

National Franchised Dealers Association (NFDA)

Competition and Markets Authority: Retained Vertical Agreements Block Exemption Regulation Consultation

Position Paper and Consultation Response

Direct sales / Agency ≠ Consumer Welfare

Competition in the UK automotive sector stands at the Rubicon. For years, UK consumers have benefitted from intense intra-brand (and inter-brand) competition at the retail level, which has offset any potential reduction in inter-brand competition through increasing OEM consolidation.

Despite being required to subscribe to complex, prescriptive and sometimes opaque terms, franchised dealers continue to offer a compelling mix of discounted prices (in some instances offering more than 20% off¹) and great customer care in appealing and convenient retail environments, supported by high levels of bespoke investment in premises, facilities, equipment, training and expertise.

This could be about to change – at least in terms of price competition - as a consequence of a radical and widespread transition by OEMs to direct sales and agency distribution models. Under these models, franchised dealers handle the product (for a fee) but have no say in the customer proposition. Moreover, other aspects of the retail experience - the part-exchange, the provision of finance, the purchase of used vehicles etc. – will become increasingly controlled by OEMs, which has the potential to reduce choice, limit customer negotiation opportunities and increase consumer costs.

As noted by leading industry analysts, a key area of OEM focus over recent years (alongside product evolution) has been to limit the decline in profitability at the manufacturing level.² An obvious way to shore up profitability is to eliminate the possibility of arbitrage (and pressure on wholesale margins) by exerting absolute control over the retail price proposition. The direct sales / agency model, which serves this purpose, is one that a number of large OEMs are now grasping (partly as a result of the COVID-19 pandemic which - in forcing many customers buy online – has changed industry perceptions on the merits of different distribution channels).

For consumers, despite possible preferences for simpler and faster transactions, the longer-term consequences of the above-mentioned changes present a number of risks or potential disbenefits. As noted by a former leading OEM executive:

“In a one-price environment for direct to consumer, the manufacturer sets the (RRP) and there’s no room for negotiation, so it will result in higher transaction prices”³

A more permissive system of exemption under EU Regulation 2010/330 (than that prevailing in respect of the automotive sector under 1400/2002) previously allowed OEMs to exert greater control over dealers; a transition to an agency model will take OEM control several steps further - far beyond just the transaction price on a new car.

So, while the entitlement to appoint an agent may be unaffected by regulatory change, in conducting any review of the current rules, the NFDA would caution against changes which: i) allow OEMs to avoid the risks and responsibilities that go with it (as a result of diluting the criteria that must be met to qualify the arrangement as ‘genuine agency’); or ii) allow the imposition of indirect resale price controls in the context of non-genuine agencies.

Indeed, given the importance of vehicles to social mobility, economic growth and sustainability; is it now time to reflect carefully on whether, at least at a domestic level, tailored sector-specific competition regulation⁴ has now become essential for vehicle sales (as well as aftersales)?

¹ 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).

² For example, Global Automotive - 2020: Another Lost Year, Allianz Automotive, 29/01/2020

³ John Krafcik, a former Chief Engineer at Ford and president and CEO of Hyundai Motor America, as well as CEO of Waymo, Google’s self-driving car project, quoted in Car Advice, 07/06/2021 - <https://www.caradvice.com.au/958389/fixed-price-agency-dealer-network-will-lead-to-higher-new-car-prices-says-industry-expert/>.

⁴ Possibly through the expansion of the retained motor vehicle block exemption.

Background

- In the UK, the Secretary of State (in consultation with the CMA) is empowered to adopt block exemption regulations that define certain categories of agreements for which it can be assumed with sufficient certainty that they fulfil the conditions of exemption under Section 6 of the Competition Act 1998 (the **Act**), thereby exempting agreements from the Chapter 1 prohibition under the Act.
- The currently applicable Vertical Block Exemption Regulation 330/2010 (**VBER**) was adopted by the European Commission in 2010. Following the end of the Brexit transition period on 31 December 2020, when EU laws ceased to apply in the UK, the VBER was transposed into UK law as a domestic regulation (**Retained VBER**). This regulation (like its EU counterpart) is due to expire on 31 May 2022.
- The CMA has undertaken a review of the Retained VBER and has launched a consultation into proposed recommendations to the Secretary of State as to whether it should be replaced when it expires on 31 May 2022.
- The purpose of this document is to provide feedback to the CMA on its proposals as set out in the consultation document and the NFDA's position with regard to the future of the Retained VBER, and to respond to the CMA's consultation questions.
- The NFDA's feedback addresses whether the Retained VBER is well adapted to market developments (notably the growth of online sales and new market players, like online platforms); whether it is sufficiently clear (agency and dual-distribution), addresses sufficient issues (online advertising restrictions) and captures current case law.
- However, the NFDA also seeks to draw to the CMA's attention the huge change to the distribution model that is currently taking place in the UK's automotive retail sector and the potential impacts this change will have on competition and consumer welfare. The NFDA remains committed to cooperating with the CMA to offer further information and perspectives on the evolution of the sector and the appropriate scope and detail of any competition rules relating to it.

PART A

NFDA position in relation to the Retained VBER

1. Executive summary

Inter-brand competition (competition among OEMs, which may control multiple brands⁵) in global automotive markets is diminishing as a result of industry consolidation and collaboration at the OEM level.

As many as 39 mergers and joint ventures have been notified to the European Commission for clearance over the last 10 years⁶ and the trend looks set to continue.

Healthy intra-brand competition (competition at the retail level⁷) is also at risk as OEMs increasingly focus on extracting (dealer-derived) customer data to build and exploit direct sales relationships with consumers, reducing OEM emphasis on independent retail networks which drive intra-brand competition.

Leading automotive consultants, Autovista, estimate that since 2010 the number of dealerships in Europe has fallen by 16%.⁸ It is possible that this trend will become even more pronounced with certain brands, such as Ford, Honda, Volkswagen and Mercedes announcing substantial reductions in franchised dealer numbers in certain markets, alongside the decision of brands, such as Mitsubishi (and possibly others), to withdraw from European markets (or certain European markets) altogether.

It is important to remember that franchised dealers do not just sell new vehicles; they advise on and support vehicle usage and maintenance, which enables more sustainable and safer mobility. They also buy back a consumer's existing vehicle (part-exchanges) and sell used vehicles; they sell finance and insurance as well as spare parts and accessories.

Franchised dealers - who currently represent an important, independent competitive dynamic for consumers in terms of convenience, choice, service and price - are already at a serious competitive disadvantage to those OEMs who wish to exert greater control over the customer proposition and, importantly, end pricing. The situation is exacerbated by the fact that franchised dealers' investments and behaviour are heavily influenced by OEMs (through often unfair and highly prescriptive, but opaque, dealer agreements, which create significant uncertainties and vulnerabilities for dealers).

If inter-brand competition is reducing, which it is, then in order to protect consumer welfare, as well as dealer employment and investment, it is crucial that legislatures and regulators take steps to safeguard competition at the retail level. Preserving healthy intra-brand competition and allowing OEMs to adapt, innovate and drive efficiencies are not mutually exclusive.

The major risk, however, lies in undervaluing the importance of appropriate checks and balances in the OEM/dealer relationship (which can be achieved through proportionate sector-specific regulation).

Given the economic dependence of dealers on OEMs, the continued absence of these checks and balances (or any failure to make them robust) will allow OEMs to exert even more control over the dealer model. This may, over time, lead to dealer disintermediation, the loss of intra-brand competition and a concomitant reduction in consumer welfare.

The current Retained VBER review (as well the review of the sector specific retained motor vehicle

⁵ For example, just in the new car space, global OEM 'Stellantis' controls the following brands: Peugeot, Citroën, DS, Fiat, Abarth, Lancia, Maserati, Opel, Vauxhall, Jeep, Ram, Dodge and Chrysler.

⁶ Based on a search (conducted 09/07/2021) of the European Commission's case database (using NACE CODE C.29.1/C.29.10 – Manufacture of Motor Vehicles) for decisions given post 01/01/2011. If component and other ancillary economic sectors are included (NACE CODE C.29 - Manufacture of motor vehicles, trailers and semi-trailers) the number rises to 162 for the same period.

⁷ Although franchised dealers also drive inter-brand competition where they represent (at least currently) multiple competing brands.

⁸ Autovista, What's in Store for Europe's Car Dealers, 30/10/2020.

block exemption that the CMA may undertake in due course) affords the CMA the opportunity to develop and/or improve appropriate sector-specific regulation (or guidance) to address these concerns, without creating a regulatory framework that prevents OEMs and distribution channels from adapting to market evolution and economic shocks.

Addressing these issues will work towards preserving and enhancing the benefits that consumers have experienced historically through strong intra-brand competition. These benefits are currently at risk as a result of increased OEM focus on cost reduction and profitability.

2. About the NFDA

The NFDA is the voice of franchised car and commercial vehicle dealers in the UK. It is the UK's leading representative body focused on the interests of franchised or authorised motor vehicle dealers and repairers. Its members operate from thousands of dealerships and support hundreds of thousands of jobs.

3. The NFDA's message

The automotive retail sector is crucial to UK and European mobility and prosperity. The sector provides direct and indirect jobs to almost 600,000 UK citizens as well as millions of people across the EU (representing 6.1% of total EU employment).

Further, the importance of the retail sector by comparison to manufacturing should not be underestimated - While 2.6 million people work in the direct manufacturing of motor vehicles in Europe (including the UK), the number engaged in their sale, distribution and maintenance (i.e. dealers and repairers – 'retailers') amounts to **4.5 million**⁹.

Retailers sustain manufacturing and employment; support the development and adoption of beneficial technologies; and are instrumental in driving choice, delivering lower prices and improving the sales and aftersales experience of consumers. These benefits risk being compromised if competition at the retail level is weakened.¹⁰

Indeed, in a 2021 report prepared by Accenture for the European body representing automotive retail, the most significant cost 'saving' estimated for manufacturers opting for a direct sales model (although agency would produce a similar result) was “...**[retail] price control [i.e. the removal of discounting] and the elimination of dealer competition**”.¹¹

The NFDA is committed to ensuring that the UK motor retail sector remains the most competitive, consumer-centric model for vehicle distribution and servicing, and for the development and roll-out of innovative mobility solutions and related services, anywhere globally. To succeed, this objective must be supported by insightful and balanced regulation, which:

- **F**osters confidence and investment at all levels of the supply chain, including in offline and online retail channels, through fairer, more transparent and predictable terms.
- **A**ccommodates new product development and evolving consumer preferences, reducing the burden of unnecessarily prescriptive and onerous standards in selective distribution systems.
- **I**mproves the competitive independence of those closest to the consumer (notably retailers) and

⁹ Source: European Commission - https://ec.europa.eu/growth/sectors/automotive_en

¹⁰ It is also important to note that retail networks may have made long term physical investments and digital investments based on an existing VBER model; it follows that any significant departure from this model could have an adverse impact on the viability of those investments with the concomitant loss of important facilities and services to consumers, which is exacerbated through a reduction in price competition and choice as a result of the proliferation of more (not less) restrictive sales channels, such as agency.

¹¹ Accenture Insights on Direct Sales, prepared for the Alliance of European Car Dealers and Repairers, 11 March 2021, page 11.

allows them to adapt to changing market forces.

- **R**ecognises the value of retailers as a crucial interface between OEMs and customers and prevents unfair discrimination against retailers.

The sector is approaching a crucial watershed, not simply in terms of new product development, but also in terms of the way vehicles are supplied and how consumers want to source them. UK policy over the next couple of years will inform whether outcomes for consumers will be wholly beneficial, not simply in terms of cleaner, more efficient products, but also in terms of the quality of customer service, access to physical infrastructure and price competition.

4. What lies ahead – potential trends and outcomes for consumers and employees

“The [OEM] sector desperately needs to consolidate and reduce ruinous levels of competition.” Bloomberg, ‘The Auto Industry Is Overdue a Bout of Mega-Mergers’, 1 April 2019

“...the car [manufacturing] industry — which has become extremely competitive — needs consolidation and strategic alliance formation to reduce the ruinous levels of competition.” Yahoo Finance, ‘Is the Auto Industry Set to Witness a Consolidation Spree?’, 23 December 2019

“[Fiat Chrysler’s] planned merger with Peugeot [PSA] could lend traction to the argument that a more thorough shakeout of the industry is needed to bolster profit and lessen waste by creating fewer but stronger manufacturers.” WSJ, ‘Megamergers Become a Possible Lifeline for Under-Pressure Car Industry’, 1 November 2019

“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

“If OEMs are too aggressive in their efforts to stimulate demand, they could cripple their pricing power for years to come. That’s what happened in the long growth phase that followed the global financial crisis of 2008. In an effort to stimulate demand in the winter of 2009, OEMs sharply increased their average discount per vehicle, a move that proved costly in the long run. 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

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/>

5. 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”

Phoenix Centre for Advanced Legal & Economic Public Policy Studies, ‘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 Association “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).”

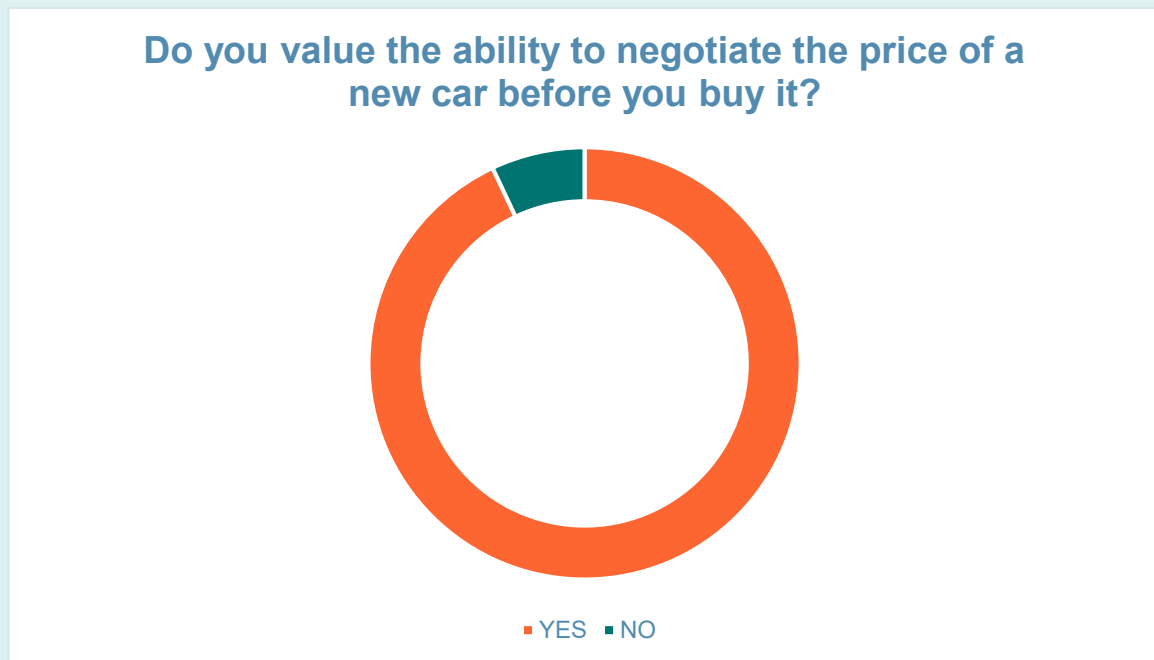
A 7-minute online survey was completed by a sample of 500 Australian new car buyers/intenders, and the results emphasise the importance of car dealers to consumers.

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

6. Core message – Better, more effective regulation is key to preserving the benefits of healthy automotive retail markets

As part of its review of the Retained VBER, the NFDA would urge the CMA to:

- recognise the importance of the automotive retail sector and its contribution to the economy and consumer welfare;
- consider that, in the absence of proportionate and fairer sector-specific regulation, the automotive retail sector and consumers will suffer harm;
- acknowledge that introducing new or improving any existing sector-specific regulatory regime for automotive retailers and consumers in the UK will not limit innovation or prevent the growth and adaptation of new and existing business models;
- seize the opportunity to set sensible parameters to ensure that competition at the retail level is preserved, and to foster more investment and employment among retailers;
- understand the consumer welfare implications of any transition to agency-style distribution and avoid steps which might diminish competition (through the adoption of any agency model, genuine or otherwise) while still placing significant limitations, burdens and risks on 'agents'.

By following these steps, retailers in a key segment of the UK and European economies will be optimally-placed to deliver the evolving products, services, technology and experience that consumers expect, on the most competitive terms.

7. Background

At the manufacturing level, the automotive sector (putting aside technology companies etc.) is characterised by a few (increasingly consolidated) global OEMs¹² supplying diverse but highly professional and consumer-oriented independent retailer networks, many of which are SMEs.

Often, when visiting a branded dealership, there is an assumption that this outlet is simply an extension of the OEM's own organisation. While this can be true, in the vast majority of cases the dealership is, in fact, owned and operated by an independent authorised retailer (or 'dealer') some of which represent a number of different OEMs across a portfolio of different dealerships.

Dealers make significant investments in premises, facilities and jobs at the retail level and provide critical services to businesses and consumers – both in terms of customer care and advice, as well as conveniently situated physical locations to inspect and test vehicles and receive important aftersales services.

The importance of physical dealerships was highlighted during the COVID-19 pandemic when many dealerships opened in order to support critical emergency services and key worker mobility as well as supply chains for vital goods and important trade and transport infrastructure.

The disparity in bargaining power between OEMs and dealers means that OEMs have the ability (as well as certain incentives) to distort competition for their products and related services (finance, insurance etc.) downstream by placing restrictions (disproportionate restrictions in some instances) on their dealers who are highly dependent on them.

The automotive sector has also been undergoing huge change. The advent of new mobility concepts and changes in customer preferences (vehicle sharing, alternative fuel vehicles, greater connectivity etc.) - together with greater online distribution, direct sales and an acute appetite for customer data -

¹² <https://www.reuters.com/article/us-renault-m-a-fiatchrysler-consolidatio/factbox-auto-industry-consolidation-mega-mergers-and-alliances-idUSKCN1SX13H>

are causing OEMs and dealers to rethink their current business models.

It follows that governments have a real challenge ahead in considering any adjustment to regulation (whether sector-specific or more general competition regulation) affecting the automotive sector alongside other industries.

There is risk in maintaining more permissive or open regulation (as has been seen in the most recent iteration of the EU block exemption regime applying to the sector), or in liberalising it further. This has and can result in excessive controls being applied by OEMs to dealers (going beyond legitimate brand protection measures).

This reduces dealers' ability to realise the benefits that consumers desire as part of a healthy, competitive market - to deliver the optimum combination of choice, quality and price and to rebuild consumer confidence in the sector. If dealers are marginalised further (for example, through the extraction of their customer data and the imposition of further controls making it difficult for dealers to compete) and retail networks contract (or are replaced by an agency model), this will leave OEMs in absolute control of the distribution channel. While this may deliver certain efficiencies for OEMs, it cannot be expected to result in a better outcome for consumers in terms of convenience, choice, service or price.

The NFDA considers appropriate flexibility can be achieved to accommodate potential social, economic and technological change while avoiding any measure that weakens downstream competition, whether in the form of less choice and higher prices or otherwise. More OEM control at the retail level is not synonymous with greater efficiency, supporting innovation or better outcome for consumers.

Any improved regulation must continue to make it clear that certain types of well-understood vertical restrictions are not compatible with competition law. At the same time, there is real scope for regulation to be improved to promote fairer business to business trading practices and greater competitive independence for smaller parties in the supply chain who have traditionally been more vulnerable to the application of subtle or indirect restrictions (economic as well as contractual) on their activities.

The NFDA believes that a new regulation (and accompanying guidance) could strike a better balance in this respect, as well as providing greater legal certainty for all businesses involved.

8. Current automotive landscape and the impact of competition rules

OEMs often – at least currently (although this could be about to change) - distribute their branded vehicles to consumers through "selective distribution" networks. A number of large OEMs are, however, at this very moment, actively exploring and pursuing agency arrangements and direct/online sales alongside their independent dealers. This trend is only likely to increase in the wake of the COVID-19 pandemic.

Under selective distribution systems, OEMs normally appoint a limited number of independent 'franchised' retailers, each of which must comply with stringent standards set by the OEM in order to join, and remain a part of, the 'authorised dealer/repairer' network. These standards should, in theory, be applied on a uniform, non-discriminatory basis.

In any event, the selective distribution model pursued by OEMs gives OEMs substantial control over how their products are presented to the market and how dealers engage with customers.

There is nothing inherently harmful about applying stringent standards (or selective distribution in general as a means of ensuring a high quality customer experience in respect of the supply and care of the most complex and important product that most households will own); however, it is important to guard against the imposition of excessive restrictions, which go beyond those which support investment and quality of service, for example:

- the assumption by OEMs of absolute control over all vehicle derived or customer data, which has the potential to deny dealers (who contribute to collecting the data in the first place) the ability to

innovate or offer customers other services they might find beneficial;

- the imposition by OEMs of onerous standards and investment demands while, at the same time, reserving for themselves the discretion to pursue direct (including agency) sales, which places dealers at a competitive disadvantage (particularly in view of the customer data that the dealer is obliged to share with the manufacturer notwithstanding this dual-distribution relationship);
- restrictions applied by OEMs on dealers from undertaking separate activities (distinct from any franchise) for the benefit of consumers, including arbitrary restrictions on sales of non-OEM ancillary products (finance, insurance etc.);
- absolute control applied by OEMs through dealer agreements over any future disposal by the dealer of the dealer's assets, even to other retailers who meet all of the OEM's standards;
- OEMs reserving the right to change key contractual terms (including those requiring substantial investment) unilaterally during the contract term, thus creating huge financial risk for dealers and undermining their ability to adapt their offering (while still complying with core standards) to market changes and consumer preferences; and
- OEM refusals to support meaningful industry codes of conduct, which set clearer expectations on both sides, or to adopt properly effective dispute resolution mechanisms.

Dealers understand and accept that markets and consumers are changing. Dealers also welcome competition based on a level playing field. In order to rise to these challenges – and sustain future manufacturing and employment – dealers have to be allowed to adapt.

Dealers should not be overburdened with unnecessary restrictions. They should not be forced to subsidise other (sales or aftersales) channels, including non-franchised or OEM direct supply channels, which free-ride on their investment. Dealers are closest to the 'market'¹³ and should, within reason, be permitted more freedom to evolve their customer proposition in the most competitive way, while continuing to respect the legitimate brand requirements of OEMs and remaining committed to offering the best possible service.

Dealers should also be entitled to use key assets (notably data) that they have invested in developing (or have supported) without undue OEM interference, subject to compliance with data protection laws.

This is where improved competition regulation comes in. When read in conjunction with accompanying guidance, these legal templates, which set the tone for distribution agreements across the UK, can provide a clear indication of what kind of vertical constraints and other behaviours are permissible under competition law and those which are not, taking into account the respective bargaining positions of the different stakeholder groups involved.

Clearer rules and guidelines (with examples) will enable the efficient resolution of conflicts between different stakeholder groups, in many instances without the need to refer to the courts or other third parties.

The NFDA therefore looks forward to working with the CMA and other stakeholders in connection with its review of the current Retained VBER (and any future review of Regulation 461/2010, which is due to expire in May 2023).

9. Key reminders

- Proportionate and targeted competition regulation is vital to preserving the benefits that consumers have hitherto experienced in the automotive retail market in the UK.
- The Retained VBER should not be allowed to lapse without being replaced; however, this also needs to be improved to reflect the growing importance of intra-brand competition and other market

¹³ For example, by virtue of their ongoing relationship with customers, keeping their cars safe and compliant, which helps retailers understand and respond to customers' evolving needs.

developments. See also **'Transition to Agency'** below.

- If these rules are not retained **and improved**, the effect will be to reduce legal certainty in terms of what kinds of vertical restrictions comply with competition law. This could in fact lead to more restrictions being placed on weaker parties.
- In terms of improvement, the focus needs to reflect emerging trends (particularly digital trends) and to address a wider range of potentially restrictive practices. This will support innovation and result in better consumer outcomes; and the changes do not need to undermine the validity of existing distribution models.
- New rules need to recognise that OEMs often leverage their upstream market power to strengthen their downstream retail offering, increasingly at the expense of downstream competitors over whom they exercise significant control.
- Consideration must be given to ensuring that dealers remain able to compete against vertically-integrated supply chains and other platforms, and that OEMs do not assume an unfair advantage by virtue of unduly restricting dealers' activities while, at the same time, forcing the latter to concede control of key downstream assets (particularly data) to OEMs.
- The NFDA would urge the CMA to give careful thought to adopting measures which preserve intra-brand, and well as inter-brand, competition, particularly for sectors, such as automotive, which are experiencing significant consolidation at the OEM level, as well as the emergence of powerful online platforms and intermediaries.
- Competitive contractual relationships should be based on fair and objective criteria to ensure a level and predictable playing field, which supports investment. Dealers which make the relevant investments (within a selective distribution system) to deliver high-quality pre- and aftersales services should not be placed at a competitive disadvantage to third parties who choose not to or who do not need to.
- The CMA should also consider whether general market share thresholds (e.g. the 30% safe-harbour in the Retained VBER) are always appropriate or whether, where relationships are characterised by major differences in bargaining power, a lower threshold (or extra safeguards preserving the competitive independence of SMEs) should be considered.
- It is important to remember that in the automotive sector, the economic dependence of dealers on OEMs (and the sunk investments made by dealers in the OEM's brand) places OEMs in a particularly powerful bargaining position, one which far exceeds any wider market or traditional 'dominance' assessment based on that OEM's market share.
- Finally, proper industry codes of conduct (separate to regulation) have a role to play. These should be fostered alongside effective/cost-effective dispute resolution processes.

A Transition to Agency?

Putting aside the question of whether any transition to an agency model represents a good outcome for consumers, the risks associated with implementing an arrangement that fails to satisfy the complex and strict competition law criteria applicable to it are substantial.

Competition law focuses on substance over form and looks at the economic reality of the situation, which is far more complex than simply drawing an easy line between one type of activity and another.

The sector therefore faces difficult challenges and risks as part of any potential transition:

- For those OEMs who wish to pursue a 'genuine agency' model, the risk that they will disregard or undervalue the significant market-specific risks that they will have to remove from dealers' shoulders (both going forward and on a legacy basis) to benefit from benign competition law

treatment.

- For those OEMs that seek to apply a partial agency model, the risk that they will attempt to distinguish markets artificially in order to avoid having to undertake an holistic analysis of the risks incurred by dealers (for the relevant OEM) outside the specific focus of the agency arrangement in question.
- For those OEMs who propose a 'non-genuine agency' model on the basis that they are prepared for their 'agents' to share commission with customers, the risk that might arise if dealers are, in reality, prevented from advertising discounted transaction prices or otherwise constrained by narrower (agency) margins from offering anything that resembles a true discount to consumers.

It is inevitable that any transition to a sales channel, such as agency, that will diminish or eliminate intra-brand (and possibly inter-brand) price competition will be of interest to any competition authority with a strong consumer protection agenda.

It is not just about price. An agency model also has the potential to impose additional duties on agents such as to limit their ability to undertake activities (deliver choice and quality of service) independently of their principal, which should be protected wherever possible.

In view of the consumer benefits that could be lost by facilitating a far more restrictive system of distribution, the NFDA would recommend a very careful review of the rules and guidance surrounding the agency model and would be happy to engage further with the CMA on this topic.

PART B

NFDA Response to CMA Consultation Questions

CMA's proposed recommendation

Policy and impact questions

Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the Retained VBER with a new UK VABEO, rather than letting it lapse without replacement or renewing without varying the Retained VBER?

a) Yes

b) No

c) Not sure

Question 2: Please explain your response providing, where possible, examples and evidence to support your answer.

Please see our submissions in Section A, in particular paragraphs 7 to 9, above.

Question 3: How will the proposed UK VABEO as outlined in the CMA's proposed recommendation impact consumers?

a) Significant positive impact

b) Moderate positive impact*

c) Negligible impact

d) Moderate negative impact

e) Significant negative impact

*This very much depends on the form any new UK VABEO takes (assuming it were to regulate the sale of new vehicles in the UK in future as opposed to, say, a new sector-specific motor vehicle order). If it were the case that a new UK VABEO:

1. failed to protect the competitive independence of weaker parties in the supply chain (dealers); or
 2. allowed OEMs to exploit the agency model unfairly (without reference to the existing or anticipated investments made by dealers); or
 3. allowed OEMs to assume absolute control of the dealer-consumer proposition (e.g. the sale of used cars, the determination of part-exchange values, control over retail finance offers etc.),

the impact would be wholly negative. For example:

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.¹⁴

Even if one assumes (conservatively) that only private sales (which the 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 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 (identified in the Motoring Research report in footnote 1 above), the potential for the total of savings that would be lost to consumers (annually and just on new car sales) exceeds **£1.74 billion**.

Associations of undertakings

Policy questions

Question 4: What are your views on the CMA's proposed recommendation for agreements with association of undertakings to continue to benefit from the UK VABEO?

Associations of undertakings should, in the NFDA's view, continue to benefit from potential block exemption, but please see below.

Question 5: Do you think that the turnover threshold should be revised for agreements with associations of undertakings to benefit from the UK VABEO (in particular, to reflect market developments, growth, inflation and/or the UK market)? If so, please provide your views on what the new turnover threshold should be.

The thresholds set out in the proposal are not suited to the automotive sector (given the high value of the products bought and sold) as they do not reflect the fact that even a small retailer (a dealer with only one or a small number of sites) could have a turnover well in excess of £44 million.

Impact questions

Question 6: To what extent is the exception for agreements with associations of undertakings, as outlined in the Retained VBER, helpful to your business's operations or the operations of those you represent?

a) Very helpful

b) Somewhat helpful

c) Irrelevant

d) Unhelpful

e) Very unhelpful

¹⁴ Based on SMMT data. For comparison purposes, registrations over the previous five years (2015 – 2019 inclusive) were generally greater than 2.5 million units.

Question 7: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was increased?

- a) Significant positive impact
- b) Moderate positive impact**
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Question 8: What would be the likely impact on your business's operations or the operations of those you represent if the turnover threshold was decreased?

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact**
- d) Moderate negative impact
- e) Significant negative impact

Dual distribution

Policy questions

Question 9: What are your views on the CMA's proposed recommendation on dual distribution?

The NFDA considers that the CMA's proposed recommendation on dual distribution is not adequate to protect franchised dealers 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. Further amendments to the existing Retained VBER provisions on dual distribution are required, as well as the provision of further and stricter guidance (including on agency), to ensure that healthy intra-brand (and inter-brand) competition, and therefore consumer welfare, is protected.

Dual Distribution

Healthy intra-brand competition (mainly competition at the retail level) 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.

OEMs occupy a position of real advantage given the power they exert over retail networks. They increasingly focus on extracting (dealer-derived) customer data to build and exploit direct sales relationships with consumers, reducing manufacturer emphasis on independent retail networks which drive intra-brand competition.

It follows that there is merit (of itself) in clearer guidance on the competition law treatment of dual-distribution models. This is particularly so as regards the extent to which market information (particularly customer information) that an OEM might require its retailers to gather and report can then be shared with that OEM's own retail operations downstream (which gives rise to the risk of coordination at the retail level). That said, a more fundamental re-think of the benefits of dual-distribution is needed.

This will not necessarily apply to all sectors; however, the increasingly widespread adoption of dual-distribution in the automotive sector is likely, over time, to result in the elimination of intra-brand competition. This fact, alongside OEM consolidation, has been widely reported within the

sector. We have repeated below extracts taken from Part A, sections 4 and 5, of the NFDA's position paper above, which summarises a variety of commentator and analyst views:

- **“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”** Phoenix Centre for Advanced Legal & Economic Public Policy Studies, ‘The Price Effects of Intra-Brand Competition in the Automobile Industry: An Econometric Analysis’, March 2015
- **“The [manufacturer] sector desperately needs to consolidate and reduce ruinous levels of competition.”** Bloomberg, ‘The Auto Industry Is Overdue a Bout of Mega-Mergers’, 1 April 2019
- **“...the car [manufacturing] industry — which has become extremely competitive — needs consolidation and strategic alliance formation to reduce the ruinous levels of competition.”** Yahoo Finance, ‘Is the Auto Industry Set to Witness a Consolidation Spree?’, 23 December 2019
- **“[Fiat Chrysler’s] planned merger with Peugeot [PSA] could lend traction to the argument that a more thorough shakeout of the industry is needed to bolster profit and lessen waste by creating fewer but stronger manufacturers.”** WSJ, ‘Megamergers Become a Possible Lifeline for Under-Pressure Car Industry’, 1 November 2019
- **“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, manufacturers 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
- **“If manufacturers are too aggressive in their efforts to stimulate demand, they could cripple their pricing power for years to come. That’s what happened in the long growth phase that followed the global financial crisis of 2008. In an effort to stimulate demand in the winter of 2009, manufacturers sharply increased their average discount per vehicle, a move that proved costly in the long run. 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 manufacturers. In light of that lesson, the objective for recovery after the novel coronavirus outbreak is to reestablish manufacturers’ market positions without slashing prices, and thus sacrificing margins, in the process. A disciplined commitment to controlling discounts and avoiding price wars will help manufacturers 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: manufacturers 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

Evolution of Shared Distribution Models - Wider implications

The risks to competition and consumer welfare within the automotive sector do not exclusively occur as a result OEMs taking on a direct sales role; indeed dealers have no objection to competition on the merits.

However, risks arise in circumstances where a more permissive system of regulation would allow the OEM to cherry pick facets of different distribution models or implement different distribution models alongside each other, which although theoretically appealing in terms of retail innovation, confer more control on the OEM or allow it to marginalise the competitive influence of healthy independent retail networks. By way of example:

- Permitting an ‘agency’ model which allowed the OEM to control retail prices and other terms while still transferring significant product-specific and market-specific risks to the ‘agent’ would reduce price competition, limit the means by which ‘agents’ would compete against each other (a transition to ‘average’ performance) and possibly result in the contraction of retail networks.
- In a dual-distribution scenario, allowing OEM retail operations unfettered access to dealer-derived customer data could potentially lead to coordination (and would also place dealers at a competitive disadvantage).
- In a selective distribution system, allowing OEMs to sell to customers through certain intermediaries (e.g. fleet or leasing companies) who are not genuine end-users is inconsistent with the application of objective, uniform and non-discriminatory selection criteria which is implicit in selective distribution systems.

Question 10: Do you think that additional guidance on information exchange in the context of dual distribution would be helpful? If so, please provide your views on what that guidance should say.

Yes. Please see reasons given in our response to Question 9 above. However, we would caution against any guidance that would result in the application of less strict criteria to the term ‘genuine agent’, or more generous treatment in terms of the types of restrictions that might be applied by ‘non-genuine agents’ (insofar as certain parties might regard this as a ‘halfway house’ as opposed to a reseller arrangement by a different name).

Impact questions

Question 11: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the Retained VBER, positively impact your business’s operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little

e) Not at all

In markets where suppliers hold far greater negotiating power, dual-distribution is often simply a means for those powerful parties to marginalise the competitive influence of weaker retailers, while free-riding on the investments made by those retailers to support the supplier's brand.

Question 12: To what extent does the dual distribution exception for non-reciprocal vertical agreements, as outlined in the Retained VBER, negatively impact your business's operations or the operations of those you represent? Please explain your answer.

- a) Completely
- b) **Very much**
- c) Moderately
- d) A little
- e) Not at all

Please see reasons given above. Dual-distribution poses horizontal risks and risks supplanting healthy and diverse retail competition over time.

Question 13: What would be the likely impact on your business's operations, or the operations of those you represent, if the dual distribution exception was not included in the UK VABEO at all? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

To the extent that this change made dual-distribution unappealing to OEMs, research carried out in other markets in our sector suggest that retail competition would intensify. Please see Part A, sections 4 and 5, of the NFDA's position paper above, as well as our response to Question 9 above.

Question 14: Do you consider the CMA's proposed recommendation, which also applies the exception to dual distribution by wholesalers and by importers, to have a positive or negative impact on business operations? Please explain your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) **Negligible impact**
- d) Moderate negative impact
- e) Significant negative impact

It is more a question of principle or substance than form.

Resale Price Maintenance

Policy questions

Question 15: Do you agree with the CMA's proposed recommendation on resale price maintenance (RPM)?

Yes – please see our response to question 16 below for more information.

Question 16: Based on your experience, do you have any examples in practice of circumstances where RPM would lead to efficiencies that outweigh the restriction of competition? If so, please provide these examples.

It is possible that RPM can, in limited circumstances, produce certain benefits, for example, where an OEM wishes, for an introductory period, to position a new product in a market and test demand (perhaps where that product necessitates specific investment by retailers).

RPM might also limit the risk of free-riding where resellers (particularly those online) - who might be unwilling to invest in a brand - trade off the investments made by those who do make those investments in supporting the relevant products (in terms of sales and after sales facilities). It is important to remember that price is only one aspect of competition, albeit an important one, alongside convenience, quality of service or product, innovation etc.

That said, the risk to healthy price competition and consumer welfare of expanding the scope of potentially permissible forms of RPM are very significant indeed. In the automotive sector, intra-band price competition at the retail level is intense and this works in the interests of consumers who can potentially benefit from significant discounts.

For example, each month, the UK motoring magazine, Whatcar?, reports discounts that are widely available on a range of brands. In its April 2021 edition, for sample models, these ranged from £942 to £6,390 off the list price. When one compares this, for example, to Tesla, where the OEM controls the retail price by virtue of its direct sales model (and discounting is, in our view, rare), the risk of extending benign treatment to a distribution model that would allow a manufacturer to impose controls having similar effects over its retailers is obvious.

Similar concerns could apply to other sales channels that also allow an OEM to circumvent independent retail distribution and control resale price, such as agency. Despite a desire to maximise profitability by controlling retail prices, the agency model has historically (at least until recently) been less attractive for OEMs as (in return for controlling prices and other terms) it obliges the OEM to assume risks that would normally be placed on independent retailers (e.g. inventory, stocking and bad debt risk at a product level and significant market or relationship-specific investments at the retail level to support the brand).

If current constraints around the definition of a 'genuine agent' were relaxed under any new regulation, this model would become more appealing to OEMs; however, it would come at the expense of price competition. Indeed, other forms of competition might also suffer as retail networks contracted on the basis that their growth would be limited by virtue of their inability to differentiate their offering on key competitive parameters. Put simply, it would foster a form of distribution that is not, in our view, aligned to consumer welfare and one where the benefits, if there are any, are entirely unproven.

Question 17: Do you think that additional guidance on when RPM may lead to efficiencies would be helpful? If so, please provide your views on what that guidance should say.

The guidance is already reasonably detailed; however, more guidance on indirect RPM would be helpful; in other words, where an OEM might:

- in theory permit a dealer as 'agent' to share their commission with a consumer (to discount the transaction price), but which in reality means that the agent is limited in advertising discount and consumers can only negotiate once through the 'dealership' door;
- 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;
- seek to control other aspects of the transaction price (e.g. the centralised determination of part exchange values using an OEM-mandated third party and the forced application of 'Approved Used Car' schemes).

Impact questions

Question 18: What would be the likely impact on your business, or those you represent, if RPM were not treated as a hardcore restriction for the purposes of the proposed UK VABEO? Please explain your answer.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) **Significant negative impact**

For the reasons set out in our response to question 16 above, we consider that, if RPM were no longer treated as a hardcore restriction, this would have a significant negative impact on the dealers that we represent. However, this point may become moot if the sector transitions to agency.

Question 19: Are you aware of, or have you encountered, any difficulties in your business as a result of the treatment of RPM as a hardcore restriction for the purposes of the Retained VBER? If so, please give examples.

No.

Territorial and customer restrictions

Policy questions

Question 20: What are your views on the CMA's proposed recommendation on territorial and customer restrictions? In particular, what are your views on the CMA's proposed recommendation to:

- a) continue to treat territorial and customer restrictions as 'hardcore' restrictions so as to remove the benefit of the block exemption (subject to exceptions);
- b) maintain a distinction between active and passive sales;

c) revisit the distinction between active and passive sales for certain types of online sales in the CMA VABEO Guidance; and

d) change the current regime in order to give businesses more flexibility to design their distribution systems according to their needs?

In your response please consider whether:

a) there are any features of the UK internal market militating in favour or against retaining the treatment of territorial restrictions as 'hardcore' restrictions for the purposes of the UK VABEO;

b) the distinction between active and passive sales remains valid and whether changes to this categorisation should be made in order to:

- i. clarify the situations where online sales amount to passive or active sales; or
- ii. give businesses more flexibility to combine different distribution models.

These distribution models will potentially become irrelevant in the automotive sector if manufacturers move to agency or direct sales models.

In any event, online retail and consumer search capabilities (which generate passive sales opportunities) means that exempting active sales restrictions to protect an exclusive territory within a market where selective distribution is also operated is unlikely to make any significant difference to the level of retail price competition that occurs.

Question 21: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say including examples of situations where online sales should be regarded as passive or active sales.

We would be happy to discuss this further with the CMA

Impact questions

Question 22: Do you have any examples of circumstances where territorial and customer restrictions might lead to operational efficiencies? Please include examples of locations within the UK and, where possible, quantitative and/or qualitative evidence in your answer.

Please see above.

Question 23: How helpful is the exemption for restrictions of active sales in the UK to your business or those you represent? Please explain your answer.

- a) Very helpful
- b) Somewhat helpful
- c) Irrelevant
- d) Unhelpful
- e) Very unhelpful

Please see above.

Indirect measures restricting online sales

Policy questions

Question 24: What are your views on the CMA's proposed recommendation on dual pricing and on the equivalence principle?

We support the CMA's proposed recommendation that dual pricing and the imposition of criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops in a selective distribution system should no longer be regarded as hardcore restrictions.

As a point of principle, it is the case in the automotive retail sector that 'authorised dealers' invest very significantly in supporting the brand, for example in terms of:

- investments in modern and appealing physical (as well as online) dealership facilities that customers can visit to view vehicles, experience and test them and seek advice pre-purchase;
- investments in properly equipped and stocked workshops where customers can deposit vehicles for aftersales care and maintenance; and
- investments in expert staff training (sales, finance, technicians etc.).

This delivers benefits not only to OEMs and parts suppliers, but also to independent garages (and, indeed, leasing or fleet companies who sometimes resell manufacturer-supplied vehicles) who are not required to comply with the same standards. This may, therefore, allow these businesses to free-ride on the investments of authorised dealers. Any new system of regulation should recognise the investments that authorised dealers are required to make in order to sustain the brand.

Question 25: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

More detailed guidance on this issue would be welcome.

It is important that authorised dealers who themselves choose to sell online are not disadvantaged by the imposition of criteria that place them at a competitive disadvantage by reference to the OEM's direct sales operations.

Impact questions

Question 26: What are your views on the current regime, which treats certain online sales as a form of passive sales? What are some examples of the benefits or costs for your business operations, or the operations of those you represent? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

Please see above.

Question 27: Does the treatment of online sales bans as a hardcore restriction have an overall positive or negative impact on your business? Where possible, please provide examples of the impact on online channels and offline channels in your answer. Please include qualitative and/or quantitative evidence where possible.

- a) Significant positive impact
- b) Moderate positive impact
- c) Negligible impact
- d) Moderate negative impact
- e) Significant negative impact

Please see above

Question 28: Do you consider that the CMA's proposed recommendation (to remove dual pricing and the requirement for overall equivalence in selective distribution from the list of hardcore restrictions) will benefit offline channels? If yes, please provide examples where possible.

Please see above.

Parity obligations (or 'most favoured nation' clauses)

Policy questions

Question 29: What are your views on the CMA's proposed recommendation on parity (or 'most favoured nation') obligations? As part of this, you might like to consider whether indirect sales channel parity obligations¹⁵ can generate benefits/efficiencies beyond those that may be created by direct sales channel parity obligations¹⁶ – if so, please provide evidence or examples in practice of circumstances where this may be the case.

Not relevant in the automotive sector.

Question 30: Do you agree that additional guidance on this issue would be helpful? If so, please provide your views on what that guidance should say.

Not relevant in the automotive sector.

Impact questions

Question 31: To what extent are indirect sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

¹⁵ As defined in paragraph 4.63

¹⁶ As defined in paragraph 4.63

Question 32: To what extent are direct sales channel parity obligations relevant for your business's operations, or the operations of those you represent? Please explain your answer.

- a) Completely
- b) Very much
- c) Moderately
- d) A little
- e) Not at all

Question 33: Are you aware of any difficulties to your business if indirect sales channel parity obligations are treated as hardcore restrictions for the purposes of the proposed UK VABEO? Please explain your answer.

We would need to discuss with the CMA the potential relevance of these questions to the automotive sector.

Non-compete obligations

Policy questions

Question 34: The CMA invites views on the proposed recommendation in respect of non-compete obligations. In particular:

- a) Should non-compete obligations that are tacitly renewable remain 'excluded restrictions' under the UK VABEO?

Yes.

- b) Are there any risks in allowing such obligations to be automatically exempt under the UK VABEO?

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.¹⁷

Moreover, the possibility of allowing an OEM – on whom a retailer is already heavily dependent – to impose an obligation (particularly on a more open-ended basis), which would prevent that retailer from representing other brands (including across its group and from other premises) will only increase that dependence. It will also potentially make the retailer 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 the actual level of market power exercised by OEMs over retailers. This has been previously recognised in

¹⁷ This position has already deteriorated following the removal of Regulation 1400/2002, which facilitated multi-branding in the automotive sector.

certain European jurisdictions, for example, the concept of 'relative dominance' in the Peugeot Austria case.¹⁸

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).

c) Should the current regime in the derogations in Article 5(2) and Article 5(3) of the Retained VBER be revised (for example, to reflect market developments such as the increasing trend towards online sales)?

To be discussed with CMA.

Impact questions

Question 35: To what extent are non-compete obligations relevant to your business or industry, or the industry that you represent? Please explain your answer.

- a) Completely
- b) Very much***
- c) Moderately
- d) A little
- e) Not at all

Question 36: Relative to the current regime as set out in the Retained VBER, what would be the likely impact on your business's operations, or the operations of those you represent, if non-compete obligations that exceed 5 years in duration were no longer treated as 'excluded' restrictions? Please include examples and where possible, quantitative and/or qualitative evidence in your answer.

*The imposition of wide ranging non-compete obligations could, in principle, have very adverse consequences for UK automotive retail distribution.

However, a transition to agency and the duties an agency model might imply could limit multi-brand representation too.

¹⁸ <https://www.wko.at/branchen/sbg/handel/fahrzeughandel/PA-Buechl-20200526.pdf>.

Question 37: What are some of the benefits or efficiencies of non-compete obligations remaining exempt if the duration is less than 5 years? Please include examples and where possible, quantitative or qualitative evidence (or both) in your answer.

Please see above. Non-compete obligations in all forms present particular risks to the future of automotive retail distribution.

Agency

Policy question

Question 38: The CMA invites views on the proposed recommendation in respect of agency issues and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

The automotive retail sector is currently anticipating (if not already experiencing) significant transition - from a selective distribution/indirect sales model to an agency/direct sales model.

As a result, it is imperative that clearer guidance is provided on the issue of “genuine agency”. This includes guidance on the extent to which a business may act both as a “genuine agent” and as an independent distributor for different products of the same supplier in the same market (i.e. “dual role” agents).

Background

Franchised dealers have been required to invest very significantly in their OEMs’ different selective distribution formats and associated standards, where even a single dealership can require investment in well excess of £10 million (although support may be given for some of the OEM-specific elements subject to conditions). This includes (for example): site acquisition and securing appropriate consents; site preparation and layout (display spaces and parking etc.); corporate identity (which extends far beyond normal branding and signage to the layout of the retail environment, colour schemes, furniture, fittings and lighting etc.); facilities; staff; IT set up etc. Many of these investments are specific to the standards required by each brand and therefore are often not interchangeable with other brands.

Indeed, OEMs have previously set standards in order to limit the potential for franchised dealers to represent competing brands at the same dealership. It is still the case that dealers, while able to share some facilities, are required to invest significantly in standards that are specific to a particular OEM’s brand, have to segregate brands with separate entrances and service desks, and have to get approval in most cases to any site-sharing with other franchises and to the particular franchise.

It follows that it is not simply a question of creating a new (agency) distribution format that is outside of the scope of the Chapter I prohibition or Article 101 TFEU; it is also important to recognise and address the legacy issues arising from an independent distribution network that has hitherto been required to invest significantly in supporting specific OEM brands.

This issue has become particularly important over recent months as an increasing number of OEMs have announced plans (or media speculation suggests that such announcements are likely¹⁹) to move from a selective distribution model to an agency (or direct sales) model, at least for certain vehicles within their range.

¹⁹ <https://cardealermagazine.co.uk/publish/exclusive-most-car-makers-are-secretly-planning-agency-sales-models-but-dont-be-afraid-says-former-hyundai-boss/225979>.

It is therefore important that the CMA produces clearer guidance on agency issues, particularly those highlighted below, to ensure that the UK VABEO does not permit an agency model that allows manufacturers to control retail prices and other terms while still transferring significant product-specific and relationship risks to the 'agent', which would have the effect of reducing price competition, limiting the means by which 'agents' would compete against each other (a transition to 'average' performance) and possibly result in the contraction of retail networks.

Challenges

The following represents a non-exhaustive list of issues that any guidance on agency in the automotive sector should address:

Premises investments

Every franchised dealer is required, in order to represent the OEM's brand, to acquire and set up dealership premises; however, these premises are often peculiar to the standards required by each brand (in terms of location, size, layout etc.). Therefore, it is not simply a question of substituting one brand at a particular location with another, or with a different business; each location and site set-up can be quite brand-specific.

It follows that any suggestion that investments in 'premises' are generic or not material to any agency analysis (as the current VBER Guidelines potentially do) would overlook the particular characteristics of automotive retail in the franchised dealer scenario.

Compensation for sunk market-specific investments

A franchised dealer should, under a genuine agency, expect the OEM to fund market-specific investments up front, not simply to propose a reimbursement model over time, where a notional figure might be allocated to offset substantial dealer investment which dealers are currently required to make upfront (not least as this may be linked to uncertain or opaque performance criteria).

Further, dealers as agents should expect to be specifically recompensed for the use of the facilities in which they have already invested (beyond mere commission on sales²⁰) where they subsequently have to be deployed to support their activities as agents.

Consideration also needs to be given to the scenario of where an OEM 'principal' terminates an agency leaving the agent exposed in terms of any substantial market-specific investments already made.

Application of targets (linking rewards to certain types of performance) in an agency/dual-role agency model, considering:

If an OEM applies (sales) targets to an agent, which are: 1) critical for the agent to meet in order to unlock commissions or bonuses to ensure that it remains viable economically; and/or 2) very similar to the (stretching) targets previously applied to the agent (in its capacity as a franchised dealer), these factors should be recognised as the agent re-assuming a degree of financial risk that is inconsistent with the concept of genuine agency.

Also, in a dual-role agency scenario, where the agent's commissions (or its appointment generally) are also linked to its performance as a franchised dealer in respect of the distribution/resale of non-agency products or services, this arrangement has to be taken into account in assessing the level of risk assumed by the 'agent' as part of any genuine agency analysis. In the NFDA's view, the relationship with the OEM has to be examined holistically.

²⁰ For example, a franchised dealer might - for a single OEM - have invested £50m over a number of years across a number of dealerships to support that OEM's brand. Following its appointment as an agent for that OEM, can the franchised dealer expect the OEM to return a proportion of that capital investment to the franchised dealer and, if so, how would it be calculated and paid?

Environmental sustainability

Policy question

Question 39: The CMA invites views on the proposed recommendation in respect of environmental sustainability and stakeholders to make any submissions they consider would help the CMA to develop useful guidance on this topic.

To be discussed with CMA.

Impact questions

The CMA proposes that the Secretary of State does not make any changes to the UK VABEO in respect of environmental sustainability issues, but the CMA would instead seek to provide guidance on this topic in any CMA VABEO Guidance.

Question 40: What are your views, if any, on whether the Retained VBER and EU Vertical Guidelines contain or frustrate initiatives which might support the UK's Net Zero and environmental sustainability goals. Please include examples to support your views where possible.

To be discussed with CMA.

Question 41: Relative to the current regime, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a positive impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a positive impact.

To be discussed with CMA.

Question 42: Relative to the current position, would any amendments relating to environmental sustainability (either in the UK VABEO or any CMA VABEO Guidance) have a negative impact on your business's operations, or the operations of those you represent? Please provide examples and evidence where possible about how any such amendments would have a negative impact.

To be discussed with CMA.

Duration

Policy question

Question 43: The CMA invites views on whether the UK VABEO should have a duration of 6 years.

To be discussed with CMA. This question should be considered in light of any wider debate on the issue set out below. That said, unless appropriate regulation and guidance is implemented now to protect competition in the sector, the state of competition in the sector may be quite different in 6 years.

VABEO Obligation to provide information

Policy question

Question 44: The CMA invites views on the above proposed recommendations in respect of the other provisions in the UK VABEO.

To be discussed with CMA. The NFDA is keen to understand – reflecting the complexities and unique characteristics of the sector referenced above - whether the CMA would be open to dedicated sector-specific block exemption regulation under any potential future expansion of the retained motor vehicle block exemption regulation.

ENDS