

European Commission
Directorate-General for Competition – Unit A1
HT.100055 Guidelines on exclusionary abuses

To Whom It May Concern,

On behalf of the Digital Poland Association, representing the digital and modern technology industry in Poland, I present our position as part of the consultation on the Guidelines on exclusionary abuses of dominance document.

1. The draft Guidelines on exclusionary abuses (“Draft Guidelines”) state that they shall ensure that Article 102 TFEU is applied in a way to keep markets segments open and dynamic, affording new opportunities for innovative players, ensuring innovation and an efficient allocation of resources, contributing to sustainable development, and enabling strong and diversified supply chains. The EC emphasizes the need for this provision to be applied in a **predictable and transparent manner** so that companies can operate freely in the internal market. The Draft Guidelines are also intended to guide national courts and national competition authorities in their application of Article 102 TFEU, notwithstanding any stricter national rules.
2. The question is whether the Draft Guidelines will be able to deliver on these objectives. On their face, this does not seem likely. The text underlines that for dominant companies, virtually every form of conduct can potentially lead to an abuse if it is capable of producing exclusionary effects, without suggesting any safe harbour.
3. In addition, by underlining the prevailing importance of a case-by-case analysis, the EC retains wide discretion for its investigations and decisions.



4. The European Commission's Draft Guidelines mark a serious retrogression from the economic and effects-based approach of the 2008 Guidance Paper to a more formalistic approach that is also at variance with and, in some cases, goes against the more modern case law of the EU Courts in the post-*Intel* era. At the same time, the Draft Guidelines abandon many of the safe harbours that the Guidance Paper offers and increase in an unprecedented manner the discretion of the Commission, thus correspondingly decreasing legal certainty and predictability. Indeed, this is a particular point mentioned in the recent Draghi report, which sharply criticized some of the Draft Guidelines' characteristics (Draghi Report, p. 304: "*excessive discretion on the finding of exclusionary abuses is left by the draft Guidelines on the enforcement of article 102 released in August 2024*").
5. These concerns will unfortunately affect all sectors of the economy and all business models. The finding of dominance in a given market segment will now become much easier as a result of the abolition of any safe harbours based on market shares and of the adoption of a new Market Definition Notice that leaves much discretion to competition authorities, essentially all companies are affected.

1) No more soft safe harbour for companies

1. On dominance, the Priorities Guidance indicated that market shares were only a "*useful first indication*" of the relative importance of the undertakings on the market and that companies with low market shares – below 40% – were unlikely to be dominant. The Draft Guidelines take a rather different tone: "*the existence of very large market shares... 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*" (paragraph 26, footnotes omitted). The soft safe harbour has been reduced from 40% to 10%, and dropped to a footnote (41): "... *Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances...*"
2. The Draft Guidelines therefore eliminate the most basic of safe harbours: that there can be no dominant position below a certain market share.



3. This is not only surprising in view of the 10% market share threshold in the De Minimis Notice, but is also not necessary and will only create legal uncertainty. Since the 2008 Guidance Paper, the Commission has done a good number of Article 102 cases and in none of them has dominance been found at market shares below 50%, while in most cases the market shares were well above 70%.

Key message:

The Guidance Paper's approach should be re-instated and the soft safe harbour that market shares below 40% are not indicative of a dominant position re-introduced in the Draft Guidelines.

2) Departure from the “anti-competitive foreclosure” guiding principle and other fundamental concepts

1. The Draft Guidelines depart from the principle of “anti-competitive foreclosure” of the Guidance Paper. That principle heralded the moving from formalism to an economic approach. It meant focusing not on protection of the commercial freedom of competitors as such, but rather on the foreclosure of competitors that leads to consumer harm. In other words, it is consumer harm that makes foreclosure “anti-competitive”. Foreclosure, as such, is a neutral term: it can be pro-competitive, when there is no consumer harm, or anti-competitive, when there is consumer harm. This principle is no longer emphasized or indeed mentioned in the Draft Guidelines. In addition, the Draft Guidelines no longer place emphasis on the concepts of “consumer harm” and “consumer welfare”, in another stark departure from the Guidance Paper. This also contradicts the latest more modern case law of the Court of Justice, which in such cases as *Post Danmark I*, *Intel*, *Google Android*, *Qualcomm (exclusivity)*, *Servizio Elettrico Nazionale*, *Unilever Italia*, and *European Superleague*, heavily relies on these notions and clarifies that “consumer welfare” is the ultimate objective of Article 102 TFEU.



2. **A less economic and more formalistic approach** One of the accomplishments of the Guidance Paper had been that it rose above legalistic formalism and focused on a more economic approach, where the form and external characteristics of conduct are irrelevant. What counts is how certain practices function, what their likely anti-competitive effects are, in short what's the "theory of harm" behind antitrust intervention. Instead, the Draft Guidelines now return to form and resort in a categorisation of practices in three groups: (i) a first group relates to those few practices that amount to "[c]onduct for which it is necessary to demonstrate a capability to produce exclusionary effects", (ii) a second group relates to the vast majority of practices that are "*presumed to lead to exclusionary effects*", these being exclusive dealing, exclusivity rebates, predatory pricing, margin squeeze with negative spreads and certain forms of tying, and (iii) finally a third group of "naked restrictions", which are seen as "by object" abusive. The criterion of what falls under any of these categories is purely formalistic and has little to do with economics. Rather, it is based on the external (formal) characteristics of practices. If a practice has the formal characteristics A, B, and C, it falls under legal test X, whereas if it has different external characteristics, it falls under a totally different test. **At the same time, there is not a single reference in the Draft Guidelines to the concept of "theory of harm", which is a serious break with all other existing EU competition policy papers and guidelines. Instead, it is the theory of harm that should categorise conduct and not the external characteristics.**

Key message:

The Draft Guidelines should focus around theories of harm to categorize conduct, as all other EU competition policies do



3. The most striking element of formalism is the introduction of presumptions for many of the different practices. The Draft Guidelines view these presumptions as “*allocating the evidentiary burden of proof*”. This is clearly at variance with the EU case law. Some of the references in the case law that the Draft Guidelines use to support their proposition in relation to presumptions have nothing to do with an allocation or reversal of the evidentiary burden. In reality, these references simply explain that the standards that the competition authorities must satisfy in order to prove an infringement may vary according to the facts and findings in each case. For example, when the case law explains that negative margins in a margin squeeze case indicate that “*an effect which is at least potentially exclusionary is probable*” (*TeliaSonera*), this is not a presumption, as the Draft Guidelines allege. It is simply a rule on the evaluation of evidence by competition authorities and on the standards that they need to satisfy in order to prove an infringement. There are countless other examples where the Draft Guidelines misread or even distort the case law in order to support their presumptions proposition. It is simply not true that the existing case law favours a “hard” presumption approach for the first stage of the analysis under Article 102 TFEU, i.e. for whether certain conduct is likely to foreclose (the second stage being the objective justification/efficiency defence).

Key message:

Case law does not favour a hard-presumptive approach and instead requires proof from the enforcing authority of anti-competitive conduct. The Draft Guidelines should reflect this.

2) 1. The Draft Guidelines fail to define the concept of “competition on the merits”

1. It is true that the latest case law of the EU Courts has settled on two cumulative conditions that have to be fulfilled for an Article 102 TFEU violation to exist: (i) conduct against competition on the merits and (ii) likelihood of anti-competitive effects. The concept of “competition on the merits” remains somewhat undefined and the new Guidelines could shed light into it and offer a principled approach on how to distinguish conduct on that basis.



2. Regrettably, the Draft Guidelines have not delivered on that front. Section 3.2.2 of the Draft Guidelines simply puts together all the instances where the EU Courts have referred to conduct against “competition on the merits”. However, these references are taken out of context and can lead to major Type I errors [*in antitrust cases, Type I error represents a false judgment in which the court condemns a conduct that was not anticompetitive; type I error reflects an over-enforcement or over-regulation*]. Instead of a casuistic list of cases, the Draft Guidelines ought to have developed a more principled approach safely grounded on economics and incentives and disincentives of dominant companies. So a rather obscure concept of EU competition law remains obscure and the lists of practices mentioned amount to undue over-inclusion.

3) Specific Problems with Some of the Proposed Legal Tests

1. The Draft Guidelines, in the second part, contain the Commission’s own interpretation of the legal tests that apply to specific practices. For the most part, the Commission’s analysis departs from the approach followed in the Guidance Paper, which had included a number of (soft) safe harbours, some of them based on self-administrable tests of legality that do not require information on rivals and, as such, are of great value to dominant companies who try to comply with competition law *ex ante*. The so-called AEC test is one of these tools.
2. Some of the analysis contained in the second part of the Draft Guidelines is well-grounded on the case law. At the same time, however, there are a number of occasions where the Draft Guidelines misrepresent the case law and systematically degrade the standards that are required from competition authorities. In particular:



3) 1. Exclusivity rebates and exclusive dealing

1. The Draft Guidelines no longer view exclusivity rebates as a pricing abuse that is subject to evaluation on the basis of numerical tools, such as the AEC test. Instead, they group them together with exclusive dealing and argue that both practices are presumptively abusive, while it is open to the dominant company to adduce evidence to show that there is no likelihood of foreclosure. This grouping together is not compliant with the *Intel* line of case law. In addition, there can be no “hard” presumption for both exclusive dealing and exclusivity rebates. Competition authorities are under a duty to take seriously economic evidence put forward by dominant companies and cannot hide behind “presumptions”. As cases such as *Unilever Italia* and *Intel* have shown, this is not just a matter of substance but also of due process. The Draft Guidelines should reflect that point.

Key message:

Numerical tools, such as the AEC test, should be re-instated for exclusivity rebates and exclusive dealing. Competition authorities are under a duty to take seriously economic evidence put forward by dominant companies and cannot hide behind “presumptions”.

3) 2. Tying/Bundling

1. Although over the last 20 years the Commission has always brought tying cases under an effects-based approach (e.g. *Microsoft*, *Google Android*), the Draft Guidelines attempt to return to very old case law that suggests that such practices are presumptively unlawful. This amounts to retrogression, notwithstanding the fact that the Draft Guidelines still allow dominant companies to rebut the presumption of foreclosure. More problematic is the fact that the Draft Guidelines do not offer a bright line between those tying practices that supposedly fall under the presumption and those that require a full-fledged effects-based analysis. This unpredictability has also been mentioned by the Draghi report (see above, p. 304, fn. 9: “As an example, tying can be presumed to have exclusionary effects, but the Guidelines do not detail under which conditions”). Besides, again the Draft Guidelines, to support the proposition of a presumption, cite case law that is more about rules for the assessment of evidence than about real “hard” presumptions.



Key message:

An effects-based approach should be re-instated for tying cases. The Commission should not attempt to return to very old case law that suggests that such practices are presumptively unlawful.

3) 3. Refusal to supply / Access restrictions

1. The Draft Guidelines break with the Guidance Paper and make a major distinction between refusal to supply practices and so-called “access restrictions” (which could also be described as “constructive refusals to supply”). With regard to the latter, an abuse may occur where *“the dominant undertaking develops an input for the declared purpose of sharing it widely with third parties”* but later refuses access to such an input. Such practices are examined under an effects-based approach but do not require the so-called *Bronner* test to be satisfied, including the condition of “indispensability”. The case law is currently in a state of flux and more light is expected to be shed by the forthcoming judgment of the Court of Justice in the *Google Android Auto* case, currently pending.
2. Certainly, when it comes to the test that applies to “pure” refusal to supply cases, the Draft Guidelines do not accurately reflect the case law. To give some examples:
 - (a) they refer to the indispensability condition in the following terms: *“access to the input is necessary for the requesting firm to remain viablely on the market and exert an effective competitive constraint”*. However, the Draft Guidelines cite no case law for that maximalist reading. Indeed, the most recent *Google Shopping* judgment of the Grand Chamber of the Court of Justice refers to the indispensability condition in the following terms: *“indispensable to carrying on that undertaking’s business, inasmuch as there is no actual or potential substitute in existence for that infrastructure”*.
 - (b) they refer to a condition *“to eliminate all effective competition on the part of the requesting undertaking”*, but the word “effective” is not to be found in the Court of Justice cases and paragraphs cited in the respective footnote (fn. 246).



3. When it comes to “access restrictions”, as explained above, the Draft Guidelines seem to be in line with the very recent case law that has reduced the scope of application of *Bronner* (*Google Shopping*). However, it is surprising that they include discontinuation of supply as a practice subject to the same test as “access restrictions”. Instead, discontinuation of supply is considered by the case law as a special form of refusal to supply, for which the condition of indispensability may not be required. Besides, the Draft Guidelines go too far in the terms they use: “*dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market, if the customers abide by regular commercial practices and the orders placed by them are in no way out of the ordinary*”. It must be possible for dominant companies to change their business models and even – sometimes – the products/services they offer.

Key message:

The Draft Guidelines must accurately reflect the case law when it comes to the test that applies to refusal to supply case. Discontinuation of supply cannot be included as a practice subject to the same test as “access restrictions”.

3) 4. Predatory pricing

1. Although the legal test for predation is already well-grounded on case law, the Draft Guidelines contain a number of novel elements. First, they put forward the general proposition that predatory pricing may also happen in a market where the company concerned is not dominant, as long as it's a “*related market*”. It cites *AKZO* for that proposition but the paragraphs cited have nothing to do with this. In addition, the Draft Guidelines speak of exclusionary effects “*preventing actual or potential competitors from getting a solid foothold in the market*”, as if this were part of the test, but again the cited paragraph in *AKZO* does not support this. Then, when referring to the requirement of an exclusionary plan when the price is between AVC and ATC, they stress that the objective of the plan can be the “*elimination or reduction of competition as such*”, a much more nebulous test, than the more conventional “*elimination or marginalization of one or more specific competitors*”. Again, the Draft Guidelines refer to certain paragraphs in the General



Court's *France Télécom* judgment as support for these novel words, but there is no support in that decision for these conclusions.

2. Another problem is that the Draft Guidelines depart from the existing case law, which speaks of a “presumption” only for prices falling below AVC and not for prices between AVC and ATC. Instead, the Draft Guidelines adopt a one size fits all approach and consider presumptively abusive also prices that are between AVC and ATC and there is an exclusionary plan.
3. Finally, there is a confusion with a reference in a different section of the Draft Guidelines (para. 57), which states that pricing above ATC “*may, in specific circumstances, be found to depart from competition on the merits*”. While this does not amount to saying that it would definitely amount to predatory pricing and, indeed, this statement is not included in the section on predation, a clarification to that extent would be welcome. A more dangerous statement appears in para. 118 and suggests that “*it may be appropriate to account for opportunity costs of the dominant undertaking*” when considering the costs that will need to be considered while performing the price-cost test. In reality, this implies that predation can sometimes also be found when the dominant firm prices above cost. Apart from the fact that the case law does not cover this scenario, this is an open-ended statement and the Commission includes no explanations or limiting principles.

Key message:

The Draft Guidelines cannot adopt a one size fits all approach and consider presumptively abusive also prices that are between AVC and ATC and there is an exclusionary plan. This case law speaks of a “presumption” only for prices falling below AVC and not for prices between AVC and ATC.



3) 5. Margin squeeze

1. A major issue with the margin squeeze test has already been mentioned above. It is part of the category of presumptively unlawful practices based on a distorted reading of a particular paragraph of *TeliaSonera*. Yet, this is a typical type of conduct where the evidentiary burden should always stay with the competition authority.

Key message:

The Draft Guidelines cannot adopt a one size fits all approach and consider presumptively abusive also prices that are between AVC and ATC and there is an exclusionary plan. This case law speaks of a “presumption” only for prices falling below AVC and not for prices between AVC and ATC.

3) 6. Other rebates (aside from exclusivity rebates)

1. For conditional rebates not based on *de jure* or *de facto* exclusivity, the Draft Guidelines adopt an effects-based analysis, however, there are also certain problems. First, they appear to imply that a price-cost test (the AEC test) is discretionary (“*may be appropriate to make use of a price-cost test*”). The most recent case law sounds less discretionary, with reference to pricing practices of this kind (*Unilever Italia, Google Shopping*). Second, there is a general idea that an AEC test may not be appropriate where “*the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking’s very large market share [...] or the existence of regulatory constraints*”. This proposition relies on *Post Danmark II*, which, however, was a very special case involving a former State monopoly and furthermore pre-dates *Intel* – indeed, it was not cited even once in *Intel*. Third and most importantly, the Draft Guidelines do not include “coverage” (*i.e. the proportion of the customer base covered by the strategy*) as a condition that must be fulfilled while the Commission performs the effects-based analysis. This is an intentional and serious omission that runs counter to explicit recent case law (*Intel, Intel renvoi, Google Android*)! Clearly, if the Commission ignores this requirement in its decisions, it will suffer more annulments.



2. Finally, the Draft Guidelines appear to embrace the old case law that labelled certain types of rebates as “loyalty inducing” and potentially suspect. While the Draft Guidelines indicate that all rebates other than rebates conditional on exclusivity need to be assessed under the effects test, they include some unhelpful comments, in particular on rebates individualised for each customer. They note that such rebates are “*in general more capable of producing exclusionary effects because they allow the dominant undertaking to target the rebate thresholds to each customer’s size/ demand, thereby enhancing the loyalty effects.*” This seems a retrogression.

Key message:

There should be no discretion for the Commission to use a price-cost test when examining conditional rebates. The Draft Guidelines cannot depart from the case law and must include “coverage” as a condition that must be fulfilled while the Commission performs the effects-based analysis.

Conclusion:

While the Commission claims that its revisions are aimed at “enhancing transparency on the principles underpinning the Commission’s enforcement action”, they lead to additional uncertainty.

Changes and adjustments should be at a minimum:

- Re-introduction of the soft safe harbour that market shares below 40% are not indicative of a dominant position, bar very exceptional circumstances;
- Adjustments in the preamble and the general framework in the form of insertion of references to concepts well-grounded on economics and the case law, such as “consumer harm”, “theory of harm”, “anti-competitive foreclosure”;
- Reworking of the lists of practices that constitute conduct that is not “competition on the merits”; the Commission should adopt a principled approach and explain why generally conduct does not amount to “competition on the merits” (e.g. with a sort of “no economic sense” test);

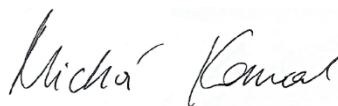


- Taking tying out of the “presumption” category;
- Clarifying that the condition of “coverage” is part of the legal test for loyalty rebates.

We hope that our comments will be taken into consideration. We remain at your disposal for any questions.

Yours faithfully,

Michał Kanownik



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