

Targeted Commission consultation on the proposed guidance relating to information exchange in the context of dual distribution

AFEP Comments

The European Commission opened a short public consultation on a draft new section dealing with information exchange in dual distribution, intended to be included in the revised Vertical Guidelines within the broader review of its Vertical Block Exemption Regulation (VBER).

The French Association of Large Companies (AFEP) welcomes this draft guidance.

In its summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation, the Commission underlines that all **categories of stakeholders asked for more guidance** on the type of information that can be exchanged between the parties in a dual distribution relationship and on the measures that undertakings can take to address possible competition concerns, including the use of Chinese Walls, aggregation of data, etc.

With the development of online sales, dual distribution system has indeed become a very structuring tool for economic players which multiplies distribution channels for products and services and offers consumers broader offers. **Additional clarity and legal certainty for economic operators is therefore appropriate.**

AFEP had underlined in its September 2021 [position](#) the **inadequacy of the framework of horizontal agreements to the dual distribution system**. Horizontal agreements aim to avoid any difficulties between competing companies **selling different products** in order to maintain efficient competition for the benefit of the consumer. Dual distribution agreements are first and foremost vertical agreements as it consists of **selling the same product** through the multiplication of channels, thereby increasing the availability of the same product for the consumer and *de facto* increasing competition in the market for this product. AFEP therefore supports the **choice made by the Commission to address this issue in the Vertical Guidelines** as it will really improve legal certainty for economic operators and dual distribution agreements are first of all vertical agreements.

The **sharing of information between the supplier and the distributors is integral to the functioning of dual distribution** to create a real sale consistency around the product in a pro-competitive approach, making it possible to best meet the demands of both the market and of the consumer. Sensitive information likely to fall within the scope of vertical agreements (price, market share, etc.) is anonymized to nevertheless allow reflection on future strategies. AFEP therefore supports the proposal that would make it possible for the information exchange in a dual distribution agreement to benefit from the exemption (covered by the “safe harbour”) except for the exchanges of information that are excluded by Article 2(5) of the Regulation (§14).

- **AFEP member companies welcome in particular:**
 - The guidance given on particular business models with necessary exchange of information (§ 12), such as exclusive distribution agreement, franchise agreements or selective distribution, which involves for the supplier and distributor to create a real sale consistency around the product. These models refer to real economic situations met by companies which indicates how well the Commission understands this point.
 - The non-exhaustive list proposed by the Commission of examples of information that can be considered necessary to improve the production or distribution of the contract goods or services by the parties, which is very helpful (§ 13). AFEP had also called in its September position for the Commission to define the exchanges it intends to target.
 - The types of information listed (§14) as generally not strictly necessary to improve the production or distribution of the contract goods or services and are excluded by Article 2(5) of the Regulation.

- However, AFEP member companies also propose two additional modifications in this draft new section dealing with information exchange. More specifically, AFEP proposes to clarify § 9 and 14 b) as follows:

- To confirm the presumption of legality related to information exchanges.

“(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 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; ***except the exchanges of information that are excluded by Article 2(5) of the Regulation (i.e. (14) of the Guidance document).***”

- To add precisions to the scope of information exchanges.

While AFEP supports the Commission’s proposal according to which an exchange of information that identifies particular customers can be justified in specific cases, it would be useful to precise it. In fact, the Commission should allow, in addition to the cases listed in point (14) (b), for the exchanges needed to provide customer care to also be permitted. Thus, point 14 (b) should be amended as follows:

“(14) (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 implement brand-specific customer care and loyalty measures*** or to allocate customers under an exclusive distribution agreement.”

- AFEP also wishes to **reiterate an essential point** in the draft revised VBER:

As mentioned by the Commission, all categories of stakeholders were critical of the threshold introduced in Article 2(4) of the draft revised VBER, which limits the current safe harbour for dual distribution to instances where the parties’ aggregated market share in the retail market does not exceed 10%.

At this stage, AFEP notes that it is **unclear from the draft additional guidance whether the 10% market share threshold for information being within the safe harbour remains**, which AFEP did not support in its position (see AFEP’s position from September 2021).

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About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members’ vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP’s core priority. AFEP has more than 110 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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