

- Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) -

Position Paper on the draft new section dealing with information exchange in dual distribution

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Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) represents the interests of online and mail order retailers active in Germany of all sizes and trade channels (online, multichannel, catalogue, TV shopping, platform dealers and operators). The members of bevh represent more than 85% of the entire industry turnover. In addition, more than 130 service providers from the e-commerce sector are affiliated with our association.

I. General Remarks

E-commerce is highly data driven. There is a broad variety of data that can and needs to be exchanged between suppliers and distributors to optimize the distribution process and customer experience. The exchange of data between the supplier and the distributor plays a crucial role in order to fulfil the contractual obligations and generate efficiencies along the distribution chain (e.g. optimize delivery performance, replenishment of stock, adaption of assortments according to customer demand, detect defective products). However, dual distribution scenarios are nowadays the normal case in e-commerce and not an exception. Therefore, we welcome the efforts of the EU Commission to create more legal certainty with regard to the exchange of information in dual distribution by clarifying what information may be exchanged in a dual distribution context to ensure a proper functioning of the supplier and the distributor relationship and what information may not be shared as it would have an anticompetitive effect.

Whereas in general such exchange of information is beneficial for competition and should be block exempted, there are also considerable risks especially for retailers.

a. The Role of Direct-to-Consumer-Sales in E-Commerce

With more and more manufacturers selling directly to consumers online (D2C), the competition between them and retailers is getting fiercer. Whereas in the past, there were only few producers / brands selling D2C, their share continues to grow. In Germany for example such D2C sales reached a market share of 3.4% in 2021 accounting for a turnover of € 3.4 billion, which might sound marginal but represents a growth of 25.4% compared to the previous year.¹ This trend will further persist and

¹ Cf. bevh (2022): [E-Commerce ist normal](#), p. 6.

producers who are selling directly to consumers are already the norm today and their number will even increase in the future. The importance of a manufacturer's direct sales channel often goes far beyond having a flagship store or a brand website for the presentation of new products but aims at gaining customers and market shares at the expense of independent distributors. An example for these attempts to prioritise the own sales channel and to try to restrict intra-brand competition can be observed in the GUESS case (AT.40428). This increase in power and influence on the side of the suppliers is further enhanced by other provisions in the draft VBER such as the ones on dual pricing, marketplace bans, the removal of the equivalence principle or the exclusion of hybrid marketplaces from the scope of the VBER, which would allow suppliers to turn their own web shops into the most attractive ones for consumers and making retailers superfluous in the long term². Thus, the new draft provisions on information exchange must not be looked at in isolation only, but also their interaction with and the combined effects of the other provisions also need to be taken into account.

b. The Risks of Information Exchange with the Suppliers

To develop their direct sales channels, suppliers are in need of sales data. In addition to product-related performance data (such as sales, stock levels or returns), this also includes

- data on the buyer structure of the products (e.g. age, gender, place of residence),
- customer buying habits (e.g. shopping basket analyses on products bought together with the manufacturer's product),
- e-commerce data (such as duration and frequency of website visits, conversion rate, source of entry to the website, devices used),
- measurement of the success of advertising campaigns,
- competitor analyses (e.g. in-shop share of the brand in relation to competing brand manufacturers, benchmarking).

Today, however, the majority of this data still accrues to retailers, who make massive investments in building up a comprehensive customer base, the online shop, reach, continuous product range improvements and the corresponding analysis capacities, and who also bear the associated risks and losses. We observe that the volume and frequency of sales data requests to retailers from brand manufacturers has increased significantly. In the case of brands that are sales-relevant, there is no real free choice for the retailer regarding the types and the level of detail of sales data shared with the respective brand. Especially brands with a sophisticated distribution strategy and differentiated selective distribution systems (which divide access to certain assortments into different distribution partner groups) have come to make membership of a privileged group of selective distribution partners dependent on the quality of the distribution data provided by the retailer. Smaller suppliers, on the other hand, who have a weaker negotiating position vis-à-vis retailers, will have to pay for comparable or possibly even less high-quality information for the foreseeable future (monetisation of data pools).

² Cf. bevh (2021): [Position Paper on the Revision of the Vertical Block Exemption Regulation & Vertical Guidelines](#)

This provides manufacturers with comprehensive market transparency on the activities of several or, in some cases, all distributors who sell their products. Brand manufacturers could also use this transparency to restrict distribution by independent retailers or to control it in a more targeted manner to the detriment of the consumer, e.g. by limiting the product selection or sources of supply or by reducing the output of articles that are in high demand or even by destroying new goods in order to keep prices artificially high. At the same time, the investments that were or are necessary for the sales data to be analysed on the part of retail are not (yet) incurred by the brands or are incurred to a considerably lesser extent. In the medium term, brands increasingly profit from the data provided by retailers, to optimise their own sales on this basis and could potentially eliminate the retail distribution channel in the long term or reduce it to a few selective (market-powerful) retail partners. The advantages of retail for the consumer would be massively reduced, in particular getting a broad product range from strong brands to less lucrative marginal assortments from one source as well as a price (also) determined by intra-brand competition.

II. Additional Safeguards against Information abuse needed

Consequently, from an e-commerce perspective, the question of a block exemption for the exchange of information in dual distribution must be looked at in a differentiated way:

- The exchange of distribution-related information is indisputably useful and necessary for the vertical relationship between supplier and retailer to optimise the product offer to the customer and in particular to achieve the greatest possible quality, choice and availability within the supply chain. This also applies to suppliers in a dual distribution scenario.
- At the same time, this data generated by the retailer as a result of significant investments inevitably creates transparency about the strategy, success, etc. of the retailer and thus represents an asset that may not be made accessible to competitors in a dual distribution scenario (and would represent an impermissible exchange of information in the horizontal relationship).
- Unlike in a pure vertical relationship, there is an immanent risk of abuse in the case of dual distributors due to the competing direct sales activities of the supplier (horizontal "spill-over").

Therefore, data exchanges between retailers and dual distributors should only be block exempted under the Vertical Block Exemption Regulation if:

- (i) the data is relevant and necessary for the distribution relationship and is not only collected "on the occasion" of the distribution relationship (in line with the current legal situation),
- (ii) the transmitted data are related to the promotion of this distribution relationship with the retailer and are used exclusively for these purposes (e.g. to improve the product range, the ability to deliver or the product quality),
- (iii) use of the retailer's data in the manufacturer's (competing) direct sales is excluded (unless such use is exceptionally inherent in the distribution system, e.g. in the case of a franchise system).

The possibility for retailers to contractually restrict the use of their data by the supplier (and, for example, to contractually prohibit a transfer to direct sales) is for various reasons not equivalent to a ban on such usage guaranteed by law:

- The retailer has no transparency as to whether, to what extent and for what (other) purposes the supplier uses the data transmitted by the retailer.
- It is not verifiable for the retailer what kind of safeguards the supplier considers appropriate regarding its competing direct sales and whether the implemented measures are actually effective.
- In practice, it will not be possible for the retailer to prove that the data was used for a brand's direct sales and that such use is in breach of contract.
- Especially in the case of powerful brands, the retailer is not in a position to impose restrictions on the depth of data to be transmitted to the brand manufacturers (such as data aggregation or time delays).

Thus, it is very important to ensure fair competition between suppliers and distributors and to sufficiently protect the information provided by the distributor from being abused for the own purposes of the supplier/brand. Therefore, the block exemption should only be granted if the information is exclusively used for the purpose of promoting the distribution relationship. Thus, the Commission should explicitly clarify that the use of such information to promote the supplier's own direct sales is not covered by the block exemption but falls under the Horizontal Guidelines. This could simply be achieved by adding to the new provision which is to be included into the new VBER that the restriction of the necessity also applies to the use of the transmitted information, e.g.:

„a provision stating that the block exemption does not apply to the exchange and use 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”.

This addition would in principle still allow the use of the transmitted information on a horizontal level if a proof of necessity can be provided. This would also take into account special distribution models such as franchising to which such use is inherent in the dual distribution system without making their use of information unnecessarily difficult.

III. Need to clarify use of precautionary measures

A lot of information exchanges may be considered “necessary and appropriate” for the supply relationship if looked at in isolation. However, regarding the horizontal relationship with the supplier's direct sales, they constitute competitively sensitive parameters. Already today, there are suppliers who - with reference to the block exemption of dual distribution - do not consider the establishment of safeguards with respect to their direct distribution business (such as firewalls or separate distribution teams) to be necessary.

For example, according to paragraph 13b of the new section daily updated information on stock levels or sales of a retailer are in principle subject to the block exemption. The same applies to information on sales campaigns (paragraph 13f). We consider such a block exemption to be appropriate with regard to the vertical relationship with the dual distributor. However, the supplier must ensure that such information is not made available to the supplier's own distribution business as this constitutes competitively sensitive information at the horizontal level, which may normally not be exchanged between competitors and would enable the supplier in its direct distribution chain to react directly to competition at retail level. This means that a supplier could e.g. postpone or completely cancel a discount campaign planned in direct sales if he knew that the retailer's stocks were low (and thus no price pressure was to be expected from the retail side). It would also seem strange if information about the customer structure of individual retailers (e.g. age, place of residence or shopping baskets) were accessible to the supplier's direct sales business which would, for example enable a supplier's direct sales business to use this information for targeted advertising to a retailer's customer groups in order to persuade them to buy in the manufacturer's own web shop.

In order to ensure that the information provided by the retailer is not abused by the supplier for his own direct sales it is crucial that the supplier is taking appropriate precautionary measures to rebut the presumption that the retailer's data is also used in an anticompetitive way in the supplier's direct sales business. However, the wording of paragraph 17 of the new section is unclear or misleading in this respect and should therefore be clarified. It seems that the Commission only wants to require suppliers to take measures to prevent a "spill-over" of information to their direct sales channel if the information exchange is not block exempted. We are opposed to this approach as the permissibility of the information transfer cannot sufficiently be controlled via the criterion of the "necessity and appropriateness" of the exchange according to Art. 2 (5) Draft VBER as outlined above. Appropriate safeguards to avoid a "horizontal spill-over" must therefore also be required within the block exemption.

IV. Market share thresholds

We read the draft new section as such that the Commission refrains from introducing an additional 10% market share threshold for the exchange of information in dual distribution constellations, provided that any arbitrary use of the information by the recipient is clearly excluded. bevh welcomes this development since such market share thresholds would have created legal uncertainty for businesses as it is difficult to define the relevant market and to judge if the data basis is sufficient for a reliable estimation of the market share. This becomes even more difficult the lower the market share gets as it is easier for businesses to know if they cover more than a third of the market (30%) or just 10%. However, we would like the Commission to clarify if we interpreted the new section correctly and if Article 2 (5) VBER is adapted accordingly.

V. Types of information (not) to be exchanged

Against this background also the catalogue of information to be exchanged needs to be looked at very carefully. On the one side, we welcome that the Commission is providing some guidance by drawing

up a catalogue of allowed and forbidden types of information exchanges. In general, we consider the categories of information as appropriate. However, the guidelines also seem to be in contradiction with previous positions of competition authorities and would once more place retailers at a disadvantage:

- **No necessity to share retail prices (Paragraph 13e):** We do not see why information on the resale prices of retailers “can generally be considered to be necessary to improve the production or distribution of the contract goods or services” (Paragraph 13). For us, it is unclear, what the supplier could use this information for other than for his own benefit. Setting the prices is subject of the distribution autonomy of the retailer, on which a supplier may not exert any influence. According to the Commission’s draft, the real-time transmission of sales prices on an individual item basis would also be block exempted. This seems very far-reaching. It also contradicts the Commission’s draft Vertical Guidelines on the monitoring of sales prices by suppliers (cf. paragraph 175) as well as statements of the German Federal Cartel Office in its "*Hinweise zum Preisbindungsverbot im Bereich des stationären Lebensmitteleinzelhandels*" of September 2017 on data exchange in vertical relationships. Moreover, a permissible price information exchange would be practically indistinguishable from an impermissible price transmission for the purpose of monitoring price discipline. Besides the competition issues this also bears a legal risk for the retailer who has to share such information and who could be held liable for such practices as well.
- **Risk of hub & spoke agreements (Paragraph 13g):** According to this provision, communications about marketing or sales efforts of other traders should be permissible in an aggregated form. Here we see the risk that such information could be given to third parties by the suppliers, which could lead to the accusation of hub & spoke agreements. We would therefore ask the Commission to clarify this provision by providing further examples on what type of conduct would be allowed.
- **Risk of coordination of price behaviour (Paragraph 14a):** The scope of the exception for the coordination of short-term sales promotions is unclear, especially with regard to competition-sensitive information such as duration, timing, discount levels and products included in the promotion (including competing products, if applicable). We see a clear risk that suppliers could increasingly want to coordinate the pricing behaviour of retailers by referring to this provision.