

Orlen S.A. comments on: „COMMUNICATION FROM THE 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”

No.	Section	Text	Comment
1.	General comment		<p>On the basis of the reading the Draft it seems that the EC shifts towards more formalistic approach. At the beginning of the Draft the EC reminds about special responsibility of a dominant undertaking which is a very vague concept. However, the most profound change seems to be introduction of presumption of anticompetitive effects of certain practices of a dominant undertaking. This division is not based on the market effects but rather practices itself. This can raise doubts as the competition authority shall analyse facts of a particular case, especially ability of a given conduct of a dominant undertaking to harm competition. The approach presented in the Draft does not stem from the law or judgements and it can raise unclarity. Also, this may have negative impact on the competitiveness and economy as companies may be more reluctant to engage in certain practices although their possible negative market effects can be unappreciable.</p>

2.	General comment		<p>Below we present suggestions that in our opinion will contribute to higher clarity and predictability with respect to the application of the Article 102 of TFUE:</p> <ul style="list-style-type: none"> • Adding examples - the EC did that in COMMUNICATION FROM THE COMMISSION Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01) what facilitates self-assessment; • Important points should be in the text of the main body of the Draft - the current Draft is not entirely composed in such a way, for instance, point 44 of the Draft: <i>44. Dominant undertakings have a special responsibility not to engage in conduct that impairs effective competition⁹⁸. This applies whether dominant undertakings engage in such conduct directly or through the actions of third parties⁹⁹.</i> <p>Footnote 99 specifies that: <i>Actions by third parties (for instance, a dominant undertaking's distributors) may be attributed to a dominant undertaking if it is established that those actions were not adopted independently by those third parties, but form part of a policy that is decided unilaterally by the dominant undertaking (judgment of 19 January 2023, Unilever Italia Mkt Operations, C-680/20, EU:C:2023:33, paragraph 33).</i></p> <p>The footnote constitutes a really crucial clarification as it concerns entities which do not constitute single economic entity. This was one of the preliminary</p>
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			<p>questions asked by the national court in Unilever case (C-680/20).</p> <ul style="list-style-type: none"> Using / ceasing to use some terms can raise questions. For instance, the Draft Guidance does not use term „anti-competitive foreclosure” which was central for 2008 Guidance. It was clear in 2008 Guidance that only anti-competitive foreclosure infringes the Article 102 of TFUE. This term was also used by the European Courts, inter alia in Case T-286/09 RENV as of 26 January 2022 Intel paras: 287,335. On the other hand, the Draft Guidelines divides forms of abuses in three categories and applies presumptions of the abuse of the dominant position. In our opinion this approach does not have grounds in judgements and can raise serious doubts.
3.	68.	<p><i>„Conduct may take place and produce exclusionary effects on the dominated market(s) or on non-dominated markets¹⁶¹. However, the substantive legal standard to prove the exclusionary effects of a conduct is the same irrespective of whether the effects take place in the dominated market or in a market different from, but related to, the dominated market¹⁶². At the same time, when assessing effects in a dominated market, the fact that in such a market competition is already weakened due to the very presence of the dominant undertaking can be taken into account.”</i></p>	<p>Orlen recognizes the need for a broader description of the current EC approach to understanding the concept of holding a position in one market and leveraging that position in related markets. In particular, it would be helpful to elaborate on the scope of the markets covered by leveraging e.g. neighbouring market, vertically related market, other type market which the dominant is economically going to engage, if it fulfils certain criteria. If the latter is also the case, an explanation concerning those criteria would be welcomed.</p>
4.	159.	<p><i>„Preferential treatment can concern, for example, the positioning or display of the leveraged product in the leveraging market³³², manipulating consumer behaviour and choice³³³ or manipulating auctions. Preferential treatment can also consist of a combination or succession of different practices over time³³⁴.”</i></p>	<p>Would it be possible to expand the issue of auction manipulations? This is undoubtedly new and important issue, whereas the Draft does not mention a specific case and does not provide details of what kind of behaviour would be considered manipulation.</p>
5.	168.	<p><i>„An objective necessity defence must be based on evidence that the behaviour of the dominant undertaking was objectively necessary to achieve a certain aim³⁵⁰. The objective necessity may</i></p>	<p>Recent events in Central and Eastern Europe, particularly the armed aggression against Ukraine, have triggered EU sanctions that have the effect of restricting entities affiliated with the</p>

		<p>stem from legitimate commercial considerations, for example, the protection of the dominant undertaking against unfair competition³⁵¹, or the placing of orders by the customer that are out of the ordinary³⁵² or if the customer's conduct is inconsistent with fair trade practices³⁵³ ...".</p>	<p>Russian and Belarusian authorities. There are also situations when an entity is not on the sanctions list but there is a risk that supplies could be used by entities included on the sanction lists. Thus, it would be welcomed if the EC could elaborate on the objective necessity defence if there is a risk as described above. It has to be noted that certain forms of sanctions imposed by states or international organisations are permanent element of the global economy, therefore providing guidance in this aspect would be helpful for conducting compliance in daily operation of dominant companies.</p>
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