

ACEA RESPONSE TO THE TARGETED PUBLIC CONSULTATION ON THE PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION

The European Automobile Manufacturers' Association (ACEA) highly welcomes the draft guidance relating to the exchange of information in the context of dual distribution agreements released by the European Commission as part of the revision of Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("Vertical Block Exemption Regulation") and the accompanying guidelines on vertical restraints ("Vertical Guidelines").

In our view, the proposed guidance is sensible and its inclusion in the revised Vertical Guidelines will greatly improve legal certainty for economic operators.

Timewise, it will ensure that the guidance is available when the revised Vertical Block Exemption Regulation is adopted and published in May 2022 at the latest. This will enable companies to use it immediately in the review of their agreements and practices to ensure these comply with the new rules.

This would not be possible if, as suggested earlier, compliance with EU competition law of the exchange of information in dual distribution agreements would have to be assessed under the Guidelines on the applicability of the Treaty on the Functioning of the European Union to horizontal cooperation agreements ("Horizontal Guidelines") since the revised version of these Guidelines is expected to be adopted and published only towards the end of 2022.

On substance, we also consider it more appropriate to address this matter in the Vertical Guidelines since dual distribution agreements are first and foremost vertical agreements even if they can have secondary effects on horizontal competition.

This means the parties typically exchange various types of information that are simply necessary to make their agreement function effectively. This information exchange generally makes distribution more efficient, promotes competition, and ultimately benefits customers.

We therefore support the proposed necessity test that would make it possible for the information exchange in a dual distribution agreement to benefit from the exemption when the information is necessary to improve the production or distribution of the contract goods or services by the parties.

We find it helpful that the proposed guidance contains a non-exhaustive list of examples of information that can be considered necessary to improve the production or distribution of the contract goods or services by the parties. We agree that the examples listed in point (13) are necessary for this purpose.

We also agree that the types of information listed in point (14) are generally not strictly necessary for this purpose and that the exchange of such information in the context of a dual distribution agreement could have an impact on the competitive relationship between the supplier and the buyer at the downstream level.

While we understand that information that identifies particular customers is more sensitive in this respect, we welcome the Commission's understanding that the exchange of such information can be justified in specific cases. In addition to the cases listed in point (14) (b), we believe this should be permitted also for the purpose of providing customer care. We therefore suggest amending point 14 (b) as follows:

Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, 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 implement brand-specific customer care and loyalty measures or to allocate customers under an exclusive distribution agreement.

We understand that the exchange of information that is not necessary to improve the production or distribution of the contract goods or services by the parties must be assessed under Article 101 of the Treaty and the Horizontal Guidelines. In this respect, we find it useful that the guidance refers to certain precautions that companies can take to minimize the risk that the information exchange will raise horizontal concerns.

Finally, we would like to re-iterate our strong concerns regarding the proposed rules for "hybrid platforms" in Article 2 (7) of the draft Vertical Block Exemption Regulation. They appear designed for large online platforms with significant market power that are used to sell products of multiple brands. However, they could have very serious unintended consequences for brand owners such as vehicle manufacturers who use online platforms for their own sales and for the sales of their distributors. These platforms complement the agreements that brand owners have with their distributors and serve to support the latter's advertising, marketing, and sales activities. Thus, they exert competitive pressure on large dominant platforms.