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SUBMISSION BY CMS

PUBLIC CONSULTATION ON

GUIDANCE ON INFORMATION EXCHANGE IN THE CONTEXT OF DUAL DISTRIBUTION (DRAFT NEW SECTION PUBLISHED 4 FEBRUARY 2022)

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1. ABOUT CMS

CMS is ranked as a Top 10 global law firm. With approximately 5,000 lawyers and 75 offices worldwide, we advise private and public clients in over 73 cities in 44 countries. Our competition team comprises more than 225 lawyers in 36 countries.

2. COMMENTS ON DRAFT ISSUE

Many stakeholders, including CMS, highlighted the need for further guidance on the treatment of information exchange in the context of dual distribution in the public consultation on the draft revised VBER. CMS therefore welcomes that the Commission has responded to this feedback by providing further clarification in a draft new section dealing specifically with information exchange in dual distribution ("draft New Section"). CMS also commends the Commission on having commissioned and published an expert report ("Expert Report") on the same topic. Taken together, these actions clearly illustrate that a public consultation process is an effective and meaningful tool in forming competition policy.

The draft New Section provides welcome clarification. In the spirit of continued dialogue, CMS would like to share the following comments which we hope the Commission will find helpful in the further drafting process.

This submission reflects CMS' views based on a long-standing practice of advising undertakings on related issues. We have not been instructed by any third party to prepare this document.

2.1 Introduction

We would like to make three general comments upfront.

2.1.1 Under Art. 2(5) draft revised VBER, information exchanged in the context of dual distribution only benefits from the exemption of Art. 2(1) draft revised VBER where the parties' market share on the downstream market does not exceed 10%. The draft New Section is silent on the 10% threshold. While the second paragraph of the consultation document on the draft New Section suggests that the Commission no longer intends to apply this additional threshold, paragraphs 15 and 17 of the draft New Section make reference to Art. 2(5) draft revised VBER, which suggests that the 10% threshold remains relevant.

CMS strongly advocates that the separate 10% threshold under Art. 2(5) draft revised VBER be dropped from the revised VBER.

2.1.2 CMS welcomes the Commission's intention to assess information exchange in the context of dual distribution primarily within the scope of the draft revised Vertical Guidelines, rather than only as part of the Horizontal Guidelines. CMS supports the view that, from a competition law perspective, dual distribution should at its core be considered a vertical relationship and not a horizontal relationship. It is therefore appropriate to distinguish between the assessment of information exchange in the context of a dual distribution relationship and that of a purely horizontal relationship. CMS encourages the Commission to uphold this distinction throughout the draft New Section (e.g. paragraph 16 could be clarified, see below).

2.1.3 CMS appreciates that the Expert Report proposes that

> *"the revised VBER should, within the general market share thresholds of Art. 3 VBER, 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"* (page 45).

The draft New Section appears to echo this proposal in paragraphs 9 and 10, where it is stated that

> *"the exemption provided by Article 2(1) of the Regulation applies to all aspects of the vertical agreement in question, including any exchange of information between the parties <u>that is necessary</u> to improve the production or distribution of the contract goods or services by the parties"* [emphasis added] (paragraph 9)

and that

> *"For this reason, Article 2(5) of Regulation (EU) X provides that, in such a scenario, the exchange of information between a supplier and buyer does not benefit from the exemption provided by Article 2(1) of the Regulation where the information exchange is <u>not necessary</u> to improve the production or distribution of the contract goods or services by the parties"* [emphasis added] (paragraph 10)

The onus placed on "necessity" in the draft New Section raises the question of whether this assessment is compatible with the ancillary restraints doctrine. Considering dual distribution as the pro-competitive main operation, the ancillary restraints doctrine would remove from the scope of Art.101(1) those restrictions which are necessary in order for the main operation to be able to function. Therefore, as long as information exchange is necessary for the functioning of a dual distribution network, in the opinion of CMS it must be considered as ancillary and outside of Art. 101(1) which renders any block exemption unnecessary.

The threshold for "necessity" under the ancillary restraints doctrine is high. As the CJEU held in *Mastercard*[1] it "must be impossible to carry out" the main transaction in the absence of the restriction in question. By maintaining the current "necessity" threshold in the draft New Section the Commission risks:

- adopting a new standard of the notion of necessity which is different from that of the CJEU-backed terminology used in the ancillary restraints doctrine; and
- depleting the substance of the ancillary restraints doctrine itself by including necessary restrictions within the scope of Art. 101(1).

Both of which could lead to challenges based on legality and ultra vires review.

CMS would therefore invite the Commission to consider instead using the notion of "directly related to" instead of "necessary" as the relevant standard in the draft New Section as we have also further described in Section 2.2.2 below.

2.2 Specific comments

2.2.1 Paragraph 4

CMS agrees with the definition of a potential competitor in paragraph 4 draft New Section and that the "short period of time" within which a company must be likely to enter the market in order to be considered a competitor, should be "normally not longer than one year".

CMS notes that "competing undertaking" should have the same meaning within the scope of the VBER and preferably throughout all block exemption regulations and guidelines. CMS therefore suggests that the Commission clarify, for example in Art. 1 c) draft VBER, that the "short period of time" is not normally longer than one year. Preferably the Commission should also, in the context of current and future reviews, uniformly refer to this one-year-period when defining or referring to "competing undertakings" in other block exemption regulations or guidelines.

[1] Judgement in case C 382/12 P *MasterCard*, EU:C:2014:2201, par. 91.

2.2.2 Paragraph 9

The draft New Section proposes to block exempt information exchange in the context of dual distribution only where such exchange is "necessary to improve the production or distribution of the contract goods or services by the parties". In all other cases the draft New Section proposes that the rules for horizontal relationships should apply.

In the experience of CMS, many vertical agreements which are block exempted by the VBER are often beneficial to, but not, strictly speaking, "necessary" for, improving production or distribution. The same holds true, in the experience of CMS, for information exchange in the context of dual distribution: information exchange may often be beneficial to improving production or distribution of the contract goods, without, strictly speaking, being necessary.

In order for parties to a dual distribution agreement to be able to benefit in a meaningful manner from the VBER with regard to information exchange, CMS suggests that the Commission replace the strict notion of "necessary" with the more realistic notion of "directly related to".

As mentioned above, CMS is of the opinion that dual distribution relationships are, at their core, vertical and not horizontal relationships. Replacing the requirement that information exchange in the context of dual distribution must be "necessary" by "directly related to" would, in the view of CMS, adequately reflect that vertical restraints tend to have less potential to negatively affect competition than horizontal restraints.

2.2.3 Paragraphs 13 e) and 14 a)

Paragraphs 13 e) and 14 a) draft New Section refer to "actual future prices". CMS notes that the current horizontal guidelines refer to "intended future prices".

CMS suggests that the Commission clarify the difference between these notions or, if there are no differences, use the same notion in both documents.

2.2.4 Paragraph 14 b)

(a) CMS agrees with the draft New Section in that the information listed in paragraph 14 a) is normally not necessary to improve the production or distribution of the contract goods or services. However, CMS queries whether this also holds true for the information listed in paragraph 14 b).

The Commission appears to have drafted paragraph 14 b) with the horizontal guidelines in mind. CMS agrees that in the context of purely horizontal relationships in B2B markets the types of information listed in paragraph 14 b) can often constitute strategic or sensitive information, which should not normally be exchanged between competitors. Customer-specific sales data and non-aggregated information on the value and volume of sales per customer may in certain markets allow undertakings to identify particular customers and to adapt their market behaviour towards that customer. In other markets collusive effects stemming from the exchange of such information are unlikely, for example in many B2C markets.

In the context of vertical relationships such concerns are much less warranted. In CMS' experience, the exchange of the type of information listed in paragraph 12 b) is relatively common between suppliers and buyers at the downstream level, in particular in the context of sales to private consumers (B2C). Anonymized but customer-specific sales data and non-aggregated information on the value and volume of sales per customer help manufacturers to better understand buying patterns and customer demand. Restricting the exchange of this information in case of dual distribution scenarios is likely to have a major impact on how manufacturers understand markets and more generally on the distribution activities of manufacturers, especially (but not only) those of consumer products.

CMS further submits that, in particular in the context of sales to end consumers in a dual distribution scenario, the exchange of the information listed in paragraph 14 b) is typically not strategic or otherwise competitively sensitive information. In the B2C business this information, if anonymized, does not enable the supplier to identify individual customers. In fact, in most cases in the B2C business, but more generally when the number of customers is so large that the identification of particular customers is not possible, it is hard to see why the exchange of such information would be caught by the prohibition of Art. 101(1) TFEU in the first place.

CMS strongly recommends that the Commission recalibrate paragraph 12 b).

(b) We welcome the Commission's confirmation in paragraph 12 that in a selective distribution system it may be necessary for the supplier to obtain information from distributors relating to their compliance with the selection criteria.

In practice, an important compliance aspect for selective distribution systems is ensuring and confirming that members of a selective distribution system do not sell to outsiders. To this end, the supplier needs to know to whom the distributor sold the contract goods or services. However, the draft New Section states in paragraph 14 b) that "information that identifies particular customers, unless in each case such information is necessary to enable the supplier or buyer to adapt the contract goods or services…" is not necessary and therefore would not benefit from the block exemption. Strictly speaking, such an exchange arguably would not even be "necessary", as suppliers could theoretically monitor compliance with the prohibition to supply outsiders via independent third parties, e.g. auditors. However, in practice a requirement to involve third party auditors would put an important and potentially prohibitive financial burden on operators of selective distribution systems, which should have the possibility to confirm compliance with the selective distribution contracts without undue burden.

CMS therefore suggests that the Commission consider clarifying in paragraphs 12 and 14 b) of the draft New Section that, for the purposes of monitoring selective distribution systems, information that identifies particular customers may also be exchanged.

2.2.5 Paragraph 17

CMS welcomes that the draft New Section recognises common risk mitigation approaches in situations where parties exchange information, such as the use of firewalls.

As, in the experience of CMS, various national competition authorities question the reliability of or even reject the concept of firewalls, CMS would appreciate if the Commission clarified that the exchange of otherwise sensitive information does not infringe Art. 101(1) TFEU if adequate mitigation measures such as firewalls are in place. In this context, the Commission could also provide further guidance on how such measures should be implemented. This would give undertakings greater comfort when implementing these types of measures, both with regards to the Commission as well as in relation to national competition authorities.

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