

Dear Executive Vice-President Ribera,

26 May 2025 - As representatives of European and international industry and trade associations, we welcome the Commission's initiative to adopt Guidelines on exclusionary abuses, seeking to codify the case law on Article 102 TFEU and provide guidance on its application, so as to help undertakings' self-assessment. We appreciate the European Commission's efforts to gather stakeholder feedback on the draft Article 102 TFEU Guidelines on exclusionary abuses ('**Draft Guidelines**').

Nevertheless, as multiple stakeholders have expressed during the public consultation inviting comments on the Draft Guidelines, there is a serious concern that the text in its current form risks undermining legal certainty and predictability. Those concerns are also noted in the Draghi Report and were clearly articulated at the Stakeholder Workshop organized by the Commission on 13 February, by a majority of the businesses, economists, and legal advisers present.

The Draft Guidelines go beyond or take a different view from established case law of the EU courts, including the subsequent judgments from the Court of Justice of the European Union, most recently in *European Commission v Intel Corporation Inc.* of 24 October 2024 and the Judgment in *Google and Alphabet v Commission (Google Shopping)* of 10 September 2024.

Some of the key concerns include:

- The major and unwarranted shift away from the economic approach in the 2009 guidance, as broadly endorsed by the Union courts, conferring broad regulatory discretion that risks chilling pro-competitive conduct
- The proposed two-step approach that abusive conduct should (1) depart from "competition on the merits", and (2) be capable of having exclusionary effects is too abstract to provide workable guidance
- The proposed form-based approach that presumes that a broad range of common commercial conduct is presumptively unlawful coupled with asymmetric burdens of proof on the dominant company and the Commission runs contrary to the case law that requires the Commission to articulate an evidenced, cogent theory of harm that establishes a causal link between the conduct in question and harm to consumers.

The multiple issues and the seriousness of the concerns raised by stakeholders, both in their written submissions and at the Stakeholder Workshop, require a revision of the Draft Guidelines that goes beyond mere tweaks. Therefore, **we urge the Commission not to adopt Guidelines on Article 102 TFEU without first issuing and opening for consultation a second draft** that adequately incorporates feedback and better reflects all nuances of the case law.

Adopting the Article 102 Guidelines without a second round of consultation would undermine the principles of openness and transparency to which the Commission is committed and would not provide sufficient weight to stakeholder engagement, which is at the heart of the Commission's better regulation agenda.

An approach to the Guidelines that is truly reflective of case law is key to providing the legal certainty and predictability necessary for businesses to comply and compete effectively, ultimately contributing to an environment that promotes growth and competitiveness in the EU economy and benefits the EU consumer. Endorsing the Draft Guidelines as they stand with only minor tweaks will create a significant burden and chilling effect on companies to the detriment of efficient competition and competitiveness - the protection of which is the mere purpose of competition law.

We therefore urge the Commission to carefully consider our request for a second consultation after revising the Draft Guidelines, in respect of case law and in accordance with the recommendations received from stakeholders.

Europe needs clear and workable competition rules that business understands and principled enforcement to foster compliance and growth. We remain committed to supporting the Commission's efforts to clarify the application of Article 102 TFEU.

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American Chamber of Commerce to the EU (AmCham EU)
Connect Europe
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