

Directorate-General for Competition – Unit A1  
European Commission  
Directorate-General for Competition  
Antitrust Registry  
1049 Brussels  
Belgium

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Dear Members of Directorate-General for Competition – Unit A1

### HT.100055 Guidelines on Exclusionary Abuses of Dominance

Dentons welcomes the European Commission's ("*Commission*") ambition to issue Guidelines on Exclusionary Abuses ("*New Draft Guidelines*") and supports its goal to design a predictable, coherent and workable framework to assess exclusionary conducts under Article 102 Treaty on the Functioning of the EU ("*TFEU*"). The draft paper released on 1 August 2024 represents an initial step and Dentons appreciates the substantial effort and expertise that has gone into the creation of the New Draft Guidelines.

Our contribution aims to provide constructive feedback and suggestions to enhance the clarity and the applicability of the New Draft Guidelines. While they are a valuable resource, they could still be significantly improved to achieve the Commission's intended objectives.

In brief:

- **Predictability** could be increased if the Commission would foresee clear and precise definitions of key concepts, case studies and examples, safe harbors or boundaries, or even clear enforcement priorities.
- **Coherence** could be ensured by reconsidering the confusing two-step test, which heralds a departure from the effects-based approach. This test results in a theoretical, and almost academic model which leaves undertakings facing a twofold jeopardy, with neither conduct nor effects providing a definitive framework for behavior.
- **Workability** is conceived as a set of evidentiary rules designed to facilitate the work of the enforcer, while the New Draft Guidelines would gain from a more balanced interpretation of the case law.

Each of these points is expanded upon in the following sections, which build to a conclusion that the New Draft Guidelines require more than mere refining but major amendments.<sup>1</sup>

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<sup>1</sup> See also for other examples of the New Draft Guidelines' shortcomings, Luc Peeperkorn (Brussels School of Competition), Kluwer Blog, September 4, 2024, available here: <https://competitionlawblog.kluwercompetitionlaw.com/2024/09/04/the-draft-article-102-guidelines-a-somewhat-confused-attempt-to-partly-roll-back-the-effects-based-approach-of-the-union-courts/> (last accessed 28 October 2024).

## 1. AN UNCLEAR AND UNPREDICTABLE GUIDANCE TOOL

Competition law practitioners and, to a lesser degree, national competition authorities and courts rely on the Commission's policy documents to inform and guide their advice. In turn, companies depend on them to ensure that their business practices are within the boundaries of permissible conduct. Yet, the New Draft Guidelines could be significantly improved in terms of ensuring foreseeability and legal certainty for companies and practitioners.

First, the New Draft Guidelines do not provide clear and precise definitions for key concepts that are critical for determining whether conduct is abusive. As further explained in section 2.2.1 below, the factors listed to establish whether a conduct departs from competition on the merits leave significant room for interpretation. This ambiguity makes it difficult for companies to predict how their conduct will be assessed. Elsewhere, the hypothetical grounds for rebutting the presumptions established for certain types of conduct are not clearly defined. This makes it challenging for companies to know what facts and evidence they need to consider and provide to successfully rebut the presumptions.

Second, the New Draft Guidelines are also lacking practical or workable tools for individual self-assessment. Article 102 TFEU requires a case-by-case analysis and a multifaceted assessment of various criteria from a legal and economic perspective. To help guide this, the New Draft Guidelines should include case studies and examples to demonstrate how the Commission plans to address these elements in its assessment. Such practical examples can be found in other Commission publications, such as the recently published Horizontal Guidelines. These examples give companies vital indications of the Commission's position on certain types of conduct. Without such practical examples, the New Draft Guidelines remain theoretical and academic, granting the Commission considerable interpretative discretion and broad enforcement powers to the detriment of the certainty and predictability expected by companies and practitioners alike.

Third, the New Draft Guidelines do not include any safe harbors. Safe harbors are vital for companies to assess their conduct confidently and ensure compliance with competition law. For example, as previously mentioned in the 2009 Guidance Paper, a market share below 40% should be included as a safe harbor indicating that dominance is unlikely, absent other conditions. Case law notes that market shares between 40%-50% are not conclusive evidence of the presence of dominance and require the assessment of additional factors.<sup>2</sup>

Finally, while the New Draft Guidelines endeavor to summarize the existing case law, they do not shed light on the Commission's enforcement policy and priorities.

We would therefore propose that the New Draft Guidelines be enhanced by outlining the Commission's enforcement policy and priorities and by providing precise and clear definitions of key concepts, including case studies and examples to illustrate the assessment. We would also welcome the implementation of safe harbors.

This recommendation for greater clarity is further applicable to the New Draft Guidelines' two-step test for assessing abusive conducts.

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<sup>2</sup> ECJ, judgment of 13 February 1979, *Hoffmann-La Roche*, C-85/76, para. 58 (the Court found the market share of 43% does not "in themselves constitute a factor sufficient to establish the existence of a dominant position" without sufficient corroborative support from other factors).

## 2. **A CONFUSING TWO-STEP TEST**

The Commission contemplates in the New Draft Guidelines a two-step test that departs from the case law and is highly difficult to implement. This proposed test requires a departure from competition on the merits and an assessment of the capability of producing exclusionary effects.

In parallel to this general rule, the New Draft Guidelines introduce a special presumption for two categories of business practices. In the first basket, five types of conduct – exclusive dealing, tying and bundling, refusal to supply, predatory pricing, and margin squeezes – are presumed capable of having exclusionary effects. According to the New Draft Guidelines, those practices satisfying that presumption fall outside the requirement to demonstrate departure from competition on the merits. In the second basket, naked restrictions, which have no economic interest for the dominant undertaking other than restricting competition, are also presumed to have exclusionary effects. This approach reflects a formalistic assessment of abuse, where demonstrating actual effects is no longer necessary.

### 2.1. **A TEST NOT REFLECTED IN CASE LAW**

Fundamentally, these cumulative conditions stand in contrast to established case law such as *Post Danmark I*,<sup>3</sup> or the more recent *European Superleague*,<sup>4</sup> where a two-step test is not required, and the focus has predominantly been on whether the conduct hinders competition or is likely to have exclusionary effects, not both.

In this perspective, the European Court of Justice, very recently, in *Intel*, explained that the use of the AEC test represents the general rule to demonstrate the capability of loyalty rebates to have exclusionary effects and enables to “consequently” assess “whether the conduct must be considered within the scope of normal competition, that is to say, competition on the merits”.<sup>5</sup> Although this finding might be limited to rebates, it very well seems that the judges are not referring to a cumulative test but rather a single step test which leads the capacity to produce exclusionary effects to the conclusion of a departure from competition on the merits.

Hence, the Commission should clarify the existing links between the capability to produce exclusionary effects and the concept of competition on the merits.

### 2.2. **A LABORIOUS IMPLEMENTATION OF THE TEST**

The general two-step test generates three different scenarios, which fates are not specified in the New Draft Guidelines:

- 1/ Conduct that is not competition on the merits and is capable of having exclusionary effects;
- 2/ Conduct that is not competition on the merits but not capable of having exclusionary effects; and
- 3/ Conduct that is competition on the merits but is capable of having exclusionary effects.

While it is apparent, from the Commission’s intention, that the first scenario constitutes an abuse, it is unclear, from an objective standpoint, whether the two other scenarios could also qualify as an abuse. In the event that the Commission does not consider the test to be strictly cumulative, this two-step framework risks therefore add superfluous layers of analysis to the enforcement of Article 102 TFEU, complicating the process of establishing an abuse and generates confusion.

<sup>3</sup> ECJ, judgment of 27 March 2012, *Post Danmark*, C-209/10, para. 24.

<sup>4</sup> ECJ, judgment of 21 December 2023, *European Superleague Company*, C-333/21, para. 129-131.

<sup>5</sup> ECJ, judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, para. 181.

Accordingly, it jeopardizes one of the principal objectives of the New Draft Guidelines, which is to bolster the enforcement mechanisms for Article 102 TFEU. It is therefore difficult to understand why the Commission is promoting a conceptual distinction accompanied by a two-step test for identifying abuse.

Besides, the criteria chosen in the New Draft Guidelines for the two-step test are themselves difficult to understand and/or insufficiently defined.

#### **2.2.1. A MISSING DEFINITION OF THE DEPARTURE FROM COMPETITION ON THE MERITS**

Given the pivotal role attributed to competition on the merits in the Draft New Guidelines, it is surprising that the Commission does not provide a clear definition of the concept. The reference to case law is insufficiently helpful and does not provide practical guidance for businesses. This mere listing of factors that the EU Courts have considered relevant to show the departure from competition on the merits, e.g., reduction of consumer choice, discriminatory treatment or unreasonable behavior, fails to capture the multifaceted nature of competition, leaving firms vulnerable to interpretation by enforcement authorities.

The Commission should therefore consider introducing a clear delineation of what constitutes competition on the merits in the New Draft Guidelines, which would help companies face an uncertain regulatory environment, and facilitate their compliance efforts.

#### **2.2.2. A FORMALISTIC SYSTEM OF PRESUMPTIONS ON EXCLUSIONARY EFFECTS**

Once it is established that the conduct departs from competition on the merits, it must be determined whether it is also capable of producing exclusionary effects, although the EU courts have sometimes applied a different standard on the likelihood to have exclusionary effects.<sup>6</sup>

A fundamental question in the New Draft Guidelines has been the allocation of the burden of proof. Concretely, and as already briefly described above, they delineate the burden of proof into distinct situations: (i) introducing a per default category wherein the Commission must establish the capacity of the impinging conduct to produce exclusionary effects, (ii) while shifting the burden of proof to the dominant undertaking in five special types of conduct (exclusive dealing, tying and bundling, refusal to supply, predatory pricing, and margin squeezes) and for naked restrictions, where the exclusionary effects are presumed.

- (i) *On the conduct for which the Commission must demonstrate a capability to produce exclusionary effects*

The New Draft Guidelines afford the Commission latitude to base its assessment on a relatively low evidentiary threshold, as it should only allegedly demonstrate, based on “*specific, tangible points of analysis and evidence, that such a conduct is capable of having exclusionary effects*”.<sup>7</sup> More specifically, in section 3.3.2 of the New Draft Guidelines on the substantive legal standard to establish a conduct’s capability to produce exclusionary effects, the Commission omits or minimize the importance of certain factors to demonstrate the capability to produce exclusionary effects, such as the capability to exclude competitors that are at least “as efficient” as the dominant company or direct consumer harm. It contrasts with the case law which considered these factors to

<sup>6</sup> ECJ, judgment of 6 October 2015, *Post Danmark*, C-23/14, para. 69.

<sup>7</sup> See paragraph 60.a of the New Draft Guidelines.

be relevant to assess such effects.<sup>8</sup> In other words, it appears that the Commission is attempting to identify conduct that by its very nature is deleterious to effective competition, in a way that is analogous to an object standard in Article 101 TFEU.

Furthermore, according to paragraph 62 of the same section of the New Draft Guidelines, the Commission can prove the conduct's capacity to have exclusionary effects merely by “*showing that it is capable of eliminating commercial uncertainty relating to the entry or expansion of competitors*”. This interpretation goes beyond the case law and is broader than the position taken by the Court in the *Lundbeck* judgment, to which the Commission refers to in the New Draft Guidelines: “*accordingly, by concluding the agreements at issue, the applicants exchanged that uncertainty for the certainty that the generic undertakings would not enter the market, by means of significant reverse payments (recital 604 of the contested decision), thus eliminating all competition, even potential, on the market, during the term of those agreements*”.<sup>9</sup>

In the same paragraph, the New Draft Guidelines also assert that “*where it is established that a conduct is objectively capable of restricting competition, this cannot be called into question by the actual reaction of third parties*”, in reference to the *AstraZeneca* judgment.<sup>10</sup> However, it is essential to recognize that the General Court was here addressing a conduct which was objectively of such a nature as to restrict competition, i.e., a naked restriction. Transplanting the phrasing placed to this paragraph mistakenly implies that, in general, factual circumstances and the actual conduct, reactions and counterstrategies of competitors cannot mitigate, or affect in any way, the demonstrated capability of the conduct to have exclusionary effects.

This suggests that the New Draft Guidelines' developments on the capability of a conduct to produce exclusionary effects should be reconsidered and more closely aligned with case law.

(ii) *On the special situations in which exclusionary effects are presumed*

As further explained for tying in section 3.2 below, the presumptions of exclusionary effects set out in the New Draft Guidelines for the five types of conduct mentioned above and the naked restrictions do not accurately reflect the case law. To some degree, they may even appear as pure Commission creations.<sup>11</sup>

With this shift in the burden of proof, any defense against allegations of breach of Article 102 TFEU should focus on rebutting presumptions. As a result, companies will likely struggle to argue objective justifications. More importantly, the New Draft Guidelines do not provide meaningful guidance on rebuttal evidence, compounding uncertainty for companies.

In addition, the reinforced presumption on naked restrictions introduced in the New Draft Guidelines according to which “*only in very exceptional cases will a dominant undertaking be able to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects*”<sup>12</sup> arguably brings in a

<sup>8</sup> In relation with the capacity of excluding as efficient competitors, see, in particular, ECJ, judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, para. 263: “As regards the question whether Article 102 TFEU imposes a systematic obligation on the Commission to examine the efficiency of actual or hypothetical competitors of the dominant undertaking, it follows from the case-law of the Court of Justice cited in paragraphs 163 to 167 of the present judgment that, admittedly, the objective of that article is not to ensure that competitors less efficient than the dominant undertaking remain on the market” (underlining added). In relation with direct consumer harm, see ECJ, judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, para. 44: “To that effect, as the Court has held, that provision seeks to sanction not only practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition”.

<sup>9</sup> EU General Court, judgment of 8 September 2016, *Lundbeck v Commission*, T-472/13, para. 363.

<sup>10</sup> EU General Court, judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, para. 360.

<sup>11</sup> For example, in its recent *Intel* judgment, the Court did not explicitly endorse the Commission's claim that exclusivity rebates could be presumed abusive, a stance also found in the New Draft Guidelines, but followed a distinct reasoning (ECJ, judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P).

<sup>12</sup> See paragraph 60.c of the New Draft Guidelines.

*probatio diabolica* and confirms the Commission's ambition to introduce restrictions by object within the Article 102 TFEU framework.

Overall, this new system of presumptions provides a greater latitude to act to the Commission by setting a relatively low evidential threshold for prohibiting conducts. Conversely, it places a high, even arguably unsurmountable, bar on undertakings with some degree of market power (even those with a low or weak dominance level) by setting high rebuttal evidentiary requirements. This stance is likely to increase their potential exposure to complaints, investigations and ultimately administrative sanctions and civil damages claims.

Against that background, should the Commission decide to maintain the above-mentioned system of presumptions in the New Draft Guidelines, additional guidance on the methods and means for rebutting these presumptions should at the very least be provided.

### **2.3. A DEPARTURE FROM THE EFFECTS-BASED ANALYSIS**

With the introduction of the two-step test, the New Draft Guidelines partly set aside the effects-based approach introduced by the 2009 Guidance Paper. Instead, the Commission brings in a conduct-based enforcement framework (*i.e.*, a watered-down interpretation of the effects-based approach), which, rather than enhancing clarity, veers towards a theoretical and almost academic model.

Unfortunately, the result is additive rather than subtractive, creating an environment in which stakeholders must monitor both conduct and its potential effects, as either one of them may be evidence of a violation. This lies in contrast to the history of abuse-based investigations, where dominance, conduct and effects are both intertwined and interdependent. Weak dominance places a far higher burden on the authority to show that conduct is having exclusionary effects than do circumstances which involve a strongly dominant undertaking. In the latter case, the smallest departure from competition on the merits can be fatal to the remaining competitive restraints on the market. The New Draft Guidelines do not seem to leave room for these kinds of nuanced investigations, or to allow for a burden of proof which is carefully calibrated to the degree of dominance.

Another consequence of the New Draft Guidelines' shift toward a more formalistic approach is that the proposed legal tests are vague and leave room for much esoteric interpretation. These inconsistencies and this level of latitude are likely to be unmanageable for stakeholders, enforcers and undertakings alike. For the latter, it will lead to a considerable burden and a significant degree of litigation risk, which in turn is likely to affect their innovation, investment and growth decisions in the EU. For the Commission, it may encourage overreach, culminating in potentially unpredictable, discretionary and arbitrary investigations and decisions. Eventually, this U-turn in enforcement risks also undermining the coherence and clarity of EU competition law.

The effects-based approach should therefore remain firmly front and center as the only valid and legitimate enforcement yardstick for the Commission.

This enforcer-oriented approach of the New Draft Guidelines, which should be rebalanced, is further visible when analysing the framework applicable to tying practices and observing the undermining of the AEC test.



### 3. AN ENFORCER-ORIENTED APPROACH

The “workability” proclaimed by the New Draft Guidelines appears to be aimed more at investigators in charge of demonstrating *a posteriori* the existence of an abusive practice than at undertakings with market power or in the process of gaining such power. For their part, these undertakings essentially need to distinguish *a priori* between behaviors that fall within the scope of competition on the merits and those likely to be qualified as abuse.

A more fundamental imperfection with the New Draft Guidelines’ approach is that they appear, in several respects, to interpret CJEU case law in a way that exceeds the courts’ own wording and interpretation of Article 102 TFEU.

The statement of Ms. Vestager published on the webpage of the public consultation seems to acknowledge the subjective nature of the postulates set out in the New Draft Guidelines.<sup>13</sup> However, while the Commission may naturally have an opinion on the interpretation to be given to the case law, the draft submitted for consultation cannot be presented as a simple consolidation of the law as it stands. The New Draft Guidelines should therefore make clearer that they are based on the Commission’s interpretation rather than an impartial rendering.

Furthermore, as already noted with regard to the two-step test, the intention of the New Draft Guidelines’ authors to ensure that the effectiveness of the enforcement process is preserved, if not strengthened, partly contradicts the economic approach followed by the EU courts since the *Post Danmark I*<sup>14</sup> and *Intel*<sup>15</sup> rulings. The legal tests described in the New Draft Guidelines thereby disrupt the fragile and delicate balance sought by the EU courts between the laudable objective of efficiency in enforcement action and the crucial and necessary preservation of the rights of defense.

Below, we provide two other examples of the draft’s enforcer-oriented approach.

#### 3.1. A MINIMIZATION OF THE RELEVANCE AND IMPORTANCE OF THE AEC TEST

The AEC test is based on the principle that conduct by a dominant operator can only be qualified as anti-competitive if it leads to the exclusion of an equally efficient competitor. Introduced in the 2009 Guidance Paper, the AEC test has played a central role in the subsequent CJEU case law, specifically but not exclusively in relation to pricing practices. Yet, except for the comments on margin squeezes, the New Draft Guidelines seem to intentionally minimize and sometimes deny the established and central role of the AEC test in assessing potential abuses.

In section 4.2.1, paragraph 80 of the New Draft Guidelines, loyalty rebates are treated as a subset of exclusive dealing practices, for which AEC tests are not to be considered in exclusionary effects analysis (paragraph 83). This contradicts case law, which holds that loyalty rebates must be assessed, as a general rule, in the

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<sup>13</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_3623](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623) (last accessed 28 October 2024), quote from executive vice-president Vestager “Our draft guidelines seek to present a predictable, coherent and workable framework to assess abusive conduct. They reflect our interpretation of the EU case law and the precious experience gained through the enforcement of abuse rules.” (underlining added).

<sup>14</sup> ECJ, judgment of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, C-209/10.

<sup>15</sup> ECJ, judgment of 6 September 2017, *Intel Corp. v European Commission*, C-413/14 P.

light of the AEC test (e.g., *Servizio Elettrico Nazionale*<sup>16</sup>). This stringent requirement was most recently recalled by the ECJ in its *Intel* ruling of 24 October 2024.<sup>17</sup>

In the assessment of conditional rebates, the New Draft Guidelines do recognize the AEC test as one of the criteria that can be taken into account to assess potentially exclusionary effects.<sup>18</sup> However, not only do the New Draft Guidelines not present it as a necessity, but they also undermine its significance. According to footnote 325 of the New Draft Guidelines, such a test would be of very limited use if the dominant company's existing competitors were currently less effective. If the New Draft Guidelines were to be followed, the AEC test would therefore only be relevant for enforcement purposes and would be almost useless as a defense against prosecution, since the Commission could simply claim that the test is irrelevant as it does not reflect the *status quo* on the market in question.

The New Draft Guidelines also provide no support for the application of the AEC test outside pricing practices, despite previous discussions on its application in self-preferencing/discrimination cases and its broader relevance, e.g., in tying and bundling practices. In this respect, the stance taken by the ECJ in its recent *Google Shopping* judgment is worth noting as the court stated that for demonstrating an infringement of Article 102 TFEU, the Commission must apply, *inter alia*, the AEC test, where that test is relevant<sup>19</sup>, instead of merely limiting its scope, as originally did the General Court<sup>20</sup>, to pricing practices.

Accordingly, the Commission should reassess the importance of the AEC test and give it a more prominent role in the New Draft Guidelines.

### **3.2. A PRESUMPTION OF EXCLUSIONARY EFFECTS FOR CERTAIN TYING PRACTICES WITH NO CASE LAW BASIS**

Within the tying and bundling remit, some practices, according to the New Draft Guidelines, are presumed to have an exclusionary effect due “to the specific characteristics of the markets and products at hand”. This presumption could apply in particular to “situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects”.<sup>21</sup>

<sup>16</sup> ECJ, judgment of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others*, C-377/20, para. 80: “Regarding the first of these two categories of practices, which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the ‘as-efficient competitor’ test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position (see, *inter alia*, judgment of 17 February 2011, *TeliaSonera*, C-52/09, paragraphs 41 to 43)”.

<sup>17</sup> ECJ, judgment of 24 October 2024, *European Commission v Intel Corporation Inc.*, C-240/22 P, paras. 180 and 181: “Thus, as regards a practice consisting in the grant of loyalty rebates, in respect of which the undertaking in a dominant position submits, during the administrative procedure, on the basis of supporting evidence, that it was not capable of producing the alleged foreclosure effects, the Commission is required to analyse not only factors such as the extent of the dominant position of the undertaking in question, the share of market covered by the contested rebates and the conditions and arrangements for granting the rebates in question, their duration and their amount, but also the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (judgment on the appeal, paragraphs 138 and 139 and the case-law cited; see, to that effect, judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraphs 47 to 49). The capability of such rebates to foreclose a competitor as efficient as the dominant undertaking, which competitor is supposed to meet the same costs as those borne by that undertaking, must be assessed, as a general rule, using the AEC test.”

<sup>18</sup> See paragraph 145, c) of the New Draft Guidelines.

<sup>19</sup> See European Commission, Decision of 20 March 2019, *Google Search (AdSense)*, para. 325 and ECJ, judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, C-48/22 P, paras. 263 to 266.

<sup>20</sup> EU General Court, judgment of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission*, T-612/17, para. 538.

<sup>21</sup> See paragraph 90 of the New Draft Guidelines.



*A contrario*, in “other circumstances”, a more detailed examination of the concrete effects of the practice carried out by the dominant undertaking would be necessary, when the tied product (i) is available free of charge and (ii) there are readily available alternatives to it.<sup>22</sup>

In this respect, it should be emphasized that the use of terms as generic as “*certain circumstances*” or “*other circumstances*” does not make it possible to clearly identify when this rebuttable presumption comes into play, leading to legal uncertainty which is at odds with the Commission objective of predictability.

Moreover, it appears that the Commission introduces a presumption in name only since this presumption can only be used where the “*specific characteristic of the markets and products at hand*” suggest a “*high potential to produce exclusionary effects*”. However, finding such “*specific characteristics*” must involve a detailed analysis rather than engaging in mere conjectures. This is confirmed in the following sentence, which refers to the “*closer examination*” required in other cases. As a result, according to the New Draft Guidelines, some examination, albeit less close, must have been conducted to trigger presumption, which goes against the very nature of presumptions.

Furthermore, and more fundamentally, the presumption contained in the New Draft Guidelines does not explicitly flow from a fair reading of any of the rulings of the ECJ listed in footnote 233 of the New Draft Guidelines. In *Hilti v Commission*, the admittance of the claimant that their conduct could be construed as anticompetitive were they to be in a dominant position precluded the necessity to determine whether tying conduct should fall under a presumption or not.<sup>23</sup> Meanwhile, in *Tetrapak v Commission*, the Commission itself spent considerable resources conducting an analysis of the tying conduct, including the technical specifications of the products and the conditions in the markets in question which, again, is not in line with the use of a presumption.<sup>24</sup> Lastly, in *Microsoft v Commission*<sup>25</sup> and *Google and Alphabet v Commission (Google Android)*,<sup>26</sup> the General Court validated the Commission’s detailed analysis of effects, without, however, ruling – since it was never asked to – on the validity of the Commission’s position that there is a presumption of exclusionary effects in classic tying cases. The Commission cannot simply manipulate the cited case-law to construct a presumption that excuses it from having to seriously demonstrate the existence of exclusionary effects with a cogent and consistent body of evidence.

Should the Commission decide to maintain the existence of a presumption of exclusionary effects for certain categories of tying practices, we would recommend that the New Draft Guidelines be more explicit about the subjective position that the Commission will defend before the European courts, rather than the current state of case law.

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<sup>22</sup> *Ibid*, para. 90.

<sup>23</sup> EU General Court, judgment of 12 December 1991, *Hilti AG v Commission of the European Communities*, T-30/89, para. 96.

<sup>24</sup> EU General Court, judgment of 6 October 1994, *Tetra Pak International SA v Commission of the European Communities*, T-83/91, in particular paras.109, 110, and 132, which mention most of the relevant factors to demonstrate a conduct’s capability of producing exclusionary effects listed at paras. 70 and 94 of the New Draft Guidelines.

<sup>25</sup> EU General Court, judgment of 17 September 2007, *Microsoft Corp. v Commission of the European Communities*, T-201/04, para. 1036.

<sup>26</sup> EU General Court, judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, para. 295.

#### **4. CONCLUSION**

While Dentons welcomes the Commission's attempt to develop Guidelines on exclusionary abuses, there are fundamental methodological and substantive shortcomings in the current draft, which must be addressed and resolved before final adoption and publication. There is no doubt, otherwise, that their legitimacy would be immediately challenged.

As currently constructed, the New Draft Guidelines bring unpredictability, uncertainty and confusion for undertakings, EU and national courts, and enforcers – including the Commission itself. The New Draft Guidelines therefore do not achieve the intended initial goal to present a foreseeable, coherent and workable framework to assess abusive conducts.

We therefore urge the Commission to reconsider its vision and approach in the areas discussed in detail above, included on but not limited to the two-step test, the AEC test, and tying conducts. This will require much more than merely refining the wording in the New Draft Guidelines. A full reconsideration is mandated.

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Yours sincerely,  
Dentons – EU Competition and Antitrust Group