

**RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON
PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN
THE CONTEXT OF DUAL DISTRIBUTION**

18 FEBRUARY 2022

Freshfields Bruckhaus Deringer was pleased to participate in the public consultation on the European Commission's published revised drafts of the Vertical Block Exemption Regulation (VBER) and Guidelines on Vertical Agreements (VGL) which closed on 17 September 2021.

In that regard, we are now pleased to comment on the Commission's additional targeted public consultation on proposed guidance relating to information exchange in the context of dual distribution, to be added to the VGL.

This proposed new section of the VGL provides welcome additional guidance on what was probably the most intensively debated issue raised by the draft new VBER. Given the generally pro-competitive nature of dual distribution arrangements, we strongly commend the Commission for having responded so constructively to the stakeholder feedback on dual distribution information exchanges, in particular given the Commission's original more critical stance towards dual distribution and its stated intention to address the issue of information exchanges in the context of the ongoing review of the rules on horizontal collaboration. We and many other stakeholders asked that guidance be provided in the new VGL and we are glad to see that this will be the case.

We welcome that the new VGL will make it clear that the new VBER covers exchanges of information between the supplier and the buyer that are necessary to improve the production or distribution of the contract goods or services by the parties, and that this will apply to dual distribution. The examples given in paragraphs 12 to 14 of the consultation document are useful in that respect. Given the pro-competitive impact of dual distribution, we consider that the requirement that the information exchange be *necessary* to improve production or distribution should be interpreted flexibly, such that the list of examples given in paragraph 13 will indeed operate as a non-exhaustive list in practice. This is particularly important as it would not be possible to capture the wide variety of (often sector or company-specific) information that can be legitimately exchanged between dual distribution partners in a short list of examples.

We also consider it helpful that the Commission recognises that technical or administrative measures such as firewalls can effectively minimise the risk that the information exchange will raise horizontal concerns.

We would only suggest two small changes. These are that:

- in paragraph 4 a reference to a SSNIP be added to the definition of a competing undertaking, for consistency with the VBER and the Commission's Market Definition Notice; and
- in paragraph 11 it be clarified that "where one party communicates information without the other party having requested it" there will not be considered to be any exchange if the receiving party promptly and unambiguously rejects the information.

Finally, we observe that, although this is not completely clear from the consultation document, it appears to us that the additional 10% retail market share threshold in respect of information sharing aspects of dual distribution agreements which the Commission had proposed to introduce in the draft VBER has been abandoned. This would indeed be very welcome, as the new 10% threshold introduced unnecessary complexity and significant practical difficulties to the distribution rules.

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