

Information exchange in dual distribution in the Vertical Guidelines – EuroCommerce views on the proposed guidance

Key messages

- EuroCommerce welcomes the decision of the European Commission to tackle information exchange in dual distribution scenarios as part of the Vertical Guidelines.
- We would ask the Commission to clarify whether it is still considering the additional market share threshold proposed in article 2(5) of the draft Vertical Block Exemption Regulation.
- We invite the Commission to include a statement on the need for a level playing field in dual distribution scenarios, clarifying that suppliers may not use information obtained through the vertical relationship with their distributors to outcompete distributors at retail level.
- We welcome the recognition of the specificities of franchise systems in the drafts and would invite the Commission to complement it with an explicit reference to the *Pronuptia* judgment.
- EuroCommerce welcomes the new wording on own-brand products and the recognition that a wholesaler or retailer providing specifications to a manufacturer to produce an own brand product is not considered a manufacturer.
- The draft should emphasise that although the exchange of certain information may be necessary, suppliers should not abuse the guidance to force buyers to provide information if buyers are not willing to do so.
- We welcome the inclusion of paragraphs 13 and 14 and categories of information which may or may not be necessary for the vertical relationship between suppliers and buyers; we provide further specific comments in this paper.
- We suggest that the guidance clarifies that the burden of implementing precautionary measures to minimise risks to competition in dual distribution scenarios falls on suppliers, as they are the ones benefitting from the information asymmetry arising in dual distribution contexts.

1. Introduction

- 1.1. EuroCommerce welcomes the decision of the European Commission to consult stakeholders on additional text¹ to be added to the Guidelines on Vertical Restraints ('the Vertical Guidelines' or 'VGL') in relation to information exchange in dual distribution contexts.
- 1.2. Throughout the consultation period on the VGL and the Vertical Block Exemption Regulation ('VBER'), EuroCommerce has stressed that the increased prominence of dual distribution is a positive development for competition but also raises uncertainties.
- 1.3. EuroCommerce pointed to the risk of anticompetitive effects arising from the exchange of some information between suppliers and distributors (such as potential for horizontal collusion or abuse of such information by suppliers to outcompete retailers in their direct-to-consumer business).
- 1.4. EuroCommerce called on the Commission to specify, to the extent possible, what information may and may not be exchanged in a dual distribution context. We welcome the Commission's effort in the present draft to provide businesses with necessary legal certainty.
- 1.5. We see as positive the decision of the Commission to tackle this matter as part of the Vertical Guidelines (and not the Horizontal Guidelines); addressing vertical information exchanges in the Horizontal Guidelines would send the wrong signal in relation to what are necessary and pro-competitive exchanges of information along the supply chain.

2. Information exchange and dual distribution

- 2.1. We welcome a number of statements included by the Commission in the new drafts, such as:
 - (a) The general statement that information exchange in vertical distribution contexts *can contribute to the pro-competitive effects of a vertical agreement, including the optimisation of production and distribution processes* (see paragraph 10 of the draft new section);
 - (b) On the other hand, the clarification that not all exchanges of information between suppliers and buyers in dual distribution scenarios are efficiency enhancing (see paragraph 10 of the draft new section);
 - (c) The reiteration that information not benefiting from the exemption under VBER does not necessarily infringe article 101(1) TFEU (see paragraph 16 of the draft new section).
- 2.2. We would however ask the Commission to clarify whether it is still considering the additional market share threshold proposed in article 2(5) of the draft Vertical Block Exemption Regulation.
- 2.3. Additionally, we believe it would be appropriate to include a statement on the need for a **level playing field in dual distribution scenarios**, clarifying that in the context of both categories of information listed in paragraphs 13 and 14 of the draft section, suppliers may not use information obtained through the vertical relationship with their distributors to outcompete such distributors at retail level, ensuring this does not occur through appropriate protective measures (some of them suggested by the drafts in paragraph 17).

¹ The additional text for consultation is available here: https://ec.europa.eu/competition-policy/system/files/2022-02/guidance_information_exchange_VBER_dual_distribution_2022_0.pdf

Franchise

2.4. In previous contributions to the stakeholders' consultation, we voiced concerns that the new vertical rules may negatively impact franchise systems. The current draft identifies franchise as a system where *'it may be necessary for the franchisor and franchisee to exchange information relating to the application of a uniform business model across the franchise network'*.

2.5. We believe that this is an important clarification which addresses some of our concerns and leaves sufficient flexibility to franchisors and franchisees to organise their distribution networks. We would also invite the Commission to include an explicit reference to the *Pronuptia* judgment² in the new section, which states that exchanges of information necessary to ensure the efficient functioning of a franchise system fall outside the scope of Article 101(1).

Own brands

2.6. According to the new draft section, a wholesaler or retailer providing specifications to a manufacturer to produce an own brand product is not considered the manufacturer of such product and consequently not a competitor to other manufacturers. We welcome this very important clarification: own brand products are produced by a manufacturer exclusively for one specific customer, who does not operate at the manufacturing level.

3. Non-exhaustive lists of information

3.1. Paragraphs 13 and 14 contain non-exhaustive lists of information which are respectively necessary and not necessary for the functioning of the vertical relationship between the supplier and the distributor.

3.2. EuroCommerce welcomes these as key additions to the Vertical Guidelines to guarantee legal certainty for businesses and limit competition risks.

3.3. Nevertheless, the drafts should clarify that although the information listed in paragraph 13 may be necessary for the functioning of the vertical relationship, suppliers should not be allowed to abuse that information for the benefit of their own direct sales channel and not force buyers to provide all information listed under paragraph 13 should buyers not be willing to do disclose it.

*Non-exhaustive list of types of information necessary for the functioning of the vertical relation and which therefore **may** be exchanged*

(a) *Information on the registration/certification or the handling of the goods/services (to ensure they comply with regulation or the adaptation to customer needs;*

(b) *Information on production, inventory, stocks, sales volumes, returns;*

(c) *Aggregated information on purchases, customer preferences, customer feedback:*

- it is fundamental that information of this type be aggregated to prevent anticompetitive effects; should the information not be aggregated, this could allow suppliers to seek to outcompete retailers in relation to specific customers.
- It should be clarified that feedback regarding a **specific product** is not commercially sensitive information if the customer is anonymised in accordance with general standards, as such feedback may be used for improvements to the benefit of inter-brand competition.

² Case 161/84 *Pronuptia de Paris GmbH v Pronuptia De Paris Irmgard Schillgallis* [1986] ECLI:EU:C:1986:41.

- We would also invite the Commission to clarify the meaning of ‘aggregation’ in the context of customer purchase of contract goods. It appears contradictory that there is an obligation to aggregate information on customer purchases under paragraph 13(c) but not to have the same obligation in relation to sales volumes under paragraph 13(b). We understand that customer purchase of contract goods may mean the same as sales volumes under paragraph 13(b) if customer-specific purchases or the identity of the end customer is not disclosed. In fact, precise product-specific demand/sales of contract goods (instead of aggregating several contract product volumes) may be necessary information to avoid stock-outs.

- (d) *Information on prices of goods to the buyers;*
- (e) *Information on recommended retail prices or maximum resale prices relating to the prices at which the buyer resells the goods or services (unless such information is used to enforce RPM):* we welcome the clarification that information of this kind may not be used by suppliers to enforce an RPM strategy.
- (f) *Information on marketing of the goods, information on promotional campaigns:* the Guidelines should clarify that information on promotional campaigns may not include information related to future discounts, unless such discounts are related to the organisation of a short-term price campaign in line with paragraph 14(a).
- (g) *Aggregated information on marketing & sales activities of other buyers (provided they are not identifiable):*
- it is fundamental that information of this type be aggregated to prevent anticompetitive effects; should the information not be aggregated, this could allow suppliers to seek to outcompete retailers in relation to specific customers.
 - However, we would invite the Commission to consider including this specification in other parts of the VGL, as this does not seem to be strictly related to dual distribution setups.

3.4. We would invite the Commission to include an additional category, namely:

- (h) *Pre-contractual information whose exchange is required under national law.*

Non-exhaustive list of types of information not necessary for the functioning of the vertical relationship

- (a) *Future prices at which the suppliers or buyers will sell the products downstream (unless the information is necessary to organise a short-term price campaign):*
- this is an important clarification which should be maintained in the final version of the Guidelines. The exchange of future prices is not relevant for the proper functioning of the vertical relation and bears significant anticompetitive risks.
- (b) *Customer-specific sales data (value, volume) or any information identifying a particular customer, unless such information is necessary to enable the supplier or buyer to adapt the 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:*
- this is an important clarification which should be maintained in the final version of the Guidelines.
 - This is of particular importance for franchise systems or franchise-like service relationships of a supplier/wholesaler who is also active in retail. The retrieval of sales data by the franchisor/service provider should be permissible to be able to advise franchisees/service

recipients in a franchise-like relationship (at their request and in fulfilment of the contractual obligations) to be able to make concrete recommendations on product range, placement and sales. We would invite the Commission to explicitly mention franchise in relation to this exemption.

- Buyers may not exchange data on their own sales with their suppliers. However, there are certain very specific situation where such information exchange may be necessary:
 - A chain organisation or a wholesaler may provide billing services to its suppliers, meaning that the supplier (generally a manufacturer) will deliver the goods from its warehouses straight to the customer but the chain organisation/wholesaler will handle the order and the billing process. In those situations, the chain organisation/wholesaler will need access to customer-specific sales data to process the order/bill. In such cases, appropriate firewalls are set.
 - in the building and technical trade with large projects, retailers may ask suppliers a quotation or a discount for a specific important customer project. Although the identity of the customer and the volume of its inquiry may need to be disclosed, the retailer's final price to the project customer would not be disclosed to the supplier.

(c) **Information on goods/services sold by a buyer under its own brand name**: this is an important clarification which should be maintained in the final version of the Guidelines.

Precautions to minimise risks of horizontal concerns from the information exchange

3.5. We welcome the suggestions included in the drafts on a number of precautions which can be taken to minimise risks to competition in information exchanges in dual distribution.

3.6. EuroCommerce had pointed to the use of Chinese walls and aggregation of information in previous consultation responses and thus welcomes the suggestions made in paragraph 17 by the Commission (aggregation of information, appropriate delay between the generation of the information and the exchange and the use of firewalls). These are welcome additions, but it should be ensured that any firewall or Chinese wall is genuine and effective.

3.7. Additionally, it should be clarified that the burden to implement such measures falls on suppliers, as they are the ones who benefit from the information asymmetry present in dual distribution contexts (it is suppliers who have access to certain information of buyers).

4. Conclusions

4.1. The further guidance the Commission intends to provide on dual distribution is an important addition to the Vertical Guidelines and their adaptation to the digital age and the new omnichannel shopping experience.

4.2. In line with the Commission concerns in relation to anticompetitive effects arising out of suppliers going direct-to-consumer, we would want to reiterate the importance of other trends brought about by digitalisation, such as:

- The key role played by marketplaces in today's economy: allowing unjustified restrictions on their use may be detrimental impact in particular on SMEs, who may find it difficult to get online. We would also urge the Commission to reconsider the exclusion of online marketplaces with a hybrid role from the VBER, which will lead to greater legal uncertainty for both the marketplaces and their business users.

- The growing development of selective and exclusive distribution systems and the abuse thereof, which may damage the single market, as well as of conduct limiting parallel trade (e.g. limitations of promotional discounts to products which are resold in certain areas).
- The need for a strong stance against conduct restricting the distributor's ability to set their own prices freely: this includes RPM but also other behaviour, such as restrictions of volumes during retailers' promotions, restrictions on resales on promotion prices after the promotion period or refusals to supply after a deep promotion.
- The importance, in light of the run to online, to support offline sales effort; the Commission should however be wary of possible unintended effects of proposals on dual pricing and the equivalence principle.

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Transparency Register ID: 84973761187-60