



Computer & Communications Industry Association (CCIA Europe)
Submission to the Additional public consultation on proposed guidance relating to
information exchange in the context of dual distribution, intended to be added to the Vertical
Guidelines
18 February 2022

1. Introduction

The Computer & Communications Industry Association (“CCIA Europe”) welcomes this opportunity to provide comments to the European Commission (“Commission”) public consultation on proposed guidance relating to information exchange in the context of dual distribution (“Draft Guidance”)¹, intended to be added to the revised Vertical Guidelines (“Draft VGL”)² accompanying the revised Vertical Block Exemption Regulation (“Draft VBER”).³ The Draft VBER and Draft VGL will set terms of trading between suppliers and their retailers or distributors for the next decade, both offline and online. They are meant as a reflection of the current legal and economic thinking around vertical agreements, providing a safe-harbour only for vertical agreements “for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty”.⁴

CCIA Europe supports the Commission’s effort of clarifying the type of information exchanges that undertakings can and cannot engage within the context of dual distribution, as provided for in Article 2(5) of the Draft VBER. The Draft Guidance would help clarify the types of information that can be exchanged between a supplier and a buyer in a dual distribution relationship. CCIA Europe agrees with the underlying concept that the information shared between suppliers and retailers is highly sensitive, all the more when a supplier is also active in competition downstream with its retailers and distributors. Thus, the utmost clarification is required to the benefit of the undertakings affected by the Draft VBER.

2. Inconsistencies between information sharing in dual distribution and dual pricing

As the Commission is reconsidering the Draft VGL regarding dual distribution, CCIA Europe would like to bring the attention of the Commission also to the very similar issues arising on dual pricing. Dual pricing benefits from a safe-harbour under the Draft VGL meaning that it is allowed “in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline.”⁵ This stance on dual pricing will require parties to exchange information to comply.

¹ European Commission, *Draft new section dealing with information exchange in dual distribution*, 4 February 2022, available [here](#) (hereinafter referred to as the “Draft Guidance”).

² European Commission, *Draft revised Vertical Guidelines*, 9 July 2021, available [here](#) (hereinafter referred to as the “Draft VGL”).

³ European Commission, *Draft revised Vertical block exemption Regulation*, 9 July 2021, available [here](#) (hereinafter referred to as the “Draft VBER”).

⁴ Draft VBER, op. cit., recital 5.

⁵ Draft VGL, op. cit., paragraph 195.



The Draft Guidance under current review correctly points out that the information exchanged between parties to comply with dual distribution might be sensitive. The Draft Guidance allows information sharing between parties to a vertical agreement “necessary to improve the production or distribution”⁶, and notably makes a distinction where information could be “used to restrict the buyer’s ability to determine its sale price or to enforce a fixed or minimum sale price”.⁷ However, considering the block exemption granted to dual pricing, the very same sensitive information will most likely need to be exchanged between suppliers and retailers in the context of agreements between these parties. Specifically, the dual pricing safe-harbour allows for discrimination against online channels “in so far as it has as its object to incentivise or reward the appropriate level of investments respectively made online and offline”.⁸ Use of this safe-harbour would necessarily entail the exchange of the exact same kinds of information that the Draft VGL and this consultation consider sensitive.

For example, a supplier seeking to “incentivise or reward the appropriate level of investments” made by retailers for offline sales (i.e. to discriminate against online sales by charging higher prices for sales made through online channels) would necessarily need to receive information from its retailers on the amount of sales they make separately through online and offline channels. Furthermore, if “offline” stock is sold “online”, the supplier could arguably require information on the sales price, in order to determine the penalty the retailer will have to pay (i.e. to make sure that the retailers’ “reward” is “appropriate”). This would amount to enforcing a fixed or minimum sales price for online sales. There is therefore a clear inconsistency with the concerns raised regarding information exchange for dual distribution and the creation of a safe-harbour that would require the exchange of the very same sensitive information in the context of dual pricing.

The intertwined consequences of information sharing on dual pricing and dual distribution are particularly a concern since omnichannel has become the prevalent mode of retail. It is in fact undoubted that nowadays suppliers increasingly leverage digital technologies to sell directly to consumers in competition with their vertical supply chain partners. Many European SMEs already have an omnichannel approach to their distribution as consumers have adopted online shopping. In 2021, 74% of European internet users shopped at least once online⁹ and the trend will continue to accelerate as many more traders began selling online during COVID-19. Inconsistencies in the Draft VBER and Draft VGL should not create discrimination for all those consumers who prefer not to shop in physical stores, whether because of lack of mobility, disability, rural location, or lack of time.

To ensure coherence and understandability of the Draft VBER and Draft VGL, further clarification is required on dual pricing. It is necessary, as is done in the context of dual distribution, that the Commission clarifies the types of information which can and cannot be exchanged in the context of dual pricing, and to ensure that National Competition Authorities (“NCAs”) are not unduly hampered in enforcing rules against such information exchange.

⁶ Draft Guidance, op. Cit., paragraph 13(e).

⁷ Draft Guidance, op. cit., paragraph 14(a).

⁸ Draft VGL, op. cit., paragraph 195.

⁹ Eurostat, *E-commerce statistics for individuals*, last consulted 14 February 2022, available [here](#).



Alternatively, the Commission should reconsider its proposal to offer a safe-harbour for dual pricing. Previously considered as a hardcore restriction, this dramatic turnaround on dual pricing will have detrimental consequences for all consumers and European SMEs.¹⁰ A majority of NCAs indeed supported maintaining the *status quo* on dual pricing.¹¹

European SMEs will also be impacted by the exclusion of online intermediaries engaged in dual distribution (so-called Hybrid Platforms) from the benefit of block exemption. SMEs would be severely impaired by losing this benefit, as they would necessarily need to comply with burdensome assessments. CCIA Europe urges the Commission to review and revise this discriminatory policy which prejudices an important distribution channel for many SMEs in Europe, and thereby reduces competition.

3. Conclusion

The Commission's continued willingness to engage with stakeholders on the Draft VBER and Draft VGL is commendable, particularly as these consultations have been run during a time when many SME merchants and retailers have been struggling to deal with a global pandemic that has shuttered brick and mortar locations, and forced many to move online for the first time.

Given these circumstances, the changing needs of retailers and merchants and the dramatic changes that the Draft VBER and Draft VGL represent, particularly with respect to dual pricing and other forms of discrimination against online sales, further consultation is needed. The Commission should furthermore substantiate the economic impact of the Draft VBER and Draft VGL, particularly on SMEs and smaller merchants.

CCIA Europe continues to support the Commission's efforts to provide further clarity and certainty in the area of vertical agreements and its continued engagement with stakeholders. CCIA Europe nevertheless continues to urge the Commission to review and revise the draft rules that would facilitate discrimination against online sales channels, unintentionally harming SMEs and reducing competition in Europe.

¹⁰ Computer & Communications Industry Association (CCIA Europe), *Submission to European Commission on Consultation on Draft revised Regulation on vertical agreements and vertical guidelines*, 17 September 2021, available [here](#).

¹¹ European Commission, *Summary of the replies of the national competition authorities of the European Competition Network provided during the targeted consultation for the impact assessment of the review of Regulation (EU) No 330/2010*, 17 June 2021, available [here](#).