

## PROPOSAL FOR A CEPS TASK FORCE

### **“The treatment of exclusionary abuses under Article 82”**

#### **PROSPECTUS**

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On 3 December 2008, the European Commission published its “Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings”. The document tackles alleged anticompetitive conducts such as exclusive dealing, tying and bundling, predation, refusal to supply and margin squeeze.

The application of Article 82 of the EU Treaty to exclusionary abuses has been subject to review for a number of years, starting with the publication of a Discussion Paper and a paper drafted by a group of economists for the European Commission in December 2005. These earlier documents went in the direction of a “more economic approach” in the scrutiny of potentially anticompetitive unilateral conduct, as advocated by most commentators during the consultation that took place before their adoption. Following the publication of the 2005 Discussion Paper, the debate has focused on the treatment of refusal to deal and refusal to grant interoperability, on the approach to tying/bundling, single branding and rebates, predatory pricing and after-markets. Moreover, the CFI decision in *Microsoft* in September 2007 has marked a potential turn in the treatment of refusal to grant interoperability, whose importance for future cases must still be fully appraised and understood. Finally, the Commission decision in the *Telefonica* case in July 2007 marked a key step in the Commission’s treatment of alleged margin squeeze practices.

Against this background, the time is ripe to reflect on the current prospects for antitrust scrutiny under Article 82. For this reason, the Regulatory Affairs Programme at the Centre for European Policy Studies proposes to launch a “Task Force on the treatment of exclusionary abuses under Article 82 of the Treaty”, inviting representatives from the European Commission, the European Parliament, National Competition Authorities, industry stakeholders, International Organisations and authoritative scholars in the field to join the group.

The Task Force will tackle all relevant aspects of the Guidance document, covering both the policy underlying Article 82 and the economic and legal issues surrounding its application. CEPS proposes to organise 5 meetings in the period February-June 2009, and to publish a *Final Report of the Working Party* by September 2009. A pre-meeting or “launch meeting” will be organised on

February 25, 2009 in order to fine-tune the list of proposed topics according to the suggestions of the prospective Task Force participants. A proposed list of topics to be tackled in the Working Party meetings is illustrated below.

## **PROPOSED LIST OF TOPICS**

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### **Meeting 1 (launch meeting)**

- Roundtable: an assessment of the new Guidance document on Article 82
  - Discussion on the agenda of next meetings
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### **Meeting 2 - EXCLUSIVE DEALING AND REBATES**

- Exclusive dealing
  - Loyalty rebates, retroactive rebates and the “relevant range”
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### **Meeting 3 - PREDATION**

- Predatory pricing
  - Sacrifice tests
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### **Meeting 4 - BUNDLING, TYING AND EXCLUSIVE DEALING**

- Single branding and rebates
  - Bundling and tying
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### **Meeting 5 - REFUSAL TO SUPPLY AND MARGIN SQUEEZE**

- Refusal to supply
- Margin squeeze
- Reprisals by dominant companies against companies that file complaints

## THE CEPS TASK FORCE: ORGANISATION AND GOVERNANCE

In organizational terms, we propose to structure the debate over 6 meetings, including an initial launch meeting aimed at launching the discussion on the 2008 Guidance document and finalising the proposed list of topics for subsequent meetings. The organisation of a free launch meeting has proven very important in previous CEPS Task Forces to fine-tune the topics to be addressed and bring them closer to the interests of industry players and regulators.

We propose to host the launch meeting on 29 January 2009. In that occasion, representatives from the European Commission will be invited to comment on the proposed Task Force agenda and indicate topics that may be usefully tackled by Task Force participants. After the launch meeting, we plan to host four meetings in the period February-May 2009, and then complete the Final Report during June 2009.

The following dates have been planned:

- March 25
- April 30
- May 12
- June 8
- June 24

As we did in other CEPS Task Forces, we will open and *ad hoc* **Task Force Blog**, where participants can post their comments on the debate taking place in the different meetings. Access to the Task Force Blog will be reserved exclusively to Task Force participants, and postings will be visible to all participants at all times.

Finally, the Chairman of the Task Force will be Dr. **John Temple Lang**, Cleary Gottlieb Steen & Hamilton LLP, Former Director, DG Competition, European Commission. The Rapporteur will be **Andrea Renda**, CEPS Senior Research Fellow and Head of the Regulatory Affairs Programme.

## **WHY A CEPS TASK FORCE AND HOW DOES IT WORK?**

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CEPS Task Forces constitute a unique forum of representatives from the European Commission, Members of the European Parliament, National competition authorities, officials from member states, business and industry, NGOs and other stakeholders to discuss highly topical issues in a multi-stakeholder setting. The objective of a CEPS Task Force is i) to create a process where issues can be analysed in open but structured discussion and ii) to publish an authoritative analysis leading to policy recommendations. CEPS will produce an (operational) synthesis report for each meeting. At the end of the Task Force, CEPS will publish and circulate among EU and member state policy circles policy recommendations together with a background report, which will be also formally published in the CEPS Task Force Report publication Series. The Background Report will be based on discussion in the meetings supplemented by research carried out by the Rapporteur.

## **CONDITIONS FOR PARTICIPATION**

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The CEPS Task Force is principally designed for CEPS Corporate Members but participation is open to non-members as well, at a higher fee.

The fee covers participation in all workshops, documentation, lunches and three copies of all reports produced. If participants wish, CEPS will mail additional copies of the final report to persons identified by participants.

### **Fee Structure**

Participation fee for:

CEPS Corporate Members: EUR 1,000

Non-members: EUR 7,000

To register, please use the Registration Form in the Appendix of this document.

### **About CEPS**

The Centre for European Policy Studies, based in Brussels, was launched as an independent research institute in 1983 to encourage the study and discussion of public affairs in Europe. It aims:

- to provide decision-makers, inside and outside government, with authoritative and independent analysis of European affairs;
- to contribute to the public debate about European institutions and policies through sound research and judgement; and,
- to create a network of leaders and thoughtful individuals who are committed to working together to enhance the development of European integration and co-operation.

CEPS is funded by corporations, public bodies, membership fee dues and income from activities.

If you have any questions regarding the Task Force, please contact:

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# REGISTRATION FORM

## CEPS Task Force

### **THE TREATMENT OF EXCLUSIONARY ABUSES UNDER ARTICLE 82 OF THE EU TREATY**

*A participation fee for the task force including all task force meetings of €1,000 applies for CEPS Corporate Members, while €7,000 applies for non-members.*

<b>Name</b>	
<b>Firstname</b>	
<b>Position</b>	
<b>Company</b>	
<b>Address</b>	
<b>Telephone</b>	
<b>Fax</b>	
<b>Email</b>	

*Please tick correct box:*

<input type="checkbox"/>	My company is a corporate member of CEPS and pays €1,000 (+21% VAT).
<input type="checkbox"/>	My company is not a corporate member of CEPS and pays €7.000 (+21% VAT).
<input type="checkbox"/>	My company is interested in becoming a member of CEPS. Please send additional information.

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