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MEMORANDUM

A : Comp-car-sector@ec.europa.eu

De : Vogel & Vogel

Réf. : Observations of the firm Vogel & Vogel on the Commission's draft Regulation prolonging the Regulation (EU) No 461/2010 and on the draft communication introducing targeted updates to the Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles

Date : 29 September 2022

Vogel & Vogel wishes to comment on the Commission's draft Regulation prolonging the Regulation (EU) No 461/2010 (Motor Vehicle Block Exemption Regulation) and on the draft communication introducing targeted updates to the Supplementary Guidelines applicable to the automotive sector in order to highlight the positive aspects arising from the proposed amendments **(I)** and to draw the Commission's attention to the obsolescence of certain provisions preserved in the drafts which are the subject of the present public consultation **(II)**. Finally, Vogel & Vogel would like the Commission to take a position on whether the questionable interpretation of the so-called "Lurel" law applied to motor vehicle distribution contracts applicable in the French overseas departments based on a qualitative and quantitative selection is contrary to the precedence of European competition law **(III)**.

I. POSITIVE ASPECTS OF THE DRAFT REGULATION AND COMMUNICATION

A. The Commission's intention to extend the Motor Vehicle Block Exemption Regulation and the Guidelines specific to the automotive sector

While Regulation (EU) No 461/2010 has little practical effect in terms of the block exemption, since the Commission traditionally considers that the market share for spare parts and after-sales services must be assessed on a brand-by-brand basis and that every brand exceeds the 30% block exemption threshold, the provisions relating to the specific rules applicable to the automotive sector nonetheless provide legal certainty for operators, as they have at their disposal written documents giving them clear guidance on the Commission's interpretation of the application of competition law to the sector.

Vogel & Vogel therefore supports the Commission's proposal to extend Regulation (EU) No 461/2010 and the Additional Guidelines applicable to the automotive sector.

B. Maintenance of the tolerance of qualitative and quantitative selective distribution up to a 40% market share in car distribution

A comparison between the wording of the old Supplementary Guidelines and the draft communication updating them is an important positive step.

Recital 56 of the 2010 Supplementary Guidelines rightly stated that:

> "*as regards the specificities of new motor vehicle distribution, quantitative selective distribution will generally satisfy the conditions laid down in Article 101(3) of the Treaty if the parties' market shares do not exceed 40%"*

This tolerance has not been called into question in the draft new Guidelines, as there are no changes to Recital 56.

This assessment related to the intensity of inter- and intra-brand competition in the field of new vehicle distribution is entirely justified. Although some groups with extensive brand portfolios have a market share of more than 30%, it should be noted that the various brands in these portfolios compete with each other, so that there is strong inter-brand competition, even within the same group.

Maintaining the dispensatory market share threshold also makes it possible to correct, even if only marginally, the overly restrictive concept of the geographic dimension of markets, which is still limited to national markets whereas cross-border trade is significant, and all markets are in the process of being Europeanized.

Vogel & Vogel is therefore also in favor of keeping in the Commission's draft communication the 40% market share threshold applicable to qualitative and quantitative selective distribution.

II. MAINTENANCE OF OUTDATED CONCEPTS AND THE ANNOUNCEMENT OF NEW CONSTRAINTS

A. The maintenance of a rigid concept of market definition that is out of step with reality

The drafts under consultation do not bring any change to the conventional views on market definition, and yet those views would clearly merit re-examination.

It should first be noted that according to Recital 13 of Regulation (EU) No 461/2010 "*a separate aftermarket can be defined"* distinct from the distribution of new vehicles and that there are *"markets for the purchase and sale of spare parts"* and *"markets for the provision of repair and maintenance services"*.

Paragraph 15 of the 2010 Supplementary Guidelines is also not subject to a rewording proposal. It states peremptorily that:

> « [B]*ecause of the generally brand-specific nature of the markets for repair and maintenance services and for the distribution of spare parts, competition on those markets is inherently less intense compared to that on the market for the sale of new motor vehicles*".

Paragraph 57 of the 2010 Supplementary Guidelines considers that: "*insofar as a market exists for repair and maintenance services that is separate from that for the sale of new motor vehicles, this is considered to be brand-specific*". This highly controversial point is not reworded in the draft amendment to the Guidelines either.

However, the competition authorities rely on these restricted market views to assume that manufacturers' aftermarket networks control on average 50% of the aftermarket and therefore cannot benefit from the block exemption[1]. The only concession to reality is limited to footnotes in the old Supplementary Guidelines admitting that it is possible in some cases to define a systems market that includes motor vehicles and spare parts when the purchase decision takes into account the overall cost of the vehicle, maintenance and repairs, but excludes its application to private vehicles and thus seems to reserve it for industrial vehicles without clearly admitting it[2].

These traditional concepts were already questionable in 2010, they are now completely outdated. Due to competition from independent repairers, quick repair franchises and multiple branded repair

[1] ADLC, opinion no. 12-A-21 of 8 October 2012 on the competitive functioning of the vehicle repair and maintenance and the spare parts manufacturing and distribution sectors.

[2] See footnote 1 of the former Supplementary Guidelines, p. 9

networks, **the automotive aftermarket is fully competitive**. All these operators, as well as all members of the brand networks, are now effectively able to provide after-sales services for all car brands, especially since the sale of parts to repairers is free and cannot be hindered and any independent operator has access to technical information. The service rate for vehicles of the brand by repairer of the official networks is now less than 50% on average and for some brands just over or around 30%. Repair networks should therefore benefit from the block exemption even in the case of quantitative selection, the 40% tolerance applicable to the distribution of new vehicles being logically extended mutatis mutandis to the motor vehicle aftermarket.

Vogel & Vogel therefore strongly recommends that the Commission conduct further analysis of the definition of the aftermarket and spare parts distribution.

B. An outdated position of access to repairer networks in relation to market realities and evolutions of case law

Paragraph 70 of the former Supplementary Guidelines on access to networks of authorized repairers remains unchanged. They indicated that the Commission considers it important that access to the networks of authorized repairers remains generally open to all firms that meet the defined quality criteria. In other words, they argued for an obligation to approve all applicants for entry into a repair network that meet the approval criteria. Again, no changes to this paragraph are announced. However, it corresponds neither to the reality of the market and the needs of businesses nor to the positive law on refusal of authorization as established from the case law in several Member States.

These concepts are first and foremost likely to encourage abnormal situations. In practice, former members of repair networks whose contracts were terminated with two years' notice because they were not performing satisfactorily without however being able to be accused of serious misconduct, try to take advantage of such claims to reapply for approval at the end of the notice period and thus benefit from a permanent renewal of their contract, a kind of perpetual contract even though the relationship with the brand is very bad and a forced contract has never encouraged efficient cooperation.

Apart from allowing the instrumentalization of competition law in order to obtain a perpetual continuation of degraded relationships, **paragraph 70 of the old Supplementary Guidelines is completely out of step with the reality of competition in the aftermarket**. Competition in the aftermarket is extremely fierce. There is no dominant position of authorized repairers in the aftermarket of their brand, as they are in full competition with a multitude of players who are constantly gaining ground every year (*see*

above section II (A)). The fact that there is one more or less authorized repairers in a catchment area does not change the competitive situation.

In particular, the position expressed in paragraph 70 of the former Supplementary Guidelines does not correspond at all to the position of case law of a number of Member States:

- First of all, it should be emphasized that the German courts have long held that repairers' applications to join a network must be assessed not on the downstream market for the maintenance of vehicles for end customers but on the upstream market for the supply of and demand for repair contracts, which is multi-brand and on which no single brand has a significant market share[3].

- Moreover, the Commission's position does not correspond to current French case law either. First, it is important to know whether a refusal of approval constitutes an agreement or a unilateral act. In many cases[4], the French courts have recognized that the decision to refuse approval should be characterized as a unilateral act. Even if the refusal is coordinated with a member of the network or is considered, rightly or wrongly, to be an explicit or implicit agreement with the network, in almost all cases, refusals to approve former authorized repairers who reapply to remain part of the network are deemed to comply with contract and competition law[5]. Denying approval to a former network member who claims to still meet the criteria for approval cannot therefore be considered anticompetitive *per se*, contrary to what is implied by the former Supplementary Guidelines (paragraph 70), but only if it has an anticompetitive object or effect, which must be assessed on a case-by-case basis.

For the reasons presented above, Vogel & Vogel therefore urges the Commission to amend paragraph 70 of the former Supplementary Guidelines.

C. New constraints on the provision of vehicle-generated data

The main contribution of the new texts is to provide that vehicle-generated data can be an essential input for repair and maintenance services and to propose therefore to extend the existing principles to the provision of technical information, tools and training necessary for the provision of repair and maintenance services, so as to explicitly cover vehicle-generated data.

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3 BGH, 30 March 2011, KZR 6/09; BGH, 26Jan. 2016, KZR 41/14.

4 Notably Paris Court of Appeal, 19 June 2016, RG No 14/07956; 27 Nov. 2019, RG No 18/06901.

5 See, most recently, French Cour de Cassation, 16 Feb. 2022, No 20-11.754, 21-10.451 and 20-18.615

It is therefore a restriction of competition which brings qualitative distribution within the scope of Article 101(1) TFEU if a party to an agreement refrains from providing independent operators with an essential input such as, *inter alia*, vehicle-generated data, it being understood that the concept of independent operators includes independent repairers, manufacturers and distributors of spare parts, manufacturers of repair equipment or tools, publishers of technical information, automobile clubs, roadside assistance companies, operators offering inspection and testing services and operators providing training for repairers (paragraph 62 of the revised draft Supplementary Guidelines).

Following the same logic, it is proposed in a new paragraph 67a of the draft revised Supplementary Guidelines that the standard arrangements for making technical information available set out in paragraph 67 of the 2010 Supplementary Guidelines (on request, without undue delay, in a usable form, without the price charged discouraging access by not taking into account the independent operator's use of the information, etc.) should apply to vehicle-generated data.

Following the same logic, it is proposed in a new paragraph 67a of the draft revised Supplementary Guidelines that the standard arrangements for making technical information available set out in paragraph 67 of the 2010 Supplementary Guidelines (on request, without undue delay, in a usable form, without the price charged discouraging access by not taking into account the independent operator's use of the information, etc.) should apply to vehicle-generated data.

It would be appropriate to very precisely define the term "vehicle-generated data" and to limit it to only those data that are absolutely essential to the activity of independent operators.

III. THE CONFLICT WITH THE PRECEDENCE OF EUROPEAN COMPETITION LAW OF THE INTERPRETATION OF THE FRENCH “LUREL” LAW APPLIED TO AUTOMOBILE DISTRIBUTION CONTRACTS APPLICABLE IN THE FRENCH OVERSEAS DEPARTMENTS BASED ON QUALITATIVE AND QUANTITATIVE SELECTION

Finally, Vogel & Vogel would like the Commission to rule on the compatibility with European competition law of qualitative and quantitative selective distribution agreements, in particular for automobiles, authorizing active and passive sales in the French overseas departments (hereinafter "DOM") and from the DOM.

Indeed, in some rulings, it has been held that a qualitative and quantitative selective distribution agreement concluded with a single authorized distributor located in an overseas department and benefiting from the block exemption provided for in the former regulation (No 330/2010) constituted an infringement of the prohibition on exclusive import agreements provided for in Article L. 420-2-1 of the

French Commercial Code and introduced by the so-called "Lurel" law[6] and should therefore be prohibited.

However, this view is wrong in several respects:

- First, it should be recalled that EU competition law is fully applicable to the French overseas departments (DOM) in accordance with Articles 355 and 349 of the Treaty on the Functioning of the European Union, unless a measure to the contrary is enacted by the Council of the European Union, and in most cases distribution agreements for the DOM are considered to have an appreciable effect on trade between Member States.

- Second, according to Article 3(2) of Regulation (EC) No1/2003[7] :

  > "***The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States*** *but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty* ***or which are covered by a Regulation for the application of Article 81(3) of the Treaty***." (our emphasis)

  Accordingly, the application of the "Lurel" law, which is governed by French competition law, considering (i) the fact that its application is subject to control by the French Competition Authority and (ii) its codification in Article L. 420-2-1 in Title II entitled "Anticompetitive practices" of the French Commercial Code, cannot lead to the invalidation of a distribution contract benefiting from the block exemption granted by former Regulation No 330/2010 (now replaced by Regulation (EU) No 720/2022).

- Third, **a selective distribution agreement, based on the principle of the freedom to make active and passive sales, cannot be equated with an import or exclusive distribution agreement** whereby a supplier grants exclusive distribution of its products in a given territory with protection against active sales from other exclusive territories.

  Therefore, while the implementation of quantitative criteria, which can be used in automobile distribution and whose application is exempted by European competition law below 30% market share, can lead to a limitation of the number of authorized operators, this situation should not

[6] Law No 2012-1270 of 20 November 2012 on French overseas economic regulation and various provisions relating to overseas (territories).

[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

be confused with a limitation of the number of distributors based on territorial exclusivity with a ban on active sales.

For all the above reasons, Vogel & Vogel would like the Commission to reiterate the precedence of European competition law over national competition rules in order to put an end to the excesses of certain national jurisdictions.