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Directorate-General for Competition
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Public Consultation – Comments to DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses

MAQS Law Firm is an international law firm with a staff of around 135 attorneys, with offices in Sweden, Denmark, Estonia and Poland. We service the business community in all legal matters, counting both Scandinavian and international large and medium sized businesses among our clients.

We are pleased that DG Competition has invited comments from all interested parties on the discussion paper and would like to submit the following comments:

1. General Remarks

We warmly welcome the issuing of guidelines by DG Competition. Most of our clients feel a strong need for legal certainty when wanting to implement new strategies for meeting competition and accommodating the requests of their customers for an individualised approach to the terms and conditions of their trade. Legal certainty, however, has become increasingly difficult to obtain, given the complex and sometimes contradictory decisions and rulings issued by the Community Authorities.

The approach suggested in the discussion paper, however, does not seem to provide for the necessary legal clarity. Rather, it is our impression that the complexity of the proposed approach to exclusionary abuses, as applied in Sections 6-10 of the discussion paper, in general increases rather than decreases the degree of legal certainty within this area.

The focus on an economic approach seems to sometimes complicate matters, rather than simplify them. It would be most unfortunate if a more economically based approach would come at the cost of legal certainty and we therefore recommend that the use of economic analyses be restricted to areas

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where the need for such analyses is obvious, e.g. in the case of alleged obligatory pricing or complex rebate systems.

2. Specific Issues of Concern

The link established between Article 82 and Article 81 (3) in paragraph 8 and in Section 5.3.3 of the discussion paper seems more likely to create confusion than to provide guidance. For the wording of Article 82 to be kept in mind, any attempt of forming a linkage between Articles 82 and 81, respectively, should be avoided.

The application of Article 82 to public undertakings or to undertakings to which Member States have granted special or exclusive rights should be the same as the application to all other undertakings having a dominant position. Any doubts on this point should be avoided, and the wording of paragraph 9 of the discussion paper should be changed accordingly.

The overall presumption that a dominant undertaking is likely to abuse its dominant position in order to harm competitors seems to pervade the discussion paper. The sometimes vague and sometimes very comprehensive descriptions found in the discussion paper of examples of abuse will make it necessary for us, as part of our legal advice, to offer detailed warnings against possible abusive conduct when it should be in the interest of both our clients and the Community Authorities instead to encourage creative marketing practices, innovative pricing systems and entrepreneurial market behaviour in a global context, in order to provide for the dynamic business environment explicitly being the aim of the EC Treaty.

More specifically, the discussion paper seems to confound price based competition, which is recognised as generally being the very aim of any competition policy, with exclusionary abuses, even when there should be no presumption for finding an abuse under Article 82. This applies both to the Section on rebates, where there seems to be an unfounded presumption of abusive behaviour tied to almost any kind of “loyalty enhancing” rebates, although most rebates offered by dominant undertakings are the result of strong pressure applied by the customers, whose loyalty is essential to every undertaking, be it dominant or not, and to the Section on bundling, where the analysis seems to neglect the innovative nature of certain types of bundling and the ensuing long-term benefits of changed consumer behaviour and resulting new patterns of purchasing.

Further, the notion of an “as efficient competitor” seems rather difficult to apply in practice. The calculations to be done, and the factors to be included in such calculations, would seem to provide for almost endless discussions, to the detriment of legal certainty.



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The same applies to the concept of “the required share” of an entrant, as applied in for instance paragraph 155. It seems to acknowledge this concern, but without adequately addressing such concerns.

The Section on exclusive dealing also seems to attach too much importance to the issue of tying of the market, rather than offering approaches to the necessary analysis of the possible blocking of access to a relevant market. This would require consideration also of the possible access to a downstream market by competing undertakings, as well as clear indication—and preferably demonstration—of consumer harm in affected downstream markets, in combination with a comparison of the benefits and efficiencies achieved against any such consumer harm.

Finally, we should like to stress the importance of applying the right sanctions to violations of Article 82. Sanctions should be proportional, and should adequately reflect whether an abuse is to be seen as incidental or rather as the result of malintent.

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Hoping that these remarks may prompt DG Competition to somewhat revise its approach to the issue of exclusionary abuses, focusing on the legally acceptable rather than the possibly illegal practices pursued by dominant undertakings, we look forward to the further initiatives taken by DG Competition.

Yours sincerely
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