

## SUBMISSIONS ON THE EUROPEAN COMMISSION'S DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS

### 1. Introduction and summary

- 1.1 CMS welcomes the opportunity to comment on the European Commission's 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 ("**Draft Guidelines**").<sup>1</sup> Our comments draw upon our cross-sector experience of engaging with the European Commission on matters under investigation and from advising clients generally on EU competition law pertaining to their business dealings. In the interests of time, our comments are focused on exclusive dealing and rebates, as an area of particular interest to our clients, as well as on the broader statement of the law on exclusionary abuse.
- 1.2 Whilst the Commission's efforts to present its view of the law on exclusionary conduct, as opposed to merely its enforcement priorities, are commendable, we have identified a number of areas of concern with the Draft Guidelines.
- 1.2.1 The Guidelines relegate the role of the as-efficient competitor test in the Commission's assessment of potentially exclusionary conduct (such as exclusive dealing and rebates), thereby departing from the direction and spirit of recent case law.
- 1.2.2 In the Commission's delineation of the categories of abuses which it regards as either "*naked restrictions*" or conduct which is "*presumed to lead to exclusionary effects*", the Guidelines only partially reflect the case law dealing with such conduct, and the Commission's formalistic approach risks chilling pro-competitive conduct.
- 1.2.3 The Commission appears to impose an asymmetric burden as to the scope and cogency of evidence that it is required to bring forward in order to demonstrate that a dominant firm's conduct is capable of having exclusionary effects compared to the body of evidence that a firm defending its conduct (on the basis that it is objectively justified or that it gives rise to sufficient countervailing efficiencies) is required to advance.
- 1.2.4 The Commission's stark generalised statement regarding the absence of any *de minimis* threshold in abuse cases must be qualified in the light of key recent case law, such as under the two ECJ judgments in *Intel I*<sup>2</sup> and *Intel 2*,<sup>3</sup> the last of these

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<sup>1</sup> This response to the consultation is on behalf of CMS and does not necessarily represent the views of any one CMS client. Moreover, the submissions contained in this response do not necessarily represent the individual views of all competition partners at CMS.

<sup>2</sup> Case C-413/14 P - *Intel Corp. v European Commission*.

<sup>3</sup> C-240/22 – *Commission v Intel Corporation*.

post-dating the draft guidelines but underlying the need for the guidelines to be changed. As drafted, the Draft Guidelines sit uneasily alongside the need to take into account the relevant economic context (even in the case of conduct which may be presumptively harmful to competition), such as the market coverage of the conduct in question, when determining whether Article 102 TFEU has been breached. The predominant line of case law supports the better view that, whilst there is no fixed de minimis threshold which applies across all cases and sectors, a level of appreciability is required in order for an exclusionary abuse to be established.

1.2.5 The potentially blurry boundary between conduct which is presumed to lead to exclusionary effects and other types of conduct (where no such presumption applies) creates an unwelcome cliff-edge for businesses and is liable to chill pro-competitive conduct (especially with regard to pricing and discounting conduct, where we specifically call for greater clarity). The Commission's entire presumptive approach requires re-evaluation post-*Intel 2*; at the very least its scope is narrower than the Commission has hitherto advocated.

1.3 As such, rather than offer greater predictability for businesses, the Draft Guidelines risk muddying the waters on areas which the Court of Justice has clarified in case law dealing with exclusionary conduct and give rise to uncertainty for those businesses seeking to safely navigate the Article 102 TFEU prohibition, such that pro-competitive conduct may be inadvertently deterred, to the detriment of consumers.

## **2. The role of the as-efficient-competitor threshold is substantially downplayed and departs from the case law**

2.1 According to the Draft Guidelines, in order to determine whether conduct constitutes an abuse, it is necessary to establish (i) whether the conduct departs from competition on the merits, and (ii) whether the conduct is capable of having exclusionary effects (paragraph 14). Where it is demonstrated that conduct is liable to be abusive, it remains possible for the dominant company to show that the conduct is either objectively justified or counter-balanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

2.2 The Draft Guidelines make little mention for the need to consider whether the conduct in question affects competitors which are equally efficient as the dominant undertaking. Indeed, the Guidelines appear to emphasise the opposite at paragraph 73: "*The assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking*".

2.3 The above position contrasts starkly with the importance placed by the Court of Justice on conduct which restricts competition by excluding equally efficient competitors, in particular, at paragraphs 175 and 176 of its recent *Intel 2* ruling (which in turn make reference to *European Superleague*):<sup>4</sup>

*"...the Court of Justice recalled that it is **not** the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, a dominant position on one or more markets or to ensure that competitors less efficient than the undertaking with such a position should remain on the market. Thus, not every exclusionary effect*

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<sup>4</sup> See paragraph 126, *European Superleague*, C-333/21. See, also, *Post Danmark*, C-209/10, paragraph 25.

*is necessarily detrimental to competition. Competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, output, choice, quality or innovation.” (175)*

*“Consequently, in order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned or by hindering their growth on those markets.” (176) [emphasis added]*

- 2.4 *Intel 2* is the most recent statement of the Court of Justice on this topic. Obviously, it post-dates these draft Guidelines which will need to be amended to take account of it. Whilst the Court of Justice accepted in *Intel 2* that the as-efficient-competitor (“AEC”) test is merely one way of determining whether an undertaking has used means other than those within the scope of normal competition,<sup>5</sup> it regarded the test as particularly valuable as it establishes whether equally efficient competitors could reproduce the dominant undertaking’s conduct and therefore whether such conduct represents competition on the merits.<sup>6</sup>
- 2.5 The value and utility of the AEC test, as recognised by the Court of Justice in *Intel 2*, is substantially downplayed by the Commission, and this is most apparent in its blunt statement at paragraph 73 of the Draft Guidelines. Indeed, taking into account the Court’s reasoning in *Intel 2*, it would be more accurate to state that, once dominance is established, the Commission’s starting point for certain forms of exclusionary abuses (particularly rebates) is to consider the application of the AEC test,<sup>7</sup> save only in circumstances where it might not be appropriate to do so.
- 3. The Commission’s categorisation of conduct and use of rebuttable presumptions weighted against the dominant firm are problematic**
- 3.1 In the Draft Guidelines, the Commission identifies three categories of conduct: (i) naked restrictions, (ii) conduct presumed to lead to exclusionary effects, and (iii) other conduct.
- 3.2 In the third category, the Commission must establish that the conduct departs from competition on the merits and has the capability of giving rise to exclusionary effects. In the first two categories (i.e. (i) and (ii)), both the departure from competition on the merits and the conduct’s exclusionary effects are subject to a rebuttable presumption by the Commission.

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<sup>5</sup> *Intel 2*, para 181.

<sup>6</sup> Whilst the use of the AEC test is not strictly mandated by the Court, where the dominant undertaking itself submits its own analysis as to why an equally efficient competitor would not be foreclosed, the Commission is required to assess the probative value of that analysis. Given that a dominant firm, under the threat of substantial sanctions, is likely to explore all means of defending itself an investigation, the Commission is likely to need to engage with such an analysis one way or the other (or permit an unfair situation in which only those firms which possess the necessary resources to submit such economic analysis are in a position to compel the Commission to engage with it).

<sup>7</sup> At para 181 of *Intel 2*, the Court noted that, “the capability of such rebates to foreclose a competitor as efficient as the dominant undertaking, which competitor is supposed to meet the same costs as those borne by that undertaking, **must** be assessed, **as a general rule**, using the AEC test”. At paragraph 202, the Court notes: “*Thus, the result of the AEC test is liable to indicate whether a pricing practice, such as loyalty rebates, adopted by an undertaking in a dominant position, with sufficiently pronounced characteristics in terms of the share of the market covered, the conditions and arrangements for granting those rebates, their duration and their amount, is capable of foreclosing a competitor as efficient as that undertaking and thus of being detrimental to competition as protected by Article 102 TFEU*”. (emphasis added).

- 3.3 Therefore, once the Commission has found that the conduct falls within one of these two categories (in some cases, following the application of a relevant test), the burden of proof shifts entirely to the dominant undertaking to rebut the presumption against it.
- 3.4 The presumption is heavily weighted against the dominant undertaking in the case of a naked restriction. The Commission indicates that only in “*very exceptional circumstances*” (paragraph 60, c)) will a dominant firm be able to rebut such a presumption. The Commission also hints that any attempt to run an objective justification defence will be inherently more challenging for these categories of restrictions (at paragraph 170). The Commission similarly notes that, where the conduct has a high potential to produce exclusionary effects (i.e. falls within category (ii)), this must also be given due weight in the balancing exercise to be carried out in this context under the objective justification defence (i.e. dominant firms can expect to face an uphill challenge).
- 3.5 Whilst there is sense in the Commission simplifying its enforcement practice, the Commission’s categorisation of conduct based on its form and the use of such rebuttable presumptions (which, for certain categories of practice, appear to be very challenging to overcome), marks a clear shift away from the effects-based approach contemplated in the existing enforcement guidance and is out of kilter with established case law, much of which dates from the 16-year intervening period since the Enforcement Guidance of 2008.<sup>8</sup>
- 3.6 Such a formal delineation creates an atmosphere in which undertakings are likely to be deterred altogether from engaging in any conduct which comes even remotely close to categories (i) and (ii), particularly, given that the Commission expressly does away with any over-arching *de minimis* threshold (on this point, see our submissions in section 5 below). However, there are circumstances in which, taking the example of a presumptively harmful sales rebate, the capacity for such conduct to actually give rise to anti-competitive foreclosure does not exist when a fuller effects analysis is carried out.<sup>9</sup> As such, the Commission is at risk of artificially lowering its burden of proof for certain types of conduct and chilling pro-competitive conduct.
- 3.7 Taking the further example of the Commission’s naked restriction of “actively dismantling” infrastructure used by a competitor (as considered in *Lithuanian Railways*), the Commission regards such conduct as possessing no other economic interest for the dominant undertaking other than to restrict competition.<sup>10</sup> However, there are conceivable scenarios in which such a step may be taken where no foreclosure effect arises or where such a step is potentially justifiable. Taking three examples: first, suitable alternative infrastructure may be readily available to the dominant firm’s competitors; second, technological progress may have rendered such infrastructure, which is costly to maintain, largely obsolete (save for one complainant, who continues to rely on legacy infrastructure); or third, using a digital sector example, a dominant firm may update its software product to a centralised cloud-offering such that certain after-sales support infrastructure (used also by third-party providers for on-premise software) is no longer required by its owner. The Commission’s stark rendering of such conduct as a ‘naked restriction’ (and its willingness to entertain only very exceptional

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<sup>8</sup> For example, *Post Danmark*, C-209/10, *Unilever Italia* C-680/20, and *Intel 2*.

<sup>9</sup> *Intel 2*, paragraph 180.

<sup>10</sup> Draft Guidelines, paragraph 60(c).

countervailing justifications) risks taking an overly formalistic approach in relation to these nuanced scenarios.

- 3.8 Moreover, the specific footnote in the Draft Guidelines which is used to justify classing the active dismantling of infrastructure as a naked restriction refers to a section of the Court’s judgment<sup>11</sup> which in fact went to whether the legal test (from *Bronner* and other cases) used for establishing an abusive ‘refusal to supply’ applies to a scenario in which the infrastructure is destroyed (rather than made inaccessible). Those passages of the ruling do not deal with whether such conduct is, save for exceptional circumstances, always capable of producing exclusionary effects.
- 3.9 If that is true for naked restrictions (the Commission’s category (i)), it is *ex hypothesi* true for conduct which the Commission says is presumed to have exclusionary effects (the Commission’s category (ii)). And foremost among conduct the Commission places in category (ii) is loyalty, or as they have come to be known, exclusivity, rebates. It is only in the most formalistic sense that the Court regards there as being a legal presumption that such rebates are unlawful. As mentioned above at para 2.4 and footnote 6, the Court has been consistently clear that once a dominant firm submits evidence-based argumentation that its conduct was not capable of having an exclusionary effect the Commission is required to examine it.<sup>12</sup>
- 4. The Commission imposes asymmetric evidentiary burdens on itself and the parties concerned**
- 4.1 The Guidelines appear to impose an asymmetric burden in terms of its evidentiary demands relating to, on the one hand, the anti-competitive effects being advanced by the Commission and, on the other hand, any pro-competitive effects/justification put forward in defence by the dominant undertaking.
- 4.2 The Commission notes that, “*as a general rule, in order to conclude that a conduct is liable to be abusive, it is necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects*” (para 179, citing to *European Superleague*). This contrasts with the requirement it imposes on dominant firms to provide a “*cogent and consistent body of evidence*” to substantiate any objective necessity or countervailing efficiencies defence, with any “*vague, general or theoretical claims*” being deemed insufficient. This is despite the Commission being able to rely on a presumption which is itself based on a generalised theoretical assertion that such forms of conduct always have, or are capable of having, exclusionary effects.
- 4.3 It is also concerning that the burden the Commission imposes on itself marks a shift away from the position under the existing guidance, which notes that the Commission would prioritise enforcement action on the basis of “cogent and convincing evidence that the alleged abusive conduct was likely to lead to anti-competitive foreclosure.” Notwithstanding the Court’s remarks in *European Superleague*, it is unclear on what basis the Commission has abandoned the requirement that its own body of evidence also be “cogent and convincing”, while maintaining that parties under investigation continue to meet that standard, or indeed whether its removal was a deliberate change by the Commission.

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<sup>11</sup> *Lietuvos geležinkeliai v Commission*, C-42/21, paragraphs 83-84 and 89-91.

<sup>12</sup> *Intel I*, paragraph 138 – 139; , *Unilever Italia*, paragraphs 47-48 and 52-55 and 62; , and *Intel 2*, paras 144, and 178 – 181.

4.4 In the same vein as the points made above, where a dominant undertaking puts forward evidence to rebut the Commission's presumptions, the Commission can dismiss such evidence by showing that the arguments and supporting evidence submitted are insufficient to call into question the presumption, for instance due to the arguments referring to “theoretical assumptions” rather than the actual competitive reality of the market. This provides a vague and overly broad brush means for the Commission to dismiss potentially compelling arguments which, by sheer necessity (e.g. as no existing competitor product exists at the time) may need to be grounded in “theoretical assumptions” rather than “actual reality”. The Commission’s supporting reference to the General Court’s ruling in *Google Android* does not provide a generalised basis for rejecting such arguments out of hand in all cases.

**5. The Commission’s remarks on the absence of a *de minimis* threshold must be framed consistently with the case law**

5.1 The Draft Guidelines are explicit that no *de minimis* threshold shall apply for the purposes of determining whether a dominant firm’s conduct infringes Article 102 TFEU. The passage merits setting out in full. It appears under a generalised heading as follows:

***“3.3.4 Elements that are not necessary to show the capability to produce exclusionary effects***

[...]

*75. Finally, there is no de minimis threshold for the purposes of determining whether a conduct infringes Article 102 TFEU. Any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU. Once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature. [...]*”

5.2 The statement, as is well known by the Commission, must be reconciled with the Court of Justice’s ruling in *Intel I*, at para 139. In that para, the Court of Justice overturned the General Court on a number of issues and held that, following the submission by the dominant firm of evidence-based arguments on incapability of its conduct producing the alleged foreclosure effects there needed to be an in-the-round-analysis of loyalty rebates in order to rule on their lawfulness. Specifically:

*“the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount,; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market”.*<sup>13</sup> [emphasis added].

5.3 That ruling is, moreover, re-affirmed by the Court of Justice in *Intel 2*:

*“[A]s is apparent from paragraphs 137 to 139 of the judgment on the appeal, the share of the market covered by the contested rebates and their duration are among the*

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<sup>13</sup> *Intel I*, 2017, para 139. See also para 103.

***factors which the Commission must assess in order to establish that the undertaking concerned committed an abuse of a dominant position [...]” [emphasis added].***

- 5.4 A similar sentiment was expressed by the Court of Justice in *MEO*<sup>14</sup> albeit in relation to a distinct context and category of abuse (price discrimination). Whilst the ruling reiterated that fixing an appreciability (*de minimis*) threshold is not justified, it was immediately qualified by the Court, which noted that it did not suffice that a downstream operator had merely suffered some immediate disadvantage from the price discrimination. Rather, the conduct in question must be capable of leading to an actual distortion of competition.<sup>15</sup> As AG Wahl put the point in the preceding Opinion on the case, “*possible differences in treatment which have no impact, or only a very minor impact on competition cannot constitute an abuse of a dominant position within the meaning of point (c) of the second paragraph of Article 102 TFEU.*”<sup>16</sup>
- 5.5 In making the generalised proposition that there is no *de minimis* standard, the Commission cites to *Post Danmark II*. It is true that in the very specific factual context of *Post Danmark II*, the Court of Justice, following the Opinion of Advocate-General Kokott, said that there was no fixed *de minimis* requirement. But that has to be seen in its specific context. That was a case about the Danish postal monopoly – where there was a very high market share, effectively inherited from a position of statutory monopoly, and a policy decision had been taken to open the market up to competition.
- 5.6 Furthermore, the Commission itself recognises the importance of such considerations, which at their heart go the appreciability of the relevant conduct, when going on to explicitly accept, in the exclusive dealing section of the draft guidelines that market coverage is a **relevant** factor (see para 83(b), Draft Guidelines).
- 5.7 Considering the totality of the case law, the better view, in our submission, is that, whilst there is indeed no fixed *de minimis* threshold which applies across all types of cases and sectors, considerations such as the market coverage of the conduct concerned are relevant when determining whether such conduct is actually capable of giving rise to exclusionary effects.
- 6. The harsh dividing line between the Commission’s formalistic categorisations has negative implications, particularly for pricing/discounting conduct**
- 6.1 We have a series of practical and related points which are concerns many of our clients face in their sales and marketing operations on a daily basis.
- 6.2 For the purpose of advancing these points, we refer to the example conditional volume/value discounts or rebates (“**discounts**”) that fall outside of standardised incremental volume discounts, and for which the application of a price cost test is considered not to be appropriate by the Commission (i.e. essentially, conditional discounts that lead to effective prices above the relevant cost threshold in the Draft Guidelines).
- 6.3 It is entirely conceivable that an individualised, conditional volume discount, may qualify as either a benign volume discount (where no adverse presumption applies) or a *de facto* exclusivity discount (where both presumptions of such conduct being outside of normal competition and of exclusionary effects would apply against the dominant firm). The ultimate

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<sup>14</sup> *MEO — Serviços de Comunicações e Multimédia SA*, Case C-525/16.

<sup>15</sup> Paragraphs 26 – 31.

<sup>16</sup> Opinion of Advocate General Wahl, delivered on 20 December 2017, paragraph 105, Case C-525/16.

answer may depend solely on private information not held by the dominant firm, such as the customer's total purchases for a given year (which may itself differ from prior years), or the share of demand that may be satisfied by third parties (so-called contestable sales). This is because such a discount may, unbeknownst to the dominant firm, equate to most (or 75%, using the figure footnoted as an example by the Commission) of that customer's total purchases – through no ill-intent of the firm in question. Indeed, information concerning the customer's total volume of purchases or the contestable share of its purchases may be unknowable, and yet these factors may mean the difference between the firm facing a serious and challenging set of presumptions of unlawfulness against it or not.

- 6.4 The above is exacerbated in circumstances where the Commission takes into account customer perceptions, that is, if a customer *believes*, for whatever reason, that a discount will only be granted if she purchases exclusively from the dominant company, then such a perception may tip such a discount toward being de facto conditional on an exclusive purchasing obligation.
- 6.5 With respect to conditional discounts which are not subject to (*de facto* or otherwise) exclusive purchase obligations and for which the use of a price-cost test is not appropriate, the Draft Guidelines are somewhat incoherent. At paragraph 144, it is noted that “*The use of a price-cost test may not be appropriate in cases where: ... (ii) the emergence of an as-efficient competitor would be practically impossible... In these circumstances, even a less efficient competitor may also exert a genuine constraint on the dominant undertaking. In these cases, the assessment of whether the conduct departs from competition on the merits will be carried out on the basis of the general principles set out in section 3.2.*”
- 6.6 However, the only criterion in section 3.2 which appears to be relevant to the assessment of such discounts is at paragraph 55 (f), which just refers back to the as-efficient competitor test. It would be helpful if the Commission could point to the specific criteria it will take into account in circumstances where the as-efficient competitor test is not applied for rebates/pricing conduct, as the current position remains unclear.
- 6.7 The Draft Guidelines could also benefit from some practical and ‘user friendly’ indicators for dominant firms engaged in price discounting conduct. These need not necessarily operate as a safe harbour, but would be indicia that exclusionary effects are less likely to arise. For example, in circumstances where the discounted “effective price” does not undercut the lowest actual price offered by any competitor (i.e. the dominant firm's discounted price is higher than the lowest competitor price). Such an indicator would enable a dominant firm to assess the risk relating to their proposed discount structures on the basis of publicly available data, and without the need to rely on private/confidential information from customers.
- 6.8 We raise the above points as price and volume discounts in general are commonplace business practices and the absence of clear guidelines combined with a blurry delineation between presumptively lawful and unlawful conduct, is liable to deter pro-competitive pricing strategies, ultimately to the detriment of consumers.

**CMS**

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