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Contributions in respect of the draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

On 1st of August 2024, the European Commission has launched a public consultation inviting all interested parties to comment on the draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (the “**Draft Guidelines**”). As a law firm interested in the development of a consistent and predictable legal regime in respect of competition law, we have prepared and submit this paper reflecting our view with respect to the Draft Guidelines.

These contributions are by no means exhaustive, and our focus was rather on strategic principles and less on detailed conditions of application of the law.

We would like to highlight that we recognise and appreciate the work that has been carried out on these Draft Guidelines and the need for creating a common conceptual framework codifying the various decisions of the Union Courts and of the European Commission.

Contributions regarding the Purpose of the Guidelines

For a long while there was a consensus around the purpose of protection of the competition law: it was meant to protect “effective competition” leading towards “consumer welfare”, usually understood as the “lowest price”.

In the past few years, perhaps following the introduction of new business models by the technology industry where the consumer is often allowed to use products without paying any pecuniary consideration, the European Commission introduced additional standards in its assessment, without concerning itself with whether such standards conflict with the “consumer welfare” or with each other.

In our view, testing the conduct of a dominant undertaking against aspects such as “[delivery of] the best products in terms of choice, quality and innovation” introduces a subjective assessment, as the competition authorities may have different subjective views for what constitutes “best product” and how the balance between “choice, quality, innovation” and price should be made. This could dictate the companies to act within business conducts prescribed by the European Commission, which may conflict with the freedom of commerce declared by the constitutions of many EU member states.

As well, we believe that such a policy creates uncertainty for European companies and hinders innovation: such companies would be reluctant to apply new business models that may be judged later on abusive.

The Draft Guidelines also state that Article 102 TFEU applies to “all practices by dominant undertakings [...] including practices that may harm consumers by undermining an effective structure of competition”. As the case law¹ repeatedly refers to the protection of “equally efficient competitors”, rather than of the less efficient ones, we believe that Paragraph 5 of the Draft Guidelines should be qualified by appropriate language.

Contributions regarding the assessment of dominance

The Draft Guidelines mention that, in assessing dominance, the authority will take into account among others the “dynamics of the market” and “trends of market shares over time”. While this is also confirmed by case law, we suggest that the authorities should look also at the prospective trends, as some of the companies sanctioned for abuse of dominance just a few years ago now struggle and have been surpassed by competitors.

A matter that is not addressed in the Draft Guideline is the interplay between DMA and the abuse of dominance. We understand that the DMA is at its early stage of application, and this might not be the appropriate time to discuss such interplay. At the same time, authorities should be careful in respect of assessing dominance on a certain platform (aside from competition with other platforms). We are also concerned that disruptive innovation will be deterred by some of the Commission decisions cited²: ultimately, we wonder if a “hardware” company could ever offer solely its own “software” on its devices, or whether a “software” company could have sufficient guide in the respective case law to decide when it is obliged to allow others on its platform.

Contributions regarding the collective dominance

The Draft Guidelines introduced a section on “collective dominance” that in our view would be confusing for the national competition authorities and courts looking for guidance on this topic.

In our view, the cited case law is not yet “settled” and should be used only in cases with similar factual background, for the following reasons:

- i. mergers case law: it is reasonable for the authorities to question how a reduced number of companies would function in the future on the same market. But this is an analysis that is prospective and cannot be applied to an investigation into abusive conduct;
- ii. conference liners case law: for these cases either the finding of abuse of collective dominance or the fines were quashed. Also, not only the specific regulatory background is relevant, but also the fact that article 101 TFEU could be (and was) applied to the respective conduct;
- iii. “same group” case law: companies in the same group are usually seen as a “single economic entity” and is therefore redundant to use a “collective dominance” assessment.

We believe that the more recent practice, including at national level, on “tacit or express” forms of collusion between companies is more appropriate in dealing with a collective behaviour.

¹ For example, Judgement of 3 July 1991, AKSO vs. Commission, Case C-62/86; Judgement of 26 January 2022, Intel vs. Commission, Case T-286/09; Judgement of 27 March 2012, Post Danmark A/S v Konkurrencerådet, Case C-209/10.

² For example, Commission decision of 04 March 2024 in case AT.4037 – *Apple – App Store (music streaming)*.

Two-step test to identify the exclusionary abuse

According to the Draft Guidelines, to determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is *generally* necessary to establish whether:

- the conduct departs from competition on the merits and
- the conduct is capable of having exclusionary effects.

In our view, the wording of the second condition may be misleading and we will discuss below.

Given that the Draft Guidelines provide it is “*generally*” necessary to establish if the two conditions are met, it remains to be seen how or in what circumstances the two-step test to identify the exclusionary abuse will not apply.

Step 1 – the conduct departs from competition on the merits

The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance by economic operators. Paragraph 49 of the Draft Guidelines contains however an idea that we believe is controversial and might prevent dominant companies from competing. In short, it states that a dominant company may take “reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to *strengthen its dominant position*”. In our view, a dominant company may take measures that lead to the strengthening of its dominant position, if such measures are expressions of “normal competition on the merits”, such as improving a product or applying a better price that remains above costs. There is no requirement or obligation in the law or jurisprudence for dominant companies to maintain their market share (if not reducing it).

Step 2 – the conduct is capable of having exclusionary effects

The Draft Guidelines distinguish three categories of exclusionary conduct and provide a different burden of proof for each of them.

First, as anticipated, in our view the reference to a conduct that is “capable” of exclusionary effects is misleading. The practice of the Union Courts includes references to either “capability” or “likelihood” of such effects, sometimes as if such notions would be similar. But “capable” reflects almost a theoretical situation and also, as signalled in the doctrine³, a limited probability to appear, whereas “likely” would require the authority to show that the effect is “more likely to occur than not”. In our view, by requiring that the exclusionary effects are “capable” to appear, the Draft Guidelines introduce a lighter standard for the enforcement authorities in comparison with the standards resulting from the case law. The same is true for the burden of proof, which appear lighter for the authorities and substantially stronger for defending companies.

The impression left is that the Draft Guidelines envisage a shift away from the effects-based approach towards a more legalistic approach based on presumptions. The Union Courts have treated some conduct as presumptively abusive but in our view there is no clear and consistent identification of “naked restrictions”, “conduct presumed to be capable of exclusionary effects” and “conduct for which it is necessary [*for the enforcement agency*] to demonstrate a capability to

³ „The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review”, by Pablo Ibanez Colomo.

produce exclusionary effects". The Draft Guidelines do not sufficiently emphasize that the analysis should be made always in the context of the factual, industrial, regulatory or legal background of the case.

Finally, with respect to the concept of "naked restrictions" we further believe that:

- On one hand, the Union Courts have identified in a very limited number of cases certain very specific practices that under the case context amounted to a severe type of abuse. Not all cases label such practices as "naked restrictions" and in each case it was examined the scope and gravity of the abuse in the context of that case. In our view, they should not be a separate category.
- On the other hand, one may envisage situations where the practice is similar but the economic context is different from that of the respective cases. For example, what if a dominant firm dismantles an infrastructure used by a competitor, if the payment for the maintenance of that infrastructure cannot be made by the competitor? Especially if the "dismantling" is as simple as "cutting the cord" for some telecom or energy line?

The Draft Guidelines will not be binding, but they will guide not only the European Commission but also any other national agencies and national courts in their decision-making. It would be preferable therefore if these Draft Guidelines would reflect more closely the conceptual terminology used in the practice of the Union Courts.

As-efficient competitor

The Draft Guidelines do not contain a dedicated chapter to this notion, but rather various references through the specific forms of conduct examined. It appears that under the proposed paper the enforcement authority seeks to protect more than the equally efficient competitors. On one hand, the reference to this principle is left, under these Draft Guidelines, only for price-related abuses (such as margin squeeze or rebates), and we understand that a less efficient competitor would be protected for other types of "abuses". On the other hand, even in respect of price-related abuses the Draft Guidelines suggest that a less efficient competitor might be protected. We believe this is not conducive to either innovation or efficiency.

PeliPartners welcomes the Commission's call for evidence and appreciate the hard work that has contributed to the drafting of the Draft Guidelines. We are looking forward to the progress of the Draft Guidelines and remain available for engaging in constructive discussions.

About PeliPartners

PeliPartners has a team specializing in complex projects that require innovative approaches. PeliPartners lawyers have been involved in some of the most important transactions on the Romanian market in the last 20 years. The team has a wealth of experience in a variety of fields, including mergers and acquisitions, financing, competition, infrastructure & concessions, energy, real estate and corporate law. More details about PeliPartners can be found at www.pelipartners.com.