

**European Commission Consultation on  
Draft Antitrust Guidelines on Exclusionary Abuses**

**Feedback from City of London Law Society**

**A. Introduction and Summary**

1. The City of London Law Society (“**CLLS**”) welcomes the opportunity to comment on the European Commission’s draft guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, as released on 1 August 2024 (the “**Guidance**”).
2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. The Competition Law Committee (the “**Committee**”) comprises leading solicitors specialising in competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters, including merger control proceedings.
3. The Committee members responsible for the preparation of this response are:
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4. Our comments are based on our members’ significant experience and expertise in advising on abuse of dominance investigations, but also advising clients on compliance with the abuse of dominance rules on a very regular basis.
5. We welcome the efforts of the European Commission (“**Commission**”) to update the guidance applicable to this complex topic, where economics play an important role in identifying harmful conduct and there have been several significant judgements from the European Courts following the prior publication of the Commission’s enforcement priority guidelines<sup>1</sup> (the “**Enforcement Priority Guidelines**”). From a practitioner’s perspective, our comments are focused on the legal standard that the Commission must meet in order to prove an infringement of Article 102 and also, importantly, the extent to which the Guidance offers clear guidance in order for companies to regulate their conduct consistent with principles of legal certainty.
6. We set out below some general comments, followed by some specific observations on the draft Guidance.

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<sup>1</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, published 24 February 2009 (2009/C 45/02).

## B. General submissions

### (i) *The presumption of innocence and benefit of doubt*

7. The European Court of Human Rights has found that fines imposed for infringements of competition laws are criminal in nature.<sup>2</sup> The European Courts have consistently found therefore that an undertaking accused of an infringement is entitled to a presumption of innocence (as codified in Article 6(2) of the European Convention on Human Rights (“ECHR”) and Article 48(1) of the Charter of Fundamental Rights of the European Union) and to benefit from any doubt regarding the existence of an infringement of the competition rules.<sup>3</sup>
8. As summarised by the Court of Justice in *Montecatini v Commission* (1999)<sup>4</sup> in reference to Article 6(2) of the European Convention on Human Rights: “*It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.*”<sup>5</sup> This fundamental principle was applied in the seminal case of *United Brands v Commission* (1978)<sup>6</sup> (“**United Brands**”) in the context of Article 102.
9. In order to reach any finding of an abuse of dominance contrary to Article 102, the Commission is therefore required to make a proper assessment of evidence and to assess whether there are any doubts of the existence of an infringement. If there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement.<sup>7</sup>

### (ii) *The burden of proof imposed upon the Commission by Regulation 1/2003*

10. Article 2 Regulation 1/2003<sup>8</sup> sets out as a matter of law that: “*In any national or Community proceedings for the application of Articles [101] and [102] of the Treaty,*

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<sup>2</sup> See for example, *Engel v The Netherlands* (1976) 1 EHRR 647.

<sup>3</sup> See for example *E.ON Energi v Commission* (2012), C-89/11 P, paragraph 73. See also: Case C-199/92 P *Hüls v Commission* (1999) ECR I-4287, paragraphs 149 and 150, and *Montecatini v Commission*, paragraphs 175 and 176.

<sup>4</sup> Case C-235/92, judgement of 8 July 1999.

<sup>5</sup> *Ibid*, paragraph 176.

<sup>6</sup> Case C-27/76, judgement of 14 February 1978. The Court of Justice in *United Brands* annulled the Commission’s finding of an abuse of dominance based on excessive pricing, finding that “*there is doubt which must benefit the applicant*” and that “*the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding*”.

<sup>7</sup> See Case T-286/09 *RENV* at paragraph 161 citing: T-67/00 and others.

<sup>8</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

*the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement.”*<sup>9</sup>

11. This obligation was restated by the Court of Justice in *Google and Alphabet v Commission*<sup>10</sup> in September 2024 (“**Google Shopping 2024**”), noting that: “*Thus, it is for the Commission to adduce evidence capable of demonstrating to the requisite legal standards the evidence of circumstances constituting an infringement.*”<sup>11</sup>

**(iii) The evidentiary standard required to prove an infringement**

12. While presumptions understandably have a place in dominance enforcement, the Court of Justice established in *Intel Corporation Inc. v European Commission (2017)*<sup>12</sup> (“**Intel**”) that in a case where an undertaking submits supporting evidence that its conduct is not capable of restricting competition and producing foreclosure effects: “*the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.*”<sup>13</sup> In other words, the Commission must conduct a full examination of the supporting evidence put forward by an undertaking accused of an abuse of dominance which contradicts a finding that the conduct in question is capable of foreclosure.
13. *Intel* also makes clear that where the Commission carries out an effects based analysis, the “*General Court must examine all of the applicant’s arguments seeking to call into question the validity of the Commission’s findings concerning the foreclosure capability of the rebate [or other conduct] concerned*”.<sup>14</sup> The General Court therefore has full jurisdiction to review the Commission’s conclusions with regards to the economic effects of the conduct in question based on the evidence presented to it.

**(iv) Implications for the conduct of cases**

14. The Commission must conduct a proper balancing of the evidence during the administrative investigation process and cannot short cut this by relying on presumptions which have no basis in law. If the Commission applies a legal standard

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<sup>9</sup> Article 2, Regulation 1/2003 continues: “*The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.*”

<sup>10</sup> *Google and Alphabet v Commission (Google Shopping 2024)* 10 September 2024, Case C-48.22 P.

<sup>11</sup> *Ibid*, paragraph 224.

<sup>12</sup> Case C-413/14 P.

<sup>13</sup> *Ibid*, paragraph 139. The General Court also set out its interpretation of the Intel decision in *Google and Alphabet v Commission*, 10 November 2021, Case T-612/17, at paragraph 441 “[...]In order to find that Google had abused its dominant position, the Commission had to demonstrate the – at least potential – effects attributable to the impugned conduct of restricting or eliminating competition on the relevant markets, taking into account all the relevant circumstances, particularly in the light of the arguments advanced by Google to contest the notion that its conduct had been capable of restricting competition.”

<sup>14</sup> *Ibid*, paragraph 141.

to reach a finding of abuse of dominance, which does not properly take account of the presumption of innocence and the need to interpret reasonable doubt in favour of the undertaking under investigation, the Commission is at risk of decisions being overturned. Years of uncertainty will remain whilst Commission decisions based on the presumptions proposed in the Guidelines are reached and then taken through the appeals process – we do not expect that this will benefit enforcers, companies under investigation or indeed citizens in the EU.

15. There is a sense in reading the Guidance that they could be motivated by an attempt to address some of the procedural inefficiencies in recent investigations, such as the Google Shopping case cited many times (39) in the Guidance, which is understood to have taken seven years. Whilst the need for swift resolution of investigations under Article 102 is well understood, in particular in cases involving digital markets where the pace of change is fast, the Commission cannot abdicate its responsibility to make a proper assessment of the evidence presented to it on exclusionary effects as a way to short cut investigations. The Commission also has new tools at its disposal to address perceived issues in digital markets. So concerns specific to this sector should not obscure the need for legal certainty for companies operating across more traditional sectors of the economy, e.g. manufacturing and retail.
16. There may therefore be a need for more creative thinking on ways in which the Commission can gather and review evidence, set out objections and allow the parties under investigation an opportunity to exercise their rights of defence in a more expedited manner.

### C. Specific comments on the Guidance

#### (i) *Assessment of dominance under the Guidance*

17. The Guidance acknowledges the legal test for dominance set out in *United Brands*<sup>15</sup> based on a position of economic strength enabling the dominant firm to behave to an *appreciable* extent independently of competitors, customers and consumers. However, the Guidance does not attempt to explain when an undertaking might be considered to behave independently of competition to an appreciable extent. Instead, the Guidance states that: “*the fact that there may be a certain degree of competition on a market is a relevant but not a decisive factor for determining whether a dominant position exists.*”<sup>16</sup> This appears to be an attempt to lower the bar for a finding of dominance in light of the jurisprudence of *United Brands*.
18. The Guidance states that it is “*in general necessary to define the relevant market*”.<sup>17</sup> It is not clear what is meant by the inclusion of the words “in general” in this context, and if they could be taken to mean that there are situations where an abuse of dominance assessment could take place without a market definition. While it is understood that this wording is meant to echo the Market Definition Notice,<sup>18</sup> it

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<sup>15</sup> Case C-27/76, judgement of 14 February 1978, paragraph 65.

<sup>16</sup> Guidance, paragraph 19.

<sup>17</sup> Guidance, paragraph 20.

<sup>18</sup> Commission Notice on the definition of the relevant market for the purpose of Union competition law at paragraph 9.

would be useful for undertakings to have an understanding of how (and whether) market definition will be dealt with in dominance investigations. We note that the established approach in case law is that the finding of a dominant position presupposes that the market in question has been defined,<sup>19</sup> and so it would be useful to understand the situations where market definition is not required.

19. The Guidance explains that market shares below 50% have given rise to a finding of dominance<sup>20</sup> and that barriers to entry in a range of different forms<sup>21</sup>, have formed the basis of a finding of dominance. Similarly, the Guidance sets out circumstances in which countervailing buyer power is insufficient to undermine a finding of dominance, with no indications of where and in what circumstances it might play a role.<sup>22</sup> There are examples in the merger control sphere where the Commission has analyzed countervailing buyer power, which could be instructive in the Article 102 context.<sup>23</sup>
20. There is therefore little in the Guidance therefore which would allow an undertaking to conclude that they are not in a dominant position, for example, a presumption that low market shares such as those below 40%, are a good proxy for the absence of substantial market power. This makes it difficult for undertakings to self-assess so that they can confidently proceed without abiding by the rules on abuse of a dominant position. As advisors we often have to tell clients to proceed on the basis that they may be treated as a dominant undertaking, in absence of case law providing reasons to conclude otherwise. Further examples in the Guidance of circumstances which would undermine a finding of dominance, would therefore be very helpful. The Guidance comes close to providing such guidance in explaining that market shares in fast growing markets with short innovation cycles may be a less useful indicator of market power.<sup>24</sup> However, the circumstances in which an undertaking might be able to rely on this are limited, also given that first mover advantage<sup>25</sup> is seen as an indicator of dominance. There are sectors of the economy where innovation is an important dynamic, such as software markets for example, where undertakings have to presume dominance and conduct themselves in accordance with the rules on abuse of dominance. We would encourage further inclusion of examples from the Commission's prior case work of facts that can defeat a finding of dominance, to try to avoid the chilling effect that a broad application of the abuse of dominance rules might have in markets where innovation is a driver. We would also encourage the Commission to reinstate the helpful guidance from the Enforcement Priority Guidelines that, generally speaking, market shares are only indicative of dominance if

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<sup>19</sup> Case 6/72 *Continental Can* at paragraph 32; Case 322/81 *Michelin v Commission* at paragraph 57.

<sup>20</sup> Guidance, paragraph 26.

<sup>21</sup> Guidance, paragraph 30.

<sup>22</sup> Guidance, paragraph 33.

<sup>23</sup> For example, in the consumer goods sector, suppliers of branded products compete with retailer-owned private label products and the success of a supplier's products depends largely on access to shelf space which is entirely in the hands of the retailers, such that the retailers are in a position to benefit from buyer power. Case COMP/M.2072, *Phillip Morris/Nabisco*, Commission decision of October 16, 2000, para. 25.; Case COMP/M.2399, *Friesland Coberco/Nutricia*, Commission decision of August 8, 2001, para. 25.

<sup>24</sup> Guidance, paragraph 28.

<sup>25</sup> Guidance, paragraph 30.

sustained over a significant period of time (at least two years), and that market shares may be a poor proxy for market power in certain instances, e.g. tender markets.

**(ii) Collective dominance**

21. The prominence of the rules on collective dominance in the Guidance is remarkable, and on our reading attempts to significantly expand the test for collective dominance as set out in the relevant case law, including by not referring to the requirements that: (i) analysis of the market must be made prior to making a finding of collective dominance;<sup>26</sup> and (ii) the undertakings concerned adopt a common policy on the market to act independently of their competitors, customers and consumers.<sup>27</sup>
22. Further clarification on when the Commission might seek to pursue collective actions under the abuse of dominance rules, Article 101, or the EU Merger Regulation, would be welcomed, in light of the fundamental principle of *ne bis in idem*.

**(iii) Imputability of third party conduct**

23. The Guidance provides that anticompetitive conduct can be attributed to a dominant undertaking “*whether dominant undertakings engage in such conduct directly or through the actions of third parties*”.<sup>28</sup> However, while referring to the *Unilever* case,<sup>29</sup> the Guidance does not expressly set out the conditions required for third party conduct to be attributed to a dominant undertaking – including clarifying that the dominant undertaking can only be liable where it has unilaterally compelled the third party to implement the conduct in question. Further clarification on the conditions required for third party conduct to be imputed to a dominant undertaking would be welcomed.

**(iv) Competition on the merits**

24. The concept of competition on the merits is notoriously difficult to articulate, as demonstrated by numerous court cases debating this concept. Further examples of reasonable and proportionate steps that an undertaking could take which are appropriate to protect commercial interests, which do not in turn strengthen or abuse a dominant position<sup>30</sup> would be extremely helpful. This is an area where the Guidance could provide more to enable companies to self-regulate. On the basis of the current draft Guidance, there is very little that an undertaking could point to as representing competition on the merits which does not also qualify as an objective justification. More generally, given the decoupling of competition on the merits from the requirement that such conduct must be capable of anti-competitive effects, the Guidance should provide a basis on which undertakings can self-assess whether conduct is not competition on the merits, in the interests of legal certainty. Alternatively, recasting the two step test as a one step test based on an assessment of

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<sup>26</sup> Cases T-68/69 etc *Societa Italiano Vetro SpA v Commission* (1992) II ECR 1403, (1992) 5 CMLR 302 at paragraph 360.

<sup>27</sup> Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge SA* and others, paragraph 44.

<sup>28</sup> Guidance, paragraph 44.

<sup>29</sup> Case C-680/20 - *Unilever Italia Mkt Operations*.

<sup>30</sup> In reference to paragraph 49 of the Guidance.

whether the conduct is capable of (i.e. likely to produce) anticompetitive foreclosure, as the Courts have done for example in Intel, might provide a more straight forward basis upon which undertakings can identify conduct which would be problematic.

25. The list of factors which are considered relevant to identifying conduct which departs from competition on the merits<sup>31</sup> is overstated by reference to the case law and overlooks the specific context of the cases mentioned.
- For example, the provision of misleading information and misuse of regulatory procedures to prevent or make more difficult a competitor's entry, has been found to constitute an abuse of dominance in the specific case of "pay for delay" in regulated pharmaceutical markets.<sup>32</sup> The cases cited in footnotes 120 and 121 of the Guidance do not provide a basis for a broader application in other markets.
  - The mere reference to discriminating or favouring itself over its competitors<sup>33</sup> may have been sufficient to constitute an abuse in certain unique circumstances. However, this provides no insight as to the circumstances in which a vertically integrated or conglomerate firm can choose to service its needs internally and when this would be deemed to be a departure from 'competition on the merits'.
26. Paragraph 57 of the Guidance makes a bold statement that conduct which at first sight does not depart from competition on the merits (such as pricing above Average Total Costs), could still be found to depart from competition on the merits based on an analysis of all factual and legal elements. This open-ended ability for the Commission to conclude that conduct does not represent competition on the merits, does not help companies looking for guidance to regulate their behaviour. Nor does it provide any bright line tests for firms who want to ensure that their pricing policies are not abusive. We would suggest therefore that paragraph 57 has no place in a set of guidelines that aim to improve legal certainty. In the interests of providing clear guidance to undertakings, we would in fact advocate for the approach set out in the 2005 discussion paper<sup>34</sup>, where it was set out that pricing above Average Total Cost is in general not considered predatory, but offered two extreme examples where that would not be the case in circumstances where there is a clear exclusionary strategy (selectively undercutting a competitor and collectively sharing the loss of revenues between a collectively dominant group<sup>35</sup> and in a scenario where a single dominant company enjoys economies of scale, but prices just below the cost of a new entrant with the intention of preventing entry<sup>36</sup>).
27. The Guidance, while not offering a meaningful test for competition on the merits, also undermines the working assumption that only conduct capable of foreclosing 'as efficient competitors' is likely to be contrary to competition on the merits. In other

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<sup>31</sup> As set out in paragraph 55 of the Guidance.

<sup>32</sup> Guidance, paragraph 55(b).

<sup>33</sup> Guidance, paragraph 55(d)

<sup>34</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005.

<sup>35</sup> *Ibid*, paragraph 128.

<sup>36</sup> *Ibid*, paragraph 129.

words, it does not reflect that competition on the merits may lead to the disappearance of less efficient competitors<sup>37</sup> or that competition law protects as efficient competitors against anticompetitive foreclosure – but not less efficient competitors. While not an absolute rule, the as efficient competitor principle is one that has been used repeatedly by the European courts when assessing both pricing abuses and non-pricing practices. We would suggest that it would be useful for undertakings, and assist them with self-assessing, if these principles were incorporated in the Guidance.

(v) ***Capability to produce exclusionary effects***

28. The Guidance introduces three categories of conduct: i) conduct for which it is necessary to demonstrate capability to produce exclusionary effects; ii) conduct that is presumed to lead exclusionary effects; and iii) naked restrictions in respect of which the Guidance notes that the dominant undertaking will only be able to provide are not capable of exclusionary effects in “very exceptional cases”.

29. We believe that the approach proposed in the Guidance in relation to the second category of cases which are presumed to lead to exclusionary effects has no basis in law and risks infringement decisions being overturned by the European Courts, as explained above. The Guidance attempts to narrow the Commission’s duty to properly assess evidence:

*“the evidentiary assessment must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects, as part of the overall assessment of the body of evidence in light of all the relevant legal and economic circumstances.”*<sup>38</sup>

30. The Guidance also purports to narrow the circumstances in which an objective justification can undermine an infringement contrary to Article 102, in the second category of cases where exclusionary effects are presumed:

*“The fact that the conduct has a high potential to lead to exclusionary effects, must be given due weight in the balancing exercise to be carried out in this context [when assessing objective justification].”*<sup>39</sup>

31. Similarly, with respect to the third category of cases (naked restrictions) the Guidance says: “it is highly unlikely that such behaviour can be justified in this way [i.e. based on objective justification].” The Guidance references no authority for limiting the scope of objective justifications in this way (in either the second or third category of cases) and could be seen as an attempt to limit rights of defence.

***a. Establishing capability to produce legal effects***

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<sup>37</sup> Intel at paragraphs 133-134.

<sup>38</sup> Guidance, paragraph 60(b).

<sup>39</sup> Guidance, paragraph 60(b).



32. The Guidance looks at whether conduct is “capable” of producing exclusionary effects,<sup>40</sup> while noting that the effects must be “more than hypothetical”.<sup>41</sup> However, the standard of proof for exclusionary effects has historically been a “likelihood” test<sup>42</sup>. We would therefore caution against using “capable” rather than “likely” in all circumstances as these terms are not interchangeable: “capable” has been interpreted as merely capable of having an anticompetitive effect,<sup>43</sup> while “likely” has been interpreted as more likely than not to result in anticompetitive effects (i.e. a more than 50% chance).<sup>44</sup>
33. The Guidance also attempts to restate the opinion of the General Court from *Google Shopping 2021* stating that “it is sufficient to establish a plausible outcome amongst various plausible outcomes.”<sup>45</sup> However, reference in the Guidance to a “plausible” outcome is somewhat misleading, as this term is not used in *Google Shopping 2021*. Rather, the Court in that case finds that “it is sufficient to establish that there are potential effects” in an abuse of dominance situation.<sup>46</sup> This view is reaffirmed in *Google Shopping 2024*, where the Court states that:<sup>47</sup>

*“In order to find, in a given case, that conduct must be categorized as ‘abuse of a dominant position’ within the meaning of Article 102 TFEU, it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that the conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market...”*

34. In light of the above, and particularly the recent decision of the Court of Justice in *Google Shopping 2024*, we would suggest that the Guidance clarifies what is required to prove exclusionary effects, noting particularly that: (i) the conduct must be “likely” to produce such effects; (ii) the effects can be actual or “potential”; and (iii) any actual or potential effects on competition should be assessed *vis a vis* an equally efficient competitor (in order to demonstrate that the methods are other than those which are part of competition on the merits).

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<sup>40</sup> Guidance, paragraph 59.

<sup>41</sup> Guidance, paragraph 61.

<sup>42</sup> This test has been detailed by the Commission itself (in the Enforcement Priority Guidelines) as well as by the European courts see, for example, *Post-Danmark II*, and also *Google Shopping 2024* at paragraph 87. “The purpose of that provision is to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus **likely to cause direct harm to consumers**, or which causes them harm indirectly by hindering or distorting that competition (judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 124 and the case-law cited).”

<sup>43</sup> Case T-814/17 *Lithuanian Railways*, paragraph 80.

<sup>44</sup> Case C-680/20, *Unilever Italia*, paragraph 42.

<sup>45</sup> Guidance, paragraph 67, citing *Google and Alphabet v Commission (Google Shopping 2021)*, T-612/17, paragraphs 377 and 378.

<sup>46</sup> *Google and Alphabet v Commission (Google Shopping 2021)*, T-612/17, paragraphs 378.

<sup>47</sup> *Google Shopping 2024* at paragraph 165.

***b. The burden of proof to establish exclusionary effects***

35. The Guidance states that, where conduct is “capable” of having exclusionary effects, the undertaking concerned must show that the “*absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects.*”<sup>48</sup> Imposing this burden on the undertaking accused – where the Commission only has to show that conduct is “capable” of exclusionary effects - essentially attempts to reverse the burden of proof from the Commission to the undertaking accused. This is inconsistent with the presumption of innocence and goes against the reasonable doubt that should be interpreted in favour of the undertaking accused of an abuse of dominance.
36. Similarly, the current wording of Paragraphs 60(b) and 82 of the Guidance suggests a reduced standard of proof for demonstrating effects when the conduct is presumed to lead to exclusionary effects.
37. However, such an approach is not supported by case law. As noted above at paragraph 12, the Commission must produce precise and consistent evidence to support a firm conviction. Where it has not done so, the alleged infringement can be rebutted where the undertaking accused can put forward another plausible explanation of the facts.<sup>49</sup> The undertaking accused should only be required to prove that the circumstances call into question the probative value of the evidence relied on by the Commission where the Commission has sufficiently demonstrated the existence of the infringement – this would not be the case where the Commission has only shown that conduct is merely “capable” of having anticompetitive effects.

***c. Elements relevant to an assessment of capability to produce exclusionary effects***

38. Paragraph 70 sets out a number of facts recognised in prior cases as relevant to the assessment of exclusionary effects. In a number of respects however, paragraph 70 attempts to dismiss factors which could be helpful to the undertaking accused of dominance to prove its innocence. For example, with reference to paragraph 70(c), the likely response of competitors such as to undermine any foreclosure strategy must be relevant to an analysis of exclusionary effects.

***d. Elements that are not necessary to show the capability to produce exclusionary effects***

39. This section in the Guidance rejects a number of widely held economic principles as relevant to a finding of an abuse of dominance. For example, in paragraph 75 the existence of a remaining contestable market which is unaffected by the conduct of the dominant undertaking is dismissed as a factor which could undermine a finding of an abuse of dominance. This is hard to justify against the background of *Intel*, which confirms that the Commission must make an assessment of all evidence put forward by the undertaking accused of dominance in relation to foreclosure effects (it would

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<sup>48</sup> Guidance, paragraph 64.

<sup>49</sup> *Intel Corporation Inc. v European Commission* (2022), Case T-286/09 *RENV* at paragraph 165.

not be consistent with the spirit of *Intel*, to say that only certain types of effects will be assessed, and others not taken into account).

**(vi) Conduct subject to specific legal tests**

40. The Guidance focusses on factors which lead to a finding that conduct is capable of exclusionary effects. However, a proper assessment, recognising the presumption of innocence to which an undertaking is entitled, should also take account of factors that weigh against a finding that conduct is capable of exclusionary effects. We set out some such factors which we believe should be recognised in the Guidance and also note instances where the Guidance appears to set a lower threshold for a finding of an abuse as compared to the applicable case law.

**a. Exclusive dealing**

41. Paragraph 83 of the Guidance should also recognise the efficiencies and economies that accrue to customers from single sourcing arrangements, which would support a finding that single purchasing is not capable of exclusionary effects.
42. Paragraph 83 (b) should also recognise the size of the contestable market, where competitors to a dominant firm can win sales and expand their market position as a relevant factor. The circumstances in which conduct affecting a small share of the market are found to be capable of having exclusionary effects, should be limited. The Guidance uses a reference from *Google and Alphabet v Commission*<sup>50</sup> on this point, which involves a digital platform and there should be limited read across to other fact patterns.

**b. Tying and bundling**

43. Paragraph 92 of the Guidance lists a series of scenarios which the Commission considers would not defeat a finding of coercion, but it does not explain what must be established as the basis of a finding of coercion. Guidance on this would be welcomed.
44. We would also request further clarity on paragraph 95 which proposes that “*the depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the case.*” Footnote 233 explains further “*this is notably the case in situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset exclusionary effects*”, without further elaboration on what those factors are.

**c. Refusal to supply**

45. Here the Guidance acknowledges that the applicable test is not whether a refusal to supply is capable of exclusionary effects but means “*capability to eliminate all competition on the part of the requesting undertaking*”<sup>51</sup>. This is a reference to the

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<sup>50</sup> Guidance, footnote 199.

<sup>51</sup> Guidance, paragraph 99(b).

*Oscar Bronner v Mediaprint* (1998)<sup>52</sup> case law (“**Oscar Bronner**”), but also introduces a capability standard. In *Oscar Bronner* the Court of Justice actually said that the conduct needed to eliminate all competition in the downstream market from the person requesting access (and not merely that it be capable of doing so).

46. The Guidance<sup>53</sup> sets out an interpretation of indispensability, which is at odds with *Oscar Bronner* and in doing so attempts to set a low threshold for finding that an input is “indispensable” such that a refusal to supply such an input could form the basis of an infringement of Article 102. In *Oscar Bronner*, the Court of Justice found that the fact that an alternative access route was not economically viable for a relatively small undertaking of the size of the complainant (Mediaprint in that case) was not sufficient to conclude that a refusal to provide access to the existing distribution network was an abuse of a dominant position.<sup>54</sup> It is not therefore part of the legal test for abuse of dominance based on a refusal to supply that there is no “viable” alternative access route, as proposed in paragraph 101(i) of the Guidance. Even if there is no economically viable alternative, the input in question is not necessarily indispensable according to the case law.

**d. Predatory pricing and margin squeeze**

47. The Guidance on pricing below cost is not new. From an advisor’s perspective, we would note that an assessment of the costs which become variable or avoidable over time is not a precise exercise and is subject to conflicting interpretations in terms of the treatment of costs within such a calculation. It would be helpful if the Guidance were to acknowledge the scope for some margin of error in these calculations and to give some credit to undertakings who have made a genuine attempt to assess their costs, in order to ensure that their pricing remains consistent with the rules on abuse of dominance. In addition, the Commission suggests that the level of aggregation at which the price cost test must be carried out may differ depending on the circumstances of the case<sup>55</sup> without further elaboration. To facilitate counseling in an already complex area, we would encourage the Commission to suggest when such an approach is appropriate, for example if the practice targets specific customers that would be of strategic importance to a competitor or new entrant.

**(vii) Conducts with no specific legal test**

**a. Conditional rebates that are not subject to exclusive purchase or supply**

48. The Guidance attempts to narrow the circumstances where volume based conditional rebates are legitimate, for example, if the dominant firm’s share is very large, there are significant entry barriers or regulatory constraints. This fails to recognise the benefit of passing on economies of scale and the potential impact on competition at the downstream level for reduced cost inputs. We would propose for the Guidance to set out explicitly that linear rebates and discounts based on volumes purchased, which are not incremental and not retroactive, are not a breach of the rules on abuse of

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<sup>52</sup> Case C-7/97, judgement of 26 November 1998.

<sup>53</sup> Paragraph 101.

<sup>54</sup> Case C-7/97, judgement of 26 November 1998, paragraph 47.

<sup>55</sup> Guidance, paragraph 119.

dominance – these discounting practices should be encouraged in the interests of economic growth.

49. The requirement to apply a price cost test for assessing a broad range of conditional rebates will likely provide a disincentive to engage in these pricing practices, given the costs of engaging experts to run analysis of costs in line with the Guidance. We would expect that pricing below AAC is very rare, except in the case of predatory pricing; it is not clear therefore that there is a real benefit to having undertakings run through price cost tests in each case when they are considering a conditional rebate.

***b. Multi-product rebates***

50. The Guidance briefly addresses the use of rebates to bundle sales of products/ services (multi-product rebates) and states that this is considered to be “*capable of producing exclusionary effects, for instance, by strengthening or protecting the dominant position*”.<sup>56</sup> This very brief example offers no real guidance on when a multi-product rebate is capable of exclusionary effects. One reading of this is that multi-product rebates are always deemed capable of exclusionary effects on the basis that they will create at least one additional sale of a dominant product/ service (and therefore are deemed to strengthen a dominant position). This is not in line with the proposed approach of conducting an assessment of capability to foreclose, for this category of cases. Therefore, further elaboration is required on the circumstances in which multi-products rebates are capable of foreclosure. The Enforcement Priority Guidelines included some helpful safe harbours which would be welcomed in the final version of the proposed Guidelines, for example, where the price of each product remains above long run average incremental costs (“LRAIC”)<sup>57</sup> and/or where a competitor can offer the same bundle.<sup>58</sup>
51. Guidance would be welcomed on the scenario where a dominant and a non-dominant product or service are bundled together through a rebate structure. In particular, if the strategy of the dominant firm is to expand sales of a non-dominant product or service, through multi-product rebates, when is this considered capable of exclusionary effects in a market for a non-dominant product which remains competitive.

***c. Self-preferencing***

52. The Guidance aims to define circumstances when self-preferencing is liable to be abusive. However, while recognizing that “*self-preferencing is widespread in certain sectors of the economy*” the Guidance states that the abusive nature of the conduct “*depends on an analysis of all relevant circumstances*”. While the indicators of departures from competition on the merits are welcomed, it remains difficult to delineate between legitimate self-preferencing and the sort of conduct which is illegal (in particular as the indicators provided from the *Google Shopping 2024* judgment are presented as non-exhaustive and non-cumulative).

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<sup>56</sup> Guidance, paragraph 155.

<sup>57</sup> Enforcement Priority Guidelines, paragraph 60.

<sup>58</sup> Enforcement Priority Guidelines, paragraph 61.

53. Additionally, the Guidance could better distinguish what type of self-preferencing should be assessed under the margin squeeze approach (4.2.5 of the Guidance) or treated as an access restriction (4.3.4 of the Guidance), and what types of self-preferencing should be assessed under the elements described at paragraph 161. For example, where self-preferencing is price-based, the assessment could be carried out through the margin squeeze test. Similarly, where the ‘leveraged market’ is an essential input, self-preferencing could be assessed under the access restriction or refusal to supply test. More clarification on which test should be used in these types of situations would be useful.

*d. Access restrictions*

54. The section of the Guidance downplays an undertaking’s right to freedom of contract, except in the discrete circumstances where a dominant undertaking pursues an exclusionary strategy.
55. There are many circumstances in which a dominant undertaking does not provide access to an input following a request for legitimate reasons, for example, because the party requesting access does not have a strong credit rating, or because the terms on which access is requested are unreasonable. The Guidance should set out such examples, in order to provide a basis for undertakings to self-regulate.
56. It would be helpful if the Guidance also addressed the circumstances in which a dominant undertaking is free to reject access requests from a party who is not in any respect a competitor to the dominant form (including at the downstream level). More generally, the Guidance on access restrictions lacks any analysis of how such practices are capable of an exclusionary effect, despite this category of case being one where such an analysis is proposed in every case.
57. There is a clear risk of undermining incentives to invest if the Guidance takes the position that owners of inputs (not even necessarily gatekeepers of inputs which are indispensable as addressed in relation to the Guidance on refusal to supply) are required to provide access on reasonable and transparent terms<sup>59</sup> and are not entitled to change their minds in relation to making those inputs available to third parties<sup>60</sup>. There is a notable absence of any explanation as to how such practices are capable of exclusionary effects.

*(viii) Objective justifications*

58. The Guidance concludes with objective justifications for the abusive conduct being excusable due to it either being necessary ((so-called “objective necessity defence”) or produce efficiencies to counterbalance the negative effect (so-called “efficiency defence”), giving examples as to how the thresholds align for both categories.<sup>61</sup>

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<sup>59</sup> As proposed in paragraph 166(c) of the Guidance.

<sup>60</sup> As proposed in paragraph 166(d) of the Guidance.

<sup>61</sup> Guidance, paragraph 167.

59. Given that the Commission decides whether conduct is capable of objective justification or can benefit from the efficiency defence<sup>62</sup>, it is particularly important to provide undertakings with clear examples of conduct which is likely to be excused on this basis. This is more important than ever given that the Guidance does not rule out a finding of dominance based on a market share below 40% and intends to apply presumptions to conclude that conduct is abusive. Undertakings and advisors will therefore be very focused on the availability of objective justifications and efficiency defences.
60. Paragraph 171 places the burden of proof on the dominant undertaking and notes that an undertaking must provide a cogent and consistent body of evidence when trying to prove an objective necessity or efficiency defence. The same standard also applies to the evidence upon which the Commission must rely in order to conclude that there is an abuse of a dominant position based on exclusionary conduct.

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<sup>62</sup> Guidance, paragraph 170.