

## FiberCop input to the public consultation on the EU guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

FiberCop welcomes the opportunity to comment on the Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct (the “Draft”) and shares the Commission’s objective *“to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse”*<sup>1</sup>.

The decisions of the antitrust Authorities have enormous relevance, not only on the companies directly affected by a given proceeding, but on the functioning and structure of the market, with concrete consequences on investments, innovation and consumers. It is therefore of pivotal importance that antitrust policies are correctly and proportionately enforced, based on the evaluation of the effects of the conducts under assessment and considering all the facts surrounding a specific case, including possible efficiencies (e.g., development of investment, competitiveness).

As a preliminary remark, we note that contrary to its stated objective, the indications provided in the document are often based on a **formalistic approach**, making the important self-assessment task of companies even more difficult than it is today with the Guidance paper (the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, “Guidance”).

In particular, **the line between dominance and abuse appears to become considerably thinner**, making assessments – by companies, but even more important, by the relevant Authorities – highly discretionary.

Indeed, contrary to what the Commission announced in the 2023 revision of the 2008 Guidance, stating that it would have kept the **effect-based approach** that over the years the Union Courts have largely confirmed, the Draft introduces a new **presumption-based** and therefore very formalistic approach.

In particular, a combined series of characteristics of this Draft – like the widening of the scope of fundamental concepts (first, the abandon of the concept of “anticompetitive foreclosure” in favor of a more general impact on effective competition), the new presumptions (of dominance, of exclusionary effects, etc.), the lowering of the evidentiary threshold for DG Comp when rebutting evidence from the parties, the lack of focus on the theory of harm, the little room left for (objective) justifications – may lead to an **unduly wide use of Article 102**. Instead, Article 102 application should be calibrated with weights and counterweights to protect the different interests in play and not to stifle innovation and economic initiative by dominant companies.

FiberCop therefore **believes** that **in order to fulfill its objectives the Draft should be fundamentally reviewed**, restating the focus on effects and on the importance of economic evidence to assess whether or not a conduct may be deemed to be abusive.

Following is a summary of the main **provisions** that FiberCop believes should be revised in the final text, as **they introduce a disproportioned level of discretion and depart from the Union Court case law**.

1. **Presumption of dominance.** The Draft introduces a **presumption of dominance on market share** which is not based on settled case law: the Draft states that **“evidence”** of a dominant position can be inferred when the market share of the concerned undertaking is **above 50%**, whereas absence of a dominant position can be presumed when market share is **below 10%**. Beyond being objectively unreasonable, this represents a relevant departure with no clear justification from the approach the same Commission adopted in 2008 and confirmed in 2023 in the Guidance paper, indicating that *“dominance is not likely if the undertaking’s market share is below 40% in the relevant market”*. Also, the case law mentioned to support this change is both unconvincing and precedes the 2008 Guidance paper (where the 40% was used as an indication of absence of dominance).
2. **Presumption of exclusionary effects.** Para. 60b) establishes a category of conducts that are generally recognized as having a high potential to produce exclusionary effects and accordingly are subject to a **presumption** concerning their capability of **producing exclusionary effects**. It identifies five conducts within this class: (i) exclusive supply or purchasing agreements, (ii) rebates conditional upon exclusivity, (iii) predatory pricing, iv) margin squeeze in the presence of negative spreads, v) certain forms of tying. The introduction of this category,

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<sup>1</sup> Para. 8 Draft Guidelines.

which does not result from the case law, raises major concerns as it seems to **include most of the relevant conducts**, which should be instead assessed according to an effect-based approach. Indeed, this shift of the burden of proof onto the dominant undertaking and the significant narrowing of the Commission's duty to conduct a thorough examination **directly contradicts established case law**. Also, the boundaries of this category, in particular with reference to the ones of section 4.2, that regards conducts subject to specific legal tests, are **not clear**.

Moreover, it must be highlighted that this presumption is even drawn up with detailed provisions that tend to further **increase the burden of proof for the undertakings** to rebut the same presumption, while decreasing the standard of proof when rebutting the parties' evidence, increasing the likelihood of type-1 errors. In fact, most of the provisions contained in para. 60b) that dictate specific rules on the application of the presumption not only create confusion by outlining a not very clear atypical presumption, but also hinder the legitimate exercise of the right of defense. Therefore, the presumption becomes an atypical aggravated (even if still "relative") presumption. Instead, the Union Courts have always expressly confirmed that any evidence that the dominant undertaking files to demonstrate that its conduct is not capable of having exclusionary effects must be taken into careful account and specifically argued and rebutted in the Commission's motivation (see, among the many examples, Intel, Google Android and Unilever cases).

It is clear throughout the document the Commission's intention to increase the workability of Article 102, but this is at the expense of the undertakings, for which the application of Article 102 becomes really complex, laborious and economically expensive (e.g. higher ex ante and ex post expenses, i.e. more requirements of compliance, increased out-of-court and court legal costs, etc.) to which it must be added the elevated risk of losing a case for a judicial error (e.g. not being able to produce the rebuttal evidence). It follows from the above that the Commission should abandon the category of conducts that are presumed to lead to exclusionary effect, as this approach violates established case law and creates a significant shift in the burden of proof, to the detriment of dominant undertakings.

3. **Effects of the legal tests.** Para. 47 and section 4.2. identify **five categories** of conducts subject to **specific legal tests** that the Draft says to be developed by the Union Court case law to establish whether certain types of conduct by dominant undertakings infringe Article 102; contemplating an **automatic relationship** between the **fulfilment** of a **specific legal test** and the **exclusionary effect** (*"when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects"*, Para. 47). FiberCop believes that the relationship between the fulfilment of a specific legal test by a conduct and (the presumption about) its capability to produce exclusionary effects and the departure from competition on the merits is not clear throughout the Draft. In any case, the **automatic abusive effect** established in para. 47 is **not endorsed by the case law**: the presumption concerning the capability attributed to certain practices of producing exclusionary effects because they fulfil a certain legal test is unwarranted according to the existing case law, although of course case law has suggested a price-cost test for certain conducts (such as predatory pricing or margin squeeze) and established certain criteria to determine whether a conduct is abusive (for example, in the cases of a refusal to supply or margin squeeze). Anyways, there should be no shortcuts for establishing whether a conduct is not competition on the merits and is capable of producing exclusionary effects.
4. **Assessment of objective justifications.** The Draft recalls that to be objectively justified the conduct must be objectively necessary (so-called "objective necessity defense") or produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (so-called "efficiency defense"). Unfortunately, the Draft **misses a chance** to provide any **new guidance** on the two criteria for objective justification of the conduct. Under this Draft, the standard of proof for the objective justification by the parties seems to be higher than the one for the capability to produce exclusionary effects assessment by the Commission. On the contrary, there should be a balanced approach. In particular, there is a **too wide discretion** for the Commission to refuse efficiencies. Also, FiberCop believes that the Guidelines should **take into account** the **later developments** in competition policy regarding which efficiencies beyond price and quality can be recognised, particularly with regard to **innovation, sustainability and investment** (see, for example, the Horizontal Agreements Guidelines – HGL). Therefore, this topic should be further elaborated; for instance, by giving clear guidance on which evidence will be satisfactory and also in which cases out-of-market efficiencies could be recognised.