

**REPLY TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON DRAFT
GUIDELINES ON THE APPLICATION OF ARTICLE 102 TFEU TO ABUSIVE EXCLUSIONARY
CONDUCT BY DOMINANT UNDERTAKINGS**

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1. Introduction

1. On 1 August 2024, the European Commission ("Commission") launched a public consultation inviting all interested parties to comment 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 ("102 Draft Guidelines").¹
2. The Autoridade da Concorrência – Portuguese Competition Authority ("AdC") welcomes the Commission's initiative, which provides an important opportunity to bring further clarity to the enforcement of Article 102 TFEU under the "effects-based" approach, which is now firmly enshrined in the case law. It can thus increase legal certainty to the benefit of consumers, businesses and the functioning of markets.
3. The AdC has provided and reiterates its full support with the stated objectives pursued by the Commission with the publication of the 102 Draft guidelines. And that objective, which the AdC fully shares, is that of a vigorous, active and robust enforcement of article 102 TFEU.
4. The purpose of this document is to identify key points which, in the view of the AdC, can be further clarified/improved in the final version of the document.

2. AdC suggestions on key points of the 102 Draft Guidelines

2.1. Focus on consumer welfare, defined in a comprehensive and dynamic way:

- The AdC welcomes the approach to consumer welfare spelled out in §1, that encompasses not only price but also quality, variety, and innovation.
- Consumer welfare assessments should consider both short-term and long-term effects, as well as the likelihood and magnitude of harm resulting from the abusive conduct.
- Any other narrower definition of consumer welfare would be incorrect, overly restrictive, and unable to capture the full extent of the impact of competition (or lack therein) on consumers.
- We believe that **this focus could be further reinforced and clarified throughout the document, to further highlight consumer welfare**, defined necessarily in a comprehensive and dynamic way, as the primary objective of Article 102 TFEU enforcement.

¹ See Commission's [press release](#) of 1 August 2024.

2.2. Promote a Flexible but Workable Approach to 102 enforcement:

- The 102 Guidelines seek to promote a **flexible, economically sound and workable approach to assess abusive conduct**, recognizing the diversity of market structures and competitive dynamics.
- That is consistent with **rebuttable presumptions of harm, as long as they are built on well-established economic knowledge**, and serve to determine the shift of the burden of proof to the dominant firm for certain abusive practices that have been shown to have strong anticompetitive potential.
- The **burden shifting based on rebuttable presumptions assists in optimising costs and time in applying article 102 regarding exclusionary abuses** and serves as a valuable tool to address the information asymmetry between the competition authority and the dominant firm. Furthermore, they are subject to a rigorous judicial scrutiny.

2.3. Clarify the concept of “competition on the merits”:

- The 102 Draft Guidelines introduce a two-legged test, which requires an assessment of whether the conduct deviates from competition on the merits and the capability to exclude actual or potential competitors.
- On this regard, the AdC puts forward the following suggestions:
- Recent case law (e.g., C-377/20 SEN) has sought to define this concept by emphasizing two situations: (i) the absence of economic interest beyond simply excluding competitors, and (ii) the lack of replicability because the conduct relies on resources or means resulting from the dominant position.
- However, abusive conduct can manifest in various ways, often without involving immediate profit sacrifice or exclusionary intent.
- The concept of "competition on the merits" could be further clarified in order to further assist the operationalisation of the concept.
- This could be accomplished by **further emphasizing its “redirection” to consumer welfare**, as stated in §51 of the 102 Draft Guidelines.
- Similarly to the guidelines on horizontal and vertical agreements, the 102 Guidelines could **provide concrete examples on how to operationalize the two-limbed test** in the assessment of specific types of abusive conduct.

2.4. Further emphasise the relevance of a coherent and evidence compatible Theory of Harm:

- The 102 Guidelines would benefit from further emphasising the relevance of articulating a clear theory of harm in each case.
- The extent to which the facts of the case align with such a theory of harm should be rigorously assessed.

- Economic analysis should play a central role in assessing the anticompetitive effects of the conduct and the degree of dominance should be factored into the competition assessment, **recognizing that, as a general principle, more entrenched dominant positions increase the potential for anticompetitive harm.**

2.5. Further the balance between future proofing and providing guidance, by scoping and providing examples:

- The 102 Draft Guidelines seek to embrace a dynamic approach to the assessment of exclusionary conduct.
- However, **the document could seek to strike a better balance between future proofing and guidance to businesses** and stakeholders, in some instances.
- Some examples relate to the **As Efficient Competitor Principle (AEC Principle) and the As Efficient Competitor Test (AEC test)**
- As a general principle, the 102 Draft Guidelines state, in §51, 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.*
- In §56, the **102 Draft guidelines bring clarity to the conducts for which the AEC test might be useful and those conducts for which it is not.** This helps demystify those views that argued the AEC test to be the core of all effects-based assessments, regardless of the type of practice at stake. The AdC welcomes this clarification, which is fully backed by economic theory and the case law.
- In §57, the document states that *“Conduct that at first sight does not depart from competition on the merits (e.g. pricing above average total costs (“ATC”)) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits”*
- Later, in §73, the document states that *“The 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”.*
- Concerns have been raised with the statement on above ATC pricing, as well as with the open-ended statement, in §73, on as efficient competitors, namely that this might chill pro-competitive strategies by firms in the market that would otherwise benefit consumers.
- There are well founded reasons that, in certain specific circumstances, justify a departure from the AEC Principle.
- However, we believe the clarity of the 102 Guidelines would benefit from providing a more detailed framework for assessing conduct that can lead to the elimination of less efficient competitors.

- In order to safeguard future proofing, which is particularly relevant for dynamic market settings, while at the same time improving legal certainty, this could be achieved by **providing examples that help scoping the circumstances under which a departure from the AEC principle might be warranted.**
- Regarding the open-ended statement on situations of pricing above Average Total Costs that may be found to depart from competition on the merits, we believe the guidelines should scope the situations in which that may occur.
- This could involve **situations in which there is evidence suggesting the dominant firm's exclusionary intent, or evidence of a plan to exclude or deny scale to the rivals.**
- In providing these examples, **the Commission would bring further clarity by stating the underlying Theory of Harm to consumer welfare.**
- Such an approach would **avoid setting too rigid boundaries and safe harbours, which would risk leaving out anticompetitive conduct, while simultaneously providing guidance by illustrating the rationale underlying such exceptional circumstances.**

2.6. Revise the indispensability criterion in vertical foreclosure cases:

- The current distinction in the 102 Draft Guidelines between outright and constructive refusal to supply, particularly the stricter standard applied to outright refusal, can lead to unintended consequences.
- The current approach, which mandates the application of the Bronner indispensability test to outright refusals to supply, treats such conduct more severely than constructive refusal, even if the latter may be less restrictive and less harmful to consumers.
- Dominant firms are thus incentivised to adopt more aggressive exclusionary tactics, opting for outright refusals rather than less restrictive conduct.
- Looking forward, we invite the Commission to consider whether there is scope for a more nuanced approach, focusing on the economic impact of the conduct rather than the specific form of the behaviour, that could provide the grounds for **more consistent approach to vertical foreclosure practices.**
