10/5/2022

Summary of the comments received in response to the additional public consultation on the new section of the Vertical Guidelines dealing with information exchange in dual distribution.

In the context of the review of Commission Regulation (EU) No 330/2010 ('Vertical Block Exemption Regulation', 'VBER')[1], together with the Commission Notice providing Guidelines on Vertical Restraints ('Vertical Guidelines')[2], the European Commission ('Commission') launched a targeted additional public consultation on a draft new section of the Vertical Guidelines dealing with information exchange in dual distribution ('draft new section'). That consultation ran from 4 to 18 February 2022.

61 stakeholders and 6 national competition authorities ('NCAs') submitted comments in response to the public consultation.

Those submissions are summarised in this document. This summary does not prejudge the outcome of the impact assessment of the VBER and Vertical Guidelines. Neither the views of the stakeholders expressed in the submissions nor the views set out in this summary represent the official position of the Commission or its services and these views do not bind the Commission in any way.

Stakeholder and NCA feedback

All categories of stakeholders welcomed the opportunity to provide comments on the draft new section. A few stakeholders commented on paragraphs 1 to 9 of the draft new section, which concerned the scope of the dual distribution exceptions in the Regulation replacing the VBER. Most of the stakeholders commented on the proposed test for block-exempting information exchange in scenarios of dual distribution and the examples illustrating the application of the test (paragraphs 9 to 17). Some stakeholders used the opportunity to comment on other issues not covered in the draft new section.

Scope of the dual distribution exceptions

Some stakeholders argued that the new guidance on the definition of non-reciprocal vertical agreements, which is a prerequisite for the dual distribution exceptions to apply, is too narrow, notably as it would exclude instances where the contract goods are resold to the supplier, regardless of the circumstances of such sales. Others took note of changes to the definition of potential competitor and invited the Commission to clarify the guidance on making investments or incurring other necessary costs 'within a short period of time', in particular to harmonize that guidance with other instruments, notably the Horizontal Guidelines[3]. Stakeholders provided mixed feedback on the guidance relating to the sale of own-brand products; in particular, the

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1 Commission Regulation (EU) No 330/2010 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, OJ L 102, 23.4.2010, p. 1.

2 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1.

3 Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements (OJ C11, 14.1.2011, p. 1)

application of the block exemption where such products are manufactured by third parties, as opposed to being manufactured in-house, in which case the block exemption would not apply.

Some stakeholders argued that it would be inappropriate to construe the dual distribution exceptions narrowly, as proposed in the draft new section, in view of the purpose of the VBER to provide a 'safe harbour'.

All categories of stakeholders welcomed the clarification that the dual distribution exception applies where the supplier sells *goods* at 'several levels of trade', including scenarios where the supplier is active upstream as a manufacturer and downstream as a wholesaler. Some stakeholders suggested that the scope of the dual distribution exception relating to *services* should be similarly extended, namely it should not be limited to scenarios where the parties compete at the retail level.

Assessment of information exchanges

All categories of stakeholders welcomed the introduction of a test for the assessment of information exchange in dual distribution, with further guidance provided, based on examples in the Vertical Guidelines. Some stakeholders stated that the test should apply irrespective of whether the combined market share of the parties to the vertical agreement exceeds 10% at retail level.

All categories of stakeholders welcomed the fact that the draft new section recognized the pro-competitive effects of information exchange in dual distribution. However, some stakeholders asked for a clarification that unsolicited communications of information do not amount to an exchange of information where the receiving party promptly and unambiguously rejects the information.

Stakeholders provided mixed feedback on the appropriateness of the proposed test for block-exempting information exchange in dual distribution ('necessary to improve the distribution of the contract goods or services'). Stakeholders primarily representing suppliers considered that the proposed test was too strict and listed various types of information whose exchange they considered to be pro-competitive, notably customer-related information (for example to negotiate special wholesale terms for large customers, to operate a customer loyalty scheme, or to monitor the distributor's compliance with selective or exclusive distribution agreements). On the other hand, stakeholders primarily representing distributors considered that the draft guidance was too permissive and expressed the concern that manufacturers would be able to rely on the new guidance to force distributors to share details on pricing and customers, which would allow the manufacturer to align its pricing or serve the customers directly.

Some NCAs noted that the proposed test essentially restated some of the conditions set out in Article 101(3) of the Treaty. They considered that the test should be whether the exchange of information is *necessary for the implementation of the vertical agreement*.

Some stakeholders, mainly law firms, argued that the draft new section does not make clear whether it is the parties to the agreement or the authority or claimant alleging an infringement of competition law that bears the burden of proving (lack of) necessity of a particular information exchange, and whether the necessity test applies only in scenarios of dual distribution.

Some NCAs raised concerns that the formulation of the proposed test was too permissive and argued that the burden should be on the parties to the agreement to show that the information exchange is necessary to improve the production or distribution of the contract goods or services.

All categories of stakeholders welcomed the provision of examples of information exchange in the draft new section and considered that this would increase legal certainty. Many stakeholders also welcomed the guidance stating that specific types of distribution system might necessitate the exchange of specific types of information. However, some stakeholders requested further clarifications in this respect, for example, as to whether particular types of information would meet the necessity test when exchanged in a free distribution model. Some stakeholders also requested clarifications regarding some of the types of information listed in the guidance as being examples of information that generally meets the necessity test. Some stakeholders provided additional examples of information which, in their view, would also meet the proposed test.

Some NCAs favoured a stricter approach and suggested that the guidance should state that the examples provided *may* meet the necessity test, rather than stating that these examples can *generally* be considered to meet the test. More specifically, some NCAs questioned whether the exchange of past or present resale prices is generally necessary to improve the production or distribution of the contract goods or services.

Stakeholders expressed differing views as to whether the exchange of customer-specific sales information should be considered "generally not necessary". Suppliers, in particular, provided examples of why the exchange of such information may be necessary to improve production or distribution, at least at the wholesale level. They referred, for example, to the organization of marketing campaigns and projects to provide customer-specific services. On the other hand, some distributors expressed concerns that, if the exchange of customer-specific sales information was block-exempted in scenarios of dual distribution, suppliers might require distributors to communicate such information for the purpose of selling to those customers directly (disintermediation).

Some stakeholders asked for more clarity regarding the legal consequences of engaging in information exchanges that do not meet the test of necessity and therefore fall outside the block exemption. In this context, stakeholders argued that the references to the Horizontal Guidelines and the case law relating to information exchange between competitors were not adequate, because, in their view, those Guidelines and that case law concern inter-brand restrictions, whereas in scenarios of dual distribution any concerns relate primarily to intra-brand competition.

Many stakeholders welcomed the reference in the draft new section to precautions that undertakings may take to minimise the risk that information exchanges will raise horizontal concerns. Some stakeholders, however, mentioned that such precautions, notably firewalls, are costly, that further guidance on how to implement them technically would be helpful and that it should be clarified whether implementing such precautions could bring information exchanges within the scope of the safe harbour.

<u>Other comments</u>

A small number of stakeholders used the opportunity of the additional public consultation to submit comments on other areas of the draft revised VBER and Vertical Guidelines that had

been subject to the public consultation (from 9 July 2021 to 17 September 2021). In particular, they commented on the proposed exclusion from the block exemption of vertical agreements entered into by providers of online intermediation services ('OIS') with a hybrid function. Some of these stakeholders considered that the exclusion was inappropriate, while others asked for more guidance, including more generally on the definition of OIS provider. On the other hand, the NCAs generally restated their support for excluding from the block exemption the agreements of hybrid OIS providers.

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