European Commission

# Expert Report on the review of the Vertical Block Exemption Regulation

## Information exchange in dual distribution

Final Report

Prepared by

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Competition

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*Information exchange in dual distribution*

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# Table of Contents

# Introduction

This Expert Report on information exchange in dual distribution scenarios is based on

- the Commission Regulation (EU) No. 330/2010 (EC) of 20 April 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[1] ("VBER") and
- the Guidelines on Vertical Guidelines of 19.5.2010[2] ("Vertical Guidelines").

On July 9, 2021 the European Commission ("Commission") published first drafts of a

- a revised VBER[3] and
- revised Vertical Guidelines[4]

according to which the Commission proposed an exclusion of any information exchange in dual distribution scenarios from the benefits of a revised vertical block exemption regulation when market share exceeds the 10% threshold.[5] On the basis of its Staff Working Document on the evaluation of the Vertical Block Exemption Regulation[6] the Commission assumed at the time that an inclusion of information exchange in dual distribution scenarios may lead to a "false positive" as "*the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible.*"[7] This assumption and the proposal outlined in the draft VBER of July 2021 triggered significant criticism from interested parties.

This Expert Report is meant to contribute to the debate of how to address information exchange in dual distribution scenarios under a revised vertical regime. Consequently, this Expert Report does not take the Commission's draft proposals of July 2021 as a starting point or basis for its analysis. Instead it provides for stand-alone considerations on the treatment of information exchange in dual distribution scenarios based on the current legal framework, relevant EU and national decision practice and the long term practical experience of the authors of this Expert Report as advisors on various distribution models and formats across industries and competitive landscapes.

The following Expert Report in its first part analyzes the legal situation with respect to dual distribution scenarios under the current legal framework and applies this framework in the second part to typical situations of information exchange in dual distribution scenarios, including different hypothetical industry examples. Against this background the third part of this Expert Report then provides the conclusions of the authors as to how dual distribution scenarios under a revised framework could be dealt with.

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[1] *OJ L 102/1, 23.4.2010.*
[2] *OJ C 130/1, 19.5.2010.*
[3] *Annex to the Communication from the Commission, Approval for the content of the Draft for a Commission Regulation on the application of Art. 101 (3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices, currently available under https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.*
[4] *Annex Communication from the Commission Notice, Guidelines on vertical restraints, Draft, currently available under: https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.*
[5] *Art. 2 (5) Draft VBER.*
[6] *Staff working document on the evaluation of the Vertical Block Exemption Regulation, SWD(2020) 172 final, 8.9.2020, currently available under: https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.*
[7] *Explanatory Note to the draft revised VBER and Vertical Guidelines under 1, par. 2 and 1st bullet point, currently available under: https://ec.europa.eu/competition-policy/public-consultations/2018-vber_en.*

# Executive Summary

A purely vertical agreement that falls within the scope of Art. 2 and 3 VBER and that does not contain hardcore restrictions is an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Art. 101 (3) TFEU. This assessment does not change simply because the supplier is or becomes to some degree active at the retail level. This Expert Report illustrates on the basis of practical examples that exchange of information is an integral part of vertical agreements also in most dual distribution scenarios. The authors of this Expert Report consider that information exchange in dual distribution scenarios does not generally create a "false positive" under the current VBER. In the view of the authors, the situations in which information exchange in dual distribution scenarios may raise competition concerns are more limited as compared to what was suggested in the draft VBER and Guidelines published on 9 July 2021.

The situations in which the assumed pro-competitive effects of information exchange may be missing mainly relate to situations in which the information exchange would either facilitate or result in vertical hardcore restraints or horizontal by object restrictions. The authors of this Expert Report therefore believe that an additional market share threshold in the VBER for information exchange in dual distribution scenarios would not help to distinguish such situations from pro-competitive practices and/or conduct. While in the view of the authors of this Expert Report recent case law as outlined in the Expert Report shows that the current legal framework is equipped to deal with restrictive practices resulting from information exchange in dual distribution scenarios, the authors, nonetheless, recognize that it would improve legal certainty and hence increase the practical benefits of the VBER to confirm that information exchange in dual distribution is not exempted without limits.

As a consequence, the authors of the Expert Report believe that

- information exchange 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 Art. 3 VBER;
- the revised VBER should, within the general market share thresholds of Art. 3 VBER, only exclude information exchange in dual distribution scenarios from its scope of application which is not "directly related" to the functioning and/or facilitation of a vertical agreement or not proportionate to it;
- the revised Vertical Guidelines should then provide explanations on the type of information that is not "directly related" for the functioning and/or facilitation of a vertical agreement in a dual distribution scenario or not proportionate to it. Here, the Vertical Guidelines could follow the VBER's general exemption principles according to which it is not necessary for the application of Art. 101 (3) TFEU to define the type of information exchange that is capable of falling within Article 101(1) TFEU, as long as it is clear which type of information exchange is not covered by the block exemption; and
- guidance on the limits of information exchange in dual distribution should be provided in the revised Vertical Guidelines and not be moved partially or in its entirety to the Horizontal Guidelines. Otherwise, the assessment for an exemption under Art. 101 (3) TFEU would be subject to entirely different legal parameters and presumptions.

# I. Legal Background

This section provides an overview on the legal parameters under which information exchange in vertical, dual and horizontal distribution is currently dealt with.

"Information exchange" in vertical or horizontal agreements is not defined by the European Commission ("Commission"). Par. 57 of the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines")[8] states:

> *"Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries [Footnote not quoted], thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against each other's best practices. Sharing of information may also help companies to save costs by reducing their inventories, enabling quicker delivery of perishable products to consumers, or dealing with unstable demand etc. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice."*

In this Expert Report the term "Information" is in the following used for all facts-based and/or subjective communication, including but not limited to sales figures and data. In this Expert Report the term "Exchange" is in the following used for all types of disclosure of such Information, irrespective of whether Information is disclosed unilaterally or reciprocally, in writing, orally or by way of technical means.

Information Exchange between parties in purely vertical agreements and/or between parties in a dual distribution scenario is not specifically addressed or dealt with by the current Commission Regulation No. 330/2010 ("VBER").

Consequently, the VBER does not provide an answer to the question, whether and under which circumstances such Information Exchange may cause restrictions of competition and hence requires an exemption from Art. 101 (1) TFEU in the first place. In line with other block exemptions, the VBER states in Recital 4 [emphasis added]:

> *"For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those vertical agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the supply and purchase side."*

This Expert Report provides considerations on the legal and factual background of Information Exchange in dual distribution scenarios under the current exemption mechanism of the VBER. These considerations are based on the authors' practical and theoretical experience in dealing with and reflecting on vertical agreements as private practitioners and authors of several publications on the subject. As a consequence, the legal focus of this Expert Report lies on the assessment of block exempted Information Exchange under the safe harbor of the VBER. The general question of whether and under which circumstances Information Exchange in vertical agreements in a situation of dual distribution is (i) restrictive of competition pursuant to Art. 101 (1) TFEU and thus (ii) requires an exemption under Art. 101 (3) TFEU is consequently only dealt with to the extent relevant for the exemption mechanism of the VBER.

[8] *OJ C 11, 14.1.2011, p. 1.*

# 1. Information Exchange in a purely vertical agreement under the current vertical framework

Information Exchange in purely vertical agreements is not explicitly addressed by the VBER. Its assessment follows from the general exemption mechanism of the VBER as well as explanations of this mechanism in the Vertical Guidelines.[9] Some indirect guidance can further be found in the Commission Notice on certain subcontracting agreements in relation to Art. 85 (1) of the Treaty ("Subcontracting Notice"),[10] the Guidelines on the application of Article 81 (3) of the Treaty ("Art. 81 (3) Guidelines")[11] and – at least conceptually – in the Commission Notice on restrictions directly related and necessary to concentrations ("Ancillary Restraints Notice").[12] Lastly, the Vertical Guidelines refer to the Horizontal Guidelines[13] that currently deal with Information Exchange between competitors, but do not address Information Exchange in the context of vertical agreements including a dual distribution situation.

## 1.1 Exemption mechanism of the VBER

Vertical restraints that fall within Art. 101 (1) TFEU, currently benefit from an exemption under the VBER if they

(i) fall within the scope of Art. 2 VBER,

(ii) are agreed between companies not exceeding the market share thresholds of Art. 3 VBER and

(iii) do not constitute a restriction pursuant to Art. 4 and/or Art. 5 VBER.

## 1.2 Scope of Information Exchange covered by Art. 2 (1) VBER

Pursuant to Art. 2 (1) VBER, the exemption under the VBER only applies to vertical agreements or concerted behavior (collectively defined as "vertical agreement", Art. 1 (1) (a) VBER) to the extent such vertical agreements contain a restriction of competition (defined as "vertical restraint", Art. 1 (1) (b) VBER).

Information Exchange may thus fall outside of the scope of Art. 2 (1) VBER for two reasons:

(i) it does not result in a vertical restraint and/or

(ii) is not related to a vertical agreement.

### 1.2.1 Unilateral Information Exchange

The Commission outlines in par. 25 (a) Vertical Guidelines [emphasis added]

> *"The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position. For there to be an agreement within the meaning of Article 101 it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties' intention. In case there is no explicit agreement expressing the concurrence of wills, the*

[9] *OJ C 130, 19.5.2010, p. 1.*
[10] *OJ C 1, 3.1.1979, p. 2.*
[11] *OJ C 101, 27.4.2004, p. 97.*
[12] *OJ C 56, 5.3.2005, p. 24.*
[13] *OJ C 11, 14.1.2011, p. 1.*

*Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party."*

We understand this guidance as follows: In a vertical context, the receipt and/or possession of Information may induce or facilitate an agreement or concerted practice, but does not constitute an agreement or concerted practice as such. This would only be different if the Exchange of the Information as such expressed a joint intention of the parties regarding a certain market behavior, which could be the case, if the Information Exchange was agreed to implement a vertical restraint. Or in practical terms: the receipt of certain Information, such as for example an end customer identity, does as such not qualify as an agreement. This would, however, be different if the Information was Exchanged following the joint understanding of the parties to only serve certain end customers. In the latter scenario the subsequent reporting of the end customers identity by the distributor would implement and as such prove the distributor's acquiescence with the vertical resale restraint. This interpretation takes into account the European Court of Justice's ("ECJ") principles in *Bayer/Adalat*,[14] also quoted in par. 25 (a) Vertical Guidelines, pursuant to which unilateral receipt and/or possession of Information in a purely vertical context does not create the presumption of an agreement or concerted practice.

While it is hence necessary to establish whether the Information Exchange expresses at least tacit acquiescence with a vertical restraint, the authors of this Expert Report are not aware of any guidance whether it may be required to distinguish between Information Exchange pursuant to a contractual obligation or otherwise formally or informally agreed, e.g. as part of a rebate scheme, and Information Exchange occurring unprompted. While it appears less likely that the receipt of entirely unprompted Information in a vertical context may result in a vertical restraint, we would not exclude the possibility as such. That being said, the receipt of unprompted information is in our view rather the exception than the rule. Even reports about ad hoc events between the parties to a vertical agreement are generally linked to either formally agreed contractual obligations or informal expectations known to both parties to be kept updated about circumstances that may have an impact on the vertical agreement. Against this background, we believe that it is more often than not possible to argue that the circumstances of the Information Exchange (and the inevitable acquiescence of Exchanging such Information as formal or informal part of a contract obligation) constitutes an "agreed" Information Exchange.[15] This is without prejudice to the question whether such "agreed" Information Exchange then results in a vertical restraint.

From a practical perspective the consequences of this interpretation can so far be left open. In our view and as already indicated above, the ECJ judgment in *Bayer/Adalat* and the way the judgment is referred to in the Vertical Guidelines support the conclusion that a restrictive agreement or concerted practice requires a "*joint intention*"[16] for a conduct beyond the mere possession of Information received. It is then on the Commission, or a party arguing a violation of competition law rules, to prove a tacit acquiescence with a unilateral policy and thus a vertical restraint e.g. based on or facilitated by Information Exchange. Unlike as in the area of horizontal agreements (see I.3, below), we are not aware of a decision exclusively dealing with vertical agreements, in which the Exchange of Information as such was considered an infringement of Art. 101 (1) TFEU.

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[14] *Judgment in Joined Cases C-2/01 P and C-3/01 P Bayer/Adalat EU:C:2004:2, paras 88 and 102.*
[15] *This also applies to Information Exchanged at the occasion of sales and marketing meetings, purchase price negotiations, etc. Information Exchanged at these occasions is likewise typically prompted by direct or indirect obligations rooted in the vertical agreement. In particular in long-term supply or distribution relations the disclosure and receipt of Information is an agreed part of the contractual relationship.*
[16] *Vertical Guidelines, par. 25 (a).*

This is in line with the decision practice of the courts: the ECJ has recently stated that in a vertical context the receipt of an unsolicited email with Information alone does not violate Art. 101 (1) TFEU but that in addition at least a presumption of a concerted practice is needed.[17]

### 1.2.2 Information Exchange not related to the purchase, sale or resale of the contract products or services

Assuming that Information Exchange facilitates a restraint and thus results in an agreement or concerted practice, Art. 2 (1) VBER further requires that this agreement/concerted practice relates to the purchase, sale or resale of the contract products or services. If not, the restraint would not be a "vertical restraint" within the meaning of Art. 1 (1) (b) VBER and, as a consequence, not be exempted under Art. 2 (1) 2nd subparagraph VBER from the prohibition of Art. 101 (1) TFEU.

Pursuant to Art. 2 (1) VBER restraints not relating to a vertical agreement can hence not benefit from the VBER. Par. 26 3rd sentence Vertical Guidelines clarifies this principle as follows [emphasis added]:

> *"More generally, the Block Exemption Regulation does not cover restrictions or obligations that do not relate to the conditions of purchase, sale and resale, such as an obligation preventing parties from carrying out independent research and development which the parties may have included in an otherwise vertical agreement."*

We understand the current rules as follows: if there are restraints (such as the rather obvious example of R&D restrictions mentioned in par. 26 Vertical Guidelines) that fall outside of the scope of Art. 2 (1) VBER for being unrelated to the purchase, sale and resale of contract products/services and thus to a vertical agreement, the safe harbour of the VBER does not apply. The legality of such restrictions has to be assessed individually within Art. 101 (3) TFEU, provided that such agreements fall within Art. 101 (1) TFEU in the first place. The same rationale would hence be applicable to Information Exchange facilitating or enabling such restrictions: Information Exchange that results in a restraint, but does not relate to a vertical agreement, because it has been agreed not as an integral part of a vertical agreement but only at its occasion, is according to our understanding of the current rules also not covered by the VBER. To the extent such Information Exchange falls within Art. 101 (1) TFEU (see under 1.2.1 above), its legality has to be assessed individually within Art. 101 (3) TFEU.[18]

In our view the practical difficulty currently lies in determining the difference between what is "a restriction of competition in a vertical agreement" (Art. 1 (1) (b) VBER) and what is a restriction of competition not in but only "at the occasion of a vertical agreement" and hence not covered by Art. 2 (1) VBER.

These rules are even more difficult to apply in a situation of dual distribution. As will be further explained below, some national competition authorities have addressed the consequences of Information Exchange in dual distribution scenarios not under the VBER, but purely on a horizontal level under Art. 101 (1) TFEU. Hence they seem to have reached the conclusion that the scope of Art. 2 (1) VBER for this type of Information Exchange was exceeded.

In view of the proposed changes to the VBER with respect to Information Exchange in dual distribution situations, we consider it relevant to briefly reflect on the consequences of Information Exchange falling outside the scope of the VBER under the current rules. Here, it is important to note that the mere fact that the VBER is not/no longer applicable does not allow a conclusion on whether Information Exchange results

[17] *Judgment in Case C-74/14 Eturas ECLI:EU:C:2016:42, paras 33-40.*
[18] *See Schultze/Pautke/Wagener, Vertikal-GVO, 4th ed, 2019, par. 145.*

in a restriction of competition in the first place, i.e. falls within or outside the scope of Art. 101 (1) TFEU.

### 1.2.3 Information Exchange in vertical agreements outside the scope of the VBER

Currently, the following Commission documents provide guidance on the question whether a certain conduct does not fall under Art. 101 (1) TFEU (and hence does not require an (individual or general block) exemption for its validity). This guidance is currently relevant for vertical restraints not meeting the market share thresholds of Art. 3 VBER or agreements falling outside of the scope of Art. 2 (1) VBER. The guidance is of limited relevance to vertical restraints violating Art. 4 VBER. Such hardcore restrictions are generally subject to Art. 101 (1) TFEU with the consequence that only a (rare) individual exemption under Art. 101 (3) TFEU can ensure their validity.

#### (i) Subcontracting Notice

Par. 22 Vertical Guidelines refers to the Commission's Subcontracting Notice.[19] The Subcontracting Notice deals with provisions in agreements under which one firm ("contractor") entrusts to another firm ("subcontractor") the manufacture of goods, the supply of services or the performance of work under its instruction and behalf and where the contractor has to provide to the subcontractor protected technology or equipment without which it would not be possible for the subcontractor to manufacture the goods, supply the services or perform the work. In these specific circumstances, the Commission considers enumerated restrictions which protect the technology or equipment or limit its use to what is "*necessary for the purpose of the agreement*" (par. 1 3rd subparagraph Subcontracting Notice).

#### (ii) Art. 81 (3) Guidelines

A related principle, however not tied to subcontracting agreements, is outlined in the Commission's Art 81 (3) Guidelines.[20] In par. 29 2nd sentence of these Guidelines, under the heading "Ancillary restraints" the Commission states with respect to the applicability of Art. 101 (1) TFEU to restrictions of competition [emphasis added]:

> "*If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1)* [now Art. 101 (1) TFEU]."

In par. 31 of the Art. 81 (3) Guidelines, the Commission explains this concept further [emphasis added]:

> "*The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it. If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it. If, for example, the main object of a franchise agreement does not restrict competition, then restrictions, which are necessary for the proper functioning of the agreement, such as obligations aimed at protecting the uniformity and reputation of the franchise system, also fall outside Article 81(1) of the Treaty.*"

[19] *OJ C 1, 3.1.1979, p. 2.*
[20] *OJ C 101, 27.4.2004, p. 97.*

From a practical point of view, the Art. 81 (3) Guidelines are often overlooked when dealing with vertical agreements. This is due to the fact that while structurally the question whether a practice falls within Art. 101 (1) TFEU should be considered first, the exemption mechanism of the VBER leads to the consequences that this question becomes relevant only if the VBER fails to apply.

### (iii) Merger Control Regulation and Ancillary Restraints Notice

Lastly, Art. 8 (1) 2nd subparagraph Regulation 139/2004 ("Merger Control Regulation")[21] states that decisions declaring a concentration compatible with the common market shall be deemed to cover "*restrictions directly related and necessary to the implementation*" of the concentration. The general principles for the necessary assessment of such ancillary agreements are outlined in the Commission notice on restrictions directly related and necessary to concentrations ("Ancillary Restraints Notice).[22] The Ancillary Restraints Notice in its par. 13 interprets this principle narrowly. For an agreement to be "*necessary for the implementation of a concentration*" it is required that "*in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty*".

### (iv) Concept of objective justification

A related concept to the ancillary restraints concept is the one of "objective justification".[23] Under this concept, otherwise restrictive provisions may not fall under Art. 101 (1) TFEU if there are "*legitimate interests […] which may justify a reduction of price competition in favour of competition relating to factors other than price*."[24] However, as regards vertical agreements, the case law has applied the concept of objective justification to the best of the authors' knowledge only in the context of selective distribution.

### (v) Preliminary conclusions

Against this background, the authors of this Expert Report believe that in particular the ancillary restraints concept as outlined in Art. 81 (3) Guidelines provides valuable guidance on a safe harbor also for Information Exchange in vertical agreements not covered by the VBER: Based on case law preceding the Art. 81 (3) Guidelines, the ECJ in its "*Mastercard*" judgment has clarified the "objective necessity test" so that the question to answer is whether the concept already considers the "*proper functioning of the agreement*"[25] to be a decisive assessment parameter for a restriction to fall outside Art. 101 (1) TFEU. The Court clarifies that this would be the case if the agreement has likely not be concluded without the restriction.

With respect to the subject matter of the Expert Report, the authors therefore draw the conclusion that Information Exchange that ensures the "*proper functioning of the [vertical] agreement*" does not fall within the scope of Art. 101 (1) TFEU. It goes without saying that such Information Exchange does not need to be assessed for an exemption, be it a general one under the VBER or an individual one under Art. 101 (3) TFEU. It also implies that, beyond the non-applicability of Art. 101 (1) TFEU, there is still the option to argue an individual exemption under Art. 101 (3) TFEU for such Information Exchange that may fall within Art. 101 (1) TFEU as it goes beyond what is "necessary" to ensure the proper functioning of the vertical agreement, but remains

[21] *OJ L 24, 29.1.2004, p. 1.*
[22] *OJ C 56, 5.3.2005, p. 24.*
[23] *Judgment in Case C-439/09 Pierre Fabre EU:C:2011:649, par. 39 with reference to judgment in case C-107/82 AEG-Telefunken EU:C:1983:293, par. 33.*
[24] *Judgment in case C-107/82 AEG-Telefunken EU:C:1983:293, par. 33*
[25] *Judement in case C 382/12 P Master Card, EU:C:2014:2201, par.93.*

still directly related and proportional to reach the pro-competitive effects of the vertical agreement. A revised approach under the VBER could thus exemplify both aspects in revised Vertical Guidelines i.e. (i) Information Exchange not falling under the scope of Art. 101 (1) TFEU and thus not requiring an exemption for being directly related to and necessary for the implementation of the vertical agreement and (ii) Information Exchange potentially falling within Art. 101 (1) TFEU but being covered by a block exemption for being directly related and proportionate to the vertical agreement. In line with its general exemption principles, the revised vertical Guidelines would not have to draw a line between the two categories.[26] The concept is further outlined under III. below.

### 1.3 Market share thresholds

Based on the exemption principles for restrictive agreements under the VBER as outlined above, the VBER only applies to vertical restraints in a vertical agreement up a market share threshold of 30% (Art. 3 VBER), provided that there are no hardcore restraints.

Above that market share threshold, companies need to individually assess the legality of the vertical restriction pursuant to Art. 101 (3) TFEU. Here, it becomes once more relevant that the exemption mechanism of the VBER leads to the practical consequence that companies only need to assess whether a practice is restrictive of competition if it falls outside the scope of the VBER. Within the umbrella of the exemption, the VBER creates a "*presumption of legality for vertical agreements*".[27]

Agreements falling outside of the scope of Art. 3 VBER benefit from the assessment principles outlined under 1.2.3, above, also with respect to Information Exchange.

### 1.4 Hardcore restrictions

Restrictions of competition based on Information Exchange in a purely vertical context are not block exempted if such restrictions constitute a hardcore restraint pursuant to Art. 4 VBER. Art. 4 VBER exhaustively enumerates hardcore restrictions. It is worth noting that Art. 4 VBER does not mention Information Exchange as a means to implement a hardcore restriction. Paras 48 and 50 of the Vertical Guidelines, however, highlight the fact that Information Exchange (namely price and resale monitoring systems as well as reporting duties by distributors) can make both resale price maintenance ("RPM") as well as resale restrictions more effective.

In line with the principles outlined under 1.1, above, it is therefore not as such a hardcore restraint under Art. 4 VBER for the parties to Exchange Information. This also applies if such Information qualifies as strategic information, as further defined in the Horizontal Guidelines ("Strategic Information"),[28] including for example daily pricing information on a by customer level, detailed resale destination data, etc. Different from Information Exchange in a purely horizontal context,[29] Information Exchange in a purely vertical relationship does neither create the legal presumption of a "by-object" restriction under Art. 101 (1) TFEU, nor of a hardcore restriction under the VBER.[30] This applies also if such Strategic Information is collected systematically by one party from the other, as such collection could take place strictly unilaterally with the consequence that it would not fall within the scope of Art. 101 (1) TFEU in the first place (see under 1.2.1).[31] While access to Strategic Information may be one

[26] See already under I above.
[27] *Vertical Guidelines, par. 25.*
[28] *See Horizontal Guidelines OJ C 11, 14.1.2011, p. 1, par. 86.*
[29] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343.*
[30] *See Schultze/Pautke/Wagener, Vertikal-GVO, 4th ed. 2019, par. 624, as well as I.4, below.*
[31] *German competition authority, 25.9.2009, B 3/123/08, par. 51 ("Ciba Vision").*

element to prove the implementation of a vertical hardcore restraint, such accessory possession of Strategic Information does not as such violate Art. 4 VBER.

In our experience, many companies are, nonetheless, aware that vertical Information Exchange may induce or facilitate hardcore restrictions. Fining decisions, both at national[32] and EU level[33] illustrate that Strategic Information may be used to implement RPM and/or other violations of Art. 4 VBER. Many companies therefore take precautions to delay access to Strategic Information or aggregate Strategic Information also in a purely vertical context in order to reduce the risk that internal compliance rules might be disregarded and the availability of such Strategic Information may eventually be used for a violation of Art. 4 VBER.

In Germany and Austria, the requirements for precautions are in particular triggered by the fact that under the respective national laws also the attempt of a hardcore restriction is prohibited.[34] Furthermore, both national competition authorities published national guidelines that mention Information Exchange in the context of vertical price fixing and thus go beyond what can be found in the Vertical Guidelines.[35] While the guidance by the German authority is related to the brick-and-mortar food sector, the principles are – at least in Germany – widely used for guidance on vertical Information Exchange also in other sectors (see further under II.3.1.1 (c), below).

## 2. Information Exchange in a dual distribution scenario under the current vertical framework

Pursuant to Art. 2 (4) VBER, a "v*ertical agreement entered into between competing undertakings*" is explicitly excluded from the scope of the VBER. Par. 27 Vertical Guidelines clarifies that such agreements are to be self-assessed under the Horizontal Guidelines "*as regards possible collusion effects*" and under the Vertical Guidelines for the "*vertical aspects of such agreements"* within the general framework of Art. 101 (3) TFEU. Vertical agreements between competitors can thus not rely on the assumption that such "*agreements confer sufficient benefits to outweigh the anti-competitive effects*" (recital 5 of the VBER) as would be required for their inclusion in the VBER.

Art. 2 (4) VBER provides for two exceptions from this general exclusion, namely for non-reciprocal agreements where

a) "*the supplier is a manufacturer and distributor of goods, while the buyer is* [only] *a distributor and not* [also] *a competing undertaking at the manufacturing level; or*
b) *the supplier is a provider of services* [operating] *at several levels of trade, while the buyer* [operates only] *at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services*."[36]

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[32] *See, e.g. German competition authority, various case summaries on RPM for consumer goods in brick-and-mortar supermarkets, e.g. AB InBev, B10-20/15, Consumer Goods, B11-12/08.*
[33] *See e.g. Commission, Case AT.40182 Pioneer, par. 24: "During the relevant period, Pioneer Europe adopted growth targets for the Pioneer Home Division products. Pioneer's subsidiaries in the 12 EEA countries and their employees were expected to report on a regular basis to Pioneer Europe to demonstrate progress in achieving these targets".*
[34] *See § 21 (2) GWB (Act against restraints of trade) for Germany and § 1 (4) Kartellgesetz (Act against cartels) for Austria.*
[35] *Austrian competition authority, currently accessible under: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Standpoint_on_Resale_Price_Maintenance_english.pdf; German competition authority, Guidance note, July 2017, currently accessible under: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.*
[36] *The brackets highlight the different wording used in no. 28 of the Vertical Guidelines as compared to Art. 2 (4) VBER.*

Both exceptions are typically referred to as "dual distribution" scenarios. The current VBER is based on the assumption that in these scenarios the potential impact on the competitive relationship at the retail product/service level is of "*lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level*".[37]

Art. 2 (4) 2nd sentence VBER therefore offers restrictions in dual distribution situations, falling within the scope of the VBER, the same exemption possibilities as restrictions in purely vertical agreements. This also applies to restrictions triggered or implemented by Information Exchange.

These rules, however, only apply if the dual distribution situation is one-sided. If the distributor would, e.g., at the same time supply products to the supplier on the same market, the relationship would be reciprocal and again outside the VBER.[38]

As explained under I.1 above, the current regime does not provide for a blanket exemption of all restrictions of competition which are based on Information Exchange in the context of purely vertical distribution. The same applies to dual distribution scenarios within the meaning of Art. 2 (4) VBER. Restrictions based on Information Exchange in dual distribution scenarios can likewise only benefit from an exemption under the VBER – compliance with the market share thresholds assumed – if they

(i) relate to the conditions under which the parties may purchase, sell or resell the contract goods or services (Art. 2 (1), Art. 1 (1) (a) VBER) and
(ii) do not qualify as a hardcore restriction under Art. 4.

Information Exchange in a purely horizontal context is seen much stricter than in a vertical context (currently including a situation of dual distribution). The Horizontal Guidelines dedicates a separate chapter to the subject matter of Information Exchange based on the case law of the ECJ.

In the *Dole* case referred to below together with *T-Mobile Nederlands* the Court starts its review in the here relevant part as follows [emphasis added]:

> "*In so far as concerns, in particular, the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty …*"[39][emphasis added]

However, as explained further under I.V below the practical hurdles to rebut a presumption of illegality in connection with horizontal Information Exchange are significant.

Under the current VBER, there is hardly any case law dealing with Information Exchange in dual distribution scenarios. The following examples illustrate selected (i) fining decisions on Commission and national level and (ii) case summaries on national level which in fact concerned a situation of dual distribution. Only in the Hugo Boss decisions there was an express mentioning of a dual distribution scenario.

## 2.1 Guess

To our knowledge, the only fining decision by the Commission under the current VBER concerning a factual set-up of dual distribution, is the fining decision in *Guess.*[40]

[37] *Vertical Guidelines, par. 28.*
[38] *See Schultze/Pautke/Wagener, Vertikal-GVO, 4th ed. 2019, par. 473.*
[39] *Judgment in Case C-286/13 P Dole EU:C:2015:184, par. 119.*
[40] *Commission, 17.12.2018, Case AT.40428.*

We find the decision noteworthy as it exemplifies concerns that were already raised in abstract by the Commission as a result of its E-commerce sector inquiry.[41]

In its final report on the E-commerce sector inquiry the Commission noted that the number of consumer good manufacturers/suppliers engaged in direct online sales to consumers has raised significantly. The Commissions comments on this development in par. 181 of its final report on the E-commerce sector inquiry [emphasis added]:

> "*Many manufacturers acknowledge that the decision to engage in direct selling at retail level is largely due to the fact that, with relatively small investments, they can benefit from the advantages of online sales, including better knowledge and control over distribution both in terms of quality and price*."

The *Guess* investigation was directly triggered by the E-commerce sector inquiry. Paras 20 and 21 of the decision state that *Guess* operates a selective distribution system in which it sells its products also directly offline and online. We conclude that in *Guess* the facts describe a situation of dual distribution.

With the decision the Commission fined *Guess* for various vertical hardcore restrictions. The fact that these hardcore restrictions were imposed in a situation of dual distribution and were accompanied by substantial Information Exchange was mentioned in the factual summary, but did not play a role in the legal assessment of the infringements.[42] In our view, the decision would not have been different in a purely vertical distribution scenario:

*Guess* was fined for online and territorial resale restrictions on its distributors as well as resale price maintenance. *Guess* enforced its online resale restrictions through contracts and communication. The enforcement of cross-system-supply restrictions and resale price maintenance was backed up by reporting duties on purchase sources other than *Guess* (par. 69) and price monitoring (par. 87).

Internal documents provided the following motives for (online) sales restrictions:

> "*One of the objectives was therefore to reduce competitive pressure from authorized retailers on Guess' own online retail activities by curtailing the ability of authorized retailers to use this advertising tool effectively, and to keep down its own advertisement costs.*"[43]

> *„The primary objective of this part of Guess Europe's e-commerce strategy was to protect its own online sales activities and to limit intra-brand competition by authorized retailers, as opposed to ensuring compliance with a set of objective quality criteria within a selective distribution system."*[44]

The decision does not focus on the competitive relation between *Guess* and its distributors at the horizontal level. This is in line with the current VBER exemption mechanism that does not submit restraints in a dual distribution scenario to specific rules. The VBER exempts all but hardcore and non-exempted restrictions in dual distribution as long as the restrictions qualify as a vertical restraint under Art. 2 (1) VBER and do not exceed the market share limits of Art. 3 VBER. We note that in *Guess*, the fact that the VBER does not specifically deal with Information Exchange did not prevent the Commission from fully addressing the (vertical) hardcore restraints imposed by *Guess* on its distributors implemented or facilitated due to Information Exchange.

[41] *Commission, 10.5.2017, Final report on the E-commerce sector inquiry, SWD(2017) 154 final, COM 2017 (229) final.*
[42] *Commission, 17.12.2018, Case AT.40428 Guess, paras 157-162.*
[43] *Commission, 17.12.2018, Case AT.40428 Guess, par. 50 in connection with AdWord restrictions.*
[44] *Commission, 17.12.2018, Case AT.40428 Guess, par. 55 in connection with general online restrictions.*

We therefore note that the infringements in *Guess* could have been avoided by a better understanding of the hardcore restrictions in vertical agreements including the dangers that may result from requesting Strategic Information from a distributor that is backing or enabling such prohibited hardcore restrictions. While this risk may be mitigated by compliance training, firewalls etc. dangers from possessing certain Strategic distributor Information cannot be eliminated completely. This risk is equally immanent for purely vertical distribution agreements as well as for a dual distribution scenario as it was the case in *Guess*.

## 2.2 Hugo Boss (Denmark)

The Danish *Hugo Boss* decisions[45] likewise concern a factual situation of dual distribution:

In this case, the supplier *Hugo Boss* disclosed Information on its own planned promotional retail campaigns to its distributors. Following the complaint from a distributor about a planned and disclosed supplier advertising campaign, *Hugo Boss* engaged in discussions about such promotion as well as about the respective prices to be charged. Thereby *Hugo Boss* ignored its internal firewalls installed to keep its own retail sales activities separate from the activities of its distributors. The Danish competition authority viewed the concerted practice resulting from the Information Exchange as restricting competition by object and fined the companies for horizontal market partitioning. The decision was confirmed with a 3:2 majority by the Danish Competition Appeals Tribunal.[46] The court decided that restrictions on the basis of horizontal Information Exchange about intra-brand retail competition fell outside of the scope of the VBER because they did not concern the conditions under which the parties could buy, sell or resell the Hugo Boss products. Consequently, the concerted practice did not constitute a vertical agreement and the restrictions no vertical restraints. The Danish court was divided in its assessment whether the Information Exchange forming the basis of this discussion was to be regarded as a by object restriction (majority view) or a restriction by effect (minority view), due to its mainly vertical nature.

In our view, the decisions in *Hugo Boss* are in line with the VBER exemption mechanism. As explained above, for dual distribution scenarios within the scope of the VBER, the current rule is that all restrictions of competition other than hardcore restrictions are exempted. However, if restrictions are not restrictions in a vertical agreement and thus not vertical restraints but are being implemented only with respect to the competing activities on the (horizontal) retail level between (i) the supplier and its distributors or (ii) between distributors, the exemption mechanism of the VBER is not available as the VBER fails to apply. This general principle is also outlined in par. 212 Vertical Guidelines, Footnote 1, albeit not in connection with dual distribution scenarios (see under 3.1, below).

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[45] *Danish competition authority, 24.6.2020 HUGO BOSS and Kaufmann, https://www.kfst.dk/media/gnghdx5f/20200624-informationsudveksling-mellem-hugo-boss-og-kaufmann-final-a.pdf (in Danish); HUGO BOSS and Ginsborg, https://www.kfst.dk/media/q4uljxkq/20200624-informationsudveksling-mellem-hugo-boss-og-ginsborg-final-a.pdf (in Danish); see also the English press release https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200624-the-danish-competition-council-has-adopted-a-decision-finding-the-exchange-of-information-on-prices-discounts-and-quantities-in-relation-to-future-sales-between-retailers-of-clothing-items-illegal/.*

[46] *Danish Competition Appeals Tribunal, 23.6.2021, KL-1-2020 and KL-2-2020 HUGO BOSS and Kaufmann https://www.kfst.dk/media/s4yoz3wy/20210623-axel-kaufmann-kl-1-2020-og-kl-2-2020-final.pdf; KL-3—2020 HUGO BOSS and Ginsborg https://www.kfst.dk/media/5twokzlp/20210623-hugo-boss-nordic-kl-3-2020-final.pdf. According to information from the press office of the Danish competition authority the decisions are not yet final and the cases are currently pending before the civil courts.*

## 2.3 Apple (France)

The decision by the French competition authority taken on March 16, 2020 against *Apple* and its wholesalers Ingram Micro and Tech Data[47] (resulting in a record fine of EUR 1,280 million) follows a similar rationale as the *Hugo Boss* decision with respect to the situation of dual distribution:[48]

*Apple* inter alia operates a dual distribution system with respect to the wholesale of its products as well as its retail sales to end customers. Retailers are supplied by *Apple* in competition with its large wholesalers. *Apple* also operates its own online store as well as its own offline retail outlets. Despite the Vertical Guidelines being silent on it, the French competition authority viewed

> "*competition between a supplier and its wholesalers [as] a pertinent factor to be taken into* account *in the economic context of an anticompetitive practice by object.*"[49]

In *Apple,* retail competition is affected by different distribution formats for different product lines. The French competition authority inter alia imposed fines on *Apple* and its wholesalers for horizontal collusion by a hub-and-spoke type of Information Exchange between *Apple* and its wholesalers under Art. 101 (1) TFEU (paras 576 subseq.) as well as on *Apple* for vertical resale restrictions (Art. 4 (b) (i) VBER) (paras 657 subseq.).

The decision provides a detailed description of Information Exchanged between the parties requested by or reported to *Apple*. It also provides an analysis of the competitive relation between *Apple* and its wholesalers regarding volume-based activities,[50] quality of service and price. On the latter, *Apple*'s wholesaler Ingram Micro stated "*On prices, we have little room for manoeuvre generally with IT. With Apple, this room for manoeuvre is even smaller*" (par. 101). Furthermore, the decision provides a detailed description about the mechanism applied for Information Exchange. In summary, *Apple* received weekly reports from its wholesalers regarding their sales to retailers (paras 115 subseq.). Contractual reporting duties required the wholesalers to provide Information on product description, invoice number, unit price and total price, quantity and the name and address of the recipient (par. 122). Similar reporting duties were also imposed on retailers (paras 209 subseq.). Furthermore, *Apple* collected informal Information by telephone calls or visits (paras 126 subseq.), e.g. in weekly meetings. An Ingram Micro manager confirmed "*Apple has a* precise *picture, it knows the quantities, the invoice dates, the customers and the prices*" (par. 132). *Apple*, on the other hand, sent to its distributors their regular market shares for sales of *Apple* products (par. 137) and an analysis of their commercial performance with suggestions for improvement. It also informed wholesalers about the stock, sales force composition and commercial strategy of the respective other wholesalers (par. 147).

The decision parameters in *Apple* are essentially a combination of the Commission approach taken in *Guess* (solely vertical enforcement) and the approach of the Danish competition authority applied in *Hugo Boss* (solely horizontal enforcement). The

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*[47] French competition authority, 16.3.2020, 20-D-04 Apple France, https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-apple-products-distribution-sector.*

*[48] Note that the decision imposed fines on Apple also for abusive unilateral conduct, namely for the exploitation of economic dependence. This Report only deals with selected elements of this decision to the extent they allow conclusions on the assessment of Information Exchange in dual distribution scenarios under Art. 101 (1) and 101 (3) TFEU.*

*[49] French competition authority, 163.2020, 20-D-04 Apple France, par. 708.*

*[50] Competition between computing hardware wholesalers is effected to a large extent by volumes: the more volume a wholesaler is able to sell, the better for it, in particular in light of the low margins in this sector. This has to be distinguished from "value-added distributors", paras 92-95.*

extensive Information Exchange between *Apple* and in particular its wholesalers was considered a violation of Art. 101 (1) TFEU as purely horizontal Information Exchange on wholesale level taking place between resale competitors. The French competition authority assessed this as a direct infringement of Art. 101 (1) TFEU for which no exemptions were available (paras 576 subseq.). The resale restrictions were also sanctioned as vertical hardcore restraints pursuant to Art. 4 (1) (b) (i) VBER (paras 621 subseq., paras 722 subseq.). The French competition authority found that the vertical resale restraints were reinforced by monitoring measures based on the submitted data reports (par. 683). The French competition authority quotes directly from the Commission's Vertical Guidelines mentioning monitoring systems as a way to make vertical resale restraints more effective (par. 660). In essence, the Information Exchange was used to support both horizontal as well as vertical hardcore restrictions.

From our perspective, like *Guess* and *Hugo Boss*, also the *Apple* decision is fully in line with the VBER and its exemption mechanism. It goes further, in that *Apple* was also considered a hub for Information Exchange between wholesalers (paras 595-599). Such indirect Information Exchange between the wholesalers was considered horizontal Information Exchange not being part of the vertical agreement between *Apple* and the wholesalers.

The French competition authority briefly considered whether an exclusive system, i.e. a system in which individual wholesalers were protected from (active) sales by either *Apple* or the other wholesalers could have led to a different conclusion regarding the vertical hardcore restriction under Art. 4 (1) (b) (ii) VBER (par. 732). The authority dismissed the thought, as it was not supported by the facts. Also *Apple's* strategy was directed against both active and passive sales (par. 734). In the absence of hardcore restrictions, we believe that the mere Information Exchange in a vertical agreement would not have been considered a problem as such.

## 2.4 XOM et. al. (Germany)

A seemingly different set of facts is dealt with by the German competition authority in its case summary of XOM Metals GmbH ("XOM").[51] The case relates to a number of B2B-trading platforms, under which manufacturers and distributors operate as suppliers on the platforms and sell products to resellers and/or industrial end customers.[52] The platforms create a situation of dual distribution, as the products sold directly by a supplier for resale to either industrial customers or resellers are also offered to wholesalers which may then serve the same customer base.

The German competition authority used XOM and other cases to provide general guidance on B2B-trading platforms in the form of case summaries. The German competition authority states in its case summary regarding XOM that it "*generally supports co-operations which are likely to increase efficiencies and aim to improve and reduce the cost of products and production processes in these industries*."[53]

The German competition authority did not assess the cases as situations of dual distribution and hence with a view of or reference to the VBER. Instead it treated all B2B-platforms as purely horizontal distribution scenarios. The German competition authority did not prohibit either of these platforms, on the basis that different measures were taken by the manufacturers to prevent an Exchange of Strategic Information.

In this regard, the German competition authority concluded with respect to XOM:

[51] *German competition authority, case summary of decision of 27.2.2018, B 5-1/18-01 ("XOM").*
[52] *See also German competition authority, press release of 9.9.2020 ("Unamera"), case summary of decision of 14.5.2020, B8-94/19 ("OLF Deutschland").*
[53] *German competition authority, case summary of 27.2.2018, B 5-1/18-01 ("XOM"), p.1.*

> "*In order to rule out coordination between suppliers via the platform, KSE has designed the platform in such a way that suppliers will not have access to data from which they can draw conclusions about their competitors' market behaviour*."

# 3. Information Exchange in a horizontal context under the current vertical framework (e.g. category management, private label)

## 3.1 Category management

The Vertical Guidelines currently contain only one reference to purely horizontal Information Exchange in the context of an otherwise vertical agreement, namely regarding category management (par. 212 Vertical Guidelines). Rather hidden – in footnote 1 to par. 212 – it is clarified:

> "*Direct information exchange between competitors is not covered by the Block Exemption Regulation, see Article 2(4) of the Regulation and paragraphs 27-28 of these Guidelines.*"

This is again in line with the principles set out under 1.1 and 1.2, above, according to which only Information which relates to a vertical agreement and hence to the contract products and/or services can benefit from the VBER. In the case of category management, the contract service is the rendering of marketing advice to a distributor, not the sale of contract goods. The Information typically Exchanged in category management (i.e. the category captain reviewing certain Strategic Information on competing third party supplier and private label products of the service buyer in order to give category advice) hence often relates to Information outside the scope of Art.2 (1) VBER. This applies irrespective of whether one looks at it from the perspective of the service agreement or from the perspective of a potentially separate supply agreement. As a consequence, it follows straight from the VBER's exemption mechanism that potential limits and safeguards required for the lawful handling of Strategic Information on competing third party brands (disclosed and typically gained in the context of providing category advice) are to be assessed solely according to the principles outlined in the Horizontal Guidelines. There is no technical need for the Vertical Guidelines to explain this in more detail, as any other interpretation would be at odds with Art. 2 (1) VBER and the exemption mechanism of the VBER as such. In practice, we are not aware that this consequence causes specific uncertainties when currently implementing such agreements in compliance with competition law principles.

## 3.2 Private label

Private label distributors do not manufacture goods themselves but have them manufactured by a third party supplier to then sell them under their own brand name. Par. 27 last sentence Vertical Guidelines considers private label distributors as non-competitors to a branded good supplier on the manufacturing level. As a consequence, the exception for dual distribution under Art. 2(4) (a) VBER is available to supply/distribution contracts between a supplier of branded goods and a distributor, not only reselling branded goods, but also offering private label products sourced by a third party manufacturer. The respective sales/distribution contract for branded contract products can – just as the supply contract with the third party manufacturer – thus benefit from the VBER. However, the Vertical Guidelines do not address the resulting situation of purely horizontal competition between the supplier of branded goods and the private label distributor at the resale level. We note that the lack of clarification of the resulting horizontal sales situation in the Vertical Guidelines may easily be misinterpreted: The fact that the distributor is a competing reseller with respect to private label products does not qualify as dual distribution under the VBER.

And there is in fact a significant difference to a dual distribution scenario: private label distributors are inter-brand competitors to the branded supplier at the resale level. This is different from the dual distribution situation defined under the VBER, which is characterized by the fact that it affects only intra-brand competition.[54]

The vertical sales agreement between supplier and private label retailer for a branded contract good (including the Information Exchanged thereunder) is therefore available for an exemption under Art. 2 (4) (a) VBER, should the supplier also sell direct at the retail level. In our view, the Information Exchange on competing third party products, including own private label products sold by the retailer, however, always falls outside of the scope of the VBER. In line with the overall logic – as. e.g., set out for category management – such Information Exchange is – for lack of a vertical element – to be assessed solely based on the Horizontal Guidelines.

In Germany, the Information Exchange in a dual distribution situation with private-label products is indirectly referred to, but not solved, in paras 95 and 96 of the Guidelines on different aspects of resale price maintenance in brick-and-mortar supermarkets, published in 2017 (see in more detail under II. 3.1.1 (c), below).[55]

## 4. Unilateral Information Exchange and concerted practices in a purely horizontal context (ECJ decision practice)

Currently, par. 25 (a) Vertical Guidelines provides explanations concerning the distinction between agreements and concerted practices (potentially falling under Art. 101 (1) TFEU and thus exemptable under the VBER) and unilateral conduct, solely governed by Art. 102 TFEU and/or national equivalents (see already under I. 1.2.1 above).

Under the current exemption regime, Information Exchange is not mentioned at all in a vertical context or a context of dual distribution and there is hence no distinction made between unilateral Information Exchange and Information Exchange as part of a vertical agreement or concerted practice. In line with the principles outlined under I.1.2.1 above, unilateral Information Exchange, i.e. the disclosure of Information by one party to the other is only of concern under the current vertical regime if it has its basis in an agreement or results in concerted practices between the parties.

The situation is entirely different for unilateral Information Exchange between actual and potential competitors, i.e. in a horizontal situation.

This conclusion is one of the baselines of the case law of the European Courts, in particular of the ECJ in "*T-Mobile Nederlands*".[56] Here, the European Court held that Information Exchange between competitors may be deemed to result in a concerted practice under Art. 101 (1) TFEU even though the information had been exchanged only unilaterally. Or in the words of the court:

> *"[The requirement of independence] strictly preclude[s] any direct or indirect contact between such [companies] by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the*

[54] *Intra-brand restrictions are – in the absence of hardcore restrictions – according to the principles of the VBER of lesser significance than restrictions of inter-brand competition par. 98 Vertical Guidelines; according to the latest decision practice of the ECJ, a lessening of intra-brand competition is only considered problematic if the respective practice would at the same time lessen inter-brand competition judgment in case C-306/20 Visma EU:C:2021:935, par. 78.*

[55] *See under www.bundeskartellamt.de; current Link: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2*

[56] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343; confirmed by judgment in Case C-286/13 P Dole EU:C:2015:184, par. 119-127, each of these paragraphs quoting T-Mobile Nederlands at the end.*

> *object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market."*[57]

The Court makes it clear that generally such concerted practice results in a by object restriction of competition:

> "*An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings*".[58]

The Court noted that the concept of a concerted practice implies as necessary requirements "*subsequent conduct on the market and a relationship of cause and effect between the two*."[59] However,

> "*it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market*."[60]

With regard to Information Exchange in dual distribution situations this means the following: unless Information Exchange is generally eligible for a block exemption the parties would have to start out their individual assessment for a potential exemption under the legal presumption that their Information Exchange results in a concerted practice and is "*tainted with an anti-competitive object*". This would impose a significant if not insurmountable burden of proof on the parties in order to qualify for an individual exemption under Art. 101 (3) TFEU.[61] As it is only a presumption, it is rebuttable in theory but in practical terms such rebuttal is very difficult. While these consequences seem adequate for horizontal Information Exchange under the conditions specified by case law and further explained in the Horizontal Guidelines, the conclusion is in our view not justified if the Information Exchange relates to the purchase, sale and resale of goods or services and is thus within the scope of Art. 2 (1) VBER. Absent the protection by the VBER, however, any Information Exchange between competing retailers would fall under the same presumption of illegality as a purely horizontal agreement. In our view, this would lead to wrong results for Information Exchange in a dual distribution scenario which always has to be seen as being rooted in and thus part of a vertical distribution set-up.

[57] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343, par. 33.*
[58] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343, par. 43*
[59] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343, par. 51; confirmed by judgment in Case C-286/13 P Dole EU:C:2015:184, par. 126.*
[60] *Judgment in Case C-8/08 T-Mobile Nederlands EU:C:2009:343, par. 51; confirmed by judgment in Case C-286/13 P Dole EU:C:2015:184, par. 127.*
[61] *See Vertical Guidelines, paras 47 et seq. explaining the high burden for arriving at such conclusion for agreements containing hardcore restrictions.*

# II. Factual background

This section gives a general overview of Information Exchange in dual distribution scenarios across distribution formats and industries based on

(1) the direction of the flow of Information,
(2) different distribution models and distribution levels and
(3) industry-specific considerations and examples.

## 1. General overview on the direction of Information Exchange in dual distribution scenarios

This section characterizes the type of Information Exchanged in dual distribution scenarios by way of its direction and flow between the parties to the agreement or third parties affected by it.

### 1.1 Typical scenarios of distributor-to-supplier Information Exchange

Buyers/distributors/franchisees (in the following "distributors") generally disclose Information to the supplier/seller/franchisor (in the following "supplier") in the following circumstances:

#### 1.1.1 Contractual obligations

Contractual obligations may provide for the Exchange of distributor Information to the supplier for

(i) measuring the distributor's **sales performance** (i.e. through sales data reports),
(ii) informing the supplier about **market developments** (e.g. regarding the competitive landscape, product developments, new market trends),
(iii) keeping the supplier informed about **customer demands** (e.g. customer complaints and expectations, warranty and guarantee claims),
(iv) updating the supplier on sales **requirements for the contract products** (i.e. import requirements, tariffs, registration, certification requirements, product declarations),
(v) identifying potential **legal risks** for the supplier (e.g. local changes to the regulatory or legal import or sales requirements, challenges to the supplier's trademarks or other IP rights),
(vi) monitoring the distributor's **compliance with sales criteria** (e.g. in a selective or franchise system) and safeguarding the contractual requirements for the system (i.e. sales only to authorised distributors, uniform application of a franchise system) and
(vii) ensuring **compliance with agreed exclusivity obligations** (i.e. active sales restrictions to territories and/or customers and/or customer exclusivity following first contacts with new customers).

#### 1.1.2 Discussions and meetings

Distribution agreements often provide for formal and informal meetings between supplier and distributor, e.g. in order to

(i) agree on forward-looking **business plans**,
(ii) plan future **demand and production**,
(iii) adjust/renegotiate **supply prices** and **volumes** and
(iv) report and discuss ad hoc **incidents in the distribution activity**.

### 1.1.3 Rebate schemes

The terms of sale for the contract products/services are in some instances complemented by rebate schemes. Such schemes, to the extent relevant here, may financially incentivize Information Exchange from distributor to supplier, as the distributor obtains more favorable purchase prices for the contract products/services if it can prove to the supplier on the basis of Information that it performed certain services and/or complied with certain sales targets.

(i) The rebate scheme might reward the creation of Information that as such is valuable to the supplier (e.g. customer survey data on contract products or services, customer evaluation reports, click rates of internet campaigns, etc.).

(ii) The rebate scheme might also trigger an indirect Exchange of Information as proof of the distributor's sales performance and/or the meeting of certain benchmarks/targets bonified by discounts (e.g. increase of total sales or sales in specific product segments/to specific customers incentivized by volume and target rebates, growth requirements, number of sales campaigns, etc.).

### 1.1.4 Use of software systems

Distributors may be contractually required to use a software system provided by the supplier, so that the supplier receives the Information it requires quickly or even in real time and in a uniform and easily usable format. In our experience, supplier software systems are particularly frequent in franchise systems, i.e. in systems which depend on close cooperation between the franchisor and the franchisees, as well as a uniform implementation by the franchisees of the franchise system. In particular, in distribution systems with a large number of distributors, the operators of such systems see a need to exchange information constantly in an automated way, to ensure the sales success of the contract products. In certain fast-moving industries, as e.g. fashion, resale Information on specific articles directly influences the production process as such Information allows immediate conclusions on consumer preferences.

## 1.2 Typical scenarios of supplier-to-distributor Information Exchange

Suppliers typically communicate Information to distributors in the following circumstances:

### 1.2.1 Contractual obligations

Supply contracts may provide for the Exchange of supplier Information to distributors for the purpose of updating the distributor about

(i) **essential contract information** indispensable or relevant to perform the main contractual duties under the vertical agreement (e.g. availability of supply volumes, stock levels, required pre-order procedures, lead times, acceptance and review periods),

(ii) **specific contract obligations** resulting from the chosen distribution format (e.g. updates on exclusive territories and customers, lists of authorised distributors, changes in the criteria for selective distribution),

(iii) **resale information** (e.g. recommended retail prices, direct rebates by supplier),

(iv) **product-related information** (e.g. technical and regulatory product information and developments),

(v) **marketing-related information** (e.g. timing of product launches, central advertising campaigns such as TV ads or social media campaigns),

(vi) **general market developments** (e.g. shortages in raw materials, entry of new competitors, changes in the supply chain),

(vii) **identification of potential legal risks** (e.g. changes to the regulatory or legal requirements in the respective sales territories, challenges to seller's trademarks and/or IP rights) and

(viii) **performance benchmarks/targets** to be achieved by the distributor (e.g. achievement of growth or volume targets).

### 1.2.2 Discussions and meetings

Sales contracts often foresee formal and informal meetings between supplier and distributor, e.g. in order to

(i) agree on forward-looking **business plans**,

(ii) plan future **demand and production**,

(iii) adjust/renegotiate **supply prices** and other contract terms and

(iv) report **ad hoc incidents** in the supplier's operations.

### 1.2.3 Use of software systems

The use of software may also be initiated and provided by distributors (e.g. wholesalers and multi-brand retailers, such as supermarkets). Distributors may, e.g., request that all supply and stock management is run through such software, which may also handle automatic ordering from various suppliers requested to use such software. Distributors may also track the resale activities of their various outlets through centrally operated software and allow their suppliers immediate access to such data concerning the contract products in order for automatic replenishment systems to work effectively.

## 1.3 Typical scenarios for Information Exchange with third parties

Distribution networks containing several (exclusive or non-exclusive) distributors often foresee network meetings to inform all parties in the network about common subject matters (i.e. legal framework, technical product training, service requirements, introduction of new product lines).

Meetings between all members of a distribution network occur in particular in franchise systems. Here the franchisor is contractually required to constantly disclose certain information within the system in order to ensure its uniformity and provide for a permanent update of know-how. Both elements are a core feature of the system. In franchise networks where the franchisor is not the supplier of the contract goods/services, such meetings may also include third party suppliers that provide information on goods/services relevant for the system.

Distribution networks at wholesale and retail level may entail joint purchasing agreements or joint rebate negotiations on behalf of all distributors. In that case, the members of the distribution network often report the demand and sales volumes to a central team or third party organization responsible for joint purchase negotiations.

## 1.4 Multi-brand buyers as an independent data resource on products beyond the contract products

Multi-brand buyers have access to Strategic Information on products competing with the contract products supplied. Such sales data can provide valuable insights to suppliers beyond the intelligence gathered e.g. by third-party marketing consultants, statistical institutes etc. In certain industries, such as consumer goods, such

Information is offered by distributors in aggregated electronic formats to suppliers against a fee or a rebate on purchase prices.

Online providers, such as large online retailers or platforms, likewise offer Information and/or data-based services consisting i.a. of data on the sales of third party distributors and suppliers. The services typically allow the recipient to benchmark the performance of its products in various ways or to evaluate the success of specific campaigns. The content of the data offered varies depending on the specifics of the industry.

## 2. Information Exchange in dual distribution under different distribution models and factual contexts

The following paragraphs provide a general overview of Information Exchange in dual distribution scenarios typical for certain distribution systems defined in and/or covered by the VBER. They highlight certain characteristics of such distribution systems which determine the nature of Information required to organise each type of distribution system and to implement them efficiently.

### 2.1 Exclusive distribution systems

Exclusive distribution systems are characterized under the VBER by the allocation of a customer group or a territory (i.e. a customer group defined by the customers in a certain territory) to one distributor or the reservation of a customer group or territory to the supplier. In such a system, the VBER allows the supplier to contractually prevent (other) distributors from actively re-selling the contract products to the exclusively allocated or reserved customer group or territory (Art. 4 (b) (i) VBER).

The Draft VBER contains a definition of exclusive distribution systems,[62] which makes it a necessary requirement of such a system that the supplier's other distributors are restricted from actively selling the contract goods or services (in)to the exclusively allocated customer group or territory.[63]

Information Exchange specific to an exclusive distribution system is hence related to the identification and communication of exclusive territories and/or customers to distributors. This Information is typically provided in the vertical agreement as such, often in an Annex, as the supplier needs to inform its distributors about such exclusively allocated territories and customers, including potential changes to this list.

In the view of the authors of this Expert Report, under an exclusive distribution system not the specificities of Information Exchange are in fact noteworthy, but the question whether direct sales by the supplier within such system should indeed be seen as a dual distribution scenario. This is due to the following:

Different from resale restrictions imposed on distributors, resale restrictions of the supplier in an exclusive or free system are not mentioned by the VBER at all. Consequently, in line with the VBER's exemption mechanism (i.e. block exemption of all vertical restraints falling within the scope of Art. 2 and 3 VBER that are not hardcore or excluded restrictions within the meaning of Art. 4 or Art 5 VBER), the imposition of such a restraint on the supplier is block-exempted: Art. 4 (b) VBER only treats resale restrictions other than the expressly mentioned exceptions as hardcore if imposed on the buyer/distributor. We conclude from this policy decision that, within the scope of application of the VBER, intra-brand competition between a supplier and its distributors is not considered to be a pre-requisite to achieve the pro-competitive effects of a vertical exclusivity system.

[62] *The extension of the exclusivity to a „limited number of buyers, determined …" does not play a role here and thus will not be further analyzed.*
[63] *This not addressed in the current VBER, but outlined out in the same way the Vertical Guidelines par. 51.*

As a consequence, in a contractual situation where the possibilities of the VBER are fully used, distributors do in fact not face any competition by the supplier regarding their exclusive customer base. This is only different if the supplier operates its own online shop which as a matter of fact always passively addresses all customers, including customers exclusively allocated to distributors. In this scenario, the supplier would therefore always compete at the retail level against its respective distributors.

The above variations of how to set up an exclusive distribution system show in our view: it requires an analysis of the contract provisions implemented by the parties as well as the factual situation between them in order to make an assessment of whether the supplier is in fact and not as a theoretical concept to be regarded a competitor to its distributors at the retail level, with the consequence that Information Exchange between the parties on the retail level could impact competition. The supplier's mere offline "activity" with respect to some reserved customers is in our view not sufficient for this conclusion. Or in other words: While the supplier's operation of an online store always makes it an actual competitor to its distributors,[64] this is not the case for various forms of customer exclusivity in a situation where the supplier only sells offline to limited customers.

This conclusion is supported by the observation that exclusive distributors are typically subject to sales and marketing targets imposed by the supplier with respect to their exclusive territories and/or customer groups. In the view of the authors of this Expert Report, it cannot be generally assumed that there is an incentive for the supplier to undermine these sales targets imposed on distributors by engaging in meaningful resale competition. Such a behavior would be contrary to the motives for imposing such sales performance parameters on the distributor in the first place. In the experience of the authors of this Expert Report, a supplier in an exclusive system has in fact every reason to strengthen its distributors vis-à-vis their respective exclusive customer base. It is therefore common that the supplier generally refers purchase requests received from such customers directly back to its distributors. Or in other words: even if not expressly prohibited by the vertical agreement, also passive sales by the supplier to such customers often do not take place. We also note that in many instances the supplier even lacks the logistics to supply these customers, e.g. in a case where the distributor serves a large customer base in a wide geographic area with small volumes whereas the sales of the supplier are limited to one or two large key customers (see e.g. example under II. 3.2.1, below). We therefore believe that the establishment of an exclusive system generally creates the presumption that the supplier refrains from competition vis-à-vis the exclusively allocated customers in order not to undermine the economic rationale of the distribution system.

Against this background, the authors of this Expert Report fail to see that, in an exclusive distribution set-up in which the supplier lawfully restricts its activities to specific key accounts and legally or factually refrains from any other activity on the relevant market, this should indeed qualify as a situation of dual distribution. There may simply be no competitive activity or intention to engage in competition by the supplier with respect to the distributor's exclusive customer base that would be protected by limiting the flow of Information between the parties. As the supplier is always in a position to undercut its distributors in service and price-based competition if it so wishes, the concept of potential competition must in our view not be overrated. The different product knowledge and cost structures lead to the simple fact that competition at the retail level of a vertical agreement can only take place as long as it is not factually excluded by the supplier's direct sales.

[64] *This would not be true in a (rare) situation where online and offline sales of the same products or services would be considered as distinct relevant markets.*

In light of the generally limited intra-brand competition in exclusive distribution, we see important arguments that Strategic Information Exchanged between the parties can generally be seen as directly related and proportionate for improving the sales performance of the distributors and hence improving the exclusive distribution system as such.

## 2.2 Selective distribution systems

Selective distribution is defined in Art. 1 (1) (e) VBER as:

> "*a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system*".

A selective distribution system can be operated based on qualitative and/or quantitative criteria. The requirement under the VBER is only that the criteria are "*specified*" which means that they must be verifiable in case of a dispute. However, it is not necessary to publish such specified criteria. Within the market share thresholds of Art. 3 VBER, it is currently irrelevant whether the nature of the product justifies the chosen selection criteria or the implementation of a selective distribution system in the first place.[65] The specified criteria also do not have to be applied in a uniform and non-discriminatory manner, which is of particular importance in the case of purely quantitative systems.

With respect to selective distribution, the ECJ has developed the concept of "objective justification".[66] Under this concept, in a selective distribution system otherwise restrictive provisions may fall outside Art. 101 (1) TFEU if there are "*legitimate interests […] which may justify a reduction of price competition in favour of competition relating to factors other than price*."[67] This notion has also to be taken into account when looking at Information Exchange in a selective distribution system that might be caught by Art. 101 (1) TFEU but exempted by the VBER. The authors of this Expert Report are of the view that Information Exchange that solely relates to restrictions that are "objectively justified" cannot be separated from such restrictions and should thus be exempted as well.

In a selective distribution system, the supplier is required (i) to verify the compliance of its distributors with the qualitative and/or quantitative selection criteria and (ii) to prevent distributors from selling outside of the system. Information Exchange in a selective distribution system is to a large extent driven by these inherent elements of the distribution format.

Based on the practical experience of the authors of this Expert Report, distributors' compliance with the selection criteria is generally ensured in different ways depending on whether such compliance relates to qualitative or quantitative criteria: with respect to qualitative criteria, specific contract obligations may require distributors to prove that they meet the selection criteria. The specifics of the selection criteria for offline outlets and online stores may be outlined further in detailed annexes to the distribution agreement. The requirement to comply with qualitative selection criteria may also oblige the distributor to access the supplier's intranet and thus access Information on, e.g., product images for brand campaigns, the exact display of

[65] *See judgments in Case C-439/09 Pierre Fabre Dermo-Cosmetique SAS v Président de l'Autorité de la concurrence EU:C:2011:649; see also by analogy judgment in Case C-158/11 Auto 24 SARL v Jaguar Land Rover France SAS EU:C:2012:351.*
[66] *Judgment in Case C-439/09 Pierre Fabre EU:C:2011:649, par. 39 with reference to judgment in case C-107/82 AEG-Telefunken EU:C:1983:293, par. 33.*
[67] *Judgment in case C-107/82 AEG-Telefunken EU:C:1983:293, par. 33.*

trademarks, product videos etc. in the exact way foreseen by the supplier. Quantitative criteria on the other hand are not necessarily published by the supplier, but may also be implemented unilaterally. This is e.g. the case with respect to the overall number of distributors in a certain city, region or country. Other quantitative criteria, as in in particular the requirement for a certain minimum turnover per distributor, may well require constant Information Exchange from distributor to supplier in order for the distributor to remain part of the selective system. Information for this assessment may either be requested contractually from the distributors or via rebate schemes. Often quantitative selection criteria differ by region and country to reflect the different competitive landscape and territorial brand recognition. The supplier typically ensures its possibilities to verify the compliance of its distributors with the quantitative and qualitative selection criteria by the right to conduct personal audits/site visits or by means of "score cards" to be completed by the distributors themselves.

We note that selective distribution systems often provide for different sets of criteria, even within one brand, allowing access to the products and related Information only to distributors that meet the specific criteria determined for the particular product line, i.e. for basic, premium, luxury product lines (see, e.g., example provided under 3.1.2 below).

Furthermore, we often note detailed reporting obligations for sales performance of distributors under selective distribution systems. In the view of the authors of this Expert Report, this obligation is not only driven by the supplier's wish to verify distributor compliance with the selection criteria, but also by the motive to ensure effective distribution via a selected – and hence in comparison to a free system – generally reduced distributor base.

Supplier-to-distributor Information on the other hand is typically driven by the requirement to (i) convey and implement the selection criteria to/on distributors and (ii) ensure that the distributors know about the members of the selective distribution system in order to allow for free cross-system supplies and prevent resale to unauthorised distributors. Suppliers hence generally inform distributors about the authorised distributor base using regular updates, i.e. via annexes to the agreement, or via access to an intranet.

National requirements imposed on suppliers with respect to the efforts required to maintain a selective distribution system differ. However, in a case decided by the German Federal Supreme Court,[68] the court objected to a requirement in a selective distribution system, pursuant to which the selective distributor had to always contact the supplier prior to selling to other re-sellers unless it was 100% sure that such other re-seller was also part of the selective distribution system. Furthermore, the selective distributor was under an obligation to make available invoices and transport bills to the supplier if it could be presumed that the distributor had sold products to buyers outside the selective system. Both provisions were held to be restrictive of free cross-border sales and the Information Exchanged pursuant to the agreement can in our view also not be considered directly related and proportionate to the legal obligations under the selective system.

We note that intra-brand competition between the members of a selective distribution system is somewhat reduced by the "specified selection criteria", irrespective of whether these are qualitative or quantitative in nature. The application of the system inevitably leads to a certain conformity between distributors with respect to these criteria. Intra-brand competition is, therefore, more limited due to the choice of this

[68] *German Supreme Court, judgment of 15.10.2020, I ZR 147/18 Joop!, par. 2. Even though the judgment relates to the principle of the free movement of goods, the Federal Court decided – in line with competition law – that it was illegal to restrict supplies between members of the selective distribution system, par. 52.*

system. In line with a recent judgment by the ECJ, we do not consider this to be problematic, as long as the system does not negatively affect inter-brand competition.[69] We believe that this approach is also reflected in Art. 6 VBER[70] which allows the Commission to declare the VBER inapplicable where "*parallel networks of similar vertical restraints cover more than 50% of a relevant market*". In our view, this applies in particular to scenarios where inter-brand competition may in fact be negatively affected.[71]

## 2.3 Franchise systems

Franchise systems were governed by a specific block exemption[72] until the entry into force in 2000 of Regulation 2790/1999, the first generally applicable block exemption for vertical agreements. Franchise agreements are not defined in the VBER, but are referred to only in the Vertical Guidelines, in particular in paras 24-46 and 189-191. According to the Vertical Guidelines par. 189

> "*franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services"*.

While the VBER does not submit franchise agreements to separate exemption principles, the Vertical Guidelines do recognize specific elements of this distribution format beyond the general description of its features. In par. 225 4th sentence of the Vertical Guidelines, the Commission even states:

> *„Similarly, fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers".*

Based on the key ECJ judgment on franchising in *Pronuptia*,[73] restrictions that are strictly necessary for the functioning of the franchise system do not constitute restrictions of competition under Art. 101 (1) TFEU. The court considered this true for provisions which prevent the know-how and assistance provided by the franchisor from benefitting its competitors. The Court also considered this for provisions which established the control strictly necessary for maintaining the identity and reputation of the network identified by the franchisor's brands. In light of these principles, there is a reduced scope to review franchise agreements for their compliance with competition law. In addition, the VBER's mechanism exempts, within the scope of Art. 2 and 3 VBER, also those restrictions that are not "strictly necessary" for the implementation of the system, but that may only facilitate its implementation, unless such elements fall under Art. 4 or 5 VBER.

Typical for a franchise agreement is the obligation on the franchisee to sell and advertise the franchise products only by using the sales and advertising principles of the franchisor and to obtain the approval of the franchisor for all advertising and promotion matters. Other typical Information-related obligations are to inform the franchisor about the stock available in the franchisee's outlet, as well as to give forecasts on products to be purchased from the franchisor. In addition, it is part of a franchise system that the franchisor continuously develops the franchise concept, and

[69] *Judgment in Case C-306/20 Visma EU:C:2021:935, par. 78 with reference to judgment in Case C-26/76 Metro/SABA EU:C:1977:167, par. 22.*
[70] *See also Recital 16 VBER.*
[71] *Art. 5 (1) (a) VBER which ensures that long-term non-compete obligations are not being exempted by the VBER could possibly be seen as another implementation of this approach.*
[72] *OJ L 359, 28.12.1988, P. 0046 – 0052 (Commission Regulation (EEC) No 4087/88 of 30.11.1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements).*
[73] *Judgment in case C-161/84 Pronuptia ECLI:EU:C:1986:41.*

in order to be able to do this, collects feedback Information from its franchisees (customer feedback, sales patterns, effects of promotional activities, etc.). The franchisee is obliged to apply the franchise concept and is under a general obligation to allow the franchisor to verify its compliance with the franchise criteria.

While this Information Exchange was expressly mentioned by the former Franchising BER and considered non-restrictive of competition under Art. 101 (1) TFEU, the VBER does on the one hand no longer address Information Exchange specifically, but has on the other hand not changed the assessment of franchise agreements. To the extent restrictive of competition in the first place, Information Exchange in franchise agreements is according to the view of the authors of this Expert Report generally fully exempted within the scope of the VBER.[74]

The Art. 81 (3) Guidelines refer to Information Exchange as ancillary restraints in the context of franchise agreements,[75] and the Vertical Guidelines highlight specific principles for franchise concepts.[76] Par. 45 (d) Vertical Guidelines is of specific relevance in this context. Here, the Commission exempts all Information Exchange relating to the Franchise Know-how by stating [emphasis added]:

> "*The following IPR-related obligations are generally considered necessary to protect the franchisor's intellectual property rights and are, where these obligations fall under Article 101(1), also covered by the Block Exemption Regulation: […]*
>
> *d) an obligation on the franchisee to communicate to the franchisor <u>any experience gained in exploiting the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-how resulting from that experience</u>;*

This exemption principle in our view relates to all Information Exchange with a nexus to the core element of franchising, namely the implementation of a uniform business concept. We fail to see that this needs to be revised for scenarios of dual distribution. In fact, we believe that the principle was originally implemented to cover scenarios of dual distribution. Unlike in other systems, where direct sales by the supplier may only have evolved over time, dual distribution has always been a characteristic element of franchising. It was e.g. part of the franchise system analysed by the ECJ in *Pronuptia*. It is also present in the practical example provided by the Commission in par. 191 of the Vertical Guidelines. The operation of own retail activities typically allows the franchisor to gain and develop the required know-how that is later applied for the sale of products and services by third party franchisees under the same format. While selective distribution already reduces intra-brand competition, this is even more so in a franchise system (which may or may not also fulfill the criteria of a selective distribution system).

In our view, for such systems, the VBER is therefore less focused on the limitation of intra-brand competition, unless it concerns the hardcore restrictions listed in Art. 4. The common identity and reputation of the franchise network already reduces key elements of marketing and service competition that are relevant in other types of distribution system.[77]

[74] *Schultze/Pautke/Wagener, Vertikal-GVO, 4th ed. 2019, par. 809.*
[75] *See already II.2 .3, p. 32, above.*
[76] *Vertical Guidelines, par. 45 lit. a-g.*
[77] *Vertical Guidelines, par. 191.*

### 2.4 Factual elements across distribution formats influencing Information Exchange

In particular outside the area of standard consumer goods there are many products that need to be (i) serviced and/or updated with firmware or other software revisions or (ii) adapted to (industrial) customer-specific needs in order to ensure their proper functioning.

In order to supply such services, i.e. provide the required updates and/or adapt the product to the customer's needs, it is generally necessary to Exchange Information between supplier and distributor, the key one being simply that the supplier needs to know the identity of the end customer (see also under example 3.3 and 3.4 below).

For consumer products, in order to receive firmware updates, e.g. for a camera or other technical equipment, the end customer Information is typically provided either by the distributor or by the customer itself registering its purchase with the manufacturer/supplier. In both cases, the supplier gets direct access to the customer, thereby enabling it to inform the customer about the availability of new firmware updates and provide instructions on the downloading (e.g. from the manufacturer's website) and installation of the updates.

Another area are the so-called Over The Air ("OTA") updates are performance boosters for software-operated products, the most well-known example being electric cars (see example under 3.4 below). Sometimes these updates can be completed directly by communicating with the contract product directly, in other instances communication with the end customer is needed beforehand.

Furthermore, for some industrial products (i.e. technical equipment, chemical products), it may be necessary to adapt and/or customize them to the specific environment and customer needs where or for which they are to be used. Industrial products may for instance require a certification process if such products are components for other products (i.e. components, raw materials for technical products to be integrated in end consumer products, such as cars, computers, machinery).

In all these instances, direct contact between the supplier and (the interim) purchaser is either strictly necessary for the product to have or maintain its value or it is at least strongly recommended to ensure its correct use for the particular industrial purpose.

## 3. Types of Information Exchange and main rationale for Information Exchange exemplified for different industries

### 3.1 Consumer goods

Consumer goods or direct products are products sold to general end consumers. Such products consist of a large variety of goods that can, e.g., be sub-segmented by purchase patterns (convenience goods, shopping goods, unsought goods, etc.), by type of product (i.e. fast-moving consumer goods, durable goods), by category of product (i.e. fashion, electronics, media, etc.), and/or by value (luxury and non-luxury products). From a competition law perspective, the distribution system is typically driven by the end-user purpose of the respective contract products as well as by the supplier's and/or the distributor's strategic decision on whether to (re)sell these products based on volume or value.

In some instances, suppliers chose to sell their products not via distributors, but only via direct sales channels, consisting either of supplier-owned entities or agents/commissionaires. Such systems are costly, as the entire distribution logistics needs to be installed and/or reimbursed by the supplier. In general, suppliers therefore use distributors, often at importer, wholesale and retail level, to reach end

customers, which may be private or industrial end-customers. The distribution formats are as diverse as the products sold.

From our experience, fast-moving consumer goods are generally sold in free distribution systems, with no exclusivity granted to distributors. While options for online selling have increased significantly, daily consumer goods are still to a large extent sold offline in brick-and-mortar stores (e.g. supermarkets, drugstores). Suppliers rarely apply selective distribution systems (as defined by the VBER), but more often unilaterally choose their distributors on the basis of certain quality and/or quantity criteria to be fulfilled by their distributors, e.g. regarding store appearances, product ranges, service levels (i.e. supermarkets vs. discounters etc.). Distributors of fast-moving consumer goods are typically multi-brand resellers, both at the wholesale and the retail level. For this category of goods, direct sales by suppliers are often limited to pre-defined customer groups (e.g. hospitals, army, government institutions), often characterized by different order and supply patterns due to specific requirements in volume, delivery time and range of supply. From a distributor perspective, delivery logistics are of significant importance. Supply and order management is hence often managed electronically between supplier and buyer. Price is a significant driver for retail competition, in particular for intra-brand competition. Information Exchange on price at retailer and supplier level have been investigated by numerous national competition authorities as so called "hub-and-spoke collusion" as is, e.g., summarized in the OECD report on hub-and-spoke cartels of 2019.[78] The EU Commission itself contributed to the paper with a note, but highlighted its lack of own enforcement practice.

### 3.1.1 Fast-moving consumer goods

#### (a) Typical distributor-to-supplier Information

Typical distributor to supplier Information entails

- sales volumes (sell-out/sell-in data[79]),
- sales values,
- order and stock volumes,
- types of marketing campaign applied (e.g. sales leaflets (Handzettel), online advertising, etc.),
- number and volume of marketing campaigns and other marketing efforts.

#### (b) Typical supplier-to-distributor Information

Typical supplier to distributor Information entails

- product availability, new products, lead times,
- recommended retail prices,
- timing of marketing campaigns,
- recommendations for product placement (e.g. shelf space, brand environment, display layout).

#### (c) Specific guidance on Information Exchange in food retail

The food sector is characterized by specific market structures. Suppliers and retailers are often large companies, markets are concentrated and there is limited requirement

[78] *See e.g. background paper of OECD of 4.12.2019, accessible under http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm.*
[79] *Sell-out data refers to the sales by the distributor to end-customers (or retailers, as the case may be), sell-in data refers to the sales by the supplier to the distributor.*

for pre-sales advice or advice on the launch of new products. As is inter alia reflected in the OECD report mentioned above, the bargaining power of large retailers vs. suppliers in fast-moving consumer goods such as, e.g., in particular supermarkets is significant. Buyers are often organized in national and supra-national purchasing co-operatives. Purchase prices are a main cost component of retail prices, which are in turn the major driver of retail competition. To the extent that suppliers engage in direct retail selling, this is often limited to specific customer groups (see above) or via web-shops. The latter are often used more as a tool to display the brand and product range than as a commercially significant sales channel.

Distributors typically operate centrally run IT systems at retail level to record real-time scanner resale data for stock and order management purposes. It may be necessary for suppliers to access such resale data, e.g. in price negotiations or for benchmarking exercises regarding their products. Suppliers may also wish to get access to the data collection by their multi-brand retailers in order to gather market intelligence. Since the Information is collected by the distributors as scanner data, it is technically available in real time for all levels of granularity, i.e. down to the price per single purchase unit.

The German competition authority conducted a sector inquiry into food retailing,[80] and fined several food suppliers for RPM facilitated by Information Exchange via retailers.[81] In connection with its RPM investigations, the German competition authority published a guidance note on the prohibition of vertical price fixing in the brick-and-mortar food sector ("Guidance Note").[82] In paras 95-98 of the Guidance Note, the German competition authority summarized its view on sales data collection in the sector as follows [emphases added]:

> *"Data on sales prices and quantities (sales data) are an important source of information for retailers. They analyze them in detail and base their price and portfolio decisions on the results of their analyses. Such data are also relevant for the manufacturers of the respective products. Professional market research companies regularly collect data on sales prices and quantities, e.g. by conducting surveys in retail outlets or by surveying households. They also collect data from the retailers themselves. Many suppliers purchase these data for their distribution strategies and product planning. A lot of them have a strong interest in purchasing the sales data directly from the retailers, as the data from the market research companies are rather costly and only cover random samples. The retailers are also interested in providing the suppliers with sales data because this generates another source of income and offers them the opportunity to use the expertise of the suppliers' market research departments for an analysis of the sales data. This provision of sales data is generally allowed under competition law.*
>
> *However, the data may not be used to coordinate pricing strategies, either between the retailer and the supplier, or between retailers with the supplier acting as a mediator, or between suppliers with the retailer acting as a mediator. The provision of data relating to the future (such as a designated promotional price) is therefore subject to the limitations described above.*
>
> *The provision of past sales data raises concerns if it not only serves the legitimate purposes outlined above, but is also used to monitor the retail prices*

[80] *See e.g. German competition authority, Sector inquiry into the food retail sector, Final report, 2014.*
[81] *German competition authority, press release 15.12.2016, accessible under: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/15_12_2016_Vertikalfall%20Abschluss.html;jsessionid=B46EABDAAF25C1CADAD77CA0CABD7520.2_cid362?nn=3591568.*
[82] *German competition authority, www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.*

> *of a retailer in order to assess whether the retailer adheres to a vertical price-fixing agreement. If data from the recent past are provided, this can be an indication of such price fixing because the supplier needs current data to effectively enforce the agreed resale prices. The provision of current data is, nevertheless, only a first indication of price fixing. Further evidence is required to prove a price-fixing agreement between supplier and retailer*."

The Guidance Note also deals with the subject of Information Exchange on promotional campaigns. Here, the German competition authority does not object to the supplier agreeing with distributors in advance on the timing of promotional campaigns,[83] provided that there are no restrictions on the distributor to also choose additional time slots. The assessment differs if a distributor also discloses Information on intended promotional prices during such campaigns. The German competition authority does not distinguish between Information which is provided under a contractual or informal obligation and Information submitted upon the own initiative of the distributor (Guidance Note par. 70):

> *"If the supplier is not only informed of the quantities needed but also of the designated promotional* retail *price, this can, however, raise competition concerns. In some cases it can be very difficult to distinguish between a (legal) information about an autonomous price a retailer intends to charge and a promise on the part of the retailer to charge a certain retail price (which constitutes illegal vertical price fixing under German and European law)."*

### 3.1.2 (Branded) consumer goods

(Branded) consumer goods comprise a wide range of products, sold under various systems, namely free, exclusive, partially exclusive, selective or franchise systems. Branded consumer goods are typically sold offline and online. As a result of its E-commerce sector inquiry, the Commission identified the following consumer goods categories as being those most frequently sold online: clothing and shoes, consumer electronics, electrical household appliances, computer games and software, toys and childcare articles, media, cosmetics and healthcare products, sports and outdoor equipment, as well as house and garden products.[84] As also reflected in the Commission's E-commerce sector inquiry, there is an increasing trend for suppliers to operate their own B2C-online stores and hence engage in direct internet selling. In many sectors, suppliers also operate their own retail flagship stores in premium locations.[85] Dual distribution is therefore a frequent set-up in branded consumer goods markets.

Inter-brand competition is an important driver for the sales success of branded consumer goods. The supplier's central webshop is often considered a "window to the brand", as it displays the full product range and the strategic positioning of the brand image to consumers. The supplier also plays a role as price indicator for competitors, retailers and consumers alike. In view of the importance of e-commerce for consumer goods distribution, both suppliers and distributors of branded consumer goods frequently use electronic tools to improve their sales performance, including price monitoring software, price comparison sites, advertising tools, search engine advertising and social media campaigns.

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*[83] Guidance Note par. 70: "In their annual talks, the supplier and the retailer may choose to agree in advance on supplier-supported promotion periods, bearing in mind the planned campaigns of other retailers (where known to the supplier). This is to ensure an efficient use of production facilities and does not violate competition law. The fact that this also ensures that not all retailers plan supplier-supported campaigns at the same time with the same products does not raise competition concerns. Otherwise, supplier-supported promotional activities at retail level would lose much of their attraction".*

*[84] Final report on the E-commerce sector inquiry, COM(2017) 229 final, par. 9.*

*[85] See e.g. Commission, 17.12.2018, Case AT.40428 Guess and French competition authority, 16.3.2020, 20-D-04 Apple France, and German competition authority, 13.1.2016, B 2 98/11 Asics.*

The wide range of distribution formats used for branded consumer goods only allows to provide for some examples for Information Exchange in dual distribution scenarios for this product category. The following hypothetical example is typical for the complexity of the systems, the mix of different distribution formats and hence the variety of Information Exchange taking place in various directions between multiple parties and either agreed contractually, directly or indirectly, or disclosed in an unsolicited and informal manner.

### a) Hypothetical example for Information Exchange in a dual distribution scenario for branded (electronic) consumer goods

A manufacturer of branded electronic consumer goods ("supplier") segments its products into three different categories, a premium, a consumer and a basic line. Market shares of the supplier in all product lines and categories do not exceed 25% on any relevant market.

(1) The premium line is sold under a selective distribution system, as defined by Art. 1 (1) (e) VBER. Selective premium retailers are also supplied with consumer line and basic products but outside the selective system.

(2) The consumer line is sold via specialized wholesalers and online and offline retailers, pre-selected by the supplier based on specific quality- and quantity-based criteria, without, however, meeting the criteria of a selective system under Art. 1 (1) (e) VBER, i.e. without imposing on the resellers an obligation not to resell to unauthorised distributors and on the supplier to only sell to members of the selective distribution system

(3) The basic line is sold by the manufacturer to wholesalers and retailers in an entirely free distribution system.

The supplier operates its own B2C-online store, offering premium and consumer line products to end-customers, but not offering basic line products. Products from both the premium and the consumer line are sold by the manufacturer offline to selected key accounts at end-customer level as well as via supplier-owned flagship stores. Wholesalers and retailers for premium, consumer and basic line products are contractually obliged to provide at monthly intervals

- aggregated sales value and per unit sales volume data and
- information on return volumes and warranty claims.

Wholesalers for the consumer line are further required to sub-segment such monthly sales data per product/order unit level according to

- pre-defined customer segments, i.e. specialized retail, general retail, pure online, online hybrid.

The supplier requires all distributors (i.e. wholesalers and retailers) to

- use an electronic ordering system.

The Information provided to the distributor via this ordering system depends on whether a distributor qualifies as a selective premium brand reseller (Information access to all products), a consumer line distributor (Information access to consumer line and basic products) or a basic distributor (Information access to basic products only). Via the order system, the supplier communicates electronically:

- general product Information,
- installation and service instructions for the products,
- product images for download in own web-shops,
- stock levels,
- lead times,
- electronic marketing material and
- announcements regarding changes in purchase prices and recommended retail prices.

Via the system, the supplier also communicates

- recommended dates for sales periods and recommended resale prices for such sales periods, staggered by phase of the sales period (for example first phase 20%, second phase 30%, third phase 50%).

The supplier has agreed with all its wholesalers and its directly supplied key accounts for premium and consumer line products

- volume- and quality-based rebate schemes.

Under these rebate schemes the supplier requires wholesalers and specific key accounts to

- meet certain sales conditions within an annual period, including
  - sales targets (taking account the requirement of free cross-supplies for the selective premium line products),
  - sales increases per specific product categories and – to the extent applicable to the respective buyer –, number and type of marketing events (i.e. print campaigns, internet campaigns).

The supplier schedules regular meetings with wholesalers to share

- general market observations such as new regulatory developments and changes to the competitive landscape (e.g. new product lines introduced by competitors, changes in the retailer landscape, handling of external events such as potential volume shortages due to shortages in the supply chain) and
- Information on new product launches as well as general market-related developments in the supplier sphere (i.e. integration of a new business line following an acquisition etc.).

The supplier uses

- external software to track sales of premium products for their appearance outside the selective distribution system.

It also uses

- an external price-tracking program to monitor the online prices of all distributors.

### b) Assessment of the Information Exchange under the current rules

In our view, the described distribution set-up qualifies as a "dual distribution" scenario pursuant to Art. 2 (4) (a) VBER. The supplier is an actual competitor of its premium and consumer goods distributors at the retail level due to its operation of a B2C-online store and its direct offline sales to key customer accounts and end customers via own flagship stores. The supplier is not an actual retail competitor of the retailers of its basic line products. However, the supplier could start retailing its basic line products at any time via the already existing distribution infrastructure online and offline.

According to our understanding of the current rules, the entire Information Exchange described in the above-mentioned example falls within the scope of Art. 2 (1) VBER because it is directly related to and does not only occur at the occasion of a vertical agreement; it is thus currently block exempted under the VBER. In practice the question whether it restricts competition and thus falls within the scope of Art. 101 (1) TFEU in the first place does therefore not matter. This assessment is made under the assumption that the Information Exchange is not used as a supportive measure for hardcore restrictions imposed by the supplier on any of its distributors.

The described system contains numerous elements by which Strategic Information is either disclosed by the distributor to the supplier (e.g. monthly unit sales values for consumer line products at the wholesale level, further sub-segmented by resale segments, number and type of marketing events as disclosed ex post under the criteria of the rebate scheme and as discussed ex ante in the annual sales meetings) or from supplier to distributor (e.g. recommended retail prices, including the proposed timing and scheme for recommended retail prices during sales periods). The distribution scheme also contains elements that can be regarded as being of direct strategic relevance in a horizontal retail relationship (e.g. the discussion of the competitive landscape during the annual sales meeting and the agreement of a marketing plan for each distributor's sales performance in the coming year). The distribution set-up also requires the Exchange of non-Strategic Information, part of which, rather evidently, does not fall within the scope of Art. 101 (1) TFEU in the first place. This applies again to certain distributor to supplier disclosures (e.g. monthly reporting of warranty claims and returned units) as well as to supplier to distributor information (e.g. general product information, installation and service instructions, product images for download in distributor web-shops, stock levels, lead times and electronic marketing material).

### c) Considerations under revised rules

For a revised approach to Information Exchange in dual distribution as further outlined under III. below, we do not see that any of the Information mentioned above creates a "false positive", as none of the Information described could as such be viewed as unrelated or disproportionate to facilitate the operation of the lawfully implemented distribution set-up in light of the nature of the products and the various distribution formats chosen for different product lines. In our view therefore, the described Exchange of Information should remain block exempted. This assessment takes into account that the use of the Exchanged Information on a vertical level is limited by Art. 4 VBER, e.g. in case the supplier would impose on the distributors RPM or illegal resale restraints regarding online or customer/territorial based restrictions based on the Information knowingly and continuously provided by its distributors.[86] If supplier and distributors used, e.g., the marketing meetings or the Information on future sales campaigns for horizontal collusion, the respective conduct fell outside the scope of the

[86] *See e.g. Guess as described under I. 2.1, above.*

block exemption on the grounds that it would not be directly related and proportionate to the vertical agreement.[87]

## 3.2 Life Science

Products sold for medical purposes are generally categorized as either medical devices[88] or medicinal products.[89]

For the purpose of this Expert Report, it suffices to point to the fact that the manufacture and commercialization of these two types of products are generally governed by different national regulations. Such regulations are based on the common principle that sufficient access by patients to affordable treatment options is a national priority.

The pharmaceutical industry was subject to a sector inquiry by the European Commission, closed in July 2009.[90] Subsequent enforcement actions, both at EU and national level resulted in substantial fines on different industry players.[91] While the Commission recognized that the industry is highly regulated and corporate behaviour therefore has to be assessed against this regulatory framework, it has been decided in numerous cases, confirmed also by the ECJ, that competition law principles, including Art. 101 TFEU, remain applicable.[92]

Distribution agreements in the pharmaceutical and medical devices industry take different formats which also have an impact on Information Exchange. The distribution of pharmaceuticals in the pharmacy/retail segment generally takes place via wholesalers and pharmacies, operating both online and offline. Pharmaceutical manufacturers are under a statutory obligation to ensure access to pharmaceuticals to meet national demand. Wholesalers are under specific requirements to ensure the timely delivery of pharmaceuticals to pharmacies, which are often supplied with products twice a day. Large e-commerce pharmacies have gained a significant role in distribution. They are often supplied directly by the supplier. In the hospital segment, suppliers either sell directly or through a distributor.

In its Report to the Council and the European Parliament on Competition Enforcement in the Pharmaceutical Sector (2009-2017),[93] the Commission provided a comprehensive overview of the market structure, regulatory parameters and competition law enforcement in the sector.

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*[87] See e.g. Hugo Boss and Apple as described under I. 2.2 and I. 2.3, above.*

*[88] Pursuant to Art. 2 (1) of Regulation 2017/745 of the European Parliament and the Council of 5 April 2017 on medical devices, 'medical device' means "any instrument, apparatus, appliance, software, implant, reagent, material or other article intended by the manufacturer to be used, alone or in combination, for human beings for one or more of the following specific medical purposes […] which does not achieve its principal intended action by pharmacological, immunological or metabolic means, in or on the human body, but which may be assisted in its function by such means".*

*[89] A medicinal product is a "substance or combination of substances that is intended to treat, prevent or diagnose a disease, or to restore, correct or modify physiological functions by exerting a pharmacological, immunological or metabolic action.", see European Medicines Agency, https://www.ema.europa.eu/en/glossary/medicinal-product.*

*[90] The entire documentation of the sector inquiry is currently accessible under: https://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/.*

*[91] See report of the Commission to the Council and the European Parliament, Competition enforcement in the pharmaceutical sector (200-2017), COM(2019) 17 final.*

*[92] See for example Judgment in Case C-591/16 P Lundbeck EU:C:2021:243.*

*[93] 28.1.2019 COM(2019) 17 final.*

### 3.2.1 Hypothetical example for Information Exchange in a dual distribution scenario for medical devices

A manufacturer of medical devices ("supplier") offers different products. The products require a relatively complex surgical implant procedure to be administered to patients. Market shares of the parties are below 30% on any relevant market. The supplier has appointed one exclusive distributor per territory for the sale of these products to customers. Due to the nature of the products, the customer base consists solely of medical institutions, such as hospitals, that meet the legal requirements to perform the surgical procedure required to implant the products in line with national law.

For each territory, the supplier retains one or two large hospitals as direct key accounts, to which it supplies the products directly. The key accounts are typically university hospitals or other centres of excellence, particularly suited to carry out novel procedures and treatments. To reserve these customers to the supplier as direct key accounts facilitates their supply with products that are still being trialled, also outside the products current medical use and/or in a phase not yet authorized for commercial resales. The identity of the customers exclusively reserved to the supplier is communicated to all distributors in a specific annex to the distribution agreement.

In line with Art. 4 (b) (i) VBER, the supplier contractually

- prohibits its distributors from actively selling to (i) territories exclusively allocated to other distributors and to (ii) customers exclusively reserved to the supplier itself and
- commits vis-à-vis its distributors to only sell the products actively and passively to its exclusively reserved key accounts.

The nature of the implant procedure requires the presence of medical product experts during certain surgical procedures. Accordingly, the contract obliges distributors to attend a defined number of such surgical procedures, together with the supplier's medical product experts. This is to train the distributor's medical experts on the specifics of the products. The contract further provides that the distributor can request the presence of the supplier's product experts to assist the distributor's staff in corresponding procedures performed by the distributor's exclusive customers. The contract also gives distributors the option to request the presence of a supplier representative at sales meetings with its exclusive customers.

For practical reasons, the products are not sold online, even though distributors are not restricted from doing so.

### a) Assessment under the current rules

The wording of Art. 2 (4) VBER – and hence an inclusion of dual distribution scenarios in the scope of the VBER – requires that the parties to an agreement are [emphasis added]

> *"competing undertakings enter into a non-reciprocal vertical agreement and:*
>
> *(a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level".*

For the purpose of the VBER, a competing undertaking means an actual or potential competitor absent the vertical agreement.[94] In the example provided, the supplier is active on the same retail market as its exclusive distributors, but it does not actually compete with these distributors over customers in this market. The supplier has lawfully restricted its active and passive sales on the market to just two key accounts per territory.

The current rules block exempt restrictions based on Information Exchange in dual distribution scenarios that meet the criteria of Art. 2 (4) (a) or (b) VBER for which a potential competitive relationship is sufficient. Consequently, the assessment of whether supplier and distributor effectively compete on the retail level, in the provided example is not of practical relevance for the purpose of applying the VBER.

According to our interpretation of the current rules, the possession of Strategic Information does not constitute a vertical restraint as such, provided the exchange falls within Art. 2 and 3 VBER and does not as such violate Art. 4 VBER (see above). However, in our view, the presence of the supplier's product experts in sales meetings between its distributors and their customers may not be compatible with the prohibition of RPM under Art. 4 (a) VBER. The authors of this Expert Report believe that the distributor's freedom to negotiate resale prices could be compromised by the mere presence of the supplier during such negotiations. The attendance of the supplier's experts at such sales meetings should therefore be limited to the parts of the meeting during which the supply of technical expertise and product information is indeed required. Purchase price negotiations should be kept separate and should not take place in the presence of the supplier. From a practical perspective, the authors of this Expert Report otherwise fail to see how the supplier could successfully rebut a presumed allegation from the distributor to have been influenced in its price setting.

### b) Considerations under revised rules

In our view, the described situation is not a typical situation of dual distribution as there is de facto no competition at the retail level. The specifics of the exclusive distribution system exclude that the supplier creates any meaningful competitive pressure on distributors. Nonetheless, the system contains Information Exchange that may be considered unrelated and disproportionate for facilitating the vertical agreement, namely the presence of the supplier in sales negotiation meetings with its customers. Information on actual price negotiations with customers is from a purely vertical perspective, neither required nor related to facilitate the vertical agreement.

[94] *Art. 1 (1) (c) VBER.*

### 3.2.2 Hypothetical example for Information Exchange in a dual distribution scenario for pharmaceuticals

A manufacturer of pharmaceutical products (supplier) sells a variety of medicines that are prescribed to patients for use in the ambulant/pharmacy market as well as in the hospital sector.

Market shares of the parties with the contract products in the pharmacy as well as in the hospital sector are below 30 %.

The supplier does not sell directly in the pharmacy segment, but sells its product in this segment via pharmaceutical wholesalers only. However, the supplier has reserved sales to all customers in the hospital sector to itself (Art. 4 (b) (i) VBER). While the supplier lacks the logistical capacity to meet the complex supply requirements imposed by national law for direct sales to pharmacies, the less complex supply of hospital pharmacies can be and is being handled directly by the supplier.

Pharmaceutical wholesalers report to the supplier daily stock and sales volume data. Wholesalers inform the supplier about their sales visits to doctors and pharmacies on a regular basis. Supplier and wholesalers agree on a scheme to allocate promotional activities in the ambulant/pharmacy market (i.e. visits to doctors and pharmacists) between them.

#### a) Assessment under the current rules

In our view, the described set-up does not fall within the definition of dual distribution pursuant to Art. 2 (4) VBER. Sales of pharmaceutical products to hospitals and sales to pharmacies are two separate product markets in territories where national law imposes different rules for pricing and reimbursements in these two segments.[95] As a consequence, a supplier that only sells products directly to hospitals but not to pharmacies is not active on the same relevant market as its wholesalers and thus does not qualify as an actual competitor pursuant to Art. 1 (1) (c) VBER. In the example provided, the supplier is also unlikely to be considered a potential competitor in that market, since it lacks the logistical capacity to serve this market in line with statutory requirements. In our view, the relationship between supplier and pharmaceutical wholesalers can therefore be regarded as a purely vertical one. Unless the Information Exchanged were to be used by the supplier in support of a hardcore vertical restraint, such Information Exchange is currently block exempted.

#### b) Considerations under revised rules

The same considerations should be applied under the current rules. In our view, this distribution set-up should not be treated as dual distribution. In any event, all of the Information Exchanged should remain block exempted.

## 3.3 Chemical Industry

The manufacture and sale of chemical products covers a wide range of products serving different customer needs. Like the pharmaceutical and medical device industry, the chemical industry is subject to significant regulation, governing both the manufacture and the commercialization of chemical products.

[95] *See e.g. German competition authority, 13.8.2003 – B3-11/03 ("Novartis/Roche").*

Distribution arrangements are, inter alia, determined by the question of whether the products are specialty or commodity chemicals. While specialty chemicals often need to be adapted to and certified for specific end customer requirements, industrial commodity chemicals are produced on a very large scale according to globally recognized standards. By contrast, specialty chemicals are produced in batches, which require individual inspection to verify their compliance with specifications. The storage, handling and transport of chemical products generally requires compliance with factual and regulatory obligations aimed to ensure the safety and quality of the products in question (e.g. taking into account whether such products are toxic, explosive or simply unstable). Some chemicals can only be stored or transported in specific transport containers or devices developed and owned by the supplier, in order to guarantee, e.g., a specific temperature, pressure, sealage, etc. required for safety or quality reasons. Consequently, the supply of such chemicals also requires a logistics system for the collection of empty transport devices that are then reused. Specialty chemicals are often subject to individual price negotiations in which the long-term supply of certain volumes of identical quality is an important parameter of competition. Competition for commodities on the other hand is mainly driven by volume and price. The average prices of commodity chemicals are regularly published in the chemical trade magazines and websites such as e.g. Chemical Week and ICIS.[96] Due to their high dependence on raw materials, price adjustments for commodity chemicals may occur on a monthly basis.[97]

E-commerce has begun to play a significant role in the distribution of chemical products. Some global players have launched digital marketplaces in the form of hybrid e-commerce platforms.[98] Other e-commerce platforms are operated by independent parties. As the platform typically allows for direct interaction between manufacturer and buyer, most platforms offer both specialty chemicals and commodities. Whether a platform also offers a logistics infrastructure depends on the particular business model of the platform.

[96] *Independent Commodity Intelligence Service, further information is available under www.icis.com.*
[97] *See e.g. Commission 14.7.2020, CASE AT.40410 Ethylene , paras 9 subseq.*
[98] *See e.g. case report German competition authority, 15.5.2020, B8 94/19, („OLF Deutschland") (Oli derivatives), accessible under https://www.bundeskartellamt.de/SharedDocs/ Entscheidung/EN/Fallberichte /Fusionskontrolle/2020/B8-94-19.pdf?__blo b=publication File&v=2*

### 3.3.1 Hypothetical example for Information Exchange in a dual distribution scenario in the chemical industry

A chemical manufacturer and wholesaler ("supplier") which also directly sells to industrial customers offers a wide variety of specialty and commodity products. The supplier has a large distribution network, consisting of own subsidiaries and third party logistics partners to ensure the storage and delivery of its products in line with regulatory requirements.

In addition to offline sales for specialty and commodity chemicals, the supplier operates a hybrid B2B-sales platform which is open for third party sales by chemical manufacturers and wholesalers to their industrial customers.

Products sold by the supplier directly either online or offline regularly compete with products sold by third parties via the supplier's platform.

Market shares of the parties do not exceed 30% on any relevant market.

As an additional service to its direct and platform customers, the supplier offers both storage and delivery and/or assistance with customer service, such as, e.g., on-site support services and collection of transport/storage devices.

The supplier can offer these services at a competitive price due to cost synergies achieved by pooling the transport and on-site services required for its own sales with those offered by third party sellers supplying the same industrial buyer.

Manufacturers and smaller wholesalers wishing to benefit from these cost-efficient services are required to store their chemical products at the decentralized warehouses of the supplier.

#### a) Assessment under the current rules

The described set-up is currently covered by Art. 2 (4) VBER as a dual distribution scenario with respect to the resale of chemical products. As regards the provision of services, the factual background provided in the example is not sufficient to make a conclusive assessment: while the supplier is engaged in platform services and logistics services at the wholesale and retail levels, third party users of the platform services may or may not be actual or potential competitors for such logistics services at the retail level.

The example provides for safeguards to prevent an illegal horizontal Information Exchange inherent in the operation of a hybrid B2B-platform. Guidance for the specifics of such requirements are inter alia outlined by recent national case law on B2B-platforms dealing specifically with Information Exchange.[99]

[99] *See e.g. German competition authority, OLF Germany, where the German competition authority described relevant firewall requirements in the case of a B2B platform for oil derivatives as follows: "Suppliers and customers have to register on the platform and open a user account before they can view supply data on the platform. The supply data (prices, quantities, local availability) are initially shown anonymously. The contracting partner is disclosed only in the final stage before a contract is concluded. OLF has also taken measures to prevent the desired effect of anonymization being undermined by computerised data-collection systems (via programs or bots)" With respect to the agricultural B2B platform Unamera, the German competition authority summarized its assessment parameters in a press release of 5.1.2020, as follows: "In assessing online trading platforms we focus on a number of key issues. Such networks should not result in price-fixing agreements, they should be non-discriminatory, and they should not create an excess of transparency. Particular focus is thus always placed on the type and extent of information exchange, the creation of "Chinese Walls" between the platform users, the publication of market statistics and the*

The dealing with Information Exchange that occurs in the context of services relating to a vertical sales agreement (e.g. the described on-site and logistics services) is not covered by such guidance. In the hypothetical example, the Strategic Information generated by the joint transport or on-site servicing of potentially competing products cannot be held separate without losing the efficiency benefits of the shared service as such. Whether the service information can be held separate from the sales data generated by the platform is also doubtful. In the present example the Information Exchange may in general be pro-competitive. In the view of the authors of this Expert Report it, however, needs to be ensured that only such Information is Exchanged that is indeed directly related and proportionate for the respective vertical sales or service agreement. Here, the Exchange of customer data, volumes, specifics of the product to be transported, and potential number of transport/storage devices to be collected are Information that are essential for providing the logistics services. Data that goes beyond such directly related Information, such as e.g. the exact sales price charged for the products sold by third parties via the platform is not.

### b) Considerations under revised rules

In our view, all of the Information Exchanged under the described system should remain block exempted. There is no "false positive" created by the Exchanged Information. In fact, all of the Information Exchanged is related and proportionate to facilitate the operation of a pro-competitive distribution system. This applies irrespective of the general necessities for hybrid platforms to ensure a compliant Information management as such that inter alia prevents a favoring of own services via Information generated by platform sales.

## 3.4 Automotive

The automotive industry is well known to the Commission. The sale of car parts,[100] vehicles[101] and trucks[102] have all been subject to enforcement decisions relating to horizontal infringements of Art. 101 (1) TFEU. In *Opel Nederland*, for instance, the Commission, confirmed by the ECJ,[103] fined a car manufacturer for imposing territorial resale restrictions in a vertical distribution agreement. In *Auto24*, the ECJ ruled on the legality of a quantitative selective distribution system.[104]

*disclosure of the identity of the trading partners.", the press release is accessible under: https://www.bundeskartellamt.de/SharedDocs/Meldung/ EN/Pressemitteilungen /2020/05_02_2020_Unamera.html.*

*[100] The car part industry was fined by the Commission with a total of 2.2 bl. since 2013, press release, Commission IP/20/1774, 29.9.2020.*

*[101] See e.g. Commission, AT.40178, 8.7 2021.*

*[102] See e.g. Commission, AT.39824, 27.9.2017.*

*[103] OJ L 59, 28.2.2001, p. 1–42.*

*[104] Judgment in Case C-158/11 Auto 24 SARL v Jaguar Land Rover France SAS EU:C:2021:351.*

### 3.4.1 Hypothetical example for Information Exchange in a dual distribution scenario in the car industry

A manufacturer of passenger cars ("supplier") sells its cars to end customers via separate distribution channels.

(1) One distribution channel is conventional car distribution via a network of dealers who purchase and resell the cars and as well as are offering service and repairs.

(2) Another conventional distribution channel consists of the supplier selling directly to large customers (car rental agencies, fleet purchasers, corporate buyers, etc.). Sales contracts are concluded between supplier and corporate customer; delivery of the cars takes place via distributors selected by each customer, generally on the basis of their geographic location. Services and repairs are handled by the distributor network, as in the dealer distribution channel (1).

Regardless of the exact market definition, market shares of 30% are not exceeded by any of the parties to the system.

The supplier unilaterally decides to supply dealers in distribution channel (1) only with combustion-engined cars and to supply electric cars only directly, i.e. either in its own sales channel (2), online or in an agency model (not of interest here).

The retail prices for cars are set as follows:

In dealer distribution channel (1), the retail prices are set by the distributors that purchase the cars at a discount from the supplier. In the direct distribution channel (2), the supplier sets the retail prices and the distributor that is selected by the customer as delivery point earns a commission as agent.

Information is exchanged between the supplier and the distributors via a central IT system. The system stores the identity of all customers and the purchase details of all cars. This is required to provide digital services to the car by all distributors belonging to the network (i.e. by over-the-air updates and distant repairs).

The supplier provides the IT infrastructure and obliges the distributor/agents to use it. Via the IT system, the supplier gets direct access to customer sales information, irrespective of whether the customers purchased via channel (1) or (2). Consequently, the supplier has a transparent view of the distributors' business activities.

#### a) Assessment under the current rules

The described distribution system qualifies as dual distribution pursuant to Art. 2 (4) (a) VBER. Supplier and distributors are direct competitors at the retail level as regards the supplier's sales of combustion engine cars in distribution channel (2).

The entire Information Exchange from distributors to supplier takes place within the framework of a vertical agreement and is directly related to it.

Under the current rules, any restriction of competition resulting from the Information Exchange in the vertical arrangement would therefore be block exempted.

### b) Considerations under revised rules

In particular, in light of the wide requirements for after-sales services, we do not see that the described Information Exchange is to be considered unrelated or disproportionate for facilitating the implementation of the chosen distribution set-up. In our view, the entirety of such Information Exchange should remain block exempted.

## 3.4.2 Hypothetical example for Information Exchange in a dual distribution scenario in the car parts industry

A tier one supplier of automotive parts ("supplier") manufactures and supplies automotive components to a car manufacturer for

(i) integration into newly built cars (OEM business) as well as
(ii) for resale of the components as branded spare parts to car dealers (aftermarket).

The supplier also sells the contract products under a private label brand to independent servicing distributors in the aftermarket.

The market shares of the parties for all relevant markets concerned by the set-up are below 30%.

The car manufacturer requires the supplier to operate an open book system which gives the car manufacturer full transparency into all of the supplier's production costs for the contract products, including the sales margin charged by the supplier to the buying car manufacturer. Specific costs of manufacturing the products for the independent aftermarket as well as the pricing of such products are not covered. However, the open book policy provides the car manufacturer with Information on the actual prices for certain input products sourced by the supplier and also sourced directly by the car manufacturer from tier two suppliers.

### a) Assessment under the current rules

The system qualifies as a dual distribution scenario pursuant to Art. 2 (4) (a) VBER with respect to automotive components. The supplier is a manufacturer and a retailer of the contract products. The car manufacturer is active at the retail level for automotive components. The open book system gives the car manufacturer access to Strategic Information, which, however, does not result in a hardcore restriction. Even if the system may compromise the supplier to freely set its sales prices, this does not constitute RPM within the meaning of Art. 4 (a) VBER, as this prohibition only applies if imposed on a buyer, not on a supplier. The open book policy is related to the vertical supply agreement and thus within the scope of Art. 2 (1) VBER. To the extent the open book policy would require the supplier to inform the car manufacturer about the prices of products that the supplier has bought from sub-suppliers in a situation where the car manufacturer is an actual or potential competitor for the purchase of such products, the respective Information Exchange and resulting restriction of competition between purchasers would, however, not be covered by the VBER: in a situation where there was a competitive relation between the supplier and the car manufacturer at the purchasing level for car parts, an Information Exchange, disclosing such actual purchase prices as part of an open book policy, is no longer related and proportionate in light of the vertical agreement as it directly relates to a horizontal purchasing level.

If there were coercive reasons for the car manufacturer to know the prices the supplier pays to its sub-suppliers, the car manufacturer would have to make sure that

the respective Information was not used by it in its own purchasing decisions; in our experience this seems difficult to achieve in practice.

### b) Considerations under revised rules

Subject to the non-existence of a competitive relationship at the purchasing level (see under a) above), we do not see that any of the Information Exchanged is to be considered unrelated or disproportionate for facilitating the implementation of the chosen distribution set-up. In our view the Exchange of all of this Information should remain block exempted.

# III. Conclusions for the assessment parameters for Information Exchange in a dual distribution scenario

## 1. General considerations

A purely vertical agreement within the scope of Art. 2 and 3 VBER but without any hardcore restrictions is an agreement for which it can be assumed with sufficient certainty that it satisfies the conditions of Art. 101 (3) TFEU. In line with the current reform proposals and as also reflected in Art. 2 (4) Draft VBER, this assessment does not change simply because the supplier is or becomes to some degree active at the retail level.

In the view of the authors of this Expert Report, the factual overview under II.1 and 2 above and the hypothetical examples provided under II.3 above, illustrate that the Exchange of Information is an integral part of vertical agreements also in most dual distribution scenarios. The authors of this Expert Report consider that Information Exchange in dual distribution scenarios does not generally create a "false positive" under the current VBER. In the view of the authors, the situations in which Information Exchange in dual distribution scenarios may raise competition concerns are more limited as compared to what was suggested in the draft VBER and Guidelines published on 9 July 2021.

The situations in which the assumed pro-competitive effects of Information Exchange may be missing mainly relate to situations in which the Information Exchange would either facilitate or result in vertical hardcore restraints or horizontal by object restrictions. The authors of this Expert Report therefore believe that an additional market share threshold in the VBER for Information Exchange in dual distribution scenarios would not help to distinguish such situations from pro-competitive practices and/or conduct. While in our view recent case law as quoted above shows that the current legal framework is equipped to deal with restrictive practices resulting from Information Exchange in dual distribution scenarios, we, nonetheless, recognize that it would improve legal certainty and hence increase the practical benefits of the VBER to reflect in the VBER and the Vertical Guidelines that Information Exchange in dual distribution is not exempted without limits.

As a consequence, we believe that

- Information Exchange 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 Art. 3 VBER;
- the revised VBER should, within the general market share thresholds of Art. 3 VBER, only exclude Information Exchange in dual distribution scenarios from its scope of application which is not "directly related" to the functioning and/or facilitation of a vertical agreement or not proportionate to it; and
- the revised Vertical Guidelines should then provide explanations on the type of Information that is not "directly related" for the functioning and/or facilitation of a vertical agreement in a dual distribution scenario or not proportionate to it. Here, the Vertical Guidelines could follow the VBER's general exemption principles according to which it is not necessary for the application of Art. 101 (3) TFEU to define the type of Information Exchange that is capable of falling within Art. 101(1) TFEU, as long as it is clear which type of Information Exchange is not covered by the block exemption.

In line with the recent case law of the ECJ, we consider it important to adequately distinguish between Information Exchanged in a (pro-competitive) vertical relationship and thus concerning intra-brand competition, and Information Exchanged in a purely horizontal relationship, which affects inter-brand competition. Only the latter is subject to a legal presumption of illegality. To us, it is thus imperative that the explanations on the limits of Information Exchange in dual distribution are provided in the revised Vertical Guidelines and is not be provided partially or in their entirety to the Horizontal Guidelines. Otherwise, the assessment for an exemption under Art. 101 (3) TFEU would be subject to entirely different legal parameters and presumptions. Even under the assumption that dual distribution would be dealt with in a separate chapter in the Horizontal Guidelines, we consider it possible that national authorities and courts may misinterpret this guidance and apply concepts from the case law on Information Exchange between competing undertakings directly to dual distribution scenarios. In our view, this would lead to wrong results.

The authors of this Expert Report consider such suggested revised approach to be fully in line with the exemption principles of the VBER as such: the VBER recognizes that vertical agreements are implemented in different distribution formats, for different types of products, across all industries and competitive landscapes. Against this background, it is not a specific type of Information, but in fact the proportional "relation" of such Information to the facilitation and/or proper implementation of the specific type of (lawfully applied) distribution set-up that determines its competitive assessment. Or to exemplify this by extrapolating on the example mentioned in the Art. 81 (3) Guidelines: in a franchise system, more extensive Information Exchange is necessary and proportionate than within a simple distribution system.[105] Which means that also more extensive Information Exchange is directly related to a vertical agreement and should thus be covered by the exemption scope of the VBER.

Apart from the distribution format, the main non-restrictive elements of a vertical agreement are determined by the nature of the products and/or services offered under the agreement and the additional service requirements implemented. Warranty obligations, registration requirements, the necessity to comply with regulatory provisions or the fact that the contract products are to be adapted to individual customer needs are just some examples typically defining the "main non-restrictive transaction",[106] i.e. the vertical agreement. Based on these considerations, we do not see sufficient support in the factual circumstances of Information Exchange to exclude certain types of Information as such from the scope of the VBER. Even Strategic Information may often be directly related to the vertical agreement and hence its Exchange justifiable to implement and/or facilitate the sale of some products/services (e.g. exact customer destination for medical devices, toxic chemicals), while it may be without a sufficient nexus and hence "unrelated" to others. We note that this principle is already recognized in the Vertical Guidelines itself as an objective justification for certain restrictions, e.g., with respect to safety and health considerations, recoupment of investments or testing of new products on a market.[107] This consideration even applies to Strategic pricing information: the communication of future pricing information from distributor to supplier is typically considered to be of most Strategic relevance for retail competition across industries and distribution formats. An obligation on the distributor to report its future resale prices to the supplier may well be used by a supplier to implement RPM and thus violate Art. 4 (a) VBER, as there is a high likelihood that such reporting requirement would be followed in the mutual understanding of a reaction – if only in form of a tacit acquiescence – by the supplier. This assessment is not specific to a situation of dual distribution, but applies equally to

[105] *Art. 81 (3) Guidelines, OJ C 101, 27.4.2004, p. 97, par. 31.*
[106] *Art. 81 (3) Guidelines, OJ C 101, 27.4.2004, p. 97, par. 28.*
[107] *OJ C 130, 19.5.2010, p. 1, paras 60 et seq.*

purely vertical agreements. The communication by the supplier to the distributor of recommended retail prices, on the other hand is in a purely vertical agreement generally not even considered restrictive of competition. In a dual distribution scenario, however, such communication could likewise be seen as the communication of Strategic pricing data. In particular if broken down e.g. to recommended retail prices for sales campaigns, product launches etc., the Information typically allows accurate conclusions on the supplier's own pricing behavior. Excluding the Exchange of Strategic pricing data in a dual distribution scenario from the benefits of the VBER would, in our view, lead to wrong results unless carving out the communication of recommended resale prices from supplier to distributor. The supplier's policy not to engage in price competition with its distributors is an inherent element of vertical and dual distribution situations, to which the supplier could even commit contractually.[108] Absent this Information, distributors may well end up at an unwanted competitive disadvantage in resale competition as the supplier may refrain from such pro-competitive communication in order not risk a violation of the vertical rules. We believe this to be at odds with the exemption principles of the VBER. .

## 2. Considerations on guidance parameters on Information Exchange in dual distribution scenarios

In light of the general umbrella exemption mechanism of the VBER ("everything that is not excluded from the scope of the VBER is exempted"), we believe that explanations in the Vertical Guidelines on the limits of Information Exchange in a dual distribution scenario should mainly focus on practices for which it can be said with sufficient certainty that they are not sufficiently related to facilitate the implementation or the proper functioning of vertical agreements. However, we believe that the Vertical Guidelines should also give positive examples of block-exempted Information Exchange to the extent that this is required for understanding the assessment concept. In light of an approach under which Information Exchange in dual distribution generally remains within the scope of the block exemption, such guidance should allow for sufficient flexibility also with respect to new business models that may emerge in the future and cannot yet be described or even anticipated.

### 2.1 Considerations for non-exempted Information Exchange in dual distribution scenarios ("Don'ts")

In our view, Information that is not sufficiently related to the implementation or facilitation of a vertical agreement in a dual distribution scenario cannot be defined in general, but needs to be assessed in light of the respective vertical agreement (see above). The following elements, however, may be used for guidance.

#### 2.1.1 Unrelated Information

Unrelated Information is in our view Information that is not justified by the implementation or facilitation of the pro-competitive vertical agreement. This would for example include: Reciprocal Exchange of Strategic Information solely relating to the horizontal retail level in dual distribution (i.e. discussion of pricing policies, discussion of customer allocation, discussion of resale strategies). In our view, the VBER already gives the supplier sufficient tools to lawfully impose certain forms of resale restrictions on its distributors (e.g. active sales restrictions to exclusive customers of other distributors, no resale to unauthorized distributors in a selective distribution system, etc.). Reciprocal Exchange of Strategic Information solely relating to the retail level is generally not necessary for the implementation of the vertical agreement nor directly related to facilitate and/or enable its pro-competitive effects.

[108] *The prohibition of resale price maintenance in Art. 4 (a) VBER only addresses the influencing of the resale prices by the distributor, but not the pricing policy of the supplier.*

With the exemption of franchising systems, where the need to Exchange Strategic Information may be required by the franchise concept, we fail to see that this statement needs to be seen more nuanced in light of different distribution formats such as e.g. selective systems. We also fail to see that additional service elements required e.g. by the distribution of some products (see, for instance, the example for the chemical industry provided under 3.3.1 above) generally change this assessment. Also in such scenarios the parties need to make the assessment whether the Information Exchanged is still directly related (and proportionate) to their agreement.

### 2.1.2 Disproportionate Information

*General elements* to determine the proportionality of Information Exchange are in our view:

- *The flow of Information:* Reciprocal Information Exchange is more critical than unilateral.
- *The timing of Information Exchange:* Information Exchange relating to current or future behaviour is more critical than past.
- *The frequency and level of granularity* of such Information Exchange: The more often and the more Strategic the Information Exchange, the more critical.
- *The use of Information*: A Discussion of Information Exchanged is more critical than its unilateral reporting/receipt.
- *Disproportionate resale Information from supplier to distributor:* Supplier Information that goes beyond the level of Information required for the pro-competitive elements of a vertical agreement, because the same effect could be achieved by less detailed Information, should be excluded from the block exemption (e.g. unilateral supplier Information about the timing of upcoming sales campaigns as well as general recommended retail prices is proportionate, the joint discussion of the exact pricing during that campaign and/or a requirement to report deviating pricing behavior in a dual distribution scenario is not; presence by the supplier in a customer meeting for technical explanations is proportionate, presence in the meetings during resale price negotiations between the distributor and its customers is not).
- *Disproportionate* resale *Information from distributor to supplier:* Distributor Information that goes beyond the level of Information required for the pro-competitive elements of a vertical agreement because the same effect could be achieved by less detailed Information, should not benefit from the block exemption (e.g. requirements to disclose end customer data by a distributor to a supplier that provides (after-sales) customer services or works under a drop-shipping set-up can be proportionate, whereas the same type of information in a dual distribution scenario absent such elements is generally not; aggregated performance Information on a specific type of promotional campaign is proportionate, while submitting the exact resale price charged by the distributor on a per unit level during its marketing campaigns is not, unless under the limited circumstances described in par. 225 of the Vertical Guidelines).

## 2.2 Considerations for exempted Information in dual distribution scenarios (do's)

The following elements are in our view relevant to determine overall the pro-competitive nature of Information Exchange as a directly related and proportionate element in a dual distribution scenario:

### 2.2.1 Distribution format

Any Information Exchange that is linked to the implementation or facilitation of a specific – block exempted – distribution format needs to remain block exempted also if this system is applied with dual distribution elements. As a consequence, in selective or franchise systems more extensive Information Exchange is related and proportionate than in free distribution systems. Fully exclusive systems that de facto exclude competition by the supplier at the retail level in respect of the exclusive territory or customer group do in our view in many instances not lead to a different resale relation between the contract parties than under other distribution formats.. In our view, such set-ups should not be submitted to the considerations specific to dual distribution.

### 2.2.2 Main non-restrictive elements of a vertical agreement

All Information related to ensure the actual implementation and successful performance of the vertical agreement as such need to remain block exempted. This concerns inter alia Information Exchange relating to compliance with regulatory requirements, return policies, warranty obligations, etc.

### 2.2.3 Other non-restrictive elements of a vertical agreement

All Information Exchanged in dual distribution scenarios regarding certain neutral or pro-competitive (efficiency-enhancing) parameters, such as servicing requirements, technical assistance, direct/drop-ship delivery, replenishment systems, IT-based ordering or stock management systems, etc. need to remain block-exempted. This also applies if Information on the parameters in question are requested and/or initiated by buyers and/or distributors, e.g. for ensuring cost efficient supply and order management.

### 2.2.4 Nature of the products and services sold under the agreement

All Information required by the nature of the products and/or services sold need to remain block-exempted. This relates e.g. to Information on registration/certification requirements, the necessity to comply with regulatory provisions, the handling of dangerous goods or the fact that the contract products are to be adapted to individual customer requirements. The nature of certain products and/or services may require more Information Exchange and subsequent interaction between supplier and distributor than is generally the case for other products/services.

### 2.2.5 Measures for marketing and sales performance

The success and competitiveness of an indirect distribution system is mainly driven by the sales and marketing performance of the distributors. Information required and proportional for measuring the efforts and ensuring future progress of distributors in sales and marketing (i.e. via sales reports, rebate schemes, marketing plans) needs to remain block-exempted. The same applies to Information communicated by the supplier to the buyer/distributor ensuring the competitiveness of the products and services from an inter-brand perspective (i.e. new product launches, adjustment of resale price recommendations, information on timing and content of central marketing campaigns, information on timing of supplier marketing campaigns, general information about the competitive landscape).

### 2.2.6 Measures to implement or monitor objectively justified elements of a vertical agreement

The recoupment of investments or the testing of new products are mentioned in the Vertical Guidelines as two factors that may objectively justify the implementation of

certain vertical restraints. In order to remain consistent within the overall system, this would also have to relate to Information Exchange in dual distribution concerning such objectively justified scenarios.

# Abstract

The Expert Report discusses the treatment of information exchange in dual distribution scenarios based on the current Vertical Block Exemption Regulation ("VBER"), EU and national decision practice and the practical experience of the authors of this Expert Report. It concludes that information exchange is an inherent part of any vertical agreement and does not generally create a "false positive". Information exchange in dual distribution scenarios should therefore remain block-exempted below the 30% market share threshold and should be excluded from the scope of the revised VBER only if not directly related to the functioning and/or facilitation of a vertical agreement or not proportionate to it.

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