CEG COMPETITION ECONOMISTS GROUP

European Commission's Draft Guidelines on Exclusionary Abuses

Consultation Response

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Prepared by:

Loes van Bohemen

Dr Hasan Tahsin Apakan

Vanja Reinkowski

Wouter Hollenberg

Prepared for:

European Commission

Directorate-General for Competition

Antitrust Registry

1049 Brussel

België

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1 Introduction

1. On 1 August 2024, the European Commission ("Commission") published its draft Guidelines on exclusionary abuses under Article 102 Treaty of the Functioning of the European Union ("TFEU"). The draft Guidelines outline how the Commission assesses conduct by dominant undertakings that may exclude competitors from the market, aiming to protect fair competition and consumer welfare. The Commission's objective is to provide greater legal clarity and predictability for businesses, national authorities, and courts about its enforcement of Article 102 TFEU, by incorporating legal and market developments since the release of the 2009 published Guidance on exclusionary abuses ("2009 Guidance").[1] The draft Guidelines reflect evolving case law and enforcement experience.

2. Alongside the release of the draft Guidelines, the Commission launched a public consultation to gather feedback on the draft Guidelines. We appreciate the opportunity to respond to the consultation and the consideration of our comments and contributions with the aim of improving the draft Guidelines.[2]

3. We welcome the effort made by the Commission to release Guidelines that reflect the developments in markets, enforcement, and case law. We appreciate the Commission's effort to draft a harmonised overview of recent case law and implement a well-crafted definition of single dominance. Additionally, we commend the implementation of the AEC-test as a price-cost test for conduct subject to specific legal tests.

4. However, we observe that the draft Guidelines appear to steer away from an effects-based analysis and consumer welfare underpinning when setting out how Article 102 TFEU should be applied in future. According to the 2023 Competition Policy brief, Article 102 TFEU enforcement protects, amongst others, the competitive process and consumer welfare within the EU.[3] The effects of the enforcement will therefore be felt on the internal market. Therefore, we believe interventions should be grounded in the economic context of the conduct observed. We would therefore welcome more economic underpinning of the various concepts in the final Guidelines

5. This consultation reviews several key aspects of the draft Guidelines and highlights areas where further clarification or refinement is necessary. Specifically, in the sections that follow we make the following key recommendations:

    - **Section 2 Consumer welfare:** Throughout the text of the draft Guidelines, the analysis of effects often seems to stop at the competitive process, and sometimes even at competitors themselves. This is in stark contrast with the central premise of the 2009 Guidance, where the principle of 'anti-competitive foreclosure' ensured a focus on how foreclosure of competitors leads to consumer harm, as it is the harm to consumer that makes foreclosure anti-competitive. We think it would aid the analysis to consider the market outcomes for consumers to understand the effects and harm of the conduct better. This could be

[1] European Commission, *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 (Text with EEA Relevance)*, 2008.

[2] This document has been prepared by a working group consisting of Loes van Bohemen, Hasan Tahsin Apakan, Vanja Reinkowski, and Wouter Hollenberg. The opinions expressed in this document are those of the authors and cannot be assumed to represent the views of Competition Economists Group Europe ("CEG").

[3] McCallum, Linsey, Inge Bernaerts, Massimiliano Kadar, Johannes Holzwarth, David Kovo, Marie Lagrue, et al., *Competition Policy Brief. Issue 1, March 2023* (Luxembourg: Publications Office of the European Union), 2023, p. 1.

accomplished by i) relating the assessment whether conduct is liable to abusive and ii) the legal test assessment more to consumer harm.

- **Section 3 Two-step test:** The draft Guidelines outline a two-step test for determining abusive conduct—requiring the conduct to depart from competition on the merits and be capable of producing exclusionary effects. In our view, it would be beneficial if the Commission does not emphasise the conceptual difference between the two steps, as in many cases they are not separate analyses. In addition, the current test reads as if the conditions are cumulative, while we argue that is not necessarily so.

- **Section 4 Lack of definitions:** The central concepts of competition on the merits and exclusionary effects are summarily defined in the draft Guidelines. Competition on the merits is predominantly illustrated by conduct that departs from competition on the merits, and the definition of exclusionary effects has an element of circular reasoning.

- **Section 5 AEC test and the role of market- specific factors and less-efficient competitors:** It is constructive that the relevance of the AEC test is acknowledged for an assessment on whether a conduct is liable to be abusive with regard to pricing conduct. However, the relevance of the test with respect to non-pricing conduct remains unclear. At the same time, we argue that the legal AEC based tests might not be sufficiently embracive of the significance of market context and less-efficient competitors which might have negative repercussions for consumer welfare. Furthermore, the general lack of clarity for such concerns in the assessment on whether a conduct departs from competition on the merits, makes it difficult to predict how exclusionary conduct against less-efficient competitors will be handled. We would welcome if the Commission voiced such considerations more clearly in its coverage of the competition on the merits concept and emphasizes that the AEC-based legal tests might not strictly necessary for establishing an abuse even with respect to pricing conduct.

6. We address each point in more detail in the sections below.

2 Consumer welfare

7. We observe a notable shift from the 2009 Guidance to the draft Guidelines in how consumer welfare is considered. In the draft Guidelines, the term consumer welfare is addressed only once:

   - Stating that Article 102 TFEU applies to "*all practices by dominant undertakings which may directly or indirectly harm the* ***welfare of consumers****, including practices that harm consumers by undermining an effective structure of competition. In particular, dominant undertakings can harm consumers, by hindering [...], the maintenance of the degree of competition.*"[4]

8. Additionally, the draft Guidelines contain only limited references to consumer harm or benefit:

   - In the introduction, stating the general purpose of the Guidelines, which is to protect effective competition. This protection, in turn, incentivises the "*market players to deliver the best products in terms of choice, quality and innovation, at the lowest prices for consumers*."[5] It is

[4] European Commission, *Communication from the Commission – Draft Guidelines on the Applicability of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings*, *Draft*, 8 January 2024, para. 5.

[5] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 1.

also mentioned that dominant undertakings are allowed, under Article 102 TFEU, to operate as long as they do not impair effective competition to the determinant of consumers.[6]

- When defining 'competition on the merits', which "*relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services.*"[7] It also notes that a relevant factor in assessing whether conduct departs from competition on the merits is if it "*prevents consumers from exercising their choice.*"[8]

- Highlighting that proving actual consumer harm is not necessary to establish that a conduct is capable of producing exclusionary effects.[9]

- To a limited extent, during the discussion of the principles to determine whether specific categories of conduct are liable to be abusive (see paragraph 12ff).

- In setting out the conditions for the efficiency defence, where the exclusionary effects should be "*counterbalanced [...] by advantages in efficiency that also benefit consumers.*"[10]

9. Throughout the text of the draft Guidelines, the analysis of effects often seems to stop at the competitive process, and sometimes even at competitors themselves. This development is in stark contrast with the central premise of the 2009 Guidance, where the principle of 'anti-competitive foreclosure' ensured a focus on how foreclosure of competitors leads to consumer harm, as it is the harm to consumer that makes foreclosure anti-competitive.

10. In comparison, 'consumer welfare' was defined in the 2009 Guidance as the clear "*aim of the Commission's enforcement activity in relation to exclusionary conduct [...] to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare*".[11] Enforcement priorities were focussed on conduct "most harmful to consumers."[12]

11. While this concept briefly appears in the draft Guidelines' definition of competition on the merits, as the *"principle, that relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services."*[13], it plays a far less central role in the overall analysis.

12. Similarly, the second main concept of the draft Guidelines, the 'capability to produce exclusionary effects' rarely emphasises consumer welfare. While it is stated that proving consumer harm is not necessary for establishing exclusionary effects,[14] it does not make clear—unlike the 'anti-competitive foreclosure' concept—that these exclusionary effects should be prevented to protect consumer welfare. For example, in the section of the draft Guidelines discussing the relevant facts

6 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 2.

7 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 51.

8 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 55a).

9 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 72.

10 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 48, 58, 169.

11 European Commission, *2009 Guidance*, para. 19.

12 European Commission, *2009 Guidance*, para. 5.

13 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 51.

14 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 72.

and circumstances used for assessing a conduct's capability to produce exclusionary effects, there is no focus on consumer harm or benefits.[15]

13. In specific legal tests for various conduct types, consumer interests are rarely considered in the analysis:

- **Exclusive dealing:** The focus is on the potential to restrict the customer's or seller's choice of supply or demand sources, with no mention of potential harm to end consumers.[16]
- **Tying and bundling:** Although it is mentioned that the conduct *"may also limit customer choice"*[17], it is unclear when the restriction of choice hurts consumers. Tying can sometimes benefit consumers, which includes the restriction of choice.[18] Further, the focus is primarily on whether tying is capable of having exclusionary effects, such as leveraging dominance in the tied market.[19]
- **Refusal to supply:** The legal test focus is on harm to competitors, without clear implications for end customers.[20]
- **Predatory pricing:** There is a brief reference to consumers in the legal test description, stating *"[b]elow cost pricing that is selectively applied to specific customers."*[21] However, the effects analysis focuses on the competitive process and the elimination of competitors.[22]
- **Margin squeeze:** The focus is on competitors being forced to exit the market due to an inability to operate profitably[23], with no consideration of consumer harm. [24]

14. Similarly, for conduct that falls under no specific legal test, the relation to consumer harm was only made for the conduct 'self-preferencing':

- **Conditional rebates:** The section centres on the application of the price-cost test to determine when conditional rebates are abusive but does not explain explicitly how the conduct might harm consumers.
- **Self-preferencing:** The conduct can hurt consumers by *"the positioning or display if the leveraged product in the leveraging market, manipulating consumer behaviour and choice or*

15 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 70.

16 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 82.

17 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 87.

18 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 85, 87.

19 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 89d), 93.

20 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 99, 103.

21 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 108.

22 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 111.

23 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 121, 122b), 124.

24 European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 122c), 127, 128, 129.

manipulating auctions."[25] It is *"liable to be abusive when the dominant undertaking leverages its dominance in a given market [...] to gain advantage in a related market"*.[26]

- **Access restriction:** The draft Guidelines provide examples such as *"disruption of supply of existing customers"*, *"dominant undertaking fails to comply with a regulatory obligation to give access"* and *"[w]here the dominant undertaking degrades or delays the existing supply of an input by imposing unfair access conditions"*[27] but the impact on consumers is not clearly outlined.

15. By contrast, the 2009 Guidance made the connection between anti-competitive foreclosure and consumer harm explicit. It did so by either mentioning consumer harm directly, or with reference to the principle of anti-competitive foreclosure, the focus on consumer welfare was always clear. In the draft Guidelines, however, it appears that competition or competitors themselves rather than consumers are protected.

16. This observation relates back to the overall steering away from effects-based analysis and consumer welfare underpinning within the draft Guidelines. We see that the analysis of the conduct and its effects stops further 'upstream,' so to say. The final link with why it is important to protect the competitive process against abusive conduct from a dominant competitor and how this conduct is harming EU consumers is missing.

17. We do not suggest going against case law in that consumer welfare effects need to be extensively analysed in order to meet any standard of proof. Rather, we think it would aid the analysis to consider the market outcomes for consumers to understand the effects and harm of the conduct better.

3 Two-step test

18. In the draft Guidelines what we interpret as a cumulative two-step test is set out to determine if conduct by a dominant undertaking is liable to be abusive.[28] The cumulative conditions to determine whether conduct by a dominant undertaking constitutes an exclusionary abuse is that it has to:

    i. depart from competition on the merits, and

    ii. be capable of having exclusionary effects.

19. The Commission concedes that the analysis of the two points might sometimes conflate, however the Commission adds that the assessment regarding each step is conceptually different from each other.[29] This and other elaborations in the draft Guidelines create the impression that the two steps are largely independent. We also note that this two-step test is confirmed in the latest

[25] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 159.

[26] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 158.

[27] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 166c).

[28] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 45.

[29] *"While the assessment of whether the conduct departs from competition on the merits is conceptually different from the assessment of whether the conduct is capable of having exclusionary effects, certain factual elements may be relevant to the assessment of both."* European Commission, Draft Guidelines on Exclusionary Abuses, para. 46.

Intel judgement.[30] In our view, this allusion to a two-step test in the draft Guidelines might be problematic and might create more issues than it might solve.

20. First, the current wording of the two-step test suggests that some unilateral conduct of dominant undertakings that lies outside of competition on the merits might not be abusive. However, it is not clear whether such conduct can exist, and the draft Guidelines do not provide any examples for it.

21. Second, the separation of the two steps suggests that showing that a conduct is capable of having exclusionary effects is not directly relevant for an assessment on whether a conduct departs from competition on the merits and vice versa.[31] For example, the draft Guidelines put forward the relevance of the as-efficient competitor ("AEC") test/principle for an assessment on whether a conduct departs from competition on the merits. However, in our view, the same AEC test is conceptually inseparable from an assessment on producing exclusionary effects, as the test considers whether the conduct is capable of having such effects against an as-efficient competitor.[32] In addition, the fact that some exclusion or marginalisation of competitors is allowed within competition on the merits[33, 34] does not immediately imply that obvious exclusionary intent or strategy against less-efficient competitors would also be permitted as part of competition on the merits.

22. Third, the conceptual separation of the two steps creates uncertainty on if and when consumer welfare effects will be considered.

23. Fourth, both steps are often met simultaneously, either affirmatively or negatively. This in itself is an indication that both steps might not be (always) easily separable as suggested by the Commission. To explain more specifically, the EC introduced with the draft Guidelines three categories of conduct, which allocates the burden of proof between the EC and the defendant.[35] We summarise the definitions of these categories in Table 3-1 below.

24. For conduct subject to specific legal tests, if the conduct departs from competition on the merits, as determined by the legal test, it is presumed to have exclusionary effects. Therefore, for these types of conduct the analysis is therefore not a two-step process, but both criteria are met simultaneously.

25. The same applies for naked restrictions. Naked restrictions depart from competition on the merits and have by their very nature the capability to produce exclusionary effects. It follows that only in the last category of 'other conduct' the two-step approach would be applied as two distinct analyses.

30 ECJ, European Commission v Intel Corporation Inc, Case C-240/22 P, 24 October 2024, para. 176.

31 European Commission, Draft Guidelines on Exclusionary Abuses, para. 46.

32 The following factor according to the draft Guidelines and the Union Courts is relevant for the assessment if conduct departs from competition on the merits: *"whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market."* European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 55f).

33 ECJ, Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato and Others, Case C-377/20, 12 May 2022, para. 45.

34 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 51.

35 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 60.

26. In our view, it would be beneficial if the Commission does not emphasise the conceptual difference between the two steps, as in many cases they are not separate analyses. In addition, the current test reads as if the conditions are cumulative, while we argue that is not necessarily so.

Table 3-1: Definition of the categories of conduct

Term	Competition on the merits	Exclusionary effects
Conduct subject to specific legal tests	*"conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits. [...] namely exclusive dealing, tying, and bundling, refusal to supply, predatory pricing and margin squeeze [...]."*[36]	Conduct that is presumed to lead to exclusionary effects. This presumption applies to (i) exclusive supply or purchasing agreements; (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying.[37]
Naked restrictions	*"conduct that holds no economic interest for a dominant undertaking, except that of restricting competition (so-called naked restrictions [...]) is also deemed as falling outside the scope of competition on the merits."*[38]	Naked restrictions, or conduct that *"have no economic interest for that undertaking, other than that of restricting competition. These types of conduct are by their very nature capable of restricting competition."*[39]
Other conduct	*"As regards other conduct, it needs to be shown that the conduct departs from competition on the merits based on the specific circumstances of the case"*[40]	Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects.[41]

Source: CEG analysis based on draft Guidelines.

4 Lack of definitions

27. A second area where the draft Guidelines lack economic underpinning is through the sparse definitions of its two central concepts: competition on the merits, and capability to produce exclusionary effects. We only see some concrete examples of what should be considered an exclusionary effect in section 4 of the draft guidelines, where specific categories of conduct are

36 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 53.

37 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 60b).

38 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 54.

39 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 60c).

40 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 55.

41 European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 60a).

discussed. Competition on the merits, however, is mainly defined in the negative, by giving examples what is **not** competition on the merits.

28. We think the document would benefit greatly from a positive definition of these concepts in Section 3 of the draft Guidelines. This section sets out the general principles and sets out the two-step approach that *"it is generally necessary to establish whether the conduct departs from competition on the merits [...] and whether the conduct is capable of having exclusionary effects."*[42]

29. The two-step analysis is discussed in section 3 above. In the following sections 4.1 and 4.2, we discuss the details of the definitions or the lack thereof for each of the two concepts in turn.

4.1 Competition on the merits

30. Competition on the merits is described in paragraph 51 of the draft Guidelines as follows:

> *"The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services."*[43]

31. Throughout the document, competition on the merits is mainly defined by what it is not.

32. First, the Guidelines present three categories of abusive conduct under the heading of competition on the merits, and later under the section of exclusionary effects. The definitions are presented in Table 3-1 above. It is apparent from the table that any behaviour that holds no economic interest for a dominant undertaking apart from restricting competition ["naked restrictions"] or passes any of the five legal test departs from competition on the merits.

33. In particular, conduct that satisfies the legal test for exclusive dealing, tying, and bundling, refusal to supply, predatory pricing and margin squeeze is considered to depart from competition on the merits.[44]

34. Further, conduct that falls under a naked restriction also falls outside the scope of competition on the merits.[45]

35. In setting out the principles to determine whether specific categories of conduct are liable to be abusive, the Commission further specifies which conduct is considered to depart from competition on the merits and how this can be demonstrated:

- To demonstrate that a conditional rebate scheme departs from competition on the merits, it may be appropriate to make use of a price-cost test.[46] The price-cost test shows that the

[42] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 45.

[43] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 51.

[44] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 53.

[45] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 54.

[46] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 143.

effective price charged by a dominant undertaking is below the AAC, the rebate scheme is found to depart from competition on the merits.[47]

- Multi-product rebates typically depart from competition on the merits if it enables a dominant undertaking to leverage a dominant position from one market into one or more other markets.[48]

- In order to determine whether self-preferencing departs from competition on the merits, relevant factors include the importance of the leveraging markets, the influence on the behaviour of users and whether the preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities in the leveraging market.[49]

36. The Commission thus mainly describes what departs from competition on the merits and how this may be demonstrated. What we feel is lacking is some discussion of a positive definition that goes beyond paragraph 51. A definition that makes clear why it is important for the competitive process and consumer welfare why dominant undertakings do not depart from competition on the merits.

4.2 Exclusionary effects

37. The definition of the concept of exclusionary effects is given in paragraph 6 of the draft Guidelines. In short, dominant undertakings can harm consumers by hindering effective competition through actions that would not be possible under normal competition. Such behaviour is referred to as 'exclusionary abuse.' The effects of such behaviour are defined as 'exclusionary effects' and may include:

- Excluding or marginalising competitors

- Increasing barriers to entry or expansion

- Hampering or eliminating access to markets

- Imposing constraints on the potential growth of competitors.

38. We note that there is a circularity to the reasoning in this definition. The definition of exclusionary effects given here hinges on the fact that they are effects that follow from exclusionary abuses. However, finding (a capability of producing) exclusionary effects is necessary to establish that a conduct is liable to constitute an exclusionary abuse. Furthermore, according to the case law, not every conduct with exclusionary effects departs from competition on the merits which indicates that some non-abusive conduct might also have exclusionary effects.[50] We would welcome if this circular reasoning were removed, and the paragraph is clarified to incorporate that possibility.

[47] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 151.

[48] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 155.

[49] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 161.

[50] ECJ, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante Della Concorrenza e Del Mercato and Others*, para. 73.

39. We would also welcome additional elaboration on how the concept of exclusionary effects relate to the concept of anti-competitive foreclosure. This concept was central to the 2009 Guidance but has disappeared from these draft Guidelines.

40. In addition, we would welcome some economic context to the concept of the exclusionary effects, and some clarification on whether the list provided in paragraph 6 is exhaustive or not.

5 AEC test and the role of market- specific factors and less-efficient competitors

41. In this section, we discuss the role of the AEC test and the principles surrounding both the as-efficient and less-efficient competitors as outlined in the draft Guidelines. We also discuss the extent to which the Commission considered the relevance of market specific factors in its coverage.

42. In a nutshell, we argue that:

    i. It is constructive that the satisfaction of an AEC based test is considered to be (almost) sufficient for finding an abuse in the context of predatory pricing and that its (potential) relevance is accepted in the contexts of margin squeeze and conditional rebates. However, at the same time, the proposed AEC-based legal tests in the draft Guidelines may not be sufficiently embracive of the relevance of less-efficient competitors and market-specific factors, which would be important for assessing the anti-competitive and welfare effects of the conduct

    ii. It is unclear to what extent market-specific factors and less-efficient competitors will be considered for an assessment on whether a conduct departs from competition on the merits. This lack of consideration makes it difficult to predict how such concerns will generally be tackled when assessing whether a conduct is liable to be (exclusionary) abusive.

43. Less-efficient competitors might play a significant role in constraining the conduct of dominant undertakings and the exclusion of them might be detrimental to consumer welfare. Such competitors might limit the price that a dominant undertaking might set, they may attain sufficient scale in the future allowing them to fiercely compete with the dominant undertaking. Furthermore, when the market is differentiated to some extent, their presence might constitute a disciplining factor on the dominant undertaking.

44. The market context and specifics would also be important in assessing the anticompetitive effects of a conduct. A price-reduction that is exclusionary against the only competitor might be assessed differently from a situation in which the price reduction is not expected to affect many of the competitors of a dominant undertaking, and it is unlikely that the losses from the price-reduction can be later recouped.

45. The structure of this section will be as follows. In sections 5.1 and 5.2 we will discuss the role of the AEC principle and less-efficient competitors and market context in the draft Guidelines in broad terms. In the sections following these general sections, we will discuss the coverage of these concerns separately (and in detail) for specific conduct including predatory pricing, margin squeeze, conditional rebates, and non-pricing conduct such as refusal to supply and self-preferencing.

5.1 AEC principle/test in the draft Guidelines

46. In this section, we explain how the AEC principle/test is covered in the draft guidelines in broad terms.

47. We understand that the draft Guidelines introduce the AEC test in paragraph 55 f) as a (potentially) relevant factor for the analysis of whether the conduct departs from competition on the merits. The AEC test is not named explicitly. For ease of reference, we would welcome the term to be included in this paragraph. The paragraph reads:

> *"[W]hether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market."*

48. The Commission refrains from including the AEC test as a universally necessary or sufficient criterion for either of the two steps of the assessment of liability of (exclusionary) abusiveness. Nevertheless, the Commission, citing the case law, states that an AEC-based price-cost test is required in the context of predatory pricing and margin squeeze for an assessment on whether the conduct departs from competition on the merits, while a price-cost test might be relevant for such an assessment regarding other pricing conduct such as conditional rebates.[51] Furthermore, the Commission states that the fulfilment of a price-cost test would indicate a presumption of a capability of having exclusionary effects in the contexts of predatory pricing, and some margin squeeze cases. The Commission also accepts the potential relevance of the test in the context of conditional rebates for an assessment whether the conduct is capable of producing exclusionary effects.[52]

49. We note that in the latest Intel judgment the ECJ strongly reiterated the relevance of the AEC test for pricing conduct and in particular for loyalty rebates.[53] In the context of loyalty rebates, the ECJ stated that if the dominant undertaking submits evidence that implies the conduct was not capable of producing alleged foreclosure effects, the Commission should analyse the possible existence of a strategy aiming to exclude as-efficient competitors and that the capability of such rebates to foreclose as-efficient rivals must be usually assessed by the AEC test.[54]

50. We welcome the role that the Commission and the recent Intel judgment give to the AEC test in the mentioned contexts. However, as we will argue, the legal test should take into account the role of market conditions and less-efficient competitors, and the AEC test should not be the only way of establishing an abuse.

51. For conduct that can be categorized as exclusive dealing, the Commission presumes a capability of producing exclusionary effects and does not propose a price-cost test. However, it mentions that it will consider evidence presented by the undertaking against the presumption including evidence on the existence of an exclusionary strategy which, according to the latest Intel judgment, should concern exclusionary strategies against as-efficient competitors in the context

[51] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 56, 143.

[52] European Commission, *Draft Guidelines on Exclusionary Abuses*, fn. 127.

[53] ECJ, *European Commission v Intel Corporation Inc*, para. 202.

[54] ECJ, *European Commission v Intel Corporation Inc*, paras. 180,181,202.

of loyalty rebates.[55] For naked restrictions, the Commission states that the conduct is by its very nature abusive and it is very unlikely that any evidence submitted by the undertaking would be able to prove otherwise.[56]

52. The Commission states that the AEC-based price-cost test might be generally inappropriate for non-pricing practices, but *"the relevance cannot be automatically ruled out"* for an assessment to establish whether the conduct diverges from competition on the merits.[57]

53. This statement slightly differs from the respective paragraphs of the Unilever judgment which states that *"the relevance of such at test cannot be ruled out"* even if it may be inappropriate for certain non-pricing cases."[58] Furthermore, as mentioned above, the draft Guidelines, citing case-law, lists the AEC principle as a (potentially) relevant factor in the assessment of competition on the merits.[59] We believe that it would be useful that the Commission clarifies whether AEC test is universally relevant or not-even if it is not appropriate in some cases.

5.2 The less-efficient competitor in the draft Guidelines

54. In this section, we will discuss the importance that the Commission attaches to less-efficient competitors in the draft guidelines in broad terms.

55. The Commission in paragraph 51 of the draft Guidelines, explains that some acts of a dominant undertaking that lie within the boundaries of competition on the merits may lead to the exclusion or marginalisation of less-efficient competitors and these would not be in breach of Article 102 TFEU. Less-efficient competitors are there defined as competitors that are *"less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."*[60]

56. However, we understand from paragraph 73 and footnote 325 of the guidelines that the exclusion or marginalisation of a less efficient competitor **can** indicate having exclusionary effects. And accordingly we understand that if the same conduct of a dominant undertaking against less efficient competitors also departs from competition on the merits, then the conduct would be liable to be abusive. It follows that, at least in principle, the Commission will take potential exclusive conduct against less efficient competitors into account when assessing the liability to be abusive, provided that the conduct is outside the scope of competition on the merits.

57. In addition, we read sections 3.3.2 and 3.3.3. of the draft Guidelines which cover the substantive legal standards and relevant element with respect to an assessment on whether a conduct is capable of having exclusionary effects, as supportive of the interpretation that exclusionary conduct against less-efficient competitors might be relevant. The mentioned sections cite exclusionary intent and strategy against competitors and the positions of competitors as relevant factors for such an assessment, and they don't make a distinction between exclusionary conduct

[55] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 78–83; ECJ, *European Commission v Intel Corporation Inc*, para. 180. Note that the Commission's statement is more general than the Intel statement which put emphasis on the AEC principle.

[56] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 60c).

[57] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 56, fn.128.

[58] ECJ, Unilever Italia Mkt Operations Srl v Autorità Garante della Concorrenza e del Mercato, Case C-680/20, 19 January 2023, paras. 57, 59.

[59] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 55f).

[60] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 51. See also ECJ, *Servizio Elettrico Nazionale SpA and Others v Autorità Garante Della Concorrenza e Del Mercato and Others*, paras. 45, 73.

against as and less-efficient competitors.[61] Additionally, in section 4.3.1 of the draft guidelines, which describes the legal test applied to conditional rebates, the Commission explicitly acknowledges the relevance of less efficient competitors in certain situations by saying that less efficient competitors can constrain dominant undertakings.[62]

58. In contrast, in the section on the relevant factors to establish that conduct departs from competition on the merits, the Commission only refers to the AEC principle - and does not seem to put enough emphasis to less-efficient competitors and market specific factors.[63] The Commission states that it is possible that some above-cost pricing might be abusive and acknowledges the potential relevance of market specific factors for such pricing (see section 5.3 on Predatory pricing for a more detailed discussion). However, the limited emphasis of such considerations in that section brings questions regarding the relevance of such factors for such an assessment.[64]

59. This lack of consideration for some market context specifics and less-efficient competitors when determining whether conduct departs from competition on the merits may result in the two-step test failing in cases where the conduct is potentially exclusionary against less-efficient competitors that exert important competitive constraints on the dominant firm.

5.3 Predatory pricing

60. On predatory pricing, the Commission states that an AEC-based price-cost test is required for the assessment of competition on the merits and can also be relevant for assessing the capability of producing exclusionary effects.

61. The Commission, consistent with the case-law, puts forward a test that distinguishes between two scenarios:[65]

    i. pricing below average variable cost ("AVC"), or alternatively below average avoidable cost ("AAC")
    ii. pricing between AVC (or AAC) and average total cost ("ATC"), or alternatively long-rung average incremental cost ("LRAIC").

62. According to the test, the former category of pricing is deemed to be predatory, while the latter is found to be abusive only when it is established that the dominant undertaking has an exclusive intent or strategy.

63. The proposed test is consistent with the case law and, in our view, is an amalgamation of the AEC principle and the 'no economic sense' test that prohibits conduct that can't be explained other than for an interest on restricting competition.[66] The 'no economic sense' test first appeared in the EU case-law through the AKZO judgment and it was explicitly restated in the draft Guidelines in relation to naked restrictions as *"conduct that holds no economic interest for a dominant*

[61] European Commission, Draft Guidelines on Exclusionary Abuses, paras. 70c), 70f).

[62] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 144b).

[63] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 53–58.

[64] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 57.

[65] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 111.

[66] For a definition of 'no economic sense' test, see: Jones, Alison, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford University Press), p. 374.

undertaking, except restricting competition."[67] The implementation of the proposed legal test will be beneficial in terms of legal certainty that they may create for undertakings. By using such a test, the Commission might minimize the risk of over-enforcing competition policy in certain cases and making type-1 errors. For instance, such an approach is less likely to mistakenly catch genuine price reductions or price-wars as anticompetitive, as such actions do not usually include under-cost pricing.

64. However, a blind application of the test without regarding the market context and dynamics and potentially the intentions of the undertakings against less efficient competitors, might sometimes lead to under - or (sometimes over) - enforcement of competition policy, which might have repercussions for (consumer) welfare.

65. First of all, the test does not seem to penalize anticompetitive conduct against less-efficient competitors, except for a specific case where less-efficient competitors are able to consistently set prices below their ATC. However, dominant undertakings might attempt to exclude less-efficient competitors without sacrificing full profits, by just reducing their prices temporarily below their less efficient competitors' cost level. By excluding such rivals, the dominant undertakings may later recoup their temporary losses and ensure future profit levels through higher prices. Less-efficient competitors can be functional in restraining the dominant undertaking in the long run. For example, they may attain sufficient scale in the future, be innovative, or serve a niche in the market.

66. Second, as other commentators had mentioned elsewhere, a price-cost test might be inappropriate for two-sided platforms, as such platforms typically use zero (below-cost)-pricing at one side of the platform.[68] Using zero-prices at one side of the platform could be economically rational, as the sensitivity of demand at one side can be larger than the sensitivity at the other side. In such a situation, a rational firm would tend to choose a zero-price at the sensitive side, as demand could be drastically reduced due to a small price increase, while setting an above-cost price at the less sensitive side. It might be difficult for entrants to enter the market in such situations, irrespective of their efficiencies, as they would face the hurdle of attracting a sufficient customer base at each side to counter-act the network effects advantage of the incumbent. However, a legal rule that would force platforms to set above-cost prices at both sides would also not be necessarily desirable from the consumer's perspective.

67. We acknowledge that the Commission, in paragraph 57 of the draft Guidelines, mentions that some pricing above ATC might be outside of competition on the merits depending on: i) the market dynamics, ii) the extent of the dominant position, and iii) the specific features of the conduct at stake. Moreover, and as mentioned above, the Commission restates the AKZO 'no-economic sense' test in paragraph 54.

68. We welcome these paragraphs as they might mitigate some of the concerns we raise in this section and section 5.1 with respect to less-efficient competitors and relevant market dynamics. However, in our view, these additional explanations are not sufficiently elaborate in contrast to the more detailed explanations in sections 3.3.2 and 3.3.3 of the draft Guidelines on relevant considerations and factors for assessing the capability of producing exclusionary effects. Moreover, it is not clear whether the Commission interprets the 'no economic sense' test broadly

[67] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 54. See ECJ, AKZO Chemie BV v Commission of the European Communities, Case C-62/86, 3 July 1991, para. 71.

[68] See for instance: Jones, Sufrin and Dunne, p. 402; Geradin, Damien, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (OUP Oxford), 2012.

enough to encompass anti-competitive conduct against less-efficient competitors. Additionally, it remains to be seen whether paragraph 55e), which discusses abnormal or unreasonable changes in behaviour, could be used to cover potentially "abnormal changes" in pricing behaviour.

69. We would welcome if these subsections were adjusted to incorporate those considerations, and it is clarified that exclusionary intent or strategy against (less-efficient) competitors might be relevant for deciding whether the conduct is within the scope of competition on the merits. Furthermore, it would be desirable if the Commission clarifies that while the proposed price-cost test may generally be sufficient for finding an abuse, there might be exceptions. The test is not always necessary, nor should it be the sole means of detecting anticompetitive conduct.

5.4 Margin Squeeze

70. For the assessment of margin squeeze, the Commission proposes a legal test that takes into account the spread between the upstream and downstream prices of a vertically integrated dominant undertaking.[69] According to the legal test, the conduct of a dominant vertically integrated undertaking constitutes an abuse if the spread is not sufficient to accommodate an as-efficient competitor and it entails a capability of producing exclusionary effects. Additionally, the conduct is presumed to be capable of producing exclusionary effects if the spread is found to be negative, that is the downstream price of the vertically integrated undertaking is below its upstream price.[70]

71. As the legal test contains a condition specifically related to as-efficient competitors, the concerns we stated in our discussion on predatory pricing about the relevance of market specific context and less-efficient competitors might also be relevant for margin squeeze cases. Less-efficient competitors might exert a significant constraint on the dominant undertakings in certain contexts, although a more nuanced approach might be warranted in certain market situations. Below, we outline such market situations where the legal test might catch conduct as abusive when it is potentially beneficial for consumers.

72. First, we consider that there may be market conditions that justify a negative or insufficient spread. Namely, if the dominant undertaking does not have a strong presence in the downstream market and requires sufficient scale to compete with the main downstream competitors, its cost base may be significantly higher than that of its main competitors in the downstream market. In such a case, the legal test in the draft guidelines might indicate a negative or insufficient spread and a subsequent signal of abuse. However, the main players in the downstream market are enjoying healthy profit margins and are not experiencing an exclusionary threat from the vertically integrated firm.

73. Second, there might be situations in which a successful exclusionary strategy even against as-efficient competitors in the downstream market might be consumer-welfare improving from a dynamic perspective. For instance, if the downstream market is dominated by a competitor and the downstream branch of the vertically integrated firm has only a marginal presence, then both dominant firms at each level would set their prices without considering the welfare effects on the other side. This is typically called a 'double marginalization problem.' In such a context, the vertically integrated undertaking may choose to engage in below-cost pricing at the downstream level to capture additional market share and attain market-dominance. Such under-cost pricing

[69] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 122.

[70] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 124, 128.

might be necessary to gain market share, especially when brand loyalty or reputation effects are benefitting the rival. When the vertically integrated firm attains dominance at the downstream level, it may set lower consumer prices. However, we note that this is a specific market situation, and the exclusion of rivals in the downstream market might also have anti-competitive repercussions for the upstream market and these potential effects would also need to be carefully considered in an assessment.[71]

5.5 Conditional Rebates

74. In this section, we will cover conditional rebates that are not part of an exclusionary purchase or supply agreement. We will first discuss the role of the AEC test and less-efficient competitors in the legal test used to assess conditional rebates in the draft Guidelines. Afterwards, we will make some other points that might be relevant for an anti- competitiveness assessment.

75. Regarding conditional rebates that are not part of an exclusionary purchase or supply agreement, the Commission follows a relatively more flexible approach and states that AEC-based price-cost tests can be both relevant for an assessment on competition on the merits and capability of producing exclusionary effects.[72] However, the Commission iterates that such tests may be inappropriate for an assessment on competition on the merits in certain cases.[73] The Commission in paragraph 144a) states that the test is required for standardised volume-based incremental rebates. To justify this, the Commission states that for such conduct, only below-cost pricing would be outside the scope of competition on the merits. We find this paragraph to be seemingly inconsistent with statements of the Commission in paragraph 57, regarding conduct that entails pricing above ATC and, to some extent, with the explanations in paragraph 144b).

76. As we have stated before in section 5.3 of this document, for a dominant undertaking to predate competitors, it might not be necessary to sacrifice its profits completely. In certain market contexts, a dominant undertaking might use an above-cost price scheme coupled with standard incremental rebates to attempt to exclude some rivals. Such an attempt to predate competitors would be successful for instance if the corresponding downstream buyer is of sufficient size and not supplying to that buyer would limit the competitor of sufficient scale to be able to stay in the market and the price schedule lies above the costs of the competitor. Incremental rebates might also be exclusionary- in other less-obvious situations. For instance, a less-efficient competitor may leave a market characterized by decreasing marginal costs, as a result of its capacity or financial constraints even when its cost schedule lies below the price-rebate schedule of the dominant undertaking until a certain volume. In such a case, to fill its inventory a buyer might need to buy enough supplies from a dominant undertaking, and that the incremental marginal-price of the dominant undertaking lies below the (marginal) cost of the competitor might be enough to foreclose the rival. We would welcome if such concerns can be addressed and the statement in paragraph 144a) is clarified.

77. We welcome however that the Commission in paragraph 144b) affirms that less-efficient competitors and market-context can be indirectly relevant for an assessment of conditional rebates on whether the conduct diverges from competition on the merits. However, the same paragraph refrains from explicitly stating the relevance of these factors for an assessment on

[71] Regarding such an assessment, the analysis might yield different predictions about long-term effects of the conduct depending on whether there are barriers of entry in the upstream market.

[72] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras 142–144, 145f).

[73] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 144b).

competition on the merits and restates instead that the general principles in section 3.2 would apply. As we have argued before, it is not entirely clear how these general principles would address exclusionary conduct against less-efficient competitors. We would appreciate if the Commission states that these concerns are unquestionably relevant for an assessment, and it voices them more explicitly in section 3.2.

78. In addition, we would like to note that for retroactive rebates, it is especially important to establish an accurate contestable and non-contestable share of customer demand. An estimated large non-contestable share would indicate that it is quite easy to exclude rivals. Accordingly, an overestimation of a non-contestable share might lead to mistakenly catching some conduct as abusive.

79. On the other hand, economic theory advances several additional factors that might be considered to be relevant for an anti-competitiveness assessment of rebates. These factors include the market context, indispensability of the buyer for the competitors, counteroffer (bargaining) ability of the competitors and their financial and capacity constraints. Moreover, rebates might be useful in solving double marginalization problems as they represent non-linear pricing contracts that might align incentives of the buyer and seller. Lastly, it has been argued by some that exclusive contracts might be useful if the dominant undertaking makes investments- on which competitors may attempt to free ride- which we interpret to be applicable also to rebates.[74] We understand that the considerations in paragraph 145a-b) regarding an assessment on capability of producing exclusionary effects and relevant general conditions stated in section 3.3.3 such as paragraph 70 a-g), to some extent, might be read to incorporate such concerns. However, these may need some additional clarification.

5.6 Self-preferencing and Refusal to supply

80. Regarding non-pricing practices, the draft Guidelines state that the AEC principle/test might be generally inappropriate for assessing whether the conduct departs from competition on the merits.[75] We take this statement to be applicable to refusal to supply and self-preferencing. While these two practices have certain similarities, however, the legal/enforcement approach employed with respect to these practices differ from each other. The legal test regarding refusal to supply is based on the Bronner judgment,[76] which strictly requires that an input is indispensable for a competitor to find that a refusal to supply is liable to be abusive. Self-preferencing does not require such an indispensability condition but might require the existence of abnormal preferential treatment to leverage dominance to neighbouring markets.[77]

81. Furthermore, the satisfaction of the legal test for refusal to supply would indicate that the conduct departs from competition on the merits and would create a presumption for the capability of producing exclusionary effects. On the other hand, self-preferencing does not have its own

[74] See de Meza, David and Mariano Selvaggi, 'Exclusive Contracts Foster Relationship-Specific Investment', *The RAND Journal of Economics*, 38.1 (2007), 85–97.

[75] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 56.

[76] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 101, fn. 243. See ECJ, Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG, Case C-7/97, 26 November 1998.

[77] European Commission, *Draft Guidelines on Exclusionary Abuses*, para. 161.

specific legal test, and therefore the elements in section 3.2, including the AEC test, might potentially be relevant.[78]

In any event, both legal approaches enable prohibiting some potentially exclusionary behaviour against less efficient competitors. However, undertakings anticipating such enforcement regarding non-pricing conduct, may try to replicate some self-preferencing or refusals of supply behaviour by commercializing the conduct and employing a margin squeeze against less efficient competitors, as the legal test on margin squeeze is not likely to catch such behaviour as anti-competitive.

[78] European Commission, *Draft Guidelines on Exclusionary Abuses*, paras. 55, 161.