I. Introduction

As a group of civil society organisations active within the European Union, we welcome the opportunity to contribute to the European Commission's consultation on the Guidelines for exclusionary abuses of dominance, with the final adoption scheduled for 2025. While some of us participated in the Call for Evidence in 2023, the Commission's presentation of the Draft Guidelines this August allows us to provide more specific input regarding this initiative.

We believe that a comprehensive 'Article 102 Package' is essential, and we would also note that it is long overdue, as Article 102 TFEU plays a crucial role in controlling economic power. For this reason, we endorse the broad thrust of the Draft Guidelines to enhance the practicability and effectiveness of enforcing Article 102, advocating for a more robust application of principles and presumptions. However, we urge the Commission to go even further in that direction to ensure an effective enforcement of Article 102.

We simply cannot afford for this key provision to be dysfunctional, especially now, in an economy where oligopolistic market power has expanded and dynamic competition seems to have diminished.[1] This is particularly striking in the digital economy, where services have emerged with "characteristics akin to those of an essential facility,"[2] with negative repercussions also on democracy and the exercise of fundamental rights. Moreover, a multi-generational challenge like the green transition demands innovative solutions, which the dynamism of the market can undoubtedly help to deliver, yet this dynamism could be thwarted by abusive practices from incumbents. And the same obviously applies to other critical sectors such as food and health.

Indeed, the fundamental reason underpinning the necessity and urgency of the Guidelines under discussion lies in the fact that the enforcement of this competition provision has critically failed. While there are likely specific parties responsible for this situation, rather than dwelling on the past, it is more important

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[1] See European Commission, Protecting competition in a changing world, 2024, at 8.
[2] GC, Case T-612/17, ECLI:EU: T:2021:763, para 224 - Google Shopping.

to recognise that today's challenge is both serious and systemic and must be addressed with a forward-thinking approach and this understanding in mind. The Digital Markets Act itself, rightly celebrated as a democratic achievement within the EU, should also be viewed as a response to the enforcement failure of Article 102.

We believe that the Commission's Guidelines, while evidently not binding, could have a significant and lasting impact on the evolution of competition law in this crucial area. At the same time, the Guidelines must be complemented by other policy measures, such as the already planned revision of Regulation 1/2003, which should address more specifically the procedural reasons behind the enforcement failure of Article 102, as well as be accompanied by what is necessary to finally make the remedies following the finding of abuse truly effective.[3] In this regard, it is particularly relevant to revisit the unjustified preference currently given to behavioural remedies over structural ones. Further tools should also be considered to comprehensively address abusive practices by firms with significant market power, such as a market investigation instrument designed to tackle structural competition issues, as also suggested by the Draghi Report.

As the Commission itself states, the goal is to produce an enforcement standard that is both workable (manageable) and dynamic.[4] Moreover, it must also be considered that this standard applies in both public and private enforcement of Article 102. Evidently, it is now the Commission's responsibility to ensure that the Guidelines are as well-suited for their purpose as possible, strengthened by the insights that will emerge from the public consultation. The Guidelines can do much to help promote a vigorous, proactive, and comprehensive interpretation of Article 102 TFEU in light of wider European normative values, steering it in a suitable direction. The Commission's essential role in orienting competition policy is also clearly demonstrated by the significant influence exerted,

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[3] Massimiliano Kadar, 'Evaluating 20 Years of Regulation 1/2003: Are EU Antitrust Procedures "Fit for the Digital Age"?' (2024) 85 Antitrust Law Journal 577.

[4] Linsey McCallum and others, A Dynamic and Workable Effects-Based Approach to Abuse of Dominance (European Commission), Competition Policy Brief No 1/2023 (Policy Brief).

particularly on the courts, by the now partially amended Article 102 Priority Guidance.

Before moving on to the examination of the Draft Guidelines, however, we wish to express our deep regret that the Commission has limited its focus of the Article 102 Package to exclusionary abuses. There is no convincing reason to exclude exploitative abuses from this important effort, thereby foregoing the opportunity to help orient competition policy in this increasingly important area, which would indeed be the Commission's proper role. We hope that the new Commissioner in charge of competition policy will recognise this shortcoming and will soon take steps to address it. We also note how little attention has been given to making the Draft Guidelines at least slightly more easily accessible beyond the narrow circle of experts. Unfortunately, the Draft Guidelines employ complex and technocratic language that complicates understanding for civil society, ordinary citizens, and small to medium enterprises. To enhance clarity, it would be beneficial, for example, to include concrete examples of practices and their assessments, similar to approaches in other Commission-issued Guidelines. Additionally, creating educational materials that are more accessible and feature numerous examples and illustrations would also be advantageous. At a time when the importance of competition policy is under attack from various quarters, we also note that it is incumbent upon enforcers to seek broader support from civil society by clearly explaining not only the objectives but also the values that EU competition policy embodies.

In submitting our views in a constructive spirit, and to provide appropriate context while clarifying the reasoning behind our subsequent comments on the draft Guidelines on exclusionary abuses of dominance, we consider it essential to:

- **First** acknowledge the *main shortcomings that have characterised the enforcement of Article 102 TFEU in recent years* (II). We believe that having a holistic view of the challenges to be addressed is particularly useful in avoiding the risk of focusing only on those that seem more easily solvable, while leaving the others unaddressed.

- **We will then** *proceed to provide our specific comments on the Draft Guidelines produced by the Commission* (III), and we remain available for further discussion, including in person at the engagement opportunities already announced by the Commission.

II. Key Shortcomings in the Recent Enforcement of Article 102

In this section of our submission, we provide a brief overview of what we consider to be the main shortcomings in the enforcement of Article 102. We do not aim for exhaustive coverage, but rather to establish benchmarks against which, in the following section, we will offer an initial assessment of the Draft Guidelines put forward by the Commission and currently under public consultation.

A. The misguided focus on narrowly defined consumer welfare

The 2009 Priorities Guidance[5] placed consumer welfare, understood as a narrowly defined economic goal, at the heart of Article 102 TFEU (and beyond), a move recognised as a mistake well before 2023, when the Commission partially amended the Guidance[6] and launched the initiative that led to the Draft Guidelines currently under discussion. As rightly noted by the Court in a recent ruling, Article 102 is not solely focused on such a restrictive interpretation of consumer welfare, unfortunately promoted by the Priorities Guidance, but rather is "part of a set of rules, the function of which is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, which ensure well-being in the European Union."[7]

It must also be said that this so-called "more economic approach" failed even to deliver on its own promises. It has neither promoted the use of sound economics

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[5] 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 (2009/C 45/02), para 19 ff.

[6] Amendments to the 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, Brussels, 27.3.2023, C (2023) 1923 final.

[7] ECJ, Case C-377/20, ECLI:EU:C:2022:379, para 41, see also 42 - Servizio Elettrico Nazionale

nor contributed to greater legal certainty, as many of its early critics had widely predicted.

B. The lack of effective enforcement

The second shortcoming stems directly from the first. Enforcement of Article 102 under the "more economic approach" has been widely judged as largely ineffective in protecting undistorted competition. Very few cases were pursued, they took far too long and produced very few meaningful results. When enforcement takes too long, abusive behaviour can continue unchecked, potentially causing irreversible damage to competition. This not only diminishes the effectiveness of Article 102 TFEU as a deterrent but also weakens its ability to prevent harm. Consequently, dominant firms may grow stronger, and opportunities for innovation could be lost permanently.[8] Those who have certainly benefited from this situation are the undertakings that abused their dominant positions, along with the closed group of consultants specialised in supporting them during those long proceedings, who are now understandably reluctant to embrace any significant changes to what is, for them, a highly profitable status quo. Moreover, it may have also encouraged acquisitions that led to dominant positions, given the substantial impunity regarding their subsequent conduct.

C. An overly narrow view of the relevant effects for the purposes of the assessment

Not only did the approach endorsed by the Commission with the Priorities Guidance fail due to a lack of effectiveness, but it also faltered because the effects it focused on were too limited. The concepts and methods associated with the "more economic approach" are notoriously ill-suited to capturing essential aspects of how markets truly operate. For instance, there is a clear inability to properly analyse innovation competition, and the same holds true for adequately considering the numerous behavioural biases of consumers.

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[8] Heike Schweitzer, Simon de Ridder, How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses, *Journal of European Competition Law & Practice*, Volume 15, Issue 4, June 2024, 222, 225.

D. The failure to adopt a forward-looking approach

Paradoxically, the approach contained in the Priority Guidance not only failed to promote the use of sound economics or lead to effective enforcement, but actually hindered them. Among its many flaws was its lack of adaptability to changes in markets, abusive behaviours, and the need to adjust accordingly. Its very existence slowed the necessary evolution of competition policy in this key area of enforcement.

III. Do the Draft Guidelines help address these key shortcomings?

A. Need to move far away from a narrowly defined consumer welfare standard

The focus of the Priorities Guidance and the Commission's enforcement, at least in the period before and soon after their finalisation, was on the promotion of consumer welfare, interpreted in a very narrow economic sense. This was clearly a mistake that must not be repeated in the new Guidelines. Instead, strong emphasis should be placed in the Guidelines on the plurality of objectives, as done by the Policy Brief that launched the Article 102 policy initiative in 2023. The authors of the Brief quote Executive Vice-President Margrethe Vestager stating that the antitrust provisions "pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy."[9] What we would like to see is that the important reference to plurality and democracy, and thus to the essential values underlying antitrust action, is included directly in paragraph 1 of the Guidelines.

At the same time, greater attention should be given to the interaction with indispensable objectives such as sustainability and privacy protection, which the Guidelines currently treat merely as aspects related to the quality of a given product, like many others, and relegate to footnote 4. While it is good that the guidelines build on a broad understanding of "quality" it might still be helpful to explicitly include sustainability and other public interest aspects in relevant paragraphs like 51, 55a or 55c.

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[9] Policy Brief (n 4).

B. Need to address the lack of effectiveness

The primary concern running through the Guidelines is to preserve the effects-based approach, even after decidedly scaling back the misguided more economic approach introduced with the 2008 Priorities Guidance. In order to improve effectiveness, the Commission's stated goal is to redesign the effects-based approach, ensuring a better balance of the costs involved.[10] The key priority is ensuring the administrability of the enforcement regime, which includes the ability to prove relevant facts at a reasonable cost and within a reasonable timeframe, as well as employing analytical shortcuts for assessing potential anticompetitive effects.[11] With this main objective in mind, the Commission in the Draft Guidelines embarks on a commendable proposal to introduce the category of naked restrictions and a series of presumptions. As rightly noted by Advocate General Juliane Kokott, there are cases of conduct "where its abusive nature is immediately shown by an overall assessment of the other circumstances of the individual case," [12] and for which it is not necessary to conduct an effects-based analysis. We strongly welcome this effort, as it can do much to facilitate enforcement and improve legal certainty. Underenforcement of Article 102, namely Type II errors, can to some extent be addressed by identifying in the Guidelines abstract rules that are easier to apply, while accusations of legal formalism are, of course, entirely unfounded. Furthermore, we urge the Commission to consider an additional extension of the list of naked restrictions. We particularly highlight a potential oversight concerning anticompetitive behaviours that may specifically arise within ecosystems—issues which, on the other hand, have already received considerable attention specifically in merger control contexts.

In this respect, the Commission should fully fulfil its role in orienting competition policy, especially by carefully identifying naked restrictions but also cases where a case-by-case and effects-based analysis is truly important and "workable." At the same time, as we will discuss in the next subsection, the economic effects to

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[10] Ibid.

[11] Schweitzer & de Ridder (n 8).

[12] AG Kokott, Opinion in Case C-23/14, ECLI:EU:C:2015:343, para 70, Post Danmark.

be considered extend beyond those too narrowly defined by the more economic approach outlined in the Priorities Guidance—an approach that is now rejected. Additionally, where appropriate, non-economic effects should also be included in the assessment.

C. Need to broaden the effects to be considered

By the need to broaden the effects that should be considered, we mean both expanding economic considerations beyond what current competition economics can offer (1) and including the assessment of effects that are not necessarily economic in nature (2).

(1) Broadening the range of economic effects to be considered

While the Draft Guidelines aim to redesign the effects-based approach to make it more effective, far less is done to address another significant failure of this approach: the failure to deliver on its promise of deeper and better economic insight. The primary reason is that the understanding of the consumer welfare standard promoted by the Priorities Guidance concentrated on a narrow set of effects that were not necessarily the most important or relevant in terms of competition policy assessment, especially in dynamic settings. This has also impacted the courts, at least to a certain degree. However, as seen particularly with the rise of digitalisation, this standard has proven to be too limited. An effects-based approach can lead to better economic insights only if it moves beyond what is currently defined as competition economics, which remains heavily influenced by the field of Industrial Organisation. This is particularly evident in dynamic contexts, where focusing on effects in terms of output and prices is clearly inadequate and even misleading. A fitting example of the harm caused by an overly narrow view of relevant economic effects is the *as-efficient competitor* test, which fails entirely to capture and protect the competitive dimension that, in various scenarios, actually matters most. Therefore, we welcome the Guidelines' statement that a price-cost test is inappropriate for non-pricing practices.[13] Further, we encourage the Commission to clarify that the *as-efficient competitor test* is just one of the tools in the toolbox and that the

13 Draft Guidelines, para 56.

Commission is not required to prove the exclusion of an as-efficient competitor in every case.[14]

More broadly, we believe that the concept of *as-efficient competitors* is problematic. This is particularly true when efficiency is narrowly defined, focusing primarily on costs or prices. Efficiency is not a factor that operates independently of economic power. Therefore, employing it as a criterion to determine whether a business practice constitutes an abuse of dominance, or as a potential defence, is concerning. Relatedly, focussing on efficiency in terms of costs and prices can limit the direction of possible innovations. Companies could otherwise decide to compete and innovate on other aspects such as sustainability, social issues or working conditions. Consumers may also base their decisions on these factors. These choices should not be restricted by an overly narrow concept of efficiency. Such a limitation would be particularly detrimental in light of the social and ecological transformations required for a European Green Deal.

Similarly, we note that the Commission refers to "resilience, dependencies, shortages, and disruptions in supply chains" as "efficiencies" that dominant undertakings can use to justify their abuses. We believe, however, that these factors should inform infringement decisions rather than merely serve as justifications for abuses. As observed during and after the pandemic, control over supply chains creates dependencies, leaving European citizens vulnerable to shortages and disruptions.

We therefore believe it is crucial to broaden the range of tests and standards well beyond what traditional 'competition economics' can offer. In this respect, it would be essential, though not yet sufficient, to incorporate into the economic analysis under Article 102 some of the insights recently gained in merger control. This includes better framing the economic power as exerted within ecosystems and taking the necessary steps to preserve innovation competition and pluralism. Finally, standard accounting and financial analysis is particularly well-suited for identifying and addressing certain types of exclusionary abuses, such as cross-

14 CJEU, Case C-48/22, ECLI:EU:C:2024:726, para 264 and 266, Google Shopping.

subsidization strategies in predatory pricing cases. The Guidelines should explicitly recommend this as an analytical tool to be utilized wherever possible and appropriate.

(2) Consideration of non-economic effects

As prominently recalled at the launch of this policy initiative, Article 102, together with other antitrust provisions, "pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy." This includes goals that cannot easily be subsumed under traditional, consumer-centric competition parameters such as choice, quality, and innovation. We believe this is a clear and fair reaffirmation of the multi-goal approach that has always characterized EU competition law. However, we contend that the Draft Guidelines must explicitly reassert this distinctive element in the introductory section, and not merely treat it as an evaluative factor in assessing competition on the merits.

D. Need to incorporate sufficient flexibility to remain forward-looking

Finally, it is essential for the Guidelines to incorporate sufficient flexibility to remain useful and forward-looking, especially insofar as they propose to preserve the effects-based approach through the development of presumptions. As widely recognized, the interpretation of competition law provisions is not static; it undergoes continuous development and adapts over time in response to changing circumstances and new insights. It should also be considered that, just as the Priorities Guidance did, the new Guidelines themselves might trigger fresh opportunities for the courts to reconsider and even deviate from their own jurisprudence. Such flexibility would enable the Commission to assume intellectual leadership and fully perform its role in orienting competition policy, especially when faced with the inevitable evolution of market dynamics and changing methods by which firms abuse their dominant positions.

The Commission should commit to reviewing the Guidelines frequently, to incorporate not only judicial developments but also, and especially, its own learnings from enforcement practice. This would require a significant shift in mindset and approach from the Commission, considering that the recently

amended Priorities Guidance is now 16 years old. An evaluation and ongoing adjustment of the new Guidelines is therefore necessary.

The new Guidelines should aim to provide the necessary standards to address novel cases, as decisions under Article 102 TFEU cover diverse and rapidly evolving sectors. For instance, major shifts in technology, the environment, and even geopolitics might give rise to new practices by firms with market power that, if adequately analysed, could be found to be abusive. For example, it is already clear that non-price-based abuses will play a fundamental role in the future. The Guidelines, however, offer little in the way of assessment standards to guide the evaluation of such novel manifestations of abuse, leaving them to be inferred or extrapolated from between the lines. These standards can guide the future application of the law and provide at least a basic level of legal certainty. Naturally, they must also be regularly reviewed and updated as needed. Notably absent, for example, is any reference to the relationship between Article 102 and the Digital Markets Act, a topic that has not escaped the attention of the EU courts. Furthermore, there is no mention or guidance regarding the potential use of Article 102 to challenge mergers.

Signatories to the submission:

1. ARTICLE 19
2. AlgorithmWatch
3. Balanced Economy Project (BEP)
4. Data Rights
5. Gesellschaft für Freiheitsrechte (GFF)
6. Open Markets Institute (OMI)
7. Privacy International (PI)
8. Rebalance Now
9. The Centre for Research on Multinational Organisations (SOMO)