

DEUTSCHE TELEKOM 'S RESPONSE TO EU COMMISSION 'S PUBLIC CONSULTATION ON EU GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU

1. Introduction

Deutsche Telekom (DT) welcomes the initiative of the EU Commission (Commission) to give more guidance and legal certainty to undertakings by introducing Guidelines on the Application of Art. 102 TFEU to exclusionary abuses.

DT notes that the main objective of the Draft Guidelines has been to codify existing case law relating to Art. 102 TFEU. In doing so the Commission needs to be cautious that this codification accurately captures the CJEU judgments. Unfortunately, to our reading it seems that the relevant cases have been interpreted in a selective manner, thereby unduly widening the potential for the finding of an infringement under Art. 102 TFEU.

A crucial example of such selective interpretation being the introduction of a category of conduct where there allegedly is a presumption of exclusionary effects that leads to a shift of the burden of proof from the Commission to the dominant undertaking. The introduction of such presumptions does not reflect the case law and the Commission itself recognises in footnote 131 that even the Courts have not always made explicit use of the term presumptions. It is clear from the recent *Google Shopping* and *Intel II* judgments that it is incumbent on the Commission to “*adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement*”.¹ At the same time, the Commission should be careful not to generalise certain conducts as being anti-competitive by codifying very specific cases with some exceptional circumstances.

Another important shortcoming of the proposed Draft Guidelines is the reduced emphasis on the as efficient competitor principle (AEC). Beyond that, the absence of the notion of ‘anticompetitive foreclosure’ is remarkable. Given that both the AEC and anticompetitive foreclosure have been an important part of the Art. 102 assessment in the past, their diminished role in the Draft Guidelines leads to more uncertainty rather than legal certainty and also goes along with an unmerited broadening of the application of Art. 102 TFEU.

Overall, the proposed Draft Guidelines widen the discretion of the Commission regarding Art. 102 cases beyond existing case law and to the detriment of legal certainty. A point also criticised in the Draghi Revamping Competition chapter of his report: “*excessive discretion on finding of exclusionary abuses left by the draft Guidelines*.”²

¹ *Google Shopping*, C-48/22 P, para 224; *Intel II*, C-240/22 P, para 328

² Draghi Report, The future of EU Competitiveness, Revamping Competition, FN 09

In light of the substantial shortcomings illustrated above, Deutsche Telekom believes that the proposed Draft Guidelines on Art. 102 TFEU need a substantial reworking. We believe that in particular following points should be revised:

- **Abolish presumptions:**

The category of conduct that are presumed to lead to exclusionary effects which goes along with a shift in the burden of proof should be abolished. The burden to prove exclusionary effects of a conduct must remain with the Commission.

- **Endorse AEC principle:**

The Guidelines should endorse the AEC principle and test and give some more guidance on their use in practice, as it also helps to promote efficient competition and innovation.

- **Clarify the Threshold for Foreclosure:**

The Guidelines should explicitly acknowledge that certain conduct, such as exclusive dealing arrangements or tying and bundling, are not abusive per se and that a detailed analysis of foreclosure effects is necessary. The Commission should follow the more effects-based approach, taking into account the pro-competitive justifications that may exist for such conducts.

- **Recognize Objective Justifications:**

The Guidelines should give more weight to objective justifications, such as innovation and investment. Especially, in capital-intensive industries like telecommunications the recovery of fixed investments or improving service quality are relevant. This would align with the CJEU jurisprudence on balancing the need to protect competition with ensuring that dominant firms can still compete on the merits.

In addition to the points outlined above we provide some more detailed comments on specific chapters of the proposed Draft Guidelines below, which may inform you on more concrete issues for the reassessment of the Draft Guidelines.

2. General principles applicable to the assessment of dominance

a. Single dominance

Generally, this section setting out the principles for the assessment of dominance is consistent with the existing case law, especially that dominance finding generally derives from a combination of several factors. Non the less, there is some selective interpretation with regard to certain factors such as market shares. In particular, when it comes to the 10% market share ‘safe harbour’ the Draft Guidelines establish being extremely low and the footnote suggesting that dominance can be established even below 10% in exceptional circumstances. By emphasizing the exception rather than the general case law the Draft Guidelines increase legal uncertainty.

The threshold for the presumption of dominance should be more consistent with *Hoffmann-La Roche*, where the Court emphasised that “*the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares*”³. Therefore, the Commission should uphold 2009 Guidance indicating that “*dominance is not likely if the undertaking's market share is below 40 % in the relevant market*”.

b. Countervailing buyer power

Conventional thinking about competition policy has emphasized the market distortion by seller power (i.e. dominance), resulting in harm to consumers and to the competitive dynamics of markets. Generally, less appreciated, but potentially even more harmful, is the exploitation of buyer or bargaining power.

In this context, the traditional mantra of competition law has been that mere wealth transfer away from suppliers is not a competitive concern. Hence, much of the exploitation resulting from purchasing power was and still is ignored.⁴ Indeed, using a short term, neo-classical model to look for harm to consumer welfare, or even total welfare, limits the enforcement agenda for competition authorities notably against the largest companies.

If, however, competition policy is consistently focused on the welfare of the end consumer, however, those suppliers disadvantaged by buyer or bargaining power could now and then find themselves in a rather defenceless position.⁵ For example, market reality shows that the Internet economy is rather imbalanced. A few of the largest companies with online business models extract the highest benefits

³ *Hoffmann-La Roche*, C-85/76, para 39

⁴ Peter C. Carstensen, Senior Fellow, American Antitrust Institute, Competition Policy and the Control of Buyer Power, 2017

⁵ Bundeskartellamt, Buyer Power in Competition Law - Status and Perspectives, Meeting of the Working Group on Competition Law, 2008, p. 13

from communications networks while network operators shoulder the investment to meet ever growing capacity demand. As consumers rightly expect impeccable connectivity to popular services of large Internet companies, commercial negotiations regarding IP data transport services are bound to fail if the largest companies with online business models translate their market power from the service level into buyer or bargaining power versus network operators.

The prevailing view is that the exercise of buyer or bargaining power undermines incentives for suppliers to invest. It is argued that a stronger buyer is more likely to —hold up the supplier, extracting a larger fraction of the additional profits that the suppliers' upfront investment generates.⁶ These effects spread from the initial victims and affect the wealth and development of the communities in which the supplier operates. Thus, the harm flows through the entire economy and is most hurtful when the economy injured is remote from any benefit that might accrue to the abusive buyer, its employees, and customers.

Against this background, DT submits that the combination of economic, ideological and political characteristics has resulted in an underappreciation of the risks purchasing power entail. The overhaul of the Guidelines on Art. 102 TFEU is a unique opportunity to include the issue of bargaining power into the overall framework of enforcement priorities.

c. Collective dominance

The assessment to establish collective dominance on the basis of (tacit) coordination between the undertakings is based on the criteria of the *Airtours* case “*where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.*”⁷

In using these criteria, it should be accounted for that these relate to a merger context, which is very different with regard to setting, ie ex ante versus ex post, and regarding consequences, which can be much more severe in an abuse of dominance case. Given this important distinction, we would welcome more clarity as to where and under which circumstances undertakings might be exposed to a charge of collective dominance under Art. 102 TFEU.

⁶ OECD, Policy Roundtable, Monopsony and Buyer Power, 2008, p. 11

⁷ *Airtours*, T-342/99, para 63

3. General principles to determine if conduct by a dominant undertaking is liable to be abusive

With the Draft Guidelines, the Commission seems to depart with the concept of anticompetitive foreclosure. In doing so it codifies a 2-limb test to determine whether certain conduct constitutes an exclusionary abuse: (i) whether it departs from conduct on the merits and (ii) whether it is capable of having exclusionary effects. Unfortunately, these concepts are quite vague and far from a sound test, which leads to more legal uncertainty for businesses.

a. Conduct departing from competition on the merits

The concept of competition on the merits as presented in the Draft Guidelines remains vague. The Guidelines do provide some examples in para 55 of what could be considered to be departing from competition on the merits but do not give any further explanations. Without providing reasoning there is no value for companies' self-assessment. Beyond that the Court has contradicted this logic in the recent *Google Shopping* decision stating: "*that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits*".⁸

b. Capability to produce exclusionary effects

In this section the proposed Draft Guidelines introduce three categories of conduct that are capable to produce exclusionary effects: (i) conduct for which it is necessary to demonstrate effects, (ii) conduct that is presumed to lead to effects and (iii) naked restrictions. This is problematic especially for two reasons. On the one hand, this seems to be a step back from the more economic approach in favour of a more formalistic approach. On the other hand, the Commission is shifting their burden of proof for the exclusionary effects of numerous types of conducts to the dominant undertakings.

With the move to a more formalistic approach the Commission also seems to limit the role of the AEC principle and the related test. This is an important part of the economic rationale of Art. 102 and why market power as such is not prohibited. It ensures efficient market competition, the incentive to innovate, and consumer benefit. The CJEU has also confirmed the general importance of the AEC in the latest *Intel II* decision finding that Art. 102 does not "*seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market*".⁹ Last but not least this is an important tool for the self-assessment of undertakings.

The introduction of presumptions for certain conducts that would shift the burden of proof to the undertakings does not reflect the case law. Especially following the recent *Google Shopping* and

⁸ *Google Shopping*, C-48/22 P, para 186

⁹ *Intel II*, C-240/22 P, para 26

Intel II decision it is clear that it is for the Commission to “*adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement*”.¹⁰ We have seen a lowering of intervention standards from actual effects to potential effects and from a ‘likelihood’ standard to a ‘capability’ standard in the case law, but courts have not shifted the burden of proof to undertakings. In particular with regard to the possible imposition of high fines, the Commission must under the general legal principle in *dubio pro reo* remain obliged to also investigate factors in favour of the undertaking and not shift the entire burden to their detriment. Beyond that, such a shift would also be difficult from a procedural perspective, since the effects-based analysis would shift to after the response to the Statement of Objections.

Given that the concepts proposed in this chapter, especially the introduction of presumptions that shift the burden of proof, are in contradiction with case law, lower the intervention threshold reinforcing bias toward the type 1 errors and thereby undermine innovation and competitiveness in EU this section and the following chapter need to be reworked fundamentally.

4. Principles to determine whether specific categories of conduct are liable to be abusive

a. Exclusive dealing

This section of the Draft Guidelines outlines the principles for assessing exclusive dealing under Art. 102 TFEU. As with most of the other sections, the entire section does not take into account the case law of the courts which require the Commission to prove that an exclusionary conduct has the effect to foreclose competition (eg. by reducing choice or forcing competitors out of the market/prevent their entry into a market). This is one example, where the Guidelines try to shift the burden of proof that those effects are not present to the undertakings, thereby trying to circumvent and ease the burden of proof for the Commission.

- Inaccuracy of Case Law Interpretation:

The Commission appears to rely on seminal cases such as *Hoffmann-La Roche* and *Michelin II*, which established that exclusivity agreements by dominant firms can constitute an abuse of dominance when they have the effect of foreclosing competitors. However, the Commission's reliance on these cases are overly broad or out of context in certain aspects.

In *Hoffmann-La Roche*, the Court emphasized that exclusive agreements by a dominant firm restrict the customers' ability to choose suppliers and foreclose competition. However, the Court also stressed the importance of analysing the market effects, including whether such agreements were genuinely exclusionary or part of normal competitive behaviour. This can be the case if the dominant firm must build additional capacities to satisfy the request of the customer which require additional

¹⁰ *Google Shopping*, C-48/22 P, para 224; *Intel II*, C-240/22 P, para 328

investments. In these cases, the dominant firm cannot bear the risk of a sunk investment should the customer not retrieve the requested capacity.

The Draft Guidelines, however, seem to suggest that any exclusive dealing by a dominant firm will be presumptively treated as abusive, without giving sufficient weight to pro-competitive effects. This narrow interpretation of the case law ignores the effect-based approach that Courts have adopted in more recent cases, such as *Post Danmark II*¹¹. The Court in *Post Danmark II* confirmed that not all exclusive deals by dominant firms are abusive—the key question is whether they result in actual or potential foreclosure that harms competition and consumers. As regards the standard of proof, it makes a difference whether the undertaking has to rebut a presumption as foreseen in the Guidelines or whether the Commission is required to find evidence itself in favour of the undertaking concerned.

- Critique of Generalization

The Commission's draft appears to generalize exclusive dealing practices as abusive when employed by dominant firms, without sufficient flexibility for a case-by-case assessment and shifts the burden of proof to the detriment of the undertaking that might presumably abuse their dominant position. The *Tomra* case is often cited to support this strict approach, but even in *Tomra*, the Court analysed the foreclosure effects of exclusive arrangements, considering factors like market conditions and the extent of competition. Individual case review by the Courts cannot be a basis to set up principles that allow for a presumption against undertakings that fully bear the burden of proof to rebut such a presumption.

This rigid approach could lead to over-enforcement against dominant firms who use exclusive agreements for legitimate commercial reasons, such as improving efficiencies, investing in additional capacities or securing long-term supply agreements that benefit consumers. The general summary of potential factors in Section 5 of the Draft Guidelines fall short of providing the necessary framework for such an assessment. The Commission's failure to account for objective justifications in a nuanced manner would undermine the balancing act required under Art. 102 TFEU, where efficiency gains and pro-consumer outcomes must also be considered, and ultimately also undermine EU competitiveness.

Against these general aspects we also see the Guidelines critical because there could be significant negative consequences for contracts with Mobile Virtual Network Operators (MVNOs). For instance, Mobile Network Operators (MNOs) frequently offer exclusive wholesale access agreements to MVNOs, which allow them to provide mobile services without owning the infrastructure. These arrangements often include provisions restricting MVNOs from accessing other networks or requiring exclusivity in exchange for preferential terms (e.g., lower prices or higher quality services).

The Commission's stance could discourage MNOs from entering into such wholesale access agreements due to the fear of facing abuse of dominance claims, even when these agreements result

¹¹ *Post Danmark*, C-23/14, paras 50, 74

in efficiency gains or better service quality for consumers. In reality, exclusive access agreements may be pro-competitive in this sector, particularly when they allow MVNOs to offer better prices or innovative services that they wouldn't be able to provide without the backing of a large network operator.

b. Tying and bundling

Tying and bundling are common business practices that can be welfare enhancing, as the Commission recognises in para 87 they „*may provide customers with better products or offerings in more cost-effective ways*“. Therefor it is not appropriate to categorise this conduct as presumed anticompetitive and thereby having a discouraging effect on potentially welfare enhancing practices. Even more so given that the draft Guidelines fail to give clear directions as to when exclusionary effects can be presumed. In fact, they state that whether “*tying is capable of having exclusionary effects depends on the specific circumstances of the case*“. The use of ex ante presumptions in the context of tying and bundling is not warranted from an economic perspective given the potential consumer benefits.

The Draghi report also criticises that the Guidelines do not set out under which conditions tying can be presumed to lead to exclusionary effects.¹² This not only increases legal uncertainty for dominant undertakings, but heightens the self-assessment and compliance burden, which ultimately will have a chilling effect on innovation and competitiveness in the EU.

c. Refusal to supply

The Commission adequately summarizes relevant case law regarding a refusal to supply including the strict Bronner conditions including indispensability. In line with relevant case law the Guidelines recognize that “*in the long term, it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business.*”

DT submits, however, that the Guidelines fall short on providing any guidance as to differentiating factors regarding the abuse type “constructive refusal to supply” to which the Bronner conditions do not apply. Moreover, the Guidelines are silent as to the interplay between *ex ante* regulation (notably access obligations) and *ex post* competition enforcement¹³. Finally, the Guidelines do not explain the decisive difference between “refusal to supply” and “access restrictions” as “conduct with no specific legal test”.

¹² Draghi Report, Revamping Competition FN 09

¹³ Deutsche Telekom, T-827/14; Deutsche Telekom C-152/19 P

e. Margin squeeze

We welcome that the Commission's Draft Guidelines also include specific guidance for conducting a margin squeeze test. The draft provides for a three-step test, namely (i) whether the undertaking concerned is vertically integrated and dominant on the upstream market, (ii) whether the spread between the prices of the dominant undertaking on the upstream and downstream markets prevents equally efficient competitors that rely on the dominant undertaking's input from operating profitably on a lasting basis on the downstream market and (iii) whether this conduct is capable of producing exclusionary effects.

- Lack of Objective Justification

The test as proposed in the Draft Guidelines, however, does not include a separate step to specifically examine an objective justification for a pricing behaviour resulting in a margin squeeze. The draft only contains general principles for assessing the objective justification of potentially abusive behaviour in paras 167- 171. Since a margin squeeze with exclusionary effects can generally be objectively justified¹⁴ and since the underlying conditions for justifying a margin squeeze are specific, the lack of an objective justification should be explicitly listed as a fourth step and described already in the section of the Guidelines dealing with margin squeezes.

According to case law, any objective justification must be assessed based on all the circumstances of the specific case. It must be determined whether the disadvantages of the exclusionary effect of the dominant undertaking's pricing policy can be offset or even outweighed by efficiency gains that also benefit the consumer. When assessing efficiencies to justify a margin squeeze, the necessary standard of proof, i.e. the degree of probability of the claimed efficiencies, plays an important role. Since – at least based on the current Draft Guidelines – it is unclear what conditions should be met to establish an exclusionary effect (see below), it should be clarified in the Guidelines that the standard of proof for demonstrating justifying efficiencies does not exceed the standard required for proving an exclusionary effect of a margin squeeze.

- Exclusionary Suitability

The criteria in the Draft Guidelines for examining whether the pricing behaviour is suitable to cause exclusion go beyond the requirements defined by case law.

- Indispensability: According to para 127 of the Draft Guidelines, it is not necessary to establish that the input on the upstream market is indispensable for competitors to compete downstream when examining exclusionary effects. Although exclusionary effects are more likely the more important the input on the upstream market is for activities in the downstream market, establishing indispensability should explicitly not be required. Thus, the Guidelines remain unclear on how to handle a situation where an input is not indispensable because

¹⁴ *TeliaSonera Sverige*, C-52/09, para 75

there are indeed sufficient alternative sources for rivals on the downstream market, or such findings have not been made.

- Indeed, according to CJEU case law, it cannot be completely ruled out that a margin squeeze, despite the lack of indispensability of the relevant input, has no – even potential – exclusionary effect. However, it is then the task of the court (or the competition authority) to examine whether the pricing policy can have any anti-competitive effect on the affected markets. The CJEU states that “*it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned.*”¹⁵. Hence, the lack of indispensability does not necessarily exclude exclusionary effects, but such effects are very unlikely, and it must be carefully examined whether the pricing behaviour can have exclusionary effects despite the existing dispensability. This means that dependence on the relevant input product must be specifically examined in each case, and particularly high requirements must be placed on proving exclusionary effects if the input is not indispensable. This differentiated view as expressed in the case law should be reflected accordingly in the final Guidelines.
- Burden of Proof: A broad application of the margin squeeze test to cases where the relevant input on the upstream market is not indispensable would be particularly concerning given that exclusionary effects are even presumed if the spread between the dominant undertaking's input price on the upstream market and its price on the downstream market is negative. According to the draft Guidelines, a negative spread should lead to a rebuttable presumption of exclusionary effects, meaning that the dominant undertaking must provide evidence that the pricing behaviour has no exclusionary effects.
- This reversal of the burden of proof is not supported by case law. The Commission refers to the CJEU judgment in *TeliaSonera Sverige*. However, this judgment does not imply such a reversal of the burden of proof. In its judgment the CJEU merely states “*if the margin is negative ... an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking (...) would be compelled to sell at a loss*”¹⁶. This means the CJEU only holds that a potential exclusionary effect is “probable” in case of a negative price spread.
- The question of whether a certain fact is probable concerns the assessment of evidence and should not be confused with the question of the burden of proof. Even if certain effects of a margin squeeze may be probable, the Commission bears the burden of proof for the existence of these effects. The CJEU explicitly clarified this in its *TeliaSonera* judgment. It held: “*In order to establish that a pricing practice resulting in margin squeeze is abusive, it is*

¹⁵ *TeliaSonera Sverige*, C-52/09, para 72

¹⁶ *TeliaSonera Sverige*, C-52/09, para 73

necessary to demonstrate that (...) that practice produces, at least potentially, an anti-competitive effect on the retail market"¹⁷. This is consistent with the CJEU judgment in the *Deutsche Telekom* case. In this judgment the CJEU set out that "*the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated.*"¹⁸. This principle must apply even more if the Commission intends to apply the margin squeeze test in cases where the input product is not indispensable for rivals to compete on the downstream market. Otherwise, the exclusionary effect of a margin squeeze would be presumed even in cases where sufficient and appropriate alternatives exist. The presumption rule provided in the Draft Guidelines should therefore be deleted.

- Cost Benchmark

The Commission correctly bases the assessment of a sufficient price spread between the products of the dominant undertaking on the upstream and downstream markets on the dominant undertaking's own costs when conducting a margin squeeze test. *Deutsche Telekom* agrees with that. On the one hand, referring to a competitor's costs would protect less efficient competitors, which would result in higher prices for consumers. On the other hand, the dominant undertaking is generally not aware of its competitors' costs, so it can only determine its pricing behaviour and assess whether the price spread between its input product and its product offer on the downstream market is sufficient based on its own costs.

Nevertheless, the draft Guidelines suggests that under special circumstances, the costs of competitors should also be considered. This should particularly be the case if the dominant undertaking's cost data is not available or not sufficiently reliable. The Commission refers to the CJEU judgment in *TeliaSonera Sverige*. However, a review of the judgment shows (again) that the specific cases mentioned by the Commission are not mentioned there. The CJEU states generally: "*Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined*"¹⁹. The judgement then mentions specific cases where it is not possible to refer to the dominant undertaking's costs (e.g., because the costs cannot be precisely determined for objective reasons or particular market conditions dictate it). But the situation mentioned in the draft Guidelines, that the costs (although available) are not sufficiently reliable is neither comparable with a case in which referring to costs is not possible nor is it mentioned in the judgment.

The term "not sufficiently reliable" is also completely unclear. It is not further explained why and under what specific circumstances available cost data may not be sufficiently reliable. However, the

¹⁷ *TeliaSonera Sverige*, C-52/09, para 77

¹⁸ *Deutsche Telekom*, C-280/08 P para 250

¹⁹ *TeliaSonera Sverige*, C-52/09, para 46

undertaking concerned must be able to rely on the fact that available own costs also form the relevant basis for conducting a margin squeeze test. To create legal certainty for companies, this exemption to rely on competitor cost data should therefore be deleted.

- Product Aggregation

Regarding the extent to which products on the downstream market should be aggregated for the purposes of conducting a margin squeeze test, the Commission generally refers to aggregation at the level of the relevant product market. This approach is based on the fundamental assumption that the competitors must at least be able to replicate the dominant undertaking's product portfolio profitably.

This "aggregated approach" is generally to be welcomed. However, the aggregated approach does not go far enough and falls short of the standard already applied by the Commission itself. The Commission refers to its decision in *Slovak Telekom* in the Draft Guidelines. In this decision, the Commission rightly aggregated not only the products at the level of the affected retail market but also considered other products that could be offered on the downstream market based on the relevant input, regardless of the definition of the relevant market²⁰. Accordingly, the Draft Guidelines should clarify that all products offered by the dominant undertaking in the downstream market and that an equally efficient competitor can replicate based on the relevant input should be aggregated in the margin squeeze test.

Furthermore, the Draft Guidelines mention that the margin squeeze test can also be conducted at a more granular level under certain circumstances. This, however, should only be possible in exceptional cases. The example of subsidization of a perspective strongly growing product, as suggested in footnote 306, is not convincing, as a margin squeeze can also be established based on an aggregated approach in case of cross-subsidization, as soon as the share of the subsidized product in the product bundle becomes so large that cross-subsidization within the aggregated products is no longer possible. Therefore, it should be more precisely described why and under what circumstances a margin squeeze test can exceptionally be conducted at a granular level.

f. Rebates that are not subject to exclusive purchase or supply requirements and multi-product rebates

It is questionable whether conducts lacking a specific legal test should be treated differently from those where effects need to be demonstrated. Establishing that a conduct is not competition on the merits and is capable of producing exclusionary effects should not be subject to shortcuts. The standard of proof becomes blurred when the Commission itself conflates the boundaries between

²⁰ *Slovak Telekom*, AT.39523, para 840

groups of cases by assuming exclusionary effects in cases of bundling and refusals to supply, while not applying this to conditional rebates and self-preferential treatment.

Furthermore, the absence of a clear test makes it challenging for companies to determine if their conduct falls into these categories, potentially leading to overly broad interpretations. These specific examples should adhere to the general rule without setting a precedent. The AEC test should remain the primary test for these cases, providing companies with a reliable tool to assess the effects of their conduct. In the case of conditional rebates, there is no safe harbour for prices above costs, contradicting the central role of the AEC test in case law on price behaviour. The AEC test must be applied uniformly across all pricing behaviours, using consistent cost benchmarks. To prevent discouraging procompetitive actions, a safe harbour should be established for pricing that exceeds either the ATC or the LRAIC, depending on the context.

The current approach also lacks consistency: while the concept of legal certainty is highlighted for predation and margin squeeze (in paras 117 and 133, respectively), it is not emphasized in the same way for rebates, despite its relevance to all pricing abuses. The AEC test is explicitly adopted for margin squeeze conduct (para 134), but not for predation, where it is only implicit, and it is outright rejected for rebates (para 144(b)), or at best, applied asymmetrically (para 145(f)). Additionally, different cost benchmarks are proposed: for predation, both AVC/AAC and ATC/LRAIC are considered; for margin squeeze, only LRAIC is used; and for rebates, only AAC is applied. This should be more consistent.

The new Guidelines even increase uncertainty as even a less efficient competitor may exert a genuine constraint on the dominant undertaking according to para 144 b. It is incomprehensible that a single case where the CJEU discarded the AEC standard could justify the Commission's deviation from the approach based on excluding competitors as efficient as the dominant firm, as established in other case law. The unique circumstances of the *Post Denmark* case, involving a former statutory monopolist with high entry barriers applying a rebate scheme to both monopoly and liberalized mail, must be considered.

To enhance legal certainty, we propose that the Guidelines include clear examples of abusive behaviours. Especially the legal framework surrounding multi-product rebates requires further clarification, particularly regarding the appropriate legal test to be applied. Unlike other forms of conduct, such as exclusive dealing and conditional rebates, the Guidelines do not explicitly state whether a price-cost test should be used for multi-product rebates. This creates ambiguity and confusion, as it is unclear why multi-product rebates are not treated with the same specificity.

The absence of a clear directive on the application of a price-cost test for multi-product rebates in the Draft Guidelines is problematic. A price-cost test is a well-established method for assessing the legality of various pricing strategies, and its application to multi-product rebates would provide much-needed clarity.

The new Guidelines are also less specific than the 2009 Guidance according to which prices are not subject to any abusive behaviour if the price for each product remains larger than the long-run average incremental cost as then an as efficient competitor can compete profitably. Additionally, it omits the language in para 61, which states that if competitors can offer a bundle, the competition revolves around the bundle itself. Therefore, the pertinent question is whether the price of the bundle is predatory, rather than whether the incremental revenue covers the incremental costs for each individual product within the bundle.

The final version of the Draft Guidelines should include a clear safe harbour for all the pricing behaviours: determining that incremental (or effective) prices that exceed ATC and/or LRAIC (depending on the situation) should be adequate proof that the behaviour constitutes competition on the merits.

g. Self-preferencing

The self-preferencing category is an example for a conduct that is critical in the very specific situation of the digital markets and that now is being generalised. Self-preferencing can clearly be an abuse in digital markets given the characteristics like the ease of manipulating digital auctions and online consumer choice. While this potentially abusive conduct category can easily be applied to other platforms, it is not clear in our opinion how it can be generalised and transferred to also apply to the off-line markets.

h. Access restrictions

The proposed Draft Guidelines define access restrictions as “*restrictions on access to an input that are different from a refusal to supply*” without explaining the difference. As indicated above the Commission selectively summarizes relevant case law regarding certain “access restrictions” (cf. refusal to deal).

DT submits, however, that the Guidelines fall short on providing any guidance as to differentiating factors regarding the abuse type “constructive refusal to supply” to which the Bronner conditions do not apply. It seems that the Commission considers the application of the Bronner criteria (“legal test”) as the sole differentiating factor without giving any further explanation. In this context, DT submits that a distinction can and should be made between an existing contractual relationship into which the access seeker had already invested (time and money) and where there is an initial access request. In case of the latter there is no reason apparent why the Bronner criteria should not apply.

Finally, the Guidelines mention a scenario where there is an ex ante regulatory obligation to provide access as a basis for Art. 102 enforcement. In this context DT submits that the Commission should clarify how a decision based on outdated market analysis may satisfy the ex post standard of proof

under Art. 102. Moreover, the Guidelines remain silent as to the conflict between enforcement of the regulatory obligation by the competent authority vs. DG Comp.

5. General principles applicable to the assessment of objective justifications

DT would welcome more guidance on the 2 different criteria for objective justification of the conduct, i.e. the objective necessity defence and the efficiency defence. On the objective justification defences the Draft Guidelines do not provide the needed clarity on standard of proof and lack concrete examples for efficiencies. While the Guidelines provide some examples for objective necessities in para 168, it would enhance legal certainty if the Commission would also give guidance with some examples on acceptable efficiencies.

With regard to the burden of proof for objective justifications it is clear in our opinion that this should remain with the parties. Regarding the standard of proof for efficiencies needing to be likely on the other hand there is an asymmetry to assessment standard for the production of exclusionary effects being capability. This does not have any justification in economics or case law. Under these Draft Guidelines the evidentiary standard for the parties to prove efficiency claims is higher than the standard for the Commission to prove harm. According to para 170 the standard of proof for efficiencies in certain categories of conduct, such as the naked restrictions, even seems to be significantly higher than just likely.

There should be no differential treatment of evidential standards based on neither the category of conduct nor whether it is anti-competitive or pro-competitive side that is being looked at. Only a balanced approach with equal standards of proof for harmful conduct and efficiencies will prevent a distortion towards type 1 errors.

Finally, the Draft Guidelines should give some more concrete examples on efficiencies beyond price and quality effects. As also emphasised in the Draghi Report factors like innovation and investment need to be given more emphasis in the competitive assessment, especially regarding the procompetitive rational of certain conduct. These Guidelines are a good opportunity to elaborate more on what an innovation defence, as suggested by Draghi in his report²¹, could look like in practice. In particular, by giving clear guidance on which evidence will be satisfactory for recognition. In addition, there could be some more clarity in which cases out-of- market efficiencies could be recognised.

²¹ Draghi Report, The future of European Competitiveness, Part B, page 299