

**DUAL DISTRIBUTION AND REVISION OF THE VERTICAL  
GUIDELINES  
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

**18 February 2022**



## COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE REVISION OF THE VERTICAL GUIDELINES AND DUAL DISTRIBUTION

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Independent Retail Europe welcomes the [consultation on the new draft vertical guidelines on dual distribution published on 4 February 2022](#). Overall, we consider that the new approach proposed better reflects market realities and needs, with the view to both preserve competition and ensure efficient production and distribution models.

Indeed, we consider positively the proposal to:

- Exempt (under the VBER) vertical agreements in situations of dual distribution that contain information exchanges necessary to improve the production or distribution of goods and services.
- Establish in the guidance a (non-exhaustive) list of examples of information exchanges that are generally considered to be efficiency enhancing (and therefore compliant with the exemption) and a list of information exchanges unlikely to fulfil this efficiency enhancing criterion.

However, we would like to ask some clarifications/improvements on some aspects of the guidance.

### 1. Clarification concerning the previous Commission proposal to limit dual distribution exemption through market share thresholds

In the draft VBER on which a consultation was organised in July 2022, the Commission was proposing in Art. 2 (5) to limit the benefit of the dual distribution exemption through specific market share thresholds (e.g. 10% and 30%). We understand from these new draft guidelines that this option is no longer favoured, although the absence of publication of a new draft VBER makes this unclear at this stage.

We would therefore welcome a clarification in the guidelines that the Commission is no longer pursuing this idea of using a new specific market share threshold to limit the benefit of the dual distribution exemption.

### 2. Para 10 –the case of information exchange to improve the production of future products

We would welcome a broader wording in order to prevent a narrow interpretation of '*improvement of manufacture/distribution of contract goods*' as in some cases other efficiencies may materialise.

Examples of other efficiencies that should be covered:

- information exchange may be necessary to improve customer service or after-sales services related to the distribution of the contract goods.
- Information exchange may also be important (though not necessary *per se*) to innovate and develop new or better products (e.g. a distributor gives customer feedback or information on customer preferences to the manufacturer. This information will be used to improve future products. Although not necessary in itself for improving the manufacture/distribution of contract goods - as they do not exist yet, it will help to improve the selection of goods to customers and therefore enhance inter-brand competition).

### 3. Franchise and similar uniform distribution systems

Para 12 explains that in a franchise system, the franchisor and the franchisee may need to exchange information on the application of a uniform business model throughout the franchise network. **We**

**welcome this clarification, together with the list of examples provided in paras 13 and 14, as it provides franchisors and franchisees greater organizational flexibility of their distribution networks.**

Indeed, the application of the horizontal guidelines to franchisor-franchisee information exchanges would have prevented the franchisor to advise the franchisee in practice and would have therefore removed its ability to fulfil one of its fundamental obligations. This would have hampered franchise systems significantly, as such distribution systems inherently require the exchange of certain competitively sensitive information. This stems from the fundamental obligation (recognised by case law) of the franchisor to transmit to its franchisees the know-how relevant to the system of its own sites and those operated by other franchisees.

Nevertheless, with regard to franchise-like systems applying a uniform distribution format, such as groups of independent retailers operating under a common brand, the following clarifications would still be needed:

**a) Para 12: clarification is needed as to the application of the provision on franchises to similar uniform distribution models**

Para 12 explains that what is necessary to improve the production/distribution of products may depend on the particular distribution model, and provides a specific example with franchise systems. Provisions on franchises normally apply by analogy to groups of independent retailers operating under a common brand (e.g. cooperative retail groups or similar structures). **Such analogy should be explicitly recognised in this provision.**

**b) Para 12 - information exchanges that are necessary for the implementation of some services**

In some distribution systems applying a uniform distribution format (franchise-like systems), it is possible that the franchisor or the central organisation holding the franchise/brand may offer specific additional services to the retailers that are part of the system. In such cases, some information exchanges may be necessary to be able to perform correctly the services offered to the members of the uniform distribution system.

For instance:

- A group of independent retailers or a wholesaler can provide a billing or guarantee service to product suppliers on behalf of the member retailers of the group/the distribution system applying a uniform format. In this case, information exchanges on the individual financial situation of each of the retailers may be needed to perform correctly such services (see also in this sense our comment below on para 14 (b)).
- In a similar setting, information exchanges between the central office of a group of independent retailers with the member retailers may also be necessary concerning the commercial conditions negotiated by the central office of the group with the suppliers (product manufacturers) or, in cases where the central office makes available to member retailers a central webshop /platform for online sales, to exchange information which are necessary for the display of a single sales price (organised in a legally compliant manner).

It is therefore important to **clarify in para 12 that information exchanges in franchise-like systems may also be necessary to ensure the correct implementation of the services offered to the members of the uniform distribution network by the franchisor or the association of enterprises organising the distribution network** (and not only to improve the production/distribution of products).

**Our suggestion for para 12:** “[...] Under a franchise agreement, *or similar distribution systems applying a uniform distribution format*, 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 **or to ensure the correct implementation of the services offered to the members of the franchise network** [...]”.

#### **c) Para 14 (b) and the case of franchise and similar uniform systems**

Para 14(b) provides that some customer-specific data are not considered to be covered by the exemption for necessary information exchanges in dual distribution. However, we noticed that it also provides a specific exemption for substitutable, non-aggregated customer specific sales data: *“information [that] is necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer”*.

**We consider that clarification is needed that this provision is applicable in franchise (or similar uniform distribution systems) services relations of a supplier/wholesaler which is also active in retail.**

As provided in para 12 of the new draft VGL, it may be necessary in a franchise or similar uniform distribution format systems to *“exchange information relating to the application of a uniform business model across the franchise network”*. Against this background, we consider that the wording of the exemption to the principle in para 14(b) may be interpreted as allowing the franchisor/service provider to request sales data in order to be able to provide specific sales-promoting advice to franchisees/service recipients in such franchise-like relationships (at the request of the franchisees and in fulfilment of the contractual obligations), to make specific product range, placement and sales recommendations.

**A clarification of the implication of this provision in para 14(b) on such services in franchise (or similar) systems would bring legal clarity.** Para 12 (when referring to franchise systems) should also be further elaborated in this sense (see also our comment above on para 12 concerning services provided to the franchisees by the franchisor).

#### **4. Para 13: clarification of the list of allowed efficiency enhancing information exchanges**

##### **a) Paras 13(c): clarification needed of the ‘aggregation’**

We consider that clarification is needed as to the request to ‘aggregate’ information on customer purchase of the contract goods. Indeed, customer feedback or preferences regarding the product/service is not sensitive if the identity of the customer is not revealed. Sharing feedback could be used to improve customer experience for instance. Moreover, in product liability cases it may be even necessary (for the distributor) to disclose the identity of the customer to the supplier.

Furthermore, the guidance should clarify what ‘aggregation’ means in the context of customer purchase of contract goods. We interpret that customer purchase of contract goods can mean the same as sales volumes listed in para 13(b) if customer-specific purchases or the identity of the customer is not revealed (which is already prohibited in para 14(b)). Exact product-specific demand/sales of contract goods (instead of aggregating several contract product volumes) may be necessary information to be shared.

**b) Paras 13(e) should also prohibit information exchanges on binding minimum advertising prices**

We welcome the clarification that information exchanges on recommended/maximum resale prices cannot be used to enforce resale price maintenance. However, para 13(e) should also **clarify that the prohibition also covers information exchanges made to enforce binding minimum advertising prices.**

**c) Paras 13(g): information sharing about third-party competitors should not be covered**

The example provided in para 13(g) deals with the sharing of third-party information in vertical agreements in dual distribution scenario. It therefore covers aggregated competitor (not party to the individual vertical agreement) information (of competing buyer or relative value/volume compared to competing brands), but does not cover information about supplier’s competing sales activities.

In an ordinary vertical relationship such information exchange related to the contractual parties’ competitors would be assessed under the Horizontal Block Exemptions and the horizontal guidelines. **Therefore, we consider that it is not suitable to include this example in para 13.**

**5. Clarifications needed on para 14 (information exchanges unlikely to be considered efficiency enhancing)**

**a) Para 14(b): other cases where information exchanges on customer sales data may be necessary**

In most circumstances, it is absolutely clear that a buyer should not exchange data on its own sales to a specific customer with its supplier, if the supplier may also approach the same customer. We therefore welcome the principle enshrined in para 14(b).

However, besides the specific exemption to this principle already foreseen in para 14(b) (i.e. to adapt the contract goods/services to the requirements of the customer, etc.), there are also other situations where such information exchange may be necessary:

- Where an organisation or a wholesaler provides billing services to its suppliers. In that case, the supplier (generally the manufacturer) will deliver the goods from its warehouses straight to the customer but the chain organization/wholesaler is the party handling the order and the billing process instead of the supplier. The party sending the bill needs to know the customer-specific sales data in order to process the order/bill. In such cases, appropriate firewalls are set.
- Another example, especially in the building and technical trade, is larger projects where a distributor may ask the supplier a quotation or a discount for a specific important customer project. The identity of the customer and the volume of its inquiry may be important to reveal.

However, the retailer's final pricing to the project customer would not be disclosed to the supplier.

**b) Clarification needed on information on recommended retail prices before general publication – para 14(a)**

The Commission should **clarify that information sharing on recommended retail prices (RPP) before general publication is also permissible if the supplier/provider adheres to them as part of his own direct sales channel** (i.e. the supplier sells to his direct customers at the RPP, for example in his online shop).

This is likely to be a very common scenario: indeed, the RRP communicated are the sales prices that the supplier considers to be optimum on the market for his products. The supplier is therefore extremely likely to adhere to his own recommended optimum prices for his own direct sale channel.

**6. Private label/own-brand products – para 5 and 14(c)**

**a) Cases where the distributor of private label/own brand products is not considered as a competitor – para 5**

Para 5 clarifies that a wholesaler or retailer who supplies a manufacturer with specifications for the manufacture of an own-brand/private label product is not considered a manufacturer of such a product and consequently not a competitor to other manufacturers. We welcome this important clarification: private labels are made by a manufacturer exclusively for a specific customer who does not operate at the manufacturer's level. The VBER exemption of article 2(1) of the (draft) new VBER should apply to this situation.

However, we consider that private label/own-brand products made by a retailer 'in-house' should fall under the VBER exemption **in so far as the products concerned are not sold to a third-party reseller.**

**b) Para 14(c) and private label/own-brand products**

We see no reason to treat specifically in para 14 the case of information exchanges concerning private label/own-brand products.

Para 5 already explains cases where a wholesaler or retailer that provides specifications to a manufacturer to produce goods for sale under the wholesaler's or retailer's brand name is not considered a manufacturer of such own-brand goods and consequently not a competitor of the manufacturer. **Where the manufacturer is not the supplier of the private label product, the information related to the private label products must simply be treated in the same manner as information related to any other competing brand.**

**7. Additional clarifications are needed to minimise some horizontal risks with information flows**

We consider that additional clarifications and safeguards are needed to avoid some horizontal risks for competition in dual distribution situations. In most instances of dual distribution situations organised by a product manufacturer, it is important to consider the direction in which sensitive information is flowing (from the distributors to the supplier/product manufacturer, at the request of the manufacturer/supplier).

**It is therefore critical to ensure that the information is only used to enhance the supply relationship, and is kept secret not only to other buyers, but also to the supplier/manufacturer's own direct sales department. A provision in this sense is missing to preserve horizontal competition and ensure a level playing field.**

While we appreciate and support the proposal in this draft guidance that suppliers and buyers may take precautions to minimise the risks for competition (see para 17), we fear that this will be insufficient in certain cases to prevent harm to horizontal competition. Indeed, the control of the 'necessary' criteria to improve the distribution may not be enough to prevent the inappropriate use of certain sensitive information by the supplier for its own direct sales channels, triggering competition concerns.

**We therefore ask the Commission to insert an additional and clearer provision stating that information received by a supplier from a buyer may not be used in the suppliers' direct sales channels unless such use is inherent to the particular distribution system (e.g. as part of a franchising or similar uniform distribution system).** For this purpose, a supplier in dual distribution situation must take appropriate protective measures (e.g. for larger manufacturers/suppliers Chinese walls making it impossible for the information to be passed from the B2B department to the B2C department or, for smaller manufacturers/suppliers, through other protective measures that are easier to implement and proportionate).

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

*Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.*

*Independent Retail Europe represents 23 groups and their over 403.900 independent retailers, who manage more than 759.000 sales outlets, with a combined retail turnover of more than 1,314 billion euros and generating a combined wholesale turnover of 484 billion euros. This represents a total employment of more than 6.620.000 persons.*

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