

**European Commission's consultation on the draft new section of
the Vertical Guidelines dealing with information exchange in dual
distribution**

Assonime response

Assonime welcomes the opportunity to comment on the draft new section of the Vertical Guidelines proposed by the European Commission to provide guidance on information exchange in dual distribution scenarios.

As a preliminary remark, we highly appreciate the Commission's efforts to properly understand and address the concerns raised on this topic by most stakeholders during the public consultation on the draft revised Vertical Block Exemption Regulation (VBER) and Vertical Guidelines (VGL) and its openness to reconsidering the approach initially adopted. This provides reassurance as to the value of public consultation as a genuine and effective tool to trigger constructive discussions with the Commission and achieve, in the public interest, an outcome consistent with the better regulation principles.

In the draft revised VBER published in July 2021 the Commission proposed to narrow the safe harbour for dual distribution, by excluding any information exchange in dual distribution scenarios from the benefit of the block exemption when the parties' aggregated market share in the

retail market exceeds the 10% threshold. Such information exchange, according to Article 2(5) of the draft revised VBER, would have to be separately assessed under the rules applicable to horizontal agreements. In our response to the Commission's previous consultation on the draft VBER and VGL we expressed some concerns about this proposal to assess the exchange of information between the supplier and its distributors, whenever the supplier is also active on the retail market, according to the rules concerning the information exchange between competitors. In particular, we pointed out that a rigid approach to the vertical exchange of information between supplier and distributors would overlook the economic reality, neglecting the fact that, whereas the information exchange between competitors is not a necessary component of economic conduct, the information exchange between a supplier and its distributors on aspects relating to the purchase, sale or resale of the contract goods and services is the norm, not the exception, and is required by the economic relationship between the parties. Assessing this exchange of information according to the rules applicable to horizontal agreements would severely hamper legal certainty and the effectiveness of the operation of distribution networks in all cases of dual distribution, with no clear benefit for competition. Since in the current framework hardcore restrictions and features not related with the purchase, sale or resale of the contract goods or services are not covered by the safe harbour, we suggested to maintain the exemption for dual

distribution without any specific limitation and to provide a clear guidance on information exchange in the VGL.

Indeed, as indicated in the Expert Report on ‘Information exchange in dual distribution’ competition concerns in this area mainly relate to situations in which the information exchange would either facilitate or result in vertical hardcore restraints or horizontal by object restrictions, In light of the above, we welcome the draft new section of the VGL published for consultation and strongly support the choice to include the guidance on information exchange in the VGL, rather than in the Horizontal Guidelines.

In the new draft proposal, the Commission is clearly seeking to adopt a proportionate approach. The aim is not discouraging harmless and probably efficiency-enhancing exchanges of information functional to the vertical relationship, but removing the safe harbour for the exchange of certain types of information in dual distribution which may raise competition concerns.

It is worth noticing that the draft new guidance (§6) correctly restates the rationale for the dual distribution exceptions, i.e. 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.

Although not directly addressing the VBER's provisions, the consultation document refers to the envisaged changes to the draft VBER rules on dual distribution. It states that the proposed guidance is based 'on the assumption that the regulation replacing the VBER 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'.

Indeed, §9 of the draft guidance indicates that if the conditions of Article 2(4) of VBER are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all aspects of the vertical agreement, including any exchange of information between the parties that is necessary to improve the production or distribution of the contract goods of services by the parties.

Importantly, the draft guidance clarifies that the assessment of 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 (§12) and provides a non-exhaustive list of examples of information whose exchange can generally be considered to be necessary and, therefore, can benefit from the block exemption (§13). Specularly, §14 of the draft guidance provides a list of examples of types of information whose exchange is generally not necessary to improve the production or distribution of the contract goods or services by the parties and, therefore, is not covered by the safe

harbour (basically, information which may facilitate horizontal collusion).

The draft guidance also states that exchanges of information that do not benefit from the exemption ‘must be assessed individually under Article 101 TFEU, taking into account the Horizontal Guidelines’. It also notes that, while information exchanges that do not benefit from the exemption do not necessarily infringe Article 101 TFEU, such exchanges are subject to the presumptions established by the case law of the EU Court of Justice relating to exchange of information between competitors.

Some comments

a. A clear improvement

Overall, we find that the draft new rules entail a clear improvement compared to the original proposals and to some extent make the assessment of information exchange easier by providing helpful concrete examples of the types of information exchange that can or cannot benefit from the block exemption.

b. Market share thresholds

It is unclear whether the Commission still wishes to indicate in the VBER that below the 10% market share threshold the safe harbour applies to any exchange of information in dual distribution, with no further specification. The choice entails a trade-off between a simplified assessment for vertical agreements involving parties

with very small market shares (below 10%) and a streamlined general approach to vertical agreements, based on the general 30% market share thresholds.

c. How to define the boundaries of the safe harbour

The boundaries of the safe harbour should be designed to identify categories of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. Reference to Article 101(3) (whereby restrictions of competition are compatible provided, inter alia, that they are efficiency enhancing and the restriction is necessary to obtain the efficiency-enhancing effect) may explain why the Commission includes in the safe harbour only exchanges of information which are ‘necessary’ to improve production or distribution.

However, it should be stressed that **a necessity test is not required for most features of vertical agreements which are covered by the safe harbour**. There is nothing intrinsically more dangerous in exchanges of information which are an integral part of vertical agreements in dual distribution scenarios. Thus, an alternative approach, as suggested in the Expert Report, would be to substitute the necessity requirement with reference to the exchange of information between the supplier and the buyer “that is **directly related and proportionate to the functioning and/or**

facilitation of the vertical agreement, so as to improve the production or distribution of the contract goods or services”.

This reference would reduce the uncertainty which may emerge when assessing whether the exchange of information is ‘necessary’ to improve the production or the distribution of the contract goods or services.

If the stricter necessity test is maintained, hopefully it will be interpreted broadly – as suggested by the examples contained in the draft VGL (§13).

d. Individual assessment of exchange of information outside the safe harbour

The narrower is the safe harbour, the more important it is to explain the criteria for individual assessment of the exchange of information between the supplier and the buyer not covered by the VBER.

Most vertical exchanges of information between suppliers and distributors, even if not strictly necessary, have no negative impact on competitive variables and, therefore, they should not be discouraged by an over-extensive application of Article 101(1). A mere reference to the Horizontal Guidelines in § 15 may be misleading. It should be clear that the individual assessment of the exchange of information does not entail a presumption of a horizontal restriction but should be based on a comparison of the

actual or potential impact of the information exchange with the situation which would prevail in its absence.

An alternative formulation of the first part of § 15 of the VGL is the following:

“Exchanges of information between a supplier and a 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. The likely effects of an information exchange on competition must be analysed on a case-by-case basis as the results of the assessment depend on a combination of various case specific factors. The assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange. For an information exchange to have restrictive effects on competition within the meaning of Article 101(1), it must be likely to have an appreciable adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product variety or innovation. Whether or not an exchange of information will have restrictive effects on competition depends on both the

economic conditions on the relevant markets and the characteristics of information exchanged”.