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EMISA Submission on Draft Guidelines on Exclusionary abuses of dominance

1. About EMISA

EMISA is a non-profit business association, established in 2007, which represents the interests of independent manufacturers, suppliers, traders, and service providers operating in the marine diesel engine and related equipment markets. EMISA aims to give independent operators a voice, to achieve fair competition and a level playing field in the marine diesel engine and related equipment markets. In the past, policy makers tended to refer regulatory debates to (large) engine builders. However, these engine builders are market players with their own commercial interests. In these debates the many independent operators on the (brand-specific) aftermarket(s) were often not represented. EMISA represents approximately 50-60 members, mainly established in Europe. Many members of EMISA are SMEs. Their business model largely depends on excellent customer relations, high levels of quality and service, and added value based on (technical) knowledge, flexibility and innovation.

2. Marine transport, marine diesel engine markets & digitalisation

It is hard to overestimate the importance of marine transport for the general economy in the EU. Approximately 90% of worldwide trade is carried by ship. The efficiency and reliability of this service affects all consumers in terms of costs, and reliable delivery times as well as in terms of the environmental impact.

Marine diesel engines are used both for marine propulsion as well as for electrical power generation. Within the marine market, the engine builders sell their engines to the builder of the ship. The builder of the ship (shipyard) is, in principle, not the future owner of the vessel and engine, nor the end-user thereof. The shipyard which is building the vessel is concerned with the initial capital costs rather than the through life costs. The shipyard will normally give a guarantee for 12 or 24 months. Thereafter, the performance, reliability and operating costs of the engine are not of concern to the shipbuilder. All long-term running costs are transferred to the shipowner, who - in practice - has had little or no choice in the selection of the engines fitted on board. Large engine builders (OEMs) compete for market share on the primary market, which has become increasingly concentrated over the last decade. Once built-in, the engine will normally remain installed in the vessel for its entire lifetime. The primary market is separated from the (brand-specific) aftermarket(s). Ships may well have a life of more than 20 years and the engines themselves may well have a life of more than 40 years. Thus, it is the aftermarket which is of the greatest economic interest, and which will have the greatest effect on the



customers. So, the engine builder's ability to set the cost of through-life maintenance can only be controlled if there is effective competition on the secondary market.

The spare parts for one engine model are -in principle- not interchangeable with another engine model with the result that the spare parts aftermarket and the repair and maintenance and overhaul services for each engine model are separate. Under these circumstances there is a severe threat that shipowners get locked-in within the brand-specific systems created by each engine-builder. This has been an issue for decennia, but two important developments have shifted power to OEMs (engine builders) to the detriment of independent service providers and parts-manufacturers on the aftermarkets: i) vertical integration and ii) digitalisation. Especially the large market players have become vertically integrated companies, e.g. MAN Energy Solutions and Wartsila. Others, like CAT and Himsen, still rely on authorized distributors and service stations.

Due **to vertical integration** large OEMs/engine builders are now also **in direct competition** with independent repair and maintenance providers on the marine diesel engine aftermarket. With vertically integration, there is a direct interest for OEMs to distort access to technical information and data to independent suppliers.

Furthermore, due **to digitalisation** and the rapidly increasing importance of the Internet of Things (IoT) OEMs are becoming gatekeepers - technically as well as commercially - to enable access to their brand-/model-/type-specific aftermarket. Through digital means an engine can be foreclosed easily. Some examples are: access only with secret OEM-passwords, no access to data deriving from sensors in the engine, no interoperability with software in the brand-specific engine, delay in updates of software, no ability to create and develop independent software that enable independent diagnostics about the status of the engine and develop the best service at the lowest costs (hampering innovation), no interoperability that enables the creation of independent (innovative) software to run in the engine (e.g. to reduce emissions), etcetera. With digital foreclosure, no independent offers are possible on the marine diesel engine aftermarkets, which means that independent market players will disappear. Independent operators need access to data, need to be able to develop and run independent software in a safe and secure way, in interaction with the engine/the ship and the crew/shipowner. This is essential to enable independent operators to make a genuine independent offer to **their** customers. Engine builders have no incentive to create interoperability in the (software-)designs of their engines, unless forced to do so.

These developments are fundamentally threatening the very existence of the independent aftermarket(s). In the ultimate interests of end-user welfare (shipowners and ultimately consumers) effective competition needs to be maintained vigorously in order to maintain a competitive structure of brand-specific marine engine aftermarkets, which ensures that



independent operators are not foreclosed or hampered from competing effectively. Art. 102 TFEU should be used vigorously as one of the few instruments in the EU that supports this.

3. Aim of Art. 102 TFEU and need for effective guidelines on exclusionary abuses

From the Treaties follows the overarching aim of Art. 102 TFEU, which is to establish and **protect a well-functioning internal market with a system ensuring undistorted competition**¹. The well-being of consumers, i.e. consumer well-fare, is the result thereof.

The purpose of Art. 102 TFEU is stated (amongst others) in the case Servizio Elettrico Nazionale² in which the ECJ held that:

“the purpose of Article 102 TFEU more specifically is, according to settled case-law, to prevent conduct of a undertaking in a dominant position that has the effect, to the detriment of consumers, of hindering, through recourse to means or resources different from those governing normal competition, maintenance of the degree of competition existing in the market or the growth of that competition (see, to that effect, judgments of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 91; of 27 March 2012, Post Danmark, C-209/10, EU:C:2012:172, paragraph 24; and of 30 January 2020, Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 148 and the case-law cited). To that effect, as the Court has held, that provision seeks to sanction not only practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition (see, to that effect, inter alia, judgments of 15 March 2007, British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraphs 106 and 107, and of 17 February 2011, TeliaSonera, C-52/09, EU:C:2011:83, paragraph 24).”

Any ‘abuse of dominance’ presupposes dominance. The Court of Justice of the European Union (ECJ) provided a legal definition of dominance under Art. 102 TFEU: *“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the **power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.**”*³ Thus, whereas other parties on the market are disciplined in their behaviour by their competitive surroundings, dominant undertakings are not, (or not sufficient). In the Michelin-case⁴ the ECJ held therefore that a firm with a dominant firm has a *“special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.”* This special

¹ Art. 3(3) TEU, Art.3(1)(b) TFEU and Protocol No 27 to TEU and TFEU.

² Case C-377/20 Servizio Elettrico Nazionale and Others, ECLI:EU:C:2022:379 para 42-43.

³ See Case 27/76 United Brands Company and United Brands Continental v Commission [1978] ECR 207, paragraph 65; Case 85/76 Hoffmann-La Roche & Co. v Commission [1979] ECR 461, paragraph 38.

⁴ Case C-322/81 Michelin v Commission, ECLI:EU:C:1983:313, para 57.



responsibility implies that certain conduct which generally would be allowed, might be abusive if done by a dominant undertaking.

The ECJ stated in the Servizio Elettrico Nazionale⁵-case that as a first step to enforce Art. 102 TFEU: *“a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could impair, by using resources or means other than those governing normal competition, an effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers.”* If, in reply, the dominant undertaking demonstrates that exclusionary effects that could result from the practice are counterbalanced (or even outweighed) by positive effects for consumers in terms of e.g. price, choice, quality and innovation, it might escape the prohibition of Art. 102 TFEU.

This seems not too overcomplicated, however, in practice the enforcement of 102 TFEU has become so burdensome that it in effect has lost its ability to maintain the internal markets open, and moreover it has lost its deterrent effect. Under the current economic conditions, with increasing market concentration and digitalisation, dominant companies benefit more from ignoring Article 102 TFEU than from complying with it. By definition, the other market players are no able to discipline such dominant undertaking, but other means are practically impossible as well, as proceedings take much too long and are way too costly, even if not pursued via civil procedures but administrative procedures in the hands of the Commission or National Competition Authorities (NCAs). Ultimately, lengthy legal procedures - with abilities to put forwards complex economic arguments and several economic reports - enable dominant undertakings to continue their conduct in a fast-moving-economy. In the meantime, of such proceedings, the market structure is changing permanently and irreversibly by foreclosing or weakening effective competition from independent competitors.

In this context, new guidelines on exclusionary abuses are not only welcomed but simply necessary to avoid that the Art. 102 TFEU-instrument becomes fully obsolete and dysfunctional. The exclusive competence to establish competition rules necessary for the functioning of the internal market is in the hands of the EU. Guidelines are an important instrument to enable a uniform and coherent interpretation of Art. 102 TFEU. Although guidelines are without prejudice to the case-law of the European Courts, the Commission has the responsibility to keep the interpretation of 102 TFEU effective and up to date, within the boundaries of the legitimate objectives of Art. 102 TFEU.

The new draft guidelines must be more than a summary of the status of case-law but should provide clear guidance of the policy the Commission will follow and provide more legal certainty. The focus of the Commission should be to keep markets open and competitive and,

⁵ Case C-377/20 Servizio Elettrico Nazionale and Others, ECLI:EU:C:2022:379 para 47.



in that respect, pursue more and smaller cases e.g. similar abusive conduct in different jurisdictions within the EU. Proceedings should be quicker, which requires a lower standard of proof for the Commission/NCAs combined with more shift of the burden of proof to the efficiency-defence of dominant undertakings. This is much more effective as the dominant undertakings are in the best position to defend their own conduct as pro-competitive (the evidence is in their hands). Moreover, the aims of deterrence and compliance should be given much more weight in the draft guidelines. For SMEs clear examples should be included in the guidelines. In vertically integrated brand-specific aftermarkets, SMEs are (to some extent) depending on the dominant undertaking, e.g. to provide access to enable interoperability with independent parts and services. These circumstances need clear examples of conduct that would result in abuse, in general. This would support SMEs by allowing them to point at the clear example and consequently request for compliance (or be provided with an efficiency-defence).

4. Main issues that should be addressed in the guidelines on exclusionary abuses

Below the main issues that need to be addressed or adjusted in the draft guidelines are mentioned.

4.1 Need for more legal presumptions

Proceedings must become more efficient to avoid Art. 102 TFEU becoming fully dysfunctional. In the guidelines the Commission should better explain why the imbalance, which is inherent in abuse cases, justifies a shift in the evidentiary burden and legal standard of proof. The Commission's responsibility to ensure a system that ensures undistorted competition in the internal market requires a fundamental update due to a paradigm resulting from, mainly, increasing digitalization, AI and other data- driven services and electrification in much faster evolving economies.

In cases of typically harmful conduct a concept of 'abuse-by-object' could be used (in line with restrictions by object under 101 TFEU). A list of examples of such typically harmful conduct could be provided in a particular context (e.g. vertically integrated undertaking that has a gatekeeper role on the brand-specific downstream market). A plausible causality should exist between the abuse-by-object and the harm. If so, these 'abuses by object' result in a rebuttable assumption of abusive conduct. A dominant undertaking can rebut this assumption, with an efficiency-defence. This shift in burden of proof is much more efficient as the (detailed) evidence is in the hands of the dominant firm, who should be able to provide evidence that the likely anti-competitive effects are outweighed by pro-competitive effects. Any pro-competitive justification that does not prevent harm to the competitive structure and/or in case less restrictive measures



would suffice (proportionality-test) cannot be used as a successful efficiency-defence. Otherwise, the section on 'naked'-restrictions (para 60. c.) draft guidelines could be adjusted accordingly.

4.2 Lower evidentiary burden

The Commission establishes in para. 14, para. 45, para. 50 and para. 164 draft guidelines an unnecessarily high threshold that could impede effective enforcement of Article 102 TFEU. The Commission states that conduct from a dominant undertaking is liable to be abusive if that conduct departs from competition on the merits and that the commission should establish (bear the burden of proof) that the conduct indeed departs from competition on the merits.

The recent Google Shopping case⁶ has made it clear that it is not always required to demonstrate that a particular behaviour deviates from competition on the merits in every instance. There are instances where potentially competing undertakings are impeded at an earlier stage from even entering the relevant market(s) altogether. For instance, in the shipping aftermarket, independent operators may lack the ability to interact with embedded management-software or access to essential (digital) parts-codes, thereby preventing effective competition. In such cases, it is not necessary to prove that the conduct departs from competition on the merits. Anyway, to demonstrate that competition on the merits did 'not' occur is to impose a 'negative' burden of proof, which is in practice always particularly difficult to meet.

Additionally, para. 47 and 53 of the draft guidelines indicate that conduct that meets the criteria of a specific legal test is considered outside the scope of competition on the merits. The reference to the Google Shopping case underscores that even when conduct does not satisfy a specific legal test, particularly in cases of "access restrictions" (para. 163-166 draft guidelines), there might well be no requirement to show that the conduct departs from competition on the merits. This should be amended in the draft guidelines.

4.2 Refusal to supply vs Access restrictions

Access restrictions on (brand-specific) aftermarkets, refusals to supply spare parts or refusals to service non-original parts (of matching quality) are often extremely harmful to the competitive structure of the market as they create barriers to entry in the aftermarket. Efficiency-defences are often disproportional because less restrictive means could have been applied, for example, cybercrime needs to be addressed but does not justify a complete access refusal (licensing would

⁶ Case C-48/22, Google and Alphabet v Commission (Google Shopping) 10 September 2024, ELI:EU:C:2024:726, par. 165



often be possible and less restrictive and demanding detailed customer information that allows by-passing an independent operator is not necessary to obtain interoperability).

The draft guidelines make a distinction between a 'Refusal to supply' (para. 96-106) as conduct which is subject to a specific legal test and conduct with no specific legal test under which 'Access restrictions' (para.163-166) are categorised. The distinction is that a Refusal to supply refers to situations where a dominant undertaking *'has developed an input exclusively or mainly for its own use'* and that Access restrictions encompass unfair access conditions (instead of outright refusals). However, on shipping aftermarkets the lines can be thin between these categories and will need more clarity. For example, if a network of selective distributors gets access to certain parts, is an outright refusal to an independent aftermarket operator considered a 'Refusal to supply' or an 'Access restriction'. It seems the latter because the (captive) parts are developed for aftermarket use by companies other than the dominant undertaking.

The standard of proof connected to the requirement of 'indispensability' and 'capability to eliminate all effective competition' is often not true for one single part in one individual case, but several individual refusals will distort effective competition by independent operators on the internal market. For example, the independent services will cease to exist if a competitor (part of the network of the dominant undertaking) is needed for independent operators to service an engine on a ship, or if, as a further example, access to software-codes are denied and make it impossible to make independent parts (of matching quality) interoperable in the embedded engine on a ship. Thus, clarity is needed.

4.3 More focus on compliance, deterrence, and vigorous enforcement

It should also be considered that the current competitive aftermarkets for the service, repair, maintenance and overhaul of engines on ships over their long lifespan, might end if it becomes easy for dominant undertakings to refuse access, especially due to digitalisation. The fact that most of these aftermarket players are SMEs that lack the financial means and economic power to obtain their rights through civil procedures, has a bigger and irreversible impact on the market structure if 102 TFEU fails to deliver undistorted competition on the internal market.

In that respect the following is important:

- More legal certainty must be provided by providing more examples in the guidelines of conduct under specific circumstances that result in or are likely to result in an abuse. Clear examples for aftermarket abuses should be provided as it will support SMEs in requesting compliance as a preventive measure from dominant undertakings and it will make it more likely that compliance will be sought from dominant undertakings on their own initiative.



- To enhance deterrence, more and smaller cases need to be pursued, that are simple and quick to enforce. For example, several smaller conducts that are applied throughout the EU, with similar effects in different Member States (but that seem too small for an NCA to address).
- More and smaller cases would also enable the Commission to take more risk, and stick to the evidence strictly needed, instead of doing very few but very large cases. These large cases evoke additional investigations to avoid a rejection from the EU courts (which would be disastrous when there is so little chance of creating useful case-law, but in effect the case-law becomes very blurry, and Art. 102 TFEU becomes dysfunctional due to lengthy proceedings).
- Enforcement should be much more vigorous to maintain the required deterrence active. At this point the dominant undertaking calculates whether ending the abusive conduct is more profitable or not, which is likely not the case when market structures can be changed in its own advantage on the longer run. It has become much easier to eliminate competition in digital markets within a short timeframe and this should be considered when enforcing Art. 102 TFEU and addressed in the guidelines as an argument for the policy of the Commission.

5. Conclusion

Guidelines on exclusionary abuses are needed to avoid Art. 102 TFEU becoming dysfunctional. The objectives of 102 TFEU should be the core of the guidelines, i.e. maintaining undistorted competition on the internal market. In addition, the guidelines should elaborate on the need for the Commission to update its policies to keep Art. 102 TFEU a relevant instrument in the context of new challenges, such as those posed by digitalisation. The burden of proof should shift more to dominant firms, making it easier for regulators to act against anti-competitive practices. And especially to enhance compliance and aid SMEs in identifying and combating abuses, the guidelines should include many and clear examples of abuses in different contexts.

For the sake of a competitive marketplace and ultimately consumer welfare, benefitting – among others - shipowners and end-users, it is critical to reinforce the application of Article 102 TFEU and its deterrence. Enhanced guidelines and more adequate enforcement with more and smaller cases is needed.