National Franchised Dealers Association (NFDA)

NFDA feedback on Draft guidance on the application of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (Draft Guidance)

1. About the NFDA and this submission

The NFDA is the voice of franchised car and commercial vehicle dealers and repairers in the UK. Its member firms operate from thousands of dealerships and support hundreds of thousands of jobs across the UK. See https://www.nfda-uk.co.uk/about for more information.

The NFDA is grateful to the CMA for the opportunity to provide feedback on the Draft Guidance on behalf of its members (although individual members may wish to make observations or propose changes that vary from those summarised in this document). The NFDA would be happy to engage further with the CMA if the CMA has any questions regarding the content of this document or the themes identified in it.

To ensure that the NFDA's feedback is as helpful and as clear as possible, this submission may reproduce extracts of the Draft Guidance with the NFDA's suggested amendments shown in mark-up.

Unless otherwise specified, please note that '**para(s).**' references in this document are to paragraphs of the CMA's Draft Guidance (CMA154 of 31 March 2022); and '**Art(s).**' references in this document are to articles of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 which will apply in the UK from 31 May 2022 (**VABEO**).

2. Context

Franchised dealers provide a range of essential services to consumers and other customers across the UK and other markets. Dealers do not just sell new vehicles; they advise on and support vehicle usage and provide maintenance and repair services, which enables more sustainable and safer mobility. They also buy back a consumer's existing vehicle (in part-exchange) and sell used vehicles; they arrange finance and insurance as well as supplying spare parts and accessories.

While stocking and displaying the brand(s) of particular vehicle manufacturers (also known as '**OEMs**') at their premises, it is important to be aware that most dealers are independent of the OEMs they represent. Dealers often make substantial investments in supporting OEM brands and subscribe to detailed and exacting contractual standards.

At the same time, they compete aggressively, not just as far as rival brands are concerned but also against other dealers of the same brand. Dealers therefore represent a vital competitive dynamic for customers in terms of convenience, choice, service and, importantly, price.

This competitive dynamic and the benefits it delivers are under threat. OEMs wish to exert greater control over the customer proposition and, importantly, end pricing, with a number of significant OEMs currently exploring direct sales and agency models for new vehicle sales, and in some cases for some elements of new vehicle sales only (such as certain drivetrains). Whilst it is not open to the CMA to dictate the distribution model of any OEM, in the NFDA's view, the CMA is right to be circumspect about any change in regulation that would not hold OEMs to the strictest standards if they were minded to opt for a model that would (whether in isolation or in combination

with similar agreements across the sector) result in a dampening or elimination of intra-brand competition. It is worth noting that under some models dealers would continue to operate for their own account in used vehicle sales (brand and non-brand), authorised servicing and repair and parts sales at the same site (albeit still subject to ongoing requirements from OEMs in these areas and with the requirement that these are carried on at the same site).

Finally, please note that the NFDA is committed to engaging in the CMA's forthcoming consultation on the Retained Motor Vehicle Block Exemption Regulation, which it considers should be expanded to capture vehicle sales (as well as aftersales) activities. The NFDA intends to provide detailed feedback in due course. It follows that suggestions made in this submission are not necessarily intended to be interpreted as a suitable alternative to stronger sector-specific regulation.

3. Feedback on the Draft Guidance

Draft Guidance ref.	Comments
4.12	*(b) Second, there are the risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal and which are necessary (or otherwise required by the principal) to enable the agent to conclude and/or negotiate the particular type of contract (or represent the principal's brand). Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot easily be used for other activities or sold other than at a significant loss or without significant modification or reinvestment.* *(c) Third, there are the risks related to other activities undertaken on the same or an adjacent or closely-related product market by the agent, to the extent that the principal requires these activities to be taken as part of the agency relationship by the agent at its own risk, and not on behalf of the principal.* **Rationale:** Please see comments for paras. 4.13 and 4.24 below.
4.13	*However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment. [fn to be added]* *fn: It should be noted that where, for example, a principal sets detailed standards, which require an agent to identify, acquire, develop and/or maintain premises at a specific location to fit a certain retail footprint, configuration, set-up and/or layout established by or for the relevant brand, or requires the agent to employ a number of dedicated or specially trained or approved staff to service the particular requirements of the brand, such investments will not normally be regarded as general investments.* **Rationale:** In the automotive sector, dealers (or agents) are required to invest significantly in OEMs' distribution formats and associated brand standards. As mentioned in previous NFDA submissions, even the selection and development of a single dealership can require investments of many £millions, not least in view of the size of the site required. Updates and refurbishments are then commonly required every few years at significant cost. OEMs will often mandate different requirements ranging from location and size to fit-out and staffing (which will involve specific investments in site acquisition,

	planning/building consents, dealership configuration/layout, corporate identity/signage/branding etc., as well as investments in specific facilities, systems, equipment and staff, among others). As the investments must conform with the specific standards required by each OEM's brand, it follows that they are not easily interchangeable with those of other brands, at least without substantial re-investment. Toyota will, for example, require standards for its dealerships which differ to those applied by BMW and, in turn, Dacia, which can affect whether a site suitable for one brand is, in fact, suitable for another (or, indeed, another retail use). As premises and staffing are therefore so brand-specific (and specific to the sector), it is not appropriate (unlike perhaps more general retail propositions) to treat them as general investments in the way office or retail space in one geographic area might be substitutable for another.
4.14	*(b) does not contribute to the costs relating to the supply/purchase of the contract products, including the costs of transporting, storing or insuring the goods or seeking/obtaining any consents, approvals or other permissions (whether fiscal, regulatory or otherwise) relevant to their import, export, marketing, distribution or sale;* *(h) does not undertake other activities within the same or an adjacent or closely-related product market required by the principal under the agency relationship; [fn to be added]* *fn: The reference to adjacent or closely-related product market is intended to capture scenarios where, for example, the agent would not be able to operate economically on the basis of the agency activities alone, such that the agent – in order to be reasonably viable – is obliged to undertake on its own account related services for the principal, for example, the supply of spare parts or aftersales services (in respect of the agency contract products).* **Rationale:** Additional clarification offered. NB: The amendment to (h) may tie-in with the CMA's addition of sub-para. 4.14(k). As regards (k), the NFDA should be grateful if the CMA would clarify more overtly that a principal cannot – either through an outright contractual obligation or the application of direct or indirect economic pressure - make risk-bearing customer support activities a condition of any agency agreement appointment for goods or services. In some respects, it is just a further reflection of the principles captured in the example in para. 4.25.
4.17	*[…]The principal must fully reimburse in a timely manner in order for the agreement to be categorised as an agency agreement for the purposes of the Chapter I prohibition.[fn to be added]* *fn: The principal must also consider carefully its agent's cashflow and financing commitments in respect of the reimbursement of both new and previous investments for the principal (including where the agent was previously appointed in a different capacity for the principal, for example, as a distributor). This is likely to render the reimbursement of the agent simply by means of attributing part of any ongoing commission towards the relevant investment inadequate. The principal must ensure that its agents are wholly shielded from such risks and costs, and ensure that its commissions and payments to the agent are entirely transparent and objective so as to enable the agent to distinguish easily between reimbursement for investment and ordinary operating margin or commission. This is particularly important where the principal might seek to link payments to*

	performance measures, as reimbursement for any risks otherwise assumed by the agent should not be contingent on the agent's performance. Further, if the principal terminates the agency, for whatever reason, and thereby deprives the agent of the ability to recoup all or part of its investment, the principal should reimburse the agent the total of any outstanding investment immediately upon termination taking effect (and irrespective of any other right to commission, compensation or indemnity that the agent might have). Finally, in the event of any dispute between the agent and the principal on sums owed or the adequacy of any dealer remuneration (or the timetabling of any repayments) the matter should be referred for final determination to an expert nominated by the parties or, in the absence of such agreement, an expert nominated by a UK professional accounting body. **Rationale:** Para. 4.17 offers very useful guidance on the question of agent remuneration and risk; however, the NFDA is concerned that unless further guidance is given the commission model will be manipulated by powerful negotiating parties (OEM principals) such as to require agents to subsidise investment risk from ordinary operating margin. Transparency is also key as otherwise the agent will always be in a position where it is unable to attribute income to investments made etc. The NFDA has therefore suggested developing the relevant guidance further. The issues around separating costs related to the operation of agency business (where the agent/dealer might be operating combined premises covering agency/non-agency business) needs further consideration as cost separation may be complex and this might quite feasibly result in the agency business being subsidised by the agent's separate retail investments (non-agency business).
4.18	**General comments:** The NFDA has no specific suggestions for this para. at this stage; it considers that the CMA has identified pertinent issues that might militate against a finding of genuine agency, but considers that some sector-specific guidance might be useful given the intention on the part of various OEMs to pursue an agency model regardless of the set-up of their former distribution networks. For example, a dealer group (and its subsidiaries) might represent 10 or more OEMs in its capacity as a distributor; it might also operate substantial used car operations independently of any OEM. This would suggest that a genuine agency appointment for that dealer would not meet the requisite standard unless the dealer abandoned its other operations/OEMs, which in turn would generate very substantial commercial risk for the dealer.
4.22	*[…]For the agreement to be considered an agency agreement for the purpose of applying the Chapter I prohibition, the independent distributor must be genuinely free to enter into the agency agreement (for example the agency relationship must not be de facto imposed by the principal through a threat to terminate or worsen the terms of the distribution relationship…* **Comment:** This is precisely what certain OEMs are doing in the automotive sector. The transition to agency is not presented as a real choice. Existing networks of agreements are being terminated unilaterally and those that the OEM wishes to retain are being offered agency agreements on a take-it or leave-it basis. Given the dependency of most dealers on their OEM partners and the sunk investments made, dealers have no option but to accept. However, does this render the agency non-genuine? The legal basis on which this could be challenged (absent a market investigation perhaps) is not clear. Other OEMS are introducing new models on an agency-only basis with existing dealers being asked to operate these alongside traditional arrangements for

	existing models. Over time all models would be covered by the agency agreement as new models are added and the traditional model will be ceased. In all cases, there has been no negotiation of the agreements being proposed. Would the CMA contemplate proposing changes to underlying competition rules so that where a trading partner occupies a position of particular power vis-à-vis another, they have a special responsibility akin to market dominance in respect of the latter even if they do not technically 'dominant' for competition law purposes?
4.24	*The risks described in paragraphs 4.11 to 4.14 of this Guidance are more likely to arise if the agent undertakes other activities as an independent distributor for the same principal in the same product market. Conversely, those risks are less likely to arise if the other activities the agent undertakes as an independent distributor concern an entirely different and unrelated product market. More generally, the less interchangeable the products are, or the less likely one subsidises or can be used to leverage the other, the less likely are those risks to occur. In product markets comprising products not presenting objectively distinct characteristics, such as higher quality, novel features or additional functions, such delineation appears more difficult and there may therefore be a significant likelihood of the agent being influenced by the terms of the agency agreement, notably regarding the price setting, for the products it distributes independently.* **Rationale:** The NFDA is concerned that the Draft Guidance places too much emphasis on Case T-325/01 *DaimlerChrysler AG v Commission* [2005] II-3319 (*DaimlerChrysler*), or at least does not contextualise its narrow application enough. As the CMA is aware, in *DaimlerChrysler* the appellant successfully relied on the agency argument to annul the relevant part of the European Commission's infringement decision. The Court held that the (dealer) agents were genuine agents in a classic dealership model, where they were prevented by the terms of the agency agreement from purchasing and holding stocks of vehicles for sale, and where the OEM determined the conditions applying to vehicle sales, in particular the sale price, and bore the principal (albeit not all) risks associated with that activity. The Commission's arguments that the agent bore certain (proven) risks associated with (i) transport costs; (ii) purchase of demonstration vehicles, and (iii) some percentage of repair costs were rejected. Generally, the Court did not accept that "certain limited risks" on related but different markets (i.e. other than the sale of cars) under the agency agreement rendered the relationship other than a genuine agency in that case (see e.g. judgment, para. 113). At the time (17 years ago), an agency-type distribution model in the automotive sector was rare (and set against a wholly different market background to that which dealers and consumers are presently facing). Moreover, in *DaimlerChrysler* the Commission argued its case mainly on *product-specific* risks as opposed to wider *market- specific* risks, so the decision itself did not – even 17 years ago - represent an holistic analysis of the dealer/OEM dynamic; it only focused on half of the story. Evidence and argument of cross-subsidising or leveraging of costs between non-agency activities and agency activities (i.e. from one market into adjacent markets) was entirely lacking in the decision. As such, more needs to be done in the Draft Guidance to distinguish *DaimlerChrysler* in appropriate factual circumstances, most notably where a mixed agency/franchise arrangement may

	be said to be so clearly structured to avoid the consequences of the Chapter I prohibition of the Competition Act 1998 that it amounts to an "abuse of rights".[1] In any event, the time has come to revisit *DaimlerChrysler* in view of the changes in the legal and commercial environment since 2005, and in particular in the light of clearer market-specific arguments around mixed agency/franchise dealerships. In the NFDA's view there are strong arguments (depending, of course, on the facts of each case) that cross-subsidy type arguments and the doctrine of leverage,[2] which are types of conduct where competitive effects are felt in a neighbouring market, ought to serve as arguments which should be adapted to extend the conclusions in the Draft Guidelines to – at least – adjacent markets, of the kind with which one would typically be concerned in the automotive dealership trade. Taking the CMA's three-step test (set out in para. 4.16) and approaching it from first principles, the NFDA considers that a more realistic approach is that where *"the economic reality of the situation"* shows that in a case where different activities are inextricably linked (e.g. in a transition from franchise to agency or any kind of dual or mixed franchise/agency) there are market-specific risks that extend across activities on these adjacent (even closely adjacent) markets, the same should also be taken into account in the competition law assessment of risk.
4.25	There is a typographical error in the first sentence of the text in the boxed example: The text *"in order to"* should be amended to *"in order for"*.
Final comments on agency	The NFDA would also invite the CMA to consider the extent to which a principal reserving the right to change key terms of an agency agreement unilaterally – such as the amount of any commission, the performance criteria against which payment or quantum of commission is calculated, investment requirements and repayment terms, quality standards, termination rights, term/duration etc. – is **of itself** inconsistent with the principle that an agent should assume no more than insignificant risk. Further, given the control that any principal has in determining an agent's ability to compete (for example, on price), does the CMA agree that one would not expect to see variations in the %s of commission paid to an agent on the basis of sales volumes achieved by that agent?
6.12, Fn 43	Please note the correct x-ref in fn 43 should be to fn 87 currently. As regards the substance of fn 87, the CMA may wish, in due course, to reflect on the definition of *"end user"* in the context of motor vehicle leasing companies beyond where there is a *"verifiable risk that those companies will resell them while still new".* It is possible that OEMs may supply vehicles to leasing companies (which might be quite unconnected from dealers) on terms that are more advantageous than those available to dealers ordinarily, which places dealers at an unfair competitive disadvantage when those vehicles are then marketed to customers. It is worth

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

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

	noting that most customers now source vehicles on the basis of a finance plan/leasing arrangement as opposed to an outright purchase.
6.21	In the NFDA's view, the CMA should resist any assumption that in circumstances where the buyer (in the automotive scenario, a dealer) is not also active upstream (as an OEM supplier), the potential negative impact of an agreement between those parties which might limit competition downstream is less important. In the NFDA's view, in the automotive sector, there is little evidence to support any assumption on this issue. Indeed, in the automotive sector, economic research indicates that intra-brand competition is the most important driver of consumer welfare: "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."[3] It follows that any guidance which is predicated on the assumption that intra-brand competition is not equally deserving of preservation risks overlooking the true competitive dynamics of a critically important sector upon which millions of UK consumers rely for social mobility and commerce. It is all the more important that at a time of deep economic uncertainty and rising energy and fuel prices, other dimensions of competition in this sector are not compromised by virtue of endorsing a distribution model (or restrictions applied as part of that model) which will inevitably place retailers or 'dealers' at a profound competitive disadvantage over OEMs that 'wear the hat' of both supplier and competitor.
8.12	(f) while being entitled to require the distributor to observe objective, quality-based brand standards, denying the distributor the right or ability, directly or indirectly (for example through the application of onerous or delayed processes or marketing authorisations) to communicate or reflect the distributor's own special or discounted prices or other savings in a manner which is easily accessible to and understood by the customer. **Rationale:** The NFDA considers the above additional example might be useful in circumstances where a supplier (who might wish, for example, to operate under a non-genuine agency model) confines its distributors'/agents' ability to communicate or advertise any (commission-sharing) discount with prospective customers. This could arise as a result of the distributor/agent having to use only the supplier's marketing copy or where the product invoicing process is conducted directly by the supplier but in a manner which is not adjusted to reflect any discount agreed by the distributor/agent, and where the distributor/agent must create a separate transaction to pay a discount (assuming this is possible).
8.17	*In the case of agency agreements, the principal normally establishes the sales price, as it bears the commercial and financial risks relating to the sale. However, where such an agreement cannot be categorised as an agency agreement for the purposes of applying the Chapter I prohibition (see in particular paragraphs 4.27 to 4.30 of the Guidance), an obligation preventing or restricting the agent directly*

[3] 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.

	or indirectly from sharing its commission with the customer,[fn to be added] irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 8(2)(a) of the VABEO. The agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal. *Fn: For example, by restricting the agent's ability to advertise a discounted effective price, refusing to amend invoices indicating the discount granted by the agent from its commission or otherwise obliging the agent to follow prescriptive requirements (including marketing and advertising standards) which reduce the agent's incentive to compete on price.* **Rationale:** The above footnote simply amplifies the useful point of principle identified by the CMA and highlights an example of how a principal might indirectly seek to limit a non-genuine agent's right to discount or communicate a discount to consumers. The transition to a commission-based remuneration model may, of itself, make it difficult for a non-genuine agent to discount, particularly if the amount of any commission that might eventually be paid is linked to complex standards and performance criteria.
8.18	**Comment:** In the context of a fulfilment contract, for example where a 'buyer' party might notionally or temporarily take title/ownership of the goods (and technically resell them), but is really simply offering a fulfilment function based on terms negotiated between the supplier and the end-user, please would the CMA offer some further clarification. In particular, the Draft Guidance suggests that this scenario – where the supplier (rather than the buyer party) has in fact agreed the price that the end user will pay - would only escape RPM classification if the end user has *"waived its right to choose the undertaking that should execute the agreement"*. With this in mind, is it sufficient for the supplier (or the buyer party) to show, for example, that the terms agreed with the end user (notwithstanding that the goods have been resold by the buyer party) have in fact been agreed with the upstream supplier, and this has been drawn to the end user's attention? In other words, is it enough that the end-user is aware that the price they pay has been set by the supplier, or does there need to be evidence of the supplier and end user having negotiated the price and for the end user to have direct recourse against the supplier for any breach of (the fulfilment) contract. Also, can the 'fulfilment contract' and the resale (from buyer party to end user) be executed at the same time (as opposed to the 'fulfilment contract' being a *"prior agreement"*)?
8.21	*(b) RPM may facilitate collusion between suppliers, notably in markets prone to collusive outcomes, for instance, where suppliers form a tight oligopoly and a significant part of the market is covered by RPM agreements (or agreements such as genuine or non-genuine agency agreements that place restrictions on the ability of those interacting with end users, whether on behalf of their principal or otherwise, to engage in price competition). This may also be the case where suppliers distribute their goods or services through the same distributors, thus allowing them to use the latter as a vehicle for implementing the collusive equilibrium. RPM makes it generally easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. This means that if a supplier decided not to enforce its RPM policy with a view to increasing its retail sales, RPM would allow the other suppliers to detect the resulting retail price decrease more easily and react accordingly*. **Rationale:**

	The motor industry, at least in certain geographies, does exhibit oligopolistic traits; moreover, the distribution model, certainly in the UK, is one where it is common for the same retail group to represent multiple OEMs, increasingly from the same dealership sites with some separation of display areas but a combined aftersales operation. It follows that the CMA should be aware that a widespread transition to an agency type distribution model (whether genuine or otherwise) as is happening in the automotive sector has the potential to create competition issues of the type identified above. The above amendment simply sets down a marker. While the CMA cannot prohibit a chosen distribution model, such as agency, the NFDA considers that it is important that the CMA does all it can to preserve the competitive independence of dealers (and non-genuine agents) at the retail level (particularly as part of its review of the Retained MVBER), which may include adopting safeguards (as was the case with the former block exemption regulation 1400/2002) to limit the influence of OEMs over their dealer networks.
8.24-8.25	*The possible competition risk of recommended and maximum prices is that they can (absent clear terms to the contrary) work as a focal point for the resellers and might be followed by most or all of them which in turn may facilitate RPM. Moreover, recommended and maximum prices may soften competition or facilitate collusion between suppliers. This risk is more pronounced where the supplier (whether through the offer or provision of benefits or incentives, or the application of pressure, or otherwise) indicates or implies that recommended or maximum prices should be regarded as fixed resale prices or that discounting is otherwise undesirable* *A factor for assessing possible anti-competitive effects of recommended or maximum resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a recommended or maximum resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market. That said, this risk is materially lower where the supplier's terms grant the reseller the explicit right to discount (and no benefits, incentives or pressure is applied by the supplier to contradict or undermine this right).* **Rationale:** Although largely reflecting established EU guidelines, these paragraphs of the Draft Guidance may benefit from further clarification. The NFDA would stress that para. 8.23 is very clear; however, both paras. 8.24 and 8.25 reference the concept of 'focal point', which is difficult to reconcile comfortably with the idea of an agreement, even if the supplier occupies a strong market position. In particular, regardless of size, where a supplier (for example a franchisor) indicates a recommended resale price or proposes or stipulates a maximum resale price, they may have a strong consumer welfare imperative in mind, such as to encourage lower (as opposed to premium) pricing. Many resellers or franchisees may choose to follow that recommendation or price at that maximum price (a classic example might be a fast food chain where one often sees little variation in price between franchised outlets). However, even if a recommended or maximum price does serve as a focal point, this does not change the fact that resellers or franchisees are not obliged to sell at

	that level; there is no agreement between them and the supplier/franchisor that the resellers or franchisees will observe that price level or will not discount. As far as recommended prices are concerned, the latter are entitled to price above or below the recommended level; and for maximum prices, they are free to discount below the maximum price. Their agreements with the supplier or franchisor recognise their entitlement to vary their pricing, and – assuming no other incentive or pressure is applied - any decision to follow a particular pricing policy is independent (not consensual). With this in mind, more as a matter of general interest, the NFDA would suggest the concept of 'focal point' is qualified slightly as it is otherwise difficult to reconcile with the concept of an agreement or understanding, formal or otherwise.
8.60-8.61	**Comment:** Please note that the exception given in Art. 8(2)(b)(ii) itself is not confined to 'exclusive' or 'authorised' wholesalers as such; however, the guidance suggests the exception is confined to these categories of wholesaler (albeit most wholesalers may fall within them anyway). The NFDA has no specific position on this part of the guidance, but simply raises the question to be helpful/invite the CMA to clarify its position if it considers this to be necessary.
9.7	*The second exclusion from the VABEO is provided for in Article 10(2)(b) of the VABEO and concerns post term non-compete obligations on the buyer. Such obligations are normally not covered by the VABEO, unless the obligation is indispensable to protect know-how transferred by the supplier to the buyer (which would not be the case, for example, where the buyer already provides similar distribution services for other suppliers or already has substantial expertise in the relevant sector), is limited to the point of sale from which the buyer has operated during the contract period, and is limited to a maximum period of one year (see Article 10(4)(a)) of the VABEO). […]* **Rationale:** In the NFDA's view, any restriction of a distributor's ability to repurpose its premises to sell the goods of a competing supplier post termination is not justifiable where a market is already characterised by multi-franchised outlets where the same distributor sells the products of a range of competing suppliers whether from the relevant location or otherwise. Indeed, the effect of permitting such a restriction in a market where the distributor is required to make significant investments in the incumbent brand(s) would be to create a very substantial dependency on the part of the distributor. This could allow the incumbent supplier(s) to influence the distributor's ordinary competitive proposition in other respects or risk termination and the application of the relevant restriction (which would amplify the adverse commercial consequences of the termination for the distributor). (For the avoidance of doubt, regardless of market share, the NFDA does not consider that any non-compete obligation imposed on a dealer would be acceptable or consumer welfare-enhancing in the automotive retail sector given the scarcity of suitable sites and current high levels of retail level inter brand competition driven by dealer groups which support multiple OEMs; however, the NFDA intends to make further comments on this issue as part of the Retained Motor Vehicle Block Exemption consultation)
10.175-10.176	*Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is strictly necessary to enable the supplier or buyer to adapt the contract products to the requirements of the customer (upon the customer's express instruction) or to provide guarantee or*

	after-sales services in respect of the contract products or to allocate customers for contract goods under an exclusive distribution agreement agreement (and in circumstances where the supplier has, in each case, implemented appropriate robust safeguards to ensure that the information communicated will only be used for these purposes);. **Rationale:** It should be stressed that the NFDA recognises the difficulty that the CMA faces in providing guidance for a general regulation that also addresses issues that it might regard as sector-specific; however, while giving an automotive sector-related example below, the NFDA considers the issues are of broader application. **Data Exchange between Distributor and Supplier (Manufacturer); Data Exchange between Vehicle and Supplier (Manufacturer)** Suppliers (OEMs in the automotive sector) derive customer information from two sources: i) the dealer (which establishes and develops the relationship with the customer); and (increasingly) ii) the vehicle itself.[4] The Draft Guidance addresses certain aspects of these relationships, but in the NFDA's opinion, further parameters would be useful in avoiding a scenario where the dominant repository of all customer information is the OEM, which (while perhaps delivering some benefits in terms of tailored offerings) has the potential to eliminate all intra-brand competition and value-added service currently provided by dealers (on top of inter-brand competition). With this principle in mind, the NFDA would recommend that the CMA make the above changes to para. 10.176(b) to reduce the risk of malpractice or misinterpretation. In the NFDA's view, the exchange of data in the above scenario is most appropriate where it is strictly relevant for the warning, assessment and remediation of important warranty or safety issues relevant to the object of the original transaction (in this case, the purchase of the vehicle or spare part). Moreover, in circumstances where the dealer is the source of that customer or introduction, contact relevant to the product's safety or its correct functioning should be delegated to and dealt by the dealer). . Further, the OEM should not be entitled – in order to circumvent any restriction placed on its use of the data received via a permitted exchange - to place pressure or an obligation on the dealer to secure broad or wide-ranging consents from the customer for the use of their data by the OEM. The dealer should not be penalised by the OEM or placed at a disadvantage if permissions received by the dealer from the customer in respect of the use of the customer's data, limit that use to pure warranty and product safety issues by the OEM, and denies any different use by the OEM or transfer to third parties. Finally, to avoid any diminution of downstream competition, an OEM should not be entitled, directly or indirectly, to place any restriction on the use of data by a dealer where the data was gathered by the dealer from a customer (whether or not

[4] The potential for connected vehicles to transmit data (driver profile, behaviour, points of interest, usage etc.) from the vehicle is increasing radically, which gives a more holistic picture of the customer, and one that can exploit as well as predict customer preferences or needs. As data transmission technologies develop, they will enable each vehicle to transmit thousands of data points to OEMs, with vehicles of the future producing more customer insights than any other digital or physical touchpoint. Of course, customers' willingness to share this data is key, as not all customers will wish to share all data gathered from their vehicles with OEMs and third party data aggregators. This is one reason why OEMs are increasingly keen to exert control over the customer interface, notably the dealer's relationship with the customer, as this enhances their ability to assume absolute control that link.

	shared with or provided to the OEM) where this use would conform to applicable data protection and privacy laws (based on consents provided by the customer). Finally, as regards para. 10.175(e), the NFDA would suggest that the CMA clarifies the reference *"…to the prices at which the buyer resells the products"* so that it reads *"to the prices at which the buyer has previously resold the products"* as even current resale price data from the buyer might be sensitive. Also, should the reference in the same paragraph to *"actual future downstream sale prices"* be to *"current actual or future…"*?
11.2	The NFDA would respectfully request that the standard time-limit for responses be extended from 10 working days to 20 working days, not least to reduce the likelihood of anticipated extension requests from affected firms wishing to procure appropriate advice.

4. Next steps

The NFDA is grateful for the opportunity to participate in the CMA's consultation and would be happy to engage further with the CMA to elaborate on any of the points identified above if helpful for the CMA.

ENDS