

## COMMENTS ON THE DRAFT GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU

We welcome the Commission's initiative to provide comprehensive guidance on the application of Article 102 TFEU. Given the increasing importance of unilateral conduct cases and the need for a consistent approach across the EU, clear guidance in this area is crucial. We are grateful for the opportunity to submit comments on the Draft Guidelines and for the deadline extensions granted by DG COMP's services.

The Draft Guidelines represent a commendable effort to synthesize the complex body of EU jurisprudence on abuse of dominance. In our view, the draft does a great job in summarizing the key principles of the Court's case law as far as the types of conduct subject to "specific legal tests" are concerned. We also support the Commission's move away from a "too economic approach" toward a workable one that is firmly based on legal principles.

That said, we believe that the Draft Guidelines require revision and refinement in several key respects if they are to achieve their stated objectives of enhancing legal certainty and providing a reliable framework for self-assessment by dominant firms. Revisions are also required with regard to the CJEU's most recent case law.

In the following, we provide a high-level summary of our main concerns and would be happy to expand on any of them in further discussions with the Commission.

### **1. Need for More Concrete Guidance and Legal Certainty**

A primary concern is that while the Draft Guidelines provide a comprehensive summary of the Commission's interpretation of the case law, they often do not translate these principles into sufficiently concrete and practicable guidance. They appear to be more focused on facilitating public enforcement of Art. 102 TFEU by competition authorities and keeping all potential options open than on providing a reliable roadmap for compliance. Dominant firms and their advisors would benefit from more specific examples and a sharper delineation between permissible and unlawful conduct similar to the detailed explanations in Horizontal and Vertical Guidelines on Art. 101 TFEU. More concrete guidance is particularly important for widespread practices such as tying, bundling, "multi product rebates" and self-preferencing, where the line between competition on the merits and anti-competitive behaviour is particularly difficult to draw and the Draft Guidelines remain too vague.

The Draft Guidelines' lack of specificity is particularly problematic given the decentralized enforcement of Article 102 TFEU. Dominant firms face significant legal uncertainty if the principles in the Guidelines are open to widely divergent interpretations by courts and national competition authorities. Experience shows that, while the Commission's Guidelines are not binding on NCAs and national courts, their content nevertheless plays an important role in public and private enforcement cases at national level. The Commission should carefully consider the impact of the Guidelines on national court proceedings and the risks resulting from overly broad and unspecific statements in the Guidelines in this

context. More precise guidance would help mitigate the risk of inconsistent application and provide a sounder basis for self-assessment.

## 2. “Presumption Approach” not Backed by the Case Law

A central pillar of the Draft Guidelines is the use of presumptions to establish both the existence of conduct departing from competition on the merits and its capability to produce exclusionary effects. For certain practices, such as exclusive dealing and loyalty rebates, the Guidelines suggest that certain forms of conduct can be “*deemed as falling outside the scope of competition on the merits*” (Draft Guidelines, paras. 53 et seq.), and that the capability of such conduct to produce exclusionary effects can be presumed (Draft Guidelines, paras. 60b) and c)).

We respectfully submit that this approach is not in line with the Court’s case law.

1. Firstly, regarding the requirement of a departure from competition on the merits, we believe that only “naked restrictions” as defined in the Draft Guidelines can be “deemed” as departing from competition on the merits from the outset. However, the same is not true for those forms of conduct that fall under the “specific legal tests” set out in the Draft Guidelines (contrary to para. 54). For example, exclusive dealing, tying or pricing below cost can very well constitute competition on the merits – for example if these practices do not relate to the dominated market (see sec. 3 below), or if certain conduct is objectively justified even though it meets the requirements of “specific legal tests” (see, to that effect, Case C-377/20 – Servizio Elettrico Nazionale, paras. 84 – 86).

That said, we agree that, in most cases, a detailed and separate assessment of a departure from competition on the merits would be superfluous once it is established that the conduct at issue meets all specific prerequisites of a “specific legal test” – precisely because the “specific legal tests” are in themselves special forms of assessing whether certain forms of conduct depart from competition on the merits. However, the way para. 53 is currently drafted risks creating the impression that the types of conduct subject to “specific legal tests” are problematic *per se*. We suggest the Commission should stress even more clearly that only the fulfilment of all requirements of a “specific legal test” indicates a departure from competition on the merits.

2. Secondly, when it comes to the capability to produce exclusionary effects (hereinafter “capability to exclude”), a rebuttable presumption may be justified for “naked restrictions” as defined in the Draft Guidelines. However, there is no basis for presumptions when it comes to conduct being subject to “specific legal tests”. The Court’s recent case law states unambiguously that the capability to exclude must be assessed on a case-by-case basis taking into account all relevant factual circumstances. This has been confirmed again very recently, and after the publication of the Draft Guidelines, in the *Intel*-judgment where the Court stresses that “*the demonstration that conduct has the actual or potential effect of restricting competition, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must be made, in all cases, in the light of all the relevant factual circumstances.*”

irrespective of whether they concern the conduct itself, the market or markets in question or the functioning of competition on that market or those markets.”<sup>1</sup> (emphasis added).

In our view, the need to assess the capability to exclude considering all relevant circumstances cannot be reconciled with a “presumption approach” – at least in cases where the undertaking concerned contests the capability to exclude as efficient competitors (“AECs”) or claims that its conduct is justified on the basis of supporting evidence<sup>2</sup> (which, in practice, will always be the case).

While the case law on Article 102 TFEU indeed supports the view that certain forms of conduct by dominant firms may be considered *prima facie* abusive (if the capability to exclude is not contested), we submit that this is best understood as an informal *prima facie* assumption that certain forms of conduct *typically can produce exclusionary effects*. Such an assumption allows the Commission to focus initially on the basic parameters of the conduct and the “specific legal test”, while avoiding a full analysis of the capability to exclude at the initial stage of its investigation. Once the undertaking concerned contests this “prima facie assumption” in a substantiated manner, however, it is then up to the Commission to fully establish the existence of an abuse, including the capability of producing exclusionary effects or otherwise restricting competition. In other words, an informal, *prima facie* assumption of capability to exclude may be justified to facilitate the initial orientation of the analysis, but it cannot obviate a full examination of the conduct’s actual restrictive capability in the specific market context once the capability to exclude is contested – just as it is always necessary in “by object cases” under Art. 101 TFEU to demonstrate the capability to restrict competition in an individual case, taking the specific legal and economic context of the agreement at issue into account (see Horizontal Guidelines, para. 29, 32 et seq.).

3. Thirdly, the use of the term “presumption” for the initial assumption of the capability to exclude is unfortunate since “presumptions” can take many different forms in different legal systems. There is a serious risk that national courts (and potentially also NCAs) will apply their own understanding of the concept of presumptions under their respective national laws and consider them to comprise presumptions *iuris tantum* which require the undertakings concerned to prove the opposite, i.e. that the relevant conduct is *not* capable of producing exclusionary effects in an individual case. Such an approach would raise significant issues under primary EU law.
  - Article 48 of the Charter enshrines the presumption of innocence, under which the burden of proving all elements of an infringement rests on the authority.
  - The Court’s case law emphasizes that if there are doubts as to the constituent elements of an infringement, these doubts must benefit the dominant company.<sup>3</sup> Hence, a dominant company cannot be required to rebut a presumption by proving that its conduct is not

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<sup>1</sup> Case C-240/22 – Intel II, para. 179; see also *ibid.*, para. 330 et seq.

<sup>2</sup> See, to that effect, Case C-680/20 – Unilever, paras. 40, 52 et seq.

<sup>3</sup> Case C-680/20 – Unilever, para. 42 and case-law cited.

capable of producing exclusionary effects. Rather, it is sufficient if the undertaking submits evidence that *calls into question* the capability to exclude in an individual case.

- Finally, the Court has already held that presumptions relating to constituent factors establishing a liability for infringement of EU competition law “directly affect the legal situation of the undertaking concerned” and are a matter of substantive law.<sup>4</sup> Since the capability to produce exclusionary effects is a constituent element of an infringement of Article 102 TFEU in the form of an exclusionary abuse – and thus also of the dominant company’s liability for such an infringement –, presumptions in this regard would be a matter of substantive law and need to be introduced by a formal legislative act. They cannot be established in Guidelines of the Commission.
4. In light of the foregoing, we think the Commission should reconsider and ultimately abandon its “presumption approach” at least for all forms of conduct apart from “naked restrictions”. If it nonetheless wishes to maintain the current wording and speak of “presumptions” of the capability to exclude, it should at the very least state unambiguously that
- the presumptions discussed in the Guidelines do not amount to presumptions *iuris tantum*, but merely to “factual assumptions” regarding the general capability of certain types of conduct to produce exclusionary effects; and
  - a “rebuttal” of such a presumption does not require proving the opposite; rather, it is sufficient to *call into question* the *prima facie* assumption of the capability to exclude, i.e. raise doubts as to the conduct’s capability to produce exclusionary effects in an individual case.

Additionally, it should drop the misplaced attempt to attribute any “probative value” to the initial “presumption” once it is rebutted/called into question (Draft Guidelines, para. 60(b), penultimate subparagraph). We do not find any support for this attempt in the case law. On the contrary, it is up to the Commission to fully prove the capability to exclude once the “presumptions” are rebutted (i.e. called into question).

5. In addition, and in any event, the Commission should make it very clear that all presumptions discussed in the Guidelines only apply in cases where the conduct at issue and its potential effects concern a dominated market. Conduct taking place on and affecting only non-dominated markets can only be abusive in exceptional cases.<sup>5</sup> Hence, there can be no justification whatsoever for any (hard or soft) presumptions in such scenarios.

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<sup>4</sup> See, to that effect, Case C-267/20 – Volvo and DAF, paras. 90 – 96 for the presumption of harm under the Damages Directive.

<sup>5</sup> See, to that effect, Case C-333/94 – Tetra Pak II, para. 27.

### 3. Insufficient Differentiation Between Dominated and Non-Dominated Markets

More generally, a matter of significant concern is the Draft Guidelines' lack of a clear distinction between conduct affecting markets where the firm is dominant as opposed to related but non-dominated markets. Paragraph 68 notably states that "*the substantive legal standard to prove the exclusionary effects of a conduct is the same irrespective of whether the effects take place in the dominated market or in a market different from, but related to, the dominated market.*" We believe that this proposition is not supported by the case law.

The Court has consistently held that Article 102 TFEU is primarily concerned with conduct that impairs competition in markets where competition is already weakened by the dominant firm's presence (see e.g. Case – C-377/20 - Servizio Elettrico Nazionale, paras. 68-69). This weakening of competition due to the mere presence of the dominant company delineates the scope of its special responsibility. However, there is no basis for an assumption that the presence or activities of a dominant company on a non-dominated market will necessarily weaken competition on this market. This holds true even if the company concerned engages in practices subject to "specific legal tests" on such markets. For example, below cost pricing of a dominant company to finance effective market entry on a non-dominated market may be perfectly in line with competition on the merits, e.g. if it serves to meet the pricing level currently prevailing in the market. Similarly, exclusive dealing on non-dominated markets is in line with competition on the merits, and there is no reason to assume that it is capable of producing anticompetitive effects in the absence of special circumstances.

Hence, we believe that the Guidelines should clarify that

- conduct occurring on and affecting solely non-dominated markets can constitute an exclusionary abuse only under exceptional circumstances; and
- a departure from competition on the merits and a capability to produce exclusionary effects cannot be presumed but must be proven in such a scenario.

Without such clarifications, we see a serious risk of an "over-enforcement" of Article 102 TFEU in national litigation brought by incumbents seeking to prevent market entry and healthy competition by undertakings that may be dominant in other markets – even if the dominant position in this other market does not confer a specific advantage to the dominant company on the non-dominated market that could not be offset by the incumbents. This concern is exacerbated by the overly broad conception of the potential categories of "exclusionary effects" set out in para. 6 of the Guidelines:

### 4. Overly Broad Conception of Exclusionary Effects

The Draft Guidelines appear to adopt an overly expansive definition of exclusionary effects. In our view, the reference in para. 6 to exclusionary effects as comprising "*any hindrance to actual or potential competitors' ability and incentive to exercise competitive constraint on the dominant undertaking*" sets too low a bar for a finding of exclusionary effects. Read literally, this could capture almost any conduct that creates a challenge for rivals, even if it is replicable or can be offset by equally efficient rivals or otherwise reflects legitimate competition. Such a broad notion of exclusionary effects is not backed by

the case law referred to in para. 12 of the Draft Guidelines (or any other case law). Moreover, para. 62 of the Draft Guidelines appears to extend the scope of exclusionary effects even further by stating that it may be “*sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct’s implementation*” – we respectfully submit that this statement, derived from an Art. 101 TFEU-case, has no relevance for the concept of exclusionary effects and should be deleted as it adds no value and is likely to cause confusion.

In our view, the notion of “exclusionary effects” should generally be aligned with the definition in para. 61 of the CJEU’s judgment in Case C-377/20 - Servizio Elettrico Nazionale: the capability to produce an exclusionary effect requires showing that the practice in question is “*capable of making it more difficult for competitors to enter or remain on the market in question and, by so doing, [...] capable of having an impact on the market structure.*”

This notion refers to the hindrance of the *ability of rivals to compete effectively* with the dominant companies, but it does not cover the mere “reduction of incentives” of individual rivals. If the Commission intended to maintain the reduction of “incentives to compete” as part of the notion of exclusionary effects, then in our view this would have to be qualified by referring only to the incentives of AECs. Without such a qualification, we see a serious risk of vexatious litigation and abuses of the notion in national courts in actions brought by less efficient rivals who feel bothered by aggressive, but legitimate competition, and of administrative proceedings seeking to protect such less efficient competitors. Extending the concept of exclusionary effects to cover any reduction of incentives of less efficient rivals facing increased competitive pressure risks chilling legitimate competition by dominant firms.

In addition, and even more importantly, we believe that an exclusionary abuse requires more than broadly defined exclusionary effects for individual rivals. To be abusive, the conduct at issue must weaken *effective competition overall* and not only individual rivals. The current definition of exclusionary effects in the Draft Guidelines does not emphasize sufficiently the need to show an impact on the market structure or the “*effective competition structure*”, even though this requirement has been repeatedly stressed in the Court’s recent case law. In our view, the Commission should put more weight on this essential requirement in the final Guidelines. This would also allow it to tie the concept of exclusionary effects back more closely to consumer harm: exclusionary conduct indirectly harms consumers if it weakens competition as such, and not only individual (potentially even less efficient) rivals.<sup>6</sup>

## **5. Need to revise sections 3.1 and 3.2 of the Draft Guidelines to reflect the CJEU’s most recent case law**

We believe that the Court’s seminal judgments in *European Superleague* (Case C-333/21), combined with the most recent judgments in *Intel* (Case C-240/22 (“Intel II”)) and *Google Shopping* (Case C-48/22) necessitate a partial redrafting of sections 3.1 and 3.2 of the Guidelines. A more refined

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<sup>6</sup> See, to that effect, e.g. C-377/20 – Servizio Elettrico Nazionale, paras. 44 and case-law cited therein; para. 47 et seq., para. 68, paras. 93 et seq.; C-680/20 – Unilever, para. 36



explanation is needed for the concept of “competition on the **merits**”, its **relationship** with the “capability to produce exclusionary effects” (“capability to exclude”), and the importance of AECs in this context.

1. First of all, the Guidelines should reflect the two categories of exclusionary abuses established in paras. 129-131 of *European Superleague*: exclusionary conduct is abusive if it constitutes a departure of competition on the merits and impedes an effective competition structure either
  - (i) because it is capable of excluding or hindering the growth of equally efficient competitors on the dominated market or related markets (C-333/21, para. 129-130);  
  
or
  - (ii) because it has the object or at least potential effect of impeding entry or expansion by potential (not necessarily “as efficient”) competitors and/or preventing the growth of competition in the dominated or related market to the detriment of consumers (C-333/21, para. 131).<sup>7</sup>

In our view, category (ii) is not adequately reflected in the current draft of the Guidelines.

2. Secondly, the Guidelines should avoid suggesting that there is a clear distinction between the concepts of competition on the merits and of the capability to produce exclusionary effects. In our view, the Court’s recent case law shows that these concepts cannot be clearly separated. Thus, the Court states in *Intel* that conduct capable of foreclosing AECs is in itself qualified in law as a form of conduct departing from competition on the merits.<sup>8</sup> Conversely, other forms of conduct that impede *other competitors’ ability to compete on the merits* can constitute an abuse regardless of whether the affected competitors are “as efficient” as the dominant company or not – provided they are likely to weaken competition as such and can be qualified as departing from competition on the merits.<sup>9</sup>
3. The Guidelines’ focus should therefore be on the concept of competition on the merits as the overarching legal principle for delineating legal and illegal behaviour of the dominant company

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<sup>7</sup> See also Case C-48/22 – Google Shopping, para. 165 – 167.

<sup>8</sup> To that effect Case C-240/22 – Intel, para. 177: “Article 102 TFEU prohibits it from engaging in practices, including pricing practices, which have an exclusionary effect on competitors considered to be as efficient as the dominant undertaking itself, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits.” (emphasis added); *ibid.*, para. 181: the AEC-test “seeks specifically to assess whether such an as-efficient competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position and, consequently, whether that conduct must be considered to come within the scope of normal competition, that is to say, competition on the merits.” (emphasis added).

<sup>9</sup> To that effect C-48/22 – Google Shopping, para. 87: “The purpose of [Art. 102 TFEU] is to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition”. (emphasis added).

and the required impact on a competitive market structure. In our view, a synthesis of the Court's most recent judgments allows for the establishment of the following general rules that should be reflected more clearly in the revised Guidelines:

- A dominant company is allowed to compete on the merits and may not engage in conduct departing from competition on the merits. Moreover, it bears a special responsibility not to impede its competitors' ability to *compete on the merit themselves* on markets where competition is already weakened because of its presence as the dominant company.
- Conduct that can *prima facie* fall within the ambit of competition on the merits – because it relates to parameters of “normal competition” and can be beneficial for consumers (e.g. lower prices, better quality, more innovation, etc.) – can only fall afoul of Art. 102 TFEU if it cannot be replicated by AECs and is liable to impede an effective competition structure. Conduct which is not replicable by AECs and is capable of foreclosing AECs fulfills these requirements (unless it is objectively justified).<sup>10</sup> Conversely, conduct which concerns parameters of “normal competition” and can be replicated by AECs is legitimate and not abusive<sup>11</sup> (unless there are other special circumstances that establish a departure from competition on the merits).
- If the conduct of the dominant company is replicable, but deviates from competition on the merits for other reasons, the conduct can be qualified as abusive without a need to show that the conduct is capable of foreclosing AECs, provided it is capable of impeding effective competition (as opposed to merely affecting individual rivals)<sup>12</sup>. An impact on “effective competition” exists if the conduct at issue makes it impossible or more difficult for other competitors to compete on the merits.
- Whether an abuse in the sense set out above exists or not is always to be assessed based on all relevant factual circumstances of each case. The relevant circumstances include all factual elements pertaining to the conduct itself, such as its nature and its market coverage, the market position of the companies concerned, the functioning of competition and the structure of the market involved, as well as the specifics of the relevant sector in which the conduct takes place.<sup>13</sup> In cases where the replicability of the conduct by AECs is a decisive

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<sup>10</sup> See, to that effect, case C-377/20 – Servizio Elettrico Nazionale, para. 71: “[...] *in order for such a characterisation [i.e. the characterisation of conduct as abusive as mentioned in para. 70] to be established, it is sufficient that that practice was (...) capable of producing an exclusionary effect in respect of competitors that were at least as efficient as the undertaking in a dominant position.*” (emphasis added).

<sup>11</sup> Case C-240/22 – Intel, para. 181 (quoted in footnote 8 above).

<sup>12</sup> The requirement of an impact on the structure of effective competition serves to delineate conduct infringing Article 102 TFEU from conduct against individual competitors that violates laws against unfair competition, such as the German UWG.

<sup>13</sup> See, to that effect, Case C-48/22 – Google Shopping, para. 168-170; see for further relevant circumstances Case C-680/20 – Unilever, para. 44.



factor and can be analysed by way of a price-cost test or another form of AEC-test, such a test is “relevant” and hence must, in principle, be conducted.<sup>14</sup>

- Finally, the relevant circumstances also comprise all evidence submitted by the dominant company to contest the abusive nature of the conduct or its capability to restrict competition. This is not only a substantive requirement, but also follows from the right to be heard.<sup>15</sup>

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<sup>14</sup> Case C-48/22 – Google Shopping, para. 266.

<sup>15</sup> See C-377/20 – Servizio Elettrico Nazionale, para. 52: “[the right to be heard] is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual, competition authorities have, inter alia, the obligation to hear the undertaking concerned, which means that they must pay due attention to the observations thus submitted by that undertaking, examining carefully and impartially all the relevant aspects of the individual case, and, in particular, the evidence submitted by that undertaking.” (emphasis added).