

## **Submission to the Consultation on the Draft Guidelines on Exclusionary Abuses**

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This submission contains two sections. In Section 1, we make some brief comments on the Draft Guidelines (DGs), focusing on the points where our views differ from the Commission's document, and identify areas for improvement. In Section 2, we offer some recommendations that the European Commission (EC) might want to consider when revising the Guidelines.

### **1. Summary and comments**

In this Section, we briefly summarise the main points of the DGs and offer a few comments on them whereby we identify the areas for improvement.

#### **a. Aims of the DGs**

The DGs aim to enhance legal certainty, help firms to self-assess, and guide NCAs and National Courts.<sup>1</sup>

#### *Comments*

We share the stated objectives of the DGs and welcome the possibility that by adopting Guidelines the EC may be able to speed up enforcement of Article 102 TFEU cases through enhanced clarity of the approach. However, as they currently stand the DGs reserve a large margin of discretion to the EC. Two examples of this wide margin of discretion include allowing the EC the possibility to consider as dominant also firms with small market shares, and the absence of safe harbours for dominant firms which engage in above-cost pricing.<sup>2</sup> Further, there is little predictability on how the EC intends to exercise that discretion. One reason for which there is little predictability is that the first limb of the abuse test used by the DGs – “departure

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<sup>1</sup> European Commission, Communication from the Commission, “Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings” 2024 (Draft Guidelines) (hereafter DGs) para. 8.

<sup>2</sup> See DGs (n 1) fn 41 and para 57.

from competition on the merits” – is based on a concept which is susceptible to different interpretations and contains little or no operational value, as discussed below.

Accordingly, we submit that, as currently drafted, the DGs offer very limited guidance and do not increase legal certainty. In Section 2, we make some suggestions that might help increase predictability.

## **b. General principles**

The DGs define exclusionary abuse as a conduct which (i) departs from competition on the merits and (ii) is capable of having exclusionary effects. Together, (i) and (ii) constitute the two-limbed test which would determine if a dominant firm’s conduct is liable to be abusive. The dominant firm has the possibility to show that its conduct is objectively justified or generates efficiencies which neutralise or outweigh the anti-competitive effects of the conduct, as a defence for its conduct when both limbs are satisfied. This defence operates as the third limb of the test of abuse, but with the burden of proof resting on the dominant undertaking.<sup>3</sup>

### *Comments*

The DGs’ definition of abuse is consistent with *some* recent case law of the EU Courts.<sup>4</sup> However, we make the following observations.

First, the concept of competition on the merits is inherently vague and subject to different interpretations, even by the Courts themselves.<sup>5</sup> The DGs do not eliminate any uncertainty about how to interpret the concept beyond providing a few examples of factors which might be taken into account to establish that conduct departs from competition on the merits.

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<sup>3</sup> For a proposal to adopt an approach to abuse where efficiencies are considered as an element of establishing abuse rather than as a defence, see P Akman *The Concept of Abuse in EU Competition Law* (Hart Publishing 2012) 316-319.

<sup>4</sup> See, e.g., Case C-377/20 *Servizio Elettrico Nazionale SpA and others v Autorità Garante della Concorrenza e del Mercato and others* ECLI:EU:C:2022:379, para. 61. However, note that in that same paragraph, the order of the test is inverted. Establishing first if the practice is capable of exclusionary effects and second if it harms consumers (and therefore constitutes competition *off* the merits) would make sense from an economic and a logical point of view. Only after having established that the conduct can exclude competitors would one want to assess if it is anti-competitive. Further, it is not clear from EU-level case law that the CJEU has intended “competition on the merits” to operate as a standalone, *operational* component of abuse.

<sup>5</sup> For instance, within the very same judgment, *Servizio Elettrico Nazionale* (n 4), a conduct departing from competition on the merits is defined respectively through (i) a no-economic sense test, (ii) an As Efficient Competitor principle, and (iii) a detrimental effect on consumers, as the following quotes show: (i) “Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position” (at para. 77, referring to predation); (ii) “a practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position” (at para. 78, referring also to non-pricing conduct); (iii) “it must be stressed that the concept of competition on the merits covers, in principle, a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services” (at para. 85).

The DGs do provide an explanation of “competition on the merits”, which associates it with consumer welfare (broadly conceived): “The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services”.<sup>6</sup> Similarly, the DGs state that a dominant firm can argue as an objective justification<sup>7</sup> that “its conduct amounts to competition on the merits because in the specific case, the actual or potential exclusionary effects produced by the conduct are counterbalanced or outweighed by advantages in terms of efficiencies that benefit consumers”.<sup>8</sup> However, the DGs do not seem to employ a consumer welfare standard to assess whether a conduct departs from competition on the merits in the first place.

We submit that if the DGs stressed and endorsed this understanding of “competition on the merits” throughout, by making it explicit that conduct departing from the merits is one that has anti-competitive effects, that is, it harms (directly or indirectly) consumers, then the two-limbed test for abusive conduct would be clearer, and the first limb of the test would be given operational value.

Second, and related to the previous comment, establishing that departure from competition on the merit amounts to having *anti-competitive* effects – namely, effects which (directly or indirectly) harm consumers – would be in line with the case law. Indeed, the Courts make it explicit that Article 102 TFEU is about preventing conduct to the detriment of consumers, and that exclusionary effects should be understood as those ultimately causing direct or indirect detrimental effects on consumers (whether intermediary or final).<sup>9</sup> Indeed, the case law uses the concept of “competition on the merits” as a component of the overarching exercise of the demonstration of exclusionary effects of conduct.<sup>10</sup> Thus, the interpretation of “competition on the merits” (limb 1) as a *qualifier* for which types of exclusionary effects (limb 2) are *anti-competitive* has clear support from the case law.

### c. The As Efficient Competitor principle and As Efficient Competitor test

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<sup>6</sup> DGs (n 1) para. 51 (footnotes omitted).

<sup>7</sup> Note that the DGs (n 1) define “objective justification” to include both “objective necessity defences” and “efficiency defences” (para 167).

<sup>8</sup> DGs (n 1) para. 58.

<sup>9</sup> See, e.g., *Servizio Elettrico Nazionale* (n 4) paras 44-47, 59, 64, 73, 85; *Case C-333/21 European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* ECLI:EU:C:2023:1011, paras 124 and 131.

<sup>10</sup> See the use of the word “[t]hus” in *Servizio Elettrico Nazionale* (n 4) para. 61: “... the **characterisation** of an exclusionary practice as abusive **depends on the exclusionary effects** that that practice is or was capable of producing. **Thus**, in order to establish that an exclusionary practice is abusive, a competition authority must show that, first, that practice was capable, when implemented, of producing such an exclusionary effect, ... and, second, that practice relied on the use of means other than those which come within the scope of competition on the merits” (emphasis added).

The case law has repeatedly resorted to the “As Efficient Competitor” (AEC) principle as one of the criteria for establishing abuse of dominance,<sup>11</sup> by defining an abusive practice as “[any] practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position”.<sup>12</sup>

### *Comments*

We note that the AEC *principle* is consistent with the economics literature which shows that an asymmetry between the incumbent firm and the potential entrant (or smaller existing rival) is necessary for a conduct to lead to anti-competitive exclusion.<sup>13</sup> Such asymmetry may consist in an incumbency advantage, in a first-mover advantage, or in the control of an essential input, infrastructure or complementary product.

It is important to understand to what extent the AEC principle can be operationalised, and the answer depends on the type of conduct at issue.

The economics literature shows that for some categories of practices, such as predatory pricing, margin squeeze and relatively simple conditional rebate schemes (i.e., those that do not reference rivals), by taking advantage of the above-mentioned asymmetries, the dominant firm can exclude a rival, but such exclusion entails a profit sacrifice. For administrability reasons, profit sacrifice can be proxied by the actual losses incurred by the dominant firm.<sup>14</sup> In such cases, therefore, we submit that a price-cost test (AEC *test*) is informative about the existence of an abuse and can be used to make the AEC principle operational. The test, though, does not try to estimate the profitability of a hypothetical firm, but consists of assessing the discrepancy between prices and costs, and hence the profitability, of the *actual* dominant firm itself. Moreover, with these practices, we submit that the Commission should consider above-cost pricing as a safe harbour, thereby respecting the AEC *principle* and providing legal certainty to dominant firms.

As a matter of economics, we note that there might be anti-competitive effects also from excluding less efficient competitors.<sup>15</sup> However, pursuing dominant firms which set above-cost

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<sup>11</sup> See, e.g. *Servizio Elettrico Nazionale* (n 4) para. 82.

<sup>12</sup> *Servizio Elettrico Nazionale* (n 4) para 78.

<sup>13</sup> On the economics of exclusionary abuses, see generally C Fumagalli, M Motta and C Calcagno *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (Cambridge University Press 2018).

<sup>14</sup> See, e.g., Fumagalli, Motta and Calcagno (n 13) at Section 1.4.3.

<sup>15</sup> In the recent economics literature on exclusionary practices, it is often assumed for simplicity that products are homogeneous, competition is in prices and the rival is more efficient than the dominant incumbent so that it is clear that, if it occurs, foreclosure is anti-competitive. But when products are differentiated and/or competition is in quantities, even foreclosure of a less efficient (or slightly lower-quality) firm may be anti-competitive. This does not necessarily contradict the fact that “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers” (*Servizio Elettrico Nazionale* (n 4) para. 73.) In other words, the foreclosure of less efficient competitors might, or might not, be anti-competitive.

pricing entails a high risk of dampening competition and of making type-I errors (that is, of finding a false positive). Furthermore, a rule which establishes that above-cost pricing is lawful provides legal certainty to a dominant firm, whereas a rule which requires second-guessing rivals' costs, or which prices would be allowed by the EC, would create uncertainty. Hence, we disagree with the statement in the DGs that prices above cost might be abusive.<sup>16</sup>

For other categories of practices, it is unclear how to translate the AEC principle into practice. In the case of exclusive dealing, for instance, the exploitation of its first-mover advantage allows the dominant firm to exclude in the absence of any profit sacrifice. Similarly, in the case of exclusivity rebates, when the asymmetry between the dominant firm and the rival is pronounced, exclusion does not involve profit sacrifice.<sup>17</sup> In such cases, we submit that the price-cost test is not informative about abuse and cannot be used to make the AEC principle operational. The same applies to other non-price practices, such as tying or refusal to supply, where we are not aware of any sensible test based on observables and that could operationalise the AEC principle.

#### d. Presumptions

One of the main traits of the DGs is that they establish presumptions for certain practices and categorise practices by virtue of the presumptions they are subject to regarding their “capability to produce exclusionary effects” (limb 2). Presumptions are utilised to allocate the “evidentiary burden” between the EC and the dominant undertaking. The base line regarding the proof of “capability to produce exclusionary effects” is that the EC has to “demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects”.<sup>18</sup> Outside the base line, the DGs institute a presumption of “capability to produce exclusionary effects” for conduct which the DGs regard as having “a high potential to produce exclusionary effects”<sup>19</sup> and so-called “naked restrictions”.<sup>20</sup> The former category covers a large portion of the practices which have been found to constitute abuse in the decisional practice and include those for which the CJEU has developed “specific legal tests”. For these two

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<sup>16</sup> DGs (n 1) at paras 57 and 144(b)(ii).

<sup>17</sup> See Section III in C Fumagalli and M Motta “Economic Principle for the Enforcement of Abuse of Dominance Provisions” (2024) 20 (1-2) Journal of Competition Law and Economics 85. See also C Fumagalli and M Motta “On the use of price-cost tests in loyalty discounts and exclusive dealing arrangements: Which implications from economic theory should be drawn?” (2017) 81 (2) Antitrust Law Journal 537.

<sup>18</sup> DGs (n 1) para. 60(a). Note that when discussing the capability of the conduct to produce exclusionary effects, in relation to the use of counterfactuals *ibid* para. 67 states that “[i]t is sufficient to establish **a plausible** outcome amongst various possible outcomes” (emphasis added). This may be justified if adopting a *balance of harms approach*: if the likely harm of the conduct is very high, and this might well be the case with an entrenched dominant position, even a small probability of anti-competitive exclusion can be enough to justify intervention. Still, given that they do not refer to a *sufficiently plausible* outcome, or to *the most plausible* outcome, but just a plausible one, it is legitimate to wonder what the standard of proof should be for establishing the capability to produce exclusionary effects and for disproving such capability.

<sup>19</sup> DGs (n 1) para. 60(b). These are: exclusive supply and purchasing agreements; exclusivity rebates; predatory pricing; margin squeeze with negative spread; and, “certain forms of” tying.

<sup>20</sup> For naked restrictions, it is only “in very exceptional circumstances” that the presumption can be rebutted; see DGs (n 1) para. 60(c). Naked restrictions are also presumed to fall outside of “competition on the merits”; see DGs (n 1) para. 54.

types of conduct, the evidentiary burden is on the dominant undertaking to rebut the “probative value of the presumption” that the practice fails the “capability to produce exclusionary effects” limb of the test.<sup>21</sup> The DGs also institute a presumption regarding “departure from competition on the merits” (limb 1): the practices for which there exist “specific legal tests” are presumed to depart from “competition on the merits” and be “capable of producing exclusionary effects”.<sup>22</sup>

### *Comments*

We are generally sympathetic to the establishment of well-crafted rebuttable presumptions. In particular, this might (a) help to speed up and streamline abuse of dominance cases, which are notoriously long, and (b) provide incentives for dominant firms, which typically hold the evidence, to disclose the data and documents necessary to assess the case – thereby reducing the asymmetric information problem suffered by the competition agencies.

However, in relation to the presumptions in the DGs, we note that:

(i) some presumptions are not grounded in economics. In particular, tying is a practice through which innovations take place and might offer beneficial effects on consumers by reducing their transaction costs.

(ii) presumptions of “capability to produce exclusionary effects” are not established by the case law (save for pricing below Average Variable Cost (AVC)).<sup>23</sup> It is, therefore, unclear on what *legal* basis some practices have been categorised as having a high potential to produce exclusionary effects (or as naked restrictions) and others not. This ambiguity also creates a disjoint between the discussion of the second limb of the test of abuse in the DGs and the later discussion of practices “subject to specific legal tests” since the scope of these two sections of the DGs do not overlap fully.<sup>24</sup> Moreover, it is unclear what the relation is between the presumptions established under Section 3.3 of the DGs for various practices and the application of the “specific legal tests”

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<sup>21</sup> See DGs (n 1) para. 60(b).

<sup>22</sup> DGs (n 1) para. 47.

<sup>23</sup> See DGs (n 1) fn 131 which remarks that “the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as ‘presumptions’” although the “Union Courts have not always made explicit use of the term ‘presumption’ for each one of these practices”. This footnote is provided with *no* reference to any case law of the CJEU – in other words, there is no reference to a judgment which institutes a presumption regarding the evidentiary burden of demonstrating “capability to produce exclusionary effects”. We are not aware of any such presumptions in the case law ourselves outside the scope of predatory pricing where the price is below AVC, as held by the Court of Justice in *AKZO*; see Case C-62/86 *AKZO Chemie BV v EC Commission* ECLI:EU:C:1991:286, para. 71. Besides predatory pricing, the main type of abuse for which the treatment came close to a presumption of anti-competitive effects was exclusivity rebates, and it was precisely this type of conduct for which the Court of Justice “clarified” its jurisprudence to instil an effects-based approach in *Intel I*; see Case C-413/14 *P Intel Corp. v European Commission* ECLI:EU:C:2017:632 (*Intel I*) para. 138.

<sup>24</sup> Although the DGs (n 1) state at para. 47 that practices which meet the conditions set out in a specific legal test are “deemed to be liable to be abusive” because they fail both limbs of the test, refusal to supply is subject to a specific legal test (paras 96-106) but is not mentioned as a practice subject to the presumption in para. 60(b). Likewise, tying is subject to a specific legal test (paras 84-95), but only “certain” unspecified forms of tying is subject to the presumption in para. 60(b).

for the same practices discussed under Section 4.2 of the DGs. Namely, it is ambiguous what the role and value of the presumptions (specific legal tests) are when there are already specific legal tests (presumptions) for the same practices, and how these two features of the DGs are supposed to operate alongside one another. Finally, the use of presumptions to demonstrate “capability to produce exclusionary effects” is likely inconsistent with the requirement of the case law that the demonstration of the conduct’s actual or potential effect of restricting competition “must be made, in all cases, in the light of all the relevant factual circumstances”.<sup>25</sup>

(iii) it is unclear that the presumptions established by the EC really are *rebuttable* presumptions. The standard of proof for rebutting the presumption of capability to produce exclusionary effects is not found in the DGs. If the standard of proof is so high that in practice it can never be met, then the presumptions will, in effect, be irrebuttable. Although the DGs make reference to the rebuttal evidence’s being “insufficient to call into the question the presumption” or having “insufficient probative value” or referring to merely “theoretical assumptions” for how the presumption cannot be rebutted, none of these suffice to set a standard of proof for how the presumption *can* be rebutted. Indeed, the DGs suggest that rebuttal will be subject to a rather high standard of proof since the EC’s assessment “must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects”.<sup>26</sup>

(iv) The establishment of (rebuttable) presumptions represent a *de facto* reversal of the burden of proving anti-competitive effects, and we wonder whether the Courts will accept the legality of this approach.<sup>27</sup> We submit that emphasising the extent to which certain presumptions are justified on economic grounds might help the Commission’s case.

(v) The DGs institute a presumption that conduct which is “subject to a specific legal test” falls outside the scope of competition on the merits,<sup>28</sup> but does not provide the possibility to rebut this presumption. The same goes for “naked restrictions”.

#### **e. Case law, effects-based approach and the As Efficient Competitor principle**

Unlike the Guidance Paper,<sup>29</sup> whose content was driven by economic principles, also because its main motivation was to adopt an effects-based approach to the enforcement of Article 102,

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<sup>25</sup> See most recently Case C-240/22 P *EU Commission v Intel Corporation Inc* ECLI:EU:C:2024: 915 (*Intel II*) para. 179.

<sup>26</sup> DGs (n 1) para. 60(b).

<sup>27</sup> Further, and more importantly, depending on how high the standard of proof is for the rebuttal, the presumptions can entail *de facto* shifting the burden of proving the (absence of) infringement to the dominant undertaking, which the Commission cannot do given Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1, Article 2 and fundamental principles of law such as the presumption of innocence.

<sup>28</sup> DGs (n 1) para. 53.

<sup>29</sup> Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7.

the DGs represent a more legalistic perspective. This reflects the ambition of the Commission to adopt Guidelines that “codify the case law”.<sup>30</sup>

### Comments

We find that aspects of the DGs make use of the case law in a selective manner. This selective reading is most obvious in relation to the case law from *Intel I* onwards.<sup>31</sup> In its modern case law, the CJEU has endorsed an effects-based approach to Article 102.<sup>32</sup> The fact that the case law has adopted an effects-based approach was readily acknowledged by the documents announcing the Guidelines.<sup>33</sup> In contrast, the DGs do not embrace aspects of the case law which are effects-oriented and either over-emphasise the value of certain concepts (e.g. “competition on the merits”) from the formalistic era of the case law or disregard statements from the case law which evidence an effects-based approach. We provide some examples of the latter here.

Beyond a small number of instances, the DGs do not refer to “as efficient” competitors in their reference to “competitors” when referring to exclusionary effects.<sup>34</sup> This systematic omission stands in contrast to the position in the case law, which has in several instances in the last decade held that Article 102 TFEU prohibits practices which have exclusionary effects on competitors as efficient as the dominant undertaking.<sup>35</sup> Although we note that the exclusion of less efficient competitors can under certain circumstances also constitute anti-competitive foreclosure, the Court of Justice has on numerous occasions expressed the position that “[c]ompetition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of,

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<sup>30</sup> See European Commission, Call for Evidence for An Initiative – Guidelines on Exclusionary Abuse by Dominant Undertakings, Ref. Ares (2023)2189183, 27/3/2023.

<sup>31</sup> *Intel I* (n 23).

<sup>32</sup> For a discussion, see P Akman “A Critical Inquiry into ‘Abuse’ in EU Competition Law” (2024) 44 (2) Oxford Journal of Legal Studies 405, in particular 416-429.

<sup>33</sup> See e.g. Call for Evidence (n 30); Communication from the Commission – Amendments to the Communication from the Commission: Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, C(2023) 1923 final, 27.3.2023.

<sup>34</sup> See e.g. DGs (n 1) paras 6, 45, 62, 70(c), 73. For selective reading of the case law, see e.g. DGs (n 1) para. 45 referring to *European Superleague Company* (n 9) paras 129-131, which explicitly refer to the exclusion of as efficient competitors. See also e.g., DGs (n 1) para. 69 referring to Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2023:33, para. 52 which explicitly refers to the capability to exclude as efficient competitors. See likewise DGs (n 1) fn 325, noting that the capacity to produce exclusionary effects needs to be assessed in relation to “actual or potential competitors” rather than a hypothetical as efficient competitor, which contradicts the CJEU case law such as *Servizio Elettrico Nazionale* holding that: “[t]he relevance of the material or rational impossibility for a hypothetical competitor, which is as efficient but not in a dominant position, to imitate the practice in question, in order to determine whether that practice is based on means that come within the scope of competition on the merits, is clear from the case-law on practices both related and unrelated to prices”; *Servizio Elettrico Nazionale* (n 4) para. 79.

<sup>35</sup> See e.g. Case C-209/10 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2012:172 (*Post Danmark I*) para. 25; *Unilever* (n 34) para. 37; *European Superleague Company* (n 9) para. 129. See also *Intel II* (n 25) paras 176, 177.



among other things, price, choice, quality or innovation”.<sup>36</sup> Thus, the AEC *principle*, namely the notion that not every exclusion of every competitor is anticompetitive, has been instrumental in the case law’s adoption of an effects-based approach. In the DGs, the AEC principle has been translated into one factor among many which can demonstrate that a practice falls within or outside “competition on the merits” (limb 1).<sup>37</sup> Through the systematic omission of the references to as efficient competitors, the DGs adopt a stance which appears to seek to change the approach to assessing an abuse, as established by the Court of Justice of the European Union (CJEU), in order to adopt a more form-based approach. Although the Guidelines can depart from the case law,<sup>38</sup> their likelihood of being endorsed by the CJEU will be lower if they adopt a significantly different approach to abuse without replacing the CJEU approach with a more coherent and robust approach (e.g., one endorsing clear theories of harm based on sound economics). This discrepancy between the DGs and the case law also diminishes the potential of the Guidelines to provide legal certainty to undertakings.

In fact, even in relation to the evidentiary burden, which has been given a central role in the DGs by way of presumptions, the Court of Justice has emphasised the relevance of as efficient competitors in holding that: “where a competition authority suspects that an undertaking has infringed Article 102 TFEU ..., and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market”.<sup>39</sup> The DGs omit any reference to as efficient competitors in the second limb of the test of abuse even though that second limb appears to be an expression of this precise holding of the Court of Justice. This omission implies that the DGs do not accurately represent the case law, which they seek to codify, and this again creates uncertainty. Given the fact that the definition of “exclusionary effects” in the DGs<sup>40</sup> does not incorporate the above-mentioned position of the Court that “competition on the merits” may, by definition, lead to the exclusion of less efficient rivals, if the Guidelines do not provide further clarity on the operation of the second limb, the approach of the Guidelines can lead to a stance that every type of exclusion is considered anti-competitive.

It should be noted that the case law of the CJEU itself is in a state of evolution and certainly mixes an effects-based approach with more formalistic concepts.<sup>41</sup> We, therefore, fully appreciate the difficulty of trying to codify the case law at this point in time. However, this difficulty should not

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<sup>36</sup> *Post Danmark I* (n 35) para. 22. See also Case 280/08 P *Deutsche Telekom v Commission* EU:C:2010:603 (*Deutsche Telekom I*) para. 177; *Intel I* (n 23) para. 133. We acknowledge that the DGs (n 1) express this sentiment at para. 51 but this concept is not carried through the Guidelines to represent the overall approach of the Guidelines.

<sup>37</sup> DGs (n 1) para. 55(f).

<sup>38</sup> There is debate in the literature on whether Guidelines can depart from case law. See P Akman “The European Commission’s Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?” (2010) 73(4) *Modern Law Review* 605, 626-627, arguing that they can, but that they would need to be ultimately endorsed by the CJEU to give their approach judicial recognition.

<sup>39</sup> *Unilever* (n 34) [52].

<sup>40</sup> See DGs (n 1) para. 6.

<sup>41</sup> See the discussion in Akman (n 32) 429-432.

translate into an unbalanced or partial representation of the case law in relation to the relevance of effects and, in particular, of the as efficient competitor principle. Such a partial expression of the case law without an alternative, robust framework which can lead to a change in the future course of the case law cannot provide legal certainty or help undertakings to self-assess the legality of their conduct.

#### **f. Economics in the DGs**

The effective enforcement of the abuse of dominance provisions also requires a robust understanding of economic principles and the enforcement approach should be supported by economic principles. We find that the DGs are thin on the economics front. In particular:

- The DGs never mention the need to spell out a theory of harm, i.e. a compelling narrative which, by building on the facts of the case, clarifies what the dominant firm aims to achieve with the practice at hand and why the conduct is likely to result in anti-competitive effects. We believe, instead, that proposing a solid theory of harm is the key factor in the assessment of allegedly abusive practices and in the adoption of an effects-based approach.<sup>42</sup>
- The DGs should refer to economics principles and theories to underpin their proposed approach. For instance, economics gives support to the presumptions regarding exclusive dealing and rebates that reference rivals, and explains why the price-cost test is informative about the abusive use of some practices (i.e. predation, margin squeeze, rebates which do not reference rivals) but not of others (i.e. exclusive dealing and exclusivity rebates).<sup>43</sup>
- The economics literature has identified several instances in which a dominant firm has an incentive to engage in vertical foreclosure. In general, such theories focus on cases where a vertically integrated firm has the monopoly of the input (which amounts to assuming that the

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<sup>42</sup> The Commission was unsuccessful before the EU Courts in its most recent exclusivity cases (*Intel I* (n 23); Case T-235/18 *Qualcomm v Commission* ECLI:EU:T:2022:358; Case T-604/18 *Google and Alphabet v Commission (Google Android)* ECLI:EU:T:2022:541; Case T-334/19 *Google and Alphabet v Commission (Google AdSense for Search)*). In none of these cases, did it spell out a clear theory of harm. We submit that this would have helped to avoid the Courts' findings that the Commission did not take into account all the circumstances of the case. In many cases, even a relatively small coverage might have anti-competitive effects if the exclusivities aim at crucial buyers or concern products which are likely to be key in the near future. Moreover, even a (relatively) short duration or the possibility of unilaterally terminating an exclusive contract is irrelevant if a customer cannot switch all of its needs to a rival. However, the Commission should spell out its theory of harm and explain why the facts of the case (in this example, relatively small coverage or duration) are consistent with it.

<sup>43</sup> See Fumagalli and Motta (n 17) Section III.A, which reviews well-established economics research showing that exclusive dealing contracts and market share discounts with a large requirement have a strong anti-competitive potential in situations in which the rival needs to achieve efficient scale to operate profitably, in which the goal of the dominant firm is to manipulate the buyer-rival relationship and extract rents from rivals and to generate a demand-boosting effect and raise prices. Sections III.B and III.C discuss to what extent economics rationalizes the use of a price-cost test. We note that the EU Courts often use terms "fidelity", "loyalty" and "exclusivity" interchangeably in the context of rebates. See eg *Intel II* (n 24) paras 38, 178, 180 and 308. For our purposes, "exclusivity" rebates are rebates which are contingent on the buyer's **effectively** purchasing most or all of its needs from the same supplier. This objective can be achieved in different ways, e.g. by asking the buyer to buy at least, say, 70-80% of what she bought in the *previous* year, or by making a quantity discount which is targeted so that the quantity threshold accounts for most of the likely purchases. We posit that the economic and legal treatment of all rebates with the same effects should be uniform.

input is *indispensable*). But this assumption is made for simplicity, and there exist models assuming the existence of an alternative (even if possibly inferior) input provider. Therefore, from an economics perspective, the input at issue should be a crucial but not indispensable asset within the *Bronner* meaning, as indispensability is not a necessary condition for a dominant firm to engage in vertical foreclosure which has anti-competitive effects.<sup>44</sup> This principle applies equally to outright refusal to supply, access restrictions (including constructive refusal to supply), margin squeeze and even “self-preferencing”. Treating practices which have similar effects in a different manner, as the DGs currently do, contradicts the adoption of an effects-based approach.<sup>45</sup>

## Section 2. Recommendations for improvement

In this section, we build upon the comments made above to identify which specific interventions would, in our opinion, improve the DGs. We note as an overarching recommendation that the Guidelines should clarify how the EC will use its wide discretion (which it seeks to reserve to itself in the Guidelines regarding the assessment of abuse) in particular aspects of the operation of its approach (e.g., assessment of the evidence for rebutting a presumption; assessing which types of tying are presumptively anti-competitive; assessment of dominance; definition of abuse; etc).

### *a. Competition on the merits*

Our main recommendation is to define a practice which departs from competition on the merits as one which ultimately adversely affects (directly or indirectly) intermediary or final consumers. This definition is already mentioned in the DGs,<sup>46</sup> but it should be stressed throughout, and Section 3.2 should refer explicitly to this definition for the purposes of assessing conduct.

This will help to ensure legal certainty, since firms, authorities and judges will know that the concept of competition on the merits is related to the objective of consumer welfare (broadly conceived). It will also bring the test in line with the well-known notion of anti-competitive foreclosure.<sup>47</sup>

Furthermore, by making it explicit that effects on consumers are central in the first limb of the test, there will be no need to explain in the second limb that exclusionary effects should be intended as effects which are ultimately detrimental to consumers.

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<sup>44</sup> See Fumagalli and Motta (n 17) Section IV.A. Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG and others* ECLI:EU:C:1998:569.

<sup>45</sup> Admittedly, the degree of freedom of the Commission with respect to the treatment of vertical practices is limited by case law which explicitly requires to show the indispensability of the input (in the sense of *Bronner* (n 44)) in cases of outright refusal to deal, but not in cases (including margin squeeze and “self-preferencing”) where the dominant firm has already given (partial) access to the input. However, for all the latter practices at least, to the extent that they achieve the same effects a consistent treatment should be proposed.

<sup>46</sup> DGs (n 1) para. 51.

<sup>47</sup> The concept of “anti-competitive foreclosure” in the original version of the Guidance Paper was one of its strengths in relation to the effects-based approach. See Guidance (original version) (n 29) para. 19.

Alternatively, should the EC not want to clarify that competition on the merits is to be assessed with reference to the consumer welfare standard, then the second limb of the test should make it explicit that it refers to the capability of producing exclusionary effects to the detriment of consumers – as in the case law discussed above.

*b. Formulating theories of harm is crucial*

The DGs never explicitly recognise the role of theories of harm when investigating a case. This is inconsistent with the adoption of an effects-based approach. A well-defined and clearly articulated theory of harm is essential in the assessment of abusive practices, as it directly pertains to evaluating whether a particular conduct is capable of excluding competitors to the detriment of consumers. We, therefore, recommend that the DGs put emphasis on the articulation of a theory of harm in every case to ensure a more coherent and comprehensive assessment framework moving forward.<sup>48</sup>

*c. As Efficient Competitor principle*

In light of the importance of the AEC principle in the case law, we believe that the revised Guidelines should pay more than mere lip service to this notion. In particular, the principle should be fully endorsed for pricing conduct (from predation to non-exclusivity rebates), where price-cost tests should be dispositive. As a consequence, the revised Guidelines should accept that price above Long Run Average Incremental Cost (LRAIC), or Average Total Costs (ATC), is legal, thereby providing a safe harbour to dominant firms. The same goes for the margin squeeze test.

As for non-pricing conduct the operational relevance of the AEC principle is doubtful, and the revised Guidelines could explain that for, say, exclusive dealing or tying, this principle does not translate into an operational test. For these practices, the Guidelines can provide guidance and advance legal certainty by specifying what type of test the EC may choose to use in determining abuse. Further, the Guidelines should, in any case, acknowledge the relevance of the principle in the case law as an indicator of the effects-based approach and explain clearly when and how the EC intends to depart from that case law regarding the relevance of the principle, if that is indeed the intention.

*d. Presumptions, standard of proof and theory of harm*

As mentioned above, the establishment of presumptions and the effective reversal of the burden of proof foreseen in some cases by the DGs run counter to the case law. We therefore submit that – even where the Guidelines state that certain conduct is deemed to be abusive – the Commission should, at the start of an investigation, formulate a theory of harm and verify the necessary conditions for the conduct to be capable of producing anti-competitive effects. For instance, in case of exclusive contracts or exclusivity rebates, the EC should not just limit itself to

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<sup>48</sup> See also the discussion at Section 1.f above.

checking that the dominant firm is, indeed, using exclusivity clauses, but also analyse the coverage, length, and contractual conditions of the clauses and verify whether they fit the theory of harm.<sup>49</sup>

*e. Justifications and rebuttal*

At the moment, although probably unintentional, the DGs do not state that all of the presumptions can be rebutted in practice. The Guidelines should clarify what the standard of proof is for the rebuttal of the presumptions.<sup>50</sup> This is crucial because if the standard is so high that it can virtually never be met in practice, then the presumptions will be effectively *irrebuttable*. Adopting irrebuttable presumptions which can lead to a finding of abuse can entail shifting the *burden* of proof to the investigated undertaking to prove the absence of abuse, which the EC cannot do.<sup>51</sup> Such irrebuttable presumptions can also violate fundamental rights recognised by the EU system and the presumption of innocence.<sup>52</sup> The Guidelines would, thus, benefit from providing examples of the types of evidence, which the dominant undertaking can put forward in order to rebut the presumptions.

The DGs should clarify that rebuttal is available for conduct which is “subject to a specific legal test” or which constitutes “naked restrictions” not only regarding the “capability to produce exclusionary effects” (limb 2), but also for the “departure from competition on the merits” (limb 1).

The Guidelines should also contain more guidance (including through examples) on which type of efficiency defences and objective justifications the EC would be ready to accept as a defence of conduct which fails both limbs of the test of abuse. The EC’s use of its discretion in the assessment of such evidence where the DGs note that the “probative value of a presumption” will be relevant should be clarified.<sup>53</sup>

*f. Presumptions should be grounded in good economics*

Whereas certain well-constructed rebuttable presumptions may be justified, for instance, with respect to exclusive dealing and exclusivity rebates, this is not the case for all practices of a dominant undertaking, which are currently subjected to a presumption in the DGs. For example, *tying* is likely to have significant pro-competitive effects in many situations. Accordingly, we submit that tying – independently of the type and circumstances – does not belong to the category of conduct which “*is deemed to be liable to be abusive*”.

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<sup>49</sup> For instance, a relatively small coverage might still be exclusionary if it denies rivals access to buyers that – for scale, learning, and/or reputation – are crucial.

<sup>50</sup> Note that when discussing the capability of the conduct to produce exclusionary effects, the DGs (n 1) adopt a very low standard of proof for the EC itself in relation to, for example, the assessment of the counterfactual; see fn 18.

<sup>51</sup> Regulation 1/2003 (n 27) Article 2.

<sup>52</sup> See e.g. P Whelan *Parental Liability in EU Competition Law* (Oxford University Press 2023) 490.

<sup>53</sup> See e.g. DGs (n 1) para. 60(b). See in the same vein, *ibid* para. 60(c).

Should the EC decide instead to keep certain forms of tying in the category of conduct which is presumed to be abusive, the Guidelines should clearly explain – also through examples and actual cases – what differentiates tying which falls in the category of conduct liable to be abusive, and that which does not.

Similarly, we find it difficult to understand why margin squeeze might fall in different categories depending on whether the so-called “spread” is negative ( $p-w<0$ ) or positive but without allowing to recover costs ( $p-w<c$ ). In both cases, the margin squeeze test is failed by the dominant firm, and therefore it should be treated in the same way. We note that, if the price-cost test is failed in case of predation (or rebates other than “exclusivity” rebates), the conduct is considered to be liable to be abusive.<sup>54</sup> It would therefore be difficult to see why the failure of the margin squeeze test should be treated differently.

#### *g. Safe harbours*

The DGs go as low as 10% market share for instituting a safe harbour for dominance and even at that, do so cautiously.<sup>55</sup> We note that the case authority provided in support of this position does not actually support such a specifically low market share safe harbour,<sup>56</sup> and recommend that the DGs institute a safe harbour for dominance in line with sound economics. It is hard to find an example of a firm which might be reasonably found to be dominant in a correctly-defined relevant market with such a small market share. Energy markets are sometimes characterised by companies which might have some pivotal plants allowing them to exercise considerable market power despite relatively small market shares. However, firstly they would certainly need more than such a small fraction of capacity, and secondly, it might be more useful to specify that this (or similar cases) is what the EC has in mind when thinking of possible dominance with less than 50% market share. Finally, the DGs’ approach is to be contrasted with the Guidance Paper where the EC had indicated that market shares below 40% are unlikely to indicate dominance.<sup>57</sup>

We also submit that price above ATC or LRAIC should be considered a safe harbour. This would reduce the risk of dampening competition and would provide legal certainty to a dominant firm, which can self-assess the lawfulness of its pricing conduct (whereas a rule which is based on unknown rivals’ costs, or which requires second-guessing the above-cost price level allowed by the EC would create uncertainty).

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<sup>54</sup> See Section 1.c above.

<sup>55</sup> See DGs (n 1) fn 41: “[m]arket shares below 10% exclude the existence of a dominant market position save in exceptional circumstances” (references omitted).

<sup>56</sup> The DGs refer to Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ECLI:EU:C:1986:399, paras 85 and 86 in support of the position that “market shares below 10%” are the relevant threshold for a safe harbour; see DGs (n 1) fn 41. However, the cited paragraphs in *Metro* simply find that 10% market share (which was the market share on the facts) is *insufficient* – save in exceptional circumstances – for a finding of dominance. The cited paragraphs do not indicate anything about what the *upper* boundary of such a safe harbour might or should be.

<sup>57</sup> Guidance Paper (n 29) para. 14.

#### *h. An effects-based approach?*

In the documentation that announced its intention to issue guidelines on exclusionary abuses, the Commission remarked that it was committed to an effects-based enforcement of Article 102.<sup>58</sup> We note that not only the wording “effects-based” does not appear in the DGs, but also, and more importantly, that the DGs seems to espouse a form-based approach.

A case in point is the DGs’ treatment of vertical foreclosure, which might consist of formally different practices which might have similar effects. Refusal to deal, margin squeeze, tying of vertically related products or services, “self-preferencing”<sup>59</sup> and other “access restrictions” are all practices that a vertically integrated firm might use to partially or fully exclude a downstream competitor. Yet, they end up being treated in different ways in the DGs. In particular, according to the DGs, for some forms of tying and for margin squeeze with negative spread both limbs of the test are ticked.<sup>60</sup> For other forms of tying and margin squeeze with positive spread ( $p-w < c$ ) and for refusal to deal, only the first limb (“departure from competition on the merits”) is ticked, but the EC is to demonstrate exclusionary effects.<sup>61</sup> For “self-preferencing” and the remaining vertical foreclosure practices (“access restrictions”),<sup>62</sup> neither limb is presumed to be satisfied, and the EC is to assess whether they amount to competition on the merits and are capable of producing exclusionary effects.<sup>63</sup>

Such a different treatment for practices which might be (to a greater or smaller extent) substitutable, is puzzling, and certainly inconsistent with an effects-based approach. We recommend that the revised Guidelines adopt an effects-based approach whereby practices with similar effects are treated in the same way in their assessment as potentially abusive conduct.

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<sup>58</sup> See L McCallum and others “A Dynamic and Workable Effects-Based Approach to Abuse of Dominance”, European Commission, Competition Policy Brief No 1/2023, March 2023.

<sup>59</sup> We note that “self-preferencing” is a grammatically incorrect phrase in the English language and submit that the Guidelines should use the correct term (“self-favouring”) for the sake of linguistic clarity and sense.

<sup>60</sup> DGs (n 1) paras 47, 60(b), 95 and 128.

<sup>61</sup> DGs (n 1) paras 47, 95, 99(b), 122(c).

<sup>62</sup> Access restrictions seem to be defined as vertical foreclosure *minus* outright refusal to supply *minus* margin squeeze. This is a new and unclear definition. The lack of clarity regarding “access restrictions” is aggravated by the fact that the DGs provide an example of a “refusal to supply” practice when illustrating what access restrictions may entail (DGs (n 1) paras 166(a) and 166(d)) after indicating that access restrictions are *not* refusal to supply cases (DGs (n 1) para. 163).

<sup>63</sup> DGs (n 1) paras 160 and 164.