

Commission consultation: Guidelines on exclusionary abuses of dominance
Response by Skyscanner Limited

1 Introduction

- 1.1 Skyscanner Limited (**Skyscanner**) operates a free-to-use meta-search platform in the travel sector. The Skyscanner website displays flight, hotel and car hire deals offered by third parties, allowing consumers to search for and compare different offers and prices. After searching for a specific flight route on Skyscanner's website, consumers are directed to third party websites where the booking takes place. Skyscanner contracts with hotel, flight and car hire suppliers and online travel agencies (**OTAs**) for the inclusion of their offerings in Skyscanner's meta-search results. Skyscanner is active in over 30 countries globally, generates a significant proportion of its turnover in the EEA and has a physical presence in the EEA via its Barcelona office. As a non-transactional meta-search platform, our ability to provide consumers with the chance to compare offers from across the travel industry depends on fair access to data from our third-party business relationships. We therefore have a deep interest in an open, fair and competitive landscape, particularly in the provision of and redistribution of travel data.
- 1.2 Given this, as an online platform that is highly important to EEA consumers and is heavily affected by the European Commission's (**Commission**) enforcement of abuse of dominance rules, Skyscanner welcomes the opportunity to comment on the 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 (the **Draft Guidelines**). Skyscanner has chosen to concentrate its submissions on a select few areas of the Draft Guidelines in respect of which it would be most useful to receive clarification.

2 Refusal to supply

- 2.1 Skyscanner welcomes the Commission's attempt to provide more detailed guidance on refusal to supply in light of the most recent case-law arising from the European Courts and the Commission's most recent decisional practice (both of which, Skyscanner notes, are still evolving, with relevant decisions published after the publication of the Draft Guidance). However, there are various areas in which Skyscanner would appreciate further clarification [REDACTED].
- 2.2 First, it would be useful for the Commission to clarify, in the refusal to supply section, that the *Bronner* criteria¹ apply only in very specific circumstances.
- 2.3 The guidance alludes to this by stating that the *Bronner* test applies only where a dominant undertaking has developed an input "*exclusively or mainly for its own use*". However, this does not explain whether it is for the dominant undertaking to declare whether a product or type of content is for its sole use, and whether it is free to make this decision for any reason whatsoever.
- 2.4 Second, it would also be useful to provide further clarity on an undertaking's general freedom to refuse to supply where it has decided an input should be for its own use. In particular:

¹ Under *Bronner*, the following three conditions must be fulfilled before the refusal by the dominant company to grant access to a service constitutes an abuse under Article 102 TFEU. It is necessary that: (i) the refusal is likely to eliminate all competition in the market on the part of the person requesting the service, (ii) the refusal be incapable of being objectively justified, and (iii) the service in itself be indispensable to carrying out that person's business, i.e., there is no actual or potential substitute to the requested input.

- (a) whether a dominant undertaking is free to decide to refuse to supply where doing so would close off the possibility of a secondary sales market and/or an intermediary market that it would otherwise have to compete with (and is therefore motivated by a desire to insulate itself from competition).
- (b) whether the answer to this would be affected by the wider practice of the industry that the dominant undertaking forms a part of – e.g. whether the fact that a dominant undertaking's competitors (including direct horizontal competitors and/or competing resellers or intermediaries) do provide particular content or data to a particular counterparty demonstrates that for the dominant undertaking to do so would not be an undue restriction on its freedom of contract and right to property.
- (c) whether a dominant undertaking's right to refuse to supply in ordinary circumstances covers only a right to refuse to sell content for resale or also includes a right to ban content from being provided to online intermediaries (e.g. comparison websites and search engines) for the purposes of being displayed to end-consumers.
- (d) whether a dominant undertaking is permitted to refuse to supply on grounds other than freedom of contract or intellectual property rights, e.g. alleged safety concerns or regulatory requirements which are proven to be false (either by a claimant, a national court, or some other competent regulatory body or authority).

[REDACTED]

- 2.5 Third, it would also be useful to provide further detail on what kinds of "inputs" may be the subject of a refusal to supply. Some of this is already contained in the list of inputs at footnote 236, but data and content should also be included in the list. It would be useful to explicitly state, following recent cases in the EU rail sector, that an undertaking may be dominant in the supply of its own data and content and therefore the refusal to supply rules would apply to any refusal to provide that data or content to a customer (which may compete with that undertaking downstream) or a direct competitor.

3 Access restrictions

- 3.1 Especially in this area, there is considerable overlap between exploitative and exclusionary abuses, for example the conditions which may be imposed upon access could be unfair trading conditions. We have concerns in this respect but understand the scope of this consultation is limited to exclusionary abuses.
- 3.2 Again, Skyscanner welcomes the Commission's attempt to provide more detailed guidance on access restrictions in light of the most recent case-law arising from the European Courts and the Commission's most recent decisional practice (both of which, Skyscanner notes, are still evolving, with relevant decisions published after the publication of the Draft Guidance). However, there are various areas in which Skyscanner would appreciate further clarification [REDACTED].
- 3.3 In particular, Skyscanner would appreciate further examples at paragraph 166 of types of access restriction that could be considered abusive.
- 3.4 First, under (a), it would be useful to provide further guidance on the extent to which these principles apply where the access restrictions are not being imposed on an *existing* customer that is now competing with the supplier downstream, but instead a *new* customer which is seeking to begin dealings with the supplier, but which is faced with the supplier imposing access

restrictions. In particular, the party seeking to access the input for which restrictive conditions are being imposed may be "new" insofar as:

- (a) they have no pre-existing relationship with the dominant undertaking at all (e.g. as the party's business or business model is new or novel).
- (b) they have a pre-existing relationship with the dominant undertaking under one form of business model and are now moving to a new type of business model.
- (c) they have previously obtained the dominant undertaking's content/ input via indirect sources (and therefore have previously not had a relationship with the dominant undertaking) which the dominant undertaking has now moved to prevent in order to force a direct business relationship (which, arguably, would therefore be a "new" relationship).

3.5 If it is the case that this principle only applies to *existing* customers, it would be useful to better understand why this is the case and why the same principle should not apply to *new* customers too.

3.6 Second, under (c), it would be useful to provide more examples of what might count as unfair access conditions. Examples may include, for example:

- (a) terms which are designed to prevent the counterparty from providing an attractive offer in a downstream market, e.g. making access to the input conditional on not undercutting a dominant undertaking's pricing or on other terms which are designed to favour the dominant undertaking over its direct competitors and/or competing re-sellers or intermediaries. There is now guidance available on similar theories of harm in the context of the application of Article 101 to Most Favoured Nation clauses. It would be helpful to understand how the EC would analyse similar facts under Article 102.
- (b) imposing access restrictions which are tied to purported regulatory, safety or other external requirements which are proven to be untenable.
- (c) where the dominant undertaking operates its own resale channel and requires the buyer as a condition of dealing to redirect customers to that resale channel.
- (d) requiring, as a condition of access, that the buyer commits not to use online intermediation services (which, we appreciate, can be an issue under Article 101).

[REDACTED]

4 Disparagement

4.1 In the list of naked restrictions at paragraph 60(c), the Commission should include a short paragraph on disparagement of rivals. [REDACTED].

4.2 We understand that the Commission has live investigations in relation to this conduct, including a substantial fine handed down on the day of this consultation response (and therefore after the original draft guidelines were drafted). In any event, Skyscanner is aware that disparagement has been looked at in a number of abuse of dominance cases by national authorities and courts, including in France, Italy and Greece, as well as in the UK; so considers the Commission should be in a position to provide some high-level guidance (even if just acknowledging the existence of disparagement as an exclusionary head of abuse).

[REDACTED]