

GTDC'S REPLY TO THE PUBLIC CONSULTATION ON INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION AGREEMENTS

Date: 18 February 2022

I INTRODUCTION AND GENERAL CONSIDERATIONS

1. The Global Technology Distribution Council (**GTDC**) is the industry consortium representing the world's leading technology distributors. GTDC members drive an estimated \$150 billion in annual worldwide sales of products (\$ 60 billion in EEA sales), services and solutions through diverse business channels, sourced from manufacturers such as Cisco, IBM, HP, Apple, Microsoft, Samsung, among others. GTDC conferences support the development and expansion of strategic supply-chain partnerships that continually address the fast-changing marketplace needs of vendors, end customers and distributors. GTDC members include AB S.A, Almo Corporation, Arrow Electronics, CMS Distribution, Computer Gross Italia, D&H Distributing, ELKO, Exclusive Networks, Esprinet, Exertis, Infinigate, Ingram Micro, Intcomex, Logicom, Nuvias, Siewert & Kau, SiS Technologies, Tarsus, TD SYNTEX, TESSCO Technologies, Inc., TIM AG and Westcon-Comstor.
2. GTDC welcomes the opportunity to participate in the additional public consultation on the draft new section on information exchange in the context dual distribution in the Vertical Guidelines (**Guidelines**).
3. Firstly, GTDC commends the European Commission (the **Commission**) on taking on board the feedback gathered in the previous consultation rounds. Most notably, as GTDC understands it, the Commission has abandoned the idea of introducing the rule that all exchanges of information in the context of dual distribution must be assessed under the Horizontal Guidelines where the combined market share at retail level of the buyer and the supplier exceeds 10%. In GTDC's view the more nuanced approach as set out in the draft new section would be a significant improvement from the market share rule.
4. However, and as explained in more detail below, GTDC takes the position that the new draft section could be clearer at certain points and should take more account of the economic reality of wholesale distribution markets and the position of wholesale distributors.

5. Moreover, in GTDC's view, the general criterion that information exchange only benefits from the safe harbour if it is "*necessary to improve the production or distribution of the contract goods or services by the parties*" is too strict and too ambiguous. The resulting legal uncertainty would create significant operational constraints for companies, especially those active in a multi-tiered distribution system, such as wholesale distributors.
6. Therefore, GTDC respectfully encourages the Commission to take its comments into account when preparing the final Guidelines.

II COMMENTS ON DRAFT NEW SECTION

II.1 General criterion for exemption

7. In GTDC's view the general criterion for the exemption of information exchange as outlined in paragraphs 9 and 10 of the draft new section is too strict. Under this criterion information exchange only benefits from the safe harbour if it is "*necessary to improve the production or distribution of the contract goods or services by the parties.*" The introduction of this standard, and the resulting uncertainty, would be highly detrimental to the business model of wholesale distributors, whose efficient functioning relies to a large extent on the exchange of information in the supply chain. In this respect GTDC furthermore points to the generally pro-competitive nature of vertical distribution agreements – and information exchange in this context – and the fact that the draft new section does not clearly identify the concerns as well as the "false positives" which the Commission aims to exclude from the scope of the safe harbour.
8. GTDC takes the position that it should be sufficient for the safe harbour that an exchange of information *is directly related to the implementation or facilitation of the vertical relationship*. To that end, the wording in Art. 2(5) of the draft revised VBER could be amended as follows:

the exchange of information between a supplier and buyer does not benefit from the exemption provided by Article 2(1) of the Regulation where the information exchange is not directly related to the implementation or facilitation of the vertical relationship.

II.2 Clarification that exception of the new Article 2(4) (b) of the draft revised VBER applies to all levels of trade

9. In paragraph 7 of the draft new section it is explained that the exception of the new Article 2(4) (a) of the draft revised VBER applies to agreements relating to the sales of goods at all levels of trade. However, paragraph 8, which discusses the exception for agreements relating to services of the new Article 2(4) (b), only refers to buyers that provide services at the *retail* level of trade. However, buyers such as wholesale distributors may also sell services to resellers at the *wholesale* level. The draft new

section could therefore be interpreted as making a distinction between the sale of good and the provision of services in this respect. GTDC assumes that the Commission does not intend to make such a distinction and advises the Commission to bring the wording of paragraph 8 in line with the wording of paragraph 7 and Article 2(4) (a), respectively, so that the exception of Article 2(4) (b) applies to buyers providing services at a *downstream* level (regardless of whether the buyer operates at the wholesale or retail level of trade).

II.3 Clarification that information exchange is also generally necessary in open distribution systems

10. Paragraph 12 of the draft new section provides examples of information exchange that meet the “*necessary for*” criterion in exclusive distribution, franchise and selective distribution models. In GTDC’s view, an example of information exchange in an open distribution model should be added, to clarify that justifiable exchanges of information exist outside the three distribution models mentioned in paragraph 12. Exchanging information in the open supply chain is mandatory for it to operate effectively and efficiently. To this extent, GTDC respectfully refers to paragraph 11(e) and paragraph 16 of its submission in the previous public consultation, dated 16 September 2021.

II.4 Examples of exempted information exchange (paragraph 13)

11. In GTDC’s view, the list provided in paragraph 13 of the draft new section is indeed only a non-exhaustive list of examples. However, in line with GTDC’s arguments in paragraph II.1 of this submission, it should be clarified that information exchanges between parties in a vertical relationship can be presumed pro-competitive. For this purpose, paragraph 13 of the draft new section should be amended as follows:

In general, all information exchanged by the parties to a vertical agreement that fulfils the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X can be considered to be directly related to the implementation or facilitation of the vertical relationship and can therefore benefit from the exemption provided by Article 2(1) of the Regulation. The following is a non-exhaustive list of examples of such information. 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, present or future conduct.

12. Furthermore, the examples in paragraph 13 do not take into account a vast range of business practices in open distribution systems that require the exchange of customer-specific information but cannot be considered anticompetitive, because of the generally pro-competitive effects arising from such exchanges. This applies in particular to multi-tiered open supply channels (i.e. suppliers – wholesale distributors – resellers – end customers), and B2B channels, in which close collaboration is often required to meet inter-brand competition and (end-)customer requirements. The

following are just a few examples of business practices that are not captured by paragraph 13:

- Supplier partner programs: In response to inter-brand competition, suppliers often need the support of wholesale distributors in monitoring the wholesale distributor's customers' (i.e., resellers') compliance with specific program criteria. A common feature of such programs, which are developed and initiated by the supplier, is for resellers to be eligible for benefits such as additional incentives and/or volume discounts if they qualify for a specific partner status. For this purpose, a supplier and a wholesale distributor may need to exchange customer-specific information, such as volume and/or value of sales generated with individual resellers. This allows the supplier to evaluate a reseller's compliance with the program and establish the corresponding volume rebates and other incentives for the reseller. Suppliers often rely on their wholesale distributors to pass on such rebates to the resellers. The same principle applies if the supplier launches promotional activities that resellers can participate in. This may require exchanges of information between the supplier and the wholesale distributor concerning individual resellers that participated in the promotional activities, including information on the success of the promotional activity (e.g. reported sales volumes by the participating resellers).
- Support for special projects: Resellers will often require support from the supplier to meet end customer expectations for special projects (for example, a large company that wants to purchase new IT equipment for its operations, or any other project for which the end-user expects invited resellers to quote special conditions). Because inter-brand competition is generally strong (e.g. the end customer can choose between offers from multiple IT suppliers), suppliers are often willing to grant additional support (such as significant discounts on the IT supplier list price, resulting in a lower end customer price than the reseller could achieve by lowering its margins). In a two-tier distribution supply chain, the reseller will place this request with the wholesale distributor, who will forward it to the IT supplier. For its commercial assessment of whether it should grant the requested support, the IT supplier will require specific information, such as (but not limited to) the identities of the reseller and the end customer, product configuration involved and expected volumes.
- Fulfilment agreements: In its response to the previous public consultation, GTDC explained that fulfilment agreements may also be relevant at the wholesale level of trade. In such cases, information on the identity of the customer and the pre-agreed pricing may need to be shared between a supplier and a wholesale distributor to execute the fulfilment arrangement.

13. Therefore, GTDC suggests that the following example is added to paragraph 13:

(X) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, provided that such information is not used to restrict the buyer's ability to determine its customers or to allocate customers in the absence of an exclusive distribution agreement.

II.5 Examples of non-exempted information exchange (paragraph 14)

14. Reflecting the proposed adjustments to paragraph 13, GTDC suggests that paragraph 14 is adjusted as follows:

Exceptionally, the exchange of the following types of information is generally not necessary to improve the production or distribution of the contract goods or services by the parties directly related to the implementation or facilitation of the vertical relationship.

and that paragraph 14(b) is adjusted as follows:

(b) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers if such information is used to restrict the buyer's ability to determine its customers or to allocate customers in the absence of an exclusive distribution agreement.

II.6 Precautionary measures in paragraph 17 and their interplay with paragraph 14

15. The explanations of possible precautionary measures in paragraph 17 could provide more guidance as to what specific actions suppliers and buyers can take to minimize the risk of horizontal concerns.
16. From the buyer's perspective, it should be noted that wholesale distributors have no control over, and often no knowledge of, the decision of suppliers to become active on the downstream market at any point in time. Wholesale distributors also have limited means to control how a supplier will use information that it has requested and received. In view of this, paragraph 17 should clarify that a buyer could generally exclude liability on its part by agreeing with the supplier a confidentiality and compliance obligation, pursuant to which the supplier commits to undertake all necessary efforts to prevent the received information from being used for its downstream sales activities.
17. Moreover, it is unclear to what extent taking such precautions will enable the parties to exchange the types of information listed in paragraph 14. For example, it is not clear if suppliers and buyers are able to share information concerning the buyer's actual or future prices at which it sells the contract goods, provided the supplier has taken measures to avoid that this information is used for its downstream sales activities. GTDC invites the European Commission to further clarify the relationship between paragraph 17 and paragraph 14.