



UNIVERSITY OF LATVIA
FACULTY OF LAW

INSTITUTE OF LEGAL SCIENCE

Riga, 31th October 2024

Directorate-General for Competition – Unit A1

European Commission

Directorate-General for Competition

Antitrust Registry

By email:

COMP-ARTICLE-102-GUIDELINES@ec.europa.eu

Re: European Commission Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

Dear Sir or Madam,

On August 1st, 2024, the European Commission (hereinafter – Commission) put forward draft Guidelines (hereinafter – Guidelines) on exclusionary abuses of dominance that reflect the Commission's interpretation of the European Union (hereinafter – EU) courts' case law on exclusionary abuses and the Commission practice. The University of Latvia expresses its gratitude for the opportunity to provide an opinion on the new Guidelines concerning the application of Article 102 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) to abusive exclusionary conduct by dominant undertakings. We also extend our appreciation to the Commission for its efforts and work invested in drafting the Guidelines.

1. The Guidelines address a range of infringements resulting in exclusionary conduct. The effects of exclusionary conduct can have different effects on the market; therefore, we

would suggest emphasising that the impact on the market of exclusionary conduct involves not only an efficient competitor test but also other methods.

[1.1.] The Guidelines set out the legal criteria for establishing the ability of a dominant market player to create exclusionary effects. Still, we believe that the range of criteria is much broader. The Guidelines now state that it is essential to assess the behaviour of a market player concerning how it excludes a competitor. However, it is also necessary to assess how the conduct of a particular market participant may affect the market.

[1.2.] For example, the Court of Justice of the European Union (hereinafter – CJEU) has held that all relevant circumstances must be taken into account to determine whether the conduct of the relevant market player was capable of forcing an equally efficient competitor out of the market, whereas the use of the as efficient competitor test is optional.¹ Furthermore, the Commission has indicated in Paragraph 73 of the Guidelines that the assessment of whether a conduct is capable of having exclusionary effects does not require demonstrating that the actual or potential competitors affected by the conduct are as efficient as the dominant undertaking. In summary, the effects of exclusionary conduct are to be assessed not only in terms of the exclusion of an equally efficient competitor but also in terms of the exclusion of less efficient competitors.

[1.3.] In the case of *Post Denmark A/S v Konkurrencerådet*, in which several preliminary questions were referred to the CJEU, it was stated that, in cases of abuse of a dominant position, the effective competitor test, while not a mandatory criterion, may be criteria to be considered when determining if the market player has abused its dominant position in the market.² Paragraph 55 of the Guidelines set out as one of its points the criterion of the inability of an equally effective competitor to adopt the same conduct. Notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market. The Commission has indicated that it may be one of the factors to be assessed based on a specific circumstance of a case where conduct departs from competition on the merits.

¹ Judgment of the Court (Fifth Chamber) of 19 January 2023 case C-680/20 Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato para.62., available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0680> [viewed 04.10.2024.]

² Judgement of the Court (Second Chamber) of 6 October 2015 case C-23/14 Post Danmark A/S v Konkurrencerådet para.57, 62., available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0023> [viewed 04.10.2024.]

[1.4.] A suggestion would be to include in the recitals of the Guidelines a consideration indicating that, depending on the circumstances of the case, different methods may be used to prove or disprove the exclusionary conduct of a dominant market player because exclusionary conducts have a very wide impact on economic consequences.

[2.] Although economic dependence is already contained in the CJEU case-law, the concept of economic dependence has long been neglected. There have been cases in which the economic circumstances of the case were more important than market share. Nevertheless, economic dependence is crucial in digital markets because they are developing rapidly. For these reasons, we believe that economic dependence is one of the elements characterising the existence of a dominant position which should be included in the Guidelines.

[2.1.] The traditional definition of dominant position focuses on market shares and refers to a paramount market position. Unlike dominance, economic dependence relates to market power that does not result from a paramount market position. Although the Guidelines mention "unavoidable trading partner" in some places, we still believe that too little attention has been paid to economic dependence as an element characterising the existence of a dominant position. Economic dependence is a situation where an undertaking has no comparable substitute for its current supplier.³ Competition must be based on merits rather than willingness to exploit trading partners.⁴ Consequently, all EU countries need a common understanding of economic dependence regarding its effects on dominance. We believe that this can be accomplished by incorporating these aspects into Subsection 3.3.1 of the Guidelines or any other section at the discretion of the Commission.

[2.2.] Although economic dependence aspects are not harmonised at the EU level, in several jurisdictions, economic dependence already exists in competition law provisions or is used to explain similar legal terms, including relative dominance and superior bargaining position.⁵

³ Court of Cassation, Decision of 3 March 2004, *Société Concurrence*, cited in: Këllezi P. Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence. In book: *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Available: <https://kellezi-legal.ch/wp-content/uploads/07Kellezi-economic-dependence-08.pdf> [viewed 02.10.2024.]

⁴ Wakui M. On Market Power and Economic Dependence. Organisation for Economic Co-operation and Development, 10 May 2022. Available: [https://one.oecd.org/document/DAF/COMP/WD\(2022\)61/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)61/en/pdf) [viewed 03.10.2024.]

⁵ Ibid.

This is particularly evident in digital markets. For example, several Member States of the EU, including Germany, France, Italy, Portugal, and Spain, have adopted rules on the prohibition of abuse of economic dependence, albeit with different structures and approaches. Belgium recently introduced the prohibition of abuse of economic dependence in order to “*fill a perceived gap in the existing Belgian and European rules on abuse of dominance and fair commercial practices*”.⁶ The absence of regulation is the main reason why we believe that aspects of economic dependence should be included in the Guidelines.

[2.3.] It should be noted that not only digital market participants can become economically dependent on other market players. The Commission’s case ABG/Oil⁷ highlights another point of view on why it is necessary to include the criterion of economic dependence in the Guidelines. In ABG Oil, the Commission held that each oil company found itself in a dominant position relative to its customers during the oil crisis of the early seventies and that BP abused this position against its customer ABG. The economic circumstances of the case proved to be more important than market share in itself; it was the shortage of oil products that put the customers in a situation of economic dependence on suppliers, which, in turn, led the latter to a dominant position.⁸ Such indications of the Commission demonstrate that economic dependence must be assessed regardless of the size of the market share. Thus, we see economic dependence as one of the main elements characterising the existence of a dominant position.

[2.4.] From the analysis of the case law on Article 102 of the TFEU, we conclude that the economic dependence on the dominant undertaking constitutes one of the factors that not only can but must be considered for the assessment of the dominant position. In the presence of low market shares, the interpretation of the CJEU allows for economic dependence to be included in the analysis.⁹ As Ritter & Braun point out, the concept of the unavoidable trading partner is

⁶ Scalzini S. Economic Dependence in Digital Markets: EU Remedies and Tools. Market and Competition Law Review, volume v, no. 1. april 2021, p. 85.

⁷ European Commission, Decision 77/327/EEC ABG/Oil companies operating in the Netherlands [1977] OJ L 117/1, available: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31977D0327> [viewed 04.10.2024.]

⁸ Këllezi P. Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence. In book: Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms? Available: <https://kellezi-legal.ch/wp-content/uploads/07Kellezi-economic-dependence-08.pdf> [viewed 10.10.2024.]

⁹ Ibid.

not used to extend the scope of Article 82 EC.¹⁰ Originally, it was mentioned by the CJEU with respect to market shares. However, at present, it is especially important to evaluate the existence of economic dependence, specifically for those companies that do not have a large market share. That is why we propose to determine not only that economic dependence between companies should be taken into account if the market share is large but also be considered as one of the circumstances in which a company may be found to be in a dominant position.

[3.] The market can be dominated not only by sellers but also by buyers, so it is important to create a common understanding of monopsony across the EU so that all Member States can successfully identify cases of monopsony.

[3.1.] A monopsony is a market condition with only one buyer, the monopsonist. Like a monopoly, a monopsony also has imperfect market conditions. In a monopsony, a large buyer controls the market, which is unhealthy for competition. Because of their unique position, monopsonies have a wealth of power, and use that power to make sellers relatively weak. And that usually results in lower prices and lower quantities sold. Though there may be multiple suppliers or sellers, they collectively have less power to control the market compared to what the buyer can impose.¹¹ Monopsonies take many different forms and may occur in all types of markets. That is why, in our opinion, monopsony should be included as a significant risk that can distort competition. The inclusion of such aspects in the Guidelines would allow the EU Member States to follow them and identify cases of monopsony.

[3.2.] Most competition legal acts do not include a definition of monopsony but prohibit it in the same way as a monopoly when it distorts competition. Therefore, we believe that there is no need for another regulation because existing provisions are deemed sufficient, particularly those dealing with monopolies, anti-competitive agreements, and mergers.¹² All that is needed is a unified interpretation of the Commission.

¹⁰ Ritter L., Braun W.D. European Competition Law: A Practitioner's Guide (2004) 3rd edition, Kluwer Law International, p. 15.

¹¹ Monopsony: Definition, Causes, Objections, and Example, available: <https://www.investopedia.com/terms/m/monopsony.asp> [viewed 09.10.2024.]

¹² United Nations Conference on Trade and Development, Competition law enforcement issues raised by monopsonies, 26 April 2023, available: https://unctad.org/system/files/official-document/ciclpd68_en.pdf [viewed 07.10.2024.]

[3.3.] Several countries replied to UN Trade and Development (hereinafter – UNCTAD) that their competition authorities had focused attention and analysed the anti-competitive behaviour of buyers holding a relatively strong position. However, the Commission has not recently handled a monopsony-related case, nor has the CJEU. In 2023, the Commission responded to UNCTAD that *"at present, there is one ongoing case involving a grocery buying alliance and several decisions of national competition authorities regarding such alliances."*¹³ This indicates the actuality of monopsony; however, it is not stated anywhere in writing. Our proposal is to include aspects of monopoly after Subsection 2.2.3., which would coincide with the above-mentioned and subsequent analysis of the dominant position. If the Commission considers this unnecessary, then we would like to propose to indicate, at least in the preamble, that the regulation of monopoly also applies to monopsony, which should not be overlooked.

4. While we are aware that commitment decisions are a procedural element, we believe that the latter should be included in the Guidelines. Given the importance of commitment decisions in abuse of dominance cases and the fact that commitment decisions have quickly become a popular and important tool for competition law enforcement, sometimes at the initiative of the Commission, sometimes at the initiative of the undertakings concerned. We therefore believe that the Commission's view on this point is important and should be included in the Guidelines.

[4.1.] Commitment decisions have several advantages: 1) the quick reestablishment of effective competition on the market, to the benefit of consumers and the public interest; 2) effectiveness, as commitment decisions do not need to be based on full-scale investigations and do not reach conclusions on the facts of the case or the application of the law; 3) they usually involve less procedural steps which allow for more appropriate use of Authorities' resources.¹⁴

[4.2.] As of October 2023, the French Competition Authority has been increasingly using commitment decisions to efficiently address competition concerns, particularly in rapidly evolving sectors like digital markets. In June 2021, the French Competition Authority (*Autorité de la concurrence*) accepted a series of commitments from *Google* to address competition concerns in the online advertising sector, the French Competition Authority considers that the

¹³ Ibid.

¹⁴ European Competition Network recommendation on commitment procedures, 20 November 2013. Available: <https://concurrency.public.lu/dam-assets/fr/agenda/2013/Reunion-directeurs-generaux-26-et-27-novembre-2013/ECN-recommendation-on-commitment-procedures.pdf> [viewed 04.10.2024].

commitments proposed by *Google* are likely to put an end to the competition concerns expressed and are substantial, credible, verifiable and has therefore decided to accept them and make them binding.¹⁵ The conclusion to be drawn from this is that the commitment decision is necessary, even in cases involving a company with a large market share, and can help to resolve a dispute efficiently.

[4.3.] In its practice, the Competition Council (*Konkurences padome* in Latvian), the Latvian competition authority, uses commitment decisions as a way to terminate an infringement case. In total, 14 cases in Latvia have been terminated by the Competition Council by means of a commitment decision.

[4.4.] Clarity is needed to allow a broader application of commitment decisions, i.e., the definition and the timeframe within which the commitment decisions should be applied. For example, the time limit within which the undertaking must submit a commitment decision to the French Competition Authority is laid down in Article L430-5 of the French Commercial Code (*Code de commerce*) - the undertaking has up to 25 working days after the submission of the full notification to submit a commitment decision unless the Competition Authority has decided the expiry of this period.¹⁶ In Latvian practice, there have been cases where the competition authority has obtained evidence to be submitted to take an unfavourable decision on an infringement, but after completing its investigation, the Competition Council has still allowed the market participant to offer a written undertaking. For example, in case No 384/12/03.02./2, the Competition Council stated that a market participant has the right to make proposals whereby it assumes legal obligations employing a written undertaking that prevents adverse effects on competition before the Competition Council adopts its final decision.¹⁷ This shows that there is no consensus among Member States precisely on the deadline for submitting an offer.

[4.5.] Although this is a procedural question, clarifying and regulating it in these Guidelines is necessary. It is expected that the inclusion of various aspects and clarity in these Guidelines

¹⁵ Autorité de la concurrence. Related rights: The Autorité accepts Google's commitments, 21 June 2022, available: <https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments> [viewed 07.10.2024]

¹⁶ Article L430-5 - Code de commerce, available: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000031013107 [viewed 09.10.2024]

¹⁷ The Competition Council of Latvia 02.11.2012. decision No 87 SIA "Sabiedriba Marupe". Available in Latvian: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/wQ3UboJ3VZ.pdf [viewed 09.10.2024]

will encourage market participants to apply commitment decisions that are beneficial for both the market participant and the competition authority.

We remain at your disposal for any further input you may require on these subjects. In case of further inquiries, please contact Mr. Dr. Lauris Rasnačs, Assistant Professor of the Faculty of Law of the University of Latvia, at the e-mail address lauris.rasnacs@lu.lv or by post: Faculty of Law of the University of Latvia, Raina boulevard 19, Riga, LV-1586, Latvia; phone (+371) 26137467.

Best regards,

Director, Associate Professor



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