

## VBER: Draft new section on Information exchange in dual distribution– Ecommerce Europe’s comments

Ecommerce Europe is the voice of the digital commerce sector. It represents a wide variety of actors in the digital commerce sector, ranging from SMEs and webshops to online marketplaces. The VBER and its Vertical Guidelines therefore provide an important framework for the vertical agreements between distributors and their suppliers. Ecommerce Europe’s members act as buyers, sellers, and resellers to end consumers and other businesses through online sales channels, but also increasingly via omnichannel business models.

Ecommerce Europe welcomes that the European Commission has decided to, in addition to the workshops that were organised, consult stakeholders on a new section to be added to the Guidelines on Vertical Restraints (‘the Vertical Guidelines’) in relation to information exchange in a dual distribution context. In our initial consultation reply, we also asked the Commission to provide more concrete guidance and examples on what information may and may not be exchanged in a dual distribution context.

While we believe further clarity on information exchange is very helpful, we do consider it to be a missed opportunity that the Commission has decided not to further consult on some of the other important elements of the VBER revision, in particular the proposed changes regarding online sales and the exclusion from VBER of hybrid marketplaces. We are concerned that due to the highly technical nature of the VBER and the strong presence of manufacturers and brands in the earlier consultation process, the perspective of retailers, in particular SMEs, has so far been underrepresented. This could have been remedied by more targeted and accessible, consultations of all stakeholders involved on the changes relevant to them.

### Digital commerce and the growth of D2C sales

The retail sector is going through several parallel developments in the last few years. Beyond the increased uptake of omnichannel business models, we have also identified a steep increase in the direct sales by suppliers to consumers (D2C). For instance, in Germany such D2C sales reached a market share of 3.4% in 2021 accounting for a turnover of € 3.4 billion, which represented a growth of 25.4% compared to the previous year<sup>1</sup>. According to research carried out by Statista<sup>2</sup> the main motivator for online shoppers is that manufacturers can offer better pricing.

With the increased D2C sales, the competition between suppliers and retailers is intensifying. It is therefore especially important to consider potential anticompetitive effects coming from the exchange of information between suppliers and distributors. For instance, there is a risk of horizontal misuse of information by suppliers to outcompete retailers in their D2C business. An example of 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). In addition to these risks, the other proposed changes in the draft VBER and guidelines appear to be skewed in favour of brands and suppliers and give them increasing control over the distribution chain and the pricing of products and services. Clear examples are proposals to remove the ban on dual pricing, the marketplace bans, the removal of the equivalence principle or the exclusion of hybrid marketplaces from the scope of the VBER.

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

<sup>2</sup> <https://www.statista.com/statistics/1274958/motivating-factors-for-purchasing-d2c-sites-worldwide/>

Ecommerce Europe therefore strongly urges the Commission not to consider the new draft provisions on information exchange in isolation, but also to take into account their interaction with and the combined effects of the other provisions.

### Information exchange and dual distribution

Overall, Ecommerce Europe welcomes that the new section on information exchange provides the general assumption that information exchange necessary to improve the production or distribution of contract goods or services by the parties is block-exempted. However, from an e-commerce perspective, there are several aspects to take into consideration:

- 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 best 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 resulting from 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).

Ecommerce Europe asks the Commission to include a clarification in the new section on the horizontal “spill-over” of the distributor’s information to the supplier’s direct sales. A safeguard should be introduced to ensure that information exchanges from a distributor to a dual distributor supplier may not be used in the direct distribution of the supplier, unless such use is inherent in the distribution system (e.g., in the context of franchising). Ecommerce Europe considers that the possibility for retailers to contractually restrict the use of their data by the supplier is not sufficient as retailers generally have no insight into how suppliers use the data transmitted by the retailer, they cannot verify the safeguards put in place by the supplier, and it would be very difficult to prove whether a supplier has used the data for its direct sales.

### Hybrid platforms

Ecommerce Europe would like to ask the Commission to reconsider the exclusion of online marketplaces with a hybrid role from the VBER. We believe that the guidance should also provide further clarity on information exchange in a dual distribution context involving hybrid platforms. Given the EU’s objective to further B2B data sharing and innovation, this guidance will be useful for all actors, hybrid platforms should not be excluded from it. In our view, the limitation to information exchange in dual distribution to that “necessary to improve the production or distribution of contract goods or services” could be similarly applied in the context of hybrid platforms. Ecommerce Europe believes the blanket provision withholding the safe harbour for hybrid platforms is not justified, for the reason that “hybrid” is not a criterion which by itself gives rise to competition concerns. Instead, vertical agreements between hybrid platforms and competing suppliers are just as likely to create efficiencies as other dual distributors. Therefore, we urge the Commission to not treat horizontal risks relating to contracts between hybrid retailers and their competing suppliers any different than risks associated with dual distribution.

## Market share

Ecommerce Europe would ask the Commission to clarify whether the 10% market share threshold proposed in article 2(5) of the draft VBER is still applicable to dual distribution. This is not clear from the updated guidance. We urge the Commission to clarify that exchanges of information necessary to improve the production or distribution of goods or services are block-exempted irrespective of market shares. This would be very helpful as, considering the difficulty to define the relevant market and to judge if the data basis is sufficient for a reliable estimation of the market share (in particular for the lower 10% market share), such market share thresholds would have created legal uncertainty for businesses.

## Remaining concerns on the VBER revision

In addition to our comments on information exchange, we would like to reiterate our concerns on the proposed lift of the ban on dual pricing, the removal of the equivalence principle and the proposed possibilities for bans on sales via online marketplaces. We strongly believe that these suggested changes do not properly reflect the ongoing developments in the retail sector. Instead, they will create practical issues for small retailers, removing the incentive to digitalise and providing suppliers with greater control over the supply chain.

You can find more information on our [dedicated website](#) and in our [position paper](#).