

bpostgroup**Feedback on the draft Guidelines on exclusionary abuses of dominance****30 October, 2024*************1. BACKGROUND**

1. The European Commission (the “Commission”) has launched a public consultation on 1 August 2024, inviting all interested parties to comment on the Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) to abusive exclusionary conduct by dominant undertakings (the “Draft Guidelines”). bpostgroup welcomes this opportunity for stakeholders to comment and share industry views on the Draft Guidelines.
2. Article 102 TFEU prohibits the abuse of a dominant position that may affect trade within the EU and prevent or restrict competition. The enforcement of Article 102 TFEU is key to ensuring that competition works effectively.
3. The Draft Guidelines bring some long-awaited clarifications, and aim at reflecting the Commission's interpretation of the EU Courts' case-law on exclusionary abuses and the Commission's practice in this regard. The EU Courts' rich body of case-law endorsed the effects-based approach to Article 102 TFEU promoted by the Commission in its 2008 Guidance on the Commission's enforcement priorities (the “2008 Guidance”). Concretely, the 2008 Guidance contributed to promote an approach focused on the potential effects of alleged abusive conduct, through the analysis of market dynamics.
4. The Commission clearly states that the Draft Guidelines are intended to contribute to the improvement of the legal certainty to the benefit of consumers, businesses, as well as national competition authorities and courts.¹ This follows the request for more clarity and legal certainty in the application of Article 102 TFEU to exclusionary conduct, previously expressed by stakeholders in response to the Commission's Call for Evidence in March 2023.²
5. Although bpostgroup welcomes the Commission's Draft Guidelines, we also believe that there is room for improvement in the Draft Guidelines which, in our view, create more uncertainty in many instances instead of promoting legal certainty.
6. We respectfully set out below our main concerns and recommendations regarding the Draft Guidelines.

¹ Draft Guidelines, §8; *Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses*, Press release, 1 August 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623.

² Ibid.; *EU competition law – guidelines on exclusionary abuses by dominant undertakings*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en.

2. MAIN CONCERNS

2.1. Presumptions

2.1.1. Introduction of new presumptions

7. One of the main innovations brought about in the Draft Guidelines is the introduction of several presumptions. The Commission distinguishes (i) “conduct[s] for which it is necessary to demonstrate a capability to produce exclusionary effects”, (ii) “conduct[s] that is presumed to lead to exclusionary effects” (for exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads, certain forms of tying), and (iii) “types of conduct are by their very nature capable of restricting competition” (for naked restrictions).³
8. To justify the inclusion of these presumptions, the Commission states the following in footnote 131 of the Draft Guidelines:

“While the Union Courts have not always made explicit use of the term “presumption” for each one of these practices, the Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as “presumptions”. Therefore, these Guidelines make use of the expression “presumption” (or “presumed”) for allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts.” (emphasis added)
9. In doing so, the Commission does not refer to any specific case-law, nor does it justify in more detail why the evidentiary burdens/tools linked to certain not further defined “*specific legal tests laid down by the Union Courts*” should be conceptualised as “*presumptions*”. However, this qualification seems to be at least subject to discussion and it remains questionable whether these presumptions are justified by the case-law of the EU Courts. Given the impact of such presumptions on the burden of proof on the undertakings concerned, one would expect the Commission to provide more legally sound justifications.
10. More in general, sometimes the stance taken by the Commission in the Draft Guidelines seems not to have a clear basis in the case-law of the EU Courts. This is not only the case in relation to the newly introduced presumptions, but also, for example, the test for conditional rebates (application of the price-cost test to the contestable part of demand) proposed by the Commission does not seem to have been validated by the EU Courts.⁴

2.1.2. Different weight given to the presumptions

11. The Commission seems to distinguish between a ‘normal’ presumption and a ‘strong’ presumption of harm (in the case of naked restrictions) without explaining how either category

³ Draft Guidelines, §60.

⁴ Draft Guidelines, §150.

could be rebutted or what the legal difference between the two types of presumption would be. The Commission merely says that “*there may be different ways to show that the conduct is not capable of having exclusionary effects, depending on the circumstances at hand. The undertaking may, for instance, attempt to overturn the presumption by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical*” (emphasis added).⁵ It should be noted that such approach would inevitably lead to a so-called “complex economic assessment”, which is impossible for a company to undertake in an *ex ante* analysis and which the EU Courts might be reluctant to challenge since this *ex post* review will likely be burdensome.

2.1.3. Presumption of dominance

12. The Draft Guidelines consider the existence of large market shares to be evidence of dominance, in particular when an undertaking has a market share above 50%.⁶ The Commission however omits to nuance this, as the 50% threshold is not decisive and it is not unthinkable that undertakings with even higher market shares, would not be dominant on a given market in view of the specific market characteristics. This is clearly expressed in the case-law of the EU Courts:

“A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned” (emphasis added).⁷

13. Moreover, if one adds to this presumption the tendency of the Commission to define very (too) narrow markets, the need for a disclaimer and nuance of the relevance of market shares is all the more important.

14. Also footnote 41 of the Draft Guidelines requires more explanations:

“Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances” (emphasis added)

15. While the Commission is making reference to C-75/84, it remains unclear what could constitute such “*exceptional circumstances*”. Such statement without any further clarifications makes it impossible for undertakings, even if they have a very low market share, to assess the risks of being found dominant on the relevant market. It would be helpful if the Commission could expand more on the “*exceptional circumstances*” that would explain the finding of a dominant position in case of very low market shares, and on the circumstances that could exclude dominance in case of the existence of very large market shares.

⁵ Draft Guidelines, §60, b).

⁶ Draft Guidelines, §26.

⁷ Judgment of 13 February 1979, Hoffmann-La Roche v Commission, Case 85/76, EU:C:1979:36, 40.

2.1.4. Result from the combination of the different presumptions

16. From the Draft Guidelines it follows that for undertakings having a certain market share, virtually every form of conduct that is capable of producing exclusionary effects can potentially lead to an abuse of dominance, without any possibility for the undertaking concerned to rely on a safe harbour and with very limited guidance as to the objective justifications that could be accepted by the Commission (see under 2.2 below). This makes it extremely difficult for undertakings with a potentially high market share to assess the risks associated with certain conduct and thus to limit the risks of a competition law infringement.
17. Moreover, the combination of presumptions will in practice lead to a reversal of the burden of proof, thereby reducing the burden of proof traditionally placed on competition authorities in pursuing abuse of dominance claims and making it very difficult for allegedly dominant undertakings to rebut the presumptions. While it is understandable that the Commission wishes to streamline its approach in the light of recent abuse of dominance case-law against international technology companies, the approach set out in the Draft Guidelines risks infringing the rights of defence, particularly in the case of smaller companies which do not have the same means of defence and for whom a reversed burden of proof will be disproportionately burdensome.

2.2. Low evidentiary thresholds for the Commission vs. lack of safe harbours and justifications for undertakings

2.2.1. Overall low evidentiary threshold

18. Even for the types of conduct whereby the burden of proof remains on the Commission, the in the Draft Guidelines suggested evidentiary threshold is not high. While the effects must be more than hypothetical, there is no requirement of proof that the conduct i) has actual exclusionary effects; ii) is the sole cause of exclusionary effects; iii) resulted in direct consumer harm; iv) was capable of excluding as efficient competitors (“AECs”); or v) had an appreciable impact on competition.⁸ In addition, the importance of the assessment of the counterfactual is significantly reduced.
19. The Commission’s interpretation of the EU Courts’ case-law in this regard, has a significant impact on the weight of the burden of proof on the Commission and on potentially dominant undertakings. Not only it remains unclear what is left for the Commission to demonstrate considering such a low evidentiary threshold, but also what a dominant undertaking can argue in its defence. Unfortunately, the Draft Guidelines usually merely point out what is insufficient for the dominant undertaking to demonstrate, without providing any guidance on what could potentially serve as an argument in the undertakings’ defence.

⁸ Draft Guidelines, §§64-65, 71-75.

20. Moreover, the departure from the customary economical approach and concepts such as “competitor foreclosure”, “as efficient competitor” and “anti-competitive effects” undermines the effects-based approach as set out in the 2008 Guidance.
21. This runs counter to the Commission's stated objective of providing greater legal certainty and guidance to stakeholders. On the contrary, by depriving undertakings of the customary economic toolbox and effects-based approach with which they are familiar and which have enabled them to assess and manage competition law risks, and replacing it with “strong” presumptions, the Commission leaves businesses unarmed in the dark.

2.2.2. Insufficient guidance on possible objective justifications and efficiencies

22. The Draft Guidelines devote 53 pages to the description of the concept of “dominance” and the analysis of possible exclusionary abuses of dominance, but only mere 4 paragraphs refer to possible objective justifications for conduct that would otherwise have been found to be an abuse of a dominant position. Moreover, these 4 paragraphs remain vague and merely descriptive, lacking the necessary precision or examples that would definitely help to clarify the concepts of the so-called “objective necessity defence” and the “efficiency defence”.
23. In the same vein, there is very limited reference to elements that could possibly serve as a safe harbour. This departs from the approach taken by the Commission in its other guidance papers concerning Art. 101 TFEU. By way of example, where the Commission is fast to link a presumption of harm to predatory pricing, it omits to provide any guidance on situations where pricing below cost could be justified, e.g. in the case of a new product launch.
24. The lack of sufficient guidance on possible objective justifications and efficiencies, combined with the generally low burden of proof maintained by the Commission, puts legal certainty significantly under pressure and discriminates companies happening to have a notable market share according to the Commission.

2.3. Lack of clarity

2.3.1. General lack of clarity and definition of key concepts

25. Furthermore, we would like to point out the lack of clarity of concepts and in particular the lack of (precise) definitions in the Draft Guidelines. Some crucial concepts remain vague in the Draft Guidelines, such as the concept of “competition on the merits”. The Commission distinguishes between the assessment of whether “the conduct departs from competition on the merits” and whether “the conduct is capable of having exclusionary effects”. However, “certain factual elements may be relevant to the assessment of both”.⁹ Such wording unfortunately creates confusion and uncertainty rather than clarifying the main principles underlying the Draft Guidelines.

⁹ Draft Guidelines, §46.

26. Also other important concepts such as the notion of “*abusive exclusionary conduct*” are not properly defined. Although the Commission puts forward a number of key considerations that may be relevant to the assessment of a conduct’s capability to produce exclusionary effects,¹⁰ there is no ranking or prioritization of these criteria. The same is true for the notion of “*hypothetical market*”.
27. More generally, the Draft Guidelines give insufficient consideration to other areas of law or legal instruments. Paragraph 13 of the Draft Guidelines states that:
- “Article 102 TFEU may also apply to conduct which falls within the scope of other regulations, Union or national, that govern the behaviour of undertakings in the market and which pursue different objectives from that of the competition rules . The fact that the conduct of a dominant undertaking has been found to have infringed other legislation does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for an infringement of Article 102 TFEU for the same conduct. In addition, the fact that an undertaking’s conduct has been found to comply with other legislation – or even been encouraged by it – does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for infringing Article 102 TFEU through the same conduct.”* (emphasis added)
28. The Commission is also not sufficiently taking the revised Market Definition Notice and other (adjacent) areas of law (such as data protection, the DMA, ...) into consideration, while it would be very helpful to have the Commission's views on the interaction between these legal fields/instruments and the abuse of dominance rules, and on how these considerations could affect the assessment of allegedly dominant market players.
29. The lack of clarity and precision contributes to legal uncertainty rather than eliminating it. In particular, the key concepts mentioned above play a crucial role in the identification of an abuse. This is not in line with the principle of legal certainty, which should enable dominant undertakings to assess the legality of their conduct.¹¹ It is therefore of the utmost importance that the Commission provides more details and more precise guidance in this respect.

2.3.2. Lack of guidance on exploitative abuses

30. We welcome the introduction of guidance on exclusionary abuses of dominance. We also note the lack of EU case-law on exploitative abuses. However, we would like to draw the Commission's attention to the fact that some guidance on exploitative abuses would also be welcome.

¹⁰ Such as “*the position of the dominant undertaking*”, “*the conditions on the relevant market*”, “*the position of the dominant undertaking’s competitors*”, “*the extent of the allegedly abusive conduct*”, “*the position of the customers or input suppliers*”, “*evidence of an exclusionary strategy*”, “*evidence relating to actual market developments*”. Draft Guidelines, §70.

¹¹ Draft Guidelines, §117.

3. CONCLUSION

31. In light of the above comments and concerns, we respectfully request the Commission to reconsider some elements of the Draft Guidelines and to consider the suggestions below in order to enhance legal certainty for the benefit of all relevant stakeholders. In particular, we respectfully request the Commission to:
- a. Take out all presumptions that have no explicit and confirmed reference in the case-law of the EU Courts;
 - b. Reinforce the customary concepts, considerations and legal tests linked to the economic “effects-based” approach;
 - c. Further develop the chapter on general principles for the assessment of objective justifications and efficiencies;
 - d. Include more safe harbour considerations in the Draft Guidelines that would clarify the situations in which certain conduct should not be considered (or is unlikely to be found) to be an abuse of a dominant position;
 - e. Further clarify the interplay between adjacent areas of law and abuse of dominance considerations;
 - f. Include more definitions in the Draft Guidelines, in particular to clarify the key concepts relating to the finding of abuse of a dominant position;
 - g. Provide guidance on exploitative abuses of dominance in the future.