Information Exchanges in Distribution Agreements

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Genuine agency relationship		
Genuine agency requires that the principal bears all risks and cost (insolvency risk, stocks & inventory, marketing cost) except the risk of earning a commission and general costs of the agent (premises, personnel).	As the genuine agent is considered part of the principal’s business for the purposes of Art. 101 TFEU, there is no restriction on information exchanges relating to the contract goods, prices, end-customers etc., regardless of market share.	As long as the agent is genuine, there is no limit to information exchanges between the principal and the agent regarding products sold by the agent on behalf of the principal, regardless of market share.

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Purely vertical relationships		
Parties are neither actual nor potential competitors. Potential competitor: realistic likelihood of market entry within one year at upstream level (manufacturing, importer, wholesaler) or downstream (retail) level, or at both levels.	Up to 30% market shares of supplier and buyer, the supplier can exchange information with the buyer on prices and customers as long as this does not amount to indirect RPM (e.g., obliging retailers to report deviating members of distribution network). Price monitoring and price reporting in e-commerce are not in themselves RPM even where they allow the tracking of resale prices of distributors and competitors. Up to 30% market shares of supplier and buyer, the supplier can exchange information with the buyer on prices and customers as long as this does not amount to an indirect territorial restriction other than the protection of exclusive territories or customer groups.	Information on prices, customers and territories that are part of a scheme to engage in (i) RPM (ii) Territorial or customer restrictions other than the protection of exclusive territories or customer groups.
“Dual distribution” relationships (= downstream competition only)		
Supplier competes with buyer at downstream (e.g. retail) level. Exceptionally exempted up to 30% market shares of supplier and buyer if (i) non-reciprocal, and (ii) only one party is active at upstream level (manufacturing, importer, wholesaler).	Information must be (i) directly related to the implementation of the vertical agreement, and (ii) necessary to improve the production or distribution of contract goods.	

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Note: the exception only applies if the party active at downstream level is not a potential competitor at the upstream level.	These criteria depend on the particular model of distribution. Examples: (i) exchanges on respective sales activities in territories in exclusive distribution, (ii) exchanges ensuring a uniform business model in a franchise system, (iii) exchanges ensuring compliance with selection criteria in selective distribution.	
	<u>Normally allowed:</u> • Technical information on the goods (registration, certification, handling, use, maintenance, repair, upgrading, recycling, adaptation to customer requirements, compliance with regulatory measures), • Logistical information (production processes, inventory, stocks, returns, sales volumes where necessary to (i) satisfy customer requirements (product adaptation, special conditions, after-sales services), <u>or</u> (ii) monitor compliance with selective/exclusive distribution agreement),	<u>Normally prohibited:</u> • Information on future prices • Information on identified end users, <u>except</u> where necessary to (i) satisfy customer requirements (product adaptation, special conditions, after-sales services), <u>or</u> (ii) monitor compliance with selective/exclusive distribution agreement • Outside exemption: reduce risk by exchanging information where (i) aggregated (ii) historic (iii) subject to firewalls

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	• Information on customer purchases, preferences and feedback, if not used to restrict sales territories or customer groups and where necessary to (i) satisfy customer requirements (product adaptation, special conditions, after-sales services), or (ii) monitor compliance with selective/exclusive distribution agreement, • Information on the supplier´s sales prices to buyer, • Information on recommended and maximum resale prices of the supplier as well as past (not future) resale prices of the buyer, provided this does not aim at RPM • Information on marketing (promotional campaigns, new products), • Performance-related information (aggregated supplier to buyer information on the activities of other buyers, information on the buyer´s sales ration of contract/competing goods).	

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Horizontal supply relationships (= parties compete at upstream level or at both levels)		
The 2022 DRAFT Guidelines, once adopted, will cover information exchanges for a number of horizontal agreements between actual or potential competitors: • Joint R&D agreements, • Joint production agreements, • Purchasing agreements, • Commercialization agreements, • Standardization agreements, • Standard terms, • Sustainability agreements. Of these, several have supply components. The focus here is on commercialization (supply or distribution) agreements.	First, the effects of information exchanges in supply agreements between competitors are assessed in light of the overall effects of the agreement. The relevant benchmark is 20% of combined market share. Second, the information exchanged between the parties to a horizontal supply agreement must not exceed what is “necessary for the legitimate cooperation.” Third, the information exchange must comply with the standards for vertical and dual distribution agreements (see above).	
Standalone information exchanges (= additional useful guidance)		
The DRAFT criteria for the assessment of standalone information exchanges (not linked to a wider project) are not directly applicable to horizontal supply arrangements but nevertheless provide useful guidance. Exchange can be unilateral (signaling).	<u>Less problematic:</u> Exchanges of • genuinely public information, • aggregate information, • historic information (depends on market characteristics, can be “several times older than the average length of the pricing cycle or the industry contract duration,	<u>More problematic:</u> Exchanges on • prices and pricing intentions, • current or future production capacities, • intended commercial strategy, • arrangements about current or future demand, • future sales, • the company’s current sate and business strategy,

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Any exchange of “commercially sensitive” information can be anti-competitive where it reduces the uncertainty of the other party´s market conduct. Note that in today´s world, even information on “soft factors” such as ESG or diversity & inclusion can be “commercially sensitive”.	• information that does not artificially increase transparency between competitors, • information that is beneficial for the consumer • firewalled information • freely accessible information • less frequently exchanged information.	• future product characteristics if relevant for consumers, • positions on the market and strategies at auctions for financial products. Hub-and-spoke arrangements, where competitors knowingly use a supplier/customer as conduit for the exchange of commercially sensitive information.

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