuine and non-genuine) go further than the sale of the vehicles themselves; there are other aggravating aspects. For example, the commission from the agency system will often not be sufficient to cover the agent’s costs and to generate a sustainable returns on sales. The agent therefore has to subsidize his business as agent with other lines of business, whether the sale of the supplier's other models in the agent’s capacity as an authorized dealer or through ancillary activities. Although, as an authorized dealer, the agent should be free to determine his own prices in these activities/transactions, in fact he is restricted due to the economic constraints placed on him by an underfunded agency model. In other words, the adoption of the agency model, could indirectly lead to the OEM also having an influence over the prices of products sold and services supplied outside of the scope of any agency arrangement - and again to the detriment of the consumer.

The simple fact of the matter is that under the guise of (non-genuine) agency models, OEMs are in fact establishing more restrictive controls and economic dependencies than those formerly associated with selective distribution systems. The Commission's own comments in No. 37 of the new Guidelines on the Vertical Block Exemption Regulation indicate that the Commission itself has also recognized such a problem as possible.

Finally, it should be acknowledged that non-genuine agency systems may have the potential to inhibit cross-border sales. This may be the case in particular if agency systems exist in some EU countries while authorized dealer systems are used for the same products in other EU countries. It is already apparent that tax instruments are being used to potentially limit cross-border sales. Detailed information can be submitted to the Commission upon request.

Since both of the above aspects involve a possible circumvention of hardcore restrictions, AECDR suggests that the Commission include further clarifications on non-genuine agency systems in the distribution of new motor vehicles in the amended guidelines on the MVBER.

b) The Commission intends to update the Supplementary Guidelines to reflect the importance that access to vehicle-generated data will have as a factor of competition. AECDR agrees that access to vehicle-generated data is becoming increasingly important. Nevertheless, OEMs have marginalised the dealer’s role and resulted in the dealer becoming a conduit of information from consumer to OEM while progressively disintermediating the dealers from their customers thus reducing further the positive impact of intra-brand competition, thus reducing consumers’ advantage.

AECDR would be happy to engage further with the Commission on this topic; however, in terms of more immediate specific comments, in the new paragraph 62 (as set out in the Commission’s Communication), the Commission uses the following wording: “…release inputs such as technical information, tools, training and vehicle-generated data that are essential for repair and maintenance.” In the actual text (No. 63 of the Supplementary Guidelines), the wording “… needed to perform repair and maintenance work” is used. In AECDR´s view, the word “needed” should be sufficient.

Finally, in the new paragraph 62a it is stated under (b) that necessary inputs "… should also be made available to independent operators on a non-discriminatory basis." AECDR considers this clarification to be potentially helpful, as it should also be recognised that problems might equally arise if independent operators are granted access to the same information as their authorized counterparts but without having to bear the same costs of access. That would lead to a competitive disadvantage for the authorized network, which could undermine the latter's ability to invest and support the services that customers expect.