

Newsletter, 7 February 2022

## New Guidance: Information Exchange in Dual Distribution

Revised Approach by the European Commission and COMMEO's Expert Report

As part of its ongoing vertical reform process, the European Commission ("EC") published in July 2021 [drafts of a revised Block Exemption Regulation for Vertical Agreements](#)<sup>1</sup> and [revised Vertical Guidelines](#).<sup>2</sup> In these drafts the EC inter alia proposed to exclude information exchange in dual distribution scenarios between the parties of vertical agreements from the scope of the Vertical Block Exemption Regulation ("VBER") in case the combined market shares of the parties would be above 10%. The proposal raised substantial criticism from various stakeholders.

The EC commissioned COMMEO to prepare an Expert Report on the matter. On 4 February 2022 the EC published its revised proposal on information exchange in dual distribution ("[New Guidance](#)")<sup>3</sup> together with our [Expert Report](#).<sup>4</sup> In line with the results of the Expert Report, the New Guidance drops the previous proposal. Instead, information exchanged in dual distribution scenarios shall remain block exempted up to the general market share threshold of 30%, unless such information is not necessary to improve the production or distribution of the contract goods or services. The revised approach is up for consultation until 16 February 2022

### Expert Report

#### *Scope of the Expert Report*

COMMEO's Expert Report looks at information exchange in scenarios where the contract products/services are sold in parallel by independent purchasers and the supplier ("dual distribution").

The Report starts with an analysis of dual distribution scenarios under the current legal framework. In the second part, the Report outlines typical situations of information exchange in dual distribution scenarios, including different hypothetical industry examples. Against this background the third part of the Report provides considerations how dual distribution scenarios shall be dealt with under a revised framework.

#### *Conclusions of the Expert Report*

The Expert Report concludes that it can be assumed with sufficient certainty that information exchange in purely vertical agreements, in line with Artt. 2, 3 and 4 VBER, 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. The Report illustrates on the basis of practical examples that exchange of information is an integral and thus pro-competitive part of vertical agreements also in most dual distribution scenarios. Situations in which information exchange in dual distribution scenarios may raise competition concerns are hence more limited as compared to what was suggested in the draft VBER and Guidelines published on 9 July 2021.

Situations in which the assumed pro-competitive effects of information exchange may be missing mainly relate to situations in which the information exchange either facilitates or results in vertical hardcore restraints or horizontal by object restrictions. As a consequence, the Expert Report concludes that a lower 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

<sup>1</sup> Annex to the Communication from the Commission, Approval of the content of a 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, C(2021)5026 final, currently available under [https://ec.europa.eu/competition-policy/public-consultations/2021-vber\\_en](https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en).

<sup>2</sup> Annex to the Communication from the Commission, Approval of the content of a draft for a communication from the Commission, Commission Notice Guidelines on vertical restraints, Draft, currently available under:

[https://ec.europa.eu/competition-policy/public-consultations/2021-vber\\_en](https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en).

<sup>3</sup> [https://ec.europa.eu/competition-policy/system/files/2022-02/guidance\\_information\\_exchange\\_VBER\\_dual\\_distribution\\_2022\\_0.pdf](https://ec.europa.eu/competition-policy/system/files/2022-02/guidance_information_exchange_VBER_dual_distribution_2022_0.pdf)

<sup>4</sup> [https://ec.europa.eu/competition-policy/system/files/2022-02/kd0122032enn\\_VBER\\_dual\\_distribution\\_1.pdf](https://ec.europa.eu/competition-policy/system/files/2022-02/kd0122032enn_VBER_dual_distribution_1.pdf)

conduct. While in our view, recent case law shows that the current legal framework is equipped to deal with restrictive practices resulting from information exchange in dual distribution scenarios, the Expert Report, nonetheless, recognizes that it would improve legal certainty and hence increase the practical benefits of the VBER to confirm the limits of information exchange in dual distribution.

- As a consequence, the Expert Report concludes 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 of 30% provided by Art. 3 VBER;
- The revised VBER should, within the general market share thresholds of 30%, 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” to the functioning and/or facilitation of a vertical agreement in a dual distribution scenario or not proportionate to it.
- Guidance on the limits of information exchange in dual distribution should be part of the revised Vertical Guidelines and not be moved partially or in its entirety to the Horizontal Guidelines.

### Revised Proposal by the EC

The EC’s New Guidance takes the same direction as most considerations in the Expert Report. The EC proposes to drop the idea of an additional 10% market share threshold. Like the Expert Report, the New Guidance concludes that the benefits of the block exemption shall continue to apply up to a threshold of 30% to all information exchange with a sufficient nexus to the (pro-competitive) vertical agreement. The EC proposes to only exclude information exchanged in dual distribution from the VBER that is not “necessary to improve the production or distribution of the contract goods or services.” The EC intends to exemplify this test in practical (negative and positive) examples to be included in the revised Vertical Guidelines. This was another point urgently wished for by stakeholders.

The EC’s positive, i.e. block exempted, list of information exchange in dual distribution comprises: technical, supply related, aggregated purchase and purchase price information, recommended resale prices and marketing and performance related information. The negative, i.e. non block exempted, examples for information exchange entail: future resale prices, non-aggregated customer specific data and the exchange of information concerning private label products not sourced from the supplier. Information outside the scope of the block exemption shall require an individual assessment under Art. 101 (3) TFEU.

### Comment

The New Guidance certainly is a relief for all practitioners. On the one hand it drops the 10% market share threshold and reinstates the rule that information exchange in dual distribution scenarios is generally pro-competitive. On the other hand and in the form of an exception to the rule, i.e. to be proven by the party claiming it, the New Guidance includes a helpful reminder that the scope of the block exemption is not limitless, and its benefits unavailable if information exchange in dual distribution is not necessary for a pro-competitive vertical agreement. Recent case law by national competition authorities in Denmark and France has arrived at comparable results already under the existing Vertical and Horizontal framework. The New Guidance should thus not come as a surprise, but rather as a helpful clarification from a practitioner’s perspective.



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