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Upcoming changes for  
brands operating dual  
distribution in Europe

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New EU competition rules on vertical agreements are expected to come into force on 1 June 2022. These will govern the relationship between suppliers and distributors of goods and services across the EU single market.

Notably, under the draft new rules, brands operating a dual distribution model will need to carefully assess the way that they exchange information with their distributors, franchisees or licensees to minimise any risk of infringing EU competition law. However, the changes also bring opportunities for brands, as some previously prohibited commercial practices are to be permitted for the first time.

## What is dual distribution, and what is changing?

Dual distribution is a business model whereby a supplier operates two parallel routes to market: one where it sells to customers directly; and a second where it supplies product indirectly through distributors, franchisees or licensees. In a dual distribution model, the supplier essentially competes for customers with its own distributors.

Dual distribution agreements often provide for exchanges of commercially sensitive information between a brand and its distributors, franchisees or licensees. These exchanges can be essential for such relationships to work properly and efficiently, as they underpin discussions on recommended retail prices, sales forecasts, new product launches, market performance and sales data.

Under the current rules - if neither brand nor distributor have an individual market share exceeding 30% - dual distribution agreements where a brand also sells directly to end users can automatically be exempt from the EU prohibition on anticompetitive agreements.

The draft new rules will not change this. However, under the original proposal, the exemption would stop applying to information exchanges in a dual distribution agreement if the combined market share of the brand and its distributor exceeds 10%.

In February 2022, the European Commission put forward an additional proposal whereby an information exchange in dual distribution may be exempt if it is necessary to improve the production or distribution of the product. We understand that this new substantive assessment will apply to agreements that do not meet the 10% combined market share threshold, but fall within the 30% individual threshold for the broader exemption. However, the Commission is yet to clarify its position.

In any event, under the draft new rules, an information exchange that does not benefit from the exemption will only be permitted in limited circumstances, and if safeguards are put in place to reduce any risk of harming competition.

## My brand sells directly to customers, how will I be affected?

If you are a brand operating a dual distribution model, you might be able to carry on with your current practices if your combined market share does not exceed 10%. Additionally, or in the alternative, your business might need to assess the type of information that it exchanges with its distributors, and how this is done, to ensure that it can benefit from the exemption.

Information exchanges that cannot be exempt will not automatically infringe EU competition law. However, they will need to be assessed under the more restrictive rules that apply to competitors. Brands can take precautions to minimise their risk, such as aggregating the information and put information barriers in place.

The proposed new rules also bring commercial opportunities for you brand, as dual distribution may be permitted at wholesale and import level of trade. Further, and for the first time, your brand may charge distributors a higher wholesale price for products intended to be sold online, effectively subsidising brick and mortar sales. Further improvements are also expected for exclusive and selective distribution.

The current EU rules on vertical agreements will expire on 31 May 2022. Brands will have until 31 May 2023 to bring their existing distribution agreements within the new rules.

## How can Fieldfisher help?

Our expert team of lawyers offers a 'one-stop shop' for advising on both EU and UK competition law; and on distribution, franchising and licensing agreements. We can help you:

- i. assess your brand's market share and bring your current agreements in line with the new rules;
- ii. identify which of the newly permitted practices are best suited to help you achieve your commercial goals;
- iii. drafting or negotiating commercially efficient and compliant distribution, franchising and licensing agreements as per the new rules;
- iv. reduce risk by advising or training your staff on commercial practices that are best avoided.

**If you would like to discuss any of these issues please do not hesitate to contact Miguel Vaz.**