

## **CMA responds to NFDA recommendations on industry competition regulation**

On 5 June, the Competition and Markets Authority (CMA) published the final version of its guidance on the Motor Vehicle Block Exemption Order (MVBE). The MVBE (alongside earlier, more general regulation, the Vertical Agreements Block Exemption Order or 'VABEO') is the domestic regulation replacing the EU regulation transposed into UK law following Brexit. The MVBE sets out conditions that need to be met for certain types of agreement, which are mainly aftersales-specific, to benefit from benign competition law treatment (an automatic safe-harbour from the application of the Chapter I prohibition of the Competition Act 1998 against anti-competitive agreements).

The NFDA (with its advisers, TLT) has, through various meetings with the CMA, sought to apprise the CMA of developments in the sector, including the anticipated transition to direct and agency (including non-genuine agency) sales on the part of certain OEMs. Given that the sector is in transition, the UK Government has limited application of the MVBE itself to six years – from 1 June 2023 to 31 May 2029 – at which point it may be replaced with a new regulation reflective of the market and competition issues relevant to the sector at that time.

In the NFDA's view, six years is still a long time in the automotive industry, and it is therefore important that dealers (and agents, whether genuine or non-genuine) remain as well positioned as possible to deliver the benefits UK consumers expect, and this, in part, relies on distribution models based on terms that are fair and proportionate (noting that even more OEM control over the customer proposition is intrinsic to some distribution models, such as agency).

The NFDA therefore recommended an expansion of the MVBE guidance, so that it would not simply assist in the interpretation of the (aftersales-focused) MVBE itself, but would also consider wider competition issues of relevance to the sector (sales as well as aftersales). This included requests for ongoing scrutiny of different agency models and their potential impacts on affected markets, as well as a call for an industry Code of Conduct to promote fairer business practices. While appreciating the obvious constraints on the CMA's ability to articulate guidance going materially beyond the more limited scope of MVBE itself, the final version of the MVBE guidelines (which also reference the VABEO) respond in a number of interesting and welcome respects to the NFDA's recommendations. In particular, they include the following helpful statements (as well as a distinct section on the merits of a Code of Conduct), which underlines the CMA's close interest in sector developments and the importance of ensuring fairer and more transparent relationships:

1. New distribution models have recently become more prevalent in the motor vehicle distribution sector (in particular, direct and agency-based distribution models). While it is currently too early to predict the impact of these models accurately, parties to such distribution agreements should carefully assess whether they meet the conditions of the VABEO and, where they do not benefit from exemption under VABEO, assess whether those agreements breach the Chapter I prohibition. [...] Where the introduction of these distribution models is imposed by suppliers of motor vehicles, the CMA may consider, in the context of any possible CA98 investigation and taking into account the specific circumstances of the case, whether it would be appropriate for it to rely on rule 5(3) of the Competition Act (Competition and Markets Authority's Rules) Order 2014 in order to address any proposed infringement decision to the suppliers of motor vehicles imposing the restrictions only (ie not to the counterparties on which the restrictions are imposed).

2. In the case of agency distribution systems, a further distinction between ‘genuine’ (outside of the scope of the Chapter I prohibition) and ‘non-genuine’ agency (within scope of the Chapter I prohibition) is a relevant consideration to ascertain whether the distribution system complies with competition law and whether there may be cumulative [anti-competitive] effects arising from parallel networks of agency agreements.
3. In particular where agency agreements are ‘non-genuine’ and therefore may fall within scope of the Chapter I prohibition, suppliers of motor vehicles (the principal) should ensure that the agent should be left free, both in principle and in practice, to reduce the effective price paid by the customer without reducing the income due to the principal. In these cases, any direct or indirect obligation preventing or restricting the non-genuine agent from sharing its remuneration with the customer, irrespective of whether the remuneration is fixed or variable, is a hardcore restriction under Article 8(2)(a) of the VABEO.
4. The history of competition enforcement in this sector shows that restrictions arise directly as a result of explicit contractual obligations or indirectly through obligations or other means which nonetheless achieve the same anti-competitive result. Suppliers of motor vehicles wishing to influence the competitive behaviour of a member of its Authorised Network may, for instance, resort to threats or intimidation, warnings or penalties. They may also delay or suspend deliveries or threaten to terminate the contracts of distributors that fail to observe a given price level. Transparent relationships between contracting parties would normally reduce the risk of motor vehicle suppliers being held responsible for using such indirect forms of pressure aimed at achieving anticompetitive outcomes. Adhering to a Code of Conduct which promotes fair business practices is one means of achieving greater transparency in commercial relationships between parties. Such codes may inter alia provide for adequate notice periods for contract termination, which may be determined by reference to the contract duration and investments required by the supplier of motor vehicles, for compensation to be given for outstanding relationship-specific investments made by the member of the Authorised Network in case of early termination without just cause, as well as for arbitration as an alternative mechanism for dispute resolution. If a supplier incorporates such a Code of Conduct into its agreements with distributors (including agents) and repairers, makes it publicly available and complies with its provisions, this will be regarded as a relevant factor for assessing the supplier's conduct in individual cases. [Emphasis added]

This guidance indicates that the CMA is paying close attention to the evolution of sales in the sector and that, were the ability of dealers (or agents) to continue to be able to deliver the benefits expected by consumers compromised, this could prompt further intervention (possibly even the removal of block exemption or targeted investigations against OEMs) before the expected expiry of the new MVBEO (Or VABEO).

The NFDA is preparing a more detailed summary of the MVBEO guidelines, which will also remind members of the core aftersales provisions of the regulation, which will be available to members upon request. In the meantime, a copy of the guidelines can be accessed here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1160744/2.0\\_CMA\\_Guidance\\_on\\_Motor\\_Vehicle\\_Agreements.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1160744/2.0_CMA_Guidance_on_Motor_Vehicle_Agreements.pdf)