



Response from the European Franchise Federation to the additional public consultation on proposed guidance relating to information exchange in the context of dual distribution (18 February 2022)

The European Franchise Federation (EFF) welcomes the opportunity to respond to the additional public consultation on the draft Vertical Guidelines in the context of the ongoing VBER review. Our principal observations regarding the draft Guidance note circulated by the Commission are as follows:

1 Positive impact of dual distribution on competition

1.1 The EFF supports the Commission's approach to exempt dual distribution under the VBER. In a franchise system the potential negative impact of the vertical agreement on the competitive relationship between the franchisor and franchisee 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 levels.

2 Market share threshold

2.1 The EFF urges the Commission to confirm the removal of the additional market share threshold proposed in article 2(5) of the draft Vertical Block Exemption Regulation.

3 Vertical information exchange

3.1 The Commission's draft states that information exchange within a dual distribution scenario has a positive impact only if the information exchange is "necessary to improve the production or distribution of the contract goods or services." This "need-to-know" principle is considered a suitable approach for assessing a vertical exchange of information in distribution systems.

3.2 As recognized by the Commission, the exchange of information by the supplier and buyer can contribute to the procompetitive effects of vertical agreements in particular the optimization of production and distribution processes. Only the exchange of certain types of information in dual distribution may raise horizontal concerns. Therefore, it should be up to the Commission to prove that the particular exchange has anti-competitive effects and is not necessary to improve production or distribution.

3.3 In particular for franchising, as unlike many other distribution systems, a vertical exchange of information is generally necessary for the functioning of the franchise system in the first place. A set of case studies outlining the importance of this exchange of information is detailed in our previous consultation response from September 2021 as well as by the Court of Justice in the Pronuptia case (see no. 27 and 33 of the Judgment). If anything, the need for information exchange in franchising could be emphasized even further in the Vertical Guidelines.

3.4 The essentiality of the vertical exchange of information in a franchise type of distribution is recognized also in the Expert Report commissioned by DG Competition into dual distribution, which states:



- “The franchisor is contractually required to constantly disclose certain information within the system in order to ensure its **uniformity** and provide for a **permanent update of know-how**. Both elements are a core feature of the system.” (Section II 1.3)
- “It is part of a franchise system that the franchisor continuously develops the franchise concept, and in order to be able to do this, collects feedback and information from its franchisees (customer feedback, sales patterns, effects of promotional activities, etc.). The franchisee is obliged to apply the franchise concept and is under a general obligation to allow the franchisor to verify its compliance with the franchise criteria”. (Section II 2.2.3)
- “Unlike in other systems, where direct sales by the supplier may only have evolved over time, dual distribution has always been a characteristic element of franchising. It was e.g. part of the franchise system analyzed by the ECJ in Pronuptia. It is also present in the practical example provided by the Commission in par. 191 of the Vertical Guidelines. The operation of own retail activities typically allows the franchisor to gain and develop the required know-how that is later applied for the sale of products and services by third party franchisees under the same format”. (Section II 2.2.3)

3.5 Due to the importance of the exchange of information in a franchise scenario, the authors of the Expert Report express the view that:

- “To the extent restrictive of competition in the first place, Information Exchange in franchise agreements is according to the view of the authors of this Expert Report generally fully exempted within the scope of the [2010] VBER” (Section II, 2.3) and
- They “fail to see that this needs to be revised for scenarios of dual distribution” (Section II 2.2.3).

3.6 The exchange of information in a franchise scenario is crucial in order to ensure both, the uniformity of the system and the update of know-how. This is also stated in No. 45 of the current draft Guidelines (and in no. 82 of the previous guidelines):

“The following IPR-related obligations are generally considered necessary to protect the franchisor’s IPRs and are, where these obligations fall under Article 101(1), also covered by the VBER: (...) (d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor and other franchisees a non-exclusive licence for the know-how resulting from that experience;”

3.7 Therefore in the light of the above, we suggest redrafting the following statement of the document under consultation:

“Under a franchise agreement, it is necessary for the franchisor and franchisee to exchange information relating to the application and improvement of a uniform business model across the franchise network and / or the preservation and the



improvement of the know-how of the franchisor. Therefore, there is a presumption in franchising that exchange of data is necessary and procompetitive.”

4 Positive & Negative list

- 4.1 Franchising does not really require a positive list of information needed to improve distribution or production, given generally all forms of information exchanged is fundamental to the efficient operation of the system, including strategic Information as recognized by Expert Report commissioned by DG Competition into dual distribution where in the conclusions is recognized that “the need to Exchange Strategic Information may be required by the franchise concept” (Section III, 2.1.1).
- 4.2 Only very limited forms of information are unnecessary in franchising systems. In particular information relating to the actual future prices at which the supplier will sell the contract goods or services downstream would not be necessary, except if it regards (i) the exchange of 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; or (ii) the exchange of information on fixed resale prices that facilitates the introduction of a new product or that is necessary to organise a coordinated short-term low price campaign. These forms of unnecessary information should be detailed in the Vertical Guidelines as opposed to the Regulation itself.

5 Customer Data

- 5.1 The EFF would support any changes to the draft Guidelines that permit the sharing of customer specific sales data and information relating to customer purchases, including recent or actual information (‘live feeds’). This is of vital importance to the franchise industry.
- 5.2 The necessity of information exchange in a franchise scenario encompasses customer specific sales data and information relating to customer purchases. Thus, the customer data to be exchanged is not limited to aggregated information relating to customer purchases of the contract goods or services, customer preferences and customer feedback. It goes far beyond that, as set out in the following section.

6 Targeted Offers

- 6.1 In retail, customer-specific data is used to ensure that franchisees can generate a better and local offer for customers. This includes personal offers, which leads to repeat visits, and assortment and planograms tailored to the store which ensures a better turnover rate and fewer losses for the franchisee. This can only be properly interpreted per location using the correct algorithms that are developed by the franchisor applied to data supplied by all points of sale, including franchisee operated locations. Franchisors help entrepreneurs to collect, analyze and interpret data, so that they can improve their own performance. To name a few examples:



- 6.2 The success of a franchising model depends on achieving economies of scale through actions taken by the franchisor on behalf of the entire network. For instance, customer data in a car rental franchise would benefit a customer if they request a rental car in another region from another partner of the rental car system. The customer will receive an offer tailored to their specific profile. This results in other franchisees in a network receiving new business opportunities and the entire network benefitting from the use of specific customer data. This same scenario would also play out in travel or real estate franchises.
- 6.3 A restaurant franchise system offers their customers an app for their mobile devices on which customers register and create an account. The app provides customers with coupons and collects the data regarding repeat purchases. The franchise system has various restaurants which are run by separate franchisees. Customers prefer to eat in different locations and at different times. Data about specific purchases is collected at the different franchisee location and stored by the central franchisor. By collecting the specific data, the franchisor's algorithm can provide the customer with coupons that cater to personal choices, which can be used at different restaurants. This is beneficial for both parties, the franchise system and the customer. If the franchise would only have been able to use aggregated customer data, the emphasis of the coupons would have been on classic products, resulting in fewer visits.

7 Loyalty Scheme Programs

- 7.1 In retailing, loyalty scheme programs are dependent on analysis of recent and actual ('live feed') customer specific data by the franchisor. In food service, gathering customer-specific sales data is essential since it is aimed at creating a better customer experience and brand engagement. Guests are assigned bonus points based on their specific purchases. Without that data, bonus points cannot be granted. Transactional data is critical to determine, identify and model customer segments in distinct groups which will then benefit from tailored promotions and experiences. Parameters such as preferences, frequency, visit recency, average time spend, use of promotions, daytime, purchase channel are all analyzed data and can feed into loyalty scheme programs.
- 7.2 With regard to the restaurant franchise system mentioned above there are also data exchanges unrelated to product purchases such as visit recency. The franchisors algorithm notices changes in customer behaviour regarding visits and provides a reminder and coupon offer.
- 7.3 A hardware store franchise system has different locations throughout the country. Locations are partly run by franchise partners; others are run by the franchisor. The hardware store franchise system offers a loyalty scheme program and customers receive a card, to be used at all locations. Every purchase generates a certain number of bonus points used to calculate discounts or vouchers which can be tailored for use at any location of the customer's choosing, whether run directly by the franchisor or by a partner. Data is shared between the franchisee and franchisor and both are able to provide the customer with bonus points and targeted offers. In turn, the customer is willing to remain loyal to that brand and both franchisor and franchisee benefit.



8 Software Systems

- 8.1 As recognized in the Expert Report under section 1.1.4, supplier software systems are particularly frequent in franchise systems, given the required close cooperation between the franchisor and franchisees and the need for a uniform implementation of the franchise systems. In these systems, data is continuously exchanged and it would be burdensome for the franchisor and franchisee to have to prove the 'need to know'. This is not how these ICT systems are designed or parties in practice cooperate.

9 Intermediation providers

- 9.1 Franchise networks often allow franchisees to sell online to the consumer through the franchise network's website. Such a mutual website should not qualify as a hybrid online intermediation service in the context of the VBER. In footnote 65 to paragraph (151), the reference to paragraph (92) (which concerns hybrid platforms) is therefore misleading and should be deleted.
