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Budapest, 31 October 2024

Response to the EU Commission's 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

Dear Madams and Sirs,

The LIDC Hungarian Competition Law Association (the **Association**) welcomes the opportunity to provide its views to the EU Commission 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 (the **Guidelines**).¹

About the Association

The Association is the leading professional association of competition law practitioners in Hungary, established in 1993 as the Hungarian chapter of the International League of Competition Law (**LIDC**). Our active members include most of Hungary's leading competition lawyers in private practice as well as in-house lawyers with competition law expertise at large international and domestic companies. Therefore, the Association is well-placed to provide the Commission with comments on how the draft Guidelines would be perceived and applied at an EU member state level in the context of ex-ante compliance self-assessments as well as during National Competition Authority (**NCA**) investigations and administrative and civil court litigation.

General remarks

Overall, the members of the Association welcome the Guidelines, and the fact that it updates and provides a comprehensive and systematic review of the case law concerning Article 102 of the Treaty on the Functioning of the European Union (**TFEU**) than the Commission's earlier Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the **Enforcement Priorities**)². We believe that such a case law summary enhances the accessibility and clarity of the case law of the Court of Justice and the General Court (the **Union Courts**) for private practitioners, national courts as well as companies seeking to ensure compliance.

Our members had several comments on how the Guidelines reflect the case law of the Union Courts, which we submit below. Besides such comments, our members expressed the view that they would welcome additional guidance from the Commission, including on points which might be crucial for ex-ante self-assessments and compliance efforts, but which might not be fully covered by the case law. If the Commission

¹ On behalf of the Association, this response to the consultation were edited and drafted by Attila Kőmíves (A&O Shearman, Budapest), Barnabás Kiss (A&O Shearman, Budapest), based on contributions from Márton Kocsis and Máté Baumgartner (CERHA HEMPEL Dezső & Partners Law Firm) and Anikó Keller (Szecskay Law Firm), Márton Horányi (Baker & McKenzie, Budapest)

² Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7

is willing to provide such additional guidance, we suggest that it is clearly distinguished from other sections of the Guidelines which is intended to summarise the current state of the Union Courts' case law.

In addition to substantive comments to the draft Guidelines, in **Annex 1**, we submit our observations on the translation of the Hungarian language version.

1. INTRODUCTION

1.1 Purpose of the Guidelines

Paragraph 9

1. As with all such high-profile Commission soft-law documents, we can expect Hungarian (and probably other) national courts to heavily rely on the Guidelines when applying Article 102 TFEU or its national law equivalent. Our Association's members' experience is that national courts can sometimes consider similar soft-law documents as a *de facto* or quasi legislative instrument. To avoid such misunderstandings, the Guidelines (in paragraph 9 or elsewhere) should provide much more transparency and clarity about the fact that they not only restate the EU courts' case law, but at places they also add the Commission's understanding of it. It is not sufficient in paragraph 9 to state that the "*Guidelines are without prejudice*" to subsequent case law of the European Court of Justice (**ECJ case law**). Such a statement fails to highlight to national courts that some of the Guidelines provide their own interpretation of the case law, including for example in the crucial area of presumptions. Small-print footnotes such as footnote 131 are insufficient to qualify the overall unequivocal statements in introduction of the Guidelines (such as in paragraph 9) that the Guidelines is nothing more than a statement of the case law.

1.2 Scope and structure of the Guidelines

Paragraph 11

2. Paragraph 11 emphasises that although only exclusionary types of conduct fall within the scope of the Guidelines, the principles contained therein may also be relevant to other forms of abusive conduct, such as exploitative conduct. Our members believe that, in the future, the Commission should consider issuing guidelines on other abusive conduct such as exploitative abuses. This would greatly assist compliance and reduce its costs for companies seeking to self-assess their conduct *ex-ante*.

2. GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF DOMINANCE

2.1 Introduction

Paragraph 18

3. As for paragraph 18, the Guidelines define dominant position as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers*". Given the Guideline's strong emphasis on the issue of collective dominance, in order to avoid inconsistencies, we would recommended to indicate the possibility of a collective dominant position in the definition, e.g. via amending the wording as follows: "*a position of economic strength enjoyed by one or more undertaking which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers*".

Paragraph 20

4. As regards paragraph 20, the Guidelines state that “*to assess dominance, it is in general necessary to define the relevant market.*” This language suggest that market definition is, while “*in general*” necessary, not always required to establish dominance. In contrast, under the Union Courts case law, identifying the correct relevant market is an essential step in determining whether an undertaking is in a dominant position (and subsequently whether that undertaking has abused its position). Therefore, we would suggest replacing the text with the following: “*To assess dominance, it is ~~in general necessary~~ essential to define the relevant market.*” This would also align with the case law that is cited in the Guidelines. For example, in *Continental Can*³, it was underlined that “*For the appraisal of (...) dominant position (...), the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.*”

Paragraph 21

5. For the sake of completeness and clarity, we suggest noting in this paragraph again (ie in addition to paragraph 16) that the application of Article 102 does not only require dominance, but also that there is an effect on trade between Member States.

2.2 Single dominance

2.2.1. Market position of the undertaking concerned and of its competitors

Paragraph 26 / footnote 41

6. Our two key comments to this section are that (i) that the Commission should carry over from paragraph 14 of the Enforcement Priorities the guidance that absent special circumstances dominance is not likely below market shares of 40%, and (ii) in any case, the Commission should delete the reference to 10% market shares in the last sentence of footnote 41 (“*Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances*”).
7. The wider context of this issue is paragraph 14 of the Commission's Enforcement Priorities, which stated that “[t]he Commission considers that low market shares are generally a good proxy for the absence of substantial market power. The Commission's experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market”. Absent any special circumstances, such guidance created a “*soft safe-harbour*” for self-assessments. The 40% threshold was well-known among companies seeking to self-assess and it was also generally consistent with reality, ie, decisions of the Commission and the Union Courts.
8. With abandoning the statements in paragraph 14 of the Enforcement Priorities and adding the last sentence of footnote 41, the Guidelines create a misleading impression that such 40% threshold serving as a “*soft safe-harbour*” is now reduced to 10%. While we appreciate that this is not the intention of the draft Guidelines, we can certainly report to the Commission that several members of our Association remain surprised and confused about the Guidelines mentioning 10% as a relevant market share threshold in the context of dominance. The Guidelines should avoid creating such confusion, because this creates a significant risk leading to false negatives, discouraging competitive behaviour by non-dominant firms.
9. To resolve this, first, we believe that there is room for the Commission to carry over the guidance in paragraph 14 of the Enforcement Priorities into the new Guidelines. There is nothing in the EU courts’

³ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, C-6/72, EU:C:1973:22, paragraph 32.

case law that would be inconsistent with a statement that market shares below 40% are in principle not indicative of dominance. Indeed, pursuant to *United Brands*⁴, “a trader can only be in a dominant position on the market for a product if he has succeeded in winning a large part of this market.” Finding dominance below market shares of 30-40% would be highly inconsistent with this finding. In fact, we are not aware of any judgements that established dominance on a specific market with a market share of approx. 15-20%. If the Commission is aware of any case law that established dominant position with a market share of approx. 15-20%, we would welcome if the Guidelines cited that judgement as a rare example, and the specific exceptional circumstances that made it possible to qualify an undertaking dominant with such a relatively small market share.

10. Secondly, and for similar reasons, we suggest deleting the last sentence of footnote 41. This sentence refers to *Metro SB-Großmärkte GmbH*⁵. That judgment does indeed state that a 10% market share is too small to be regarded as evidence of a dominant position on the market. However, the Guidelines take this finding out of the context of the case and places it in the context of deleting the reference to the 40% threshold. This creates the misleading impression that there is some qualitative difference between market shares below and above 10% from the perspective of dominance. This is certainly not the case: indeed, market shares well above 10% but below 50% also exclude the existence of dominance, save in exceptional circumstances. To avoid any confusion, we suggest deleting the last sentence of footnote 41.
11. The stated purpose of the Guidelines is to provide legal certainty to companies on the basis of the case law of the EU courts. Pursuant to paragraph 8 of the Guidelines, the Commission seeks to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU. We believe that such a very low market share as 10% in the context of dominance is highly unhelpful for self-assessments. It risks inducing lots of unnecessary inquiries and analyses, thereby significantly raising compliance costs and resulting in chilling effects on competitive behaviour in case of firms with a relatively weak market position.

2.3 Collective dominance

12. Although the Previous Guidelines did not explicitly mention collective dominance, paragraphs 34-42 of the Guidelines discuss the issue in detail. According to paragraph 36 of the Guidelines, “the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance.” Given the lack of case-law dealing with collective dominance over the last 15 years, we would welcome additional reference to the principles according to which it distinguishes tacit restrictive agreements under Article 101 TFEU from abuses of collective dominance. For example, we believe that additional references would be helpful to *Società Italiana Vetro*⁶, which sets out that “for the purposes of establishing an infringement of Article 86 of the Treaty, it is not sufficient, as the Commission’s agent claimed at the hearing, to ‘recycle’ the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.”

⁴ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraph 107.

⁵ Judgment of 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, Case 75/84, ECLI:EU:C:1986:399, paragraphs 85 and 86.

⁶ Judgment of 10 March 1992, *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities*, Joined cases T-68/89, T-77/89 and T-78/89, ECLI:EU:T:1992:38, paragraph 360.

3. GENERAL PRINCIPLES TO DETERMINE IF CONDUCT BY A DOMINANT UNDERTAKING IS LIABLE TO BE ABUSIVE

3.2 Conduct departing from competition on the merits

Paragraph 57

13. This paragraph states that conduct that at first sight does not depart from competition on the merits, may nevertheless do so on closer examination. This paragraph is slightly confusing as it is unclear how, in the Commission's interpretation, it is related to the factors and exercise described in paragraph 55. Paragraph 55 lists the factors which in earlier Union Court decisions were examined to determine if the conduct departed from competition on the merits. Given such paragraph 55 this paragraph 57 seems unnecessary. Therefore, we suggest either deleting it or including in it references to case law with specific examples to the circumstances that the Commission has in mind.

3.3 Capability to produce exclusionary effects

3.3.1. *The evidentiary burden to demonstrate a conduct's capability to produce exclusionary effects*

Paragraph 60

14. With respect to conduct capable of producing exclusionary effects, paragraph 60 of the Guidelines introduces a threefold categorisation: (i) conduct for which it is necessary to demonstrate a capacity to produce exclusionary effects; (ii) conduct that is presumed to lead to exclusionary effects; and (iii) naked restrictions. According to the Guidelines, conduct falling under categories (ii) and (iii) may be presumed to lead to exclusionary effects.
15. We encourage the Commission to thoroughly revise and consider removing this paragraph and the concept reflected therein from the Guidelines, as the case law of Union Courts does not imply either (i) the above threefold categorisation, or (ii) such a wide presumption-based assessment of potentially abusive practices.
16. As to the question of presumptions, in particular, in our view it does not follow from the case law that there is a presumption of exclusionary effects in the case of most category (ii) conduct. In fact, it appears that most references which seek to support the Guidelines' views concerning presumptions are either taken out of context or are not correct.
17. For example, concerning exclusive dealing, in footnote 137, the Guidelines refer to *Intel*⁷ to establish that the dominant undertaking can seek to rebut the probative value of the presumption. However, this judgment merely states – in the context of exclusivity commitments – that the undertaking under investigation may submit “*during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects*”. It does not follow from the wording of the judgment that the burden of proof is shifted to the undertaking. To the contrary, paragraph 138 must be considered in the context of the following paragraph 139. That paragraph is very clear that once the undertaking has adduced such “*supporting evidence*”, it is not sufficient for the Commission to show such that evidence is insufficient or deficient, as we would expect in the case of a presumption. Instead, paragraph 139 lists a number of factors that the Commission must examine to build and establish a bottom-up case of exclusionary effects, regardless of the evidence submitted by the dominant undertaking: “*the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their*

⁷ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138.

amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market”.

18. Another example is tying and bundling, in relation to which we submit our comments below, in relation to paragraph 95 of the draft Guidelines.
19. Finally, in the crucial Article 2 of Regulation 1/2003, the EU legislator provided that the burden of proof shall rests with the competition authority: *“In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”* The draft Guidelines’ approach concerning presumptions should not change the burden of proof and thus undermine this legally binding EU legislation.

Paragraph 60 b) ii)

20. We are concerned about paragraph 60 b) ii) of the Guidelines, which states that even if the presumption is rebutted by the undertaking in respect of category (ii) conduct, the evidentiary assessment must give due weight to the *“probative value”* of a presumption. The draft Guidelines thus seem to suggest that, even if the presumption is rebutted, the Commission’s burden of proof would be somewhat reduced. This, however, has no basis in previous case law of the Union Courts. Crucially, the draft Guidelines themselves acknowledge in footnote 131 that the Union Courts with very limited exceptions have not even made explicit use of the term *“presumption”*. Given this lack of *“presumptions”* in Union Courts’ judgements, it is unclear on what basis the draft Guidelines states that Union Courts would have attributed any special probative value it.

3.3.4. Elements that are not necessary to show the capability to produce exclusionary effects

Paragraph 75

21. Paragraph 75 of the draft Guidelines states that there is no *de minimis* threshold for determining whether a conduct infringes Article 102 TFEU, implying that any actual or potential exclusionary effect, regardless of its magnitude, will be captured by Article 102 TFEU. This assertion appears to be based primarily on a few paragraphs from the ECJ’s preliminary ruling in *Post Danmark*⁸, as referenced in footnote 181. However, the assertion is misleading, because it is taken out of the context of the *Post Danmark* ruling. The context in *Post Danmark* was a question from the Danish court about whether the concept of *“appreciability”*, crucial under Article 101 TFEU, is also relevant under Article 102 TFEU. While paragraphs 72-73 of *Post Danmark* indeed clarify that appreciability is not a relevant concept under Article 102 TFEU, this should not be construed to mean that conduct with imperceptible effects could constitute an abuse under Article 102 TFEU. Such conduct would not be capable of exclusion, as supported by various factors listed in section 3.3.3, particularly point (d).
22. Therefore, we suggest that the European Commission clarify this wider context to avoid misinterpretation. Without this clarification, there is a serious risk that undertakings, NCAs and courts might misunderstand this point, potentially leading to an application of Article 102 TFEU that is inconsistent with the Union Court’s case law.

⁸ Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 72-73.

4. PRINCIPLES TO DETERMINE WHETHER SPECIFIC CATEGORIES OF CONDUCT ARE LIABLE TO BE ABUSIVE

4.2 Conducts subject to specific legal tests

4.2.1. Exclusive dealing

Paragraph 82

23. Paragraph 82 of the draft Guidelines states that exclusive dealing is “*presumed to be capable of having exclusionary effects*”. The Guidelines seek to support this position with references in footnote 192 to *Hoffmann-La Roche*⁹, *Unilever*¹⁰ and *Intel*¹¹. However, none of such judgements in fact support the draft Guidelines’ position that there would be a “*presumption*” of exclusionary effects:
- (a) Concerning *Unilever*, the draft Guidelines in footnote 192 refer to this judgement’s paragraph 46. However, this reference is taken out of context. The subsequent paragraph in *Unilever* begins with “*However...*” and, crucially, paragraph 52 later explicitly states that there is no presumption and no reversal of the burden of proof. Instead, the authority in such cases “*must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market*”. There is no indication that it would be sufficient for the authority to simply examine the evidence submitted by the dominant undertaking. Instead, the ECJ in *Unilever* indicates a two-step process: (i) an infringement can be established if certain facts are present; (ii) if the undertaking reasonably disputes the exclusionary effects with supporting evidence, the burden to establish the infringement remains on the Commission. Unlike a presumption, in the second step, it is not sufficient for the Commission to merely show that the undertaking’s evidence is weak; the burden of proof to establish any exclusionary effects lies with the Commission.
 - (b) Concerning *Intel*, also referenced in the footnote, we refer to our comments to on paragraph 60 of the draft Guidelines, above.
 - (c) Finally, the third judgement which footnote 192 of the draft Guidelines references to support the existence of a “*presumption*” is *Hoffmann-La Roche*. However, its paragraphs 89-90 of such judgement (on which the Guidelines seek to rely) are the very same paragraphs that the ECJ later “*clarified*” in *Intel* and subsequently in *Unilever*. This is very clearly explained by the ECJ in paragraphs 46-47 of *Unilever*, which we discuss above, in paragraph 23(a) of this paper. Therefore, these paragraphs 89-90 of *Hoffmann-La Roche* also cannot serve to support the Guidelines’ position on a presumption of exclusionary effects.
24. We respectfully request that the Commission re-examine these references and revise the Guidelines to ensure that the full context of the judgements cited and issues around burden of proof are accurately represented. This will help avoid potential misinterpretations by NCAs and courts, helping the application of Article 102 TFEU consistently with the case law of the Union Courts.

⁹ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 89-90.

¹⁰ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

¹¹ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; Judgment of 26 January 2022, *Intel Corp. v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 124.

4.2.2. Tying and bundling

Paragraph 89

25. Paragraph 89 of the Guidelines list the conditions that must be fulfilled for tying to be considered abusive. For the sake of clarity and completeness, we propose to add to the list that “*tying is not objectively justified*”.

Paragraph 95

26. The second sentence of paragraph 95 takes the position that exclusionary effects of tying can be presumed in case of certain circumstances. However, similarly to the presumption concerning exclusive dealing, the draft Guidelines’ position seems to be based case law references that are either taken out of context or are not relevant.
27. To support its position, the draft Guidelines refers in footnotes 233 and 234 to three judgements and one Commission decision:
- None of the references to *Hilti*¹² or *Tetra Pak*¹³ direct us to any specific paragraphs of those judgements that would establish a presumption in relation to tying. In fact, there is no reference in those judgements to presumptions in relation to tying or bundling at all.
 - Paragraph 841 of Commission decision No. C-3/37.792 (*Microsoft*)¹⁴ in fact supports the opposite of a presumption. In this paragraph, the Commission itself acknowledged that there were “*good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition*” (emphasis added). Later, in paragraph 867 of its judgement *Microsoft v Commission*¹⁵, the General Court also highlighted that “*while it is true that neither that provision nor, more generally, Article 82 EC as a whole contains any reference to the anticompetitive effect of bundling, the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition*”. It is unclear how these references are suitable to support the position that there is a presumption of exclusionary effects.
 - It is also difficult to follow how the references to paragraphs 292-295 of the General Court’s judgement in *Google Android*¹⁶ can support the existence of a presumption. Beside there being no findings concerning a presumption in these paragraphs, in paragraph 295, the General Court highlights that the Commission in that case relied on a close examination of the effects on the conduct rather than on presuming such effects: “*[i]n the present case, the Commission therefore correctly found, as it did in the decision which gave rise to the judgment of 17 September 2007, Microsoft v Commission (T-201/04, EU:T:2007:289) (see paragraph 286 above), that close examination of the actual effects or further analysis, according to the terminology used in the past in that regard, was required before it could be concluded that the tying in question was harmful to competition*” (emphasis added). Thus, there seems to be no support in this (or in fact in any other) section of the judgement to the draft Guidelines proposition of presumption on exclusionary effects.
28. We respectfully request that the Commission re-examine these references and revise the text of the Guidelines to ensure that the context and burden of proof are accurately represented. This will help avoid potential misinterpretations by NCAs and courts, ensuring a consistent application of Article 102 TFEU.

¹² Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70

¹³ Judgment of 6 October 1994, *Tetra Pak International v Commission*, T-83/91, EU:T:1994:246

¹⁴ Commission decision of 21 April 2004 in case COMP/C-3/37.792 – *Microsoft*, paragraph 841

¹⁵ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289

¹⁶ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541

4.2.3. Refusal to supply

Paragraph 96

29. Paragraph 96 of the draft Guidelines essentially discusses the application of the *Bronner*¹⁷ case law, stating that the conditions set out in *Bronner* apply to situations where a dominant undertaking refuses to give access to infrastructure that it has developed “*exclusively or mainly*” for its own use. However, this interpretation reflects an overly broad application of the *Bronner* case law, as the Union Courts have consistently limited its application to infrastructure developed by the dominant undertaking for its own use, ie., without the qualifier “*mainly*”.
30. This is supported by the very judgements that the draft Guidelines quote in footnote 237, as follows.
31. *Google Shopping* (C-48/22)¹⁸:
- (a) “*The imposition of those conditions, in paragraph 41 of the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), was justified by the specific circumstances of that case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct.*” (paragraph 90) (emphasis added)
 - (b) “*...the imposition of the conditions referred to in paragraph 41 of the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), was justified by the particular circumstances of the case which gave rise to that judgment, which consisted in a refusal by a dominant undertaking to give a competitor access to an infrastructure that it had developed for the purposes of its own business, to the exclusion of any other conduct.*” (paragraph 110) (emphasis added)
32. *Lietuvos Geležinkeliai* (C-42/21)¹⁹:
- (a) “*As regards practices consisting of a refusal to grant access to infrastructure developed by a dominant undertaking for the purposes of its own business and owned by it, it is apparent from the case-law of the Court that such a refusal may constitute an abuse of a dominant position provided not only that that refusal were likely to eliminate all competition in the market in question on the part of the entity applying for access and that such refusal were incapable of being objectively justified but also that the infrastructure, in itself, were indispensable to carrying on that undertaking's business, inasmuch as there was no actual or potential substitute in existence for that infrastructure.*” (paragraph 79) (emphasis added)
 - (b) “*The imposition of those conditions, in paragraph 41 of the judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569), was justified by the specific circumstances of the case which gave rise to that judgment, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct.*” (paragraph 80) (emphasis added)
33. *Slovak Telekom* (C-165/19)²⁰:
- “Consequently, where a dominant undertaking refuses to give access to an infrastructure that it has developed for the needs of its own business, the decision to oblige that undertaking to grant that access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned. ... The application, to a particular case, of the conditions laid*

¹⁷ Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569

¹⁸ Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P., ECLI:EU:C:2024:726

¹⁹ Judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12

²⁰ Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239

down by the Court of Justice in the judgment in Bronner, set out in paragraph 44 of the present judgment, and in particular the condition relating to the indispensability of the access to the dominant undertaking's infrastructure, allows the competent authority or national court to determine whether that undertaking has a genuinely tight grip on the market by virtue of that infrastructure. Thus, that undertaking may be forced to give a competitor access to an infrastructure that it has developed for the needs of its own business only where such access is indispensable to the business of such a competitor, namely where there is no actual or potential substitute for that infrastructure." (paragraphs 48-49) (emphasis added)

34. Thus, it seems that the ECJ has consistently applied the Bronner criteria to infrastructure developed by a dominant undertaking for its "own use", and not to infrastructure that it developed "mainly" for its own use. Therefore, we suggest that the European Commission revise paragraph 96 of the Guidelines to reflect this more precise limitation, ensuring consistency with the established case law, e.g., as follows: "refusal to supply refers to situations where a dominant undertaking has developed an input exclusively ~~or mainly~~ for its own use".

Paragraph 97

35. We suggest adding to the helpful explanation in this paragraph a reference to paragraph 113 of the ECJ's recent judgement in *Google Shopping*²¹, which should help the reader of the Guidelines to understand the scope of this specific legal test ("113. Since, as has been stated in paragraphs 105 to 107 of the present judgment, Google gives competing comparison shopping services access to its general search service and to the general results pages, but makes that access subject to discriminatory conditions, the conditions established in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), do not apply to the conduct at issue.").

4.2.5. Margin squeeze

Paragraph 121

36. Pursuant to paragraph 121 of the Guidelines, "margin squeeze refers to a situation where an undertaking that is active in an upstream input market and an associated downstream market sets its upstream or downstream prices at a level that prevents downstream competitors relying on that input from operating profitably on a lasting basis." We suggest clarifying in the definition that the margin squeeze is only abusive if it is the only obstacle preventing the company's competitors from operating profitably on a lasting basis, e.g. by changing the wording as follows: "(...) sets its upstream or downstream prices at a level that it alone / as a sole reason prevents downstream competitors relying on that input from operating profitably on a lasting basis".

Paragraph 124

37. As for paragraph 124, the Guidelines state that the condition contained in paragraph 122(b) is satisfied when the spread between the price that the dominant undertaking charges to competitors upstream and the price that it charges to its customers downstream is either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs that that undertaking has to incur to supply its downstream products. Even though footnote 288 clarifies that the spread corresponds to the downstream price minus the upstream price, we would suggest amending the wording of paragraph 124 for the sake of clarity as follows: "The condition under paragraph 122(b) requires it to be established, by means of a price-cost test, that the spread between the price that the dominant undertaking charges to its customers downstream ~~upstream~~ and the price that the it charges to competitors upstream is either (...)"

²¹ Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P., ECLI:EU:C:2024:726

Paragraph 126

38. We suggest amending the wording of paragraph 126 as follows: “Furthermore, it is also not necessary to *demonstrate that the dominant undertaking is capable of recouping any losses it may suffer, as it engages in an abusive practice of squeezing the margins of its competitors*”.

Paragraph 127

39. As for paragraph 127 (“*The condition under paragraph 122(c) requires that the margin squeeze is capable of having exclusionary effects, for instance by making the entry of competitors onto the market concerned more difficult, or impossible*”) we would welcome if the Commission could give more guidance on the logical link that has to be established between upstream input and downstream competition in order to find an abuse.

Paragraphs 132-136

40. We believe that the price-cost test cannot be applied mechanically as a mere “*mathematical model*”, as these highly complex economic calculations must be determined and carried out on a case-by-case basis, taking into account all relevant economic aspects of the specific case.
41. Pursuant to paragraph 136 of the Guidelines, in general it is appropriate to apply the price-cost test at a level of aggregation which corresponds to the relevant product market. We would welcome any additional guidance from the Commission (ie, even beyond the factors established by the Union Courts in their judgements) that could provide its views on the method on how to aggregate products in the context of a margin squeeze test. Even if this issue has not been completely covered by the Union Courts, undertakings seeking to self-assess to ensure compliance would benefit from guidance and added legal certainty in this regard.

4.3 Conducts with no specific legal test

4.3.1 Conditional rebates that are not subject to exclusive purchase or supply requirements

Paragraph 145(f), footnote 325

42. This footnote should be deleted or clarified, because it is confusing given other sections of the draft Guidelines and appears to go against the as-efficient competitor principle (AEC principle) which is expressed in paragraph 51 of the draft Guidelines.
43. According to this footnote 325, “... *the fact that a hypothetical as-efficient competitor would be able to compensate the loss of the rebates is not necessarily a relevant factor showing that the rebates scheme is incapable of producing exclusionary effects. This is because the conduct’s capability to have exclusionary effects needs to be assessed in relation to the existing actual or potential competitors of the dominant firm, rather than in relation to hypothetical competitors (see paragraph 73 above).*”
44. The footnote is confusing, as paragraph 73 and the case law discussed therein contains the opposite conclusion, ie that exclusionary effects does not require an assessment in relation to actual competitors of the dominant firm and whether they are as efficient as the dominant firm. Paragraph 73 states that “[t]he assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking”. This paragraph is based on paragraphs 540-541 of *Google Shopping*²², where, in similar vein, the General Court held that the “*Commission had only to demonstrate the potential exclusionary or restrictive effects on competition attributable to the practices at issue, irrespective of whether, in relation to comparison shopping, Google was ‘more efficient’ than the other comparison*”

²² Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763

shopping services, which is actually impossible to know when those practices are capable of distorting competition". (This finding has been recently approved by the ECJ in paragraphs 268-269 of its *Google Shopping* judgement).

45. In contrast, footnote 325 appears to suggest that an authority can find exclusionary effects simply because the conduct is capable of excluding certain actual or potential competitors, regardless of whether they are less efficient than the dominant firm. Such a suggestion appears contrary not only to paragraph 73 and *Google Shopping*, but also to other paragraphs of the Guidelines, such as paragraph 51, which states that "*Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation*".
46. Therefore, we suggest that footnote 325 is deleted or clarified accordingly.

4.3.3. Self-preferencing

Paragraph 161 (iii)

47. Point (iii) should be deleted, because it is pure *obiter dictum* by the General Court, which should not be present in the Guidelines which seek to systematise the established jurisprudence of Union Courts. In this point (iii) the Guidelines state that for the purposes of determining whether a conduct qualifies as competition on the merits, it is relevant whether "*iii) the preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities in the leveraging market, for instance by being contrary to its interests or those of its customers in that market*".
48. While a footnote to this point refers to paragraphs 176-185 of the General Court's judgement in *Google Shopping*²³, in fact, this point was made by the General Court *obiter*. The Commission did not make such a finding during the administrative procedure, and thus such finding was never subject to a proper review by the Union Courts. As the ECJ highlighted in paragraphs 196 and 198 of its judgement in *Google Shopping*²⁴, "*... the considerations set out in paragraphs 176 to 179 and 181 to 184 of the judgment under appeal were ... set out for the sake of completeness*" and "*those considerations were not necessary to confirm the assessment that the conduct at issue could be regarded in law as falling outside the scope of competition on the merits*".
49. Given the lack of proper judicial review of this point, we believe that point (iii) of paragraph 161 is not appropriate to be included in the Guidelines. Alternatively, in the event it is included, it should be placed in full context to avoid the risk of misunderstandings. In such case, the Guidelines should explain that despite the reference in the footnote, this finding was not a legal basis of the Union Court's findings in *Google Shopping*, and was never properly reviewed and approved by the ECJ.

4.3.4. Access restrictions

Paragraph 166(d)

50. It is confusing to find in this section related to access restrictions a reference to, and a finding from, *Google Shopping*, a self-preferencing case.²⁵ Such a reference blurs the apparent distinction that the draft Guidelines seeks to make between these two different types of specific restrictions. In addition, similarly to the factor set out in paragraph 161(iii), the factor set out in paragraph 166(d) is also merely an *obiter dictum* by the General Court (see this explained by the ECJ in paragraphs 196-198 of its

²³ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763

²⁴ Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P., ECLI:EU:C:2024:726

²⁵ "166 d) d) Where the dominant undertaking develops an input for the declared purpose of sharing it widely with third parties but later does not provide access or restricts access to that input. In such cases, the dominant undertaking has already made the business and investment decision to share the input from the outset and to contract with third parties to give access thereto"

*Google Shopping*²⁶ judgement). If paragraph 166(d) remains part of the Guidelines, it should be put into full context and explained that it was not the legal basis of the Union Court's decisions in *Google Shopping*²⁷.

5. GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF OBJECTIVE JUSTIFICATIONS

Paragraph 168 - Meeting competition defence

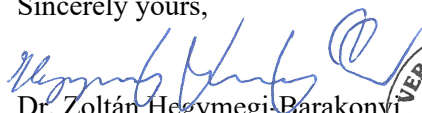
51. We suggest that the Commission considers explicitly addressing the meeting competition defence. The draft Guidelines only marginally refer to this defence, e.g. in paragraphs 49 (*"the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests, if they are attacked."*) and 168 (*"objective necessity may stem from legitimate commercial considerations, for example, the protection of the dominant undertaking against unfair competition"*). We believe that additional explanations are needed to obtain transparency and clarity for self-assessments and for dominant undertakings seeking to engage in lawful and healthy competition.


Paragraph 170

52. Pursuant to paragraph 170 of the draft Guidelines, "[w]hile it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context." We would suggest either (i) deleting this section, as the wording of the phrase "must be given due weight" is rather vague and risks hollowing out the concept of objective justification, or (ii) clarifying what the Commission understands by the above wording and to what extent it intends to take into account the fact that the conduct has a high potential to produce exclusionary effects or can be regarded as a naked restriction in the context of the assessment of the arguments for objective justification.
53. The key risk in our view is a possible misunderstanding that the seriousness of the conduct plays a role in assessing its objective justification. This clearly was not the case of any of the judgements that the Guidelines reference in paragraph 168. For example, paragraph 168 refers as an example to Joined Cases C-468/06 to C-478/06 *Sot Lelos kai*²⁸, in which the conduct concerned parallel import restrictions, one of the most serious infringements seeking to undermine the fundamental market integration objectives of the TFEU. Nevertheless, throughout paragraphs 52 to 77, in which the ECJ assessed the dominant undertaking's objective justifications, it did not discuss or give "due weight" to the seriousness of the infringement. Instead, it analysed all relevant circumstances of the case and ultimately held that an objective justification in the context of that particular situation is in principle possible.
54. Thus, paragraph 170 should be deleted to align the draft Guidelines with the Union Court's case law.

We trust that you find the above comments useful.

Sincerely yours,


Dr. Zoltán Hegymegi-Barakonyi
President
LIDC Hungarian Competition Law Association



²⁶ Judgment of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P., ECLI:EU:C:2024:726

²⁷ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763

²⁸ Judgment of 16 September 2008, *Sot. Lélós kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton*, C-468/06 to C-478/06, EU:C:2008:504

ANNEX 1

COMMENTS TO THE HUNGARIAN LANGUAGE VERSION

Location	English version	Original Hungarian Text	Suggested amendments	Comments
Title of the Guidelines	„Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings”	„Iránymutatás az Európai Unió működéséről szóló szerződés 102. cikkének az erőfölényben lévő vállalkozások versenykorlátozó visszaélő magatartására történő alkalmazásáról”	change to „Iránymutatás az Európai Unió működéséről szóló szerződés 102. cikkének az erőfölényben lévő vállalkozások kiszorító jellegű visszaélő magatartására történő alkalmazásáról”	Suggested translation better suits the English expression of abusive exclusionary conduct, and is a widely accepted terminology among Hungarian competition lawyers.
Multiple instances throughout the text	“exclusionary abuse”	„versenykorlátozó visszaélés”	change to „ kiszorító jellegű visszaélés ”	Suggested translation better suits the English expression of exclusionary abuse, and is a widely accepted terminology among Hungarian competition lawyers.
Multiple instances throughout the text	“exclusionary effect”	„versenykorlátozó hatás”	change to „ kiszorító versenykorlátozó hatás ”	Suggested translation better suits the English expression of exclusionary/foreclosure effect, and is a widely accepted terminology among Hungarian competition lawyers.
Multiple instances throughout the text	“naked restrictions”	„álcázatlan korlátozások”	change to „ csupasz korlátozások ”	Suggested amendment better suits the meaning of naked restrictions.
Paragraph 17	“acquiring on its own merits, in particular on account of its skills and abilities, a dominant position”	„hogy saját érdemei alapján, különösen képességei és készségei alapján erőfölényt szerezzen”	change to „hogy saját érdemei alapján, különösen a szakértelmének és képességeinek köszönhetően erőfölényt szerezzen”	Suggested translation is more appropriate in light of the case law cited under this paragraph. See, for example, the Hungarian version of the judgment in <i>Unilever</i> , case C-680/20, paragraph 37.

Location	English version	Original Hungarian Text	Suggested amendments	Comments
Multiple instances throughout Chapter 2.3 (Collective Dominance)	“coordination”	„egyeztetés”	change to „ koordináció ”	Suggested amendment is more appropriate terminology to describe any kind of coordination.
Paragraph 40	“To make the common policy sustainable over time”	„Ahhoz, hogy a közös politika idővel fenntartható legyen”	change to „Ahhoz, hogy a közös politika hosszabb ideig fenntartható legyen”	Correction of translation.
Paragraph 60b)	“A dominant undertaking can seek to rebut the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects”	„Az erőfölényben lévő vállalkozás a konkrét körülmények között megkísérelheti megdönteni a vélelem bizonyító erejét azáltal, hogy alátámasztó bizonyítékok alapján azt állítja, hogy a magatartás nem alkalmas arra, hogy versenykorlátozó hatást váltson ki”	change to „Az erőfölényben lévő vállalkozás a konkrét körülmények között megkísérelheti megdönteni a vélelem bizonyító erejét azáltal, hogy bizonyítékokkal alátámasztva azt állítja, hogy a magatartás nem alkalmas arra, hogy versenykorlátozó hatást váltson ki”	Correction of translation.
Paragraph 99(b), footnote 241	“The case law of the Union Courts also specifies that that refusal must not be objectively justified.”	„Az uniós bíróságok ítélezési gyakorlata azt is kimondja, hogy a megtagadást nem lehet objektíven indokolni”	„Az uniós bíróságok ítélezési gyakorlata azt is kimondja, hogy a megtagadást nem lehet objektíven indokolni akkor lehet jogsértő, ha objektív okokkal nem igazolható ”	Correction of translation
Paragraph 122 c)	„122. A margin squeeze is considered as liable to be abusive where the following conditions are met: ... c) the conduct is capable of producing <u>exclusionary effects</u> ”	„c) a magatartás alkalmas arra, hogy versenykorlátozó hatásokat váltson ki.”	change to „c) a magatartás alkalmas arra, hogy kiszorító versenykorlátozó hatásokat váltson ki.”	Correction of translation
Paragraph 126	“Furthermore, it is also not necessary to demonstrate that the dominant undertaking is capable of recouping any losses it may	„Ezenkívül azt sem kell bizonyítani, hogy az erőfölényben lévő vállalkozás képes lenne megtéríteni azokat a	change to „Ezenkívül azt sem kell bizonyítani, hogy az erőfölényben lévő vállalkozás képes lenne kompenzálni azokat a	Correction of translation.

Location	English version	Original Hungarian Text	Suggested amendments	Comments
	suffer to squeeze the margins of its competitors”	veszteségeket, amelyeket versenytársai árréseinek préselésével szenvedhet”	veszteségeket, amelyeket versenytársai árrésének csökkentésére irányuló magatartása következtében szenved el”	
Paragraph 130	“could not operate profitably”	„nem tudott nyereségesen működni”	change to „nem tudna nyereségesen működni”	Correction, this sentence is not in the past tense but in conditional form.
Paragraphs 149-150, footnote 327	“contestable”	„vitatható”	change to „ támadható ”	Suggested amendment is more appropriate terminology for contestable share, contestable unit price, etc.
Multiple instances throughout Chapter 5	“efficiency defence”	„hatékonyságvédelem”	change to „ hatékonysági védekezés ”	Suggested amendment is more appropriate terminology for efficiency defence.
Paragraph 166a)	“customers”	„fogyasztók”	change to „ ügyfelek ”	Correction of translation.
Paragraph 170	“whether the conduct has <u>a high potential</u> to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context”	„e magatartásnak <u>van-e esélye</u> arra, hogy versenykorlátozó hatásokat váltson ki, vagy álcázatlan korlátozásnak minősül-e.”	„e magatartás nagy eséllyel versenykorlátozó hatásokat vált-e ki, vagy <u>csupasz</u> korlátozásnak minősül-e. ”	Correction of translation.