



To DG COMP European Commission

FROM Hungarian Association of Automobile Dealers
GÁBOR GABLINI President

DATE 18 February, 2022

SUBJECT **Comments to the proposed guidance dealing with information exchange in dual distribution ('Information Exchange Guidance' or 'Guidance') in relation to the EU Commission's ongoing consultation on the Information Exchange Guidance in connection to the ongoing review of the Vertical Block Exemption Regulation ('VBER') and Guidelines on Vertical Restraints ('VG')**

Dear Ladies and Gentleman,

Referring to the invitation for additional public consultation on proposed guidance relating to information exchange in the context of dual distribution, intended to be added to the Vertical Guidelines, we hereby submit our comment on the Information Exchange Guidance.

The proposed Information Exchange Guidance has of utmost importance for our Association and our Members. Although the adverse consequences and risks are obviously significant, we, as distributors have had not much practical guidance so far on information exchange in dual distribution situation.

Considering the market power of the manufacturers¹ on the one hand and the very limited bargaining power of the Members of our Association against manufacturers on the other hand, we would appreciate as much clarity and practicability as possible from the proposed Guidance.

Our general comment is that

- the draft Guidance provides very limited clarity and practicability only;
- at the same time, we have serious concern about the Guidance itself, that creates additional manoeuvring room for manufacturers to enhance their market power while offering safe harbour for practices in vertical relationships which are clearly contrary to the original purpose of VBER and VG;
- more case studies and practical examples (similar to those in the Horizontal Guideline) would boost the practicability of the Guidance.

We would like to emphasize and draw your attention to the recent market development in our CEE region, especially in Hungary that the importers become private companies independent from the manufacturers. In our view, the concept of dual distribution and VBER does not reflect this recent market change with sufficient precaution.

Our detailed comments are as follows.

1 Categories of information

We understand that 3 (three) categories of information are relevant from the scope of VBER's subject matter: information (a) falling outside scope of Article 101 (TFEU) (b) falling within scope but be block-exempted² and (c) requiring justification under Article 101(3) (TFEU)³. We understand that the Guidance deals with

¹ as it is clearly stated in the Austrian Supreme Court's decision in Büchl vs. Peugeot Austria case

² i.e. 'necessary' information, see Paragraph 13 of the draft Guidance

³ i.e. 'generally not necessary' information, see Paragraph 14 of the draft Guidance



categories (b) and (c) only, but it is unclear which information falls into category (a). Our Association would welcome more clarification to this category as well.

2 Market share cap

The draft Guidance does not deal with the highly controversial issue (arising out in the course of the review of replacing VBER) whether 10 % market share cap on information exchanges in VBER⁴ is included in the final VBER version. In the Hungarian market, this 10 % market share cap would cause serious uncertainty and complexity in the assessment of compliance because the majority of vertical relationships fall into the 5-10 % market share range. Our experience shows that even in the range of 5-10 % market share, the very same competition concerns arise as in the range of 10-30 %.

Therefore, our Association would prefer and recommend a regulatory language in both VBER and VG **applying same rules for information exchange in dual distribution irrespective of the market share**. In our view, this to be unified regime should follow the concept of Article 2(5) of the draft VBER, according to which block exemption does not involve information exchange in dual distribution automatically.

Alternatively, should the originally proposed VBER regulatory regime in the final version remain, our Association would welcome a lower 5 % market share cap for the safe harbour in Article 2(4) (instead of the current proposed limit of 10%)

3 Risk mitigation - Firewall / Chinese walls

The draft Guidance is vague on the question which precautionary measures required on information exchange raising horizontal concerns⁵.

Our Association would welcome more detailed guidance to

- (i) which measures shall be introduced in special cases (e.g. by multi-branded manufacturers or by multi-branded dealers);
- (ii) how effective measures should look like, e.g.
 - access rights to sales information of manufacturers'/importers' C-level shall be excluded;
 - separated IT-system and data base shall be implemented for dual distribution by the manufacturers;
 - requirement of physical separation of teams responsible for vertical clients.

Reasonably, the level of appropriate delay between the generation and the exchange of information should be specified in more detailed way as well. For instance, in our view, a minimum level of delay should be defined in the Guidance.

4 Non-exhaustive list of information generally considered as necessary to improve production or distribution goods;

Article (1) of the proposed Guidance contains information which in our view not necessary to improve production or distribution goods. In more detail, information shall be deemed as unnecessary and excluded from the safe harbour of VBER insofar as it relates to:

- (i) strategic information relating to the future;
- (ii) overall stock level;
- (iii) 'prices at which the buyer resells the goods and services'
- (iv) Resale Price Maintenance by indirect means.

5 List of information generally considered as not necessary to improve production or distribution of goods

Customer-specific data shall be (almost) entirely excluded from block-exemption. Information required for providing guarantee services may be justified only. We believe that the manufacturers does not need

⁴ see draft VBER Article 2 Paragraph (4) and (5)

⁵ see Section 17 of the draft Guidance



customer-specific data even for adaption the contract goods and services or after-sales services (which are outside of OEM guarantee).

Furthermore, it should be clarified in the Guidance that block-exempted information or data-bases gathered from different sources by the supplier (being part of a dual distribution system) cannot be combined in a way that such combination would result horizontal infringement. In other words, block-exempted information shall be treated separately within the organization of the supplier even after the (otherwise compliant) information exchange.

By way of example, if the manufacturer combines (i) aggregated information relating to customer purchases (gathered from the distributor block-exempted) with (ii) in-vehicle data (transmitted by the cars/distributor to the manufacturer), the manufacturer might be able to produce customer-specific sales data and information on the value and volume of sales per customer or information that easily identifies particular customers. This combined database might raise serious horizontal competition concerns which should not be block-exempted⁶.

5.3 Without prejudice to the application of other regulations regarding information exchange

The draft Guidance makes reference to GDPR in footnote 11 saying that this Guidance is without prejudice to the application of GDPR. However, new regulatory measures are to be expected to data exchange⁷ soon, so it would be advisable to make reference not only to GDPR but any other current or future regulations dealing with data exchange between actors of a vertical distribution chain.

6 Enforcement against distributors

Last but not least, we would welcome clear guidance from the Commission on enforcement against distributors.

In horizontal infringements of Article 101 (TFEU), all parties to the agreement or concerned practice are generally found to be offenders and receive fines. With vertical restraints, however, there is an established practice that in appropriate circumstances the Commission only finds one party to the agreement liable for an infringement.

Our Association would consider and very helpful and extremely important if the VG would provide guidance on when – if at all - the downstream party to a vertical agreement (e.g. distributor) can expect to be held liable for an infringement of Article 101 (TFEU) when it comes, for example, to RPM. In particular, in case of RPM, it would welcome if the VG could provide clear guidance as to when would RPM/Information demand of the manufacturer be seen as coercion by the manufacturer/supplier and when distributor can be deemed to have acquiesced. In our view, the latest version of the draft VG⁸ does not address this concern sufficiently.

⁶ We refer to the notion of non-compliant data-base combination ban under GDPR which could be applied by way of analogy for competition law as well

⁷ e.g. Data Governance Act, Omnibus Directive etc.

⁸ https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en