

## Linklaters LLP response to European Commission consultation on guidelines on exclusionary abuses

- (1) We welcome the opportunity to respond to the European Commission's call for contributions with respect to the draft guidelines on exclusionary abuses (hereafter the "Guidelines").<sup>1</sup>
- (2) We support the purpose of the Guidelines to codify and clarify the case law on exclusionary abuses and thereby promote "*a predictable, coherent and workable framework to assess abusive conduct*".<sup>2</sup> There are, however, several areas where we believe further clarification will ensure that the Guidelines promote both effective enforcement and legal certainty to the benefit of EU businesses and consumers.
- (3) Our contribution follows the structure of the Guidelines. In Section I we set out general comments on the Guidelines. Section II contains our views on the concept of dominance. Section III sets out our views on the concept of abuse. In Section IV we comment on specific categories of abuses and in Section V on the concept of objective justification.

### I. General Comments on the Guidelines

- (4) Article 102 TFEU makes illegal certain types of unilateral conduct. The Commission and national competition authorities have the power to impose significant fines for infringement. Parties adversely affected by such conduct can also claim significant damages for infringements. Clarity on what conduct Article 102 TFEU prohibits is therefore important to preserve the rule of law as well as ensure effective market outcomes.
- (5) Whilst we welcome the introduction of Guidelines as an important step to codify and clarify the existing law, there are a number of areas where we believe the Guidelines are at risk of undermining legal certainty.
- (6) The Guidelines should maintain the principle of anti-competitive foreclosure (paras. 5 - 7). The 2009 Enforcement Priorities for exclusionary abuses stated that enforcement aimed to prevent dominant undertakings from foreclosing their competitors 'in an anti-competitive way' ("***anti-competitive foreclosure***").<sup>3</sup> Therefore not all foreclosure is necessarily problematic. This reflects the foundational principle that effective competition may "*by definition, lead to the departure from the market or the marginalization of competitors that are less efficient*".<sup>4</sup>
- (7) The Guidelines in contrast refer to '*exclusionary effects*', which appear to go beyond anti-competitive foreclosure and catch conduct which excludes competitors whose failure is mainly due to their inefficiency and are therefore not entitled to protection under the law. It also puts the emphasis of what is legal or illegal on the concept of 'competition on the merits': a concept which is open to arbitrary interpretation.
- (8) By discarding this principle of anti-competitive foreclosure, the Guidelines thus risk undermining legal certainty and effective market outcomes. To the extent that the Commission believes it needs to clarify that foreclosure of less efficient rivals may harm efficient market functioning in some circumstances, we

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<sup>1</sup> Draft Communication from the European Commission, 1 August 2024, "Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings".

<sup>2</sup> European Commission Press release, 1 August 2024, IP/24/3623, "Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses".

<sup>3</sup> Communication from the European Commission, 24 February 2009, 2009/C 45/02, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", para. 19 (the "Guidance on Enforcement Priorities").

<sup>4</sup> Judgment of 6 September 2017, Case C-413/14 P, *Intel Corporation*, ECLI:EU:C:2017:632, para. 134. We also note that the Guidelines paraphrase the principle in para. 51 to state that Article 102 TFEU "*does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking ...*" (*emphasis added*).

believe it is possible to do so without abandoning the principle of anti-competitive foreclosure. We would recommend reinstating it.

- (9) The use of presumptions cannot undermine the importance of establishing anti-competitive effects (para. 60(b)). The Guidelines delineate between naked restrictions, conduct that is presumptively abusive and conduct for which the Commission must prove the capability to produce anti-competitive effects (para. 60). Whilst correctly calibrated rebuttable presumptions can in principle serve both the administrability of Article 102 TFEU and legal certainty, the Guidelines contend that:
- Where a dominant undertaking seeks to rebut the presumption, the Commission may either (A) show that the dominant undertaking's arguments and evidence do not call into question the presumption or (B) provide '*evidentiary elements*' demonstrating the capability to foreclose based on the scope and nature of the dominant undertaking's arguments and evidence.
  - Even where an undertaking has successfully called into question whether its conduct is capable of anti-competitive foreclosure, the "*evidentiary assessment must give due weight to the probative value of the presumption*".<sup>5</sup>
- (10) Neither element is based on the case law. *Intel* instead provides that where the dominant undertaking submits that its conduct is not capable of restricting competition on the basis of supporting evidence, the Commission must assess the conduct in the relevant circumstances.<sup>6</sup> The claim that such an approach is justified because such conduct has '*a high potential to produce exclusionary effects*' runs contrary to practical reality. Provisions such as exclusive dealing may have no anti-competitive effects and are often pro-competitive. If retained, we would suggest that any presumption of anti-competitive effects should be consistent with the test laid down in *Intel*.
- (11) The Guidelines must take into account the AEC principle for determining whether conduct is competition on the merits. The Guidelines stipulate that a price-cost test is "*generally inappropriate for assessing whether non-pricing practices depart from competition on the merits*" (although it is rightly not ruled out as held by the Court of Justice in *Unilever*).<sup>7</sup> This is correct but ignores that other evidence capable of demonstrating that non-pricing practices are incapable of foreclosing efficient rivals is still relevant. As the Court of Justice held in *SEN*:
- "[t]he relevance of the material or rational impossibility for a hypothetical competitor, which is as efficient but not in a dominant position, to imitate the practice in question, in order to determine whether that practice is based on means that come within the scope of competition on the merits, is clear from the case-law on practices both related and unrelated to prices."*<sup>8</sup> (*emphasis added*)
- (12) We would recommend that the Guidelines reflect this statement and clarify the importance of evidence demonstrating that as-efficient rivals would not be able to match the allegedly abusive conduct.

## II. Comments on Dominance (Section 2)

- (13) The Guidelines build on established case law in relation to the assessment of dominance. There are, however, two points where we believe the Guidelines can provide greater clarity.
- (14) The Guidelines should include a presumptive safe-harbour that an undertaking does not hold a dominant position in a market where its share is below 40%. The Guidelines broadly repeats established case law and in particular reiterates the *Akzo* presumption of dominance in relation to market shares of 50% or more (para. 26). The safe harbour of 40% in the Guidance on Enforcement Priorities has, however, been

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<sup>5</sup> Guidelines, para. 60(b).

<sup>6</sup> Judgment of 24 October 2024, Case C 240/22 P, *Intel Corporation*, ECLI:EU:C:2024:915, para. 110.

<sup>7</sup> Guidelines, para. 56; Judgment of 19 January 2023, C-680/20, *Unilever Italia Mkt Operations*, EU:C:2023:33, para. 59.

<sup>8</sup> Judgment of 12 May 2022, Case C-377/20, *Servizio Elettrico Nazionale*, ECLI:EU:C:2022:379, para. 79.

lowered to 10%.<sup>9</sup> This one-sided adjustment unnecessarily undermines legal certainty and is impractical, particularly in circumstances where the *De Minimis* Notice considers agreements involving parties with market shares of 10% to be of minor importance.<sup>10</sup> The Guidelines could include a presumption of no dominance in cases of market shares below 40% without unduly circumscribing the Commission's freedom to intervene in the exceptional cases where dominance may be found below that threshold. It would also be immensely beneficial if the Guidelines included more examples of scenarios that would negate a finding of dominance.

- (15) The Guidelines should not import the test for collective dominance from merger control (paras. 34 - 42). The Guidelines are intended to clarify the case law on exclusionary abuses. The EU Courts have consistently interpreted the notion of collective dominance narrowly, limited to circumstances where there are significant commercial links between the undertakings concerned (*Compagnies Maritimes Belges* and *Irish Sugar*).<sup>11</sup> The Guidelines are tellingly unable to refer to any case law concerning Article 102 TFEU to support its inclusion.
- (16) The issue for competition policy appears to arise out of the coordination of a number of undertakings, combined with the ability to monitor adherence to the terms of their coordination as per the *Airtours* case.<sup>12</sup> In that context, there is a risk that this analysis would enable Article 102 TFEU to regulate oligopolistic practices and thereby blur the line between Articles 101 and 102 TFEU. We consider that the test for collective dominance should not be expanded in this manner. If the Commission believes that it is necessary to address collective dominance, we recommend that it adopts the test set in the case law on Article 102 TFEU.

### III. Comments on Abuse (Section 3)

- (17) The introduction to the section on exclusionary abuses provides that the anticompetitive conduct of third parties can be attributed to a dominant undertaking (para. 44). The high bar for attribution is only included in a footnote, namely that the relevant actions: “*were not adopted independently by those third parties, but form part of a policy that is decided unilaterally by the dominant undertaking*”.<sup>13</sup> To avoid giving the impression that conduct of third parties can be attributed more generally, we recommend that the Guidelines specify the test directly and in full in para. 44 (notably that “*implementation*” of the dominant undertaking's policy is indeed an essential condition for imputability).<sup>14</sup>

#### A. Competition on the merits (Section 3.2)

- (18) While we agree that competition on the merits plays an important role in the case law, there is a risk that the importance given to the concept in the Guidelines undermines legal certainty, unless it is properly calibrated.
- (19) The “*relevant factors*” for establishing whether conduct is on the merits risk undermining legal certainty (para. 55). The Court of Justice has recently clarified in *SEN* and *Unilever* that conduct which (A) serves no other economic purpose than eliminating competitors (economic irrationality test) or (B) uses “*resources or means inherent*” to a dominant position that cannot be replicated by as-efficient rivals (non-

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<sup>9</sup> Guidelines, footnote 41.

<sup>10</sup> Communication from the European Commission, 30 August 2014, 2014/C 291/01, “Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union”, para. 8 (the “*De Minimis* Notice”).

<sup>11</sup> Judgment of 10 July 2001, joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports and Others*, ECLI:EU:C:2001:393.

<sup>12</sup> Judgment of 6 June 2002, *Airtours*, ECLI:EU:T:2002:146.

<sup>13</sup> Guidelines, footnote 99.

<sup>14</sup> Judgment of 19 January 2023, Case C-680/20, *Unilever Italia Mkt Operations*, ECLI:EU:C:2023:33, para. 33.

replicability test), should be regarded as departing from competition on the merits.<sup>15</sup> While these tests are not exhaustive, they nevertheless provide a workable framework for whether conduct is potentially abusive.

- (20) The Guidelines, in contrast, lack a conceptual framework for assessing whether conduct is contrary to competition on the merits:
- The “*relevant factors*” do not correspond to a general framework but instead constitute specific circumstances in which conduct has been found abusive. As such, they are incapable of providing a workable means for undertakings to evaluate whether their conduct is potentially abusive. This shortcoming is exacerbated by footnote 118 which provides that “[t]his should not be understood as an exhaustive list of all the factors that may be relevant to establish that a given conduct departs from competition on the merits.”
  - Most of the conduct identified as “factors” can also be characterized as being based on either the economic irrationality or non-replicability tests. For example, discriminatory treatment in both *SEN* and *Google Shopping* was abusive in circumstances where it involved access to key inputs and customer traffic which non-dominant rivals could not replicate.<sup>16</sup> The same holds true of *AstraZeneca* where the provision of misleading information to a patent authority served no other purpose than eliminating competition (in that case by extending the relevant patent by what should have been permissible).<sup>17</sup>
  - The factors listed also risk overstating the case law in some instances. In particular, the Court of Justice held in *Google Shopping* that the General Court had not relied on the alleged “*abnormality*” of Google’s conduct to establish that its self-preferencing was contrary to the merits (*a contrario* para. 55(e)).<sup>18</sup>
- (21) We would, for these reasons, recommend that the Guidelines set out the economic irrationality and non-replicability tests for assessing whether conduct is contrary to the merits and clarify that the “*relevant factors*” in para. 55 represent specific circumstances in which conduct has been found to be contrary to the merits of competition.
- (22) Protecting competition from less efficient rivals (para. 57). The Guidelines provide that conduct which “*at first sight does not depart from competition on the merits*” such as above cost pricing may nevertheless do so “*based on an analysis of all legal and factual elements.*” As set out in our general comments, this statement risks undermining the principle that Article 102 TFEU only prohibits conduct that may cause anti-competitive foreclosure. Without a proper focus on anti-competitive foreclosure (as was the case in the Guidance on Enforcement Priorities), the Guidelines risk re-opening an area of unpredictability and lack of economic analytical rigour.
- (23) In this framework, dominant undertakings can no longer be confident that conduct which would not foreclose as-efficient rivals constitutes “normal” competition. It also entails an immediate loss for consumers since dominant firms are unable to offer better pricing or conditions to customers by fear of infringing Article 102 TFEU. We would, for these reasons, recommend that this section is deleted or at the very least that the Guidelines specify that this only occurs in limited circumstances where the characteristics of the market mean that it is not feasible for as efficient rivals to co-exist and. As stated in

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<sup>15</sup> Judgment of 12 May 2022, Case C-377/20, *Servizio Elettrico Nazionale*, ECLI:EU:C:2022:379, para. 78; Judgment of 19 January 2023, Case C-680/20, *Unilever Italia Mkt Operations*, ECLI:EU:C:2023:33, para. 57; Judgment of 3 July 1991, Case C-62/86, *AKZO*, ECLI:EU:C:1991:286, paras. 70-71.

<sup>16</sup> Judgment of 12 May 2022, Case C-377/20, *Servizio Elettrico Nazionale*, ECLI:EU:C:2022:379, para. 82; Judgment of 10 November 2021, Case T-612/17, *Google Shopping*, ECLI:EU:T:2021:763, paras. 170-173 and 224-225.

<sup>17</sup> Judgment of 6 December 2012, Case C-457/10 P, *AstraZeneca*, ECLI:EU:C:2012:770, para. 110.

<sup>18</sup> Judgment of 10 September 2024, Case C-48/22 P, *Google Shopping*, ECLI:EU:C:2024:726, para. 195.

*Post Danmark II*, “the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market” (i.e. intervention is likely to protect consumer welfare).<sup>19</sup>

## **B. Capability to produce exclusionary effects**

- (24) The Guidelines set out three categories of conduct, along with the necessity for the Commission to demonstrate exclusionary effects (para. 60). The Guidelines differentiate between (A) naked restrictions, where rebuttal is rare; (B) exclusive dealing, predatory pricing, margin squeezing, and certain forms of tying, which have a rebuttable presumption of exclusionary effects; and (C) other conduct, where the Commission must demonstrate “*capability to produce*” such effects.
- (25) The standard of evidence for proving effects is too low (para. 60(a)). The Guidelines provide that the Commission need only advance “*specific, tangible points of analysis and evidence*” to demonstrate exclusionary effects. This means that the Guidelines impose an asymmetric burden of proof on the Commission vis-a-vis dominant undertakings which must provide a “*cogent and consistent body of evidence*” to substantiate objective necessity or countervailing efficiencies (para. 171). This also differs from the Guidance on Enforcement Priorities in which the Commission set out that it would only prioritize enforcement if there was cogent and convincing evidence that the alleged abusive conduct was likely to lead to anti-competitive foreclosure.<sup>20</sup> There is no plausible defence for granting the Commission a lower standard of evidence for proving a *prima facie* abuse versus what a dominant must prove for efficiencies.
- (26) The Guidelines should clarify that the Commission must prove the likelihood of exclusionary effects (paras. 61 - 67). These effects must be “*more than hypothetical*” and based on specific, tangible evidence, without needing to show “*actual exclusionary effects*”. We note that this standard is far less stringent than the Guidance on Enforcement Priorities, which required “*likely*” exclusionary effects substantiated by detailed analysis and evidence. The idea that effects only need to be “*more than hypothetical*” also conflicts with Court of Justice in *Post Danmark II*, which stipulated that:

*“It follows that only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article 82 EC.”<sup>21</sup>*

- (27) This is also consistent with the standard of proof in merger control. The Court of Justice in *CK Hutchison* has recently reiterated that the balance of probabilities applies to assessing whether a concentration significantly impedes effective competition.<sup>22</sup> There is no basis for a different standard under Article 102 TFEU. The practical effect would be to permit the prohibition of conduct which is unlikely to give rise to anti-competitive effects. In such circumstances, intervention is likely to harm consumer welfare than enhance it.
- (28) The Guidelines should clarify that naked restrictions only concern exceptional conduct that is irrefutably anticompetitive and cannot possibly be justified (para. 60(c)). The category of “naked restrictions” must be interpreted narrowly since it entails a presumption that an undertaking will only “*exceptionally*” be able to prove that in the specific circumstances the conduct was not capable of having exclusionary effects.

## **IV. Comments on the specific categories (Section 4)**

- (29) We welcome the guidance on the specific categories of abuse (consistent with *Google Shopping* where the Court of Justice recognises that specific legal tests, or “*different analytical templates*”, can be used to establish whether conduct is contrary to the merits of competition).

<sup>19</sup> Judgment of 6 October 2015, Case C-23/14, *Post Danmark II*, ECLI:EU:C:2015:651, para. 60.

<sup>20</sup> Guidance on Enforcement Priorities, para. 20.

<sup>21</sup> Judgment of 6 October 2015, Case C-23/14, *Post Danmark II*, ECLI:EU:C:2015:651, para. 67.

<sup>22</sup> Judgment of 28 May 2020, Case T-399/16, *CK Telecoms UK*, ECLI:EU:T:2020:217, para. 118.

#### A. Categories of abuse with specific legal tests (Section 4.2)

(30) Exclusive Dealing (paras. 78 - 83):

- The Guidelines should clarify the application of the AEC test to exclusive dealing. The legal test for exclusive dealing does not mention the as-efficient competitor test ("**AEC test**"). As clarified in *Intel*, the capability of loyalty 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.*"<sup>23</sup> The Court of Justice also recognized in *Unilever* that the AEC test may be relevant for assessing exclusive dealing irrespective of whether the case concerns a pricing element.<sup>24</sup> The Guidelines should clarify both points in order to ensure consistency with the case law.
- The Guidelines should clarify the need to assess the capability of exclusive dealing practices to foreclose in the specific circumstances. The Guidelines address the circumstances which are likely to mean that exclusive dealing practices have exclusionary effects but omit the circumstances which make them less likely to do so. In particular, undertakings frequently single source particular products for a variety of reasons. In such circumstances, exclusive dealing is not capable of anti-competitive foreclosure as the Court held in *Qualcomm*.<sup>25</sup> To reflect this, we would suggest that the characteristics of demand are accordingly included in the relevant factors which are assessed in relation to exclusive dealing.

(31) Tying should be subject to an effects assessment (paras. 84 - 95). The Guidelines provide that in some circumstances "*tying has a high potential to produce exclusionary effects and those effects can be presumed*" whereas in other circumstances "*a closer examination of actual market conditions may be warranted.*" For the purposes of legal certainty we would recommend that the Guidelines apply an effects standard to all tying practices since there is insufficient clarity on when tying is presumptively anti-competitive and when it is not. Such an approach would also be consistent with recent case law and the fact that tying is frequently pro-competitive (and results in lower prices for consumers).

#### B. Categories of abuse with no specific legal tests (Section 4.3)

(32) Conditional rebates (paras. 138 - 151). Consistent with *Intel*, the Guidelines should clarify that the Commission should apply an AEC test as a "*general rule*" to assess whether conditional rebates are contrary to competition on the merits and capable anti-competitive foreclosure.<sup>26</sup> The circumstances identified in para. 144(b) as unsuitable for the application of an AEC test should only constitute exceptions to the "*general rule*".

(33) Self-preferencing (paras. 156 - 162). The Guidelines propose three non-cumulative criteria for when self-preferencing is likely to depart from competition on the merits. Self-preferencing is an inherently normal commercial practice: firms inherently use their own resources for their own purposes. It is therefore critical that Article 102 TFEU does not impose an unduly broad test that chills perfectly legitimate commercial practices.

(34) To this end, self-preferencing can only be contrary to the merits in circumstances where the leveraging market is an important input or distribution channel for the dominant firm's rivals in the leveraged market (consistently with *Google Shopping*). We would also strongly recommend clarifying that self-preferencing is also only likely to be contrary to the merits where the relevant input or distribution channel is inherently open (and hence self-preferencing is contrary to the underlying business model). Otherwise there is a

<sup>23</sup> Judgment of 24 October 2024, Case C 240/22 P, *Intel Corporation*, ECLI:EU:C:2024:915, para. 181.

<sup>24</sup> Judgment of 19 January 2023, C-680/20, *Unilever Italia Mkt Operations*, EU:C:2023:33, para. 59.

<sup>25</sup> Judgment of 15 June 2022, Case T-235/18, *Qualcomm (Exclusivity payments)*, ECLI:EU:T:2022:358, para. 414.

<sup>26</sup> Judgment of 24 October 2024, Case C 240/22 P, *Intel Corporation*, ECLI:EU:C:2024:915, para. 181.

risk that it applies to inputs or distribution channels that the dominant firm has reserved fully or partially for its own use (and hence should be assessed as a refusal to supply).

- (35) Access restrictions (paras. 163 - 166). The Guidelines currently provide that a dominant undertaking “cannot cease supplying existing customers who are competing with them in a downstream market, if the customers abide by regular commercial practices and the orders by them are in no way out of the ordinary.” The effect of the provision is to impose a duty to supply on dominant undertakings irrespective of whether there are good commercial reasons for terminating supply. It is also likely to disincentivize undertakings from supplying inputs where they may subsequently wish to remove them from the market to the detriment of consumers.
- (36) The approach risks distorting the established case law. The Guidelines refer to *Commercial Solvents* and *Syfait II* as authorities. However, the former concerned circumstances in which the termination of supply eliminated “all competition” on the part of the customers, while the latter concerned a refusal to supply which was likely to partition the internal market. Neither justify the imposition of a general duty to supply in such circumstances.

## **V. Objective justification (Section 5)**

- (37) Consistent with *Intel*, the Guidelines should clarify that the “balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission’s decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.”<sup>27</sup>

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<sup>27</sup> Judgment of 6 September 2017, Case C-413/14 P, *Intel Corporation*, ECLI:EU:C:2017:632, para. 140.