DCI SUBMISSION

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Draft Guidelines on exclusionary abuses under Article 102 TFEU

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To:

President Ursula von der Leyen
European Commission
Executive Vice-President Teresa Ribera
European Commission
Director General Anthony Whelan, Directorate-General for Competition, European Commission

Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Re: Draft Guidelines on exclusionary abuses under Article 102 TFEU

Dear President von der Leyen, Executive Vice-President Ribera, and Director General Whelan,

We write to call upon the European Commission (EC) to postpone adopting the Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) to abusive exclusionary conduct by dominant undertakings (hereafter, the Draft Guidelines) for the following reasons. Although we fully support the EC's goal of promoting legal certainty and the effective enforcement of Article 102 TFEU, we are concerned that the Draft Guidelines introduce presumptions and analytical shortcuts that do not distinguish appropriately between anticompetitive conduct and procompetitive conduct that reflects business acumen, superior skill, or efficiency by dominant firms. Such presumptions and shortcuts are antithetical to the policy paradigm reflected in the Draghi Report. Indeed, preparation of the Draft Guidelines began well before the Draghi Report was issued.[1]

It is a trite statement that any attempt to draw the right line between good and bad conduct by large, dominant firms deserves particular attention today.[2] The EC wishes to strengthen European firms' ability to grow, scale, and compete globally. To that end, the recently published Draft Merger Guidelines (hereafter, the DMGs) emphasize innovation, investment, dynamic competitive effects, and the need for sound evidence to distinguish good from bad mergers. The Article 102 Draft Guidelines should follow the same logic. Alas, currently, they do not.

The treatment of tying and bundling practices illustrates the problem. The Draft Guidelines acknowledge that these are 'common' business practices that can benefit customers through higher quality or less costly offerings even when adopted by dominant firms (para 87). But although tying and bundling by dominant firms may, in specific circumstances, harm competition, the Draft Guidelines presume that this will be the case where competitors' inability to enter or expand is likely to result directly from the tie (paras 60 & 95). This is a category mistake: just like an anticompetitive one, a procompetitive tie will limit competitors' ability to enter or expand. This is the case if the tie improves functionality, performance, quality, security, convenience, price, privacy, resilience, or whatever consumer preference legally matters. In other words, while it might be reasonable to rely on a presumption against tying in the absence of any related efficiencies, such efficiencies are likely to emerge in at least some sectors of activity. And greater efficiency will make

[1] The Draghi Report itself urges a rethink of the Draft Guidelines' formulation. See, M Draghi, *The Future of European Competitiveness: Part II* (2024) 304.
[2] We understand the concept of a dominant firm as one that may be constrained on the contestable share of demand by actual or potential rivals.

life harder for rivals. The same empirical observation – rivals losing the ability and incentive to enter or expand – is thus consistent with both anticompetitive behaviour and procompetitive conduct that increases consumer welfare. And yet, both cannot simultaneously be true. As currently formulated, the Draft Guidelines' presumption against tying and bundling consequently embeds an imperfect proxy that risks giving rise to unnecessary enforcement errors.

Similar flaws affect the Draft Guidelines' treatment of exclusive dealing and conditional rebates. In all logic, to be abusive, these practices must foreclose a substantial part of the contestable demand for rivals which impose, or would otherwise impose, a significant competitive constraint on the dominant firm. Otherwise, Article 102 TFEU could be deployed in irrelevant cases where rivals compete for an insignificant share of the market. However, the Draft Guidelines create a general presumption that exclusive dealing will produce exclusionary effects (para 60). The current text does not condition a finding of abuse on a showing that the dominant firm has removed access to a portion of the demand that rivals could realistically contest in the absence of exclusivity (para 83). Even worse, the Draft Guidelines go further, suggesting that a dominant firm's large captive demand constitutes in itself an indicator of bad behaviour. This is illogical. In *Qualcomm v EC*, the General Court criticised the EC for assuming that customer Apple could have switched to a rival chip supplier of the allegedly dominant firm. The Court viewed the EC's assumption as an inappropriate analytical shortcut, and held that the EC should have examined whether a viable technical alternative existed on the market.[3] In the particular case, there was none, and the large captive share of the dominant firm could not be held against it.

Finally, the treatment of predatory pricing provides an additional reason to proceed with caution. This is an area of the law that has long relied on presumptions. Yet, the Court of Justice is currently considering an appeal that concerns a judgment handed down by the General Court in a leading predation case.[4] The Court's final ruling can be expected to formulate principles directly relevant to the use of presumptions: the treatment of price-cost data, the weight of direct and indirect evidence, the role of intent, and the burden of proof in predation cases. Finalising guidance while this important appeal remains pending appears premature to us.

As AG Bobek wrote in *Sanofi Pasteur*, presumptions are valuable where they are based on experience and scientific analysis.[5] These are the necessary conditions to treat certain specific, observable facts as a proxy for likely competitive harm. In their current formulation, the Draft Guidelines do not satisfy AG Bobek's test. The triggering criteria for the Draft Guidelines' presumptions are often equally compatible with procompetitive and anticompetitive explanations. In those circumstances, even if rebuttable, such presumptions will impose substantial costs on dominant firms that engage in normal business practices by shifting onto them substantial defence burdens. We will recall here that not all dominant firms are deep-pocketed and well-capitalized Silicon Valley giants able to shoulder any cost of doing business.

In the light of the above, we respectfully suggest that the EC (i) postpone final adoption of the Draft Guidelines; and (ii) carry out a focused supplementary consultation on the issue of legal presumptions. This consultation process should concentrate on tying, exclusive dealing, conditional rebates, and predatory pricing; the role of contestable or captive demand; the evidentiary threshold for establishing capability to exclude; and the implications of forthcoming judgments.

[3] Case T-235/18 *Qualcomm, Inc. v European Commission* [2022], para 477 ("The Commission could not legitimately come to the conclusion that the payments concerned had actually reduced Apple's incentives to switch to competing LTE chipset suppliers without taking account of the fact that, for Apple's requirements for the models allegedly concerned, there was no technical or schedule-related alternative to the applicant's chipsets.").

[4] Case C-819/24 P *Qualcomm v Commission* [appeal pending].

[5] Case C-621/15 *N. W and Others v Sanofi Pasteur* [2017] Opinion of AG Bobek, para 33.

There is no enforcement gap that requires immediate adoption of the text. The principles derived from the 2008 Guidance on enforcement priorities related to abusive exclusionary conduct by dominant undertakings, refined by the case law of the EU Courts, provide a sound basis for enforcement by the EC and compliance by dominant firms. A short pause would impose limited cost at best, while materially reducing the risk that the first comprehensive Article 102 Guidelines become difficult to apply, deter beneficial conduct, burden dominant European firms of all sizes involved in broad-spectrum competition under litigation threats, or require revision soon after publication. Finally, revision of the Draft Guidelines should also ensure coherence with the EC's emerging approach to innovation and dynamic competition in merger policy.

We offer these observations to support the EC's agenda. New Guidelines on abusive exclusionary conduct can represent a major contribution to European competition policy, and to Europe's wider innovation, investment, and competitiveness goals, but only if they prove to be logically and economically sound. Otherwise, they risk doing more harm than good.

Yours sincerely,

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