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European Commission issues proposed guidance on information exchange in dual distribution relationships

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As part of its review of the EU antitrust rules governing vertical agreements, the European Commission (EC) has published for consultation a draft new section of its Vertical Guidelines, which contains proposed guidance on information exchange in "dual distribution" relationships. Reacting to feedback from stakeholders, the EC has adjusted the review test it proposed in July 2021, and provided concrete examples of information exchanges that can and cannot benefit from block exemption. Whilst the proposed guidance will make self-assessment easier in some respects, the EC has chosen to adopt a review test that could be open to wide interpretation.

What is dual distribution?

In short, dual distribution covers situations where a supplier not only sells its goods or services through independent distributors (such as retailers), but also directly to end customers in competition with its distributors. The rise of online sales – in particular through suppliers' own online shops – has resulted in a significant increase in dual distribution.

Treatment under the existing VBER and proposed changes

The EU Vertical Agreements Block Exemption Regulation (VBER) provides parties to vertical agreements (i.e., agreements entered into between businesses operating at different levels of the supply chain) with increased certainty about the compatibility of their agreements with Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), by creating a safe harbour exemption.

If neither party's market share exceeds 30%, vertical agreements, which do not contain any so-called "hardcore restrictions" (including, for example, resale price maintenance or territorial/customer restrictions), can be presumed to benefit from an exemption. Agreements which do not satisfy the VBER conditions may still be compatible with Article 101(1) TFEU, but these agreements require individual assessment.

The current VBER excludes vertical agreements between competitors from the block exemption,

but specifically provides that dual distribution is covered by the safe harbour for vertical agreements.

In the draft of a revised VBER and draft revised Vertical Guidelines published in July 2021 for consultation, the EC proposed to narrow the safe harbour for dual distribution arrangements in the following respects:

- All information exchanges will be excluded from the benefit of the block exemption, unless the parties' aggregated market share in the retail market does not exceed 10% (Articles 2 (4) and (5)).
- The block exemption does not apply to providers of online intermediation services (e.g., online platforms) if they have a hybrid function, namely where they sell goods or services in competition with enterprises to which they provide online intermediation services (Article 2 (7)).

New consultation on information exchange in dual distribution

In the consultation on the draft VBER, stakeholders in particular did not support the proposed narrowing of the safe harbour with a 10% threshold, and requested more detailed guidance on the types of information that can be exchanged in a dual distribution relationship.

In response to this reaction, on 4 February 2022, the EC published for consultation a draft new section to be included in the revised Vertical Guidelines dealing with information exchange in dual distribution. On the same day, the EC published an expert report on this topic.

The EC did not publish a revised version of the VBER, but stated that its proposed guidance is based on the "assumption" that the revised VBER will include a "*provision stating that the block exemption* ***does not apply to the exchange of information between the supplier and the buyer that is not necessary to improve the production or distribution of the contract goods or services by the parties***".

Although it has not been made clear in the new draft section, it appears that the EC has dropped its July 2021 proposal to limit the safe harbour to only those dual distribution agreements where the aggregated market share is below 10% at the retail level. The removal of this additional market share threshold test will make self-assessment easier in one respect. However, the exclusion from the safe harbour of exchanges that are "not necessary to improve the production or distribution of the contracts goods or services" creates uncertainty as to which type of information exchanges between a supplier and its distributors benefit from the safe harbour.

To assist the self-assessment, the draft guidance includes examples of information exchange that benefit the safe harbour and those that do not, but these examples are described as "non-exhaustive" and "generally" considered to fall within or outside the block exemption.

Separately, it appears that the EC intends to retain the carve-out for online intermediation services that was proposed in its July 2021 draft (Article 2 (7)).

Categories of exempted and non-exempted information exchange and safeguards

The draft includes a "non-exhaustive" list of examples of information exchange that **can and cannot benefit from block exemption** and provides some general safeguards that the companies can take.

The "non-exhaustive" list of examples of information exchange that "generally" can be considered to **benefit from block exemption** includes:

- **Technical information**, such as that relating to registration, certification, or handling (notably for compliance with regulatory measures), and information that enables the supplier or buyer to adapt the contract goods/services to the requirements of the customer
- **Information relating to the supply** of the contract goods or services, including information relating to production, inventory, stocks, sales volumes and returns
- **Aggregated information relating to customer purchases** of the contract goods or services, customer preferences and customer feedback
- **Wholesale prices** – Information relating to the prices at which the contract goods or services are sold by the supplier to the buyer
- Information relating to the supplier's **recommended resale prices (RRPs) or maximum resale prices**, provided that such information exchange is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price, and there is no information exchange relating to actual future downstream sale prices (other than as part of short-term price promotions)
- **Information relating to the marketing** of the contract goods or services
- **Performance-related information**, including
    - aggregated information communicated by the supplier to the buyer relating to marketing and sales activities of other buyers of the contract goods/services (provided that this does not enable the buyer to identify the activities of particular competing buyers)
    - information relating to the volume or value of the buyer's sales of the contract goods or services relative to the buyer's sales of competing goods or services

The list of examples that "generally" do **not benefit from block exemption** and requiring individual assessment under Article 101 TFEU (taking into account the EC's Horizontal Guidelines) includes:

- Information relating to the **actual future prices** at which the supplier or buyer will sell the contract goods or services downstream (except in the context of a coordinated short-term low price campaign). This does not affect the supplier's ability to exchange information on the supplier's RRPs or maximum resale prices for the contract products (provided this is not done in a manner that is effectively resale price maintenance)
- **Customer-specific sales data**, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless necessary to enable the supplier or buyer to adapt the contract goods or services to the requirements of the customer or to provide guarantees or after-sales services, or to allocate customers under an exclusive distribution agreement
- **The exchange of information relating to goods sold by a buyer under its own brand name** with a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods

The draft states that while information exchanges that do not benefit from an exemption do not necessarily infringe Article 101 TFEU, the burden to justify an information exchange not covered

by the VBER is squarely on the parties. Noting the relevant jurisprudence from the EU Courts, the EC states that "undertakings that participate in a concerted practice and that remain active on the market are presumed to take into account information exchanged with their competitors in determining their conduct on the market" (para. 16).

Finally, the draft notes that companies can take precautions to reduce the risk that the information exchange is not exempted and may raise horizontal concerns (para. 17), such as:

- exchange only **aggregated sales information**; or
- ensure an appropriate **delay** between the generation of the information and the exchange; or
- use **firewalls**, e.g., to ensure that information communicated by the buyer is accessible only to the personnel responsible for the supplier's upstream activities and not to the personnel responsible for the supplier's downstream direct sales activity.

Timeline and next steps

Date	Event
9 July 2021	Publication of draft EU VBER and draft Vertical Guidelines
17 September 2021	Closure of deadline for parties to submit comments on draft VBER and Vertical Guidelines
4 February 2022	Launch of consultation on information exchange in dual distribution relationships
18 February 2022	Deadline for parties to submit comments on the consultation on information exchange in dual distribution relationships
1 June 2022	New EU rules will enter into force until 31 May 2034

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