

**CONSULTATION ON DRAFT GUIDELINES ON EXCLUSIONARY  
ABUSES BY DOMINANT UNDERTAKINGS  
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

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## COMMENTS OF INDEPENDENT RETAIL EUROPE ON DRAFT GUIDELINES ON EXCLUSIONARY ABUSES BY DOMINANT UNDERTAKINGS

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Independent Retail Europe welcomes the proposed publication of a set of guidelines on exclusionary abuses by dominant undertakings within the framework of article 102 TFEU, as this would strengthen the Single Market and raise legal certainty for all market operators about the behaviours of large/dominant economic operators.

Nevertheless, we consider that the draft guidelines should provide more clarity on certain aspects (e.g. threshold for dominance) or be more in line with ECJ case law (e.g. categorisation of abuses and standard of proof). Moreover, an explicit reference to market partitioning practices by dominant firms (e.g. territorial supply constraints) and how they should be treated (as such practices also have an exclusionary dimension) is missing in the draft guidelines.

### 1. Market position of the undertaking and threshold under which dominance is unlikely

The 2009 guidelines indicated that dominance was unlikely under a 40% market share. However, para 26 seems to change this approach, as the indicative threshold of 40% is no longer mentioned, and is replaced by a footnote stating that dominance is excluded under a 10% market share.

Though we understand the Commission's more cautious approach due to developments in digital and data markets, we consider that:

- An indicative figure under which dominance is unlikely is very useful for companies and in-house counsels when assessing risks, as it can also be used in various trainings within companies to guide market behaviour.
- The absence of a higher than 10% threshold raises an issue in terms of legal coherence, as the Vertical Block Exemption Regulation (VBER) uses a 30% market share threshold to assume that competition issues are unlikely in vertical agreements under this threshold. It is therefore unlikely that a market share below 30% would lead to dominance, if the VBER uses this threshold to provide a safe harbour in vertical agreements. This is particularly true as the VBER provides a safe harbour for some vertical agreements covered by this guidance (e.g. exclusive supply or purchase).

The guidelines should therefore at least acknowledge that dominance is unlikely below a 30% market share.

#### Our recommendation:

- ➔ In para 26, explicitly indicate a market share threshold under which dominance is unlikely. Such threshold should be coherent with the threshold used in the VBER (e.g. 30%)

### 2. Criteria considered to establish single dominance

Para 25-33 provide a list of factors to consider when assessing dominance. To provide more legal certainty, this part of the guidance could clarify whether the criteria mentioned are also applicable in merger control proceedings.

#### Our recommendation:

## → Clarify if the same criteria are used in merger proceedings

### 3. Capacity to produce exclusionary effects

Para 60 distinguishes between three categories of conduct: conducts capable of having exclusionary effects, conducts with a high potential of exclusionary effects for which a rebuttable presumption of these effects apply, and naked restrictions.

We believe that the categorisation proposed and the impact on the ability to rebut presumptions is not fully in line with the ECJ case law, as the wording suggest the creation of new ‘by object’ restrictions which in practice may be impossible to rebut completely.

Such indirect effect would contradict ECJ case law: the ECJ imposed on the Commission a duty to scrutinise each case according to the specific facts for some of the practice listed in case some evidence is presented by the defendant. For instance, concerning exclusivity, the ECJ explicitly stated in case C-680/20 (para 51/52) that “*their ability to exclude competitors is not automatic*” and that the competition authority must assess on a case by case basis the ability of the disputed clauses to restrict competition. Similar considerations are also made in the Google shopping case (para 166). Moreover, even for naked restrictions the ECJ stressed the importance of the effects analysis under the AEC test. Furthermore, the ECJ in its recent judgement in the Intel case (C-240/22 P) clearly stated that even for practices which can be assumed to have restrictive effects on competition, there is no ‘per se infringement’ of article 102 TFEU and that, in light of supporting evidence submitted by the defendant, the Commission must conduct a full effects analysis on the capacity of the conduct to exclude competitors.

The current wording of the guidelines does not recognise this duty on the Commission to assess the effect of each conduct following evidence presented (e.g. it says instead that the Commission will examine whether the presumption is rebutted – para 60(b) 4<sup>th</sup> paragraph – which is not the same). In practice, the draft guidelines would result in a much a lower burden of proof for the Commission for these practices (and the de facto creation of ‘by object’ restrictions) that is not compatible with the duties imposed by the ECJ on the Commission.

We therefore invite the Commission to amend this Chapter of the guidelines to align fully on the ECJ case law.

#### Our recommendation:

→ **Do not create ‘by object’ restrictions which are in practice impossible to rebut and fully align chapter 3.3 and the categorisation on ECJ case law, notably in light of the duties it imposes on the Commission/competition authorities to always assess the potential effect of conducts when disputed (with evidence) by the defendant.**

### 4. Conducts subject to legal test – exclusive dealing

Para 78 and footnote 184 state that exclusive dealings include obligations to purchase or sell ‘most’ of a customer’s or a supplier’s requirements from the dominant firm. Unfortunately, there is no guidance as to what in practice means the word ‘most’, therefore undermining legal certainty.

We therefore invite the Commission to provide an indicative threshold above which the agreement can be assumed to be qualified as an exclusive dealing.

**Our recommendation:**

- ➔ **In para 78, provide guidance to clarify as to above which threshold the dealing is likely to be considered exclusive (or under which it is unlikely to be considered exclusive).**

**5. The guidelines should include a section on market partitioning practices (e.g. territorial supply constraints and similar practices) which can be both exploitative and exclusionary**

The draft guidelines on exclusionary practices currently do not contain any reference to the abusive practice of market partitioning. Such practices are unfortunately widespread in branded food and FMCG markets, where they are also known as Territorial Supply Constraints (TSCs), as shown by the AB inBev (2019) and Mondelēz (2023) cases, by the European Commission study on [“territorial supply constraints in the EU retail sector”](#) (2020) and by the fact that the Council tasked this year the Commission with a fact finding mission on territorial supply constraints.

Market partitioning is a specific type of abuse, and given their frequency by dominant actors, **it deserves specific and explicit attention in the guidelines, notably as market partitioning can have both exclusionary and exploitative effects**: for instance territorial supply constraints imposed by dominant suppliers result in both the imposition of unfair conditions on buyers in some territories (exploitative effect) and in the restriction of intra-brand competition and exclusionary effect on potential competition from resellers cross-border (i.e. dominant supplier in market A and B, selling at more competitive prices in market B and implementing measures to prevent parallel trade and in effect prevent distributors in market B from reselling the product in market A to local buyers where the dominant firm sells at higher prices).

As ECJ case law and various European Competition decisions recognise explicitly that market partitioning (and therefore territorial supply constraints) by dominant companies are contrary to article 102 TFEU, the guidelines should explicitly acknowledge this as well.

**We therefore invite the Commission to:**

- ➔ **Acknowledge in the guidelines that market partitioning practices (e.g. territorial supply constraints) by dominant firms can have exclusionary effects and are in all circumstances (be they exclusionary or exploitative) contrary to article 102 TFEU;**
- ➔ **Add references to market partitioning practices as a form of conduct departing from competition on merits (chapter 3.2);**
- ➔ **Provide examples of market partitioning conducts (e.g. measures impeding parallel imports or with similar effects, or measures taken to make it difficult to (re)sell the products in other countries);**
- ➔ **Add under the section on exclusionary refusal of supply a reference to cases where such conducts are meant to partition the single market.**

*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

*Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.*

*Independent Retail Europe represents 24 groups and their over 501.000 independent retailers, who manage more than 764.000 sales outlets, with a combined retail turnover of more than 1.411 billion euros and generating a combined wholesale turnover of 621 billion euros. This represents a total employment of more than 6.440.000 persons.*

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