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# **Public Consultation on Guidelines on exclusionary abuses of dominance**

**Communication from the Commission Guidelines on  
the application of Article 102 of the TFEU to abusive  
exclusionary conduct by dominating enterprises**

1. *Introductory.* The Nexa Center for Internet and Society of the Turin Polytechnic welcomes the opportunity to provide feedback on the European Commission’s consultation on the draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings (hereinafter “The Proposed Guidelines” or “Draft Guidelines”).
2. We warmly welcome the Commission’s initiative to issue the guidance on exclusionary abuses by dominant undertakings. The time is ripe to provide more structured and explicit guidance to the dominant undertakings, both in consolidated and emerging markets, that have the special responsibility not to abuse their dominance, to the challenger undertakings that can suffer exclusionary abuses. Guidance is also highly relevant for national competition authorities and national courts that are dealing with exclusionary conduct cases and have the task of providing timely and effective public enforcement of the law. Predictability on the Commission’s approach is also highly valuable. We consider the public consultation timely, necessary and appropriate for the reasons exposed in the following paragraphs.
3. It is undisputed that Guidelines, including the *Guidelines on the application of Article 102 of the TFEU to abusive exclusionary conduct by dominating enterprises* considered here, are intended to give practical guidance and therefore to clarify the current status of the law, in particular by referring to the body of precedent accumulated by the relevant case law. Innovative proposals would therefore be out of place both in the *Guidelines* themselves and in a commentary to them.

However, the present contribution must, if only to a limited extent, depart from this otherwise indisputable assumption. Indeed, it has to be recognized upfront that the approach followed throughout the most part of the *Draft Guidelines* has a markedly outdated, even old-fashioned, ring to it, which requires some discussion.

We submit that this depends on two separate, if interrelated, grounds. First, the *Draft Guidelines* still appear to focus primarily on a set of rules prevailing in prior stages of the economic development, i.e. in connection with businesses based on old-fashioned production-line models rather than on the current digital-algorithmic environments. Second, they seem still to place an exaggerated reliance on neoclassical economic models, as popularized about half a century ago by the Chicago school of Economic Analysis of Law. We also would like to elaborate about the collective dominance issues which are relevant for the infrastructure markets underlining the digital-algorithmic

environment.

In the subsequent pages we will deal with these issues. We hope that these remarks may contribute to a reconsideration of the present text of the *Draft Guidelines*.

4. *Factoring in the decline and fall of the Chicagoan paradigm.* Some parts of the *Guidelines* might easily be mistaken as excerpts of the 1975 US textbook prepared by Richard Posner, *Antitrust law*. We have to wait for just two lines from the beginning of the document before coming to the statement according to which “Effective competition drives market players to deliver the best products in terms of choice, quality and innovation, at the lowest prices for consumers” (§ 1). This reference to the goal of maximizing consumer welfare is repeated throughout the *Guidelines*. The yardstick to assess whether a given conduct by dominant enterprises deviates from “competition on the merits” is identified by reference “to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services” (§ 51), which, in turn, is buttressed by multiple references (in §§ 2 and 51) to recent holdings from the European Court of Justice. In particular reference is made to the judgement where the ECJ emphatically proclaimed that “the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law” (European Court of Justice 12 May 2022 (Fifth Chamber), C-377/20, Servizio Elettrico Nazionale s.p.a., Enel s.p.a., Enel Energia s.p.a. v AGCM and Green Network s.p.a., Associazione Italiana Grossisti di Energia and Trader – AIGET, Ass. ne Codici – Centro per i diritti del cittadino, Associazione Energia Libera, Metaenergia s.p.a., case «Servizio Elettrico Nazionale», par. 45; the underlining is ours).

Surely, a document intended to provide guidance may not altogether depart from the holdings of EU Courts. What one might wish for at the present time is some sense of nuance and a more sophisticated perception of the complexity involved in the definition of the purposes of antitrust law. The assertion that the goal of maximizing consumer welfare is the primary – or even exclusive – goal of antitrust, which was forcefully advocated by influential scholars such as Richard Posner (his first casebook dates back to 1974) and Robert Bork (*The Antitrust Paradox. A Policy at War with Itself*, Basic Books, New York, 1978), today is widely discredited (also for the reasons illustrated by R. VAN HORN, *Reinventing Monopoly and the Role of Corporations. The Root of Chicago Law and Economics*, in Ph. Mirowski and D. Pleheve (eds), *The Road from Mont Pèlerin. The Making of the Neoliberal Thought Collective*, Harvard University Press, Cambridge,

Mass., London, 2009, 204 ff.). Nowadays there are very few scholars and judges who still believe that antitrust is solely about allocative and productive efficiency, for the reasons brilliantly explained by the current Federal Trade Commission Chair L.M. KHAN (in her *Amazon's Antitrust Paradox*, in 126 *Yale L.J.* 2017, 710 ff. at [https://www.yalelawjournal.org/pdf/e.710.Khan.805\\_zuvfyveh.pdf](https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyveh.pdf)). This more modern approach would appear to be confirmed by several recent cases even in the US (see the *US v Google* case decided by the District Court for the District of Columbia 5 August 2024, available at <https://www.documentcloud.org/documents/25032745-045110819896>).

Today the prevailing view is that in our legal systems antitrust laws serve a variety of purposes, which may well include consumer welfare maximization but only alongside with the primary goal of keeping in check market power and more fundamentally of testing its legitimacy. This priority was crystal clear at the time of the adoption of the Sherman Act: as Senator Sherman said in a powerful speech made on the floor of the US Congress during the passage of the 1890 Act bearing his name, “If the concentrated powers of this combination are intrusted in a single man, it is a kingly prerogative, incompatible with our form of government” (see D. MILLON, *The Sherman Act and the Balance of Power*, in E.T. Sullivan (a cura di), *The Political Economy of the Sherman Act. The First One-Hundred Years*, Oxford, 1991, 111). The corresponding principle is firmly established in the legal systems of continental Europe (at least since 1927: see the reprint of F. BÖHM, *Das Problem der Privaten Macht*, in *Reden und Schriften: Über die Ordnung einer freien Gesellschaft, einer freien Wirtschaft und über die Wiedergutmachung*, Ernst-Joachim Mestmäcker (ed.) Karlsruhe, C. F. Muller, 1960, 25 ff.) and has been only momentarily forgotten in the heydays of prominence of the Economic Analysis of Law movement.

Taking stock of the decline and fall of the Chicagoan approach would enable a decisive shift of focus. Our attention might extend beyond the recurring episodes of abusive dominance which have been commonplace in the practice of competition law all along in the previous decades and are re-hashed once more by the *Guidelines*, to reach the new challenges raised by the emergence of Big Data, machine learning, Artificial Intelligence and of very large online platforms (VLOPs, as they are now dubbed in EU legislation).

Actually, there is a string of cases which have begun dealing, with all the proper insights, on these novel challenges (see ECJ 10 September (Grand Chamber), case C-

48/22 P, Google LLC and Alphabet supported by Computer & Communications Industry Association v EU Commission supported by Price Runner International AB, Federal Republic of Germany and ors, case «Google Shopping»; Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541; Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 344 and 345; Commission decision of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*, paragraphs 249, 250 and 251; Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, all discussed in the Guidelines except the first one which was published after the *Guidelines* themselves). In our opinion, specifically here should be the focus of the *Guidelines*. One of the benefits of this change of perspective is that it would align guidance on Art. 102 of TFEU with the new instruments adopted by the EU to complement antitrust in striving for the contestability and fairness of markets dominated by VLOPs. Reference is made here in particular to Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and to the Regulation (EU) 2020/1828 (Digital Markets Act).

5. *Tackling the challenges of the digital-algorithmic environment.* In the perspective suggested here, it would appear that a number of issues might be revisited in a more adequate way to factor in the specificities of the digital-algorithmic environment.

- (i) The first issue which should be reconsidered is the definition of the relevant markets on the basis of which dominance is to be assessed. It is unfortunate that the definition of the relevant market is to be found in a separate document (see the *Commission Notice* on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, quoted at note 24 of the *Guidelines*). Quite apart from this (understandable) shortcoming, it is submitted that the *Guidelines* themselves resort throughout the document to a notion of market shares which, while possibly appropriate when dealing with bananas, drugs and tires (as in the “old” case law of the ECJ), may turn out to be flawed when dealing with digital ecosystems. Indeed, it is generally accepted that digital platforms do enjoy what is sometimes called a “God’s eye”, as possession of vast Big Data troves and sophisticated analytics systems easily enable firms to jump with remarkable agility

from one market to many others (see A. DE STREEL, J. CRÉMER, P. HEIDHUES, A. FLETCHER, G. KIMMELMAN, G. MONTI, R. PODSZUN, M. SCHNITZER, F. M. SCOTT MORTON, *The Effective Use of Economics in the EU Digital Markets Act* (July 30, 2023). Yale Tobin Center for Economic Policy Discussion Paper No. 8, available at SSRN: <https://ssrn.com/abstract=4526050> or <http://dx.doi.org/10.2139/ssrn.4526050>; for specific reference to the notion of ecosystems developed by Amelia Fletcher see note 37). The relevance of market share as a factor of assessment of dominance is thereby diminished. The *Guidelines* fail to take into account this, in spite of the intent declaration in § 4.

- (ii) As to the factors relevant for the assessment of dominance (§§ 17 ff.), it is also submitted that there is a marked asymmetry in the role played by market shares, depending on the side of the market one looks at. A 40% market share on the supply side may give a modicum of market power; but the same share or even a much smaller one (e.g. 20%) on the purchasing side (i.e. demand) may give an extraordinary degree of leverage. This simple fact has come to the attention of observers in connection with the rise of large platforms. For instance in a brilliant chapter of their work R. GIBLIN-C. DOCTOROW, in *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labor Markets and How We'll Win Them Back*, Boston : Beacon Press, 2022, 20 ff. illustrate “how Amazon took over books”, and demonstrate how even a relatively modest % of the demand may confer dominance. This is a rather important issue. However, if we were to look for guidance on this in the document discussed here we would be disappointed: the issue is not mentioned at all.

- (iii) Also the analysis of barriers to entry and network effects in creating dominance (§§ 29-31 of the *Guidelines*) is affected by significant shortcomings.

On the one hand, data driven advantages are barely mentioned in § 30, which altogether avoids delving into the radical insufficiency of EU rules on interoperability of systems and portability of data. Fact is that, in spite of all the well-wishing, Reg. 2018/1807 on a framework for the free flow of non-personal data in the European Union in its Art. 6 confines itself to encouraging self-regulation by interested parties. In turn, even in connection with Public Sector Bodies, the rules adopted by Art. 5, par. 1, of Directive (EU) 2019/1024 on open

data and the re-use of public sector information and by Arts. 10, 12, letts. d) and i), 22 and 26-26 of the Digital Governance Act, Reg. 2022/868 appear so bland to lead to the conclusion that interoperability is a long way to come, with the sole exception of the field of the Internet of Things, which benefits from the advanced (and very welcome) regime of Arts. 33-34 of the Data Act, Reg. 2023/2854.

Data portability, an essential feature for switching, is even further away from presenting a satisfactory set of rules: see Art. 16, par. 4, of the Digital Content Directive 2019/770, particularly if contrasted to Arts. 23 ff. of the Data Act and Art. 20 of GDPR.

A discussion of the adverse impact of these defective sets of rules on users' possibility of switching from one firm to the other would have been essential for an in-depth treatment of barriers to entry and of their role in establishing and perpetuating dominance; but the matter is altogether missing in the *Guidelines*.

In a similar vein, it is often noted that lock-in may also be the outcome of a denial by platforms to enable user access to data, even in aggregated form, generated by platform usage. This is a barrier to entry which, again, is typical of digital-algorithmic environments and on which guidance is to be expected, both in connection with a full discussion of barriers to entry and of conduct capable of producing exclusionary effects (see below item v).

A mild disappointment also comes from the reference (in § 30 in correspondence to footnote 64) to “behavioural biases” among the impediments to switching. We submit that here reference to “choice architectures”, i.e. design of the interfaces which may encourage, or, rather, discourage, switching, as again explored by A. FLETCHER and A. DE STREEL and others, *The Effective Use of Economics*, quoted above, would have proved more valuable. Also it would have avoided falling into the usual trap of blaming the victims; plus it might have opened up an inquiry on the question whether choice architectures may themselves be abusive when a dominant business engages in them (this hypothesis is, more encouragingly, taken up and discussed later in lett. a) of § 55 and in § 159 in connection with self-preferencing).

On the other hand, and coming to network effects, high expectations are raised by the first sentence of § 31 of the *Guidelines*: “In particular in platform markets, network effects can also create barriers to entry and expansion”. Except that these hopes are promptly dashed by what follows: the analysis supplied is so

elementary that it would also apply to telecommunications and plain-vanilla software.

What is missing here is an antitrust treatment of the several specific factors which contribute to the “stickiness” of platform networks. The defects of interoperability and portability rules have just been mentioned. Also, one might have well expected that the *Guidelines* would deal with the role played by copyright protection to prevent the interoperability of Application Protocol Interfaces (APIs; the issue is discussed at length in a number of contributions: see J. DREXL-C. BANDA, B. GONZALEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER, K. WIEDEMANN, [Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on Harmonised Rules on Fair Access to and Use of Data \(Data Act\)](#) [Max Planck Institute for Innovation & Competition Research Paper No. 22-05](#), 81 ff.). However, § 30, while mentioning intellectual property rights as possible barriers to entry and expansion, does not even mention APIs.

- (iv) As to the establishment of collective dominance (§§ 34 ff.), also features which are specific of the digital-algorithmic environment could be taken into account. Thus, it might be expected that the chances of collusion provided by algorithmic adjustment mechanisms (as investigated among others by PETER GEORG PICHT-BENEDIKT FREUND, *Competition (law) in the era of algorithms*, in *Max Planck Institute for Innovation & Competition Research Paper No. 18-10*, available at SSRN: <https://ssrn.com/abstract=3180550> or <http://dx.doi.org/10.2139/ssrn.3180550>) would have deserved a minimum of attention. This is even more so considering that recently Member State legislators have adopted rules to counter collusive algorithmic pricing mechanisms in airplane and ferry-boat ticketing (on the Italian Act 136 of 2023 see for detail M. LIBERTINI, *Diritto civile e tutela del mercato. Il rapporto tra pubblico e privato: la complementarità fra public e private enforcement nel diritto antitrust*, in *Accademia* 2024, 1ss. a <https://accademiaassociazionecivilisti.it/diritto-civile-e-tutela-del-mercato-il-rapporto-tra-pubblico-e-privato-la-complementarita-fra-public-e-private-enforcement-nel-diritto-antitrust/>).



- (v) As to conduct capable of producing exclusionary effects, the specific features of digital-algorithmic environments suggest to extend the analysis to factors which appear neglected in the current text of the *Guidelines*. Several of these have already been mentioned, in item iii. Above, in connection with barriers to entry and network effects: see the discussion of denial by platforms to enable user access to data generated by platform usage, of exclusionary design of choice architecture, of obstacles to interoperability, portability and other tools leading to lock-in, including resort to IP protection also of APIs.

It is suggested that guidance should be given also on other related issues. A prohibition on platforms to use data generated by businesses to compete against them (on which see A. DE STREEL and others, *The Effective Use of Economics*, quoted above, 16) would seem to be in place, at least in some circumstances on which the *Guidelines* might wish to elaborate.

Another area which deserves attention, but is not even mentioned by the *Guidelines*, is the antitrust status of the abuse of technical protection measures (TPM) and of the abusive resort to IP-protection measures (Digital Rights Management, or DRM). Both the US Digital Millenium Copyright Act (1998) and the EU InfoSoc Directive 2001/29 introduced anticircumvention provisions which, while legitimately protecting online content, have been abused by intermediaries, here: large platforms, in order to keep competitors out (not of right holders' content, but) of their infrastructure, even against the (legitimate) wishes of right holders. Again the work of R. GIBLIN-C. DOCTOROW, *Chokepoint Capitalism*, quoted above, 26 ff. (on Apple-I-Tune for music) and 32 ff. (on Amazon for books), gives a detailed account of this abusive practice. By the same token, even failure to remove TPM where the request is legitimate, amounting to an abuse of right according to C. SGANGA, *Propertizing EU Copyright. History, Challenges, and Opportunities*, Edward Elgar, Cheltenham, 2018, 255, might well deserve antitrust scrutiny.

Similarly, also consideration of the procedural side might prove worth its while, to complete the inventory of conducts which may be considered abusive on the basis of their exclusionary effect. The *Guidelines* do mention Standard Essential Patents (SEPs; see § 30 in correspondence to footnote 52), but only in connection with the assessment of dominance. It has been noted however that also their enforcement may give occasion to abusive behaviour, in the form both of

patent hold-up and of “revers” hold-up (see the recent monograph by L.E. DIJKMAN, *The Proportionality Test in European Patent Law. Patent Injunctions before EU Courts and the UPC*, Hart, Oxford, London, New York, New Delhi, Sydney, 2023). Some guidance in this connection might prove appropriate.

Of course, we are aware that accepting some of the above suggestions would significantly expand the dimensions of the *Guidelines*. We also are aware that this sort of document must respect some limitations in its size, to remain manageable for its users. It is however suggested that a large amount of space might be saved by eliminating the lengthy discussions about costs (§§ 56-57; 108-136, 146-151). This level of detail might have been appropriate half a century ago, when production-line manufacturing still prevailed, but would now appear to be over-lengthy and somewhat obsessive in the zero-marginal cost context which for several decades now has been prevailing in all things digital (see J. RIFKIN, *The Zero Marginal Cost Society. The Internet of Things, the Collaborative Commons and the Eclipse of Capitalism*, Palgrave Macmillan, 2014).

(vi) Probably the most striking shortcoming in the guidance provided by the *Guidelines* concerns the total failure to examine both the assessment of dominance and the analysis of conduct with potential for exclusionary effects from the perspective of buying power, even though the business conduct of digital platforms has provided dramatic examples of the potentially abusive behaviour of monopsony and even more so of oligopsony. This is somewhat surprising (and even more so as buying heft is considered in § 33 as a possible countervailing power to supply-side dominance). Indeed, both the *Guidelines* and the *Commission Notice of 22.2.2024* mention several times multi-sided markets. It cannot therefore come as a surprise that businesses which find themselves in the position of middlemen, like Amazon when purchasing books, operate also on the buying side. It is well known what happens as the oligopsonistic firm proves able to extract huge rebates from suppliers (for vivid examples see L.M. KHAN, *Amazon’s Antitrust Paradox*, quoted above, 775 ff.). The *Guidelines* mention rebates (in § 80), but only in connection with the reverse perspective of a seller striving to achieve results equivalent to exclusive dealing. We support the idea that the *Guidelines* should devote a whole Chapter to discuss buying power and oligopsony.

6. Finally, we welcome the Commission's proposal to include guidance on exclusionary abuses by collectively dominant undertakings, to provide more structured and explicit guidance on those specific cases. While we already referred to collective dominance with respect to digital-algorithmic environment (see above 3, iv), we believe that this is a growing relevant issue also for infrastructure markets which are developing into oligopolistic structures.

(i) As an example, mobile telecoms markets are characterized by the presence of few network players (3 MNOs) and limited presence of MVNOs, where the early entrants are generally the operators with strong market share, spectrum portfolio, capillary infrastructure and the electromagnetic emission spaces, while the late entrants (i.e. 3rd and 4th MNO) because of their late entrance don't benefit of the same strong market position. Those types of markets may be more subject to collective dominance, which can take the form of an explicit or a tacit coordination between undertakings. In case of a tacit coordination the factors that should be present to assess a collective dominance are the following: competitors can easily arrive at a common understanding of how the coordination should work, and of the parameters that can be used as coordination point between the parts of the implicit coordination; the ability to coordinate their behaviour on the market by simply observing and reacting to each other's behaviour; the ability to monitor adherence to terms of coordination and to identify the deviations to react (punish) to them quickly and with intensity.

(ii) In this respect, we fully agree with the proposed Guidelines statement on the basis of clear indications provided by the case-law: *"..., the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance. Collective dominance may also be established based on other connecting factors, or on an economic assessment of the structure of the market in question and the way in which the undertakings in question interact on the market. Where the characteristics of the market facilitate the adoption of a common policy by the undertakings concerned, collective dominance can also be established without there being an agreement or structural links"*.

(iii) Finally, the proposed Guidelines, on the basis of the EU case-law, state that *"Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, that the undertakings concerned adopt identical*

*conduct on the market in all respects or that the abuse involves all the undertakings concerned. It is sufficient that the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position". This a key point for the assessment of the cases of joint dominance and for ensuring an effective deterrence capacity for the Proposed Guidelines. As clearly specified by the Proposed Guidelines: "Pursuant to the Union Courts' case law, Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers, including practices that may harm consumers by undermining an effective structure of competition."*

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We hope that these remarks may prove useful in the next steps of the drafting of the Guidelines.

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