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Structured guide to new retail strategies of vehicle manufacturers and intermediation of ancillary motor insurance in Spain

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The automotive industry in Spain is implementing new formulas for motor vehicle distribution and advertising, preparing for the demands of an increasingly digitalised consumer. We respond hereto to some of the main legal aspects to be taken into account in Spain in connection with new retail strategies by manufacturers regarding online motor sales and the intermediation of ancillary motor insurance.

1. Online motor sales – new retail strategies of vehicle manufacturers. Legal analysis

Automotive consultants point to direct online sales by manufacturers as a strategic trend in the industry, although at present in situ sales by dealers continue to have a decisive weight in the sales processes in Spain and such are not a common proposition among all manufacturers precisely because of the strategic relevance of the network in the automotive distribution industry.

One German manufacturer has recently modified the dealer agreements with its distribution network in Spain, so that the manufacturer "retains" online motor sales, paying a fee to the dealer for delivery and customer service in the collection. The way forward is for dealers, in addition to undertaking their current distribution work, to be also conceived as "customer experience centres", where each brand sees an important opportunity to differentiate itself from other brands, create brand image and customer loyalty with it.

These conceptual changes in traditional distribution of motor vehicles shall make it necessary to reconsider the agreements with the dealer network and their qualitative standards. Both quantitative and qualitative standards, which are characteristic of selective distribution, must be redefined in such a way that the standards that can influence the homogeneous brand image sought to be conveyed (customer experience associated with the motor vehicle purchase in such network) are perfectly defined, so that non-compliance allows for termination of the dealer agreement. It will also be necessary to review the dealer agreements currently in effect and their flexibility to adapt to the new scenario, although in many cases direct sales by the manufacturer are already envisaged in "special circumstances" or when so determined by the manufacturer. In the latter cases, special care will have to be taken with the provisions of article 1256 of the Spanish Civil Code, which provides that the performance of the agreement cannot be left to the discretion of one of the parties, so it will be necessary to have the acceptance of the network. In addition, dealers may require compensation for lost sales in their territory.

2. **How are the new arrangements between manufacturers and dealers (with the former retaining online motor sales and the latter the delivery of these) sit with Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the EU Treaty to categories of vertical agreements and concerted practices?**

   Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the EU Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("BER"), that is in force until May 2022, applies to the "sale or resale of new motor vehicles" according to the referral by Commission Regulation No 461/2010 of vertical agreements in the motor vehicle sector ("MVBER"). It does not seem that the BER would apply to the new relationship in which the manufacturer directly sells online and the dealer simply delivers the car (with no sale or resale on their part) as a commission agent for delivery of the manufacturer. The reason being that the BER, as a block exemption, applies to vertical agreements between manufacturers and dealers related to the sale and resale of vehicles and the subject matter of the contract of this new structure is not the sale and resale of goods. Therefore, the new arrangements between manufacturer and dealers for these new functions might also need to be checked in the light of EU antitrust legislation.

3. **How can the EU Commission's Final Report on the E-Commerce Sector dated May 2017 ("the Report") condition the distribution of motor vehicles regarding digital and electronic commerce?**

   Especially relevant are the Commission conclusions related to:

   a) Automatic software programmes that adjust prices based on the prices of competitors.

   According to the Report, the wide-scale use of such software may, in some situations, depending on the market conditions, raise competition concerns.

b) Only online sales by the network

The Report acknowledges that brick-and-mortar requirements are generally covered by the BER for selective distribution agreements. However, certain requirements to operate at least one brick-and-mortar shop without any apparent link to distribution quality and/or other potential efficiencies may require further scrutiny in individual cases.

c) Free-riding

Dual pricing for one and the same retailer - where the manufacturer sets a different wholesale price for the same product to the same hybrid retailer depending on the resale channel through which the product is to be sold (offline or online) - is generally considered as a hardcore restriction under the BER and the 2010 Guidelines on internet sales, because it would make difficult online sales. However, the Report points to the possibility of exempting dual pricing agreements under Article 101(3) TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding behaviour, where consumers use pre-sale services of brick and mortar shops before purchasing the product online.

d) Geo-blocking

The Report expressly mentions geo-blocking. For example by blocking access to websites, re-routing customers to websites targeting other Member States or by simply refusing to deliver cross-border or to accept cross-border payments.

Within a selective distribution system, neither active nor passive sales to end users may be restricted.

e) Prohibition to online sales and sales on third party electronic platforms

The total prohibition of online marketing by dealers is considered a particularly serious restriction of competition, so any online sales model established by the manufacturer must coexist with the dealer's right to sell the motor vehicles online.

However, the need to protect the luxury image of motor vehicles in selective distribution models allows the manufacturer or importer to prohibit authorised dealers from marketing on third party electronic platforms such as Amazon, eBay, etc. This has been confirmed by the Judgment of the CJEU of 6 December 2017 in case C-230/16 (Coty), provided that the prohibition: (a) has the objective of preserving the luxury image of those goods; (b) is laid down uniformly; (c) is not applied in a discriminatory fashion; (d) is proportionate in the light of the objective pursued.

4. Digital marketing in the automotive industry in Spain

Data from the *Observatorio Digital del Marketing de la Automoción* (Automotive Digital Marketing Report) suggests that the automotive industry is at the forefront of investment in the field of digital marketing and makes it possible to weigh the importance that the industry is giving to these new forms of advertising, such as blogs, statements on social networks, Twitter, Youtube, etc.

In this regard, the lack of payment or consideration of another kind cannot exclude the intention to advertise products (Judgment of the Court (Third Chamber) of 9 June 2011, Case C-52/10) and therefore all these new promotion channels are considered advertising and are subject to the Information Society Services Act 34/2002, the Advertising Act 34/1998 and the Unfair Competition Act 3/1991. This means that all types of product promotion must be identified as advertising (although it is not necessary to use the word "advertising"), and it will also be necessary to identify the advertiser.

Special mention should be made of the use of another's trademark as a *keyword*, which will constitute a trademark infringement. Among others, the Judgment of the Court of 11 July 2013 C-657/11, *Belgian Electronic Sorting Technology NV v. Bert Peelaers Visys NV*.

5. How is the intermediation in the sale of ancillary motor insurance regulated in Spain?

This traditional collaboration between the automotive industry and the insurance companies will have to follow closely the incorporation into our legal system of Directive 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution. Directive 2016/97 provides that ancillary insurance intermediaries (such as the dealer network) could be exempted from its application.

Article 1 of the Directive expressly provides that it does not apply to ancillary insurance intermediaries carrying out insurance distribution activities where all the following conditions are met: (a) the insurance is complementary to the good or service supplied by a provider, where such insurance covers: (i) the risk of breakdown, loss of, or damage to, the good or the non-use of the service supplied by that provider; or (ii) damage to, or loss of, baggage and other risks linked to travel booked with that provider; (b) the amount of the premium paid for the insurance product does not exceed EUR 600 calculated on a pro rata annual basis; (c) by way of derogation from point (b), where the insurance is complementary to a service referred to in point (a) and the duration of that service is equal to, or less than, three months, the amount of the premium paid per person does not exceed EUR 200. The insurance products in question may not offer life insurance or civil liability cover, except where such cover is complementary to the good or service provided by the intermediary in his principal professional activity.

Pending the incorporation of the Directive into our legislation, insurance intermediation is subject to the Private Insurance and Reinsurance Mediation Act 26/2006 and to the exceptions provided for therein.

6. How is the sale of ancillary motor insurance by distributors normally structured in Spain?

Nowadays, normally, the sale of ancillary motor insurance is structured in such a way that the manufacturer or importer -or, as the case may be, the manufacturer's captive finance company- negotiates unique terms and conditions for its network of dealers with the insurance company and the broker, being only the dealers who assume the functions of external collaborators of the insurance entity, with the importer or manufacturer remaining outside said relations. External collaborators must identify themselves as such to the final consumer and include the identity of the mediator on whose behalf they are acting. They must also provide the policyholder with all the information referred to in the Private Insurance and Reinsurance Mediation Act 26/2006 (pending 'transposition' of Directive 2016/97). The insurance company shall keep a register with the identification data of external collaborators subject to the control of the Directorate-General of Insurance and Pension Funds.

7. How does Anti-Money Laundering regulations affect the activity of sale of ancillary motor insurance and financial product intermediation in Spain?

Spanish Anti-Money Laundering and Counter Financing of Terrorism Act 10/2010 establishes that those carrying out activities of sale of insurance and financial products are obligors.

However, in the case of the automotive distribution industry, the Executive Service of the Anti-Money Laundering and Monetary Violations Committee ('SEPBLAC') has clarified that motor vehicle dealers would not be obligors provided that they intermediate in the financing of the products they market. This makes it necessary to analyse in detail whether these types of products are really products for the financing of the motor vehicle and whether this clarification from the SEPBLAC can be construed broadly.

For instance, the marketing of payment protection insurance connected to the financing of the motor vehicle, which is not strictly a financing product for the motor vehicle purchase and more so includes cover for the risk of death, which could be likened to life insurance. In these cases, to the extent that (i) the beneficiary of such insurance will always be the financial institution itself and in no case will there be any flow of money to the insured or to third parties (so there is no risk of possible money laundering on the part of the customer purchasing the motor vehicle through this type of transaction) and (ii) both the insurance company and the financial institution act as obligors, having to apply the preventive measures provided in the legislation, it could be understood that there is no legal interest to protect. Therefore, the

interpretative reason operating in the formal binding answer of the SEPBLAC in relation to motor vehicle financing products would equally be applicable here.

8. How does Payment Services regulation (Royal Decree-Law 19/2018) affect the distribution of vehicle industry in Spain?

The recent Royal Decree-Law 19/2018 on payment services will apply to those cases where there is intermediation in the payment, for example by the dealers who receive the insurance premium of the beneficiaries and have to pay it on their behalf to the insurance company.

However, Art. 4(b) of Royal Decree-Law 19/2018 exempts from application payments from the payer to the beneficiary through a commercial agent authorised by an agreement to negotiate or conclude the sale or purchase of goods or services for the exclusive account of the payer or the beneficiary.

Accordingly, in the case of a commercial agency relationship between a possible third party intermediating in the payment with a dealer network (if the manufacturer also intermediates through its network) and the dealer network with the insurance company, provided that the payment is in full discharge ("*pago liberatorio*") and the appropriate proof of payment of the premium is issued, the exemption would apply.