**ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA – AEDC**

# Contribution to the Call for Evidence of the European Commission on the Guidelines on exclusionary abuses by dominant undertakings

24 April 2023

On 27 March 2023, the European Commission published a Call for Evidence in order to gather feedback from stakeholders that may set the elements to draft and adopt future Guidelines on the application of Article 102 TFEU to exclusionary conduct. This document conveys the preliminary views of the **Asociación Española para la Defensa de la Competencia – AEDC** on this process, both as a whole and in relation to particular issues that competition practitioners face in their daily application of Article 102 TFEU[1].

First of all, the AEDC welcomes the initiative launched by the European Commission and the willingness to upgrade the current guidance on enforcement priorities to full-fledged Guidelines. As competition law practitioners, the AEDC members usually face a significant degree of uncertainty when addressing potential competition concerns related to potentially exclusionary behavior. The current guidance provided by the European Commission ("**the 2008 Enforcement Priorities Guidance Paper**"[2]) proves insufficient (specially as the Commission claims that it is not bound to follow its own guidance) and has been greatly superseded by the significant developments on the caselaw of the European Court of Justice ("**ECJ**").

This being said, and before entering into particular comments on these future Guidelines, the AEDC is aware of the size of the challenge than implies addressing all the concerns and, more importantly, the need for safe harbors or clear legal tests for some of the potential abuse figures. We understand that any future Guidelines should set clear red lines that allow companies that are (or may be) in a dominant position to take commercial decision within a reasonable degree of comfort, and that also allow providers, customers and competitors to identify potentially abusive conducts.

In this document, the AEDC provides **three lines of comments of issues that, as competition law practitioners, would like to see addressed in the future Guidelines**.

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[1] These comments have been drafted by Rafael Baena, Fernando Díez Estella, Daniel Escoda, Diego García Adánez, Alfredo Gómez, Eduardo Gómez de la Cruz, María López Ridruejo, Borja Martínez Corral, Yolanda Martínez Mata, Irene Moreno-Tapia and Victoria Rivas.

[2] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7–20).

These lines are: (i) comments related to general concepts on the application of Article 102 TFUE, (ii) comments related to particulars forms of abuse, and (iii) comments related to the interaction between the application of Article 102 TFEU and other areas. As a preliminary remark, the AEDC considers that the future Guidelines should not result into a mere codification of the existing caselaw and hence some of our comments go beyond this objective.

## 1. Comments on general concepts

### a) General comments on the methodology to establish dominance, suitability of possible thresholds or set of positive and negative presumptions.

First of all, we consider that one of the priorities of the new Guidelines must be setting a clear methodology to establish the existence of dominance.

The 2008 Enforcement Priorities Guidance Paper outlined certain criteria (paragraph 10) when determining if a company enjoys a dominant position in the market. Such situation would arise, according to the said Guidance Paper, only if several factors are combined, as taking them separately does not always trigger a determinative dominant position by an undertaking.

These criteria, for example, include the holding of a market share of at least 40% (paragraph 14), the existence of barriers to entry, such as tariffs or quotas or privileged access to essential inputs (paragraph 17) or/and the existence of a countervailing buyer power (paragraph 18). Moreover, the European Commission also considers other factors (paragraph 20) such as the level of competition within a particular market, customer dependency and the overall dynamics of the market, among others.

Being a good starting point, however, these criteria are too broad, and can have the undesired effect of preventing companies with a strong presence in the market but without an economic independence of behavior from adopting investment decisions or market practices that would lead to innovation and consumer welfare in the short or in the long term. This is particularly relevant in innovative markets, where the potential dominance of a company may be subject to a higher degree of uncertainty. Within this context, it would be useful and convenient to develop the creation of presumptive mechanisms, such as safe harbors and conclusive evidence, in order to provide greater legal certainty for companies, especially to those that possess a relevant position in the market:

(i) Safe harbors would become a suitable tool to promote legal certainty for companies, providing greater economic certainty and predictability in their actions, which are closely related to the promotion of investments and, therefore, of economic growth.

(ii) Establishing conclusive evidence can help companies demonstrate that their alleged anticompetitive behavior is within the law and does not constitute a market harm. In this sense, when there are no duly established thresholds or evidentiary elements, companies may refrain from investing in new projects for fear of incurring in practices considered as anti-competitive, which may be sanctioned by the European Commission or National Competition Authorities ("**NCA**"). Therefore, having guidelines that can provide clarity and transparency regarding the limits to be respected can promote efficiency in the market, thus benefiting not only companies, but also consumers, creating sustainable economic growth.

For these reasons, it is also necessary to reconsider the suitability of the 40% threshold presumption (and the possibility of increasing it), in order to avoid inducing the companies to be captured by potential "false positive" situations. The demand which is allocated to an

economic operator (i.e. market share) is the best proxy that shows a successful performance in the market and also for market power; but it cannot create a general presumption of dominance above a market share of 40% that could subject dynamic companies to a higher level of accountability incompatible with the freedom to conduct a business (Article 16 Charter of Fundamental Rights of the European Union).

The future Guidelines on Article 102 TFEU must clarify that in those markets situation where there is no control of an essential input to compete or a strategic client or a situation of power leveraging in related or neighboring markets, dominance might be presumed above high market shares; but in any case, above 50% or more. Some of the participants in this paper have suggested even the possibility of exploring additional criteria (e.g., more than twice the share of the nearest competitor).

The market share criteria should also consider the dynamics of each relevant market. High market shares should only be considered a proxy for market power if they are sustained for a period of time. For instance, where an undertaking has created a new niche market, and thus will foreseeably initially enjoy a very high market share, such high market share should not lead to a presumption of dominance. And on the contrary, where an undertaking has a rapidly declining market share, this should be a good proxy that it does not hold a dominant position, even if still above 40% market share, as the decline shows the impact of competition from other alternatives.

In any case, and in line with the presumption of the a relevant impact on competition above 30% of market share on the EC Regulation 2022/720 of 10 May 2022 to categories of vertical agreements for the purposes of applying Article 101 TFEU, it might seem reasonable that the threshold for qualifying dominance (i.e. to behave independently in the market) should be notably higher.

**b) Comments on the different approaches to the existence of a dominant position (in particular, in relation to the behavioral analysis) and possible overlaps with other figures.**

As advanced on the previous section, the assessment of whether an undertaking is in a dominant position and of its degree of market power is the basic preliminary step in the application of Article 102 TFEU.

Under EU competition law, dominance has been defined as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. In this regard, the ECJ's ruling in *United Brands* established that a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative. In this line, the 2008 Enforcement Priorities Guidance Paper clearly state that the European Commission will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking.

Taking this into account, when assessing whether a company can behave independently of its competitors, suppliers, or customers (i.e. to analyse whether a company has market power), there are different possible approaches:

(i) **Structural analysis**: this methodology seeks to identify the characteristics of the undertaking or the market structure that would allow it to behave independently. It is an "inductive" approach to market power in which one must examine factors of the

firm's structure such as its resources and production methods, its presentation, transport and sales methods, technology or vertical integration; and factors of the competitive situation in the market such as the number and strength of competitors, market shares and sales volumes, prices, or barriers to entry (amongst many others, ECJ Rulings in case C-27/76, *United Brands/Commission*, 14 February 1978).

(ii) **Behavioural analysis**: this methodology, consistent with Paragraph 11 of the 2008 Enforcement Priorities Guidance Paper, seeks to check whether a company's decisions and market behaviour are largely insensitive to the actions and reactions of its competitors, its customers and, ultimately, consumers. This is a "deductive" approach to market power, as it attempts to demonstrate market power on the basis of behaviour by the firm that would only be possible if it enjoys such market power (EC Decisions in cases IV/29.491, 7 October 1981, *Michelin I*, and COMP/E-2/36.041, *Michelin II*, 20 June 2001; and ECJ Rulings in cases C-27/76, *United Brands/Commission*, 14 February 1978, C-85/76, *Hoffmann-La Roche/Commission*, 13 February 1979, or T-321/05, *AstraZeneca/Commission*, 6 December 2012).

(iii) **Dependency analysis**: this methodology seeks to assess whether a company can behave independently of another company of which it is, for example, a supplier or customer, because it is an indispensable business partner for that company. In other words, this methodology assesses the bilateral relationship between a company and its customers or suppliers, irrespective of the broader reality in which they are embedded (EC cases IV/28.851, *General Motors*, 19 December 1974; or COMP/E-2/36.041, *Michelin II*, 20 June 2001; and ECJ ruling in case C-226/84, *British Leyland/Commission*, 11 November 1986, rec. 226/1984).

In this regard, despite the fact that the caselaw of the ECJ has identified different ways of assessing dominance, the 2008 Enforcement Priorities Guidance Paper still focuses in the structural analysis, which is the most common approach taken by the European Commission and NCAs.

Taking all this into account, it would be positive to provide further guidance as regards both the behavioural analysis and the dependency analysis to identify and prove dominance, especially in digital markets (where defining relevant markets for a structural analysis is usually a challenging exercise). In the same line, it would also be necessary to address the potential overlap of antitrust theories of harm with theories of harm based in fairness, both under the DMA or under national unfair and/or competition law provisions, specifically addressing situations of economic dependence.

### c) Comments on the notion of competition on the merits and the role of an as-efficient competitor principle in the exclusionary abuse test

Article 102 TFEU is based on the idea that dominant undertakings should compete on the merits; to the extent that they do so, their behavior will fall outside the scope of this provision. Recent caselaw from the EU Courts (e.g. *Slovak Telekom*, *Google Search*, *Google Android*, *ENEL*, *Unilever*) has recently raised the as-efficient competitor notation to the level of **principle** separated from the as-efficient competitor test. While the EU Courts seem to have underscored the relevance of the as-efficient competitor test as simply one of the multiple ways of establishing the anticompetitive (foreclosure) effect and have provided indications about how to assess it, the as-efficient competitor principle seems to be the connecting thread giving consistency to the two limbs of the exclusionary abuse test: (i) competition not based on the merits and (ii) anticompetitive effect – *i.e.* if the dominant

company derives an artificial advantage that as-efficient competitors cannot derive, it is not competition on the merits and if that artificial advantage cannot be offset by as-efficient competitors, there is an anticompetitive effect.

It would be important for any future Guidelines to accurately reflect those indications with a view to providing greater legal certainty to companies, enforcers and Courts by finally asserting the existence of a single two-fold exclusionary abuse test based on (i) competition not based on the merits and (ii) anticompetitive effect, and explaining how is the as-efficient competitor principle applied to each of those limbs.

The role of the as-efficient competitor principle as yardstick to make the assessment of competition on the merits more objective is of the utmost importance in digital markets because if competition authorities and courts were to enjoy excessive discretion in qualifying a business decision or business model as "artificial" or "abnormal", it would be a way of bypassing the indispensability requirement (which strikes a fundamental balance between competition and freedom to conduct business in the form of the essential facilities doctrine), which is hardly ever satisfied in digital markets (e.g. *Google Search*).

Regarding the as-efficient competitor test (as opposed to principle), the European Commission's recent Policy Brief and the amendment to the 2008 Enforcement Priorities Guidance Paper suggest that in, certain circumstances, less efficient or less attractive competitors may be worthy of protection, and that authorities need not necessarily apply an as-efficient competitor price-cost test. In the AEDC's view, it would be important for any future Guidelines to underscore that **any effects on competition resulting from superior efficiency or attractiveness constitute competition on the merits**, which may naturally result in the departure from the market or marginalisation of competitors that are less efficient and so less attractive to consumers. This would reflect the caselaw from the EU Courts making clear that Article 102 TFEU does not exist to protect less efficient rivals.[3] The alternative would create the prospect of an "efficiency offence" that would inevitably chill competition as firms could refrain from engaging in efficient consumer welfare enhancing behavior.

The AEDC also supports, as a general rule, the use of the AEC price-cost test given its potential to enable companies to self-assess the lawfulness of their conduct based on information at their disposal.

### d) Comments on the notion of "fairness" under article 102 TFEU.

Unilateral conducts having a negative impact on competition are not only prohibited by Article 102 TFEU and the equivalent provisions under national competition law. A number of national competition laws oppose to unfair unilateral behaviours deemed to have a negative impact on the competitive process, and allow the relevant administrative authorities to impose hefty fines to companies infringing those rules. However, it is unclear how to analyse potentially unfair practices under Article 102 TFEU, as fairness is not necessarily based on effects on the market, and objective justifications may be irrelevant in the analysis of whether a particular behaviour may be fair.

In this context, there is a risk of legal uncertainty as regards theories of harm that may be based on fairness of the behaviour by dominant companies, as there are no clear precedents of the ECJ regarding how to take fairness into account in the assessment of potentially

[3] See, for example, Case C-377/20, *Servizio Elettrico Nazionale* EU:C:2022:379, paras. 45 and 73, and Case C-413/14 P, *Intel v Commission*, EU:C:2017:632, paras. 133–134.

abusive conducts, and, thus, under which circumstances (if any) unfair behaviour by dominant companies should be considered an abuse under article 102 TFEU. The analytical framework could be provided by clarifying the concept of artificiality/competition not based on the merits based on the as-efficient competitor test as requested under section 1.c) above.

### e) Comments on the responsibility of the dominant undertaking in the context of distribution

One basic element of any infringement proceeding, which is part of the fundamental right of defense, is evidencing that the anticompetitive behavior under examination is attributable to a given company. Thus, in the sphere of Article 102, the ECJ recently considered that the exclusionary behavior of distributors may be attributed to a dominant company if (i) the behavior was adopted in accordance with the specific instructions given by the dominant company; (ii) the behavior was part of the implementation of a policy that was decided unilaterally by the dominant company; and (iii) distributors were required to comply with such behavior.

In the framework of distribution systems, there might be a plethora of different situations in which distributors themselves ask the dominant company for guidance vis-à-vis their interaction with their own clients in the downstream market (i.e., implementation of commercial policies, provision of model contracts, common contacts to clients, etc.).

In light of the recent caselaw, it may be worth that the future Guidelines:

(i) clarify whether the finding of the ECJ should be limited to the imposition of exclusivity clauses in the downstream distribution market; and

(ii) provide guidance for distinguishing in which other situations the behavior, eventually requested by distributors or designed to facilitate distribution, would fall or not fall under the scope of Article 102.

### f) Comments on the causal link between the existence of abuse and the investigated behaviour

Under established caselaw, a finding of abuse requires also evidence that anticompetitive effects arise from the investigated conduct. Competition authorities have traditionally reviewed causality by relying on counterfactual analysis that examine whether there would have been greater competition absent a given conduct, and the 2008 Enforcement Priorities Guidance Paper made clear that this analysis was also relevant under Article 102 TFEU. The European Commission's Policy Brief accompanying the Call for Evidence, however, takes the view that "*requiring a nexus of full causality between the conduct and the anticompetitive effects*" would "*render enforcement unduly burdensome or impossible*" (paragraph 30).

In the AEDC's view, any future Guidelines should not abandon the requirement to establish causality to the requisite legal standard. In line with the framework set by the EU Courts in relation to all areas of EU competition law, we suggest that the Guidelines clarify that this analysis should be performed against the background of a realistic counterfactual (i.e. a realistic competitive situation absent the impugned conduct). Furthermore, some of the participants in the drafting of these comments have even suggested that where an undertaking has applied an allegedly abusive practice for a long period of time, a lack of evidence of anticompetitive effects should serve as presumption that such practice is not abusive.

The already indicated link between the two limbs of the exclusionary abuse test (competition not based on the merits and anticompetitive foreclosure) could also be relevant to the causality test because it could make the artificiality of the conduct and its potential for excluding competitors homogeneous so, if a conduct cannot be replicated by as-efficient competitors and cannot be offset by means of other reactions, either there would be a link between artificiality of the conduct and foreclosure. This would be compatible with the EU case-law whereby the causal link is to be established not between dominance and conduct but between conduct and effect (e.g. *AstraZeneca*).

### g) Comments on the consideration of sustainability criteria as an objective justification

Moving on to the assessment of the objetctive justification, the AEDC would welcome an explicit reference on how certain types of abuse would be analyzed in the light of sustainability criteria as an objective justification. Considering the importance of the subject within the Commission's regulatory and political agenda, this issue provides a perfect opportunity for the Commission to break ground on the matter.

The future Guidelines should detail the characteristics of sustainable practices of dominant undertakings that are suitable to be objectively justified. In this respect, the AEDC would welcome specific examples of practices that could be potentially considered an abuse but that, due to its sustainable nature, are suitable for objective justification. In this sense, the European Commission should specify which are the relevant sustainable objectives that should "inspire" the conduct of dominant undertakings. As a (positive) consequence, dominant undertakings will have legal certainty when implementing their sustainable business plans and align its behavior with the Green Deal objectives.

The future Guidelines should also detail which the relevant sustainable criteria would be in order to objectively justify the alleged anticompetitive effects of a given conduct. In this regard, the European Commission should take the opportunity to clarify how a dominant undertaking should behave (i) in the most economically efficient way and (ii) in the least restrictive way, while (iii) achieving relevant sustainability objectives. The European Commission should therefore clarify the standard of proof in order to counterbalance alleged hints of abusive conduct.

Clarifying these two points (i.e., types of eligible practices to be justified and sustainability criteria) is of particular relevance, as dominant undertakings with sustainable aims will be granted (deserved) legal certainty. Moreover, clarifying these two points will prevent other undertakings from abusing their dominant position while claiming unrealistic sustainable objectives. In relation to the latter issue, by way of example, a dominant undertaking could limit the production shipped to a certain territory on the basis of sustainability criteria (lower transport costs, pollution, etc.).

We understand that these clarifications would be welcomed in a wide range of sectors but especially in the energy, manufacturing and transport sectors. The inclusion of these specifications would give comfort to dominant undertakings that are aligned with the European Commission's sustainability goals. In this way, dominant undertakings would receive detailed guidance on how to implement sustainable practices that also respect competition law.

**h) Comments on the need to develop a specific catalog of objective justifications for each autonomous type of abuse.**

In relation to objective justification and efficiencies, Article 102 TFEU does not include exemptions similar to those of Article 101.3 TFEU, but it is clear according to caselaw that before concluding the existence of an abuse, the conduct must be ascertained in order to confirm whether the potential efficiencies or objective justifications outweigh the potential negative effects of the conduct.

The caselaw sets forth that a company has the burden to evidence the justification that the conduct is objectively necessary or that it produces substantial efficiencies. However, this need to confirm an objective justification is made once the conduct has been qualified as abusive, and not as an additional element when qualifying the conduct. We understand that the assessment of the potential infringement would be sounder and closer to the economic reality of the behaviour if advancing an efficiency defence or objective justification is not just a theoretical possibility but forces the Commission to engage with such arguments rather than merely dismissing them[4].

In practice, the possibility of invoking objective justifications or efficiencies is more theoretical than practical, since in the vast majority of cases, these justifications have been rejected for lack of evidence and have not prevented the application of the prohibition.

Moreover, regarding the assessment of dynamic efficiencies by the European Commission, it should also be really extended in practice to the field of abuse. Thus, NCAs should take into account not only static efficiencies- savings or cost reductions, evidenced by a short-term effects analysis, but also the so-called dynamic efficiencies, which are evidenced in a long-term analysis that, in addition to price, takes into account other parameters such as quality, investments, or time-to-market, innovation or structural changes in market conditions.

Thus, even if this could be challenging, it would be extremely useful to develop a specific catalog of possible objective justification, allowing companies to correctly identify objective justifications and efficiencies for each category of abuse (even in broad terms). In this way, a better understanding and focus will be achieved as to what type of conduct is supported, taking into account economic efficiency. In addition, having specific documentary support is paramount, as lack of evidence may lead to a wrong decision by the competition authorities. Likewise, the type of documentation required might vary with respect to different abuses, so it is convenient to know precisely what is expected in terms of evidence and documentation for each type of abuse.

**i) Comments on the notion of anticompetitive foreclosure**

Despite the avances in the caselaw in the field of Article 102 TFEU, There remains still a considerable degree of uncertainty around the meaning of "anticompetitive foreclosure". This is a particular source of concern given that this notion is the bottom-line of any effects analysis, and refers to the very question that needs to be established in order to find a given conduct abusive. This uncertainty is confirmed by the European Commission's recent amendments to the 2008 Enforcement Priorities Guidance Paper, which replace the previous interpretation of this key notion by a new one establishing a lower threshold. The AEDC

[4] In this regard, an example of a too-easily-dismissed efficiency defence is arguably to be found in the *Qualcomm* (exclusivity payments) decision.

encourages the European Commission to provide, on the basis of the caselaw, a consistent definition of this concept, and of the analytical framework that should govern its analysis. This interpretation and framework should, ideally, be in line with that applied in other areas of competition law, including merger control.

While a finding of anticompetitive foreclosure may not require evidencing that competitors have actually been excluded from the market, it would be helpful for the Guidelines to clarify that for conduct to be abusive it must hinder rivals' ability and incentive to effectively compete with the dominant company by reference to the situation that would exist absent that conduct.

The European Commission's Policy Brief also advances an interpretation of the caselaw under which it would be sufficient to find an abuse in presence of "potential effects". In the AECD's view, it would be important for any future Guidelines not to confuse the temporal scope of the analysis (when the effects may take place) with the probability that they take place. In line with established caselaw from the EU Courts, and with general principles of law, the AEDC considers that any future Guidelines should clarify that effects may not be merely "hypothetical", particularly where an allegedly abusive practice has been in place for some time, and that authorities need to establish their likelihood subject to a meaningful threshold of probability.

In line with the comments in section 1.c), the as-efficient competitor principle has been pointed to by the EU Courts as a yardstick also to ascertain the anticompetitive effect in a consistent way. Traditionally, three standards seemed to coexist (from lower to higher: presumption of anticompetitive foreclosure for per se abuses, capacity to foreclose in EU caselaw and likelihood to foreclose in the 2008 Enforcement Priorities Guidance Paper). After the more-economic approach was revived by Intel, and especially following the General Court of the EU's judgement in Google Android, several standards for anticompetitive foreclosure still seem to coexist (in Google Android, from lower to higher: "anticompetitive nature" for anti-fragmentation agreements, competitive advantage that competitors are not able to offset for tying, and significant competitive advantage that competitors are not able to offset based on the Intel test in the exclusivity payments). Therefore, it would be useful for the future Guidelines to set out a single standard based on the extent to which as-efficient competitors cannot offset the artificial competitive advantage that results from the conduct not based on the merits, and to establish the counterfactual as the tool to gauge it.

## 2. Comments on particular types of abuse

### a) Abuse of economic dependence as an abuse and abuse of relative market power.

The 2008 Enforcement Priorities Guidance Paper indicates (paragraph 11) that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant. Thus, under Article 102 TFEU it can be an abuse of dominance the unilateral behaviour of companies that profitably modify prices (up or down) of their trading partners. However, there are circumstances in which such unilateral behaviour, which has the particular features and exploitative effects of certain abuses of dominance, is only possible in the bilateral behaviour of two companies because one of them is economically dependent of the other, but not in the general market.

Differences in bargaining positions are common in most markets, and the fact that a trading partner is important for a company, or that it is able to exert heavy pressure in a commercial negotiation does not necessarily means that the economic operator with more negotiation

power is dominant vis-à-vis the other, or that it is dominant in the market in which it competes. In fact, in distribution or digital markets, there are many companies that compete fiercely and do not enjoy market power, while being able to behave independently from their suppliers or professional users (this is common in platforms and/or digital platform markets).

Therefore, guidance as regards when a company is dominant in a bilateral relationship (using the abovementioned dependency analysis), and when the behaviour of a company can be an abuse in those bilateral uneven relationships would be helpful.

**b) Detailed guidance on refusals to supply and unfair access conditions**

Detailed and more comprehensive guidance on refusals to supply, providing in particular a clear understanding on:

(i) what constitutes a constructive refusal to supply and what would be considered an outright refusal to supply as well as what test is the European Commission going to use to assess this matter;

(ii) what are the differences in scope of application between the *Bronner* criteria (C-7/97) and the test provided for in the 2008 Enforcement Priorities Guidance Paper and when to use each one;

(iii) the concept of essential facility/asset;

(iv) specificities of refusals to supply' practices in digital markets; and

(v) assessment of the implications of the *Lithuanian Railways* judgment (C-42/21 P) especially in cases where there is not really a possibility for the dominant company to decide *ex novo* if it wants to starts dealing or not, either because that decisions has already been made and it stops dealing without an objective justification or worsens the dealing conditions (e.g. *TeliaSonera*, *Slovak Telekom*) or because there exists already a regulatory obligation to supply or to grant access to the essential facility or asset in question (e.g. Deutsche Telekom).

This is linked to the clarification requested under section 1.c) to clearly delineate conducts that are artificial or not based on the merits and thus would be subject to the general exclusionary abuse test (no need to prove indispensability, just anticompetitive foreclosure) and those that are legitimate business decisions which can only be double-guessed by competition authorities where that is indispensable to compete (under the essential facilities doctrine). Margin squeeze seems to be a clear case of the latter, so it would deserve a separate analysis from classic refusal to supply as argued below, but more guidance is needed in relation to non-price worsening of dealing conditions (constructive refusal to supply), self-preferencing in dealing and stopping from dealing, especially in digital markets.

Guidance regarding the above-mentioned topics is necessary to provide as much legal certainty as reasonably possible in the application of Article 102 TFEU to refusals to supply cases. An exhaustive and precise assessment of the compatibility of these practices with competition law is of the upmost importance since refusals to supply are closely linked to the right of any undertaking to freely decide on the use of its assets and to choose its trading partners. Enforcement of Article 102 TFEU is thus particularly sensitive in these cases, which suggests that a restrictive approach would be indeed desirable.

In addition, data are critical and strategic assets for many firms active in digital markets and for online platforms. In some cases, data may therefore be indispensable to compete in

downstream or related market and refusals to grant access to it may have implications under Article 102 TFEU, for which the current provisions in the 2008 Enforcement Priorities Guidance Paper may not be sufficient.

As for structure of the Guidelines, we suggest including a specific section for refusals to supply separately from margin squeeze cases, thus allowing for a more specific assessment of the former. Despite some similarities as regards the market (pre)conditions leading to both practices (in essence, a vertically integrated dominant firm), refusals to supply require a differentiated analysis which would deserve an individualized approach in the Guidelines.

In general terms, we would welcome more guidance on the essential facilities (asset) doctrine, in particular on how to determine when a facility or an asset is actually essential for the purposes of the application of Article 102 TFEU. Within the essential facility doctrine, the duplicability test should also be further clarified and how the European Commission will assess the feasibility of creating an alternative source of efficient supply. For instance, the Guidelines could consider including a temporal horizon (i.e., a reference in years) to determine as a matter of principle whether the asset could be effectively duplicated, instead of generally referring to the duplication of the input "in the foreseeable future".

In particular as regards constructive refusals to supply, the AEDC cannot welcome the deletion of the last two sentences of the paragraph 79 of the 2008 Enforcement Priorities Guidance Paper, as stated on point 4 of the Annex to the Communication (C(2023) 1923 final). As a result of this deletion, the European Commission would manifestly depart from the caselaw of the EU Courts, which upholds the application of the indispensability test in constructive refusals to contract. In this regard:

(i) First, the indispensability condition is required where intervention would necessarily impinge on the dominant undertaking's freedom of contract and right to property. The EU Courts have made clear that the Bronner conditions are necessary in cases where putting an end to the alleged abuse would necessarily have the "consequence" of interfering with the dominant undertaking's freedom to contract and right to property by requiring it to dispose of an asset or conclude contracts with persons with whom it had opted not do so (Case C 165/19 P, *Slovak Telekom*, para. 46; Case C-42/21 P, *Lithuanian Railways*, para. 86 and; AG Rantos' Opinion in Case C 42/21 P, Lith*uanian Railways,* paras. 64 and 81).

(ii) Second, the indispensability condition should apply to constructive refusals of access having de facto the same result as an explicit refusal of access. Some conducts that could be perceived as an implicit refusal of access (constructive refusal to supply) ultimately having, de facto, the same result as an explicit refusal of access must also be analysed under the Bronner framework where its constituent elements share the meaning intended by the judgment in *Bronner*. Confining the indispensability requirement to cases involving an express refusal would arguably (i) not be in line with the caselaw of the ECJ (see e.g. Case C 311/84, *Télémarketing (CBEM),* para. 26); (ii) lend itself to potential circumvention; (iii) reduce legal certainty; and (iv) fail to capture the impact that intervention would have on dominant undertakings' fundamental rights.

(iii) Third, as the European Commission itself explained in its Rejoinder in *Slovak Telecom*,[5] "*the distinction [...] between outright refusals and constructive refusal is misleading. The true distinction is whether the circumstances are such that a compulsory access obligation stems directly from Article 102 TFEU, with failure to*

[5] Made public following an access to documents request.

*grant such access constituting an abuse* [...].” Thus, and in the light of the European Commission’s statements, the deletion of the last two sentences of the paragraph 79 of the 2008 Enforcement Priorities Guidance Paper proves to be inappropriate and should be corrected in the future Guidelines.

(iv) Finally, specific guidance on refusals to supply in the context of digital markets would be required and, in particular, what is to be understood as an asset in the digital economy. Furthermore, guidance on the conditions under which data (datasets) could or could not be effectively replicated or substituted would be welcome to shed light on those cases in which data is considered essential and ensure effective competition in the digital marketplace.

### c) Detailed guidance on tying and bundling

Bundling and tying are very common commercial practices in many sectors across the economy and in many cases these practices constitute competition on the merits which can lead to efficiencies that ultimately benefit consumers.

The current framework does not provide sufficient guidance on which practices are indeed non problematic and those cases in which tying and bundling practices are considered to result in anticompetitive foreclose and are therefore considered abusive behaviour. This results in legal uncertainty as well as can deter innovation in particular in technically complex and digital sectors.

The Guidelines should provide for clear guidance on what constitute competition on the merits and prohibited practices and in particular, they should clarify: (i) the concept of tying and bundling in particular in digital markets; (ii) the criteria that should be applied to establish that products are distinct or not; and (iii) the circumstances that are relevant and should be taken into account for establishing foreclosure in particular in digital markets.

It would be desirable that the future Guidelines include at least the minimum standard of assessment that competition authorities will consider in determining whether a dominant company’s intervention in certain administrative procedures or complex litigation might constitute an abusive conduct by a dominant undertaking.

In particular, it would be useful to clarify the specific test for multi-product discounts that is left open in the 2008 Enforcement Priorities Guidance Paper (paragraphs 59-61), which limits itself to providing for the principle that, where competitors can replicate the bundle, then the test is whether the price of the bundle is predatory; and where competitors cannot replicate the bundle, then the predatory pricing test applies to each product in the bundle. However, there are several practical approaches to this: e.g. the individual (incremental) price and cost of all tying (non-replicable) and tied products must be calculated and the whole discount is to be applied to each of them and then compared to its costs, the individual (incremental) price and cost of only tied (replicable) products is to be calculated and the whole discount is to be applied only to them and then compared to its costs, the discount must be allocated from the whole bundle to each tying and tied or just to tied product and the global discount-adjusted price is to be compared with their incremental costs, the contestable part of the demand is to be calculated as in loyalty payments and then the absolute volume of discount is spread over the non-contestable part to see whether it would

be profitable for competitors who cannot replicate some of the products to offer the same absolute volume of discounts. The different models are discussed in economic literature.[6]

### d) Detailed guidance on abuse of proceedings or vexatious litigation as a form of abuse

In relation to the possibility of a dominant company may be considered to have abused its dominant position through the figure of abuse of proceedings or vexatious litigation, it may be of interest identifying whether there should be a higher standard of proof in the case of judicial action, as a fundamental right of the dominant company may be at stake and judicial organs may have already intervened in the dispute.

It would be desirable that the future Guidelines include at least the minimum standard of assessment that competition authorities will consider in determining whether a dominant company's intervention in certain administrative procedures or complex litigation might constitute an abusive conduct by a dominant undertaking.

For this purpose, it may be helpful to further develop the elements identified as relevant by the competition authorities and the ECJ in previous cases, such as:

(i) the provision of deceptive and/or consciously misleading information to administrative or judicial authorities[7];

(ii) judicial action with inexistent winning prospects and/or with proven intention to foreclose the market and exclude competitors[8];

(iii) the (non-)necessity of a formal finding of judicial recklessness for a finding of abuse[9]; or

(iv) the relevance of eventual diverging decisions or judgments by administrative or judicial bodies on the underlying facts (or law) which are the subject of the allegedly abusive litigation[10].

Particular attention should also be given to the litigation promoted by SEP owners in the context of the interpretation of Article 102 TFEU rendered by the ECJ in its judgment of 16 July 2015, *Huawei/ZTE*, C-170/13, ECLI:EU:C:2015:477. In line with the broader discussion under section 2.b) above, it is particularly important in this respect to draw the line between general exclusionary abuses based on artificial conduct (not based on the merits) and anticompetitive foreclosure (as in *ITT Promedia*) and essential facilities cases where a SEP holder who may legitimately protect their SEP may be forced to offer licence in FRAND terms (as in Huawei v ZTE). In the latter case, it would be useful, in line with the discussion on "fairness" above and the broader discussion on artificiality/competition not based on the merits to give more detail on how to establish where not so obviously

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6 E.g., Patrick Greenlee, David Reitman, and David S. Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 2004.

7 See judgment of 6 December 2012, Astrazeneca/Commission, C-457/10 P, EU:C:2012:770, paragraphs 93, 96 and 98.

8 See decision of the Spanish National Markets and Competition Commission of 21 October 2022, S/0026/19 Merck Sharp & Dohme, S.A.

9 Ibid.

10 See judgment of 13 September 2012, Protégé International Ltd/Commission, T-119/09, ECLI:EU:T:2012:421, paragraph 56.

vexatious actions by SEP holders could still be artificial and thus subject to the general abuse test. Some criteria that may be useful in this regard could be transparency (whether the designation of the patent as SEP has been the result of an open process in the context of standard-setting bodies and the criteria for calculating the FRAND conditions are disclosed); openness (whether there is a commitment in the context of the standard-setting process in the standard-setting body to licence the SEP in FRAND terms and that commitment follows the SEP in subsequent transfers); fair value (whether the FRAND terms are calculated based on all relevant factors to assess the value of the patented invention apart from its inclusion in the standard and its combination with other technologies not claimed in the patent); unconditionality (FRAND licence not being conditional upon taking licence for other non-essential patents); impartial and affordable dispute settlement mechanisms.

### e) Guidance on the new categories of abuses such as self-preferencing, data-leveraging and other type of abuses, in particular in digital sectors

Since the publication of the 2008 Enforcement Priorities Guidance Paper, new and complex digital markets have surged due to the accelerating technological progress, and with this advances, new commercial practices have also been considered as new types of infringements under Article 102 TFEU such as so-called, self-preferencing (*Google Shopping*, case T-612/17) and data-leveraging (*Servizio Elettrico Nazionale*, case C-377/20). Taking into account the crucial importance of these new markets in the current economy and the novelty of the practices, it is necessary for the new Guidance to provide clear rules on these new infringements that were not previously foreseen in the 2008 Guidelines.

Without prejudice of the interaction with other areas (such as the DMA or DSA, see Section 3c, below), given the increasing relevance of these new markets, a clear set of rules from the European Commission would be invaluable for NCAs which are also dealing with an increasing number of matters related to dominant technological undertakings.

The Guidelines should provide guidance on which type of practices are going to considered problematic as well as it should explain which methodology will be used by the European Commission is going in future cases to establish the limit is between competition on the merits and abuses of dominant position. For example, more guidance would be welcome on how the European Commission plans to analyse if a company that owns a platform is favouring its own products or if said products are simply at the top of the list because of organic reasons (namely SEO practices). The same goes for data-leveraging. Clear indications on how to differentiate between resources that are obtained due to the dominant position of a company or due to experience and know-how, and in what cases the use of these resources can be justified on the basis of consumer efficiencies. Furthermore, clarifications on infringements such as naked restrictions can also be helpful in order to ensure legal certainty for every undertaking active in digital markets.

## 3. Interaction between Art. 102 TFEU and other areas

### a) Dominance and parallel trade

The Court of Justice considered in the past that a refusal to meet ordinary orders from wholesalers by a dominant undertaking may be abusive.[11] To ascertain whether the orders

[11] Judgement of the Court of Justice of 16 September 2008, joined cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE et al.*, ECLI:EU:C:2008:504, paragraph 77.

are ordinary, the Court mandated an analysis of both the size of those orders in relation to the requirements of the market in a given Member State and the previous business relations between the dominant undertaking and the wholesalers concerned.

More recently, the European Commission has given indications that a limitation of product quantities for a given territorial market "*so that the volumes correspond to the demand from customers in certain territories or the demand from certain customer groups*" may be contrary to Article 101[12] and/or Article 102.[13]

A unilateral decision limiting volumes directed to a given territory may be justified on grounds of capacity limitations, avoiding shortages in other territories or strategic investments in new markets, among many others.

However, the European Commission seems to suggest that a decision to this effect may be anticompetitive, regardless of the ordinary or extraordinary character of the orders received from a distributor in the affected Member State. The European Commission seems to understand that a limitation of volume related to the demand of a given territory amounts to a hardcore restriction. It would then be worth clarifying how to encompass such interpretation with the concept of ordinary orders included in the caselaw.

### b) Dominance and merger control

The ECJ judgment of 16 March 2023, *Towercast*, C-449/21, ECLI:EU:C:2023:207 has confirmed that a concentration of undertakings which has no Community dimension, is below the thresholds for mandatory ex ante control laid down in national law and has not been referred to the European Commission under Article 22 of the Merger Regulation, may constitute an abuse of a dominant position.

We would strongly support the European Commission to include in the Guidelines a clear delineation of the criteria that will follow to assess those cases and that the degree of dominance thus reached would substantially impede competition, which is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market[14].

### c) Dominance and Digital Markets Act

Whereas the prospect of Guidelines on exclusionary abuses is indeed welcome, since they will provide legal certainty and foster more consistent enforcement, the lack of references (not even the slightest hint is provided in the accompanying Competition Policy Brief) to the coordination of the text with the DMA is worrying, at least in relation to the following topics:

(i) It is necessary to understand whether contestability "*must relate to the ability of firms to effectively overcome barriers to entry and expansion, and compete with the*

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12 Guidelines on vertical restraints, Brussels, 10.5.2022, C(2022) 3006 final, paragraph 204(d).

13 Decision of the European Commission of 13 May 2019, case AT.40134 – AB InBev beer trade restrictions.

14 See, judgment of 16 March 2023, Towercast, C-449/21, ECLI:EU:C:2023:207, paragraph 52, and case law therein cited: judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26, and of 16 March 2000, *Compagnie maritime belge transports and Others* v *Commission*, C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 113)

*gatekeeper on the basis of the intrinsic quality of their products and services*" (DMA, Recital n. 32), is it to be understood as the opposite to the concept of dominance.

The purpose of Regulation 2022/1925, of 14 September 2022, is made explicit in its official name: "*on contestable and fair markets in the digital sector*". The first of these two purposes shows that the DMA is undoubtedly inspired by competition law, although it has been repeatedly asserted that the DMA is not competition law. Hence, in this same Article 1, paragraph 6 reads: "*This Regulation is without prejudice to the application of Articles 101 and 102 of the TFEU*". This is repeated like a mantra throughout the provisions and is developed at length in the previous recitals. Are the well-established criteria used to assess the existence of dominance useful to assess lack of contestability?

(ii) It must be clarified whether the concept of gatekeeper bear any relation to an undertaking in a dominant position, specifically, regarding the "*established and lasting position*" (Article 3.c) DMA).

The concept of an "*established and lasting position*" is quite complicated to construe. The influence of competition law on the DMA is evident here, and it is inevitable to associate the "*established and lasting*" position with the dominant position of Art. 102 TFEU. But the new Regulation is silent on the matter, and it is to be expected that it will be caselaw that will define to what extent the two legal categories are analogous.

Implicit in the gatekeeper concept is market power[15], since without it, neither would the gatekeeper have "*significant influence*" on the internal market (Art. 3.1.a) DMA) nor would the basic platform service it provides be a "*significant*" gateway (Art. 3.1.b) DMA). Therefore, nothing should prevent importing the entire body of doctrine and caselaw of more than half a century of application in the EU of the prohibition of abuse of dominance contained in Art. 102 TFEU to outline, mutatis mutandis, the precise contours of this "*entrenched and durable position*".

(iii) There are certain infringements of gatekeepers that may simultaneously violate the new DMA and competition law. That situation is likely to occur mainly in relation to the abuse of dominant position prohibited by Art. 102 TFEU. The risk of a situation of non bis in idem demands to clarify whether there could be any kind of prejudiciality.

The proposed Guidelines should not deviate from the DMA, for the same reason that this Regulation is "essentially sectoral competition law. Its fairness provisions are secondary. The main behavioral obligations imposed on gatekeepers are aimed at preserving competitive processes"[16].

As a synthetic summary of the flawed interrelationship between the DMA and competition law, we fully endorse these words: "The DMA will unquestionably change the legal reality of digital gatekeepers. Inspired by competition law, the DMA will always carry that DNA. At the same time, it is important to remember that the DMA differs from competition law in several respects: it follows a prohibition system, it includes a numerus clausus of prescriptive obligations and prohibitions, and it is an ex-ante sector-specific regulatory regime. The challenge will be to ensure that the

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15 GERADIN, D.: "What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?" (18 February 2021). Available at SSRN: https://ssrn.com/abstract=3788152.

16 PETIT, N.: "The Proposed Digital Markets Act (DMA): A Legal and Policy Review" (May 11, 2021). Available at SSRN: https://ssrn.com/abstract=3843497.

complementarity between the DMA and competition rules does not result in fragmentation and inconsistencies"[17].

(iv) In the same vein, Articles 5 and 6 DMA are a whole amalgam of obligations and prohibitions, mostly born from the experience already existing in digital markets, from sanctioning proceedings under article 102 TFEU, some of them already closed, others open, and many of them still pending judicial review. This raises the question on what happens if one of these practices, condemned as anticompetitive, is acquitted by the General Court or the ECJ and the possibility of affecting the DMA list?

Some authors have already highlighted[18] that some of the remedies envisaged by the European Commission in enforcing article 102 TFEU against anticompetitive practices of the gatekeepers such as self-preferencing, tying, refusal to supply, etc. are the core of much of the obligations now envisaged in articles 5 and 6 of the DMA.

Indeed, it is very interesting to see the exercise carried out by some authors[19] to explain in which concrete antitrust cases the obligations originate, and how easy it is to "trace" the entire content of articles 5 and 6 of the DMA in the files against Google, Amazon, Apple, Facebook, etc. in the digital markets.

However, given this close connection between both set of norms, there are too many areas of overlap for there not to have been a greater effort to coordinate and articulate the two. Hence, it is not clear whether the combination now of ex ante regulation with the classic ex post regulation of antitrust law will achieve better results in the market, or whether it will create a greater degree of regulatory confusion and legal uncertainty among operators.

### d) Dominance and sector regulation

The enforcement of Article 102 TFEU and regulatory actions that may affect the competition in the markets must be as consistent and coherent as possible, otherwise consumer welfare will be adversely affected. Thus, legal certainty is ensured by promoting that regulation and public policies are predictable and not overturned by the enforcement of article 102 TFEU.

Regulation may also seek to promote effective competition, ensuring that markets function in a fairly manner. Therefore, when dealing with dimensions directly linked to freedom of enterprise or the internal market (i.e., innovation, investment, price reduction), conflicts between the objectives of regulation and those of competition policies must be avoided in order to achieve a coherent and balanced approach. Regulatory authorities are usually well placed to better understand from a holistic approach the markets which are regulated and the needs and tradeoffs of the economic decisions.

A sound and coherent approach by the European Commission of prior regulatory decisions when enforcing article 102 TFEU will allow companies to plan and act strategically and effectively, which encourages investment and innovation. In addition, a stable and

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17 KOMNINOS, A.: "The Digital Markets Act: How Does it Compare with Competition Law?" (June 14, 2022). Available at SSRN: https://ssrn.com/abstract=4136146.

18 HUTCHINSON, C. and TRESCAKOVA, D.: "Tackling gatekeepers' self-preferencing practices", European Competition Journal, Vol. 18, n. 3 (2022), pp. 567-590.

19 CAFFARRA, C. and SCOTT-MORTON, F.: "How Will the Digital Markets Act Regulate Big Tech?", in Promarket (Stigler Center), 11 January 2021. Available at: https://www.promarket.org/2021/01/11/digital-markets-act-obligations-big-tech-uk-dmu/.

predictable business environment is created, which benefits consumers and the economy as a whole.

According to paragraph 8 of the 2008 Enforcement Priorities Guidance Paper, when applying the general principles of enforcement, the circumstances of each case will be taken into account, as in the case of regulated markets, where the specific regulatory environment, market conditions and the specific behavior of the companies involved will be merely taken into account. But it is necessary to reach a step further and promote and implement mechanisms to enhance and ensure the best coherent approach to the competition problems at stake.

Therefore, it is a good opportunity within the framework of the debates of these future Guidelines to decide whether to increase the importance of prior regulatory decisions during the process of qualifying a conduct as an abuse of dominance. Thus when regulatory authorities have faced and decided situations concerning for example the fair remuneration of essential inputs, incentives to supply to competitors, methodology and criteria for profitability of investments decisions, or specific situations concerning discriminatory practices or barriers to entry, the European Commission and the NCAs should consider these prior analysis or decisions as a rebuttable presumption of a sound and reasonable appraisal for the same goal that Article 102 TFEU wants to achieve: effective competition.

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