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2022-2023

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May 2, 2023

Via Email: COMP-Article-102-Guidelines@ec.europa.eu

SUBJECT: Joint Section Comments on the European Commission's "Call for Evidence" Regarding Abuses of Dominance under Article 102 TFEU

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to the "Call for Evidence" issued by the European Commission on 27 March 2023, seeking input on the EC's commitment to publish (by mid-2024) and then adopt (in 2025) Guidelines on exclusionary abuses by dominant undertakings pursuant to Article 102 TFEU.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Marcos Rios
Chair, International Law Section

Thomas F. Zych
Chair, Antitrust Law Section

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S ANTITRUST LAW
SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN
COMMISSION’S “CALL FOR EVIDENCE” REGARDING ABUSES OF DOMINANCE
UNDER ARTICLE 102 TFEU**

April 27, 2023

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section (the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments in response to the “Call for Evidence” issued by the European Commission (“EC”) on 27 March 2023, seeking input on the EC’s commitment to publish (by mid-2024) and then adopt (in 2025) Guidelines on exclusionary abuses by dominant undertakings pursuant to Article 102 TFEU.¹ The Call for Evidence was released as part of a package including amendments to the EC’s 2008 Guidance² on its enforcement priorities in regard to exclusionary abuses of dominant position.³ The package also included a Policy Brief authored by twelve Commission officials, providing further background on the announced amendments to the 2008 Guidance.⁴ These Comments address relevant aspects of these EC statements, actions, and proposed future steps.

The Antitrust Law Section is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and nonlawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For over thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section’s scope of expertise.⁵

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-Guidelines-on-exclusionary-abuses-of-dominance_en.

² Commission Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7-20 (“2008 Guidance”).

³ See [antitrust legislation 20230327 amending communication art 102.pdf | Competition Policy \(europa.eu\)](#)

⁴ See Competition Policy Brief, Issue 1, March 2023, A dynamic and workable effects-based approach to abuse of dominance, [Policy Brief \(europa.eu\)](#) (the “Policy Brief”).

⁵ Past comments of the Antitrust Law Section are available at www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs. The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section’s Council.

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input to debates relating to international legal policy.⁶ With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.

The revisions to the 2008 Guidance make important changes to a key EC enforcement policy document, although understanding the nature of some of these changes requires consideration of the Policy Brief. Taken together, the amendments and the Policy Brief seem to preview the direction of the EC's future Guidelines on exclusionary conduct, which "will codify the case law of the EU courts on exclusionary abuse of dominance and provide comprehensive and clear guidance on applying Article 102 TFEU."⁷

The Sections support the EC's initiative to issue Guidelines, providing for "greater legal certainty for business and help[ing to] foster more consistent enforcement between the Commission, national competition authorities and national courts."⁸ Legal restrictions on the competitive conduct of dominant firms have the potential for profound economic effects. In recent decades many new business firms have emerged, based on a variety of innovative technologies. The products and services introduced by many of these firms have gained wide acceptance, thus altering in some respects the economic and social landscape of the EU and worldwide. Some of these firms have achieved great size in terms of revenue and market value, for example.

Issuance of guidelines and other efforts to clarify the interpretation and enforcement of the rules of dominant-firm conduct can play an important role in facilitating enforcement of the law. The appropriate legal limits on dominant-firm conduct pose difficult issues for policy makers and enforcement agencies. Distinguishing "competition on the merits" from anticompetitive conduct is often complex. Price-cutting, to take a classic example, has immediate benefits for purchasers and will generally lead to enhanced output, but it entails the potential to exclude or discipline efficient competitors and thereby limit competition in the long run, which could lead to higher prices, reduced output, or possibly other forms of economic harm. Antitrust and competition agencies around the world are grappling with many issues of this same character.

Questions regarding the proper legal treatment of competitive conduct by dominant undertakings have persisted since the inception of modern national antitrust legislation in the late 19th century. Given the importance and difficulty of issues surrounding the interpretation and application of statutory limits on dominant-firm conduct, the Sections believe that it is of great importance for antitrust and competition authorities to provide for timely and adequate consultation with

⁶ *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about.

⁷ Call for Evidence, page 2.

⁸ https://competition-policy.ec.europa.eu/antitrust/legislation/application-article-102-tfeu_en.

interested parties on any anticipated changes to applicable enforcement policy and substantive rules.

The revised 2008 Guidance and the Commission’s commitment to develop Guidelines for the interpretation and application of Art. 102 to exclusionary abuses reflects the ongoing – and perhaps increasing – significance of this branch of the law in the EU and in many other jurisdictions worldwide. As a restatement of EU law, rather than an explanation of EC policy priorities, the Guidelines will have paramount importance for the understanding and application of Art. 102 TFEU and, in all likelihood, touch on some of the most controversial questions of modern antitrust and competition law. The resolution of such issues – in the EU and in other jurisdictions – could have profound long-run effects on innovation, productivity and economic performance in the EU and in many other jurisdictions worldwide.

The Sections look forward to participating in the consultation process in relation to the announced draft Guidelines. However, the Sections respectfully recommend that the Commission conduct a more targeted consultation to obtain input on issues raised by the amended Guidance Paper in time to consider such input as part of the Guidelines’ drafting process, rather than after that process concludes in mid-2024. Indeed, the EC’s apparent intention to apply Article 102 TFEU more vigorously underscores the need for more stakeholder input and legal certainty. The issuance of the amended Guidance and the Policy Brief can be taken to indicate the Commission’s views on important issues that deserve to be addressed in Guidelines. Leaving only 28 calendar days for public input, however, on some of the most profound and complex questions in the entire competition policy sphere (both in the EU and worldwide) does not allow a full airing of relevant evidence, analysis and views likely to be offered by interested parties.⁹

⁹ Contrast the Commission’s present approach, for example, with the actions taken in 2005 that ultimately led to publication of the 2008 Guidance. The process began with public notice and led to several years of public discussion and consultation with legal and economic scholars, the business community, and with a wide range of other interested parties.