BASF welcomes the Commission's willingness to consider the input received on its proposed rules for dual distribution. The updated approach as documented in the draft section of the Vertical Guidelines contained in the consultation document ("Draft Guidelines") is an improvement to the Commission's previous proposal. At the same time, it still remains unclear which specific issues the Commission sees a need to address through the restriction of the exemption of dual distribution compared to the current legal situation. This is particularly true in the industrial environment, where conditions are different from those in the B2C e-commerce sector that the Commission appears to be focusing on.

In addition to some fundamental considerations, BASF also has identified several concrete issues in the Draft Guidelines which require changes in order to allow significant pro-competitive efficiencies in important dual distribution scenarios. Three points are particularly relevant:

- It should be clarified that the principles as described in the Draft Guidelines apply to all cases of dual distribution, irrespective of whether the concrete relationship is block exempted, e.g. because market share thresholds are (slightly) exceeded.
- The apparent inclusion in Article 2(5) VBER of a criterion of 'necessity' for the admissibility of the exchange of information devalues the VBER; a broader exemption with specific exceptions would give more legal certainty, at the least a broader criterion should be used.
- Information exchange on individual customer data must be privileged, e.g. for technical marketing purposes and to agree on special conditions.

BASF encourages the Commission to take into account the following observations when finalising the VBER and the Vertical Guidelines.

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1. In principle: Ignoring the pro-competitive effect of the widening of competition by dual distribution – classification as a horizontal issue hard to understand and with negative consequences for competition

We disagree with the Commission's continued classification of the exchange of information in dual distribution scenarios as a horizontal issue, as evidenced in the reference to the Horizontal Guidelines and rules on the exchange of information between competitors in paragraphs 15 and 16 of the Draft Guidelines. The dual distribution scenario is fundamentally different. The focus is clearly on intra-brand competition, not inter-brand competition. Any theoretically possible negative effect on competition must be assessed against this background. A dual distribution agreement allows and establishes intra-brand competition which would not be opened otherwise. Without the agreement, the trader would have no access to the goods or services at all. The agreement therefore per se expands competition. Any restriction agreed therein merely restricts the extent of this opening up of competition, but cannot restrict pre-existing competition. Any non-discriminate application of the horizontal rules is therefore not appropriate.

The VBER underlines this distinction when it defines the non-compete obligation in Article 1(d) as an obligation on the purchaser not to purchase goods which compete with the contract goods. It therefore excludes the direct purchase obligation from the non-compete obligation and thus underlines the much smaller effect on competition in the case of restrictions that only affect intra-brand competition.

The special position and privilege of dual distribution, which has so far been recognised by the Commission, is also evident in the customer and territory allocations exempted in the VBER: the definition of "exclusive allocation" emphasises that all other customers must be prohibited from actively selling to the exclusive customer group or to the exclusive territory – with the exception of the principal itself. A dual distribution set-up with only one sales partner in addition to the manufacturer is considered "exclusive" and thus exempted. Why? Because this does not restrict competition but creates additional competition.

Insofar as the conditions for exemption under the VBER are not met, the Commission proposes in paragraph 15 et seq. of the consultation draft that the information exchange

needs to be individually assessed taking into account the Horizontal Guidelines and considering the strict case-law of the European Courts for concerted practices between competitors (e.g. paragraph 16, which, unlike paragraphs 15 and 17, does not refer to a lack of exemption under Article 2(5) VBER, but is drafted wider). In this aspect, the Expert Report differentiates, since of course even in cases where e.g. the market share thresholds of VBER are (slightly) exceeded, most exchanges of information will be helpful in strengthening manufacturers and their retailers in the inter-brand competition – i.e. have pro-competitive effects – but will go beyond what is allowed to be exchanged between competitors. The proposed complete and fundamental change of the legal test (from vertical to horizontal) is not convincing – especially in the case of minor changes in market shares. In addition, this fundamental distinction presents companies with great practical difficulties: If a manufacturer has business relationships with a dealer across many different (related) product markets, the exchange of information for different products has to be set up be fundamentally differently. The much more limited scope for products with higher market shares is worrisome, but de facto, due to the uncertainty associated with an individual assessment under the horizontal rules, it is questionable whether any exchange of information will take place at all, to the detriment of inter-brand competition.

Accordingly, **it should be clarified that the exchange of information in dual distribution scenarios should be dealt with entirely according to the principles laid out in the Vertical Guidelines and should not be assessed in whole or in part under the Horizontal Guidelines** (This could be done with a separate reference in section 8 of the Vertical Guidelines.). The Expert Report similarly proposes a uniform legal test of the information exchange in dual distribution scenarios (p. 48).

2. Changes in the VBER unclear – 'necessity' in Article 2(5) of VBER?

In the context of the consultation, it is not clear to which extent the proposed text of the regulation has also been amended. In particular, it is not clear whether/to which extent the originally proposed additional market share threshold of 10% will continue to be included as a criterion. We have already commented on the problems caused by such a threshold.

Paragraph 10 of the Draft Guidelines contains a reference to a possibly amended Article 2(5) VBER:

> Article 2(5) of Regulation (EU) X provides that, in such a scenario, 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 necessary to improve the production or distribution of the contract goods or services by the parties.

This again reflects the Commission's extremely critical attitude towards dual distribution. By establishing the requirement of 'necessity' of exchanging information to improve production or distribution, a high hurdle is created, which in practice will ultimately create problems similar to those which make an individual assessment under Article 101(3) TFEU unattractive. The value of the block exemption, which thrives precisely on the clarity and simplicity of the "safe harbour" created, is thereby considerably diminished. Ultimately, companies would then be forced to consider for each individual piece of information to be exchanged whether it is absolutely necessary as such, in the respective form and timeliness, in the respective degree of aggregation, with or without the possibility of identification and at the respective time. Whether the result of this analysis would then also be valid in court cannot be predicted with sufficient certainty, even for experienced advisors. The inclusion of concrete examples in the Vertical Guidelines is only of limited help here, as it has no binding effect on NCAs and courts, which are much more likely to deal with the majority of cases than the Commission, the only entity bound by the Vertical Guidelines. Consequently, such an abstract criterion entails the risk of major differences in application throughout the Single Market, contrary to the objective of the reform of the VBER.

For reasons of legal certainty and to stay more in line with the general systematic approach of the BERs, **a general exemption of the exchange of information directly in the VBER would be preferable, with a few concrete "black" or "grey" clauses that would not be exempted**, which could take the form of paragraphs 14 (a) and 14 (c) of the Draft Guidelines. Article 2(5) could read:

> *The exemption provided for in paragraph 1 shall not apply to the exchange of the following information between the parties to a vertical agreement that fulfils the conditions of Article 2(4)(a) or 2(4)(b):*
>
> *(a) Information relating to the actual future prices at which the supplier will sell the contract goods or services downstream, unless the exchange of such information is related to the organization of a coordinated short-term low price campaign;*
> *(b) The exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods.*

In any case, if this proposal is not followed, **a broader criterion such as "useful" or "helpful" or – as proposed in the Expert Report (p. 47) – "directly related" should replace "necessary"** in order to create the required legal certainty for companies. VBER fails in its purpose of providing a legally secure framework when its application is determined by a criterion such as “necessary to improve”. This amounts to a test similar to Article 101(3) TFEU and thus presents the user with the same difficulties and risks as without VBER.

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3. Dual distribution also in cases of exclusivity/reserved customers?

The Draft Guidelines do not reflect an important aspect raised in the Expert Report. It does not consider the many different forms dual distribution can take, in which the closeness of competition between the manufacturer's own business and the dealer varies greatly. The Expert Report identifies case groups in which there is no competitive relationship at all, e.g. where the manufacturer has reserved certain major customers for itself, but has allocated the rest of the market to dealers (exclusively or non-exclusively) and is not active there itself (e.g. p. 23f.). Especially in the industrial sector, this is a common scenario.

The Draft Guidelines apply the same principles on the exchange of information to all cases of dual distribution since they only consider whether manufacturers and distributors are active on the same downstream market. A further differentiation as to whether a competitive relationship from the customer's point of view actually exists is not made. Especially in cases where the manufacturer serves only a few reserved customers, a significantly higher degree of information exchange is required, since the manufacturer hardly has any access to the market of its own and is dependent on the input of its dealers in order to adapt its offering to the needs of certain customers or the market in general.

A blanket application of the same rules on the exchange of information across all dual distribution situations would also undermine or substantially devalue the possibilities the VBER includes for customer and territory allocations. In the case of an exclusive assignment of a customer group or territory to a dealer, it is necessary to be able to exchange detailed information in order to be able to control the flow of goods to the exclusive territories. The exclusivity cases are the clearest example where no concerns about an impairment of competition through the exchange of information can arise. The Guidelines should therefore **clarify that the limits on information exchange do not apply to dual distribution scenarios where the manufacturer is not a viable supply alternative for the distributor's customers**.

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4. Catalogues in paragraphs 13/14 are generally helpful but need to be improved

The Commission's approach of establishing a positive and a negative catalogue in the Draft Guidelines is to be welcomed in principle, as it provides the legal practitioner with essential examples in a compact way. A weakness of this solution, as described above, is the lack of binding effect of the Vertical Guidelines for NCAs and the courts with the significant risk of inconsistent application of the law in the Internal Market. However, there is also room for improvement within the proposed structure, both systematically and for specific, important case groups that need to be taken into account.

a. Systematically: General exemption outside black clauses preferable

The examples given by the Commission in paragraph 13 are helpful; however, they do not cover the pro-competitive exchange between manufacturer and dealer on a large number of other topics. Although the list is expressly described as not exhaustive, experience has shown that in practice undertakings hesitate from deviating from the examples given in the Guidelines. Accordingly, the wording should clarify that no narrow standard of interpretation is applied to the categories of information that are generally considered necessary to promote production or distribution. It would be preferable to **introduce a presumption of general admissibility of the information exchange with limited and clearly defined exceptions** ("black" or "grey clauses"):

> *13) ~~The following is a non-exhaustive list of examples of information that, when~~ Generally, all types of 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 ~~generally~~ be considered to be necessary to improve the production or distribution of the contract goods or services by the parties 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:*
>
> *14) Conversely, the exchange of the following types of information is ~~generally~~ exceptionally not necessary to improve the production or distribution of the contract goods or services by the parties.*

b. Paragraph 14 restricts major cases of pro-competitive exchange of information regarding technical marketing and special conditions

Paragraph 14 b) unduly restricts the common division of labour between manufacturer and dealer to satisfy customer needs in many cases of dual distribution. The proposed exceptions would destroy long-established forms of cooperation in the industrial context, to the detriment of customers, because they leave no room for the required exchange between manufacturer and dealer on the needs of individual customers or projects. The exception provided for in paragraph 14 (b)

> *„unless in each case such information is necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement“*

excludes such a pro-competitive exchange strengthening inter-brand competition in many important cases. In addition, the criterion of "necessity", with all practical difficulties it entails, is again established here, running counter to goal of a simpler application of the law by means of a block exemption regulation (see above). By way of example, we would like to point towards two important case groups of the exchange of concrete customer information, which are excluded from the exemption by the current wording; a large number of other pro-competitive cases are certainly conceivable here:

- Technical marketing

  In the case of highly complex technical products, it is often not possible for retailers to fully know the details of all of the products they are offering and to advise customers accordingly. Especially in the industrial sector, the manufacturer therefore offers support in such cases with its expertise through so-called technical marketing, including joint customer visits. For this purpose, however, the identification of and an exchange on individual customers and their (technical and commercial) needs is needed. This ensures the best possible advice for customers and allows an enlightened purchasing decision, especially in contrast to products from other manufacturers (inter-brand competition). In many cases, the products are not adapted, and the aftersales area is not necessarily affected so that the exchange would not be allowed under the Draft Guidelines.

- Special conditions for large orders/project business

  In addition, for large orders, in the context of tenders, for large projects or for the first-time acquisition or defence of larger customers, it is often the case that dealers need special conditions to enable them to compete effectively in inter-brand competition. These can be particularly favourable prices, special warranty rules or payment conditions or even the provision (free of charge) of equipment or tools for the (commercial) customer by the manufacturer. When being accessed by a dealer for such support, the manufacturer must be able to assess the extent to which the granting of special conditions or providing certain equipment is commercially attractive, in order to ensure the effective use of the resources available for such transactions in competition with other manufacturers. For this purpose, an exchange on the identity of individual customers or projects and their (technical and commercial) needs is necessary. Again, in many cases, the products are not adapted, and the aftersales area is not necessarily affected so that the exchange would not be allowed under the Draft Guidelines.

In order to fully leverage the efficiencies brought about by dual distribution to the benefit of consumers, **paragraph 14b) should be deleted in its entirety and paragraph 13 c) should be supplemented** as follows:

(c) ~~Aggregated I~~nformation relating to customer purchases of the contract goods or services, customer preferences and customer feedback, including customer-specific sales data, information on the value and volume of sales per customer, or information that identifies particular customers~~without prejudice to paragraph (14) below~~

If paragraph 14 b) is not deleted completely, as a matter of urgency **the exception in paragraph 14 b) should be extended** as follows:

„unless in each case such information is ~~necessary~~ directly related to enabling ~~enable~~ the supplier or buyer to provide individual advice or individualised commercial offers to customers, adapt the contract goods or services to the requirements of the customer or to provide guarantee or after-sales services or to allocate customers under an exclusive distribution agreement.“

c. Addition of a category of information exchange on "market colour"

In paragraph 13, to provide greater clarity, another category of information should be included which may be exchanged without any concerns. This refers to general information on important market developments, e.g. information on market growth, the identification of new competitors and new competitor products and their price level, or the withdrawal of competitors or their products from the market, significant developments at important customers, e.g. insolvency, M&A activity, etc. Especially in the cases described above, in which the manufacturer itself is hardly active in the market, but only supplies a few reserved customers, this information is highly relevant for the adaptation of its market behaviour as a manufacturer in inter-brand competition.

5. Relation of firewall to black clauses unclear

The Draft Guidelines state in paragraph 17 that undertakings may take precautions to prevent potential horizontal restrictions of competition, e.g. by aggregating data, delaying the data exchange or setting up “firewalls”.

It is unclear to which extent the exchanges of information referred to in paragraph 14 can also be legitimised by the use of appropriate measures. E.g, is an exchange on individual customers generally permissible, provided that this is only carried out with a separate "upstream" unit at the manufacturer? Would it then also be possible to exchange information on the dealer's current or future resale prices, or would the Commission see the vertical element in the foreground here? A clarification would be helpful.

Furthermore, the reference to “firewalls” or similar measures in paragraph 17 is difficult to assess without knowledge of the future Horizontal Guidelines. In any case, it is worth noting that risks are only "minimised" and not excluded, which in practice will not give undertakings sufficient certainty in view of the serious consequences of a violation of the (horizontal) cartel prohibition. From a practical perspective, it should be noted that establishing "firewalls" entails large administrative burdens, which are difficult to manage, especially in smaller units. In this respect, in many cases these do not represent a "simple solution" but rather a "last resort".

* * *