



**PROPOSED GUIDANCE RELATING TO INFORMATION EXCHANGE IN THE CONTEXT OF DUAL  
DISTRIBUTION, INTENDED TO BE ADDED TO THE VERTICAL GUIDELINES**

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**CNMI FEEDBACK**

**1. INTRODUCTION AND BACKGROUND**

Established in 1958, *Camera Nazionale della Moda Italiana* (“**CNMI**”) represents, promotes and protects the values and the development of the Italian fashion industry in Italy and globally. CNMI represents almost all of the major Italian fashion brands.

The Vertical Block Exemption Regulation (“**VBER**”) and the accompanying Guidelines on Vertical Restraints (“**VGL**”) are of great practical significance to CNMI members, given its members’ use and reliance on vertical agreements for the resale of their branded products. CNMI has been actively engaged in the European Commission’s (“**Commission**”) review process of these rules:

- (a) *April 2019*: CNMI contributed to the Commission’s first public consultation on the review of the VBER and the VGL.
- (b) *November 2020*: CNMI submitted input on the Commission’s inception impact assessment.
- (c) *March 2021*: CNMI submitted its contribution to the second public consultation on the review of the VBER and VGL.
- (d) *September 2021*: CNMI submitted its feedback on the Commission’s proposed draft VBER and VGL.

**2. CNMI’S VIEWS**

CNMI welcomes the Commission’s proposed guidance on information exchange in the context of dual distribution (“**Proposed Guidance**”).

CNMI particularly appreciates the Commission’s willingness to consider and address stakeholders’ concerns over the proposed legal framework for dual distribution in the draft VBER and VGL, published in July 2021. CNMI and its members were amongst the stakeholders considering that treating dual distribution under the vertical rules is appropriate and hence that the exception under Article 2(4) of the VBER should remain unchanged. Dual distribution is common in the luxury and fashion sector and CNMI’s members engage in dual distribution with their clients in their ordinary course of business.

In that regard, CNMI noted that, to the best of its knowledge, dual distribution has not created specific antitrust concerns at the European level, when it comes to exchange of information. To the extent that such potential concerns may exist, CNMI called for further



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guidance in the VGL on how to lawfully exchange information within a dual distribution context. In particular, CNMI noted that an assessment under the Horizontal Guidelines would not be appropriate in the context of dual distribution, as dual distribution should be considered as a cooperative relationship rather than a competitive one.

For these reasons, CNMI generally concurs with the Commission's Proposed Guidance. Set out below are CNMI's key observations:

- The Commission could take a more straightforward approach on the basis of the inclusion of a presumption of legality with respect to information exchanges in the context of dual distribution, instead of introducing an exception for the exchange of information between the parties that is "*necessary to improve the production or distribution of the contract goods or services by the parties*".

Paragraph (9) of the Proposed Guidance could be amended as follows:

*"(9) If the conditions of Article 2(4), point (a) or (b) of Regulation (EU) X are fulfilled, the exemption provided by Article 2(1) of the Regulation applies to all aspects of the vertical agreement in question, including any exchange of information between the parties ~~that is necessary to improve the production or distribution of the contract goods or services by the parties~~, provided that such exchange of information is not of the type that is expressly excluded by Article 2(5) of the Regulation [i.e. paragraph (14) of the Proposed Guidance]"*

CNMI notes that such approach would provide greater clarity. In fact, the general rule that the VBER does apply to information exchange between a supplier and a buyer that is necessary to improve the production or distribution of the contract goods or services by the parties appears to overlook that some information exchanges may simply be necessary for the operation of the commercial/contractual relationship between a supplier and a buyer, while not strictly meeting the requirement to "*improve the production or distribution of the contract goods or services*." In contrast, by adopting the proposed presumption the information exchanges that meet the Article 2(4) requirements would be deemed compliant, to the exclusion of any information exchanges that have been "black listed" under paragraph (14) of the Proposed Guidance.

- CNMI welcomes the introduction of examples of what is considered necessary to improve the production or distribution of the contract goods or services, depending on the distribution model (in particular, exclusive distribution, franchising and selective distribution). CNMI's members often rely on selective and exclusive distribution models, which usually require a certain degree of information exchange between a brand/supplier and the exclusive partner or authorised reseller.

Given the importance and practical significance of these two distribution models for CNMI members, CNMI considers that it would be helpful to benefit from further examples of permitted and prohibited exchanges of information specifically in the context of exclusive and selective distribution.



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- The introduction of a list of information exchanges considered non-problematic in the context of dual distribution (“**white list**”), as well as of a list of information exchanges presumed to fall outside the scope of the VBER (“**black list**”) is most welcome. The introduction of a black list was one of CNMI’s suggestions to the Commission in order to provide clarity on the assessment of information exchange in the context of dual distribution.

These lists will provide legal certainty to brands wishing to assess the legality of their exchanges with customers. This will allow brands to act with written guidance and to reduce costs for legal advice (costs which might have been passed on to consumers).

Even though these non-exhaustive lists of examples are generally helpful, CNMI notes that they may be of limited use in practice if a particular exchange does not strictly fall within the pre-identified scenarios. Indeed, situations that do not fall within either the white list or the black list would be subject to self-assessment. However, there still appears to be limited guidance in the Proposed Guidance on how market operators ought to self-assess cases falling outside of the above-mentioned lists. Such guidance could, for example, be further set out in the same manner as in the Commission’s guidance on restrictions “by object.”<sup>1</sup>

Finally, CNMI notes that the example set out in paragraph 14(b) of the Proposed Guidance is in contradiction with the core principles of selective distribution. In particular, it is of paramount importance for an operator of a selective distribution system to know the identity of customers who onsell products falling within the selective distribution network because the entire system is based on permitting sales by and between only those resellers who are expressly authorised to do so. The inability to confirm the identity of a buyer’s customers severely undermines a brand’s/supplier’s ability to enforce its selective distribution rights. In this respect, CNMI notes that the Customer Relationship Marketing (“**CRM**”) requires some exchange of consumer information and related profiling. The CRM is an essential support tool for the authorised distributor network of a selective retail system. Indeed, thanks to the collection of customers’ data and feedback, CRM strategies constitute an useful tool to develop and strengthen long-term relationships with authorized distributors, with final customers ultimately benefitting from this synergy. Considering this, CNMI suggests that paragraph 14(b) ought to be revised, for example by moving the exception “*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*” into the white list provided for in paragraph 13 of the Proposed Guidance, or at least carving out from paragraph 14(b) the exchanges of information in the context of selective distribution.

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<sup>1</sup> Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the *De Minimis* Notice.



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CNMI wishes to thank the Commission again for the constructive dialogue and for the opportunity to express its position on a number of topics of interest for the fashion industry.

CNMI stands ready to continue this open dialogue with the Commission and to further discuss these or any other issues, and to assist the Commission with any additional information or clarification it might require in the ongoing review of the VBER and the VGL.

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