THE DRAFT AMENDMENT TO THE GUIDELINES ON THE EXCHANGE OF INFORMATION IN DUAL DISTRIBUTION

The European Automobile Agents Group (CEGAA) brings together various national groups of agents and repairers.

The issue of information exchange between the dealer and the manufacturer is nowadays at the heart of the change of the economic model of the distribution.

Turning away from indirect distribution, manufacturers are engaging in direct sales of their products, to act as resellers and compete with their distributors.

The movement is all the more ambitious since, taking advantage of the leverage that the contract gives them over their distributors, manufacturers intend to take over a growing share of their partners' business in all areas of the automotive industry, without exception: new vehicles, financing, leasing, maintenance and repair, spare parts and used vehicles.

Without waiting to know the evolution of the regulatory framework of their activity, manufacturers have already undertaken to integrate into their own database the customer files of distributors and repairers.

In this context, the draft general exemption regulation and guidelines published in July 2021, have provided for the benefit of the exemption to exchanges of information when the parties' combined market share does not exceed 10%.

We understand that this project has raised some objections.

On February 4, 2022, the Commission published a proposed amendment, which seems to waive the 10% threshold altogether, granting the benefit of the exemption to exchanges of information that are *"necessary to improve the production or distribution of the contract goods or services"*[1].

Two criteria, therefore: necessity and the existence of efficiencies.

[1] points n° 9 and 10 of February 4, 2022 draft.

1) The new criteria are inefficient

a) The Commission's proposal tends to replace an objective criterion - the 10% threshold - with a subjective criterion - necessity and utility.

When reviewing the legality of a data transfer, two judges, *a fortiori* established in different parts of the European Union :

> - will probably have the same opinion as to whether or not the threshold has been exceeded, since this criterion is factual;
>
> - on the other hand, may have a different opinion on the point of assessing the necessity or usefulness of the transfer, on which there is a wide margin of interpretation and which depends largely on the personal opinions of each one.

b) Article 101 of the Treaty on the Functioning of the European Union provides that agreement may be exempted from nullity when it *"contributes to improving the production or distribution of goods"*, provided, among other things, that they do not impose restrictions *"which are not indispensable to the attainment of these objectives"*.

The draft of 4 February 2022 states that exchanges of information may benefit from the exemption, provided that they are *"necessary to improve production or distribution"*.

This is tantamount to reproducing the provisions of the Treaty and therefore does not provide any clarification as to the criterion of the legality of information exchanges.

c) While the Commission's proposal does not propose any real guidelines, it does provide a list of examples of information whose transfer would appear to be legal and, conversely, of information whose transfer would not be exempted.

One such example is the transfer of customer data:

> *"Customer-specific sales data, including non-aggregated information on the value and volume of sales by customer, or information that identifies specific customers, unless, in each case, such information is necessary to enable the supplier or buyer to tailor contract goods or services to the customer's requirements or to provide warranty or after-*

sales services or to allocate customers under an exclusive distribution arrangement"[2].

Although this provision seems to exclude the exemption of customer data from the outset, it nevertheless authorizes it in certain cases, so that the criterion remains unclear and maintains the legal uncertainty of the parties.

This is all the more true since the Commission specifies that its examples form *"a non-exhaustive list"*.

d) The uncertainty is increased by the fact that the Commission postulates that the advantages to be expected from the exchange of information would generally outweigh its disadvantages:

> *"(...) the potential negative impact of the vertical agreement on the competitive relationship between the supplier and buyer at the downstream level is less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream level"*[3].

And the Commission adds that the prohibition of the exchange of information is only envisaged as an exception and must therefore be interpreted narrowly:

> *"The rationale for these exceptions is that, in dual distribution, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and buyer at the downstream level is considered to be less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream levels. Whether a vertical agreement fulfils the conditions of Article 2(4), point (a) or point (b) of the Regulation is to be construed narrowly, due to the exceptional nature of these provisions"*[4].

Thus, the Guidelines seem to define a presumption of legality of information exchanges.

e) Since the guidelines do not provide a clear rule, the parties will be inclined to submit to the judge, on an *ad hoc* basis, the assessment of the necessity and usefulness of the information exchanges.

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[2] Item 14 (b) of the February 4, 2022 draft.
[3] introduction to the project of February 4, 2022.
[4] Item 6 of the February 4, 2022 draft.

The court in charge of applying the competition rules is the one that most commonly hears commercial cases.

In France, this court considers that within the limit of 30% of market share and by virtue of the general exemption regulation, the benefit of which is systematically recognized, the constitution of networks purely and simply escapes the rules of selective distribution (any rule, in fact, since the courts invoke the prevalence of Community law in order to exclude the application of domestic law).

The exemption regulation is *de facto* a patent of impunity, so that specific situations will not be subject to any real control.

2) The inadequacy of the efficiency test

For the record, Article 101, § 3 of the Treaty only allows for the exemption of distribution agreements if they :

- contribute to improve production or distribution ;

- contribute to promot technical or economic progress;

  . while reserving for users a fair share of the resulting profit ;

  . and without imposing on the enterprises concerned restrictions which are not indispensable to the attainment of these objectives ;

  . nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The draft guidelines postulate that, with some exceptions, the exchange of information is by its very nature in the pursuit of efficiency gains, thereby minimizing the possibility that it may pursue less virtuous objectives, at the expense of competitors and end users.

Above all, the guidelines do not propose any formula to ensure that consumers actually benefit from the exchange of information.

Nor does it propose a formula to prevent the exchange of information from contributing to the elimination of competitors.

In this case, current events suggest that the appropriation of distributors' customer files seems to go hand in hand with the termination of all distributors prior to their partial reinstatement, with the result that many of them will be eliminated.

The regulation and the guidelines should therefore define the criteria for ensuring that the agreements comply with all the requirements of the Treaty, whether it is a question of benefit to consumers, non-essential restrictions or the capacity to eliminate part of the competition.

3) The CEGAA's concerns and wishes

a) At this stage, the guidelines do not offer a clear rule of interpretation that would secure the exchange of information, while the digitization of vertical agreements places this issue at the forefront of the parties' concerns.

This deficiency is all the more worrying as distributors cannot rely on the referral of their case to the national judge and by the way, do not have the possibility to take any action against the commercial partner on which their company depends.

It is therefore imperative to establish an objective rule, which does not require the initiation of litigation and which is sufficiently imperative and precise to be included in the drafting of contracts.

In this perspective, it would be useful to provide that the exchange of information between actual or potential competitors is presumed to have a negative impact on competition, when it concerns data that allows the identification of customers or data that allows access to details of the partner's costs and margins.

Such an exchange must be excluded from the benefit of the exemption in principle and, by way of exception, admitted to its benefit, as long as the exchange meets the following conditions cumulatively:

> 1°- it does not concern data relating to accounting and management, nor data allowing the identification of customers, with the exception of information required by the respect of mandatory laws and the execution of the contract, in the sense that the supply of the product or service would not be possible without them (e.g.: identification of the vehicle to be repaired or of the customer to be invoiced) ;

2°- it does not confer on the person who receives the information, any advantage of his own, neither over the party who provides it, nor over third parties who do not have access to it;

3°- it reserves to the users, in the context of the execution of the contract, a part of the profit resulting from the gain in efficiency produced by the exchange of information, to an indentifiable and justified extent.

We must insist on the fact that the exemption mechanism, as it is conceived in competition law, is not easily accessible to the ordinary judge: a practice is prohibited, but can be exempted from this prohibition, except in certain conditions, which are themselves envisaged in a restrictive manner, the exemption regulation being not mandatory...

In short, it is imperative to establish a simple and readable rule, which is straightforward, both for the parties and for the Judge.

b) While the exchange may validly concern evidence of solvency likely to guarantee the quality of the representation provided by the distributor, it may in no case concern the details of the partner's accounting and management, nor enter into the secrecy of its business.

Indeed, if the communication of this information was debatable in a manufacturer/distributor relationship, even though its purpose is essentially to adjust the distributor's remuneration downwards, it must be resolutely excluded in a relationship between competitors, since it provides an advantage likely to enable the partner to be ousted.

And this is all the more certain as the information is asymmetrical, since it is essentially envisaged for the benefit of the manufacturer.

On this point and by way of illustration, it should be remembered that the Commission's draft guidelines provide for the possibility for the manufacturer to sell to its distributors at different prices, depending on whether the product or service is resold in the physical point of sale or online, on the Internet;

The intimate knowledge of the distributor's cost structure will allow the manufacturer to set the selling price of products and services at a level that does not allow it to maintain a profitable offer on the Internet, thereby *de facto* driving it out of a market that the manufacturer might plan to reserve for itself.

The exchange of this information would also allow - and to a certain extent already does - manufacturers who produce and distribute under several brands, to direct the prospects of one distributor towards another of their

brands, by punctually increasing the discount granted to the neighboring and competing distributor.

c) Furthermore, the question of access to the identification data of the distributors' customers should not be debated, since it would obviously allow the manufacturer to be even more active in its downstream deployment, at the expense of its partners, by offering its products and services directly to the distributor's customers.

It should be noted that the guidelines on horizontal restrictions only consider the legitimacy of the exchange when it concerns aggregate data, considering that the exchange of individualized data would not be indispensable to the production of efficiencies.

The same guidelines add that *"(...) the higher the market power of the parties the less likely they are to pass on the efficiency gains to consumers (...)"*[5].

d) It should also be considered that contracts generally require that the exchange of information be undertaken on an exclusive basis, with distributors being required to direct all prospective customers to the manufacturer, in order to reserve for the manufacturer the commercial potential of persons to whom competing products and services could be offered.

In the same spirit, this exchange of information is sometimes designed in an irreversible way:

- the exchange of information is envisaged in a systematic way, to the point that the customer data collected by the dealer is directly entered on the manufacturer's server, which sometimes claims ownership of this information under the protection of databases;

- the distributor retains access to the personal data of its customers, when it has entered them on the manufacturer's server, without however being able to retrieve the authorizations of the persons concerned, nor consequently, freely organize the processing of the data it has collected.

Thus, the distributor is finally inclined to set up a double data entry solution, which implies superimposing two watertight IT organizations within the company, to an unnecessarily costly extent, contrary to the pursuit of efficiency gains.

[5] Guidelines on horizontal restrictions of January 14, 2011, 2011/C 11/01, point n° 143.

Under these conditions, the exchange of information is not only likely to compromise the possibility for the distributor to engage in a competing activity, but it is also likely to compromise access to the market for alternative and innovative players, whether they are new manufacturers, equipment suppliers or entrepreneurs capable of developing new mobility formulas.

e) Finally, distributors are inclined to fear that the exchange of information within the framework of the ecosystem set up by the manufacturer will essentially tend to increase its profits, reduce the competitive capacity of traditional distribution players and finally, progressively emancipate it from any pressure on prices, at the expense of consumers.

In Paris, on February 17, 2022.