BSH Hausgeräte GmbH, Postfach 83 01 01, 81701 Munich, Germany

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Additional public consultation on proposed guidance relating to information exchange in the context of dual distribution, intended to be added to the Vertical Guidelines ("Draft Vertical Guidelines") – Submission of BSH Hausgeräte GmbH

General comments

The proposed sections on dual distribution in the Draft Vertical Guidelines are considerably less complicated than the previous version, reflect commercial practices and necessities much better, and create more legal certainty for suppliers. This is in particular because information exchange in dual distribution scenarios will to a large extent be addressed directly in the Draft Vertical Guidelines (where it belongs), and because the 10% downstream market share threshold and the reference to "horizontal restrictions of competition by object" proposed in the previous draft have been omitted.

Block exemption of the exchange of necessary information

The proposed new article in the Vertical Block Exemption Regulation ("VBER") provides 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". In other words, this new provision would exempt, within the scope of application of the VBER (in particular provided that market share thresholds are not exceeded), any exchange of information that is "necessary to improve the production or distribution of the contract goods or services by the parties". We understand that this is a provision that would apply exclusively to dual distribution scenarios, because such information exchange cannot possibly require any exemption in "standard" distribution scenarios without any horizontal dimension.

While we believe that this kind of information exchange will generally not need any exemption either even in cases of dual distribution, we welcome the increased legal certainty that this new provision would bring, in particular when combined with the useful and pertinent examples in paras. 13 and 14 of the Draft Vertical Guidelines of what constitutes information that is "necessary" or "not necessary". We note, in particular, that the Commission takes a very nuanced approach when it comes, for example, to information about resale prices in paras. 13 e and 14 a.

While we understand that the list is not and cannot be exhaustive, we would like to draw the Commission's attention to one type of information that is of particular practical importance: The supplier and its trade partners will often agree on certain performance-related trade terms (such as turnover bonuses, bonuses granted specifically for growth in a particular product category or in a specific sales channel, or discounts granted subject to the provision of certain services to consumers in the context of the sale of the product in question). Such performance-related trade terms are very common, and it must be possible for the supplier to collect / request from its trade

partners all information necessary to verify compliance with such requirements, in a dual distribution scenario just like in a "standard" vertical agreement. And the same is true in the context of selective distribution, where access to the products is conditioned upon the buyer meeting certain quality criteria and / or providing certain services.

We would assume that "information relating to the marketing of the contract goods or services" (para. 14 f) and „performance-related information" (para. 14 g) covers such cases, even if the specific examples given there seem to have other scenarios in mind. To further increase legal certainty, we suggest either adding a new sub-paragraph in para. 14 for this particular purpose or amending para. 14 g accordingly, e.g., by adding "including any information necessary for the supplier to verify the buyer's compliance with or the degree of fulfillment of performance-related conditions or other criteria or requirements related to the quality of distribution that are provided for in the vertical agreement between the parties".

Information exchange not covered by the Block Exemption; market share threshold

We understand that, as per para. 15 of the Draft Vertical Guidelines, if parties whose vertical agreement falls within the scope of the VBER exchange information that is not necessary, this exchange does not benefit from exemption and may be viewed as anti-competitive, but that the remainder of their vertical agreement remains exempted. In other words, the exchange of non-necessary information does not have the character of a hardcore restriction. We agree with this approach. We can think of a large variety of scenarios where the parties exchange or share non-necessary information, ranging from completely innocent cases to rather critical cases. We also believe that for such scenarios – where the information is not necessary to improve the production or distribution of the contract goods or services – the general reference to the Horizontal Guidelines is appropriate.

At the same time, we are unsure of the relation between para. 15 and para. 16 of the Draft Vertical Guidelines. Para. 15 seems to apply exclusively to cases where the exemption fails because the information that is exchanged is not necessary, while para. 16 seems to apply to all cases where the exemption fails, no matter why, in particular also to cases where the information is necessary, but where market share thresholds are exceeded. While para. 15 refers to the Horizontal Guidelines, para. 16 refers to the case law on concerted practices. We think that this cannot be correct: Where the market share thresholds are exceeded, the exchange of information that is necessary to improve the production or distribution of the contract goods or services is still a fundamentally pro-competitive practice and is vertical in nature, even in a dual distribution scenario.

Accordingly, we would strongly suggest adding some language to the effect that even outside the scope of application of the VBER, i.e., where market shares thresholds are exceeded, there is a presumption that the exchange of such necessary information is pro-competitive even in dual distribution scenarios, or at least that it is highly unlikely that any negative effects on consumer welfare would not be outweighed by efficiencies.

Cases where the buyer also has manufacturing activities; potential competition

Para. 5 of the Draft Vertical Guidelines states that cases where a manufacturer sells goods to "wholesalers and retailers that manufacture goods in-house for sale under their own brand name" are not covered by the VBER. We think this is too strict: Where a retailer belongs to a large corporate group that also has manufacturing activities in the same market as the supplier, this fact alone should not bring the vertical agreement between the supplier and the contract partner's "retail branch" completely outside the scope of the VBER. The exchange of necessary information in the context of the vertical agreement between such parties should also benefit from the block exemption.

This approach would also eliminate the problem that it is often very difficult in practice to determine if a downstream contract partner is a potential competitor at the manufacturing level: A buyer who is engaged in a "make or buy" decision making process (i.e., considering whether to start manufacturing certain products himself for sale under his own brand, or whether to continue purchasing such products from third parties) would probably need to be viewed as a potential competitor at the manufacturing level as per para. 4 of the Draft Vertical Guidelines. However, it is impossible (and would possibly even be unlawful) for the supplier to know if his contract partner is engaged in such considerations, and at what stage.

Unilateral disclosure of information; rejection of unwanted information

Para. 11 clarifies that "information exchange" also covers cases where "information is communicated by only one party". Without going into the difficult discussion of whether such a unilateral act can really constitute a "vertical agreement", we would suggest a clarification that no such "information exchange" takes place where the receiving party promptly and unambiguously rejects the information.