



CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE DRAFT NEW SECTION DEALING WITH INFORMATION EXCHANGE IN DUAL DISTRIBUTION

FEBRUARY 18, 2022

1. In the context of the public consultation launched on February 4, 2022, by the European Commission (hereinafter, the “Commission”), the Association of Lawyers Practicing Competition Law (hereinafter, the “APDC”) presents below its observations regarding the draft new section dealing with information exchange in the context of dual distribution.
2. This contribution follows the APDC’s observations dated September 17th, 2021, in response to the public consultation launched by the Commission on July 9th, 2021 regarding drafts of the revised Vertical Block Exemption Regulation (hereinafter, the “VBER”) and of the Vertical Guidelines (hereinafter, the “VGL”).
3. The drafts VBER and VGL published on July, 9th, 2021, provided that a vertical agreement between a supplier of goods or services engaging in dual distribution and a distributor/buyer would only be block exempted in full where the parties’ aggregate market share in the relevant market at the retail level would not exceed 10%.¹ In cases where the parties have an aggregate market share at the retail level that exceeds 10% but otherwise have individual market shares that remain below the thresholds set out in Article 3, the draft VBER provided that the block exemption would apply except as regards any exchange of information between the parties.² In addition, the draft revised VBER excluded providers of online intermediation services from the benefit of the safe harbour when they sell goods or services in competition with undertakings to which they provide online intermediation services.³
4. This proposal was criticized by many stakeholders, including by the APDC which considered that the scope of the block exemption was overly narrowed for dual distribution agreements. In particular, the APDC considered that the additional 10% threshold introduced by the draft revised VBER was impractical and overly restrictive in practice, and that clear guidance as to the information that can be exchanged in dual distribution relationship was needed. Moreover, the APDC was doubtful that the

¹ Draft revised VBER of July, 9th, 2021, Article 2(4).

² Draft revised VBER of July, 9th, 2021, Article 2(5).

³ Draft revised VBER of July, 9th, 2021, Article 2 (7).

exclusion of all providers of online intermediation services from the exemption of the VBER was warranted for a business model that is currently in development.

5. Consequently, the APDC welcomes the Commission's consultation on a draft new section dealing with information exchange in dual distribution, and would like to thank the Commission for the very open discussion throughout the revision process of the Regulation and Guidelines. The APDC is grateful for the quality of the exchanges and the Commission's consideration of the stakeholders' comments.
6. The new draft section provides that the regulation replacing the VBER would include a provision stating that, in the context of dual distribution, the exchange of information between a supplier and a buyer does not benefit from the block exemption where the information exchange is not necessary to improve the production or distribution of the contract goods or services by the parties. In addition, the Commission provides a draft new section of the VGL which lists examples of information exchanges that can and cannot benefit from the block exemption in the context of dual distribution.
7. The APDC welcomes the Commission's proposal to provide clear guidance on the type of information exchange which can benefit from the block exemption in a dual distribution scenario (I). The APDC suggests that some further clarifications could be useful (II), and considers that the new proposal of the Commission should also apply to providers of online intermediation services engaging in dual distribution (III).

I. The APDC welcomes the Commission's new proposal regarding information exchange in dual distribution

8. The APDC understands that the precedent proposal to limit the safe harbour to dual distribution agreements where the aggregated market share of the parties is below 10% has been dropped (although the draft new section does not say it explicitly). Instead, all dual distribution agreements that fulfil the conditions of either Article 2(4) point (a) or (b) of the VBER would be block-exempted, except for exchanges of information between the supplier and the buyer which are not necessary to improve the production or distribution of the contract goods or services by the parties.
9. The APDC welcomes the removal of the proposal to introduce an additional market share threshold for the exemption of dual distribution agreements. In addition, the APDC supports the Commission's effort to provide guidance on the types of information exchange that benefit from the block exemption in dual distribution agreements.
10. While the suggested review test to be included in the new VBER (*i.e.*, whether the information exchanges are necessary) is particularly broad and leaves a wide margin of interpretation for its implementation (draft new section, p.1), the Commission's draft new section of the VGL helpfully complements the review test by providing useful guidance on the types of information exchange which can benefit, or not, from the block exemption in the context of dual distribution.
11. The concrete examples listed in paragraphs 13 and 14 of the draft new section of the VGL are useful in clarifying the scope of the block-exemption for dual distribution agreements. The draft new section of the VGL is also helpful in providing examples of precautions that can be taken by the parties to an exchange of information that does not

benefit from the exemption, in order to minimize the risk that the information exchange will raise horizontal concerns (draft new section, para 17).

12. The APDC also supports the acknowledgment and clear statement in the draft new section of the VGL that exchange of information between a supplier and a distributor can contribute to the pro-competitive effects of vertical agreements, including in a dual distribution scenario (draft new section, para 10).

II. Some further clarifications in the Guidelines would be needed

13. The APDC would like to suggest a few points on which further clarification could be helpful.
14. First, the word "*generally*" in paragraphs 13 and 14 of the draft new section of the VGL suggests that information may be "*necessary*" in some situations but not in other. The APDC believes that the two lists of positive and negative examples should be substantiated with explanations of the elements that may overturn the analysis. Such explanations would provide more predictability and a sufficient level of legal certainty for companies regarding the implementation of their distribution systems.
15. In addition, the use of the word "*necessary*" appears to be inappropriate as it entails the performance of a necessity test which is too high for a self-assessment relating to exchange of information. Such burden of proof may lead suppliers to limit exchanges of information that are not strictly "*necessary*" to improve the production or distribution, even in cases where these do not raise any competition concerns and could generate efficiencies.
16. Instead, we would suggest sticking to the proportionality test proposed by the Expert report. Indeed, rather than only exempting information exchange "*necessary to improve the production or distribution of the contract goods or services by the parties*", the Expert Report proposed that "[i]nformation that is directly related and proportionate to implement and/or facilitate the main non-restrictive vertical agreement should also in a dual distribution scenario remain within the safe harbor of the VBER up to the general market share threshold provided by Article 3 VBER" and to only exclude "*information exchange in dual distribution scenarios from its scope of application which is not directly related the functioning and/or facilitation of a vertical agreement, nor proportionate to it*" (Expert Report, p. 3). We would encourage the Commission to endorse this proposal.
17. Second, it would be helpful to clarify that the exchanges of information (including on prices) can be exempted in a situation where distributors request specific conditions to meet an individual customer's request.
18. The draft new section specifies that information relating to "*customer-specific data on the value and volume of sales per customer or information that identifies particular customers*" are generally not necessary to improve the production or distribution of the contract goods or services by the parties, "*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*" (draft new section, para 14 (b)).

19. The APDC considers that it would be useful to further clarify, in the exceptions listed in the second part of paragraph 14(b), that exchange of customer specific information or information identifying particular customers can also be necessary to enable the buyer to offer more favorable conditions, including on price, to a specific customer requesting it.
20. It is common that distributors request rebates or specific conditions from their suppliers in order to meet an individual customer's request. In these cases, it is necessary that the distributor provides information on its customer to the supplier. Such exchange of information is generally considered pro-competitive and should benefit from the block exemption also in a dual distribution scenario.
21. The APDC also considers that it would be useful to clarify that paragraph 14 (b) only concerns specific and non-aggregated data relating to the final customer (either a consumer or any other end user), being understood that a supplier or a wholesaler must remain free to obtain specific information on any reseller. If this was not the case, paragraph 14 (b) may have the harmful effect of preventing suppliers from obtaining retailer-specific data or information which allow them to identify their wholesaler/importers' clients and/or monitor their performances in terms of sales and/or monitor the compliance of retailers with quantitative and/or qualitative selective criteria.
22. Third, it would be important to clarify how the new guidelines on information exchange in dual distribution would be articulated with Article 2(6) of the draft revised VBER of July 9th, 2021, if this Article is retained in the final version of the Regulation. Article 2(6) provides that dual distribution agreements which have as their object to restrict competition do not fall within the safe harbour. However, paragraph 15 of the draft new section of the VGL provides that exchanges of information which are not covered by the exemption, such as information relating to actual future prices, do not prevent other aspects of the dual distribution agreement to benefit from the exemption. If Article 2(6) was to be retained in the final version of the Regulation, it would be useful to clarify that the exchanges of information mentioned at paragraph 14 of the VGL would not cause the entire agreement to lose the benefit of the exemption.
23. Fourth, the paragraph 14 a) provides for a welcome exception to the exchange of information relating to *"actual future prices"* when *"necessary to organise a coordinated short-term low price campaign"*. However, the APDC regrets that such exception does not also encompass the other exceptions to RPM prohibition listed in paragraph 182 (a) to (c) of the draft of VGL such as the introduction of a new product.
24. Finally, under para. 14 c), the Commission explains that unless the manufacturer is also the producer of the own-brand goods, exchange of information relating to goods sold by a buyer under its own brand name with a manufacturer of competing branded goods should not be covered by the safe harbour. While the APDC can understand this position, the APDC believes that this should be reciprocal. The Commission should specify in this section that exchange of information relating to goods sold by a branded manufacturer (in particular new products) to a buyer competing on these products with its own brand should not be covered by the safe harbour either unless the buyer has put in place the necessary safeguards to ensure that the information requested about the branded goods (in particular new products) under the main vertical relationship cannot be used internally to produce competing goods.

III. Providers of online intermediation services shall benefit from the block exemption of dual distribution agreements

25. The draft new section does not contain information on whether the Commission intends to retain the exclusion of providers of online intermediation services from the safe-harbour as provided in Article 2 (7) of the draft revised VBER of July 9th, 2021.
26. The APDC considers that the suggested new condition for the block exemption of dual distribution agreements, and the useful clarifications provided in the draft new section of the VGL, should also apply to providers of online intermediation services.
27. Dual distribution relationships involving providers of online intermediation services do not raise additional concerns in comparison to dual distribution agreements concluded by other suppliers. In this context, the APDC does not see any valid rationale to differentiate providers of online intermediation services from other suppliers in the context of dual distribution.
28. First, it is unusual under the VBER to give a specific treatment to a given business model. The overall logic of the VBER is to decide whether an exemption should be granted or not, based on the likely impact on competition of the vertical agreement rather than based on the business model of the companies at stake.
29. Second, the APDC has not observed that all dual distribution agreements involving suppliers of online intermediation services potentially raise anti-competitive concerns and should be excluded from the scope of the block exemption. A great diversity of undertakings act as suppliers of intermediation services and it cannot be assumed that these companies all have market power in a way that could raise competition concerns.
30. In particular, there is an increasing number of small platforms of intermediation services, whose activities are unlikely to raise concerns *per se*. Moreover, with the development of online sales, more and more suppliers have started creating their own marketplaces to extend their offering to products other than their own and try to compete more efficiently against large platforms, to the benefit of consumers. Removing the benefits of the exemption for all providers of online intermediation services as soon as they also sell competing products could discourage the emergence of new competitors offering intermediation services or, alternatively, discourage suppliers of online intermediation services to start distributing products directly as well.
31. Thus, excluding all suppliers of intermediation services from the exemption for dual distribution may ultimately and paradoxically have detrimental effects on competition. Such an exclusion seems all the less warranted that (i) practices implemented by the larger intermediation service providers may still be caught under Article 102 TFEU, and (ii) potentially problematic exchanges of information would in any case be deprived of the benefit of the exemption. The exclusion of suppliers of intermediation services from the exemption for dual distribution would therefore impact mainly smaller intermediation platforms, which activities are unlikely to raise competition issues.