RESPONSE TO COMMISSION CALL FOR EVIDENCE SEEKING FEEDBACK ON THE ADOPTION OF GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE

The French *Association des Avocats Pratiquant le Droit de la Concurrence* (the "**APDC**") has taken good note of the initiative of the European Commission (the "**Commission**") to amend its 2008 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings (the "**Guidance**"), through an "**Amending Communication**" published in the Official Journal on 31 March 2023 and entered into force immediately.

The Amending Communication aims at taking into account "*the evolution of the case law of the Union Courts*" and "*enhancing transparency on the principles underpinning the Commission's enforcement action*"[1].

The APDC also duly notes that, on 27 March 2023, the Commission launched a "**Call for Evidence**" with a view to adopt broader guidelines on the application of Article 102 TFEU to exclusionary conduct (the "**Forthcoming Guidelines**"). The Commission indicated that it plans to publish a draft of the Forthcoming Guidelines for public consultation by mid-2024, for final adoption in 2025. Upon the adoption of the Forthcoming Guidelines, the Commission has stated that it will withdraw the 2008 Guidance, as amended by the Amending Communication.

The upcoming contribution from the APDC will encompass a wide range of topics, including an introduction and some methodology remarks (**Section I**), comments regarding the negative influence criteria (**Section II**), regarding the As Efficient Competitor test (**Section III**), and regarding the concepts of refusals to supply and margin squeeze (**Section IV**), and finally express some expectations for Forthcoming Guidelines on the application of Article 102 TFEU (**Section V**).

Section I – Introductory remarks & Methodology

1. Before providing substantive comments on the Amending Communication and considerations for the Forthcoming Guidelines, the APDC would like to set out some preliminary remarks regarding the process and methodology used by the Commission in adopting its Amending Communication and launching its Call for Evidence.

2. **First,** regarding the method, the APDC doubts whether good administration and legal certainty would require the adoption, by surprise, of substantial and immediately applicable amendments to a binding communication of the Commission.

3. Although the Commission argues that the Guidance "*did not constitute a statement of the law and did not provide an interpretation of the notion of abuse of a dominant position*", there is no doubt that the Guidance is in fact binding on the Commission.

4. Indeed, the European Court of Justice ("**ECJ**") has consistently ruled that "*in adopting [soft law instruments] and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations*"[2].

[1] *See* Amending Communication, para. 7-8.
[2] *See* e.g., Judgement of the ECJ of 28 June 2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, para. 211, *Dansk Rørindustri*.

5. There is no question that those findings apply to the Guidance, which has been formally adopted, publicly announced and presented, published in the Official Journal of the European Union and is accessible under the "Legislation" tab of DG COMP's own website. The Guidance itself states that its purpose is to "*provide greater clarity and predictability"* and "*to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission*"[3].

6. Therefore, by substantially modifying the Guidance on essential points related to the standard of proof and the application of Article 102 TFEU, without any prior consultation and with immediate effect, the Commission is at least jeopardizing legal certainty and the protection of legitimate expectations and, more generally, exceeding its powers.

7. At the very least, the Amending Communication should have been subject to prior public consultation to be more useful, and its entry into force should have been delayed to allow undertakings to take into account the new guidance.

8. **Second**, as concerns the substance, the APDC acknowledges the Commission's intention to apprehend effectively any form of abuse of a dominant position that could harm the efficiency of markets and the welfare of the European consumers; it also welcomes the Commission's willingness to update the Guidance with the most recent case law and to "*provide greater clarity and predictability as regards the Commission's general framework of analysis in determining whether to pursue as a matter of priority certain cases of exclusionary conduct*"[4].

9. However, the APDC doubts that this objective of clarity and predictability can be achieved in view of the methodology retained by the Commission.

10. In particular, the APDC would like to point out the following issues, which will be further developed in subsequent sections of this contribution:

    - The proposed evolution of some key concepts of the Guidance does not seem to bring greater certainty to undertakings. For example, the introduction of the notion of "*negative influence*" in paragraph 19 of the Guidance is questionable, as the notion does not seem sufficiently operational to allow potentially dominant companies to assess precisely the situations in which they are likely to infringe Article 102 TFEU. By definition, any competitive constraint may be such as to negatively influence the activity of one or several competitors;

    - The Amending Communication allegedly aims at taking into account the evolution of the case law since 2008. More precisely, the Amending Communication refers to 27 Commission decisions and 32 rulings by the EU Courts regarding the application of Article 102 TFEU since 2008[5]. However, the amended paragraphs in the Guidance refer to only 12 judgements of the Courts post-2008, without any explanation as to how these few cases have been selected. If the purpose of the Commission is indeed to reflect recent case law in the Guidance, then it should have been made clear as to what guiding principles were followed to select what is presented as the relevant case law. Besides, in some cases, the insight that the Commission is deriving from those rulings seems at odds with the key findings of the EU Courts – *see e.g.,* the rather surprising use made by the Commission of the *Intel* ruling[6] of the ECJ, which seems to unduly limit the lessons that can be derived from this judgment.

[3] *See* Amending Communication, para. 2.
[4] *See* Amending Communication, para. 5
[5] *See* footnote 9 on page 2.
[6] Judgement of the ECJ of 6 September 2017, Case C-413/14 P, *Intel Corp. v Commission*.

11. In the APDC's view, these immediately effective amendments to the Guidance signal a backtracking and flexible deviation from the objective of setting up a coherent analytical framework based on consumer welfare and effects-based approach grounded in solid economic analysis.

12. **Third**, the adoption of the Forthcoming Guidelines, given the stakes and the impact on stakeholders, particularly in technological and innovative sectors, would require an extensive impact assessment. In this respect, the APDC is surprised to note that the Commission excludes from the outset any need for such a study. Therefore, with regards methodology, it is imperative that the Commission implements a just and equitable process, in particular when reforming the Guidelines, as such reform will impact a multitude of stakeholders. Consensus-building amongst all parties involved, including judges and Advocates General of the ECJ, is crucial to ensure the balance of the enforcement of the Forthcoming Guidelines. In that context, the APDC strongly encourages the Commission to conduct and publish a thorough impact assessment, including a declination of the impact of the Forthcoming Guidelines on different sectors. A sectoral analysis seems required to ensure the proportionality and legality of the Forthcoming Guidelines.

13. Besides, the DG COMP Staff Policy Brief titled *A dynamic and workable effects-based approach to Article 102 TFEU* (the "**Policy Brief**"), which accompanies the Call for Evidence and explains the background to the launch of this initiative, clearly states the objective for the Commission to "*go beyond consumer welfare, at least when the latter is defined strictly in economic terms*" (*see* Introduction to Policy Brief). This constitutes a strong overarching statement that will need to be openly discussed with all stakeholders before any final position is adopted on the matter.

14. Generally speaking, the APDC is concerned about what appears like a highly political initiative, which may obviously be seen as an attempt to enlarge the scope of the Commission's intervention and use a more flexible legal standard, in competition with the jurisdiction of sectoral regulators. In this context, the APDC considers the consultation process on the Forthcoming Guidelines as an opportunity for the Commission to specify the limits of its field of intervention.

15. Finally, the Commission should carefully consider potential improvements to its internal procedures, in order to strike a more effective balance between efficiency and the implementation of calls for contributions necessary for informed decision-making.

Section II – Negative influence criteria

16. The Policy Brief and the Amending Communication suggest that the existing test for exclusionary conduct enabling the dominant undertaking to profitably increase prices (or profitably "influence output, innovation, or the variety of goods and services") will be dropped.

17. In its Policy Brief and in its Amending Guidelines, the Commission argues that profitability is not necessarily a relevant consideration when assessing foreclosure intentions and effects. The Commission thus suggests replacing the notion of "profitability" by a more generic notion of conduct "*adversely impact[ing] an effective competitive structure, thus allowing the dominant undertaking* ***to negatively influence****, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services*" [emphasis added].

18. This calls for several comments, in line with what was set out in the first part of this contribution.

19. In terms of methodology, the setting of enforcement priorities by the Commission should not lead to changes in definitions that are structural for the application of Article 102 TFEU, such as the notion of "anticompetitive foreclosure".

20. On the merits, while an increase in price is indeed not the only relevant factor to determine consumer harm, profitability cannot be entirely dismissed as a relevant consideration to determine whether certain conducts lead to a competitive advantage to the detriment of a competitor (and ultimately to the detriment of consumers). A rational economic organisation will only engage in or maintain exclusionary conduct if it is viable in the short, mid or long-term and is likely to result in profits through increased margins, access to technology, innovation, services, data, or other competitively relevant inputs.

21. The Commission here again appears overly selective in articulating its revised test based on EU case law. While the Google Android judgement did indeed refer to "*negatively influencing parameters of competition*", the judgement also referred to hampering or eliminating effective access of actual or potential competitors to markets or to their components "[…] *through recourse to means different from those governing normal competition*".[7] It is also subject to a pending appeal (C-738/22 P).

22. Likewise, the new "test" also seems to be at odds with the recent Servizio Electtrico Nazionale SpA[8] judgment in which the ECJ specifically refers to the value of the comparison with an equally efficient competitor[9] and the importance of the economic interest for the dominant undertaking in qualifying what can be considered as means other than those which come within the scope of competition on the merits:

> "*Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits (see, to that effect, judgment of 3 July 1991, AKZO v Commission, C-62/86, EU:C:1991:286, paragraph 71)*"[10].

23. Beyond ignoring the relevance of "profitability" and other factors previously considered by the EU Courts, the new test of "negative influence" seems excessively broad and would likely increase uncertainty around the interpretation of Article 102 TFEU rather than providing helpful guidance. The threshold of what constitutes "negative influence" is likely to be very low, based on any literal interpretation of the term "influence", which is defined as the "power or capacity of causing an effect in indirect or intangible ways" (according to the Merriam-Webster dictionary). Such threshold may therefore imply an absence of need for the conduct to result in any actual or potential direct effect.

Section III – As efficient competitor test

24. In the ECJ's own words, the "As Efficient Competitor" ("**AEC**") test refers to "*various tests which have in common the aim of assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses*"[11].

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[7] Judgment of the General Court of 14 September 2022, Case T-604/18, *Google and Alphabet v Commission (Google Android.)*
[8] Judgment of the ECJ of 12 May 2022, Case C-377/20, *Servizio Elettrico Nazionale.*
[9] Ibid., points 71 et seq.
[10] Ibid., points 77 et seq.
[11] Judgment of the ECJ of 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 56, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*.

25. In cases involving price-based alleged exclusionary conduct (*i.e.*, predatory pricing, margin squeeze but also discount and rebates schemes), this test has traditionally been used as a proxy by the Commission to set its enforcement priorities and distinguish between cases which warrant an intervention from the Commission on the basis of Article 102 TFEU and those which do not. As reflected in the paragraphs 23 and 27 of the Guidance:

    - "*With a view to preventing anti-competitive foreclosure, the Commission will* ***normally only*** *intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking*" (emphasis added); and

    - "*If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene*".

26. In the Amending Communication, the Commission has decided to move away from this approach, which it no longer considers suitable, on account of the fact that, in certain cases, a foreclosure effect may be characterized, and an abuse may thus be found, even if an equally efficient competitor as the dominant undertaking could, without being driven out of the market, engage in and sustain the same pricing policy. According to the Commission, this assessment should be conducted "*taking into account other relevant quantitative and/or qualitative evidence*"[12].

27. Beyond the criticism of the general approach of the Commission which, as mentioned above, is in itself questionable, the modifications brought to the Guidance in relation to the AEC test call for the following observations from the APDC.

28. **First and foremost**, the APDC notes that, although the AEC test has never been presented as a universal solution to detect and prevent all sorts of pricing abuses, in view of its central position in the Guidance and EU Courts' case-law, it has largely been viewed and used by (potentially) dominant companies as a "*safe harbour*" when considering new pricing strategies. It therefore constitutes a useful tool for companies to self-assess their pricing strategy and ensure compliance with Article 102 TFEU. The Commission's change of approach is thus likely to increase legal uncertainty for (potentially) dominant undertakings.

29. **Second**, it is clear from the Amending Communication and its Policy Brief explaining in more detail the reasons for the Commission's initiative that the shift operated in relation to the relevance of the AEC test intends to capture cases where a conduct harmful to less efficient competitors would have detrimental effects on the market overall. The Commission indeed indicates that, although it will "*generally intervene*" when the conduct at stake is capable of hindering competition from equally efficient competitors[13], it would now also be inclined to intervene in a situation where a less efficient competitor also exerting a constraint on the dominant undertaking is impacted[14]. According to the Commission, such an intervention could notably be warranted in markets with significant barriers to entry and expansion such as digital markets where challengers, although less efficient, "*could still be successful in satisfying specific consumer needs*"[15].

[12] Paragraph 27 of Amending Communication.
[13] Paragraph 23 of Amending Communication.
[14] Paragraph 24 of Amending Communication.
[15] Policy Brief "*A dynamic and workable effects-based approach to abuse of dominance*", page 5.

30. However, in the absence of appropriate guardrails, this new focus appears to be a source of legal uncertainty for companies in particular since the Commission does not provide explanations/objective criteria to determine which situations would warrant an intervention when only less efficient competitors would be concerned. The APDC considers that the Commission should stick to EU Courts' established case-law according to which "*article 102 TFEU does not seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market*"[16] and limit potential interventions to very exceptional cases where the competitive structure of the market – not competitors – needs to be protected.

31. **Third**, the Commission suggests amending paragraph 25 of its Guidance, by introducing a possibility rather than an obligation to examine economic data relating to cost and sales prices to determine whether even a hypothetical competitor as efficient as the dominant undertaking in terms of costs would likely be foreclosed by the alleged abuse or not. This change of approach is based on an analysis of European case-law which does not appear to be complete and therefore requires certain clarifications.

32. The APDC does not challenge the fact – as presented in the introduction to this amendment – that the AEC test is optional. Indeed, the AEC test has consistently been presented by both the Commission and the EU Courts as one tool among others to establish an abuse of a dominant position, which must be found "*in the light of all the relevant circumstances*"[17].

33. However, the Commission ignores the fact that the case-law has also consistently held that:

- Foreclosure cannot be purely hypothetical and must, in principle, be based on tangible evidence[18];
- In order to establish such foreclosure, the AEC test is applicable irrespective of the practice at stake and not only, as the Policy Brief suggests, in cases of predatory pricing or margin squeeze. In particular, it follows from the decisional practice that the AEC test is applicable in analyses of exclusivity clauses[19] or loyalty rebates, including retroactive rebates[20]. The ECJ went even further in *Intel* where it stated that the balancing of the pro- and anti-competitive effects of a rebate scheme can be carried out "*only after an analysis of the intrinsic capacity of that practice to*

[16] *See*, for example, Judgment of the ECJ of 6 September 2017, C-413/14 P, EU:C:2017:632, paragraph 133, *Intel Corp. v Commission*, and Judgment of the ECJ 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 37, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*.

[17] Judgment of the ECJ of 19 January 2023, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*, Case C-680/20, EU:C:2023:33 paragraph 62. Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet*, C-23/14, EU:C:2015:651, paragraph 29; *See* as well Judgment of the General court of 14 September 2022, T-604/18, EU:T:2022:541, paragraph 643, *Google and Alphabet v Commission (Google Android)*.

[18] Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet*, C-23/14, EU:C:2015:651, paragraph 65; Judgment of the ECJ of 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 42, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*.

[19] Judgment of the ECJ 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 59, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*: "*Nevertheless, even in the case of non-pricing practices, the relevance of such a test cannot be ruled out. A test of that type may prove useful where the consequences of the practice in question can be quantified. In particular, in the case of exclusivity clauses, such a test may theoretically serve to determine whether a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts (See, by analogy, judgment of 25 March 2021, Slovak Telekom v Commission, C165/19 -P, EU:C:2021:239, paragraph 110)*".

[20] Judgment of the ECJ of 6 October 2015, C-23/14, EU:C:2015:651, paragraph 58, *Post Danmark A/S v Konkurrencerådet*,: "*Nevertheless, that conclusion ought **not** to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC.*

foreclose competitors which are at least as efficient as the dominant undertaking"[21], it being underlined that, in general, in order to assess this capacity, an AEC test "*can be useful*"[22].

34. Above all, the Commission, according to the APDC, inappropriately minimizes a point made in the European case-law that, when an AEC test is submitted, the Commission has to take it into account, whether it is a test initiated by the defendants[23] or comes from the critical analysis of a test initiated by the Commission[24] . The EU Courts have indeed generally held that the " *use of an 'as efficient competitor' test is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results*."[25]

35. Without such an analysis, the Commission risks having its decisions overturned, not only because it is required to analyze the dominant undertaking's capacity to foreclose "as efficient competitors" and balance the favorable and unfavorable effects of the practice in question, but also because it may even expose itself to a violation of the undertaking's rights of defence, for example when it does not allow the undertaking concerned to express itself orally on the AEC test in due time.[26]

36. Thus, if it turns out that an AEC test, although presented by the Commission, is not such as to corroborate the finding of abuse, the Commission's decision must be annulled[27].

37. The APDC considers that, to ensure to the legal certainty to which the Commission must contribute, these points should be included in the Amending Communication.

38. **Finally**, as mentioned above, the APDC notes that the Commission has entirely redrafted paragraph 27 of its Guidance, opening up the possibility for it, in its analysis, to balance the results of an AEC test with other quantitative and/or qualitative evidence. This change of paradigm, which is not explained in the Policy Brief, enlarges the scope of intervention of the Commission.

39. To justify this change of paradigm, the Commission relies in footnotes on selected case-law, in which either an AEC test was not put forward[28], or, even when it was, the passages selected do not give the

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[21] Judgment of the ECJ 6 September 2017, C-413/14 P, EU:C:2017:632, paragraph 140 *Intel Corp. v Commission*: "*The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer (judgment of 15 March 2007, C95/04 -P, EU:C:2007:166, paragraph 86, British Airways v Commission). That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision* ***only after*** *an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking*." *See* as well Judgment of the General court of 14 September 2022, T-604/18, EU:T:2022:541, paragraph 640, *Google and Alphabet v Commission(Google Android)*.

[22] Ibid., paragraph 641.

[23] Judgment of the ECJ of 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 62, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*.

[24] Judgment of the ECJ of 6 September 2017, C-413/14 P, EU:C:2017:632, paragraphs 141 et seq., *Intel Corp. v Commission*, where the Court concluded: "*In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.*".

[25] Judgment of the ECJ of 19 January 2023, Case C-680/20, EU:C:2023:33 paragraph 62, *Unilever Italia Mkt.Operations v Autorita Garante della Concorrenza e del Mercato*.

[26] Judgment of the General court of 14 September 2022, T-604/18, EU:T:2022:541, paragraph 997 et seq., *Google and Alphabet v Commission (Google Android)*.

[27] Judgment of the General court of 14 September 2022, T-604/18, EU:T:2022:541, paragraph 799 et seq., *Google and Alphabet v Commission (Google Android)*.

[28] Judgment of the ECJ of 30 January 2020, EU:C:2020:52, *Generics (UK) and Others*, C-307/18 ; Judgement of the ECJ of 17 February 2011, C-52/09, EU:C:2011:83.

full measure of the – primary – importance of the AEC criterion in the overall analysis of the (actual or potential) effects[29].

40. Against this background, the APDC is concerned that the Commission's underlying objective is to lower the standard of proof to characterize an abuse in cases where the AEC test is positive (*i.e.,* the conduct is not capable of excluding equally efficient competitors). While the Commission seems to still recognize that an effects-based approach is warranted under Article 102 TFEU, in line with the case-law of the ECJ, the possibility for the Commission to factor in the results of an AEC test and balance them with other relevant quantitative and/or qualitative evidence leaves plenty of room for the Commission to resort to a more formalistic approach.

41. In particular, if the Commission's intention is to have qualitative evidence, such as the intention of the dominant undertaking, prevailing over quantitative evidence, there is a risk of false positives. In the APDC's view, it is only in exceptional circumstances that the Commission, if it concludes that the conduct at stake is not capable of excluding an equally efficient competitor, should be allowed to nonetheless conclude to an abuse under Article 102 TFEU.

Section IV - Refusals to supply and margin squeeze

42. The Amending Communication and Policy Brief address the question of refusals to supply and margin squeeze.

43. At the outset, the APDC notes that, similar to the Guidance, the Policy Brief focuses on exclusionary abuses and does not address the question of exploitative abuses. Even if the Commission has dealt with a limited number of exploitative abuse cases so far, the APDC would see value in the Forthcoming Guidelines also addressing exploitative abuses.

44. Indeed, national competition authorities (the "**NCAs**") have relied on exploitative abuses more frequently, including in significant cases in the digital sector[30]. The adoption of EU-wide guidelines on exploitative abuses would enhance legal certainty and minimise any risk of divergence between the NCAs in terms of their interpretation of Article 102 TFEU. In addition, the distinction between exploitative and exclusionary abuse may be difficult to draw in practice. Self-preferencing in the digital economy provides an illustration of practices which may fall on either side of the distinction depending on the circumstances of the case[31]. Finally, the Commission seems to also rely on exploitative abuses in more recent but emblematic cases[32].

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[29] Judgement of the ECJ of 17 February 2011, C-52/09, EU:C:2011:83, paragraphs 31 and 33, *TeliaSonera Sverige*, ; Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 177: "*It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits."* judgment of 29 March 2012, Telefónica and Telefónica de España v Commission, T-336/07,EU:T:2012:172, paragraph 189; *See* also in the same case, Judgment of 10 July 2014 Telefonica C-295/12 P, paragraph 124: "*That third complaint must be rejected as unfounded since, first, in order to establish that a practice such as margin squeeze is abusive, that practice must have an anti-competitive effect on the market, although the effect does not necessarily have to be concrete, it being sufficient to demonstrate that there is a potential anti-competitive effect which may exclude competitors who are at least as efficient as the dominant undertaking (See TeliaSonera Sverige EU:C:2011:83, paragraph 64) and, second, the General Court found at paragraph 282 of the judgment under appeal, in its assessment of the facts, that the Commission had demonstrated that there were such potential effects".*

[30] *See*, for instance, Bundeskartellamt, case B6-22/16, *Facebook* (2019). The press release is available here.

[31] *See*, for instance, Judgement of the General Court of 14 September 2022, T-612/17, *Google and Alphabet v Commission* (2021).

[32] DOJ, 2023 Annual antitrust enforcers summit: challenges in monopolisation cases panel, during which Oliver Guersent indicated that the Commission sent a statement of objection to Apple focused on exploitative abuse (available here).

45. Then, although the APDC welcomes that the Amending Communication corrects certain outdated considerations from the Guidance notably with respect to refusal to supply and margin squeeze, the Amending Communication could have further clarified the distinction between outright and constructive refusals to supply and provide more guidance on margin squeezes. The APDC would suggest that the Forthcoming Guidelines provide more concrete guidance on these practices.

➢ ***The APDC invites the Commission to further clarify the distinction between constructive and outright refusals to supply***

46. Under the Guidance, a refusal to supply could take the form of "*unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply*"[33] and was to be analysed under the Bronner criteria[34]. In practice, this meant that outright and constructive refusal to supply were treated the same way.

47. This framework of analysis was set aside by the ECJ in Slovak Telecom and Lithuanian Railway judgements[35]. In these cases, the Court has judged that the conditions laid down in paragraph 41 of the judgment in Bronner, and in particular the condition relating to the indispensability of the access, do not apply to practices other than refusal to supply (including where the dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions). The Policy Brief refers to the position of the ECJ in this respect.

48. In its Amending Communication, the Commission took into account the ECJ's position that the Bronner criteria (in particular the indispensability) only apply to outright refusals to supply, removing the reference to constructive refusals to supply.

49. While the APDC acknowledges that the Commission's intention is to codify the most recent Court's case law concerning refusal to supply and other related practices in the Amending Communication, it formulates the following comments:

- The Amending Communication simply deletes the reference included in the Guidance under paragraph 79 that outright and constructive refusal to supply were treated the same without any further guidance. More comprehensive guidance would have been welcomed precisely reflecting the ECJ's position on refusal to supply and related practices;

- More specifically, the notion of constructive refusal to supply could be further clarified. For instance, Advocate General Rantos suggested, in his Opinion in Lithuanian Railway, that the notion was equivalent to "*implicit refusal of access*"[36]. While this definition has not been used by the ECJ, this illustrates that the notion is not straightforward and the need for Guidance;

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[33] The Guidance, para. 79.

[34] In Bronner, the ECJ held that, in order for the refusal by an undertaking in a dominant position to grant access to a service to constitute abuse within the meaning of Article 102 TFEU, it was necessary (i) that that refusal be likely to eliminate all competition in the market on the part of the person requesting the service, (ii) that that refusal be incapable of being objectively justified and (iii) that the service in itself be indispensable to carrying out that person's business, inasmuch as there was, in respect of that person, no actual or potential substitute in existence for that home-delivery service (the "***Bronner* criteria**") (Case C-7/97, 26 November 1998, Bronner, para 41). *See* Opinion of AG Rantos, Judgement of the ECJ of 7 July 2022, C-42/21 P, *Lietuvos geležinkeliai AB v European Commission*, para. 61.

[35] Judgement of the ECJ of 25 March 2021, C-165/19, *Slovak Telekom/Commission* (*Slovak Telekom*), para. 50-51; Judgement of the ECJ of 12 February 2023, C-42/21, *Lietuvos geležinkeliai AB v European Commission* (*Lithuanian Railway*), para. 81-84 and 91 mentioned in the Policy Brief.

[36] Opinion of AG Rantos of 7 July 2022, in Judgement of the ECJ of 12 February 2023, C-42/21 P, *Lietuvos geležinkeliai AB v European Commission* (*Lithuanian Railway*), para. 74.

- Furthermore, in its Policy Brief, in drawing the distinction between outright and constructive refusal to supply, the Commission refers in particular to the Court's position[37]. This case suggests that the Bronner criteria would apply to cases where a dominant undertaking owned and developed an infrastructure for its own use, which it reserved for itself in pursuit of an immediate benefit (paragraph 82). In other words, the Bronner criteria would apply to "*closed infrastructures*", where no third party has been granted access, and not to "*open infrastructures*", where third parties may be given access but where the conditions for access may be unfair;

- Distinguishing outright refusal from constructive refusal (instead of closed vs open infrastructures) appears to muddy the waters. A third-party may face an outright refusal to access an open infrastructure: would the Commission consider it needs to apply the Bronner criteria in such a case?

50. To provide legal certainty and fully align the Commission's position with the ECJ's case law, the Commission could consider distinguishing closed and open infrastructures, or clarifying that outright refusals apply to closed infrastructures, whereas constructive refusals apply to open infrastructure only.

➢ ***The Forthcoming Guidelines should provide more guidance on margin squeeze***

51. As a general remark, the APDC would have welcomed more developed guidance on the assessment of margin squeeze infringements in the Amending Communication. The fact that the Commission simply reproduced paragraph 80 of the Guidance into a separate section in the Amending Communication contrasts with the experience acquired by the Commission and NCAs since 2008 in relation to margin squeeze cases[38].

(i) The Forthcoming Guidelines should include more detail on the practicalities of the AEC test applied to margin squeeze

52. Even though the Amending Communication includes a reference to Long-Run Average Incremental Costs ("LRAIC") in the context of the AEC test, it fails to provide methodological tools on certain issues that complexify in practice the execution of this test which is warranted in margin squeeze cases[39].

53. **First**, the Amending Communication does not provide additional guidance on the price charged by the dominant undertaking on the downstream market (to be compared with the price charged by the same dominant undertaking on the upstream market). In practice, precisely identifying the relevant price on the downstream market may prove difficult. This is particularly true on retail markets where different product offerings are available. Should the AEC test be carried out on an offer-by-offer basis, on a product range basis, or on a relevant market basis?

54. **Second**, the Amending Communication does not supplement the Guidance with more detailed developments on the possibility to used "a non-integrated competitor downstream as a benchmark"[40]. Given that the benchmark used is paramount to the outcome of an AEC test and that undertakings typically do not have access to their competitors' cost structure, it would have been helpful that the Amending Communication go into more methodological details.

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[37] As set out in Judgement of the ECJ of 12 February 2023, C 42/21 P, *Lietuvos geležinkeliai AB v. European Commission* (*Lithuanian Railway*).
[38] As an illustration, between 2014 and 2020, NCAs have investigated 16 margin squeeze infringements according to Theon Van Dijk and Linda Gratz in *Competition Case Law Digest,* Concurrences, 2020.
[39] Judgement of the ECJ of 6 October 2015, C-23/14, *Post Dankmark A/S,* para. 55 mentioned in the Policy Brief.
[40] Footnote 5 in para. 90 of the Amending Communication reproduced from footnote 9 in para. 80 of the Guidance.

55. **Thus**, the APDC suggests that the Forthcoming Guidelines include further guidance on the execution of the AEC test in a margin squeeze context, especially regarding the relevant price on the downstream market and the use of a non-integrated competitor downstream as a benchmark.

(ii) The Forthcoming Guidelines should include certain distinctions set out by the ECJ in TeliaSonera

56. The Amending Communication could have reflected more precisely the ECJ's reasoning in TeliaSonera judgement[41] to ease the self-assessment by dominant undertakings of their pricing policies under the margin squeeze framework. More precisely, the Amending Commission could have referred to the following concepts.

57. **First**, the Amending Communication does not reflect the reasoning of the ECJ in paragraphs 69 to 72 of the TeliaSonera judgment concerning the indispensability criteria. According to the ECJ, (i) even if the wholesale product is not indispensable, this does not rule out an infringement to Article 102 TFEU in the form of a margin squeeze but (ii) the fact that the wholesale product is indispensable is relevant to the assessment of the anti-competitive effects. A reminder that the assessment of the indispensable nature (or not) of the upstream input is useful at the stage of the effects and not of the qualification of the practice itself would have reflected more precisely the Court's position.

58. **Second**, the Amending Communication does not reflect the distinction made by the ECJ in paragraphs 73 and 74 of the TeliaSonera judgement between pricing practices involving a negative margin or where the margin remains positive for the dominant undertaking. Indeed, the Court referred to the existence of two categories of squeeze:

- "*If the margin is negative, [...] at least potential foreclosure is likely, given that in such a situation the dominant firm's competitor, even if they are as efficient as or more efficient than the dominant firm, would be forced to sell at a loss*" (*TeliaSonera*, paragraph 73);

- "*If, on the other hand, such a margin remains positive, it will then have to be shown that the application of this pricing practice was, for example, because of a reduction in profitability, likely to make it at least more difficult for the operators concerned to carry out their activities on the market concerned*" (*TeliaSonera*, paragraph 74).

59. In the first scenario, an at least potentially exclusionary effect is probable while in the second scenario it must be demonstrated that the pricing practice at hand is nonetheless likely to hinder the development and operations of competitors on the market concerned.

60. The APDC suggests that the Forthcoming Guidelines complement the Amending Communication and reflect more exhaustively the framework for the assessment of margin squeeze practices set out by the ECJ in TeliaSonera.

Section V – Expectations

61. The APDC would welcome additional clarifications in the upcoming Guidelines on a number of issues that are central for the assessment of exclusionary abuse cases, including the following:

- ***The criteria used to demonstrate the existence of a dominant position***

[41] Judgement of the ECJ of 17 February 2011, Case C-52/09, *TeliaSonera*, para. 56 mentioned in the Policy Brief.

62. While it is not the main focus of the Guidance, the characterization of dominance is an essential preliminary step to characterizing an abuse. The Forthcoming Guidelines provide an opportunity to consolidate the Commission's practice and clarify/develop further the different criteria likely to be taken into consideration to demonstrate a dominant position. Examples of how each of these criteria are weighed in the assessment would be helpful, particularly in cases where markets or future competitive constraints are uncertainly defined or where designated gatekeepers are involved (see below for the interaction with the DMA).

63. Setting out a consolidated view on the concept of collective dominance with regard to the EU Courts case law, and the direction the Commission intends to take in this respect for abusive exclusionary practices is also welcome.

- ***The effects-based analysis and the role of the economic studies***

64. In 2008, the Guidance paved the way for an effects-based approach to abuse of dominance in EU competition law[42]. In light of the recent case law of the EU Courts that has been outlined in the recently Amending Communication, the APDC would welcome further clarifications on how the Commission intends to combine legal and economic analysis in Article 102 TFEU cases[43].

65. It is imperative that these Forthcoming Guidelines should provide clear guidance to companies for self-assessment and compliance and ensure a unified application of EU law by NCAs. The Commission shall provide practical clarification on its legal benchmark and burden of proof, including the utilization of theories of harm and definition of the object/effect dichotomy in Article 102 TFEU cases.

- ***The potential environmental defenses as a shield in Article 102 TFEU cases***

66. In its Amending Communication, the Commission has explicitly referred to objectives that go beyond the traditional defense of competitive market structure and consumer welfare. It has referred to plurality in a democratic society[44] and various parameters of competition (including production, innovation, variety or quality of goods[45]), which have a possible impact on the theories of harm that the Commission may consider in the future. Reciprocally, it may as well consider extending symmetrically the efficiencies when assessing a practice.

67. In the absence of an explicit possibility for an exemption in Article 102 TFEU cases, such as in Article 101(3) TFEU, it would be helpful to develop the objective justifications likely to exclude the characterization of an abuse, especially the possible "*environmental*" objective justifications.

68. In this respect, the APDC considers that Article 102 TFEU should be part of the discussions of the "greening" process of EU competition law. Even if the potential influence of Article 102 TFEU in the debates on sustainability considerations is not very developed so far, the Commission seems to have already stated that pro-environmental motivations could justify the conduct of dominant undertakings[46].

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[42] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, incl. pts 28-31.
[43] Especially in the area of pricing and rebates, after the Intel case (Judgement of the General Court of 26 January 2022, Case T-286/09, *Intel Corporation v. Commission*).
[44] Communication from the Commission dated 27 March 2023, pt 1.
[45] Annex of the Communication from the Commission dated 27 March 2023, pt 1.
[46] *See* the prevention of air congestion: "*The existence of economies of scale, the aim of reducing air traffic noise or air congestion, for example, could be regarded as objective reasons. However, in the case of landing and take-off services such economies of scale do not exist*", pt 52, Comm. EC. Dec 2000/521/EC of 26 July 2000, *Spanish Airports*.

➢ ***The issue of exploitative abuses***

69. As above-mentioned (§43 and seq.), the APDC would see value in the Forthcoming Guidelines also addressing exploitative abuses.

➢ ***The interaction of substantive rules pertaining to Article 102 TFEU, on the one hand, and to the DMA, on the other hand***

70. The DMA Regulation creates indeed a number of possible intersections between both sets of rules. It would be helpful to provide guidance on whether, and how, the implementation of the DMA could impact on the way Article 102 TFEU is applied. More specifically, with respect to:

- **The definition of market power**: Would the designation as a gatekeeper constitute an indication or create a (rebuttable or non-rebuttable) presumption of market power for the purpose of Article 102 TFEU? If so, what would it take to rebut a presumption of market power arising from the designation as a gatekeeper? What would be the importance of the relevant market definition for the purpose of characterizing a dominant position in these circumstances, given that no market definition is required for the designation of gatekeepers under the DMA?

- **The characterization of anticompetitive foreclosure**: Having regard to the definition of 'contestability' in the DMA (*see e.g.*, recital 3[47]), as well as to the "unfair practices" identified and their effects (as described in recital 4[48]), would the status of designated gatekeeper entail some sort of (rebuttable or non-rebuttable) presumption that its conduct is liable for foreclosing competitors? What would it take to rebut such presumption, if any, or what further demonstration would be required from the Commission and NCAs to characterize foreclosure for the purpose of Article 102 TFEU in such circumstances?

- **The type of exclusionary conduct covered**: Would a violation of any of the gatekeeper obligations provided for in the DMA lead to a possible characterization of an abuse under Article 102 TFEU? What is the level of demonstration required to establish an abuse in such circumstances?

71. These clarifications are even more important and necessary as Articles 38 and 39, in combination with Article 1(6) and (7) of the DMA, provide that NCAs and national courts applying Article 102 TFEU shall not take decisions which run counter to a decision adopted by the Commission under the DMA.

72. Finally, as regards the format of the Forthcoming Guidelines, the APDC expresses strong expectations regarding their presentation so that they can be pragmatic and easily applied in practice, on the model of other guidelines with very concrete examples and situations[49].

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[47] DMA, recital 3: "*Contestability is reduced in particular due to the existence of very high barriers to entry or exit, including high investment costs, which cannot, or not easily, be recuperated in case of exit, and the absence of, or reduced access to, some key inputs in the digital economy, such as data. As a result, the likelihood increases that the underlying markets do not function well, or will soon fail to function well.*"
[48] DMA, recital 4: "*The combination of those features of gatekeeper is likely to lead, in many cases, to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users, as well as for end users of core platform services provided by gatekeepers, to the detriment of prices, quality, fair competition, choice and innovation in the digital sector.*"
[49] As in the Guidelines *on the applicability of Article 101 TFEU to horizontal co-operation agreements.*