



# Balanced Economy Project submission to the European Commission

October 31, 2024

## 1. Introduction

- 1.1. The Balanced Economy Project welcomes the opportunity to submit a response to the European Commission's draft guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. Our insights aim to enhance the guidelines' effectiveness and ensure they address the interests and perspectives of all market participants, including wider civil society. The market distorting effects of concentrated power are a major concern and requires an approach that puts power rather than simply price at the centre of market operations.
- 1.2. The Balanced Economy Project is a civil society organisation whose purpose is to hold powerful corporations to account and reclaim the ability of present and future generations to continually restructure our economies by collectively constraining corporate power. We support legal and public policy frameworks that regulate business activities to ensure that they do not undermine human rights and the public interest.

## 2. General comments

- 2.1. We welcome the Commission's draft guidelines on Article 102 TFEU and consider it an important step in reinvigorating effective enforcement of a key competition tool for controlling economic power. This is particularly relevant in the context of increasing economic concentration in the EU, as highlighted in the European Commission's recent study on "Protecting competition in a changing world".<sup>1</sup> The draft guidelines are an opportunity for the Commission to carve out more room for manoeuvre in the application of Article 102 TFEU with a framework that promotes meaningful and deterrent enforcement.
- 2.2. It is important in this exercise to recognise the wider goals of competition policy, and that it is not isolated to a narrowly defined economic goal. The Court underlined the wider context of the application of Article 102 TFEU in *Servizio Elettrico Nazionale* when it stated that it is "part of a set of rules, the function of which is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, which ensure well-being in the European Union".<sup>2</sup>

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<sup>1</sup> European Commission (2024) "Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years".

<sup>2</sup> Case C-377/20, EU:C:2022:379, para 41.

- 2.3.** The future enforcement of Article 102 TFEU should be operationalised with express recognition of the multiple goals of competition policy and with the objective of addressing the harms from rising market concentration and disruptive developments that undermine rather than enhance dynamic competition. It is imperative that markets are kept open and contestable for the benefit of all market participants. Effective and administrable enforcement of Article 102 TFEU is essential for a regime that delivers on protecting competition and remedies the resulting harms to the competitive structure. This means addressing the underlying reasons behind both the underenforcement of Article 102 TFEU and the increasing number of excessively long adversarial proceedings.
- 2.4.** It is also important to acknowledge that the draft guidelines on exclusionary abuse are not in of themselves going to address current problems with the enforcement of EU competition law. The debate on the draft guidelines is an opportunity to revisit the rationale for a New Competition Tool / market investigation tool to intervene more effectively in markets with a structural lack of competition or market failures. With a growing number of competition authorities adding or looking to include a market investigation power, and the assessment of the application of Article 102 that has led to the draft guidelines, it is time for the Commission to reassess the merits of introducing a tool to address market failures that are not readily or effectively solved under competition law. In addition, the ongoing review of Regulation 1/2003 is an opportunity to critically review the procedures for enforcing Article 102, from case selection through to time frames. There is a need to address the constraints of Regulation 1/2003 that on the one hand create a general (legal) preference for behavioural over structural remedies, and also make the design of effective remedies capable of surviving judicial review legally challenging, particularly in the context of online platforms.
- 2.5.** There is scope for the draft guidelines to be bolder in their stated objectives. The Commission's press statement and the guidelines set out that the aim is to reflect the Commission's interpretation of the existing EU case law and the Commission's decisional practice. However, this has led to criticisms that the Guidelines, by pulling together a disparate and inconsistent set of case law into a unified theory of exclusionary abuse of dominance, is based on a selective reading of the case law that is an attempt to roll back on the effects-based approach introduced in the 2009 Enforcement Priorities Guidance. The limitation of the stated aim of the draft guidelines to summarising Court precedents is a lost opportunity to set out a bolder and clearer policy document that articulates the policy and enforcement dynamics that underpin the draft guidelines' apparent and unstated (but welcome) aim for a more workable approach than the effects-based approach introduced in the 2009 Guidance Paper. Framing the guidelines this way would address head-on some of the criticisms noted above and make the draft guidelines a clearer, policy-based instrument rather than confining itself to a restatement of the law. This would facilitate the inclusion of bolder innovations and novel cases, such as mixed exploitative and exclusionary abuses, as well as folding in enforcement realities such as those that characterise digital markets. A more ambitious policy document would acknowledge that the interpretation of rules is evolutionary and therefore the draft guidelines can elicit changes and that court rulings can be deviated from and developed further.
- 2.6.** The draft guidelines will have a strong influence on how cases are run at national level and how national judges review them. Therefore, the rules must be workable for smaller national competition authorities that do not have the same resources as the European Commission if they are to be enforced effectively across the EU, and indeed in third countries that take inspiration from them. And they must be manageable for judges in Member States reviewing the legality of enforcement decisions or private action claims. In this respect it would be useful to have more illustrative examples in the draft guidelines to help with judicial understanding.

- 2.7. The impact and influence of EU competition law in emerging and developing countries should be another consideration in relation to the ease of understanding and applying the guidelines. Bilateral dialogues, cooperation agreements and technical exchanges between the EU and younger competition agencies have promoted convergence on a number of substantial and procedural matters, including the approach to the enforcement of Article 102. Moreover, the EU has been very influential in developing, setting and promoting international competition law norms. If the current approach to the enforcement of Article 102 has proved dysfunctional in the EU, then what chance do small, often under resourced and inexperienced agencies have of applying a similar effects-based assessment in developing and emerging markets that are often highly concentrated with high barriers to entry, pervasive state ownership or favouritism and vested interests. And yet there is pressure from private practitioners, and well-intentioned international organisations, networks and the international competition community to adopt the analytical and enforcement approaches of the European model of competition law as an example of best practice, when instead it risks having a chilling effect on the capacities of competition authorities and the usefulness of competition law as an instrument to make markets work in developing and emerging economies.
- 2.8. We commend the Commission's public consultation exercise on the draft guidelines and its encouragement of feedback from a wide range of stakeholders. In order to make this process and its outcome more readily accessible to as wide a group of interested parties as possible, including civil society, citizens and less well-resourced organisations and business, we suggest that the Commission produce an accompanying document to explain the guidelines in less technocratic language. This would improve understanding of the aims and objectives of the guidelines and facilitate on-going dialogue and feedback with a broader range of stakeholders.

### 3. Specific feedback

- 3.1. We set out our views and recommendations on specific points in the draft guidelines in the following sections.

### 4. Dominance

- 4.1. The change in emphasis on market shares compared to the 2009 Priorities Guidance is an important development given the rising economic concentration mentioned above and the evidentiary burdens involved in bringing Article 102 cases (see section 7 below for more detail on the latter). We welcome the reference in paragraph 26 of the draft guidelines to *"the existence of very large market shares... are in themselves – save in exceptional circumstances – evidence of a dominant position. This is the case in particular where an undertaking holds a market share of 50% or above"*. The text also refers to a soft safe harbour of 10% market shares, save in exceptional circumstances (footnote 41 of the draft guidelines), which would benefit from further clarification of what is envisaged to provide greater legal certainty.
- 4.2. We support the inclusion of collective dominance in the draft guidelines with a helpful analysis of the case law. This is an important development in light of the Commission's findings of increased concentration of markets in the EU.<sup>3</sup> And we hope it signals a commitment by the Commission to pursuing collective dominance cases after a significant hiatus.

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<sup>3</sup> European Commission (2024) "Protecting competition in a changing world - Evidence on the evolution of competition in the EU during the past 25 years".

## 5. Consumer welfare

- 5.1. The draft guidelines indicate a welcome shift away from a narrow understanding of consumer harm and the consumer welfare standard. And the guidelines state that there is no need to prove direct harm on consumers to fall within the Article 102 prohibition. This is important given that over-reliance on the consumer welfare standard – with welfare defined primarily in terms of lower prices – has weakened competition enforcement in recent decades, particularly in digital markets.
- 5.2. As noted above (section 2.2), the draft guidelines should explicitly set out the wider goals of competition policy and the multiple interests that Article 102 protects. These go beyond the reference in paragraph 1 of the draft guidelines to “*choice, quality and innovation, at the lowest prices for consumers*”. The draft guidelines should make explicit reference in paragraph 1.1 to the multiple goals of competition policy as noted by Executive Vice-President Margrethe Vestager “*such as fairness and level-playing field, market integration, preserving competitive process, consumer welfare, efficiency and innovation, and ultimately plurality and democracy*”.<sup>4</sup> This would also reflect statements from Court judgements for a more encompassing set of interests, including the “well-being” of consumers, both intermediary as well as end consumers<sup>5</sup>; “the maintenance of the degree of competition existing in the market or the growth of that competition” and “the functioning of the internal market”<sup>6</sup>, and “plurality in a democratic society”<sup>7</sup>.
- 5.3. There should also be a cross-referencing of these wider goals of Article 102 in section 51 of the draft guidelines. This would underpin the approach in the draft guidelines to look more broadly than the effects of the conduct of dominant companies on as efficient competitors.

## 6. The concept of abuse

- 6.1. The two-part test for identifying an exclusionary abuse of dominance is a welcome and necessary framework given the complexity of the EU Courts’ jurisprudence in the area. The test would benefit from further clarification on whether the two limbs of the test are cumulative or alternatives if they are regarded as conceptually different. Increased certainty here would go some way to avoiding enforcers being tied-up with defence strategies framed around these points before the Courts.
- 6.2. The draft guidelines would also benefit from more discussion on the importance of protecting less efficient competitors in certain cases and where it is important to protect competitors in order to protect competition. This would underpin the concept that a less efficient competitor may be better than no competitor at all.

## 7. Legal and evidentiary presumptions

- 7.1. We strongly agree with the introduction of a more principled approach to exclusionary abuses in the draft guidelines. Rebuttable presumptions based on well-founded economic theory and case experience that work to trigger evidentiary burden shifting between parties and the competition agency are an important step forward to improve the timely and effective enforcement of Article 102. We therefore strongly support the approach in the draft guidelines that evidentiary burden associated with the demonstration of

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<sup>4</sup> Policy Brief.

<sup>5</sup> *Servizio Elettrico Nazionale*, para 46

<sup>6</sup> *Servizio Elettrico Nazionale*, paras 41-44, 68

<sup>7</sup> *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, para 1028.

exclusionary effects needs to be proportionate to the likelihood that conduct will produce harm. And we agree with the Commission's interpretation of the EU Courts' case law regarding the existence of legal presumptions in relation to types of conduct that have a high potential to produce exclusionary effects or are by their very nature capable of doing so.

- 7.2.** The draft guidelines make a number of improvements to strengthen the enforcement of Article 102 and avoid making it “unduly burdensome or even impossible”.<sup>8</sup> We support the clarifications on the concept of causality of conduct and evidentiary requirements in section 3.3, anchoring a finding of abuse to the actual competitive reality of the market and the examination of the facts and circumstances at the time of the conduct, rather than theoretical assumptions. It would be helpful to have further clarification on the importance of qualitative evidence. It would also be useful to expand the list of naked restrictions, which is rather narrow and overly prudent. For example, including predatory pricing below variable cost and looking to categorise the abusive conduct in the Superleague judgement<sup>9</sup> as a naked restriction.
- 7.3.** The draft guidelines should also consider the practical implications of the “soft presumptions”, given the importance of setting out an administrable evidentiary framework. Once a presumption is rebutted, there will be a high evidentiary burden on enforcers, which is a risk that will need to be mitigated.

## **8. The “as efficient competitor” test and effects-based approach**

- 8.1.** We strongly support the approach across the draft guidelines to re-evaluate the effects-based approach and make it more meaningful and to prevent it from over-burdening proceedings and ultimately result in underenforcement of Article 102 given the enormous resources to investigate potentially abusive practices. It should not be the case that complex economic models dictate the substance of EU competition policy and therefore the enforcement of Article 102. The significant reduction in importance of the price-cost test and the “as efficient competitor” (AEC) test in the draft guidelines is welcome.
- 8.2.** The draft guidelines helpfully clarify in which cases and conduct the AEC test may be useful and where it is not. We support the approach to disentangle the conflation of an effects-based approach with the application of the AEC test for all conducts in all situations. Nevertheless, the draft guidelines would benefit from more illustrative examples for the application of the AEC given the challenge to identify the cases where a case by case and effects analysis is important and feasible.
- 8.3.** The draft guidelines may require some refining in light of the recent *Intel* judgement<sup>10</sup>, but we would argue that this should not lead to a horizontalization of the AEC test across the board. Instead, we encourage the Commission to take into consideration the Courts' comments on the AEC test in other judgements and address the weaknesses of the *Intel* decision through further refining and clarifications of the draft guidelines.
- 8.4.** We agree with the shift away from the exclusion of “as efficient competitors” towards a focus on the impact of conduct on the structure of the market. This does not discount the role and usefulness of economics. Indeed, it is important that the draft guidelines derive the categorisation of conducts based on sound economics. And it is clear that economic insights have an important role to play in the framing and analysis of the facts. However,

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<sup>8</sup> Lindsey McCallum and others “A dynamic and workable effects-based approach to abuse of dominance”, European Commission, Competition Policy Brief No 1/2003 (Policy Brief).

<sup>9</sup> *European Superleague Company*, C-333/21, EU:C2023:1011.

<sup>10</sup> *Intel*, Case C-240/22P, ECLI:EU:C:2024:915.

the over-emphasis on the effects-based approach has had a negative impact on enforcement.

- 8.5.** At the same time as considering a more workable approach than the effects-based approach, the draft guidelines should look to incorporate standard accounting and financial analysis (AFA) as an analytical tool. AFA is better able to measure excess profits or predatory pricing, where industrial organisation economics has had limited results. It is therefore well suited to identifying and addressing certain types of exclusionary abuses. AFA uses internationally standardised data from company accounts. This data is used routinely by companies and analysts to understand the business world, and it can be used in standard and accepted ways to measure (for example) excess profits, or predatory pricing. This data is legally mandated and audited according to agreed international standards, and also generally available on public record, so it is far less open to manipulation.

## **9. Exploitative abuses**

- 9.1.** Although the draft guidelines recognise that the principles relevant to the assessment of exclusionary abuses are relevant for the assessment of exploitative abuses as well, there should be explicit guidance set out for exploitative abuses in the same way as for exclusionary abuses. This would reflect a resurgence in exploitative abuse cases by both the European Commission and Member States. This has included more classic cases of excessive pricing in the pharmaceutical sector.<sup>11</sup> Newer types of conduct have been pursued in the digital economy, notably with the EU Apple App Store Practices (Music Streaming) case<sup>12</sup> the German Facebook case<sup>13</sup> and the French investigation of Google's use of protected content of press agencies and publishers<sup>14</sup>.
- 9.2.** Given the increasing level of economic concentration, exploitative abuses are an increasing concern both because they are easier to inflict in a concentrated market and because much of the harm comes from extraction. These should be an enforcement priority for the European Commission and reflected in the draft guidelines as Article 102 can play a key role in addressing the exploitative practices of dominant firms. This is particularly relevant in the case of digital markets and dominant gatekeepers where there is increased risk of exploitative abuses.

We thank you for your consideration of this contribution, and look forward to further dialogue on these issues.

Balanced Economy Project

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<sup>11</sup> *Aspen*, Case AT.40394, Autorita` Garante della Concorrenza e del Mercato, decision of 29 Sept 2016 (Case A480—Incremento prezzi farmaci Aspen); Konkurrenserådet, decision of 31 Jan 2018 (Case 14/08469, CD pharma's pricing of syntocinon).

<sup>12</sup> *Apple App Store Practices (Music Streaming)*, Case AT. 40437.

<sup>13</sup> Bundeskartellamt, decision no. B6-22/16 of 6 Feb. 2019.

<sup>14</sup> Autorité de la concurrence, Decision 20-MC-01 of 9 April 2020.