Distribution Law Center
DRIVEN BY CONTRAST

ADDITIONAL PUBLIC CONSULTATION ON PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION

Observations submitted by

Distribution Law Center

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I. INTRODUCTION

The Distribution Law Center is an initiative of the Brussels-based law firm **contrast**, supported by law firms from all over Europe, to create a one-stop platform for information related to the various legal aspects of distribution relationships (**link**). Competition law occupies a central position in this respect. The timing of the initiative is closely linked to the revision of Regulation 330/2010. Access to the Distribution Law Center platform is free of charge.

The Distribution Law Center groups specialized teams of law firms representing no less than 27 European jurisdictions (including the UK). These teams provide the relevant input to ensure that the platform meets the expectations of users from the legal, business and academic world.

The contributors of the Distribution Law Center that have assisted with respect to the present observations are the following: Arnecke Sibeth Dabelstein (Germany), Arntzen De Besche (Norway), Banning (The Netherlands), Cederquist (Sweden), Chrysses Demetriades & Co (Cyprus), contrast (Belgium), Delchev & Partners (Bulgaria), Dittmar & Indrenius (Finland), Divjak Topić Bahtijarević & Krka (Croatia), Eisenberger + Herzog (Austria), Havel & Partners (Czech Republic and Slovakia), Horten (Denmark), Kyriakides Georgopoulous (Greece), Modzelewska & Paśnik (Poland), Mușat & Asociații (Romania), Pavia e Ansaldo (Italy), Philippe & partners (Luxembourg), SBGK (Hungary), Šelih & partnerji (Slovenia), SRS (Portugal) and TGS Baltic (Estonia and Latvia)

The Distribution Law Center is grateful for the opportunity offered to comment on the draft new section dealing with information exchange in a dual distribution context (hereafter 'draft Section on information exchanges').

II. OBSERVATIONS

A. VERTICAL GUIDELINES

In its previous observations, submitted on 17 September 2021 (**link**), the Distribution Law Center expressed its concern about the fact that Article 2(5) of the draft VBER refers to the need to assess the exchange of information in dual distribution scenarios on the basis of the rules applicable to horizontal agreements (contained in the Horizontal Guidelines) as such rules are currently not tailored towards such scenarios.

The Distribution Law Center therefore welcomes the decision of the Commission to offer precise guidance on information exchanges in a dual distribution context, and to include such guidance in an additional section to be added to the Vertical Guidelines. Given that information exchanges between suppliers and buyers in most instances are essential to ensure the proper functioning of their vertical agreements, the additional section in the Vertical Guidelines will offer undertakings enhanced legal certainty.

B. MARKET SHARE THRESHOLD

Paragraph 9 of the draft Section on information exchanges states that "*if the conditions of Article 2(4), points (a) and (b) of the Regulation are fulfilled, the exemption provided for in Article 2(1) of the Regulation applies to all aspects of the vertical agreement, including any exchange of information between the parties that is necessary to improve the production or distribution of the contract goods or services*".

It is the understanding of the Distribution Law Center that this new test implicitly eliminates the market threshold of [10]% from the draft VBER. If such understanding is correct, this represents a welcome adjustment of the draft VBER. Although the Distribution Law Center understands that the Commission has a concern that a dual distribution scenario may lead to possible so-called "false positives" (i.e. information exchanges that raise significant horizontal concerns, but are nevertheless block exempted), it is not convinced that the introduction of an additional market share threshold in the future VBER serves as an appropriate remedy to address such concern. The approach that is adopted now seems much more effective in this respect.

C. DETAILED DISCUSSION OF DRAFT SECTION

In this part the Distribution Law Center will formulate its observations in relation to specific paragraphs of the draft Section on information exchanges.

- In **para. 2**, regarding the **definition of 'non-reciprocal'**, it seems useful to spell out that the goods or services concerned must belong to the same relevant market. Only in the event that a supplier and a buyer supply each other with goods or services that are

part of the same relevant market, the vertical agreements should be considered reciprocal.

Furthermore, it is difficult to imagine a scenario where the buyer sells the contract goods (i.e. the goods that are the object of the vertical agreement) to the supplier and where there should be a concern of reciprocity that renders the block exemption inapplicable. An (exceptional) scenario where such sales may happen is that where the supplier is in need of contract goods to perform direct sales and relies on the local stock available at the buyer. We fail to see why this should present a problem for purposes of the applicability of the block exemption.

In view hereof, the Distribution Law Center recommends that the reference to contract goods is eliminated from para. 2. If it is decided to maintain such reference, the Distribution Law Center invites the Commission to leave an opening for completely innocent scenarios (such as that outlined in the previous paragraph) so that not every instance where contract goods are resold to the supplier triggers legal uncertainty as to the continued applicability of the block exemption.

- **Para. 4** provides more guidance on the **definition of a 'competing undertaking'**. While this additional language is most certainly welcome, the Distribution Law Center is of the opinion that it leaves a specific and critical situation unaddressed. The concept of 'competing undertaking at the manufacturing level' is not clarified further. The open question concerns the situation in which two undertakings are active as producers in the same relevant (product and geographic) market, but the vertical agreement relates to a relevant (product and geographic) market in which only one of the two undertakings is active as a producer.

  For example, two undertakings both produce lawn mowers and are active in the same geographic markets. The undertakings conclude a distribution agreement in respect of motorcycles which one of them produces while the other undertaking is not at all active in the production of motorcycles. The objective of the vertical agreement is to enable the buyer to enhance the product range offered in its capacity as a distributor. Although the distribution agreement does not concern a product for which the undertakings are competing manufacturers (i.e. motorcycles), they are still actual competitors at the manufacturing level regarding products belonging to a different product market (i.e. lawn mowers).

  The Distribution Law Center is of the opinion that such a vertical agreement, whereby a manufacturer essentially wishes to complete its product range with products which it does not produce, but a competitor does, should be able to benefit from the block exemption if the parties otherwise qualify for the application of Article 2(4) VBER. This represents a genuinely vertical scenario, and it would be helpful if the future Vertical Guidelines were to endorse this position so as to increase legal certainty.

- In the last sentence of **para. 6** it is stated that "*whether a vertical agreement fulfils **the conditions of Article 2(4), point (a) or point (b) of the Regulation is to be construed narrowly**, due to the exceptional nature of these provisions*". In view of the rather binary

formulation of Article 2(4), points (a) and (b) VBER, it is not entirely clear how these conditions could be interpreted narrowly as they leave generally little room for interpretation. Therefore, the Distribution Law Center proposes that the last sentence of para. 6 is deleted as it causes legal uncertainty. If the sentence is preserved, it would be most helpful if the Commission provides more guidance as to the specific points on which a narrow interpretation may be called for.

- **Para. 7** discusses the exception provided for by **Article 2(4), point (a) VBER** in more detail. According to this paragraph the **buyer can sell the contract goods at the downstream level as a wholesaler or retailer**. This possibility, however, appears to deviate from the text of the draft VBER. The draft VBER, as published in July 2021, states that the buyer cannot be a competing undertaking at the "*manufacturing, wholesale or import level*". This formulation implies that the buyer can only be active at the retail level. If it is the intention of the Commission to expand the exception of Article 2(4), point (a) VBER, the Distribution Law Center assumes that the text of the future VBER will be amended accordingly. If so, the Distribution Law Center also wishes to draw attention to the fact that a buyer (in order to fulfil the condition of Article 2(4), point (b) VBER) can only provide services at the retail level. Given that a different treatment of the sale of products and the sale of services does not appear necessary, the Commission may consider expanding the scope of Article 2(4), point (b) VBER.

- **Para. 9** introduces a new test. In the event that a vertical agreement meets the conditions of Article 2(4), point (a) or (b) VBER, any exchange of information will be block exempted provided that it is **necessary to improve the production or distribution of the contract goods or services**. The Distribution Law Center is of the opinion that this necessity test lays a heavy (if not even an insurmountable) burden of proof on the shoulders of undertakings. In competition law terms, 'necessity' implies 'indispensability'. Put differently, it implies that an undertaking will need to show that, absent the information flow (or parts of it), the efficiencies cannot be realized. This is too stringent and not workable, and a softer standard is called for. The examples provided in para. 13 would seem to endorse the position that the necessity standard is not intended as an indispensability standard and that a broader interpretation of the concept of necessity is aimed for. From that perspective, a more appropriate test that the Commission may wish to consider is that the information exchange is 'useful and relevant to the production or distribution of the contract goods, without being instrumental in a restriction by object'. This test seems to match well with the examples provided in para. 13. If it is decided to maintain the necessity wording, the Distribution Law Center invites the Commission in any event to require only that the information exchange is necessary to the production and distribution of the contract goods or services, thereby eliminating the reference to 'the improvement of'.

- In **para. 12** the Commission clarifies that **in particular distribution formats** (such as franchising, exclusive and selective systems) the **exchange of certain information may be considered necessary**. By focussing on specified distribution formats, the false impression may be created that certain information exchanges in a free distribution system are less likely to be considered 'necessary'. Accordingly, the Distribution Law Center would welcome additional language to the effect that these distribution

format-related examples should not be understood as meaning that the same information flows may not qualify as 'necessary' outside the context of such systems. An easy example to illustrate the relevance of this observation is the reference to selection criteria (typically quality standards) at the end of para. 12. It cannot be a point of debate that, also outside a selective distribution context, information on quality standards (in the form of admission criteria or otherwise) and compliance therewith should be acceptable.

- The Distribution Law Center assumes that the **examples of information relating to the 'supply'** provided in **para. 13(b)** apply both to data provided by the supplier to the buyer, and data provided by the buyer to the supplier. By way of example, a common requirement in a distribution agreement is that the distributor always keeps a sufficient level of stock to be able to ensure the timely delivery of contract products to end customers. Consequently, the supplier should be able to receive information on the inventory of the buyer. Hence, communications on stock levels should be able to go both ways.

- According to **para. 13(c)** only **aggregated information relating to customer purchases, customer preferences and customer feedback** can generally be considered necessary to improve the production or distribution of the contract goods or services. While para. 14(b) provides for **two exceptions** to this rule, the Distribution Law Center is of the opinion that in practice also other scenarios can justify the exchange of non-aggregated customer data. For example, in certain markets it is common practice that the supplier rewards customers of its products with a direct kick-back. It is evident that such a (loyalty) program is not possible without the supplier having access to detailed information on customer purchases. This example illustrates that it may be appropriate to clarify that the exceptions listed in para. 14(b) are non-exhaustive.

- Finally, the Distribution Law Center welcomes the **clarifications** included in **para. 17**. There is currently considerable legal uncertainty as to the extent that competition law enforcers are receptive for precautions to minimize horizontal spill-over concerns and the format such precautions may take. The addition of explicit guidance in the future Vertical Guidelines is therefore very welcome and is bound to contribute to increased compliance efforts by businesses.

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