Draft new section dealing with information exchange in dual distribution

The European Commission ('Commission') is currently reviewing the Commission Notice providing Guidelines on Vertical Restraints ('Vertical Guidelines')[1], within the broader context of the review of Commission Regulation (EU) No 330/2010 ('Vertical Block Exemption Regulation', 'VBER')[2]. During the impact assessment for this review, the Commission launched a public consultation on the draft revised rules, reflecting the Commission's proposed changes to the VBER ('draft revised VBER') and Vertical Guidelines ('draft revised Vertical Guidelines'). This public consultation took place from 9 July 2021 to 17 September 2021.

As explained in the background note accompanying the public consultation on the draft revised VBER and Vertical Guidelines, it was proposed to limit the safe harbour for dual distribution by specifying in Article 2(5) of the draft revised VBER that the vertical agreement would remain block-exempted except for information exchanges between the parties[3]. As mentioned in the summary of the comments received in response to the public consultation, this proposal was not supported by stakeholders[4]. In particular, all categories of stakeholders requested more guidance on the types of information that can be exchanged between the parties in a dual distribution relationship, and many considered that the reference in the drafts to an assessment under the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ('Horizontal Guidelines')[5] was not appropriate or at least not sufficient[6].

To gather further evidence and inform the drafting of guidance on the specific topic of information exchange in dual distribution, the Commission commissioned an expert report, which is published on the page of the Commission's website relating to the VBER review[7]. In light of the above, the Commission has decided to launch a public consultation on the following draft new section dealing with information exchange in dual distribution, which is intended to be included in the Vertical Guidelines.

Introduction

Dual distribution is the scenario where a supplier sells goods or services not only at the upstream level but also at the downstream level, thereby competing with its independent distributors. In that scenario, in the absence of hardcore restrictions, and provided that the buyer does not compete with the supplier at the upstream level, 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.

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[1] Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

[2] Commission Regulation (EU) No 330/2010 of 20 April 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, OJ L 102, 23.4.2010, p. 1.

[3] https://ec.europa.eu/competition-policy/document/download/e0eacfbb-9dbe-4dc5-8fdf-b0e9c74a7f15_en, p. 3.

[4] https://ec.europa.eu/competition-policy/document/download/d120e232-0893-4dee-91e4-a663f5e94f71_en, p. 2.

[5] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72.

[6] https://ec.europa.eu/competition-policy/document/download/d120e232-0893-4dee-91e4-a663f5e94f71_en, p. 3.

[7] https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.

The exchange of information between a supplier and buyer can contribute to the pro-competitive effects of vertical agreements, in particular the optimisation of production and distribution processes. However, in dual distribution, the exchange of certain types of information may raise horizontal concerns.

The Commission is consulting on the following guidance on the assumption that the regulation replacing the VBER ('Regulation (EU) X') would include a provision stating that the block exemption does not apply to the exchange of information between the supplier and the buyer that is not necessary to improve the production or distribution of the contract goods or services by the parties. The present consultation is nonetheless without prejudice to any future decision by the Commission in relation to any regulation replacing the VBER.

Draft new section dealing with information exchange in dual distribution, which is intended to be included in the guidelines that will replace the Vertical Guidelines and accompany Regulation (EU) X

(1) As regards vertical agreements between competitors, it should first be noted that, pursuant to Article 2[X] of Regulation (EU) X, on which guidance is provided in section [X] of these guidelines, the Regulation does not apply to vertical agreements the subject matter of which falls within the scope of any other block exemption regulation, unless otherwise provided for in that regulation.

(2) Article 2(4), first sentence, of Regulation (EU) X establishes the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into between competing undertakings. Article 2(4), second sentence, of the Regulation contains two exceptions to this rule. It provides that the exemption provided by Article 2(1) of the Regulation applies to non-reciprocal vertical agreements between competing undertakings that fulfil the conditions of either Article 2(4), point (a) or point (b) of the Regulation. Non-reciprocal means in particular that the buyer of the contract goods or services does not also supply the contract goods or services or competing goods or services to the supplier. If the buyer does make such supplies, the vertical agreement is reciprocal, in which case the exemption provided by Article 2(1) of Regulation (EU) X does not apply.

(3) Vertical agreements between competing undertakings that do not meet the conditions of Article 2(4), second sentence, of Regulation (EU) X must be assessed under Article 101 of the Treaty, taking into account the Horizontal Guidelines, including any exchange of information between the parties. Conversely, non-reciprocal vertical agreements that meet the conditions of Article 2(4), point (a) or point (b) of Regulation (EU) X have to be assessed under that Regulation and these guidelines, unless otherwise indicated in these guidelines.

(4) Article 1(1), point (c) of Regulation (EU) X defines a competing undertaking as an actual or potential competitor. Two undertakings are treated as actual competitors if they are active on the same relevant (product and geographic) market. An undertaking is treated as a potential competitor of another undertaking if, absent the vertical agreement between the undertakings, it is likely that the former would, within a short period of time (normally not longer than one year), make the additional necessary investments or incur other necessary costs to enter the relevant market in which the latter undertaking is active. This assessment must be based on realistic grounds, having regard to the structure of the market and the economic and legal context. The mere theoretical possibility of entering a market is not sufficient. There must be real and concrete possibilities for the undertaking to enter the market, without any insurmountable barriers to entry. Conversely, there is no need to

demonstrate with certainty that the undertaking will in fact enter the relevant market and that it will be capable of retaining its place there[8].

(5) A wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the wholesaler's or retailer's brand name is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer for the purpose of applying Article 2(4) of Regulation (EU) X. Therefore, the exemption provided by Article 2(1) of the Regulation can apply to a vertical agreement entered into between a wholesaler or retailer that sells own-brand goods that have been manufactured by a third party and a manufacturer of competing branded goods. By contrast, in view of the differences in the investments that they make, wholesalers and retailers that manufacture goods in-house for sale under their own brand name are considered to be manufacturers and therefore the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements entered into by such wholesalers or retailers with manufacturers of competing branded goods. Such agreements must be assessed individually under Article 101 of the Treaty, taking into account the Horizontal Guidelines.

(6) Article 2(4) of Regulation (EU) X contains two exceptions to the general rule that the exemption provided by Article 2(1) of the Regulation does not apply to vertical agreements between competitors. Both exceptions, namely Article 2(4), points (a) and (b) of the Regulation, concern scenarios of dual distribution, where a supplier of goods or services is also active at the downstream level, thereby competing with its independent distributors that are not active at the upstream level. 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.

(7) The exception provided by Article 2(4), point (a) of Regulation (EU) X concerns the scenario where the supplier sells the contract goods at several levels of trade, namely as a manufacturer, importer, or wholesaler and also as a wholesaler or retailer, whereas the buyer sells the contract goods at a downstream level, namely as a wholesaler or retailer, and is not a competing undertaking at the upstream level where it buys the contract goods.

(8) The exception provided by Article 2(4), point (b) of Regulation (EU) X concerns the scenario where the supplier is a provider of services operating at several levels of trade, whereas the buyer provides services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

(9) If the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all aspects of the

[8] See Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5). See also the Commission's Thirteenth Report on Competition Policy, point 55, and the judgments of 30 January 2020, *Generics (UK) and Others* v *Competition and Markets Authority*, Case C-307/18, EU:C:2020:52, paragraphs 36 to 45; 25 March 2021, *H. Lundbeck A/S and Lundbeck Ltd* v *European Commission*, Case C-591/16 P, EU:C:2021:243, paragraphs 54 to 57.

vertical agreement in question, including any exchange of information between the parties that is necessary to improve the production or distribution of the contract goods or services by the parties.

(10) The exchange of information between a supplier and a buyer can contribute to the pro-competitive effects of vertical agreements, including the optimisation of production and distribution processes. This also applies in the scenario of dual distribution. However, not all exchanges of information between a supplier and buyer in a dual distribution scenario are efficiency enhancing. For this reason, Article 2(5) of Regulation (EU) X provides that, in such a scenario, the exchange of information between a supplier and buyer does not benefit from the exemption provided by Article 2(1) of the Regulation where the information exchange is not necessary to improve the production or distribution of the contract goods or services by the parties.

(11) For the purpose of applying Article 2(5) of the Regulation and this guidance, information exchange includes any communication of information by one party to the other, irrespective of the characteristics of the exchange, for instance whether the information is communicated by only one party or by both parties, or whether the information is exchanged in writing or orally. It is also immaterial whether the parties expressly agree the form and content of the information exchange or if it takes place on an informal basis, including, for example, where one party communicates information without the other party having requested it.

(12) Whether an exchange of information is necessary to improve the production or distribution of the contract goods or services by the parties may depend on the particular distribution model. For example, under an exclusive distribution agreement, it may be necessary for the parties to exchange information relating to the territories or customer groups that are allocated to the buyer or reserved to the supplier. Under a franchise agreement, it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network[9]. Lastly, in a selective distribution system, it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria.

(13) The following is a non-exhaustive list of examples of information that, when exchanged by the parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X can generally be considered to be necessary to improve the production or distribution of the contract goods or services by the parties and can therefore benefit from the exemption provided by Article 2(1) of the Regulation. Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct.

(a) Technical information relating to the contract goods or services, such as information relating to the registration, certification or handling of the contract goods or services, notably when such goods or services must comply with

[9] See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97) for the Commission's general methodology and interpretation of the conditions for applying Article 101(1) of the Treaty and in particular Article 101(3) thereof, paragraph 31.

regulatory measures, and information that enables the supplier or buyer to adapt the contract goods or services to the requirements of the customer;

(b) Information relating to the supply of the contract goods or services, including information relating to production, inventory, stocks, sales volumes and returns;

(c) Aggregated information relating to customer purchases of the contract goods or services, customer preferences and customer feedback, without prejudice to paragraph (14) below;

(d) Information relating to the prices at which the contract goods or services are sold by the supplier to the buyer;

(e) Information relating to the supplier's recommended resale prices or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or services, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X[10], and without prejudice to paragraph (14), point (a) below concerning information relating to actual future downstream sale prices;

(f) Information relating to the marketing of the contract goods or services, including information on new goods or services to be purchased and sold under the vertical agreement, as well as information on promotional campaigns for the contract goods or services, without prejudice to point (e) of this paragraph or paragraph (14) below;

(g) Performance-related information, including aggregated information communicated by the supplier to the buyer relating to the marketing and sales activities of other buyers of the contract goods or services, provided that this does not enable the buyer to identify the activities of particular competing buyers, as well as information relating to the volume or value of the buyer's sales of the contract goods or services relative to the buyer's sales of competing goods or services.

(14) Conversely, the exchange of the following types of information is generally not necessary to improve the production or distribution of the contract goods or services by the parties.

(a) Information relating to the actual future prices at which the supplier or buyer will sell the contract goods or services downstream, unless the exchange of such information is necessary to organise a coordinated short-term low price campaign in accordance with the guidance provided in paragraph [X] of these guidelines, and without prejudice to the possibility to exchange information on the supplier's recommended resale prices or maximum resale prices for the contract goods or services, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price within the meaning of Article 4, point (a) of Regulation (EU) X;

[10] See Section [6.1.1. of these guidelines] for further guidance on RPM, including on indirect means to achieve RPM.

(b) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement[11];

(c) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.

(15) Exchanges of information between a supplier and buyer in a dual distribution scenario that, pursuant to Article 2(5) of Regulation (EU) X, do not benefit from the exemption provided by Article 2(1) of the Regulation must be assessed individually under Article 101 of the Treaty, taking into account the Horizontal Guidelines. The other provisions of the vertical agreement between the supplier and buyer may nonetheless benefit from the exemption provided by Article 2(1) of the Regulation, provided that the agreement otherwise complies with the conditions set out in the Regulation.

(16) Exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the exemption provided by Article 2(1) of Regulation (EU) X do not necessarily infringe Article 101 of the Treaty. However, such exchanges are subject to the presumptions established by the case law of the Court of Justice of the European Union relating to exchanges of information between competitors. In particular, undertakings that participate in a concerted practice and that remain active on the market are presumed to take into account information exchanged with their competitors in determining their conduct on the market[12].

(17) The parties to an exchange of information that, pursuant to Article 2(5) of Regulation (EU) X, does not benefit from the exemption provided by Article 2(1) of the Regulation may take precautions to minimise the risk that the information exchange will raise horizontal concerns[13]. For example, they may exchange only aggregated sales information or ensure an appropriate delay between the generation of the information and the exchange. Another possible precaution is to use technical or administrative measures, such as firewalls, to ensure, for example, that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity.

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[11] The guidance provided in these guidelines is without prejudice to the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

[12] See the judgments of 10 November 2017, *ICAP* v *Commission*, Case T-180/15, EU:T:2017:795, paragraph 57, 4 June 2009, *T-Mobile Netherlands and Others*, Case C-8/08, EU:C:2009:343, paragraph 51, 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127, 21 January 2016, *Eturas UAB and Others*, Case C-74/14 ECLI:EU:C:2016:42, paragraphs 40-44.

[13] See the chapter on information exchange in the Horizontal Guidelines.