

Brussels, 17 February 2022

Comments on the draft supplementary Guidelines on information exchange in the context of dual distribution

1. General comments

- Points 6 to 9 of the draft supplementary Guidelines do not indicate whether, in the context of dual distribution, the exemption of information exchanges is conditional:
 - not only that the information exchanged is necessary to improve the production and distribution of the contracted goods or services,
 - but also to the specific threshold of the combined market share of the supplier and the distributor on the retail market not exceeding 10%, as provided for in Article 2.4 a) and b) of the draft regulation published in July 2021.

This uncertainty does not allow for an informed assessment of the scope of the draft supplementary Guidelines.

Exchanges of information can have significant negative horizontal effects and in some cases constitute restrictions of competition by object. It would therefore be logical that they should only be exempted if they are strictly necessary to improve the production and distribution of the contracted goods or services, irrespective of any market share threshold.

- The introduction to the draft recalls paragraph 28 of the current Guidelines according to which in the case of dual distribution, *"the potential negative impact of the vertical agreement on competition between the supplier and the buyer at the retail level is less important than the potential positive effect of the vertical agreement on competition at the manufacturing and retail level"*.

However, there are two important caveats to this approach.

On the vertical level, direct sales by a supplier are in contradiction with a selective distribution system:

- legally, because they are antinomic to the criteria deemed *"necessary"* for a good distribution of its products or services, which the supplier requires its distributors to respect and which it dispenses with for its direct sales;
- economically because an unrestricted development of its direct sales by the supplier undermines the viability of the investments made by the distributors to meet the selective criteria they are required to meet.

In addition, at the horizontal level, the development of a supplier's direct sales on the basis of net prices generally leads to price alignment practices, with the prices posted by the supplier becoming the reference price (see French Competition Authority, Decision 20-D-04 of 16 March 2020, point 333 et seq.)

Such an alignment effect can only be reinforced by increased price transparency with the development of internet sales, in addition to the numerous factors that limit the pricing freedom of distributors in most networks, in particular the low margins and the unpredictability of discounts (see in particular for the distribution of APPLE branded products the aforementioned decision of the French Competition Authority, points 350 to 456; for car distribution, the decision of the Austrian Supreme Cartel Court of 17 February 2021, points 175 to 211).

2. Remarks on the typology of necessary and unnecessary information proposed by the draft supplementary Guidelines

➤ Information considered necessary

Point 6 of the draft specifies that the conditions for exemption under Article 2.4 of the Regulation must be assessed restrictively in view of their derogatory nature.

Certain types of information considered necessary in the draft supplementary Guidelines should nevertheless be specified.

- 13(a) Information enabling the supplier to tailor the contracted products and services to the needs of the customers.

This information should be kept anonymous, as the supplier does not need to know the identity of customers in order to improve the characteristics of the products or services.

- 13(b) Information relating to the supply of products.

Information about stocks may be justified in order for a supplier to ensure that a distributor has a sufficient volume of products for display or demonstration purposes.

However, information on overall stock levels may have negative effects on competition.

On the one hand, it may encourage the implementation of automated stock management systems that allow a supplier to saturate a distributor's needs and thus prevent the latter from purchasing substitutable products of equivalent quality (e.g. spare parts in the context of car distribution).

On the other hand, and conversely, they may give the supplier visibility enabling him to limit the sales capacity of certain distributors, in particular those whose pricing policy might compete with his direct sales (see French Competition Authority, decision 20-D-04 of 16 March 2020, points 683 et seq.)

- 13(e) Information on the recommended or maximum resale price

We believe that Resale Price Maintenance ('RPM') imposed by indirect means is the current reality on the car distribution market¹. Surprisingly, the proposed Guidance does not reflect appropriately this reality.

To the contrary, the proposed Guidance offers safe harbour for exchange of '*information relating to the prices at which the buyer resells the goods and services*'². We believe that the mere reference to the prohibition of information exchange for the use of restriction the buyer's capability to determine its sale price is not sufficient. This is because the exchange of such information raises competition concerns in itself.

Moreover, in our interpretation there is a contradiction in Paragraph (13) point (e) to Paragraph (14) point (a) in relation to future prices which may open manufacturers (false) ways to determine future prices of the distributors. Section (13) says:

"The following is a non-exhaustive list of examples of information that [...] can be generally considered to be necessary [...] and can therefore benefit from the exemption by Article 2(1) of the Regulation. Unless indicated otherwise, the examples cover information communicated by

¹ CECRA's note to EC Working document on 'Distributors that also act as agents for certain products for the same supplier' dated on 2 April, 2021

² See draft Guidance Section (13)(e)

the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past, present or future conduct. [...]

e) [...] Information relating to the supplier's recommended resale prices or maximum resale prices for the contract goods or services and information relating to the prices at which the buyer resells the goods or service'; (emphasis added)

The exchange of any price information (even if it does not relate to future prices) and of any other future strategic information would be clearly in contradiction with the purpose of Section (14a) (actual future prices) and with the aim of VBER as well as with general competition law principles.

Therefore, we recommend to remove entirely the wording 'future' and 'information relating to the prices at which the buyer resells the goods or service' from Paragraph (13). This removal would strengthen the reference '*without prejudice to paragraph (14) point (a) below concerning information relating to actual future downstream sale price*' as well.

Finally, we would welcome more specific wording to information exchange having direct or indirect anti-competitive effects.

Our suggestion to Paragraph (13) and point (e) is the following:

"The following is a non-exhaustive list of examples of information that [...] can be generally considered to be necessary [...] and can therefore benefit from the exemption by Article 2(1) of the Regulation. Unless indicated otherwise, the examples cover information communicated by the supplier or the buyer, irrespective of the frequency of the communication and irrespective of whether the information relates to past or present ~~or future~~ conduct. [...]"

'Information relating to the supplier's recommended resale prices or maximum resale prices for the contract goods or services and ~~information relating to the prices at which the buyer resells the goods or services~~, provided that such information exchange is not used or has no direct or indirect effect to restrict the buyer's ability to determine its sale price [...]'

- 13(g) Performance information.

The disclosure by the supplier to the buyer of aggregated information about the sales and marketing activities of other buyers may be considered necessary if it relates only to sales volumes of the products.

On the other hand, the provision of information by the supplier on the value of sales of the products, even in aggregate form, requires that the supplier obtains from each buyer individualised information on the value of its sales and thus visibility on the retail prices charged and the margins earned by each buyer, thus providing the supplier with a means of monitoring the pricing policy and profitability of the different operators in its network.

The expert report suggests that the supplier's access to the amount of sales made by a distributor might be necessary to verify compliance with quantitative criteria relating to the achievement of a minimum turnover (page 26). Such a criterion can, however, be measured in terms of the amount of purchases made by a distributor. Moreover, it is generally on the basis of the amount of purchases and not of minimum sales that the quantitative turnover criteria for membership of selective networks are defined. Obligations relating to the achievement of sales volumes are usually understood as obligations to endeavour to sell a certain number of units of a product and not to achieve a minimum turnover in value.

➤ **Information not considered necessary**

- 14(b) Customer-specific sales data

With regard to sales data specific to individual customers, it is not clear how such data could be "*necessary*" in the sense of the competition rules, i.e. indispensable "*to enable the supplier to tailor the contracted goods or services to the requirements of a customer*", or "*provide after-sales services*" (outside the contractual guarantee).

"*Adapting the goods or services to the specific needs of a customer*" is the function of the distributor; if technical support from the supplier is needed for this purpose, this support may be provided on the basis of information provided by the distributor/purchaser to the supplier on the characteristics and/or use needs of the customer, without the need for that customer to be identified individually by the supplier.

- Example of information exchange in a dual distribution scenario in car distribution, given in the expert report (pages 44, 45)

In the scenario considered, a supplier/automotive manufacturer :

- distributes the new vehicles in its range equipped with combustion engines through buyer-reseller distributors (1) or direct sales to rental companies, fleets and companies, on the one hand, and vehicles equipped with electric motors through direct sales, online or through an agency system (2), on the other hand
- has both ranges of vehicles serviced by the distributors who buy and sell the combustion engine vehicles (1),
- requires its dealers to use a central computer system which allows the supplier "*to have access to sales information to customers, buying via both channel (1) and channel (2)*",
- "*As a result, the supplier has a transparent view of the distributors' activities*".

According to the expert's report: "*In the light of the very broad requirements for after-sales services, we do not see how the information exchange system described should be considered disproportionate for the implementation of the chosen distribution configuration*".

On the contrary, it appears that the access to all "*information on sales to customers*" by the distributors of the channel (1) that the supplier thus provides for itself is in no way "*necessary*" for the implementation of such a distribution configuration.

On the one hand, the fact that the supplier has both vehicles with combustion engines and vehicles with electric motors serviced by channel (1) dealers cannot justify that he has access to "*information on sales to customers*" buying through channel (1) and that the supplier has a "*general transparent view of the dealers' activities*".

Indeed, the distributors operate as independent operators, competitors of the supplier, for the sale of vehicles in channel (1) and moreover as independent operators for the after-sales service, both for vehicles sold through channel (1) and for those sold through channel (2).

On the other hand, it is not "*necessary for all digital services to be provided by all dealers belonging to the network*" that the "*identity of all customers and the purchase information of all vehicles*" pass through an IT system imposed by the supplier, giving him "*a transparent view of the dealers' activities*".

A centralisation of the data necessary for this purpose can indeed be ensured by an IT system managed by a trusted third party.

➤ **Practical measures to be implemented with regard to information exchange**

It would be useful for the Guidelines to provide indications on the precautionary measures to be taken to prevent the anti-competitive effects of information exchanges, in particular as regards

- separation of computer systems and databases
- separation of the parties involved in dual selling situations on the supplier and distributor sides,
- in general and in multi-branding situations.

3. Additional remarks on hybrid platforms

Article 2.7 of the draft Regulation provides that providers of online intermediation services that sell goods or services in competition with the undertakings to which they provide intermediation services do not benefit from the exemption.

This is of particular importance for the car distribution sector.

Indeed, manufacturers intend to set up "ecosystems" around marketplaces on which not only new vehicles, but also second-hand vehicles (in particular by putting all their stocks online, which is required of the distributors in their networks), financing and mobility services would be offered.

In order to organise these "ecosystems", manufacturers appropriate the personal data of customers and impose its transfer to their distributors, at best in return for discretionary conditional payments.

Through the information feedback they require from their distributors, manufacturers also have strategic information on prices and discounts granted to customers, sales volumes, consumer preferences and purchase forecasts.

The retention of the provisions of Article 2.7 of the draft regulation is therefore essential.

The argument that these provisions would prevent suppliers from helping their distributors to sell online by making a central site available to them is not relevant.

The majority of distributors now have their own websites. Moreover, while a central site common to a network can improve the visibility of a brand, it is not necessary that it be controlled by the supplier, who competes with his network through direct sales.

The management of platforms common to a network by a trusted third party is perfectly possible and necessary in order to avoid the mixing of genres and the risks of negative effects on competition inherent in hybrid platforms.