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Orange Group's answer to the on the Public Consultation of the European Commission on the **Draft Guidelines on the Application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings**

Executive Summary

Orange welcomes the Commission's initiative to submit the draft guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (hereinafter the "**draft Guidelines**") for public consultation.

Orange considers that issuing guidelines on Article 102 TFEU is an important step toward providing companies subject to Article 102 TFEU with greater legal certainty, especially given the increasingly demanding compliance expectations of competition authorities.

The Commission intends for the draft Guidelines *"to reflect the EU courts' case law on exclusionary abuses in light of the extensive experience gained by the Commission in the enforcement of Article 102 TFEU"*, to help *"to increase legal certainty to the benefit of consumers, businesses and the national competition authorities and national courts"* and to *"help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU"*².

While Orange supports these objectives, unfortunately, the draft Guidelines, in their current form, fall short of achieving them. Rather than establishing a clear framework to provide legal certainty and assist companies in their self-assessment, they increase legal uncertainty for two main reasons.

First, the draft Guidelines contain numerous contradictions, discrepancies, and inconsistencies that create legal uncertainty and confusion rather than assisting companies in their compliance efforts to prevent the risks of abusing a dominant position.

Second, the draft Guidelines depart significantly from established EU case law by replacing an effects-based economic assessment with a formalistic approach and shifting the evidentiary burden from the Commission to dominant undertakings with a by default negative stance for any rebuttal. This creates a significant imbalance, granting the Commission a wide discretion in establishing an abuse of dominance.

¹ https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en

² Paragraph 8 of the draft Guidelines

While it is understandable that the Commission aims accelerate antitrust proceedings which can last far too long and for which the Commission is criticized, introducing concepts not endorsed by EU case law and lowering the evidentiary standards applicable to defining dominance and proving abuse is not the solution.

This approach would create a risk of over-enforcement, would encourage opportunistic complaints and, consequently, raise the number of potential litigations. Furthermore, this would increase legal uncertainty, as the decisions made under the draft Guidelines are unlikely to withstand EU court scrutiny, which would continue applying established case law. This could result in even more burdensome and lengthy proceedings and frequent overturning of Commission decisions.

Notably, all recent attempts by the Commission during different antitrust proceedings to introduce a presumptive approach to certain types of conduct (where exclusionary effects do not need to be demonstrated to establish an infringement under Article 102 TFEU) have been rejected by the Courts.³

Moreover, simplifying the burden of proof for the Commission does not justify forcing well-performing companies to assume that they are systematically at risk of being deemed dominant and their conduct abusive. This is especially unreasonable given the complexity of implementing antitrust compliance programs and the significant impact of the "*special responsibility placed on dominant undertakings*"⁴ on their day-to-day operations.

In practice, this new approach implies that holding a dominant position is automatically presumed to be abusive, despite the draft Guidelines reiterating the general principle deriving from case law that "*Article 102 TFEU does not prevent an undertaking from acquiring on its own merits a dominant position*"⁵ and that dominant undertaking "*may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests*"⁶.

Endorsing the draft Guidelines as they stand would make compliance more challenging for companies, significantly impacting their legal security and their ability to comply with competition rules without overly penalizing themselves. They will create a significant burden and chilling effect on companies as soon as they are (or may be) dominant to the detriment of efficient competition in terms of prices, quality, investments and innovation - the protection of which is the mere purpose of competition law.

For these reasons, Orange considers that the draft Guidelines require substantial revision – as detailed below - to align with existing case law and resolve inconsistencies, thereby enhancing legal certainty.

³ Judgment of General Court of 26 January 2022, Intel v. Commission, paragraph 144; Judgment of 18 september 2024, Google Adsense, paragraph 389; Judgment of 14 October 2010, Deutsche Telecom v. Commission, paragraph 250

⁴ Paragraph 3 of the draft Guidelines

⁵ Paragraph 17 of the draft Guidelines

⁶ Paragraph 49 of the draft Guidelines

I. Clarifications needed regarding the definition of dominant position to ensure legal certainty and prevent over-enforcement

The Company's ability to self-assess whether they have a dominant position in the market is the first step in implementing and adjusting their competition law compliance policies. Furthermore, this is also the first step for any assessment of a potentially abusive conduct of an undertaking.

The characterization of dominant position in the draft Guidelines raises several important concerns in terms of consistency with existing case law and economic relevance, particularly due to the lack of alignment between the definition of dominant position and the criteria for its assessment.

A. Presumption on dominance based solely on market shares

At substance, the approach adopted by the Commission on the qualification of the dominant position is highly formalistic and lacks consistency with existing case law.

First, in its draft Guidelines, the Commission suggests establishing a presumption of dominance when a company holds a market share equal to or exceeding 50%⁷, considering that case law supports this approach. Indeed, in *Hoffmann-La Roche* Court states that "very high market shares are in themselves, and save in exception circumstances, evidence of the existence of a dominant position".⁸ As per *Akzo* judgment, market share of 50% is considered to very high market share⁹ while in *Hilti* the Court identifies a much higher percentages of "between 70 and 80%" for dominance.¹⁰

However, this presumptive approach based solely on market shares, fails to reflect that this criterion, in practice, has never been considered in isolation. Indeed, case law has always assessed this criterion alongside others, even when the company's absolute market shares were very high.

In *Hoffman La Roche*, the Court reminds that even with high market shares other factors should be assessed before concluding on dominance "A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned".¹¹

The same approach is adopted in the *Astrazeneca* case where even if the market shares were very high still the capacity of Astrazeneca to behave independently of its competitors was

⁷ Paragraph 26 of Draft Guidelines

⁸ Hoffman La Roche, 13 February 1979, paragraph 41

⁹ Judgment of 3 July 1991, Akzo, paragraph 60

¹⁰ Judgment of 12 December 1991, Hilti v. Commission, paragraph 92

¹¹ Hoffman La Roche, 13 February 1979, paragraph 40

examined¹² as well as in recent *Google shopping*¹³ case where even if the market shares were well over 50%, the Commission evaluated them in light of the relative position of competitors or the existence of barriers to entry or expansion.

In addition, an approach based on solely on market shares is contradictory to the very principle reiterated in the draft Guidelines, which states that the existence of a dominant position "*derives from a combination of several factors that, taken separately, are not necessarily determinative.*"

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Therefore, rather than considering that 50% or above market share is sufficient in itself to qualify dominant position, Orange considers that it would be better to consider that, for 50% or above market share, and in light of considering other factors (such as market position of competitors, entry barriers, etc.), a dominant position could more likely be established than below the 50% threshold.

Second, by stating that "*a dominance may also be found where an undertaking has a market share below 50%*"¹⁵ and only mentioning in a footnote that "*factors other than the market share of the undertaking concerned, such as the strength and number of competitors need to be considered*"¹⁶, the draft Guidelines give the market share criterion a weight that case law has not endorsed.

Indeed, in the case of *United Brands* quoted by the Commission where dominant position has been established with market share between 40 and 45%, other factors have also been considered on top of market shares as the Court stated that "*this percentage does not however permit the conclusion that UBC automatically controls the market. Must be determined having regard to the strength and number of the competitors*"¹⁷.

Furthermore, this is an isolated case that should not be generalized. It would be more appropriate for the draft Guidelines to follow the Commission's previous, more nuanced position in its 2009 Guidance, suggesting that below a 40% market share, "*is not likely*"¹⁸ that a dominant position could exist, although the presence of other factors, such as when "*competitors [...] face serious capacity limitations,*"¹⁹ could still lead to such a finding.

In addition, the omission of this 40% threshold in the draft Guidelines appears inconsistent with the recently adopted Commission's guidelines on vertical restraints, which, for example, recalled

¹² Astrazeneca, 6 december 2012, paragraphs 176 -178

¹³ Judgment of 10 September 2024, Google and Alphabet v. Commission (Google shopping), paragraph 21

¹⁴ Paragraph 24 of draft Guidelines

¹⁵ Paragraph 26 of draft Guidelines

¹⁶ Footnote 41 of draft Guidelines

¹⁷ Judgment of 14 February 1978, United Brands, paragraphs 108 -110

¹⁸ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 14

¹⁹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 14

that it is unlikely there would be cumulative foreclosure effects “*where the total tied market share is less than 40%.*”²⁰

If competition concerns below this threshold are deemed unlikely under Article 101, there is no reason to consider such concerns more likely under Article 102.

Third, the draft Guidelines mention in a footnote that “*market shares below 10% exclude the existence of a dominant position save in exceptional circumstances,*”²¹ in reference to the *Metro* judgment. However, in *Metro*, the Court states that a threshold of 10% - which was Saba’s share on the market – is “*too small to be regarded as evidence of a dominance position on the market*”²².

This does not in any case mean that this threshold should be the referenced threshold to exclude dominance as the Court’s statement was in a special context to explain that even if Saba had the largest market share in a highly fragmented market, it was not sufficient to consider Saba as a dominant operator due to its very limited market shares.

Consequently, the removal of the 40% threshold in favor of the 10% threshold drastically reduces the “safe harbour” the undertakings may consider in self-assessing their position. Combined with the other aspects developed below, this approach is a source of significant legal uncertainty.

Therefore, Orange proposes to remove the reference of 10% market share threshold to avoid confusion and to insert the presumption on absence of dominant position for market shares below 40%.

B. Assessment of other factors relevant for establishing dominance

The assessment of a dominant position should be consistent with the very definition of a dominant position, namely the ability of the undertaking “*to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers.*”²³

It would therefore be useful to prioritize indicators that allow, when available—and especially in markets characterized by price competition—directly assessing the company’s ability to truly detach itself from market conditions.

However, the draft Guidelines omit the reference from the 2009 Guidance to the company’s ability “*to profitably increasing prices above the competitive level for a significant period.*”²⁴

This omission is inconsistent with the definition of dominant position retained in the draft

²⁰ Guidelines on vertical restraints, paragraph 310

²¹ Footnote 41 of draft Guidelines

²² Judgment of 22 October 1986, *Metro SB-Grosmarkte BmbG & Co versus Commission*, paragraph 85

²³ Paragraph 18 of draft Guidelines

²⁴ Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 11

Guidelines since it is still based on the assumption that a dominant position derives from the ability “*to act to an appreciable extent without having to take account of competition [on a particular market] in its market strategy and without, for that reason, suffering detrimental effects from such behaviour.*”²⁵.

An undertaking unable to raise its prices for a sustained period or unable to disregard competitors’ pricing policies, regardless of the market’s characteristics or the company’s market share, cannot be considered as holding a dominant position since it is acting in consideration of competition.

Therefore, the company’s capability to detach itself from market conditions (e.g. not being constrained to constantly adjust its prices based on competitors’ actions) should be reflected in draft Guidelines as a relevant factor for establishing dominance at least for price-based competition markets.

This factor should be assessed, when available, by dynamic indicators assessing the dominant company’s historical pricing relative to competitors or other industrial economic criteria analyzing the company’s actual ability to detach its prices from market conditions.

II. Contradictions in determining if conduct by a dominant undertaking is liable to be abusive

The draft Guidelines state that to determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse under Article 101 TFEU, two criteria should be fulfilled: conduct departs from competition on merits and conduct is capable of having exclusionary effects²⁶.

Even though this approach has been adopted in some case law (but not necessarily constantly)²⁷, it is worth recalling that the 2009 Guidance refer only to anticompetitive foreclosure (meaning only effect-based assessment), which, by the way, is abandoned by draft Guidelines and replaced by capability to have exclusionary effects.

The articulation of the two criteria suggested in the draft Guidelines is not clear due to many contradictions which creates legal uncertainty.

First, as per draft Guidelines, for conduct to constitute an exclusionary abuse “*it is generally necessary to establish whether the conduct departs from competition on the merits and whether the conduct is capable of having exclusionary effects*”²⁸ (emphasis added). It would be useful if

²⁵ Paragraph 19 of the draft Guidelines

²⁶ Paragraph 45 of draft Guidelines

²⁷ Judgment of 12 May 2022, Servizio Elettrico National C-377/20, paragraph 103

²⁸ Paragraph 45 of draft Guidelines

the Commission could clarify the reasons and precise circumstances under which this dual criterion is assessed “generally” rather than “systematically.”

At the same time, the draft Guidelines state that “*depending on the circumstances of the case, it may be necessary to carry out a comparatively more detailed assessment of whether the conduct departs from competition on the merits or of whether the conduct is capable of having exclusionary effects.*”²⁹ It is unclear in which circumstances a “comparatively more detailed assessment” of one of the two criteria could be necessary and whether such assessment would suffice to qualify an exclusionary conduct in the absence of the other criterion being met.

Second, as per paragraph 47 of the draft Guidelines, “*when a given conduct meets the conditions set out in a specific legal test, such conduct falls outside the scope of competition on the merits and is capable of having exclusionary effects*”. This means that when the specific legal test is met, the Commission considers that both conditions of the exclusionary abuse are fulfilled.

Paragraph 54 of the draft Guidelines however reduces the scope of application of this paragraph by stating that “*conduct fulfilling the requirements of a specific legal test is deemed as falling outside of the scope of competition on the merits*” and not mentioning exclusionary effects. This means that when the specific legal test conditions are met, only one of the conditions of the exclusionary abuse are considered to be fulfilled.

In paragraph 60 (b), the draft Guidelines reintroduce the presumption on exclusionary effects for conducts for which there is an established legal test stating that “*certain types of conduct are generally recognised as having a high potential to produce exclusionary effects and therefore they are subject to a presumption concerning their capability of producing exclusionary effects*”.

These three paragraphs appear contradictory. It is therefore unclear if the intent of the Commission is to consider that if the specific legal test is met for certain types of conducts, both conditions for exclusionary abuse (departing from competition on the merits and capable of having exclusionary effects) or only one of them (departing from competition on the merits) should be considered fulfilled.

In the first case, it would mean that when specific legal test is met, conduct would be deemed abusive while in the second case, only one of the conditions of exclusionary abuse would be deemed to be fulfilled.

Third, the draft Guidelines, on one hand state that “*when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects*”³⁰ while, on the other hand, state that “*In the case of certain pricing practices, namely predatory pricing and margin squeeze, a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits. Whenever a price-cost test is carried out to establish whether conduct departs from competition on the merits, the outcome of*

²⁹ Paragraph 46 of draft Guidelines

³⁰ Paragraph 47 of the draft Guidelines

*the test can also be relevant for the assessment of the capability of such conduct to produce exclusionary effects. Conversely, a price-cost test is generally inappropriate for assessing whether non-pricing practices depart from competition on the merits.”*³¹

These two paragraphs appear contradictory: it can be understood, for example, that a predatory price assessed under a price-cost test should, in principle, be considered to meet both criteria "if the test is fulfilled", but at the same time, its result "may be relevant" in assessing exclusionary effects (meaning potentially as a result of assessment this second criteria may be considered not be met even if the test is fulfilled).

Fourth, the draft Guidelines state 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, based on an analysis of all legal and factual elements [...]”*³². Even though this paragraph does not introduce the second criteria which is the capacity to have exclusionary effects, the following paragraph assumes that such effects are produced as it mentions that *“if a dominant undertaking argues that its conduct amounts to competition on the merits, because, in the specific case, the actual or potential exclusionary effects produced by the conduct are counterbalanced or outweighed by advantages in term of efficiencies that benefit consumers, this argument is evaluated as part of the assessment of objective justifications.”*³³

The draft Guidelines appear to indicate that Article 102 TFEU could also apply to conducts that are likely to exclude only less efficient competitors. While, at the same time, the draft Guidelines also recognize that in principle Article 102 of the TFEU does not preclude that, as a result of competition on the merits, less efficient competitors than the dominant company depart from the market or be marginalized.³⁴

This sends a very negative signal to dominant companies, suggesting that no legal certainty exists for these companies when setting prices. In addition, a dominant company cannot determine whether the price it intends to adopt is likely to exclude a less efficient competitor, as it has no knowledge of how much less efficient this competitor is due to absence of visibility on its competitors' costs or competitiveness.

As a result of such a broad application of Article 102 TFEU, dominant companies may be discouraged from adopting competitive pricing, discounts, bundling, etc., that can increase economic efficiency and/or intensify competition without producing exclusionary effects. In practice, this would lead to protecting by principle companies that are not efficient.

³¹ Paragraph 56 of the draft Guidelines

³² Paragraph 57 of the draft Guidelines

³³ Paragraph 58 of the draft Guidelines

³⁴ Paragraph 51 of the draft Guidelines

Orange considers that if the dominant undertaking charges above ATC, this conduct should be considered as based on competition on the merits and not likely to produce exclusionary effects, as the legal test associated with the conduct is not met (this is also compliant with paragraph 47). The paragraphs 57 and 58 should be therefore removed.

All in all, clarifications and adjustments to the draft Guidelines are necessary to ensure a coherent and predictable application of Article 102 TFEU if the articulation of the two criteria is to be maintained. Otherwise, Orange suggests reverting to a single criteria approach focused on the foreclosure effects of a conduct, as in the 2009 Guidance.

III. Presumptive approach and shift of burden of proof for certain categories of conduct which has no endorsement in case law and is disproportionate

The draft Guidelines introduce three categories of conduct: (i) conduct for which it is necessary to demonstrate a capability to produce exclusionary effects, (ii) conduct that is presumed to lead to exclusionary effects, and (iii) naked restrictions.

For the second type of conduct – presumed to lead to exclusionary effects - the draft Guidelines take the position that "*the case law of the Union Courts has developed specific analytical framework to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (specific legal tests)*" and therefore "*when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects*" (paragraphs 47 and 53). These conducts are "*generally recognised as having a high potential to produce exclusionary effects. Accordingly, they are subject to a presumption concerning their capability of producing exclusionary effects*" (paragraph 60b).

While in footnote 131 the draft Guidelines acknowledge that "*the Union Courts have not always made explicit use of the term "presumption" for each one of these practices*", nevertheless the Commission considers that "*the case law has developed tools which can be broadly described and conceptualised*". The draft Guidelines further explain that the expression of presumptions is used in the guidelines for the purposes of "*allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts*".

The introduction of presumptions through a "broad conceptualization" as suggested by the Commission is not endorsed by case law and has several shortcomings, inconsistencies and contradictions which create substantial uncertainties and doubts as to their application in practice reducing heavily legal certainty. What is more, such broad conceptualisation is by principal contrary to legal certainty.

Furthermore, case law does not support a shift of the burden of proof from the Commission to dominant undertaking through allocation of evidentiary burden resulting from the application of specific legal tests as suggested by the Commission.

Moreover, the categorisation proposed by the draft Guidelines is arbitrary, exclusively form-based and it is unclear why for certain specific conducts the presumption applies and why for similar forms of conducts with potentially comparable effects, the presumption does not apply. For example, while self-preferencing is essentially a form of tying, the two conducts are subject to different legal standards: for self-preferencing, the Commission has to demonstrate the capability of the conduct to produce exclusionary effects, while tying is presumed to lead to exclusionary effects, the same for mixed versus pure bundles or conditional versus exclusivity rebates.

Finally, in addition to the fact that such broadly applied presumptions are not mandated by case law, the draft Guidelines also fail to explain in detail what level of evidence the dominant undertaking will be required to adduce to effectively rebut the presumption, which directly contradicts the stated aim of the draft Guidelines to provide legal certainty and enable self-assessment.

Orange presents below its main concerns related to this presumptive approach.

A. Biased selection and interpretation of case law to advance a presumptive approach

Despite numerous references to EU case law on exclusionary abuses, the draft Guidelines fail to reflect existing case law in a neutral and balanced manner due to opportunistic, incomplete and often out of context selection of case law favoring a position that is clearly in contradiction with the established case law and unfavorable for businesses and market competition.

The draft Guidelines introduce as a general principle that case law has developed specific frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU. Therefore, when a conduct meets the conditions set out in a specific legal test developed by case law, such conduct shall be deemed abusive as it departs from competition on the merits and is capable of having exclusionary effects³⁵ referring - in footnote 101 - to the *European Superleague Company* and *Servizio Elettrico Nazionale* judgments.

However, both judgments clearly and explicitly, as does the Unilever ruling that followed, rebut such a formalistic approach of the Commission:

- in its *European Superleague Company* judgment, the Court clearly stated that while there may be different analytical templates to be used to demonstrate abuse for different types of conduct, the demonstration must be made in light of all the relevant factual circumstances and be aimed at establishing the capability of the conduct to produce exclusionary effects based on specific, tangible points of analysis and evidence³⁶. (emphasis added)

³⁵ Paragraph 47 of the draft Guidelines

³⁶ Judgment of 21 December 2023, *European Superleague Company*, C-333/21, paragraphs 129- 130

- in the *Servizio Elettrico Nazionale* judgment, the Court held that "given that the *abusive nature of a practice does not depend on the form it takes or took, but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts*".³⁷(emphasis added)
- In the *Unilever* judgment the Court held "... That demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.³⁸" (emphasis added)

Therefore, although case law has suggested a price-cost test for certain types of conducts (such as predatory pricing or margin squeeze) and established several-step test to determine whether a given conduct is abusive (for example in the cases of a refusal to supply or margin squeeze), in no instance has case law ruled out an effect-based assessment based on the factual circumstances of the case.

Furthermore, as detailed below, the case law quoted in the draft Guidelines for each category of conduct on which the Commission wishes to establish a presumption regime does not in any way support the assertion that such conduct has a high potential to produce exclusionary effects, and therefore such effects can be presumed.

(i) *Exclusive dealing*

The Commission considers that "*exclusive dealing by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer's or seller's choice of possible sources of supply or demand*". Consequently, exclusive dealing is presumed to be capable of having exclusionary effects.³⁹

However, case law on exclusive dealing (including rebates conditional upon exclusivity) does not support this assertion.

Indeed, while in *Hoffman-La Roche* the Court recognized that exclusive dealing is incompatible with the objective of undistorted competition⁴⁰, this alone is insufficient to support a presumption of exclusionary effects to the extent suggested by the draft Guidelines. In this judgement, despite at first setting out a formalistic approach regarding exclusive purchasing agreements or rebate schemes, the Court went on to conduct an in-depth examination of the effects of the conduct

³⁷ Judgement of 12 May 2022, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato*, paragraph 72

³⁸ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paragraphs 40 and 42

³⁹ Paragraph 82 of the draft Guidelines

⁴⁰ Judgment of 13 February 1979 *Hoffman – la-Roche v. Commission*, paragraph 90

and further case law does not endorse such a restrictive interpretation of the Hoffman-La Roche case law as claimed by the Commission.

Moreover, the Commission has previously attempted to apply this presumptive approach based on Hoffmann-La Roche case law in certain antitrust cases related to exclusivity which was overturned by the Court and deemed a misinterpretation of case law.

In particular, throughout the lengthy judicial saga of the *Intel* case, while the Commission argued that rebates conditional upon exclusivity (and exclusivity) are anticompetitive by nature and that it is unnecessary to demonstrate foreclosure capability to establish an infringement of Article 102 TFEU, this position was not upheld by neither the General Court nor the Court of Justice.

The General Court established that "*although a system of rebates set up by an undertaking in a dominant position on the market may be characterized as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition, the fact remains that what is involved is, in that regard, a mere presumption and not a per se infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to conduct an effects analysis*"⁴¹.

The General Court went on to clearly reject the Commission's presumptive approach stating that "*the Commission inferred from the Hoffmann-La Roche case-law, first, that the rebates at issue were by their nature anticompetitive, with the result that there was no need to demonstrate foreclosure capability in order to establish an infringement of Article 102 TFEU. Second, although the contested decision contains an additional analysis of the foreclosure capability of those rebates, the Commission took the view that, in accordance with that case-law, it was not required to take that analysis into account in order to conclude that those rebates were abusive...⁴² the Commission... took the view that the AEC test was not necessary for the purposes of assessing whether Intel's practices were abusive and for concluding that those practices were abusive⁴³. It must be stated that that position is not consistent with the Hoffman-La Roche case-law, as clarified by the Court of Justice in paragraphs 137 to 139 of the judgment on the appeal. It must therefore be found that the applicant and ACT are correct in maintaining that the Commission vitiated the contested decision by an error of law in taking as a starting point the premise that, in essence, the Hoffman-La Roche case-law allowed it simply to find that the rebates at issue infringed Article 102 TFEU on the ground that they were by their very nature abusive, without necessarily having to take account of the capability of those rebates to restrict competition in order to reach the conclusion that they constituted an abuse.*"⁴⁴ (emphasis added)

This decision of the General Court has been recently endorsed by the Court of Justice stressing the importance of effect-based assessment and noting that "... it is apparent from paragraphs 133 to 147 of the judgment under appeal that the analysis carried out in the decision

⁴¹ Judgment of 26 January 2022, *Intel Corp. v. Commission*, paragraph 124

⁴² Judgment of General Court of 26 January 2022, *Intel v. Commission*, paragraph 144

⁴³ Judgment of General Court of 26 January 2022, *Intel v. Commission*, paragraph 147

⁴⁴ Judgment of General Court of 26 January 2022, *Intel v. Commission*, paragraph 145

*at issue, intended to demonstrate that the contested rebates constitute an abuse irrespective of the conclusions drawn by the Commission from the AEC test, is vitiated by an error of law in so far as it starts from the premiss that the contested rebates were abusive irrespective of whether they were capable of foreclosing a competitor as efficient as Intel...*⁴⁵" (emphasis added)

The same approach is also in Google AdSense case where "*the Commission considered... that the exclusivity clause in GSAs concluded with all sites direct partners was contrary to Article 102 TFEU, without it having been required to verify whether that clause was capable of restricting competition in the light of all the circumstances of the case*"⁴⁶ which was not endorsed by the General Court which held that "*contrary to what it asserted in the contested decision, the Commission could not limit itself to finding, in order to establish an infringement of Article 102 TFEU, that the exclusivity clause in GSAs concluded with all sites direct partners required them to source all or most of their requirements in terms of online search advertising intermediation services exclusively from Google. It [Commission] also had to demonstrate that the said clause was capable of restricting competition, taking into account all the relevant circumstances of the case, which it incidentally did, in the alternative, in the contested decision*"⁴⁷. "...it must be concluded that *the Commission was wrong to consider, primarily, that it had not been required to verify whether that clause could restrict competition in the light of all the circumstances of the case*"⁴⁸.

Similarly, in the *Unilever* case the Court clarified that "*it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic*".⁴⁹ Furthermore, the Court stated that "*Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition*".⁵⁰ (emphasis added)

In addition, in all of the above cases, the Court is clear on the fact that the Commission has to conduct a full effects-based assessment if the dominant undertaking provides evidence which substantiates that its conduct does not restrict competition – this practically concerns all cases as it is difficult to imagine that a dominant undertaking would not submit evidence to defend its conduct⁵¹ (see more details below).

(ii) *Margin squeeze*

⁴⁵ Judgment of the Court of 24 October 2024, Intel Corp, paragraph 340

⁴⁶ Judgment of 18 September 2024, Google AdSense, paragraph 374

⁴⁷ Judgment of 18 September 2024, Google AdSense, paragraph 389

⁴⁸ Judgment of 18 September 2024, Google AdSense, paragraph 390

⁴⁹ Judgment of 19 January 2023, Unilever Italia Mkt Operations, paragraph 51

⁵⁰ judgment of 19 January 2023, Unilever Italia Mkt Operations, paragraph 62

⁵¹ Judgment of 6 September 2017, Intel v. Commission, paragraphs 138-140; Judgment of 19 January 2023, Unilever Italia Mkt Operations, paragraphs 46; Judgment of 18 September 2024, Google AdSense, paragraph 380-381

The draft Guidelines suggest that where the price-cost test indicates a negative spread, *"margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed"*⁵². When reviewing the case law referenced by the draft Guidelines, it becomes clear that such case law does not suggest a "high potential to produce exclusionary effects", but rather a "probability for a potential exclusion", which is a subtle yet significant distinction.

Indeed, as stated in *TeliaSonera* judgment: *"if the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss"*⁵³ which is to be understood as part of a wider analysis that the Commission must carry out taking into account *"all the specific circumstances of the case"*⁵⁴ (emphasis added).

Furthermore, in the *Deutsche Telekom* case regarding margin squeeze, the Commission has already tried to reverse the burden of proof but this attempt has been ruled out by the Court of Justice which stated that, *"the General Court correctly rejected the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated"*.⁵⁵ (emphasis added)

Therefore, both in *Deutsche Telekom* and *TeliaSonera* cases quoted in the draft Guidelines, the Court held that the mere existence of a margin squeeze does not allow the Commission to avoid having to prove anti-competitive effects stating that *"in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice"*.⁵⁶

(iii) Tying and bundling

The draft Guidelines suggest⁵⁷ that, in certain circumstances, it may be possible to conclude that, due to the specific characteristics of the market and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed. In other cases, however, an assessment of exclusionary effects is required. The cases falling under this presumption are not explicitly identified, but the Commission explains in footnote 233 that *"this could be notably the case in the situation where the inability of competitors to enter or expand*

⁵² Paragraph 128 of the draft Guidelines

⁵³ Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 73

⁵⁴ Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 68

⁵⁵ Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, paragraph 250

⁵⁶ Judgement of 14 October 2010, *Deutsche Telekom v Commission*, paragraphs 254, Judgement of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, paragraph 66

⁵⁷ Paragraph 95 of the draft Guidelines

their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects".

While certain older case law on tying has highlighted the "per se" nature of exclusionary effects for certain tying practices in very specific circumstances, the most recent case law references do not support the Commission's assertion. Indeed, in the *Microsoft* case, both the Commission's decision and the judgment confirm the need for an effect-based assessment, which was conducted by the Commission in that specific case: "*there are ... circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case... There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition*"⁵⁸ (emphasis added).

The same, in the *Google Android* case, the Court stressed the importance of effect-based assessment by stating that "*the Commission therefore correctly found... 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*. Such an examination, first, serves to reduce the risk that penalties may be imposed for conduct which is not actually detrimental to competition on the merits and, second, further to clarify the gravity of the conduct in question, which will facilitate determination of the appropriate level of any penalty"⁵⁹ (emphasis added).

(iv) *Refusal to supply*

The draft Guidelines do not mention refusal to supply in paragraph 60b (which addresses conduct presumed to lead to exclusionary effects), yet it is included in section 4 – conduct subject to specific legal tests (where meeting the legal test conditions deems the conduct abusive, as per paragraph 47).

It is therefore understood (but needs to be clarified in the draft Guidelines) that refusal to supply does not fall under the category of presumptions but rather falls under the category of conduct requiring a demonstration of its capability to produce exclusionary effects.

(v) *Predatory pricing*

The draft Guidelines specify that, as established by *Akzo* case law, a presumption applies according to the level of the company's price relative to the unit cost structure associated with the product or service in question.

For prices below AVC or ACC (hereafter the "black zone"), "*the conduct can be considered predatory*," in other words, it is presumed to have exclusionary effects. The draft Guidelines also note that when prices are between AVC/ACC and ATC/LRAIC (hereafter the "gray zone"), then

⁵⁸ Judgment of 17 September 2007, *Microsoft v. Commission*, paragraph 977, 1035-1037

⁵⁹ Judgement of 14 September 2022, *Google and Alphabet v Commission* paragraph 295

*“the pricing conduct can be regarded as predatory if it is part of a plan to eliminate or reduce competition.”*⁶⁰

Even though the draft Guidelines do not make it explicit despite unambiguous Akzo case law on this aspect, it follows from the above that it is for the Commission to prove the existence of such a plan and thereby overturn the presumption of legality applicable, in principle, to gray-zone pricing.

However, in the following paragraph, the draft Guidelines take a less nuanced approach by asserting that *“predatory pricing has a high potential to produce exclusionary effects and is therefore presumed to do so”*.⁶¹

No more reference is made to the Akzo judgment but instead, the draft Guidelines refer “by analogy” to the *Hoffman- la- Roche*, *Intel* and *Unilever* cases, which are not only unrelated to predatory pricing, but, more importantly, do not suggest any presumption of exclusionary effects - neither for predatory pricing nor for exclusive dealing, which they address (see also the section on exclusive dealing above).

Therefore, it would be important for the draft Guidelines to clarify that if indeed, for the black zone exclusionary effects can be presumed, for the gray zone such effects shall be demonstrated by the Commission. Otherwise, this would extend the presumption beyond any legal precedent.

It would also be useful to clarify in the draft Guidelines that there is a presumption of legality in cases of white zone pricing by the dominant firm.

All in all, it follows from the above that the Commission goes well beyond established case law by introducing presumptions about the effects of several types of conduct and granting itself much broader discretion in establishing an abuse of dominance. This approach would potentially lead to over-enforcement, increased legal uncertainty for businesses, and a rise in opportunistic complaints.

Such a broad presumptive approach, based on purely formalistic considerations, would also create suspicion and a zone of risk for companies regarding practices that may be common or even inherent to the competitive functioning of markets.

Therefore, Orange urges the Commission to abandon the presumptive approach and adopt an effect-based assessment in conformity with established case law. This would require removing the second category of conduct - conduct presumed to lead to exclusionary effects – and instead placing most conduct under the first category, i.e., conduct for which it is necessary to demonstrate a capability to produce exclusionary effects.

⁶⁰ Paragraph 111 of the draft Guidelines

⁶¹ Paragraph 112 of the draft Guidelines

B. Unbalanced evidentiary burden with a default negative stance toward rebuttals regarding conducts to which the presumption applies, without endorsement from case law

The draft Guidelines state that when presumption is applied, a dominant undertaking can seek to rebut the probative value of the presumption by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects and "*the submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation*"⁶².

What is more, the Commission considers that the capability to produce exclusionary effects is established if the Commission (i) either shows that the arguments and supporting evidence are insufficient to call into question the presumption or (ii) provides evidentiary elements demonstrating the capability of the conduct to have exclusionary effects – however, "*reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects*"⁶³.

To support this assertion, the draft Guidelines refer to certain case law on exclusive dealing and claim that this case law applies "by analogy" to other types of conduct.

First, this shift of the burden of proof from the Commission to the dominant undertaking directly contradicts established case law. Second, there is no objective justification for applying case law on exclusive dealing by analogy to other types of conduct, especially in a context where, for each of the mentioned conducts, case law places the burden of proof on the Commission to demonstrate exclusionary effects. Third, no case law supports such a significant reduction in the Commission's duty to conduct a thorough examination, nor such a "restricted" rebuttal opportunity for the dominant undertaking.

Indeed, in the *Unilever* judgment (regarding exclusive dealing) the Court holds that "*it is for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position... That demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.*"⁶⁴ This is also reminded by the Court in the *Slovak Telecom* judgment (regarding margin squeeze) "*it must be recalled that it is for the authority alleging an infringement of the competition rules to prove it*"⁶⁵. (emphasis added)

In the *TeliaSonera* and *Deutsche Telecom* judgments (regarding margin squeeze), the Court states that margin squeeze "*constitutes an abuse within the meaning of Article 102 TFEU, where, given*

⁶² Paragraph 60b of the draft Guidelines

⁶³ Paragraph 60b of the draft Guidelines

⁶⁴ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paragraphs 40 and 42

⁶⁵ Judgment of 25 March 2021, *Slovak Telecom v. Commission*, paragraph 72

*its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned"*⁶⁶; "the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market"⁶⁷. (emphasis added)

In this regard, the recent decision of the Court of Justice on *Intel* case (exclusive dealing) confirmed one more time that the burden of proof to demonstrate the capability of conduct to have exclusionary effects lies with the Commission stating that "it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement"⁶⁸. (emphasis added)

Furthermore, even in *Intel* and *Unilever* quoted by the draft Guidelines, the Courts explicitly endorse the need for a full effect-based assessment by the Commission when a dominant undertaking submits rebuttal "in a situation where an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims, that its conduct was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects... In that situation, the competition authority 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 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" (emphasis added).⁶⁹

In addition, in the *Unilever* case the Court clarified that "where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using exclusivity clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority 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"⁷⁰. (emphasis added)

This is also confirmed in the recent *Intel* judgment as the Court held that "... the fact that that undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing an anticompetitive foreclosure effect means that the Commission is under a specific obligation to assess the possible existence of a strategy

⁶⁶ Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraph 63

⁶⁷ Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, paragraph 252

⁶⁸ Judgment of the Court of 24 October 2024, *Intel Corp*, paragraphs 328

⁶⁹ Judgment of 6 September 2017, *Intel v. Commission*, paragraphs 138- 139; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paragraphs 47-48

⁷⁰ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, paragraph 52

*aiming to exclude competitors that are at least as efficient as that undertaking from the market*⁷¹. " ... it is apparent ... that the General Court identified a series of shortcomings vitiating the relevant recitals of the decision at issue that led it to find that the Commission had not considered properly the criterion relating to the share of the market covered by the contested rebates or the duration of those rebates as evidence making it possible to determine the capability of those rebates to have an anticompetitive foreclosure effect"⁷². (emphasis added)

It follows from the above that, contrary to what the draft Guidelines suggest, based on established case law, it is the Commission's responsibility to prove that conduct is abusive.

The Commission cannot artificially reduce its administrative burden by limiting itself solely to the examination of the arguments and supporting evidence submitted by the dominant undertaking while at the same time adopting a presumptive approach by default; it must assess all the factual circumstances of the case to demonstrate the capability of conduct to produce exclusionary effects.

In addition, the draft Guidelines show significant deficiencies in terms of clarity and precision regarding the evidentiary standards required to rebuttal the presumption of exclusionary effect. This ambiguity creates considerable legal uncertainty for dominant firms, which may find themselves in a position where they must constantly demonstrate that their most common practices, such as simply setting a price on the market, are not abusive in themselves.

Therefore, Orange urges the Commission to abandon the presumptive approach, which shifts the burden of proof on the dominant undertaking and to align with established case law regarding the standard of evidence required for the Commission to establish exclusionary effects as well as the standard of evidence expected from a dominant undertaking for a rebuttal.

C. Several shortcomings related to presumptive approach creating a circular construct

Beyond the contradictions with case law mentioned above, it appears that the concept of presumption in the draft Guidelines has several shortcomings, inconsistencies and contradictions.

Indeed, while in paragraph 60(b) of the draft Guidelines, the Commission notes that certain types of conduct (five categories of practices detailed in Section 4.2 of the draft Guidelines) are "*generally recognized as having a high potential to produce exclusionary effects*" and, consequently, "*a presumption concerning their capability of producing exclusionary effects applies*," the dominant undertaking can "*rebut the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that its conduct is not capable of having exclusionary effects*," including by "*showing that the*

⁷¹ Judgment of the Court of 24 October 2024, Intel Corp, paragraphs 130

⁷² Judgment of the Court of 24 October 2024, Intel Corp, paragraphs 132

circumstances of the case are substantially different from the background assumptions upon which the presumption is based [...]”.

Therefore, it is understood that the Commission must provide, for each conduct to which a presumption of abuse applies, “background assumptions” constituting the “probative value” of the presumption. However, neither these “background assumptions” nor “the probative value of the presumption” appear to be listed or specified in the draft Guidelines.

In addition, the very concept of a presumption relies on the premise that there are no background assumptions as such concerning the case at hand. Instead, the conduct is presumed to be capable of producing exclusionary effects per se, making any rebuttal purely theoretical and granting the Commission significant power in establishing exclusionary effects.

Nevertheless, one could try to deduce the “background assumptions” constituting the “probative value” of the presumption from the assessment proposed for each of the five conducts discussed in Sections 4.2.1-4.2.5 of the draft Guidelines. However, in these sections, “the background assumptions on which the presumption is based” refer, for four out of the five conducts to the Commission’s ability to prove that the behavior “is likely to produce exclusionary effects”.

- **Tying and bundling:** Section 4.2.2 indicates that “the background assumptions upon which the presumption is based” implies – in line with case law- a several-step test among which the requirement to assess whether “*the tying conduct is capable of having exclusionary effects*”⁷³. In other words, to presume the exclusionary effect, it appears necessary for the Commission to demonstrate, based on criteria established in paragraphs 93 and 94 of the draft Guidelines, that the conduct is capable to result in exclusionary effects.
- **Refusal to Supply:** Section 4.2.3 indicates that “the background assumptions upon which the presumption is based” implies – in line with case law - a several-step test among which the requirement to assess whether “*the refusal is capable of having exclusionary effects*”⁷⁴. Again, to presume the exclusionary effect, it appears necessary for the Commission to demonstrate, based on criteria established in paragraphs 103 to 106, that the conduct is capable to result in exclusionary effects.
- **Predatory Pricing:** Section 4.2.4 indicates that “the background assumptions upon which the presumption is based” relates to the price-cost test derived from case law. Based on the results of the price-cost test, two scenarios, each subject to presumptions already established by case law, will apply according to the degree of deviation from two relevant unit cost thresholds (CEM and CTM, respectively)⁷⁵. In other words, to presume the exclusionary effect, it appears necessary for the Commission to provide evidence that the company’s pricing is predatory.

⁷³ Paragraph 89 of the draft Guidelines

⁷⁴ Paragraph 99 of the draft Guidelines

⁷⁵ Paragraphs 111 and 112 of the draft Guidelines

- **Margin Squeeze:** Section 4.2.5 indicates that "the background assumptions upon which the presumption is based" implies – in line with case law – a several-step test among which the requirement to assess whether "*the conduct is capable of producing exclusionary effects*".⁷⁶ Again, for presumption of exclusionary effects, it appears necessary for the Commission to demonstrate, based on criteria established in paragraph 127 to 131, that the conduct is capable to result in exclusionary effects.

This creates a circular construct when the Commission simultaneously claims that exclusionary effects can be presumed for certain types of conduct, while at the same time requiring – in line with case law – that capability to produce exclusionary effects must be established in order to rely on the presumption.

D. Presumptive approach likely to cause undesirable side effects in actions for damages

Introducing a presumption -based approach could also have significant and prejudicial side effects for dominant companies in damage action litigations related to claims of abuses of dominant position.

The presumptive approach as proposed in the draft Guidelines means that certain conducts by dominant companies are now presumed "by default" to produce exclusionary effects unless the dominant company can prove otherwise.

For reference, Directive 2014/104/EU which is specifically aimed to (already) ease the burden of proof for claimants in actions for damages, establishes a presumption of harm only in cases of cartel infringements. Article 17(2) of the Damages Directive presumes that cartels cause harm but the infringer shall have the right to rebut that presumption.

With the proposed presumption of exclusionary effects in the draft Guidelines, there is a risk that before the national courts, particularly in standalone procedures, some players will use and interpret this as a new easing of the burden of proof for plaintiffs in damages claims, overstepping the framework already set by the above Directive.

The courts might consider that, if a conduct is presumed to produce exclusionary effects, this should imply a presumption of harm in damage actions similar to horizontal cartels. This would simplify the evidentiary burden for claimants, who would no longer have to demonstrate harm.

To avoid this confusion, it would be useful to clarify in the draft Guidelines that the presumption of exclusionary effects cannot be interpreted as a presumption of harm in damage actions. Without such a clarification, the guidelines would create a presumption that even the Directive did not recognize.

⁷⁶ Paragraph 122 of the draft Guidelines

IV. Serious concerns raised by the heterogeneous use of the essentiality criteria for different types of conduct

The draft Guidelines state that, regarding margin squeeze cases, “*it is not necessary to establish that the upstream input is indispensable for rivals to compete downstream.*”⁷⁷. Similarly, the draft Guidelines introduce a new category of conduct – access restrictions – where indispensability of the input is not necessary to establish abuse. This position appears unfounded and raises concerns in several respects.

First, this assertion of the Commission is not fully supported by the margin squeeze case law cited in the draft Guidelines. Indeed, in *TeliaSonera* case, the General Court did not assess the case on its merits, but only responded to the preliminary questions referred by the Swedish Court. In this context, the Court clarified that when the input is indispensable, at least potentially anti-competitive effects of a margin squeeze is probably, while when the input is not indispensable, it is for the court to satisfy that the practice may be capable of having anti-competitive effects: “where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors ... who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage ... In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable. However, taking into account the dominant position of the undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned” (emphasis added)⁷⁸.

Therefore, the draft Guidelines should be more nuanced on the point of essentiality of input when addressing margin squeeze, to reflect the case law more accurately.

Second, the draft Guidelines provide a non-exhaustive list of access restrictions which could be considered as contrary to Article 102 TFEU⁷⁹. However, this list seems problematic as it either tries to generalize one or two isolated cases which had a specific context (e.g. paragraph 166a - disruption of supply of existing customers) or refers to an abusive conduct which is already addressed in a separate section of the guidelines – the conducts mentioned in paragraphs 166 b, c & d refer in reality to margin squeeze, refusal to supply or self-preferencing.

With such a broad category of abuse, there is a risk of artificially extending the application of Article 102 TFEU to any conduct that does not meet the conditions established by case law for different types of abusive conduct (e.g. refusal to supply, margin squeeze, or self-preferencing).

⁷⁷ Paragraph 127 of the draft Guidelines

⁷⁸ Judgment of 17 February 2011, *TeliaSonera Sverige*, paragraphs 70-72

⁷⁹ Paragraph 166 of the draft Guidelines

This concern is particularly relevant in a context where the draft Guidelines do not explicitly outline the exclusionary effects that conducts falling under access restrictions may produce, nor do they provide an assessment framework for each type of conduct based on established case law.

In practice, this means defining new types of abuse which include other types of abuses but with less demanding standards of proof, which generates uncertainty as conducts that do not meet the requirements of the specific legal test may still be deemed abusive.

Third, this position is questionable in principle and may even be counterproductive for the competition dynamics in the market. The draft Guidelines do not define what constitutes a non-essential input which could potentially lead to abusive conduct in a form of a margin squeeze or access restrictions.

Therefore, it is necessary to deduct from the definition of an essential input - suggested in the section on refusal to supply - what a non-essential input entails.

For refusal to supply abuses, the draft Guidelines recall that “*an input is considered indispensable if there is no real or potential substitute to it*” and that “*specifically, this means that (i) the input cannot be duplicated realistically and in a viable way due to physical, technical, legal or economic reasons; (ii) an equivalent input cannot be obtained from other sources; and (iii) access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint.*”⁸⁰

The draft Guidelines also specify that “*should there be a real or potential substitute to the input in question, even if access were less advantageous for the requesting undertaking, the input cannot normally be considered as indispensable.*”⁸¹

Thus, deductively, a non-essential input for the purposes of margin squeeze or access restrictions could be considered as:

- an input that is realistically and viably replicable from a physical, technical, legal, or economic standpoint;
- an input that can be obtained from other sources;
- an input whose access is not necessary for the requesting company to remain viable in the market and exert effective competitive constraint.

These characteristics of a non-essential input have several implications for different buyers and competitors in the downstream market:

- **Availability of substitutes:** Buyers can turn to viable alternatives, reducing dependence on a single supplier in the upstream market;

⁸⁰ Paragraph 101 of the draft Guidelines

⁸¹ Paragraph 102 of the draft Guidelines

- **Flexibility:** Companies have more options, allowing them to adapt their sourcing strategies based on market conditions;
- **Risk reduction:** There is, by definition, less risk of supply disruptions or unfavorable terms imposed by a sole supplier;
- **Competitiveness maintenance:** Companies can remain competitive by using alternative inputs, if they find the price or commercial terms of the dominant upstream company unsatisfactory;
- **Market power:** The non-essential input supplier has, by definition, less power to impose high prices or unfair conditions, as buyers can turn to substitutes.

In light of above, it is seriously questionable to define a form of abuse against a vertically integrated dominant company - when an unfavorable competitive situation, if any, can be attributed to the choice of the buyer who has an alternative solution on the market allowing it to compete with the offers of the dominant vertically integrated operator.

Orange also notes that the French version of the draft Guidelines on margin squeeze is not compliant with the approach pursued by the Commission in the English version as it indicates that « *l'écart entre les prix en amont et les prix en aval empêche des concurrents aussi efficaces qui sont tributaires de l'intrant de l'entreprise dominante d'exercer rentablement et durablement des activités sur le marché en aval* »⁸².

In this regard, the choice of terminology in the French version “*tributaire-dépendant*” seems particularly fitting, as the margin squeeze conduct should, by principle, only be used when downstream competitors depend on the vertically integrated company’s input (and not simply rely on it as mentioned in the English version) - and thus only when the input is essential for downstream competition.

Fourth, it is important to recall that according to the draft Guidelines and established case law, when an input is not essential, a dominant company may legitimately refuse access to this input for its competitors as credible alternatives exist in the market.

In other words, the ability for competitors to source from alternative inputs allows the dominant company to decide to be active or not in the input market.

From the perspective of legal certainty and risk assessment by the vertically integrated dominant company, downplaying this criteria in cases of margin squeeze and access restrictions may lead the dominant company to prefer a total refusal of access rather than taking the risk - especially with a presumptive approach applied on margin squeeze - to open its input to third-party commercialization.

Finally, an approach that is too broad could ultimately lead to incriminating dominant undertaking for an input which is available on the market at better prices and whose use can allow competitors to be potentially more competitive than the dominant undertaking.

⁸² Paragraph 122-b) of the French version of the draft Guidelines

More generally, such an approach contradicts the principle of freedom of contract, is not endorsed by established case law, and could negatively impact incentives to invest as well as overall legal certainty.

It is therefore crucial to maintain coherence throughout the draft Guidelines and apply the essentiality criteria in refusal to supply cases also to margin squeeze as ignoring the essentiality of the input in margin cases could lead to inconsistencies and weaken the competitive dynamics in the relevant markets.

As to access restrictions, Orange urges the Commission to abandon this category otherwise this will generate contestable infringement decisions followed by lengthy litigations.

V. Several issues raised by downplaying the role of the "as efficient competitor" (AEC) principle and test

It would be helpful to make a distinction between, on one hand, the equally efficient competitor principle and, on the other hand, the price-cost/AEC test itself.

As to the principle, the draft Guidelines provide that *"the assessment of whether a conduct is capable of having exclusionary effects does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking."*⁸³

However, this approach of the Commission is contradictory with other provisions of the draft Guidelines, where - in line with case law- the draft Guidelines state that *"Article 102 TFEU does not preclude the possibility the departure from the market or the marginalization, 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"*⁸⁴ or that AEC test is one of the relevant factors to consider when determining whether a behavior departs from competition on the merits *"whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct..."*⁸⁵.

Equally efficient competitor principle has a paramount importance in case law and has been also confirmed by recent judgments.

Indeed, in recent *European SuperLeague* and *Unilever* cases the Court held that *"it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, on account of its skills and abilities in particular, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market"*. Furthermore, the Court explained that *"Indeed, not every exclusionary effect is necessarily*

⁸³ Paragraph 73 of the draft Guidelines

⁸⁴ Paragraph 51 of the draft Guidelines

⁸⁵ Paragraph 55f of the draft Guidelines

detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation"⁸⁶. Similarly, in the *Google shopping* case the Court held that "*the objective of that article [102] is not to ensure that competitors less efficient than the dominant undertaking remain on the market*"⁸⁷.

Therefore, the draft Guidelines should reflect AEC principle without any ambiguity or contradiction by notably modifying paragraph 73.

As to the test, the draft Guidelines explain that "*while in the case of certain pricing practices, namely predatory pricing and margin squeeze, a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on merits*",⁸⁸ "*a price-cost test is generally inappropriate for assessing whether non-pricing practices depart from competition on the merits*".⁸⁹ Nevertheless, in the footnote, the draft Guidelines add that "*the relevance of a price-cost test cannot be automatically ruled out, when it is possible to reliably quantify the non-price elements of the conduct*".⁹⁰

While the draft Guidelines do not make reference to price-cost test when presenting the legal test applicable to exclusive dealing and exclusivity rebates, the draft Guidelines underline that "*the amount or value of the incentives that are granted in return for exclusivity may be particularly relevant when assessing the capability of exclusive dealing to produce exclusionary effects*"⁹¹.

For conditional rebates, the draft Guidelines consider that "*to demonstrate that a conditional rebate scheme departs from competition on the merits, it may be appropriate to make use of price-test cost*".⁹²

The downplay of the "as efficient competitor" test by the Commission (except for margin squeeze and predatory pricing cases) in the draft Guidelines raises several concerns.

First, this test has historically played a crucial role in evaluating anti-competitive behaviors by dominant firms. Its omission or marginalization as proposed in the draft Guidelines would have significant consequences on legal certainty and the consistency of competition law enforcement.

The AEC test is an essential tool for determining whether the practices of a dominant firm are likely to exclude as efficient competitors from the market, whose exit, by definition and in light of the very objectives of competition policy within the Union, is much more harmful than the exit of less efficient competitors.

⁸⁶ Judgment of 19 January 2023, *Unilever*, paragraph 37; Judgment of 12 May 2022 *Servizio Elettrico Nazionale*, paragraph 73

⁸⁷ Judgment of 10 September 2024, *Google and Alphabet v. Commission (Google shopping)*, paragraph 263

⁸⁸ Paragraph 56 of the draft Guidelines

⁸⁹ Paragraph 56 of the draft Guidelines

⁹⁰ Footnote 128 of the draft Guidelines

⁹¹ Paragraph 83c of the Draft Guidelines

⁹² Paragraph 143 of the Draft Guidelines

Marginalization of the AEC test will result in punishing dominant undertakings that are simply efficient (without abusing such position) and will represent a departure from the economic approach entailing a switch from the protection of competition to the protection of competitors.

Second, established case law has consistently reaffirmed the importance of this test for price abuses and sometimes also for non-price abuses.

Indeed, in *Servizio Elettrico Nazionale* case, the Court held that for "loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position"⁹³

In *Unilever* case, the Court held that "even in the case of non-pricing practices, the relevance of such a test cannot be ruled out. A test of that type may prove useful where the consequences of the practice in question can be quantified. In particular, in the case of exclusivity clauses, such a test may theoretically serve to determine whether a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts."⁹⁴

Finally, in the recent *Intel* judgement the Court confirmed that "the result of the AEC test is liable to indicate whether a pricing practice, such as loyalty rebates, adopted by an undertaking in a dominant position, with sufficiently pronounced characteristics in terms of the share of the market covered, the conditions and arrangements for granting those rebates, their duration and their amount, is capable of foreclosing a competitor as efficient as that undertaking and thus of being detrimental to competition as protected by Article 102 TFEU"⁹⁵

Third, while the draft Guidelines indeed mention that if the dominant undertaking provides evidence suggesting that the behavior is unlikely to produce exclusionary effects, the Commission will consider it, the draft Guidelines do not explicitly mention the obligation for the Commission to evaluate the AEC test that may have been presented by dominant undertakings be it for pricing or non-pricing conducts. This is important, especially in the context that the Court has recently clarified in *Unilever* case that "where an undertaking in a dominant position suspected of abuse [non-pricing conduct] provides a competition authority with an analysis based on an 'as efficient competitor test', that authority cannot disregard that evidence without even examining its probative value".⁹⁶

⁹³ Judgment of 12 May 2022 *Servizio Elettrico Nazionale*, paragraph 80

⁹⁴ Judgment of 19 January 2023, *Unilever*, paragraph 59

⁹⁵ Judgment of 24 October 2024 *Intel*, paragraph 202

⁹⁶ Judgment of 19 January 2023, *Unilever*, paragraph 60

To ensure a consistent and predictable application of competition law, it is crucial that the Commission maintains the AEC principle and test as a central tool in its effect-based assessments by clearly distinguishing cases where the test applies (as per case law) and to provide further clarity on how such test will be applied. Mentioning explicitly the Commission's obligation to analyse AEC test, when provided by the dominant undertaking, would also provide an additional guarantee of legal certainty for companies, ensuring that a test produced in defense and showing a result contrary to the Commission's allegations would be given a sufficient weight.

VI. Other developments and clarifications that the draft Guidelines should consider

A. Modifications of specific paragraphs to align with case law

(i) Exclusive dealing

Based on *Intel* case law, when conducting an effect-based assessment, the Commission should establish the possible existence of a strategy aimed at excluding competitors that "*are at least as efficient as the dominant undertaking*"⁹⁷ rather than "*actual or potential competitors of the dominant firm*" as stated in paragraph 83d of the draft Guidelines. Furthermore, in the same paragraph, the draft Guidelines overreach by stating that such an exclusionary strategy is not legally required; this position is not supported by case law.

(ii) Refusal to supply

Paragraph 98 of the draft Guidelines states that for a refusal to supply to be considered abusive, "*it is sufficient that a potential market or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers*". However, according to the cited case law⁹⁸, an abusive refusal occurs only when there is *an actual demand for the input* (rather than potential) *on the part of undertakings which seek to carry on the business for which they are indispensable*. The paragraph should be aligned with case law.

Furthermore, Paragraph 90 of the draft Guidelines states that for the refusal to supply to be abusive such refusal should be capable of having exclusionary effects, which "*in this specific context means the capability to eliminate all competition on the part of the requesting undertaking*". This approach is not endorsed by case law which is focused on "the elimination of effective competition"⁹⁹ rather than all competition as the purpose of competition law is not to protect non-efficient competitors. As a consequence, the wording of this paragraph should be adjusted to comply with case law.

⁹⁷ Judgment of 6 September 2017, *Intel v. Commission*, paragraph 139, Judgment of 19 January 2023, *Unilever Italia Mkt Operations*,

⁹⁸ Judgment of 29 April 2004, *IMS v. NDC Health*, paragraph 44

⁹⁹ Judgment of 9 September 2009, *Clearstream v Commission*, paragraph 148; Judgment of 17 September 2007, *Microsoft v Commission*, paragraph 563.

Additionally, when defining the indispensability of the input, the draft Guidelines assert that one condition is that "*access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint*" (paragraph 101 (iii)). None of the cited case law support this criteria; therefore, it should be removed.

(iii) Multi-product rebates

Multi-product rebates being different from exclusive dealing and conditional rebates, it is legally not justified to consider that these rules apply by analogy to multi-product rebates as suggested by paragraph 153 of the draft Guidelines.

(iv) Other modifications

Paragraph 49 which states that "*such an undertaking [dominant] may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it*" should be modified to remove "*strengthen its dominant position*" as what is problematic is not the dominant position or its strengthening but abusing such position.

B. Alignment of economic methodology by conduct type

The draft Guidelines present inconsistencies regarding the use of price-cost tests for different abusive conducts- predatory pricing, margin squeeze, conditional rebates, and multiproduct rebates.

In the case of predatory pricing, the draft Guidelines recall that a three-zone test is necessary to evaluate whether prices charged by a dominant firm are abusive¹⁰⁰. This test distinguishes three scenarios:

- If the prices are below the AVC/AAC, the pricing practice is presumed to be predatory;
- If the prices are below the ATC/LRAIC but above the AVC/AAC, the pricing practice may be considered predatory only if it part of a plan to eliminate or reduce competition;
- If the prices are above the ATC/LRAIC, they are not considered as predatory.

However, for margin squeeze, the draft Guidelines adopt a binary approach based on a two-zone test, where only the reference to the LRAIC of the downstream arm of the dominant operator is mentioned¹⁰¹.

Similarly, for conditional rebates and multiproduct rebates, the draft Guidelines only refer to the AAC.

¹⁰⁰ Paragraph 111 of the draft Guidelines

¹⁰¹ Paragraph 132 of the draft Guidelines

This difference in the approach to price-cost tests for different pricing conducts lacks consistency, since in each case the objective is the same – to determine whether the dominant firm's strategy in the downstream market is capable to lead to an exclusionary effect.

Beyond the unit cost reference to be considered, the Commission states in the section dedicated to margin squeeze – in line with case law - that the test should generally be applied at the most granular level or at the aggregate portfolio level¹⁰². It would be relevant for the draft Guidelines to clarify whether the same approach should be applied to all other pricing practices.

Similarly, the draft Guidelines indicate in the section of margin squeeze that the Commission reserves the right, "*in some circumstances*," to conduct the price-cost test at a more granular level, e.g the level of each individual offer.¹⁰³ This constraint does not seem to be justified if competitors have the possibility, on the basis of the input, to market several offers. More generally, this flexibility lacks clarity and undermines legal certainty and the self-assessment ability of dominant firms. It would therefore be useful for the Commission to specify the "circumstances" that might lead it to adopt such an approach.

C. Alignment of the draft Guidelines with similar principles established in other EC Guidelines

In line with the principle of good administration, it is essential that the draft Guidelines be adopted in coherence with the provisions of other guidelines and regulations by the Commission.

For example, it would be useful to align the standard for qualifying exclusive agreements in the context of abuse of dominant with the standard used to qualify an "exclusive purchase" under Regulation 2022/270 and the guidelines on vertical restrictions.

Indeed, while as per the draft Guidelines "*to a rebate conditioned on customers purchasing 75% of their requirements from a dominant undertaking has been held to be an exclusivity rebate*"¹⁰⁴ under the Hoffmann-La Roche case law, Regulation 2022/270 sets a near-exclusivity threshold at 80% of needs.

It would therefore be advisable to align both thresholds.

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¹⁰² Paragraph 135 of the draft Guidelines

¹⁰³ Paragraph 136 of the draft Guidelines

¹⁰⁴ Footnote 184 of the draft Guidelines