ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA

(SPANISH ASSOCIATION FOR THE PROTECTION OF COMPETITION)

COMMENTS TO THE COMMISSION'S DRAFT SECTION DEALING WITH INFORMATION EXCHANGES IN DUAL DISTRIBUTION

INTRODUCTION

On 9 July 2021, the European Commission published its proposal for a revised Vertical Block Exemption Regulation and its accompanying guidelines (the "**Draft VBER**" and the "**Draft VGL**") that will replace 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. 1–7) ("**Current VBER**") and the Commission Notice – Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1–46) ("**Current VGL**").

In view of the comments received in response to the public consultation that took place until 17 September 2021, the European Commission has reconsidered its proposed treatment of information exchanges between parties in dual distribution. To that effect, following the gathering of further evidence by commissioning the Expert Report[1], it has launched this public consultation on a draft new section dealing with information exchange in dual distribution intended to be included in the new VGL (**"Draft New Section"**).

The Spanish Association for the Defence of Competition welcomes again the opportunity to provide additional feedback to the Draft New Section.

The AEDC's observations are provided by a working group of lawyers, economists and academics, all specialists in the competition law field. However, these observations are made on an individual basis and do not necessarily represent the views of all the members of the Association.[2]

1. GENERAL CONSIDERATIONS.

1.1 Principles on which the VBER and the VGL should operate.

[1] Expert Report on the review of the Vertical Block Exemption Regulation: Information exchange in dual distribution, Final Report, prepared by Commeo Rechtsanwäite und Notar (the **"Expert Report"**).

[2] The members who have contributed to this working group are (by alphabetical order): Marcos Araujo, Juan-José Gisbert, Belén Irissarry, Patricia Liñán, Irene Moreno-Tapia, Edurne Navarro, Alberto Pérez, Héctor Pérez, Leyre Prieto, Pablo Solano, Ainhoa Veiga.

Without prejudice to the inferences that we draw below from the wording in the Draft New Section, some contributors consider that, as a matter of principle, the exemption to non-reciprocal vertical agreements between competitors should not be construed as an exception to the general rule (as it is conceived in Article 2(4) of the Draft VBER) but as the general rule whereby vertical restraints in vertical relations between competitors are to be assessed under vertical rules when such restraints are not horizontal (and Article 2(4) would only be clarifying that non-reciprocal distribution is a case where restrictions are indeed not horizontal). Construing Article 2(4) of the VBER as an exception risks being inconsistent at least with

> (i) Article 1(1)(a) of the Draft VBER, which delineates the scope of the exemption by reference to the position of the parties "*for the purposes*" of the relevant agreement or concerted practice, and thus by considering the horizontal or vertical nature of the restriction and not only the competitive relationship between the parties; and
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> (ii) Paragraph 12 of the Horizontal Guidelines (under review), which expressly refers to the (very common) scenario where "*vertical agreements, for example, distribution agreements, are concluded between competitors*" in order to make their assessment subject to the Horizontal Guidelines instead of to the VBER or the VGL, unless otherwise indicated. The fact that this is expressly clarified in the Horizontal Guidelines and justified on the basis (an to the extent that) "*the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements*" would reveal the Commission's understanding that, by default, vertical relations among competitors would be subject to rules on vertical restraints and only in those cases where the effects are horizontal then the analysis is also horizontal (which is not the case of non-reciprocal distribution as expressly acknowledged in footnote 11 of the Horizontal Guidelines).

From this point of view, information exchanges in non-reciprocal vertical agreements would be, as a general rule, vertical restraints eligible for exemption if the general market share threshold is not exceeded. Therefore, making such information exchanges subject to horizontal rules under certain circumstances (such as a market threshold departing from the general 30 %) would be an exception to the general rule that does not seem justified enough on the basis of differences between information exchanges and other types to warrant Article 2(5), which is suggested being removed. At most, the explanation could be inserted in the Draft New Section (or even in the forthcoming review of the Horizontal Guidelines) that information exchanges in non-reciprocal distribution (exceeding certain market share threshold) pose horizontal rather than vertical concerns and are thus excluded from the VBER.

For the same reason, while the Draft New Section suggests that the European Commission does not intend to drop out the carve-out for dual-role platform providers in Article 2(7), some contributors submit that vertical restraints involving those should be covered by the Draft VBER, even if relating to agreements with third-party sellers (commercial users on the seller side of the platform) which are also competitors of the platform service supplier for end users on the buyer side of the platform. The exclusion of dual-role platform providers is another exception to the general rule that the exemption for vertical agreements does apply to competitors in a non-reciprocal relationship (except for horizontal concerns) and thus its insertion in the Draft VBER should be justified by economic differences vis-à-vis other types of non-reciprocal distribution that do not seem to be present. Therefore, it is suggested removing Article 2(7) of the Draft VBER and address any clarification of the general rule (i.e. horizontal concerns arising from dual-role platform providers relations with competing users and thus not covered by the VBER) in the Draft VGL (or even in the forthcoming review of the Horizontal Guidelines).

1.2. Inferences from the Draft New Section.

The wording in the Draft New Section invites to infer the following amendments to the Draft VBER[3] and the Draft VGL that are to be welcome:

(i) First, information exchanges within the context of dual distribution seem now to be assessed under specific rules contained in the Draft VGL and not under the Horizontal Guidelines.[4] This change clarifies that the assessment for an exemption of information exchanges in dual distribution under Article 101 (3) TFEU is not subject to the same legal parameters and presumptions that the decisional practice of the authorities and the case law of the EU Courts have applied to horizontal information exchanges.[5]

(ii) Second, from the Draft New Section, we infer that Article 2(4) and (5) of the Draft VBER would have been amended so as to make clear that the exemption extends to "*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*"[6].

(iii) Third, on the above, it follows that the Draft New Section assumes that the 10 per cent market share threshold in said provisions of the Draft VBER would have been dropped out. We reinstate the comments in the AEDC's contribution to the Draft VBER and the Draft VGL that the elimination of this threshold was advisable given the practical complexity that it would introduce and the fact that competition authorities have so far expressed concerns essentially regarding information exchanges between hybrid platforms and retailers.

2. COMMENTS ON THE PROPOSED GUIDANCE.

2.1. On the proposed general standard.

The Draft New Section proposes to withdraw the exemption to any exchanges of information that are not "*necessary to improve the production or distribution of the contract goods or services by the parties*" (para 10). Some contributors contend that this standard is much stricter than the current one, where information exchanges are generally permitted within the "safe harbour". This new perspective is problematic on several accounts:

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[3] Last paragraph to the Introduction in the Draft New Section states the assumption on which the guidance would work:

> "*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. The present consultation is nonetheless without prejudice to any future decision by the Commission in relation to any regulation replacing the VBER.*"

[4] As initially suggested by the European Commission; see Draft VGL, para. 90 (d). The Draft New Section now suggests that guidance on information Exchange in dual distribution should be included as a new section in the Draft VGL.

[5] For a more comprehensive analysis of the consequences of this change, please see Expert Report, pages 3 and 19.

[6] See Draft New Section, paras. 9 and 10.

(i) First, the proposed standard appears to go far beyond the initial purpose of the Draft New Section, which is limited to dual distribution. It amounts to a far wider principle that would lead to the questioning of information exchanges in non-dual distribution scenarios too. This is further exacerbated by the fact that some of the situations identified in the Draft New Section as not acceptable information exchanges under the proposed standard are not clearly limited to dual distribution, as further discussed below.

(ii) Second, in addition to stricter, the proposed standard is vague, as it is difficult to agree on when some information would improve production or distribution (the "*necessary to*" adds confusion and some contributors consider that it should be removed). Partly, there is a problem of formulation, as the standard is proposed as binary, when the problem is often one of degree (i.e., what is an acceptable intensity of information).

In line with the above, any proposed new standard should balance the potential benefits resulting from an information exchange and the eventual impairment of competition under a defined theory of harm. This is replaced in the Draft New Section by a rather blank standard. Indirect guidance in that respect can be found in the negative list in paragraph 14 of the Draft New Section, which suggests that the conduct may be harmful either (i) in the context of future pricing discussions; (ii) if customer-specific sales data were to be delivered; or (iii) certain information on sales of private label goods. However, these are three very different problems leading to a marked lack of clarity on the theory of harm.

The lack of any reference to the competitive harms that should be countered makes the necessary balancing complicated and thus, it would be desirable that the Draft New Section elaborated on those harms to centre at each instance the debate on which exchanges are problematic and why.[7]

2.2. On the scope of the clarifications in the Draft New Section to identify exempted information exchanges in dual distribution.

The Draft New Section intends to provide useful clarification on how to delineate the boundaries between necessary and unnecessary information exchange in a dual distribution scenario, through:

(i) The inclusion of concrete examples of information exchanges that would be legitimate or would raise concerns.

(ii) The clarification that the necessity test must be construed in view of the specific distribution system model put in place. Accordingly, the Draft New Section expressly recognises that for an exclusive distribution model it would be necessary to exchange information on the

[7] In the specific context of dual distribution, information exchanges may reduce downstream competition where the supplier can use internal information on the buyer's initiatives, which has been requested for the better organisation of distribution, in a manner that may damage downstream competition. To put an extreme example, arguably a supplier implementing an open book policy (access to any internal workings, costs, prices and dealers, which makes sense in various markets) should not use that information to compete with the distributors and keep separate retail activities with appropriate information silos on these specific data. We should therefore propose that his theory of harm (or any other if appropriate) is explicitly expressed in any guidance on this matter.

territories or customer groups that are allocated to the buyer or the supplier, whereas in a franchise model it may be necessary to share information on the application of a uniform business model across the franchise network[8].

(iii) The recognition that undertakings may put in place certain mechanisms to minimise competition concerns arising from information exchanges in a dual distribution scenario, such as in-house firewalls between personnel responsible for the supplier's upstream activities and downstream activities, aggregation or an appropriate delay of the information exchanged.

The AEDC's contributors have noted the following issues that deserve further consideration:

(i) Concerning the notion of agreement:

The Draft New Section is understandably concerned that informal exchanges may be understood not to fall under the rules that are proposed. This is both welcome and understandable. However, the example provided at paragraph 11 *in fine* ("*takes place on an informal basis including, for example, where one party communicates information without the other party having requested it*") is misleading in that it mixes purely unilateral communications with information that is requested. It is submitted that only the latter falls under Article 101 TFEU and may be concerned by the proposed rules.

(ii) Concerning the link between information and distribution system:

Paragraph 12 discusses the relationship between the distribution model and the information that may be admissible.

While some contributors miss more useful examples, other contributors observe that this is overly prescriptive and risks missing the point. Ultimately, the question is what information may be accessed by a supplier in a context of dual distribution. Introducing the separate issue of whether specific categories of information may be required by "distribution model" would open the door to questioning the admissibility of information requests beyond dual distribution based on preconceived ideas of what information should be provided to suppliers in each distribution model.

In line with the above, some contributors suggest that this paragraph should be removed and be replaced by a new paragraph discussing categories of information which should generally be available to the supplier to organise distribution and buyer's internal strategic information, which should not be requested or eventually ring-fenced appropriately so that it is not accessed by the downstream branch of the supplier.

(iii) Concerning dual pricing:

The Draft New Section does not explain how suppliers are expected to implement dual pricing policies in compliance with the information exchange guidance. As explained in the

[8] Draft New Section, para. 12.

AEDC's comments to the Draft VBER and the Draft VGL, suppliers are expected to conduct a price-to-cost comparison to ensure that the difference in price reflects differences in the costs incurred in each channel by the distributors at the retail level.

In addition, it would be helpful to clarify that price vigilance and reporting aimed at preventing that the low-priced goods enter the separate higher-prices channel is necessary to properly implement a dual pricing policy.

2.3. On the proposed "white list".

The list in paragraph 13 contains a non-exhaustive list of examples of information that would initially be unproblematic, which is a welcome exercise. Two specific comments:

(i) It is suggested that, in the specific context of dual distribution, the details in (b) ("*Information relating to the supply of the contract goods or services, including information relating to production, inventory, stocks, sales volumes and returns*') should arguably be protected from use by the supplier in its downstream activities, unless shared with the entire network of retailers.

(ii) The information in d) seems of no use to the supplier since the supplier knows at which price it sells to the buyer.

(iii) On a related vein, the sharing of information of other dealers at (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'* – emphasis added) should comprise the sales activities of the supplier itself in equal terms as those of the other buyers.

2.4. On the proposed "black list".

The list in paragraph 14 refers to three very different situations:

(i) Indent (a) concerns information sharing linked to illegal price fixing. Because this information sharing is a hard core restriction under the VBER and the Draft VBER, some contributors consider that its inclusion in this list is likely unnecessary and confusing. Besides, these exchanges are considered hard core restrictions irrespective of a dual distribution scenario, which is initially the scope of the Draft New Section.

Other contributors would find it useful to further clarify whether, in line with para (182) of the Draft VGL, the introduction of a new product would also be covered by the exemption as the exchange of information related to actual or future prices could be considered necessary to improve the production or distribution of the contract goods or services.

(ii) Indent (b) appears to blacklist any 'open book' agreements. As earlier noted, this is a feature in some distribution agreements that makes sense in certain situations and is currently permitted by the VBER. The proposal is to exclude that from the exemption in the context of dual distribution. While understanding the underlying reasons and accepting that this could be a solution, it is submitted that a less restrictive (and hence more appropriate remedy) would be to allow strict information ring-fencing as an alternative (see comments on remedies below).

(iii) Indent (c) addresses a very specific and unrelated problem concerning private label products. It is understood this is again independent of dual distribution, in that retailers should never be put in a position to disclose any information on private labels, whether the supplier competes downstream or not. We may add that the distinction that the Draft New Section proposes in paragraph 5 between private label 'in-house' manufacturers and subcontracting scenarios is inappropriate and confusing. That said, whether horizontal or vertical, the problems are similar and access to this information should be restrained. But again this is not a specific dual distribution problem and hence its inclusion in the Draft New Section is confusing.

Moreover, if only the exchange of information stated in point c) is considered problematic, it is respectfully requested that "the exchange of information relating to competing goods sold by the buyer not under its own brand name" is expressively included in the "white list". Some contributors consider that selling prices of competing goods is crucial for any supplier in any sector to pro-competitively analyse and adapt its pricing positioning in the market, and efficiently optimize its marketing and commercial strategy, and ultimately, the workload of the manpower of any organization.

2.5. On the proposed remedies.

The Draft New Section in paragraph 17 suggests the adoption of certain measures to minimize the risks of horizontal concerns in information exchanges and this is very welcome. However, the contributors have noted the following:

(i) The suggested precautions assume that the exemption does not apply, or in other words, that the information that is requested would not improve distribution. It would be useful to clarify that appropriate ring-fencing and other suggested precautions would result in treating the information exchange as one benefitting from the exemption and that this clarification is included in the VBER itself.

(ii) More generally, the Draft New Section should suggest an indicative level of aggregation or delay in exchanging information that could serve as a general principle, subject to the legal and economic circumstances of each market.

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