

February 2022

1. Introduction

The Competition Policy Working Group of the European Round Table for Industry (ERT) highly appreciates the European Commission's decision to revise its guidance for information exchange in a dual distribution context, which is intended to be added to the Vertical Guidelines (hereinafter "Draft Guidance").

We have contributed with an Expert Paper to the previous consultation in the framework of the revision of the Vertical Guidelines (March 2021)¹ and would like to emphasise certain points whilst reacting to new elements in the Draft Guidance.

We appreciate that the Draft Guidance is a step into the right direction but think that further clarifications are needed to harvest the full pro-competitive potential of dual distribution setups. It cannot be stressed enough that dual distribution is genuinely vertical and pro-competitive. In addition to distributors, wholesalers and retailers, the manufacturer itself engages in selling its products to customers and consumers. In the end, products become more widely and easily available to customers and consumers.

We urge the Commission to further explain its theory of harm clarifying why it is concerned about dual distribution and why stricter rules on information exchanges between a manufacturer and its distributors / retailers should apply.

Against this background, we encourage the Commission to take into account the following observations when finalising the Draft Guidance.

2. The deletion of the 10% market share requirement in Art. 2 (5) Draft VBER should be implemented

We understand that Art. 2 (5) of the Draft VBER published on 9 July 2021 will be replaced by a new 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" and, accordingly, the originally foreseen 10% market share threshold requirement for block-exempting information exchange in a dual distribution scenario has been dropped by the Commission.

We highly welcome that the too narrow and unpractical additional market share threshold will no longer apply.

¹ See ERT webpage: <https://ert.eu/documents/ert-expert-paper-vertical-agreements/>.

3. General information exchange rules for vertical relationships should apply to dual distribution with only very narrow and limited exceptions

Dual distribution agreements allow suppliers to open up additional sales channels, geographic territories or customer segments for their products. Suppliers are thus able to reach many more customers and consumers than they could do with their own limited resources either by only (a) selling direct (including on-line) or (b) only relying on intermediaries. Dual distribution increases both interbrand and intrabrand competition and ultimately broadens choices for customers and consumers. In order to support resellers as well as possible in selling their products and services (to the ultimate benefit of consumers) suppliers who are active downstream and their resellers depend on a mutual exchange of information to the same extent as suppliers who are not active downstream. The fact that the supplier is also active downstream in dual distribution scenarios does not change the nature of the relationship established between that supplier and its retailers, which is a vertical and not a horizontal one

Accordingly, the block exemption of the VBER for purely vertical relationships provided in Art. 2(1) should also apply, as a general rule, in a dual distribution scenario. The treatment of dual distribution and information exchanges in the context of dual distribution does not warrant regulation by exception as currently envisaged by draft Art. 2(4) and 2(5). Bringing dual distribution under the umbrella of the general rule would better align the text of the VBER with economic reality as described in the expert report and as acknowledged by the Commission in para (6) of the Draft Guidance: *"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."* ERT submits that the exemption should only be denied in exceptional cases of a hardcore restriction.

4. Criterion in Article 2 (5) should be clarified and broadened to ensure legal certainty and uniform application of the law

We note the Commission is proposing to include in Article 2 (5) a criterion to determine the application of the block exemption to the information exchange: *"necessary to improve the production or distribution of the contract goods or services by the parties"*.

This criterion is vague and ambiguous and likely to lead to a wide range of interpretations by NCAs and national courts. Divergent interpretation and application threatens legal certainty and uniform application of the law.

5. The treatment of information exchanges should be clarified in the VBER itself and not only in the Guidelines in order to promote legal certainty and uniform application of the law

ERT welcomes that the Commission has clearly defined the types of information exchange which it considers would remove the benefit of the block exemption.

However, the ERT regrets that the Commission has only indicated its position in the Draft Guidelines, while the Draft VBER remains silent. The ERT submits that the approach of regulating via Guidelines is likely to threaten legal certainty and uniform application of the law. NCAs and national courts, which are not bound to the more concrete guidance provided in the Vertical Guidelines, have already taken divergent approaches on a number of issues in the past.

In line with the goals of the VBER reform to strengthen legal certainty and to match the systematic approach chosen in the BERs, the exemption of Art. 2 (1) should generally apply and only selected and concrete forms of information exchange which are not covered by the block exemption should be included in the VBER itself. In this regard, the VBER could take the form of para 14 a)/c) of the Draft Guidance.

6. Para 13/14 should exempt all information exchange for customer/project specific commercial requirements

Should the Commission maintain the proposed approach of giving concrete guidance on the applicability of the VBER only in the Guidelines, para 14 b) should be deleted and para 13 c) expanded. It appears difficult to broaden the exceptions provided in para 14 b) to cover the manifold pro-competitive forms of cooperation between suppliers and resellers which in numerous cases require a concrete exchange of information on individual customers. To give just a few examples that should definitely be block exempted:

- In many instances products are complex and either need to be explained to customers, or require special conditions (e.g. price, warranty, delivery), technical consultancy and/or on-site support involving not only the distributor / reseller but also the supplier. This scenario occurs frequently, in particular in the B2B project business. In these cases, the supplier needs to know the customer's identity and the main parameters of the customer's requirements in order to support the reseller or the customers as well as possible.
- Exchanging information on the customer's identity for the purpose of customer care by the supplier can be essential to increase efficiencies, such as enabling the supplier to implement brand-specific customer loyalty measures which lie in the common interest of both the supplier and the buyer. Access to non-aggregated customer data can be indispensable to calculate compensation of resellers and sales representatives if based on individual performance.
- Information on geographic location and customer identity may be required to ensure that the supplier and its resellers can offer their products and services to the greatest possible number of customers and to ensure maximum geographic and segment reach, e.g. by analysing white spots in their sales network.

- Information on prices charged by the buyer to its customers and/or on its margins may be required by the supplier to secure that the buyer is passing on its customers the rebates and/or specific pricing conditions granted by the supplier to support the sales efforts of the buyer. Similarly, in situations where the supplier sets maximum resale prices, information on prices charged by the buyer to its customers may be required to check that the buyer is not charging its customers higher than allowed.
- A distributor may maintain and service a machine and the supplier fill the machine with products (or vice versa). In this scenario, it is vital to have full access to information in order to provide the customer/consumer with a seamless experience.
- In order to guarantee effective, customised promotional efforts (which ultimately benefit consumers), suppliers may have to tailor them to specific retailers and even locations which again requires granular information.
- Especially in consumer-facing businesses, a thorough understanding of customer habits on reseller and location level may be critical to drive sales with offerings that respond to different demand patterns effectively. This requires insights into a broad range of factors from size, type and location of a store and specific customer demographics.
- It may also be critical for suppliers to have details on individual products and services sold for inventory, demand and production planning.
- Across industries, customer-specific information may be indispensable to improve the supplier's offering and continue innovating.
- Where resellers are small businesses that cannot afford sophisticated data analytics, they may benefit from their suppliers' capacities to evaluate granular sell-out data. On that basis, suppliers can support resellers with software support and individualised data-based insights on, for instance, customer segments and purchase propensity. These assessments help resellers to shape targeted campaigns and more generally effective sales strategies.

7. Vertical rules to apply also outside the VBER

Finally, the exchange of information in dual distribution setups outside the VBER (e.g. in case of market shares (slightly) above 30%) should also be assessed under the vertical rules, as suggested by the expert report. Accordingly, the exchange should be assessed following a pure effects-based approach, comparing the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange.

A clarification on this point should be included in Section 8 of the Vertical Guidelines.

Also, paras 15 and 16 of the Draft Guidance should be amended in as much as they state that exchanges of information between a supplier and buyer in a dual distribution scenario that do not benefit from the exemption provided by Art. 2(1) of the VBER should be assessed under Art. 101 TFEU applying the Horizontal Guidelines (para 15) and the presumptions established by the case law of the Court of Justice of the European Union relating to exchanges of information between competitors (para 16).



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This Expert Paper has been prepared by the Competition Policy Working Group of the European Round Table for Industry in response to a consultation by the European Commission [February 2022]

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