
The EC's Draft Guidelines on the application of Article 102 TFEU

Response by RBB Economics to the EC consultation

RBB Economics, 31 October 2024

1 Introduction

In August 2024, the European Commission published its draft guidelines on exclusionary abuses of dominance ("Draft Guidelines"). The stated aim of the Draft Guidelines is 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. This, argues the Commission, will help increase legal certainty, to the benefit of consumers, businesses and the national competition authorities and national courts.¹

In our view, the Draft Guidelines should balance three key objectives: (i) **competitive outcomes**: promoting pro-competitive behaviour while deterring anti-competitive conduct, and thereby benefiting consumers;² (ii) **ease of compliance and administrability**: providing clear and implementable guidance to practitioners and businesses; and (iii) **legal consistency**: reflecting the (evolving) caselaw on exclusionary abuse.

Achieving the right balance is crucial to ensure the guidelines fulfil their purpose without causing unintended negative consequences. In our view, the first objective is key. Indeed, we trust it is uncontroversial that the primary objective of competition policy should be to ensure competitive outcomes for the benefit of consumers.³

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

² For example, the Commission states that "the enforcement of Article 102 TFEU is key to ensuring that competition works effectively and that consumers can reap the benefits of competitive markets" (*ibid*).

³ See the speech by Neelie Kroes, European Commissioner for Competition Policy, at Fordham University Symposium, 25th September 2008. "We all agree that the overall aim of competition policy, including the application of Article 82 and Section 2 of the Sherman Act, is to protect consumer welfare. We also agree that protecting consumers is not necessarily the same as protecting competitors. We want to leave sufficient room for dominant firms to compete on the merits. Our enforcement should not protect competitors who do not deliver to consumers in terms of price, quality and innovation. If competitors leave the market because they are not good enough, that is the fair price of fair competition." See also the discussion in Fumagalli and Motta's response to a request from the Commission for expert economic

However, tension between this and the other two objectives can arise due to the absence of clear bright lines separating forms of conduct by dominant firms that are likely to harm competition and consumers from those that are not. Many commercial practices can have exclusionary effects, yet they can also enhance efficiency and provide direct consumer benefits, even when undertaken by dominant firms.⁴ Thus, in the vast majority of cases, an economic analysis of effects is required to evaluate the likely impact of impugned conduct on prices, output, innovation and consumer outcomes.⁵ This assessment does not always need to be extensive or detailed but should be grounded in the evaluation of competitive effects.

To that end, we are mindful that “effects-based analysis” may mean different things to different practitioners. In our view, an effects-based approach to the assessment of exclusionary behaviour means the following:

- Assessing conduct according to its (likely) effects on competition, and ultimately consumers, as opposed to its form.
- Adopting a consistent approach to the meaning and assessment of anti-competitive exclusionary effects, namely one based on coherent economic theories of harm to competition and consumers that are supported by facts and empirical evidence.
- Acknowledging that many commercial practices that potentially have exclusionary effects also have efficiency-enhancing properties or direct benefits for consumers, even when undertaken by dominant firms.
- Giving the same weight to evidence on the beneficial features of any conduct under investigation as is given to its potential negative effects, not least because these effects often have the same source.⁶
- Intervening only when there is compelling evidence that harmful effects are likely to outweigh beneficial outcomes arising from the impugned conduct.

An appropriate enforcement policy against exclusionary conduct must avoid both over-enforcement and under-enforcement, as each carries significant costs to society. It must also avoid (i) arbitrary enforcement (where policy leads neither to systematic over-enforcement or under-enforcement but simply performs poorly in its ability to consistently distinguish “bad” from “good” behaviour)⁷ and (ii) inconsistent enforcement (e.g., where different forms of conduct are treated differently, even if they have the same competitive effect). Steering clear of these risks requires avoiding presumptions of violation under Article 102 TFEU for the

advice on themes related to the 2023 amendment to the Guidance Paper and the associated Policy Brief. (See Chiara Fumagalli and Massimo Motta (2023): *Note on the enforcement of Article 102 TFEU*.)

⁴ For one of the earliest comprehensive treatments of these issues (including the development of effects-based frameworks for assessing foreclosure and how as-efficient competitor tests can be applied to rebate schemes), see Selective price cuts and fidelity rebates, Economic discussion paper, July 2005, A report for the Office of Fair Trading by RBB Economics, OFT804. (See, inter alia, paras. 3.177, 4.157-4.168, and 4.36-4.58).

⁵ See, for example, ‘*An economic approach to Article 82: Report by the Economic Advisory Group for Competition Policy (“EAGCP”)*’ (July 2005), pages 2-3.

⁶ Low pricing/predation, for example, falls firmly into this category, as discussed further below.

⁷ For example, application of a specific policy rule may give rise to as many false positives as false negatives. That is, on average, such a policy would over-intervene as often as under-intervene. However, because it would be wrong so frequently, it would not be effective at delivering the right outcomes for consumers.

simple reason that the impact on competition of any given conduct depends too greatly on the specific circumstances.⁸

Given the above, our response to the Commission's consultation on its Draft Guidelines is summarised as follows:

- The 2008 Guidance on the Commission's enforcement priorities in applying Article 102 to exclusionary abuses ("**the Guidance Paper**") established a sound, effects-based framework that provided a good balance between the three (sometimes conflicting) objectives of (i) competitive effects, (ii) ease of compliance and administrability, and (iii) legal certainty.⁹
- Disappointingly, the Draft Guidelines have failed to build on that sound framework. Rather, they have taken a step backwards in time, seeking to reassert form-based assessment over effect, an approach that fails to adequately satisfy the key objective of promoting pro-competitive behaviour while deterring anti-competitive conduct. Attempting to draw up lists of good and bad forms of behaviour is misfocused because the commercial practices targeted by the Commission can both give rise to exclusionary effects and provide direct consumer benefits, even when adopted by dominant firms.
- The Guidance Paper offered a better approach by focusing on the impact of conduct on consumers, which requires an evidence-based analysis of competitive effects. This approach is the only way to make sense of the term "competition on the merits", a concept that the Draft Guidelines relies on heavily. An effects-based approach is also consistent with clarity on compliance.
- This is not to deny a role for the identification of form-based "aggravating factors" as part of a broader framework for assessing exclusion. However, the use of such indicators must be set firmly within a broader framework for the assessment of competitive effects.
- We therefore urge the Commission to reconsider the Draft Guidelines. They should move away from a focus on form-based rebuttable presumptions of abusive behaviour to providing coherent effects-based frameworks for determining when dominant firm conduct is likely to give rise to anti-competitive foreclosure.

⁸ In principle, there could be a presumption against practices that are difficult to justify for any reason other than their anti-competitive effect. However, because most conduct has at least the potential to be beneficial for consumers, this principle – while valid – may rarely translate into practical guidance.

⁹ 2009/C 45/02.

2 The enduring merits of the 2008 Guidance Paper

The Draft Guidelines are set to replace the Commission's 2008 Guidance Paper. The latter marked a significant step forward by signalling a shift towards an effects-based analysis of exclusionary conduct. Specifically, the Guidance Paper (at paragraph 20) set a clear standard to assess dominant firms' conduct, explaining that such conduct is abusive when it likely leads to anti-competitive foreclosure.¹⁰

The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure (emphasis added).

Crucially, the Guidance Paper introduced the important principle, for pricing abuses, that enforcement should focus on conduct that threatens to exclude as-efficient competitors.¹¹ This principle recognised that normal competition is intrinsically a selection process that leads to less efficient firms becoming marginalised and hence competition policy should be targeted primarily at cases where equally efficient firms are likely to be excluded. This stance recognised that intervention to protect less efficient competitors risks chilling competition to the detriment of consumers. Notably:

- dominant firms (and non-dominant firms who fear being found dominant) may avoid pro-competitive behaviour that would benefit consumers but weaken their rivals if that would expose them to antitrust scrutiny; or
- competitors of dominant firms might seek protection from competition authorities instead of investing in becoming more competitive, thereby reducing market dynamism.

The Guidance Paper prioritised the most important of the three policy objectives set out above, namely *competitive outcomes*. For example, whenever possible, it advocated the as-efficient competitor principle as a way to balance the risks of over- and under-enforcement, and to ground intervention in sound economic principles. As for the other two objectives, the Guidance Paper facilitated compliance and administrability by setting out factors relevant to when such conduct is likely to lead to anti-competitive foreclosure.¹² Further, by focusing on tools to evaluate likely competitive and consumer effects, it has offered a coherent assessment framework that could assist the Courts modernise the law.¹³

¹⁰ Emphasis added in quote. The introduction of the anti-competitive foreclosure concept, which had just been included in the Commission's 2008 non-horizontal merger guidelines (see, for example, paragraph 18 of those guidelines), had the ambition of aligning the enforcement of Article 102 TFEU with sound economic reasoning.

¹¹ See paragraph 23 of the Guidance Paper: "*the Commission will normally only intervene where the conduct concerned has already been or is capable of harming competition from competitors which are considered to be as efficient as the dominant undertaking*" (emphases added).

¹² See paragraph 20 of the Guidance Paper, which sets out a list of economic-based factors that are relevant to the assessment of anti-competitive foreclosure. Similar factors are listed at paragraph 70 of the Draft Guidelines, albeit in the context of assessing whether conduct is capable of having exclusionary effects, as opposed to the likelihood of anticompetitive foreclosure (evaluated against the as-efficient competitor standard). As such, the Commission appears to regard them as relevant only where its form-based presumptions and specific legal tests do not apply.

¹³ See, for example, the Opinion of Advocate General Nils Wahl in Case C-413/14 P, *Intel Corporation Inc. v European Commission*, referencing the Guidance Paper: "*Experience and economic analysis do not unequivocally suggest that loyalty rebates are, as a rule, harmful or anticompetitive, even when offered by dominant undertakings. That is because rebates enhance rivalry, the very essence of competition*" (paragraph. 90). Similarly, for example, Advocate General Rantos references the Guidance Paper when stating (at paragraph 43 of the Opinion in Case C-377/20,

We believe that the assessment framework set out in the Guidance Paper continues to offer a sound basis for assessing exclusionary abuses and the merits of intervention. In that regard, it is notable that, in the background information to the consultation on the Draft Guidelines, the Commission states that the case law has *endorsed* an effects-based approach.¹⁴

Given this, it is far from evident that the fundamental changes embodied in the Draft Guidelines – most notably the shift to form-based assessment – were required. Instead, targeted updates could be made straightforwardly to the Guidance Paper to reflect evolving experience and lessons learned. Indeed, while we did not agree with all the specific changes made, the process that led to the 2023 update to the Guidance Paper demonstrated that this is eminently feasible.¹⁵

To illustrate: we recognise that there has been concern regarding the effects of the foreclosure of less efficient competitors. We acknowledge that exclusion of such rivals may harm competition and consumers in certain circumstances. Whilst we think there are well-established downsides to intervention in such cases, the Commission could address this issue further within an effects-based approach.¹⁶ For instance, if the evidence shows that, absent the conduct at issue, these rivals would be likely to (have) become as-efficient competitors and exert a significant constraint on the dominant firm, then intervention could be justified.¹⁷

Servizio Elettrico Nazionale SpA and Ors v AGCM and Ors): “... *the mere fact that certain conduct has the potential to drive a competitor from the market does not make the market less competitive, still less does it make the conduct abusive within the meaning of Article 102 TFEU. A distinction must therefore be drawn between a risk of foreclosure and a risk of anticompetitive foreclosure, since only the latter may be penalised under Article 102 TFEU*”.

¹⁴ “The 2008 Guidance contributed to promote an approach focused on the potential effects of alleged abusive conduct, through the analysis of market dynamics (“effects-based approach”). Since the adoption of the 2008 Guidance, the Court of Justice of the European Union has delivered 34 judgments on exclusionary abuses. This rich body of case law *endorsed the effects-based approach to Article 102 TFEU* promoted by the Commission and substantially clarified the scope of the rules” (emphasis added). https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623

¹⁵ See the March 2023 Amendments to the Communication from the Commission – Guidance on the Commission’s priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2023/C 116/01), the DG Comp Policy Brief: “A dynamic and workable effects-based approach to Article 102 TFEU”, and the RBB response to the EC’s updated Article 102 TFEU Guidance and Policy Brief (available at <https://www.rbbecon.com/publication/article/rbb-response-to-the-ec-s-updated-article-102-tfeu-guidance-and-policy-brief>).

¹⁶ A small change was already made in the 2023 amendment to the Guidance Paper in response to this concern of the Commission. See the amended Guidance Paper and also RBB’s response to the EC’s updated Article 102 TFEU Guidance and Policy Brief.

¹⁷ As noted, this principle was already explicitly recognised at paragraph 24 of the Guidance Paper. The Draft Guidelines could therefore have built on the case experience to contemplate flexing the as-efficient competitor principle (and the associated as-efficient competitor test) to identify a narrow set of circumstances in which a not-yet-as-efficient competitor might warrant protection.

3 The proposed Draft Guidelines: an unhelpful backward step towards a form-based approach

It is understandable that the Commission would update the Guidance Paper given the passage of time. Ideally the Commission would have built on its sound, effects-based framework and, as just described, could have done so while retaining the core principles of the Guidance Paper. It is disappointing, therefore, that the Commission has proposed to replace the Guidance Paper with Draft Guidelines that turn back the clock by seeking to reassert form-based assessment over effect.

To elaborate, the Draft Guidelines indicate that conduct by dominant undertakings is liable to constitute an exclusionary abuse where it: departs from competition on the merits; and is capable of having exclusionary effects.¹⁸ Strikingly, the Draft Guidelines advocate a form-based approach to this assessment that distinguishes between “(a) Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects” and “(b) Conduct that is presumed to lead to exclusionary effects” (“if need be under the conditions established in [so-called] specific legal test[s]”).¹⁹

In our view, this approach is misconceived. In what follows:

- We first set out why “competition on the merits” (or “normal competition”) can only be understood in terms of competitive effects.
- Next, we explain that while form-based presumptions are unhelpful and inefficient, there is a useful role for form-based *indicators* if these are firmly set within the framework of an effects-based approach.
- Finally, using the examples of how the Draft Guidelines address predatory pricing and access restrictions, we illustrate some major shortcomings of the form-based approach.

3.1 Competition on the merits makes sense only when understood in terms of competitive effects

In our view, competition on the merits has no practical definition and can only make sense when linked to expected outcomes – simply put, is the conduct in question *likely* to harm competition to such a degree that consumers would be materially and adversely impacted?²⁰ If it is, then it is not “competition on the merits”.²¹

In that regard, it is notable that the Draft Guidelines helpfully state:

¹⁸ See paragraph 45 of the Draft Guidelines.

¹⁹ See paragraphs 47, 53 and 60 of the Draft Guidelines.

²⁰ The concept of ‘competition on the merits’ is often cited by courts but it is not defined in practical terms. The Draft Guidelines introduce the concept in its two-prong test, and then attempt to illustrate the meaning of this concept by listing a non-exhaustive set of conducts that are deemed to violate competition on the merits. However, the Draft Guidelines do not offer any practical definition to identify when dominant firms compete on the merits. We note too that Fumagalli and Motta (2023) observes that “it is difficult to define in general what constitutes ‘normal competition’ or ‘competition on the merits’” (p.8) and that, as a concept, the latter “does not seem particularly helpful in distinguishing abusive practices from practices which do not run counter Article 102” (p.9).

²¹ We appreciate that the law refers to conduct “capable” of exclusionary effect. Nevertheless, if the Commission wishes to offer useful guidance and balance the risks of over- and under-enforcement, we believe it should make clear its intention to prioritise conduct “likely” to give rise to anticompetitive foreclosure (as the Guidance Paper rightly did).

The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.²²

On its face, the first sentence links normal competition to *competitive effects*, i.e., the consumer-benefitting outcomes that it delivers. Moreover, the second sentence can be read as consistent with the application of the *as-efficient competitor principle*. These features align well with the framework set out in the Guidance Paper which sought to implement an effects-based approach.

Given this, we submit that the Draft Guidelines should make clear that “competition on the merits” can be understood in practical terms to mean behaviour that is unlikely to foreclose as efficient competitors.

3.2 Form-based presumptions vs form-based indicators

Given the importance of identifying competitive effects correctly as a way to implement the (otherwise vague) notion of “competition on the merits”, rebuttable presumptions make sense in our view only for conduct which is very likely to be harmful (whether in itself or in clear and easy to describe settings). However, in most cases, we believe that the competitive effects of any given conduct depend too greatly on the specific circumstances, such that it is not possible to determine reliably whether the dominant firm’s conduct has resulted in anti-competitive foreclosure without developing a clear theory of harm that is substantiated persuasively by the facts of the case. This applies to all conduct – including the list of behaviours that the Commission identifies as presumptively harmful.²³

In our view, enforcement based on rebuttable presumptions therefore goes against the primary objective of intervention to deliver competitive outcomes.²⁴

²² Draft Guidelines, paragraph 51, footnotes omitted.

²³ These are exclusive supply or purchasing agreements; rebates conditional upon exclusivity; predatory pricing; margin squeeze in the presence of negative spreads; and certain forms of tying.

²⁴ Fumagalli and Motta support the use of rebuttable presumptions in respect of certain practices - exclusive dealing and rebates conditioned on buyers purchasing a large part of their needs from the dominant firm, i.e. much more narrowly than proposed in the Draft Guidelines. They apparently do so on the basis that “*the economic literature suggests that some practices have a stronger anti-competitive potential than others*” (Fumagalli and Motta (2023), p.11) and because these do not necessarily require profit sacrifice. At the same time, the authors observe that “*the literature stresses that such practices might also exert beneficial effects on consumer welfare*” (Fumagalli and Motta (2023), p.13). They also add a further qualification that the presumption on rebates is “*only justified for contracts or rebate schemes with a large [market] coverage*” (Fumagalli and Motta (2023), p.12), i.e. the presumption is conditioned on much more than the form of conduct to reflect a broader economic assessment. Given this, and that coverage matters just as much in the case of exclusive dealing, our view is that Fumagalli and Motta’s analysis supports form-based *indicators* set within an economic framework as opposed to presumptions per se.

The “presumed abuses” in the Draft Guidelines involve conduct that is not straightforward to assess. For example, for a definition of predatory pricing to be meaningful, it must distinguish between low prices that benefit consumers and those that ultimately harm them due to their long-term impact on competition. However, if understanding whether pricing is truly “predatory” or not requires a detailed assessment, then the presumption against “predatory pricing” is pointless – it amounts to saying that harmful prices are those that are presumed to be harmful. The solution is not to say that *pricing below cost* is presumed to be harmful because such pricing is easier to identify. As we discuss further below, identifying the relevant price and cost is not straightforward and, in many cases, pricing below cost *benefits* consumers. It is therefore better to drop the presumption and focus on the assessment of competitive effects.

Another well-known issue with a focus on form over effect is that two practices with similar effect may fall into different “boxes” (and thus be liable to different treatment) on the basis of their form (as we discuss further below in relation to access requirements). The solution is not to try to refine the list of blacklisted conduct further but to set out a clear principle by which conduct will be judged, such as whether as-efficient competitors would be foreclosed.

To be clear, while we dispute the merit of form-based *presumptions*, we consider that the Draft Guidelines could helpfully identify form-based “aggravating factors”, namely types of conduct that (irrespective of their effect) have historically given rise to greater scrutiny by the Courts. Dominant firms can factor that into their risk assessments. However, to identify such practices as “presumed” abuses is neither necessary nor desirable from the point of view of protecting competition. Focusing on the form of conduct is inefficient – it shifts the substantive argument away from competitive effects to “box allocation”.

Furthermore, the above is not to deny the potentially useful role of form-based *indicators* as part of a broader framework for assessing exclusion. Indeed, price-costs tests can assist an assessment of whether an as-efficient competitor would likely be foreclosed. However, other factors can be just as (or more) important, such as whether the impugned behaviour is long-lasting or covers a sufficiently large part of the market to deny rivals the opportunity to reach an efficient scale of production. This is the critical point. Form-based indicators are not useful by themselves – they must be firmly set in a broader framework for the assessment of competitive effects.

3.3 A misfocused approach to predatory pricing under the Draft Guidelines

The treatment of predatory pricing under the Draft Guidelines is a marked step backwards compared to that set out in the Guidance Paper.

The Guidance Paper *framed the existing case law in the context of economic effects*, providing a clear definition of predatory pricing that broke predation down into its component parts, namely:

- “*deliberately incurring losses or foregoing profits in the short term (“sacrifice”),*
- *so as to foreclose or be likely to foreclose one or more of its actual or potential competitors*

- *with a view to strengthening or maintaining its market power,*
- *thereby causing consumer harm.*²⁵

While “pricing below cost” falls within the first bullet element of this definition (albeit imperfectly), the remaining bullets make clear that this is not sufficient to give rise to harm. From a consumer perspective what matters is not low pricing (consumers gain from this) but that higher prices will arise in the future if the act of predation increases market power. The Guidance Paper correctly picked up on this point.²⁶ Rather than emphasise the fact that the Courts have ruled out the need to show recoupment (i.e., the Courts do not require the Commission to show that *harm to consumers* from higher prices in the future is likely), this point was rightly relegated to a footnote in the Guidance Paper.

In sharp contrast, the Draft Guidelines’ approach to predatory pricing is underwhelming. Compared to the carefully constructed definition of predatory pricing in the Guidance Paper, the Draft Guidelines state: “*Predatory pricing refers to below-cost pricing strategies of a dominant undertaking.*” That is, the focus is squarely on the first bullet above, not the question of harm to consumers.

In this way, instead of providing insights to help practitioners distinguish predatory pricing from legitimate (and beneficial) low-pricing strategies, the Draft Guidelines remove a large part of the economic context offered by the Guidance Paper, relying mainly on the AKZO judgement to formulate a presumption that below-cost pricing by a dominant firm constitutes an abuse.²⁷

While we do not object to Draft Guidelines making clear that if a dominant firm prices below cost then this is an “aggravating factor” based on precedent, it is unhelpful to define predatory pricing simplistically as pricing below cost. There are numerous benign commercial reasons for pricing below cost, which include promotional pricing, new product launches, and multi-sided platform strategies.

Furthermore, the Draft Guidelines’ formalistic approach may deter dominant firms (and firms fearing they might be dominant) from setting low prices. This is because establishing a cost benchmark, whether it is average variable cost or average avoidable cost, can be complex. Without the reassurance that an assessment of predatory pricing will focus on effect as opposed to form, dominant firms may set prices further above any measure of costs (than would be the case under the approach set out in the Guidance Paper) to avoid falling into the presumption zone. In other words, the Draft Guidelines increase the risk that price competition will be chilled, to the detriment of consumers.

²⁵ See paragraph 63 of the Guidance Paper.

²⁶ The Guidance Paper added, “*Generally consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.*”

²⁷ Further, the Draft Guidelines reinstated in the main body that “*it is not necessary to demonstrate that it is possible for the dominant undertaking to recoup its losses.*” See Draft Guidelines, paragraph 113.

3.4 Inconsistent treatment of refusal to supply and access restrictions

The treatment of refusal to supply and access restrictions provides another example of the (unhelpful) proposed shift from the Guidance Paper's focus on competitive effects to the Draft Guidelines' form-based approach.²⁸

Under the Guidance Paper, refusal to supply was considered within a broad economic framework that also included practices like access restrictions.²⁹ Significantly, the Guidance Paper highlighted the relevance to intervention of the likely effect of such a refusal on effective competition on the downstream market, and on the likelihood of consumer harm.³⁰

The Draft Guidelines, however, divide these practices into separate categories, subject to different legal standards, creating considerable scope for inconsistencies in how similar effects are treated. For instance, the standard for showing that a dominant firm has abused its position by engaging in constructive refusal to supply is lower than that for 'outright' refusal to supply, despite the scope for the two forms of conduct to give rise to the same effects.³¹ In the case of 'outright' refusal to supply, following the Bronner judgement and subsequent court cases which form the essential facility doctrine, the input must be indispensable.³² In the case of constructive refusal to supply, the input only needs to be viewed as important by the access seeker — a lower threshold. Perversely, this would seem to risk incentivising dominant firms to engage in outright refusal to supply rather than offering terms that *might* be deemed to constitute a constructive refusal to supply.

²⁸ This unhelpful shift was also reflected in the Commission's 2023 update to the Guidance Paper.

²⁹ See Guidance Paper, paragraph 76. Access restrictions encompass practices such as disrupting supply to existing customers, failing to comply with regulatory access requirements, and imposing unfair access conditions (also known as constructive refusal to supply).

³⁰ Guidance Paper, paragraph 81.

³¹ The Guidance Paper acknowledged (at paragraph 84) that the fact supply had previously occurred might, nevertheless, have implications for the assessment.

³² According to the essential facilities doctrine, a dominant firm that refuses to supply a customer is liable for violating Article 102 TFEU only if the input (or the facility) in question is indispensable for that customer to compete effectively.

4 Conclusion

As currently formulated, the Draft Guidelines take a step backwards compared to the Guidance Paper. While we recognise that there is a difference between (i) guidance on enforcement priorities and (ii) a statement of relevant legal positions, we think that it is more valuable for guidelines to address the former than the latter. Well-constructed guidelines that set out clear enforcement priorities based on the assessment of anti-competitive foreclosure can not only help dominant firms to assess risk but also assist courts to modernise the law to the benefit of consumers.

Seeking consistency with the case law for consistency's sake is not helpful where the case law can be highly context specific (as opposed to general) and, in some cases, fails to provide a useful guide to identifying behaviour that is truly likely to harm consumers. Attempting to draw up lists of good and bad behaviour is equally misfocused when many commercial practices can both give rise to harmful exclusionary effects and provide direct consumer benefits. A better approach is to ask how consumers are affected. In our view, this requires identifying a coherent theory of harm and prioritising evidence-based analysis of competitive effects.

Disappointingly, the Draft Guidelines fail to build on the sound framework established by the Guidance Paper, that sought to implement an effects-based approach to identify conduct that is likely to give rise to anti-competitive foreclosure. We urge the Commission to reconsider its approach and recast the Draft Guidelines to build on this fundamental principle.