

Automobile

# Commission Evaluation Report on the operation of Regulation (EU) 461/2010 concerning the exemption of certain vertical agreements in the automobile sector

The report of the European Commission of May 2021 is analysed regarding the application of Commission Regulation (EU) 461/2010 to the exemption of certain vertical agreements in the automotive sector.

This report is of interest in order to assess, at the present time, the state of the market's competitive structure and the lines of the possible policy that the Commission could adopt in the future.

## AINARA RENTERÍA TAZO

Of counsel & Head of the Automotive Group  
Gómez-Acebo & Pombo

## MIGUEL TRONCOSO FERRER

Managing Partner of the Brussels office  
Competition and EU Law Practice Area  
Gómez-Acebo & Pombo

### I. Preamble

Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (the "Regulation") expires on 31 May 2023. In compliance with the mandate under Article 7, the European Commission issued an evaluation report on 28 May 2021. The purpose of the report is to evaluate the impact of the regulation on the automotive industry and its effects on competition in the distribution, after-sales and repair of vehicles in the European

Union. The report is in no way binding on the European Commission's final decision as to whether, after its expiry, the regulation should be extended, abolished or amended. Nevertheless, the Commission's report is of interest in order to assess, at the present time, the state of the competitive structure of the market and the lines of possible policy that the Commission might adopt in the future.

The Commission concludes, following the assessment, that there is still no justification for differentiating the distribution of motor vehicles from that of other durable goods and that the existing body of rules, which

for the distribution of new vehicles refers to the Vertical Block Exemption Regulation (EU) 330/2010 (VBER), is therefore considered adequate, subject to certain updates. Similarly, with regard to the sale or resale of spare parts and the provision of repair and maintenance services, the Commission concludes that there are rigidities in the market which indirectly reduce the choice available to end consumers. It therefore considers that a differentiated treatment for spare parts and aftersales services, as currently provided for in the Regulation, is necessary.

## II. Conclusions of the European Commission's evaluation report

The Commission concludes that (a) *no major changes to the existing rules would be necessary at present*; (b) *some provisions may nevertheless need updating*, in particular to reflect the importance that access to data is likely to have as a factor of competition; and (c) *some of the specific policy objectives of the current rules should be reconsidered in the light of this evaluation*.

The following are the most relevant aspects of the report, which could undoubtedly have an impact on subsequent updates of the current regulatory framework relating to competition in the automotive sector:

1. *Passenger cars: brand-specific aftermarkets appear to exist because (a) the majority of buyers are private individuals or small and medium-sized undertakings that purchase motor vehicles and aftermarket services separately; (b) although the fact-finding shows that consumers increasingly use the Internet for research before buying a passenger car, it does not show that such buyers adapt their purchasing*
- behaviour swiftly and consistently in response to changing aftermarket conditions; and (c) there is a well-developed framework of entities offering only aftermarket products and services. This might not be the case for other vehicle categories, where the higher presence of professional consumers might result in more complex purchasing patterns.*
2. *The light commercial vehicle sector has become more concentrated, more so following the merger of Fiat Chrysler Automobiles (FCA) and the Peugeot, S. A. Group (PSA). (PSA). The bus and truck sectors are traditionally also more concentrated (a summary of market shares and concentration ratios for passenger cars, light commercial vehicles, trucks and buses can be found in Section 5 and Annex 2 of the Commission's working document). This will indicate the need to continue to take into account certain targets for these sub-sectors.*
3. *The current market share threshold of 30% is considered still adequate and relevant today. The Commission's monitoring practices support this view. To date, the Commission has not identified any category of agreements that are unable to benefit from the exemption because of the parties' market share, but which are relatively unproblematic in terms of competition. The identification of such a category would have been an indication that the threshold was set too low. Nor has it found any elements that have led it to consider withdrawing the exemption from any agreement, which is an indication that the exemption threshold has not been set too high.*

4. *The lists of hardcore and excluded restrictions remain appropriate.* No additional clauses have been identified during the evaluation that should have been considered as a hardcore or excluded restriction.

5. In its Communication of 22 July 2009 (“2009 Communication”), the Commission noted that a number of *specific policy objectives underlying* Regulation (EC) No 1400/2002 (the previous block exemption regulation in the motor vehicle sector) should be continued. These objectives were set taking into account issues which, at the time, were considered to be particularly relevant for the sector. With regard to these targets, the Commission concludes the following at this stage:

(a) Preventing the foreclosure of competing vehicle manufacturers and safeguarding their access to the market

At the time, the Commission considered that the widespread use of single-branding clauses could unduly hamper access to markets by competing motor vehicle manufacturers. It is concluded that this objective appears to have been achieved for passenger cars where competition in the EU is considered to be strong and stable, but not for light commercial vehicles, trucks and buses. Therefore, this objective may remain important for the latter market segments, but less so for passenger cars.

(b) Protecting competition between dealers of the same brand

In 2009, the Commission considered that there was a danger that intra-brand competition could be harmed, especially in a context where new vehicles were distributed through dealers with near-identical business models. It therefore considered it appropriate to protect price competition between dealers of the same brand and to encourage a diversity of distribution formats.

As regards the passenger car sector, there are dealer groups which may hold a portfolio of brands in a given local area, thus potentially reducing inter-brand competition in that area. Therefore, the Commission considers that intra-brand competition also remains a relevant objective for passenger car distribution. The evaluation shows that the homogeneity in distribution formats observed before 2010 is still present in the markets in 2021, and that, in particular, the vast majority of passenger cars continue to be distributed through quantitative selective distribution networks.

Similarly, this objective remains relevant for the light commercial vehicles, trucks and buses sectors, where concentration levels are higher and inter-brand competition is weaker.

(c) Prevent restrictions on parallel trade in motor vehicles

The evaluation shows that this objective has been at least par-

tially achieved, as consumers are generally able to purchase motor vehicles in other Member States without substantial obstacles. While the Commission has received formal complaints about restrictions to cross-border trade, it has not identified substantial obstacles on the part of suppliers that would warrant an in-depth investigation.

In any case, the Commission concludes that this objective remains relevant.

- (d) Enabling independent repairers to compete with manufacturers' networks of authorised repairers

In its 2009 Communication, the Commission noted that independent repairers' ability to compete depended on unrestricted access to essential inputs such as spare parts, tools, training and technical information. It therefore considered it necessary to take measures to ensure such access, as well as to deter suppliers or their authorised repairers from using other indirect means to foreclose independent repairers, such as by misusing warranties.

The Commission considers that this objective has been partially achieved because independent operators competing with authorised repairers continue to report difficulties in accessing the inputs they need to repair vehicles (e.g. problems in obtaining complete or up-to-date information and re-

strictions on access to in-vehicle data).

- (e) Protecting competition between authorised repairers of the same brand

The Commission, in its fact-finding study, notes an overall decrease in the number of authorised repairers between 2007 and 2017, as well as a reduction in the total number of contracts signed by motor vehicle manufacturers with authorised repairers. However, there is a widespread practice of refusing entry into the network to candidate repairers that meet the applicable quality criteria.

Notwithstanding the above, the Commission considers that this objective remains relevant, in particular as the authorised networks continue to enjoy significant market power.

- (f) Preventing the foreclosure of spare parts suppliers

Two rigidities can be observed in this respect. Firstly, the contractual arrangements of original equipment manufacturers (OEMs) with motor vehicle manufacturers may prevent or make it difficult for (OEMs) to supply their spare parts directly to the aftermarket, in competition with parts sold to vehicle manufacturers and then resold as spare parts.

Secondly, the agreements between OEMs and authorised repairers

may oblige or incite the latter to purchase the bulk of their parts supplies directly from the motor vehicle manufacturer. The Commission therefore concludes that this objective remains relevant.

- (g) Preserving the deterrent effect of Article 101 of the Treaty - preventing suppliers from using indirect pressure and threats to achieve anticompetitive outcomes

The Commission refers to the relative weakness of dealers' contractual position that has been alleged during the consultation period, but notes that there are few indications that pressure or threats have been used to exploit this alleged weakness in order to hinder competition on the market.

The evaluation indicates that this objective may not be particularly relevant, especially as regards the passenger car markets where, as confirmed by the fact-finding study in an annex to the Commission's report, there would be healthy inter-brand competition.

Rather, the Commission notes that, in its view and experience, the ability of suppliers to influence the behaviour of their dealers or repairers tends to manifest itself in the fact that, like many durable goods distributors, the latter make large investments in the brand and are therefore unwilling to jeopardise those investments by going against what they perceive to be their supplier's interests. However, in view of comments made by some stake-

holders in relation to a number of practices which, in their view, could serve as indirect means to achieve anticompetitive outcomes (set out in footnote 150, sections 2.3.1 'Prevalence of particular restrictions' and 3.3.2 of Annex 3 and section 1.9 of Annex 6 of the Commission Staff Working Document), it may be necessary to analyse further whether this remains a relevant specific policy objective.

6. *Would it be appropriate to add new specific objectives to those addressed so far?*

#### 6.1. Access to in-vehicle data

Much in-vehicle data or information derived from it (such as whether a vehicle has a particular fault or needs routine servicing) may be considered an essential input for repair and maintenance. Where such data or information is not available from other sources and is supplied to authorised repairers, it should also be supplied on an equal basis to independent operators competing with those repairers.

It should be seen as a subset of the specific objective of enabling independent repairers to compete with manufacturers' networks of authorised repairers, rather than as a separate objective.

#### 6.2. Sustainability

The Motor Vehicle Block Exemption Regulation (MVER) already allows for the exemption of all

agreements, including those that target sustainability objectives, provided that the market shares of the parties do not exceed the 30% threshold and the agreements do not contain hardcore restrictions on competition. Where market shares exceed the 30% threshold, such agreements remain subject to an individual assessment under Article 101(3) of the Treaty.

### 6.3. Scope of application

Although a majority of respondents to the public consultation considered that the scope should be widened to also cover two-wheeled vehicles and some vehicles not meant for roads (e.g. agricultural machinery, tractors, forestry vehicles and construction vehicles), the Commission's experience over the last decade has not given any concrete indications that similar rigidities exist in respect of such products. Its current assessment is therefore that the current scope remains relevant and appropriate: a view shared by the majority of national competition authorities.

### 6.4. Technological evolution

Despite the strict and detailed quality criteria and the heavy investments that authorised repairers are required to make, independent repairers continue to exert vital competitive pressure on authorised repairers and ensure that consumers have a choice in provision and prices. These operators can only continue to exert such pressure

if they have access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. The current rules therefore remain appropriate but may require updating to take account of technological progress.

## 7. Conclusions

- (a) The Commission concludes that at this stage there are no indications of market failure or actual or potential consumer harm that would justify distinguishing the distribution of motor vehicles from the distribution of other durable goods. Therefore, the application of the VBER appears appropriate for motor vehicle distribution.
- (b) As regards the market for the repair of motor vehicles, the Commission considers that, according to the evaluation carried out, many authorised repairers enjoy considerable local market power (in particular given their high share of repairs of newer passenger cars and light commercial vehicles) and that it would therefore not be appropriate to raise the market share threshold of the MVBER to capture agreements between such repairers and their suppliers.
- (c) Although intra-brand competition within authorised networks is limited by strict and detailed quality criteria and the large investments that authorised repairers are required to make, independent repairers continue to exert vital competitive pressure on authorised

repairers and ensure that consumers have a choice in provision and prices. These operators can only continue to exert such pressure if they have access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. The current rules therefore remain appropriate but may require updating

to take account of technological progress.

- (d) The motor vehicle spare parts markets appear to have rigidities that (indirectly) reduce the choice available to end consumers. Therefore, at this stage, it seems that special treatment of these markets continues to be merited.