

**EUROPEAN COMMISSION REVIEW OF THE HORIZONTAL GUIDELINES
RESPONSE TO PUBLIC CONSULTATION
BRANDS FOR EUROPE**

This response is submitted on behalf of by **Brands for Europe**. **Brands for Europe**, is a group of leading brands across numerous industry sectors. The member companies of Brands for Europe are Adidas, Apple, Bose, Canon, Colgate Palmolive, HP, the LEGO Group, Levi Strauss & Co., L'Oréal, Nestlé, Nike, McDonald's, Panasonic, Philips, Pioneer, P&G, Puig, Swatch Group, Unilever, Whirlpool and Yum! (KFC, Pizza Hut, Taco Bell). The group is represented by Baker McKenzie.

RESPONSE TO COMMISSION CONSULTATION: INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION

- 1.1 Brands for Europe is grateful for the opportunity to provide views on the draft horizontal co-operation guidelines (Draft HGL).

On dual distribution

- 1.2 Our contribution focuses on the treatment of information exchange in the dual distribution context, specifically paragraph 48 of the Draft HGL which contains a reference to dual distribution scenarios but fails to explain with sufficient clarity that information exchange in that context is to be assessed exclusively under the VBER and Vertical Guidelines subject to certain exceptions. We therefore suggest the following amendments to paragraph 48:

48. "[...]However, to the extent that vertical agreements, for example, distribution agreements, are concluded between competitors, the effects of the agreement on the market and the possible competition problems can be similar to horizontal agreements. Therefore, vertical agreements between competitors fall under these Guidelines, **unless they fall under the VBER or the Vertical Guidelines. Where competitors enter into a non-reciprocal vertical agreement and one of the conditions in Article 2(4), points (a) or (b) apply, such an agreement is exclusively assessed under the VBER and the Vertical Guidelines (see Article 2(4) of the VBER), and not under these Guidelines. This also applies to any exchange of information between the parties, which is exclusively assessed under the VBER and the Vertical Guidelines, except for information exchange that is not covered by Article 2(5) of the VBER or the Vertical Guidelines.**"

- 1.3 As regards the actual text of Article 2(5), we refer back to the suggestion made in section 4 of our response to the "Draft new section dealing with information exchange in dual distribution" published for consultation on 4 February 2022. In that submission, we strongly recommended that Article 2(5) be amended in order to operate as a broader exemption for information exchange in the vertical context with specific carve-outs for specific exchanges in a dual distribution scenario which would instead fall to be considered under the Horizontal Guidelines.
- 1.4 In addition, we note that the heading of section 6.2.4.2 refers to "Indirect information exchange and exchanges in mixed vertical/horizontal relations", while the section itself only addresses the indirect exchange of information. We therefore recommend that the heading is limited to "Indirect information exchange".
- 1.5 We also suggest the amendment below to make it clear that situations of dual distribution (within the meaning of Article 2(4) VBER) will be assessed exclusively under the Vertical Guidelines even where they are not technically 'covered by the VBER' because of the supplier's market share for example. We believe that this was the Commission's intention (since it would not make sense to treat a 'vertical' dual distribution agreement as having been transformed into a 'horizontal' relationship simply because the supplier's market share exceeded 30 per cent). However, we would be grateful if the Draft HGL were amended to make this clear. The penultimate sentence in paragraph 357 could also footnote the text

that currently appears in Article 3 of the “Draft new section dealing with information exchange in dual distribution” published for consultation on 4 February 2022.¹

357. The only exception to the two-step process mentioned in the previous paragraph is in case of non-reciprocal distribution agreements between competitors where (a) the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, or, (b) the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services ~~that are covered by the VBER~~, to which these Guidelines do not apply. Paragraph 48 provides additional guidance on the general relationship between these Guidelines with the VBER and the Vertical Guidelines

On customer-specific data

- 1.6 We also take this opportunity to reproduce the views that we expressed in response to the additional consultation on information exchange in the context of dual distribution, specifically the Commission’s proposals on when specific types of information should be covered by the VBER and when they should be subject to the HGL. In this regard, please see the submission dated 18 February submitted on behalf of Brands for Europe; AIM; the European Cultural and Creative Industries Alliance (ECCIA); and the Federation of the European Sporting goods Industry (FESI).
- 1.7 We broadly agree with the proposed classification of the various types of information exchange in the consultation² with one major exception: the inclusion in Article 14 (and therefore the denial of the VBER) of customer-specific sales data, including non-aggregated information on the value and volume of sales per customer.
- 1.8 We see no competition law justification for denying the benefit and legal certainty of the VBER for the exchange of customer-specific sales data. Accordingly, we urge the Commission to specifically include this type of information exchange in Article 13 (or its equivalent) so that it is covered by the VBER in situations where it is not used to impose any of the hardcore restrictions on the buyer specified in Article 4 of the VBER.
- 1.9 This type of information is a critical component of the business model of many suppliers across a wide variety of sectors. This is especially the case in respect of distribution at the wholesale level, e.g., when manufacturers sell to third party resellers and will therefore have little to no visibility over follow-on sales to downstream levels (e.g. retailers etc.). The same needs can arise in relation to consumer level data as explained in our submission. It is also necessary in the context of franchising arrangements where accurate sell-out information from the franchisees is particularly important to enable the franchisor to guarantee consistent high quality across the entire franchise system.
- 1.10 The Commission has not put forward a theory of harm explaining why the sharing by a reseller of customer-specific sales data could harm consumers. Nor is there any decisional practice under EU competition law showing how such harm could arise.
- 1.11 We understand that a concern may have been expressed that a supplier could use customer specific information received from a buyer in order to ‘target’ customers of that reseller. Alternatively, where a

¹ Article 3 provides that “non-reciprocal vertical agreements that meet the conditions of Article 2(4), point (a) or point (b) of Regulation (EU) X have to be assessed under that Regulation and these guidelines, unless otherwise indicated in these guidelines.” https://ec.europa.eu/competition-policy/system/files/2022-02/guidance_information_exchange_VBER_dual_distribution_2022_0.pdf

² These are set out in paragraphs 13 and 14 of the draft new section on information exchange in dual distribution: [guidance_information_exchange_VBER_dual_distribution_2022_0.pdf](https://ec.europa.eu/competition-policy/system/files/2022-02/guidance_information_exchange_VBER_dual_distribution_2022_0.pdf) (europa.eu)

supplier and a buyer, for example, both serve the same customer, it is theoretically possible that a supplier could gain insights from pricing information it receives from the buyer so as to try to encourage the customer to divert purchases directly to the supplier.

- 1.12 We are not surprised at the fact that no competition issues have ever arisen about such scenarios. Quite aside from the question of whether these scenarios would even fall within the scope of Article 101(1) TFEU, the principal incentive for the supplier is to compete successfully against rival suppliers by maximizing its sales through all available channels. The supplier will always seek to ensure that its entire distribution 'ecosystem' can best meet the demands of customers interested in the brand. The supplier's downstream operations and those of independent resellers are typically complements that can serve different customer preferences and operate under inherently different competitive conditions.
- 1.13 If the supplier were to try to limit the ability of its buyers to compete effectively, it would run a serious risk that it would lose sales to rival brands at the level of independent buyers, thus undermining its goal to maximize sales overall. Plus, if a buyer approaches the scale at which it might be more attractive to the buyer to buy direct from the supplier (e.g. due to volume of purchases), then the buyer would typically approach the supplier (and not rely on the supplier approaching it to suggest a modification to its supply chain practices). In fact, in some territories, it is common for suppliers to serve particular accounts directly because the latter has insisted upon this.
- 1.14 Overall, the supplier has every incentive to ensure that independent buyers remain committed to the brand and invest in promoting the brand and its products. Creating an adversarial relationship with buyers would be against the supplier's own best interests, as it would undermine its ability to compete against rival brands and potentially raise issues under non-competition laws (e.g. provisions relating to fair trading etc.).
- 1.15 Certain buyers might express concerns about the supplier's use of their sales data to benefit its own downstream operations. However, buyers are entirely free to decide whether or not to provide the data and, in fact, will often charge for this information. In the end, the question of whether data can be obtained is one of many commercial considerations that a supplier needs to address to maintain a productive relationship with its buyers.

Conclusion

- 1.16 To conclude, suppliers need customer-specific sales data (volume and value) from their buyers for procompetitive reasons and in particular for the efficient operation of their entire channel network (including their direct and indirect sales).
- 1.17 We consider that the exclusion from the VBER of this type of information exchange will in practice lead to significant issues for suppliers, which will also be to the detriment of their resellers and end customers.
- 1.18 The inappropriate and ambiguous application of the HGL to this information exchange would reduce legal certainty. Suppliers in a position of dual distribution would be unable to:
 - (a) Provide tailored/customer-specific promotions and investment
 - (b) Provide and benefit from data insights
 - (c) Forecast and manage channel inventory efficiently
 - (d) Evaluate the performance of resellers/retailers
 - (e) Meet customer demand when this requires collaborating with resellers to provide solutions to end customers

- (f) Drive demand by educating customers on their products and services in the most efficient manner

- 1.19 Concrete examples showing these issues are identified in paragraphs 2.11-2.36 or our submission, and are supported by the evidence contained in Confidential Annexes A-D that were also submitted.