

# Dual distribution and information exchange

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# Dual distribution

- Exemption introduced by the VABEO applies to:
  - vertical agreements between competing undertakings
  - which are non-reciprocal and meet certain conditions
  - the conditions include where a supplier is a provider of services operating at several levels of trade, while the buyer only operates at the retail level and does not compete with the supplier at the level of trade where it purchases the contract services
- ‘Dual distribution’ is typically where the supplier is mainly active on the upstream market but also has some activities in the retail market:
  - it only covers restraints that are genuinely vertical;
  - it does not extend to horizontal agreements between competing undertakings
- If a vertical agreement between competing undertakings is reciprocal or does not meet the conditions, it should be assessed under the Horizontal Guidance
- Exemption includes the exchange of information that is required to implement that vertical agreement

# Dual distribution – information exchange

- Assessment requires consideration of the particular facts of the vertical agreement on a case-by-case basis
- Whether an exchange of information is required to implement the vertical agreement (and therefore is to be considered genuinely vertical) may depend on the particular distribution model
- Exchanges of information that do not benefit from the block exemption:
  - do not necessarily infringe the Chapter I prohibition
  - however, they are subject to the presumptions established by relevant case law relating to exchanges of information between competitors

# Dual distribution – ‘White List’

- Technical information relating to the contract products
- Logistical information relating to the production and distribution of the contract products at the upstream or downstream levels
- Information relating to customer purchases of the contract products, customer preferences and customer feedback
- Information relating to the prices at which the contract products are sold by the supplier to the buyer
- Information relating to the supplier’s recommended resale prices or maximum resale prices for the contract products and information relating to the prices at which the buyer resells the products
- Information relating to the marketing of the contract products, including information on new products to be supplied under the vertical agreement and information on promotional campaigns for the contract products
- Performance-related information

# Dual distribution – ‘Black List’

- Information relating to the **actual future** prices at which the supplier or buyer will sell the contract products downstream
- Information relating to identifying end users of the contract products unless the exchange of information is necessary:
  - to enable the supplier or buyer to satisfy the requirements of a particular end user, for example to adapt the contract products to the requirements of the customer, to grant the end user special conditions (including under a customer loyalty scheme), or to provide pre- or after-sales services (including guarantee services); or
  - to implement or monitor compliance with a selective distribution agreement or an exclusive distribution agreement under which particular end users are allocated to the supplier or buyer
- Information relating to goods sold by a buyer under its own brand name exchanged between the buyer and a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods

# Dual distribution – The UK and the EU regime

- In both jurisdictions:
  - there was an extension of the benefit of the exemption to suppliers that are wholesalers or importers too
- In the EU:
  - information exchange is covered if *(i) directly related to the implementation of the vertical agreement, and (ii) necessary to improve the production or distribution of the contract goods or services*
- In the UK:
  - information exchange benefits from the block exemption where it is required to implement the vertical agreement (and therefore is considered to be genuinely vertical)

# Dual distribution – The UK and the EU regime

- In the UK:
  - it was never proposed that information exchanges be subject to a specific market share threshold (eg 10%)
  - the exemption applies to hybrid platforms (undertakings operating simultaneously as an operator of a marketplace and direct retailer using that marketplace for distribution)
- In the EU:
  - there is a carve-out for these types of suppliers of hybrid platforms (note: the CMA will keep this policy position under review)

# Private labels

- A distributor that commissions a manufacturer to produce particular goods under the distributor's brand name is **not** considered a manufacturer of such own-brand goods and therefore is not a competitor of the manufacturer for the purpose of applying Article 3(5) of the VABEO
- The exemption in Article 3(1) VABEO applies to a vertical agreement entered between
  - (i) a distributor selling own-brand goods manufactured by a third party (and not inhouse) and
  - (ii) a manufacturer of competing branded good.
- However, distributors that manufacture goods in-house for sale under their own brand name **are** manufacturers. This means that:
  - the exemption in Article 3(1) of VABEO does not apply to vertical agreements entered into between such distributors with manufacturers of competing branded goods' and
  - the horizontal effects of such agreements must be assessed under the Horizontal Guidance