



Response to the European Commission's public consultation on the Draft Guidelines on the application of Article 102 TFEU to exclusionary conduct

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I Introduction

1. **BRG** is a global economic consultancy that regularly advises clients on antitrust issues relating to European and national competition law, including exclusionary abuse cases. The opinions expressed herein are those of the individual authors and do not represent the opinions of BRG or its other employees and affiliates. The information provided is not intended to and does not render legal, accounting, tax or other professional advice or services, and no client relationship is established with BRG by making any information available in this publication. None of the information contained herein should be used as a substitute for consultation with competent advisors.
2. In this document, we set out our response to the public consultation on the Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (hereinafter, also the “**Draft Guidelines**” or “**DGL**”) launched by the European Commission (the “**Commission**” or “**EC**”) on 1 August 2024 (the “**Public Consultation**”).²
3. To summarise our view, we welcome the initiative of the Commission to adopt the Guidelines and are thankful for the opportunity to comment on the draft text. We believe that the adoption of Guidelines marks a significant step forward from the Guidance on Enforcement Priorities published in 2009 (the “**Guidance Paper**”).³ The Guidance Paper has significantly fostered compliance by private undertakings and the more economic approach that underpins it has now been endorsed by the General Court and the Court of Justice (together, the “**European Court**” or “**Court**”).⁴
4. We therefore welcome that the Commission now considers that it is appropriate to move to the natural next step and issue formal Guidelines. Guidelines are, in general, an essential document which can provide national courts, national competition authorities, undertakings and practitioners operating within the EU increased legal certainty and transparency on the principles guiding the Commission’s enforcement of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”), one of the most contentious areas in competition law.
5. Notwithstanding the above, we are concerned that the tone set by the Draft Guidelines could lead to largely different interpretations and therefore reduce, rather than increase, legal certainty and compliance; and increase, rather than decrease, litigation, hence leading to longer investigations and, overall, less-effective and -predictable enforcement of Article 102 TFEU.
6. To avoid such unintentional and detrimental repercussions and ensure that the effects analysis will eventually remain central to the Commission’s enforcement of Article 102 TFEU,

² See https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

³ See *Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal C 45, 24.2.2009, pp. 7-20.

⁴ In recent years important judgments have confirmed and endorsed the main elements of an effects-based approach to exclusionary conduct by dominant undertakings. See, *inter alia*, judgment of 17 February 2011, *TeliaSonera Sverige*, Case C-52/09, EU:C:2011:83; judgment of 27 March 2012, *Post Danmark*, Case C209/10, EU:C:2012:172; judgment of 6 October 2015, *Post Danmark II*, Case C23/14, EU:C:2015:651; judgment of 6 September 2017, *Intel*, Case C-413/14 P, EU:C:2017:632; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, Case C-377/20, EU:C:2022:379; judgment of 19 January 2023, *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33; judgment of 10 September 2024, *Google and Alphabet V Commission (Google Shopping)*, Case C-48/22 P, EU:C:2024:726..

we think that it would be necessary to introduce some concrete changes to the Draft Guidelines.

7. We illustrate these changes below, alongside proposals on how the current Guidelines could be improved.

II The definitions of “competition on the merits” and “exclusionary effect” are loose, leading to an ineffective two-pronged test

8. The concept of *anti-competitive foreclosure* has been the cornerstone of Article 102 TFEU enforcement since being introduced in the 2009 Guidance Paper.⁵
9. By linking the nature of the abuse of a conduct to its capability to restrain the ability of (as-efficient) competitors to compete on the market so as to produce *consumer harm*, the concept of anti-competitive foreclosure has served as a useful guide for the assessment of conduct which falls within or outside competition on the merits. In this way, it has provided legal certainty and clear guidance to all stakeholders on what is deemed to fall *outside* competition on the merits: while competition on the merits can lead to the foreclosure of competitors, especially less-efficient ones, it cannot lead to consumer harm.
10. The Draft Guidelines propose to replace the concept of *anti-competitive foreclosure* with a *two-pronged test*,⁶ according to which a conduct by dominant undertakings is liable to constitute an abuse if it (i) departs from *competition on the merits* and (ii) is capable of producing *exclusionary effects* (DGL, para. 45).
11. However, the Draft Guidelines do not provide a clear and practical definition of *competition on the merits*: the definition given at para. 51 is loose,⁷ and the concept is not clarified by the list of potentially relevant factors to establish that conduct *departs* from competition on the merits, set out at para. 55, as this list is inevitably non-exhaustive, and the Commission does not provide a conceptual framework to weigh these factors in a final decision.
12. Similarly, *exclusionary effects* are circularly defined as effects caused by dominant undertakings “*hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition*” (DGL, para. 6). The Draft Guidelines do not require a *direct link* between the conduct and consumer harm, which characterised the definition of *anti-competitive foreclosure*.

⁵ The 2009 Guidance Paper defines anti-competitive foreclosure as a situation where “*effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers*” (para. 19, emphasis added).

⁶ The test is based on recent case law, notably *Servizio Elettrico Nazionale and Others*, para. 103, and *European Superleague Company*, Case C-333/21, EU:C:2023:1011, para. 129.

⁷ The Draft Guidelines state, with reference to recent case law, that the concept “*covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services*” (DGL, para. 51).

13. Moreover, the threshold set by the Draft Guidelines to establish an exclusionary abuse seems to be very low, as it does not require that the conduct resulted in direct consumer harm (DGL, para. 72) or has been enabled by the dominant position (DGL, para. 74), nor that the actual or potential exclusionary effects of the conduct are appreciable (DGL, para. 75).
14. In particular, the absence of a *de minimis* threshold seems to derive from rulings of the Court which stated that showing appreciability is not required once actual or potential effects have been established.⁸ However, the Court has also clearly indicated that conduct with insufficient coverage is not capable to lead to anti-competitive foreclosure, and hence to be abusive.⁹
15. Therefore, by allowing for more discretion regarding the standard the Commission intends to follow in its enforcement of Article 102 TFEU, the introduction of the *two-pronged test* and replacement of the concept of *anti-competitive foreclosure* with the one of *exclusionary effect* risk reducing the *effects-based analysis*. These changes do not provide a conceptual and “workable” framework on which basis to assess the impact of an Article 102 TFEU infringement.
16. Therefore, the new framework runs contrary to the stated aim of providing guidance to undertakings in self-assessing whether their conduct constitutes exclusionary abuse. It also risks chilling out pro-competitive conduct to the detriment of consumers and the economy at large. Eventually, it may lead to agencies investing resources in investigating conduct that is *prima facie* as well as factually unlikely to harm consumer welfare.
17. We therefore propose the following changes to the Draft Guidelines:

1. Create a conceptual link between the concept of competition on the merits and anti-competitive foreclosure.
2. Re-establish the concept of anti-competitive foreclosure as the guiding standard to identify abusive conduct.

III The departure from the established as-efficient competitor principle reduces predictability and risks chilling pro-competitive conduct

18. The Draft Guidelines mark a substantial shift from the *as-efficient competitor principle* (the “**AEC principle**”). A clear manifestation of this shift is that the Draft Guidelines neglect the AEC principle in the formulation of the second condition of the two-pronged test (that is, in the assessment of the capability of conduct to have exclusionary effects). In the same vein, the Draft Guidelines state that, to establish an exclusionary abuse, it is no longer required that

⁸ See *Post Danmark II*, para 73.

⁹ See judgment of 18 September 2024, *Google AdSense*, Case T-334/19, para. 641.

actual or potential competitors that are affected by the conduct are *as efficient as* the dominant undertaking (DGL, para. 73).

19. Outcompeting rivals should not be discouraged, even for dominant companies, as such motive gives the right incentives to price aggressively, innovate and increase efficiency to the benefits of consumers. The purpose of competition law is not to provide an umbrella to the competitors of dominant companies, but to guarantee an open and dynamic competitive process, allowing rivals to react effectively and compete with the dominant undertaking.
20. We do acknowledge that in specific circumstances, efficient, yet not as-efficient, competitors might contribute to intensifying the competitive pressure on the dominant undertaking, in the short to medium term, such that their protection could benefit the competitive process and, ultimately, consumers.
21. For example, intervention might be needed in specific circumstances when relevant competitors are currently below minimum efficient scale due to the presence of strong static or dynamic network effects or economies of scale.¹⁰
22. However, we believe that the AEC principle should remain the standard to assess anti-competitive foreclosure. This principle has also been recalled in recent judgments,¹¹ and the change proposed in the Draft Guidelines seems to go well beyond the caution to “*avoid an unduly strict and dogmatic application of [the as-efficient competitor] standard*” called for in the 2023 Policy Brief.¹²
23. In this regard, we recommend that the Commission clearly sets out the circumstances that would justify departure from the AEC principle in the assessment of exclusionary effects. Without a clear indication of such specific circumstances, we are concerned that any successful outcompeting of rivals could be deemed as anti-competitive and thus subject to an investigation and, possibly, prohibition by the Commission. Bearing in mind that the marginalisation of less-efficient competitors is inherent to the competitive process and typically derives from conduct which falls within competition on the merits, this uncertainty inevitably will have a chilling effect on competition, as undertakings will face a realistic concern that, particularly where successful, healthy competitive behaviours may be sanctioned.
24. We therefore propose the following changes to the Draft Guidelines:

3. Reinstate the as-efficient competitor principle as the guiding principle in the assessment of the capability of conduct to produce anti-competitive foreclosure.
4. Clarify the specific circumstances under which the Commission will consider that the foreclosure of less-efficient competitors can lead to anti-competitive effects.

¹⁰ See, *inter alia*, *Post Danmark (II)*, paras. 59 and 60.

¹¹ See, *inter alia*, *Intel*, para. 136; *Google Android*, para. 280; *Servizio Elettrico Nazionale*, para. 76; *Unilever Italia*, para. 39. The principle has recently been stated again in the judgment of the Court of 24 October 2024, in Case C-240/22 P (*Intel*), e.g., paras. 180-181, 202.

¹² See Commission’s Competition policy brief: “A dynamic and workable effects-based approach to abuse of dominance”, March 2023 (the “**2023 Policy Brief**”).

IV The as-efficient competitor test should be applied whenever it sheds light on the conduct in question

25. In the same vein, the Draft Guidelines seem to severely limit the use of the *as-efficient competitor* test (the “**AEC test**”). The Draft Guidelines portrays the AEC test as being appropriate only to establish whether conduct departs from competition on the merits for some types of price-based conduct, such as predatory pricing, margin squeeze and rebates (but not for exclusivity rebates) (DGL, para. 56).
26. While we agree with the Commission that the AEC test is normally necessary for proving capability to produce exclusionary effects for pricing conduct, we think that the informative value of the test is wider and expands to non-pricing conduct too.
27. Where used to complement the assessment of a clearly stated theory of harm, embedded in a wider effects-based approach and contextualised in a broader set of compelling evidence, the AEC test is an important tool to inform the analysis effectively in a broader range of Article 102 TFEU cases than only price-based abuses.
28. The Court acknowledges that companies can refer to this tool for their defence even for non-pricing abuses (such as exclusivity rebates and exclusive dealing);¹³ and clearly stipulates that if a dominant firm submits the result of an AEC test during the rebuttal process, the Commission is required to engage with that evidence and, if the submission is compelling, assess all circumstances of the case.¹⁴
29. It is therefore important that the Draft Guidelines explain how the Commission will handle evidence of replicability by an as-efficient competitor submitted by a dominant firm. For example, the Draft Guidelines should clarify how evidence that effective prices are above costs—and, hence, that an as-efficient rival may in principle be able to match the exclusivity rebate offered by the dominant firm—will be taken into account.
30. This would ensure consistency with economic principles and recent case law and enhance predictability for all stakeholders.
31. We therefore propose the following change to the Draft Guidelines:

5. Provide guidance on how the as-efficient competitor test can be helpful in assessing pricing and non-pricing practices and how its results would be considered in relation to other factors deemed relevant for the assessment.

¹³ See *Unilever Italia Mkt Operations*, para. 59.

¹⁴ See *Unilever Italia Mkt Operations*, para. 60 (“Consequently, where an undertaking in a dominant position suspected of abuse provides a competition authority with an analysis based on an ‘as efficient competitor test’, that authority cannot disregard that evidence without even examining its probative value.”)

V The reliance on presumptions should not be a substitute for a well-articulated theory of harm

32. The Draft Guidelines put forward specific legal tests for five categories of conduct. The Draft Guidelines conclude that if the legal tests are met, there is a presumption that they are capable to produce exclusionary effects and that they fall outside competition on the merits.
33. Irrespective of the form of the conduct, the assessment of the capability of the conduct at issue to lead to anti-competitive foreclosure should be based on well-developed theories of harm, substantiated by the facts of the case. A theory of harm should clearly set out the incentive of the dominant undertaking to engage in the conduct at issue, the logic of the mechanism through which the conduct causes the exclusion of competitors and how this would lead to consumer harm.
34. This is all the more important as the assessment of some conduct presumed by the Draft Guidelines to lead to exclusionary effects is in fact complex.¹⁵ The most detrimental effect of a strict categorisation based on the *form* of conduct, rather than on their effects, is that two practices with similar effect may be liable to different treatment as they fall into different *categories* on the basis of their form.¹⁶
35. Against this background, the emphasis put by the Draft Guidelines on the *form* of conduct, combined with identifying certain practices as presumed abuses, is unlikely to enhance predictability and legal certainty and could lead to chilling normal business behaviours and pro-competitive conduct.
36. We acknowledge that certain types of conduct by a dominant undertaking have historically attracted more attention from the Commission and the European Court. This might be partly because of their likelihood to restrict competition and, ultimately, harm consumers. However, different types of conduct that can have the same pro- and anti-competitive effects should not be subject to fundamentally different assessments.
37. If used in a clear conceptual framework which sets out the principles under which certain conduct will be assessed and anti-competitive effects can be found, presumptions can streamline the administrative process by limiting the enforcement costs. We would nevertheless strongly advise against a mere *tick-box* exercise that would exempt the Commission from engaging properly with an assessment of all the circumstances of the case in the context of a well-developed theory of harm.
38. The Commission should always consider whether the factual and legal context of the conduct raises doubt as to its restrictive nature. This can be the case when there exist plausible pro-

¹⁵ See DGL, para. 60(b).

¹⁶ For example, the Draft Guidelines propose to classify constructive refusal to supply, including margin squeeze, as a category of abuse distinct from outright refusal to supply. Accordingly, the Bronner criteria for indispensability do not apply to constructive refusal to supply. However, this difference could lead to a situation where intervention is harder in cases of outright refusal to supply (where, among other things, indispensability is to be shown) and easier in cases of constructive refusal to supply. If so, this would lead to an unbalanced situation where a dominant company would run fewer legal risks when simply refusing to supply outright than when it supplies on terms that could be seen as disadvantageous to rivals.

competitive rationales for the conduct; or when the mechanics identified by the Commission (its theory of harm) are unlikely in the market circumstances (that is, when the conduct is not capable to lead to anti-competitive foreclosure). Moreover, conduct with limited market coverage or applied for a limited time generally cannot limit the ability of rivals to compete and hence to lead to anti-competitive foreclosure.

39. We therefore propose the following changes to the Draft Guidelines:

6. Abandon the proposed three-tier categorisation of conduct to define presumptions.
7. Develop clear and well-grounded theories of harm, directly linked to the features and rationale of the various types of conduct, to assess their anti-competitive effects.
8. Set out a clear process of rebuttal of a finding of a departure from competition on the merits.
9. To the extent that presumptions are maintained, ensure that they do not create distortions between conducts of different forms leading to similar effects, and that the standard for their rebuttal is clearly set.

VI Efficiencies and objective justifications are different concepts

40. The last section of the Draft Guidelines contains references to the practice on objective justifications for conduct that has been found abusive under Article 102 TFEU, which comprise both the “*objective necessity defence*” and the “*efficiency defence*”.
41. While objective justifications refer to the necessity of the restriction, in view of the nature of the product (e.g. safety considerations, health reasons), or relate to the protection of legitimate business interests of undertaking, efficiencies are benefits for consumers in terms of price, quality and innovation which stem from the conduct and are of such magnitude to counterbalance, or outweigh, the anti-competitive effect of the conduct.
42. In both cases, the burden of proof is on the dominant undertakings and requires providing a “*cogent and consistent body of evidence*”. This contrasts with the need for the Commission to only advance “*specific, tangible points of analysis and evidence*” to demonstrate exclusionary effects and sets an evident asymmetric evidentiary burden for anti- and pro-competitive effects.
43. We believe that the Draft Guidelines should clarify the type of evidence required to substantiate the different defences. Moreover, the evidentiary standard of their assessment should be aligned with that envisaged for the exclusionary capability of conduct to reduce the risk of *false positive*.
44. Finally, the Draft Guidelines do not single out the existence of plausible pro-competitive rationale as a reason to rebut a presumption of abuse. Plausible pro-competitive rationales refer to a situation where a conduct cannot be presumed to be liable to be abusive because it

can correspond to a legitimate business conduct, taken in its legal and economic context. Because harm has not been established at the stage where the existence of plausible pro-competitive is considered, the legal standard is different and does not involve either proportionality or indispensability.

45. We therefore propose the following changes to the Draft Guidelines:

- 10. Treat efficiencies and objective justifications separately.
- 11. Align the burden of proof and evidence required to prove anti-competitive effects and pro-competitive benefits.
- 12. Clarify the role of plausible pro-competitive rationales for the rebuttal of presumptions.

VII The absence of safe harbours decreases legal certainty

- 46. While we understand that the Commission has a policy interest in setting up a flexible analytical framework able to accommodate different scenarios and future changes in the enforcement of Article 102 TFEU, the Draft Guidelines provide limited *safe harbours* to help undertakings self-assess the legality of their conduct. This, here again, may chill pro-competitive and innovative conduct to the detriment of consumers.
- 47. For example, while acknowledging that there might be circumstances in which competitors are not able to constrain effectively the dominant undertaking even below a certain threshold, the Guidance Paper clearly stated that *“low market shares are generally a good proxy for the absence of substantial market power”* and *“dominance is not likely if the undertaking’s market share is below 40% in the relevant market”*.¹⁷
- 48. On the contrary, the Draft Guidelines maintain that market shares are a good screening tool for the assessment of market power, but put forward an asymmetric approach in this screening. On the one hand, there is a presumption of dominance applying to market shares above 50%.¹⁸ On the other hand, the Draft Guidelines seem to suggest that “in exceptional circumstances” dominance can be established when an undertaking’s market share is “below 10%”.¹⁹
- 49. Similarly, the Draft Guidelines state that pricing above average total cost represents an example of conduct that “in specific circumstances” can be found to depart from competition on the merits.²⁰ However, ample economic literature shows that pricing strategies above average total costs should not be regarded as leading to anti-competitive foreclosure.

¹⁷ See the Guidance Paper, para. 14.

¹⁸ See DGL, para. 26, which states: “One important factor is the existence of very large market shares, which are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position. This is the case in particular where an undertaking holds a market share of 50% or above”.

¹⁹ See DGL, footnote 41, which states: “Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances”.

²⁰ See DGL, para. 57.

50. We are concerned that the general absence of safe harbours for dominant firms contributes to reducing legal certainty and, here again, hindering incentives to engage in pro-competitive conduct.

51. We therefore propose the following changes to the Draft Guidelines:

13. Reintroduce a safe harbour for the assessment of dominance when market share is below 40%.

14. Reintroduce a safe harbour for pricing above average total costs.

VIII Conclusion

52. We strongly support the initiative of the Commission to issue comprehensive Guidelines which encapsulate the Commission's cumulated experience and interpretation of the existing case law of the European Court on exclusionary abuses. When adopted, they will mark a fundamental milestone on several fronts. They will provide stakeholders with increased transparency, predictability and legal certainty. They will also help national authorities and courts in pursuing a consistent enforcement of Article 102 TFEU across different jurisdictions. Last but not the least, they will help undertakings self-assess whether their conduct is capable to lead to anti-competitive foreclosure, which will facilitate their compliance efforts and therefore strengthen the rule of law in Europe.

53. On several aspects, the Draft Guidelines do achieve such a high expectation by setting out explicitly the principles which will guide the Commission's intervention regarding unilateral conduct of dominant firms. However, for the reasons illustrated in this document, several aspects merit further consideration.

54. We recognise that striking the right balance between a timely intervention in possible exclusionary abuses and an in-depth, exhaustive, legal and economic examination of all the elements of conduct is arguably a delicate exercise. The use of some presumptions, as suggested by the Draft Guidelines, could, indeed, prove useful in reaching a workable compromise between these conflicting goals. Here, the Guidelines need to clearly explain where these presumptions come from and how they can be rebutted, with a symmetric standard.

55. However, in view of, among other things, the proposed definitions of "*competition on the merits*" and "*exclusionary effect*" in the Draft Guidelines, and the resulting *two-pronged test*, the departure from the *as-efficient competitor principle* and the *absence of safe harbours*, we are concerned the Draft Guidelines could lead to unwanted outcomes, in particular reducing (rather than increasing) legal certainty and compliance, and increasing (rather than decreasing) litigation. As a result, the enforcement of Article 102 TFEU might take longer and be less effective and predictable, contrary to the policy objective of more timely and effective intervention. All this can have a chilling effect on normal business behaviour which can reduce the competitiveness of the European economy, which is a top priority for the new Commission.

56. We therefore hope that the proposals set in our response will prove useful in reaching workable Guidelines.