

Comments on ‘Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings’

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INTRODUCTION

Thank you for the opportunity to comment on this document. I hope my observations are helpful. I am happy to discuss these further and elaborate on the points that I have made.

Hereinafter, the consultation document is referred to as ‘Draft Guidelines’. Unless otherwise specified, all paragraph and section references are to it. Case citations are provided only for those cases not mentioned in the Draft Guidelines. I have sometimes used “domco” instead of dominant firm.

General Remarks about some themes that emerge are in section 1. Specific comments about certain paragraphs are in section 2. A discussion of the various types of abuses and how these map onto the analytical framework of the Draft Guidelines are in Annex I.

1. GENERAL REMARKS

1. I welcome the approach suggested in the Draft Guidelines because it is line with the aims pursued by applying Article 102 TFEU. While the EU Courts have incrementally altered the interpretation of Article 102 TFEU, in part aligning with the policy stance taken in the 2009 Guidance Paper on Enforcement Priorities, this has not been such a radical resettlement as to displace the approach in the earlier case-law. Conduct infringes competition law when it is incompatible with the internal market. This means that harm to consumer welfare is not the only adverse effect that one should consider.
2. However, the Draft Guidelines fail to reach their full potential by frequently restating nearly all the points made in the case-law and not distilling any real meaningful guidance from the case-law. Please take what follows as suggestions on how better guidance may be achieved.
3. It is outside the scope of this contribution to discuss whether guidelines are a good idea. However, the aim of vigorous and effective enforcement (para 4) cannot be achieved without two further efforts. First, more resources should be devoted to designing and/or monitoring remedies and compliance. Second, greater transparency and guidance can be achieved by an improved drafting of Commission decisions. Currently, decisions lack a precise conceptualisation of the theory of harm underpinning the findings of infringement. This is not unachievable: see the recent judgment in *US v Google* as an example of lucid drafting in the face of complex issues.² Clarity serves to facilitate desistence since firms understand better what is forbidden and why.

¹ **Disclosures:** As member of the Academic Society for Competition Law (ASCOLA), I have the following disclosures to make pursuant to its Code of Ethics: (1) I am co-author of a paper funded by CCIA that examines the ECJ’s case-law on exploitative abuse (Monti and de Streel, ‘Exploitative Abuses: The Scope and the Limits of Article 102 TFEU’ RSCAS Research Paper no.2023-62 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4630871); (2) I am co-author a study on behalf of the Dutch Ministry of Economic Affairs and Climate Policy on abuse of dominance (Argenton, van den Boom, van Damme, Graef and Monti, ‘Can Abuse of a Dominant Position be Tackled More Effectively?’ (2023), <https://open.overheid.nl/documenten/8d07509f-602a-49b5-b0f3-974644563fb0/file>); (3) I am a member of the Supervisory Board of the Consumer Competition Claims Foundation <https://www.consumercompetitionclaims.com/>; (4) I am a research fellow at the Center for Regulation in Europe (CERRE). In all funded work referred to above, the *Netherlands Code for Scientific Integrity* applies: <https://www.nwo.nl/en/netherlands-code-conduct-research-integrity>.

² *US et al v Google LLC*, 20-cv-3010 (APM) (D.D.C. 5 August 2024).

1.1 Presentation

4. It seems as if the Draft Guidelines are written to incorporate each and every utterance by the Court of Justice. At times this leads to the repetition of words and phrases from the case-law without adding much substance to help understanding. For example, “special responsibility” is mentioned numerous times but little is done to explain what this actually means beyond the duty that any undertaking has to comply with EU competition law. Guidelines should enhance our understanding of the case-law. Rendering the spirit of the Court’s approach in more user-friendly language should be the key mission of this document. Examples can help explain how rules and standards are to be applied, as is done in other guidelines.
5. I wonder if a more judicious selection of what the Commission thinks are the key doctrinal takeaways from the Court might be more productive than an attempt to make every utterance of the Court and every judgment fit into the Draft Guidelines. This point matters in particular because the Court used the *Superleague* judgment (and the other two sports cases delivered on the same day) as a means of writing up a synthesis of the case-law.³ And *Superleague* also corrects one of the mistakes in *Unilever*.⁴ It might be preferable to omit references to case-law and passages from the case-law that are not representative of the Courts’ overall line.
6. A linguistic point: consider removing references to ‘naked’ restraints. In the Italian language version of the Draft reference is made to ‘manifest’ restrictions. This less explicit language seems preferable and is used here.

1.2 Overall vision as to the function of Article 102 TFEU

7. The approach in the Draft Guidelines is legitimate. It draws on what I see as the original understanding of EU competition law which the Court has continued to draw upon. This original understanding is premised on keeping markets open to competition. It is assumed that competitive markets lead to improved economic welfare and thus there is no need to go beyond an account of foreclosure to establish an abuse of dominance. Competition law is enforced to achieve efficient markets by ensuring markets remain open (as stated well in para 1). **Openness, not efficiency, is the litmus test for legality.** And when there is a tension between openness and efficiency, then openness prevails. If this is right, then as discussed below in section 2 of this document, some clearer drafting of paragraphs 2 and 5 is necessary.
8. However, the Draft Guidelines should do more to explain what the overall vision for the role of Article 102 TFEU is and how this fits with the approach to abuse of dominance set out in the Draft. Instead, it hovers between passages that consider effects on consumer welfare and those which focus on the protection of open markets. While it is true that in most cases both approaches yield the same outcome, they require a different analytical framework. Below, I explain and discuss elements of this focus on open markets which are found in the Draft Guidelines and suggest that these should be expanded further.
9. The very last passage on the effects analysis (para 75, last sentence) embodies a general principle which I think deserves more place in the Draft Guidelines if there is a commitment to open markets. In *Tomra* (which is cited in the Draft Guidelines) the Court states: “it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.” (*Tomra*, para 22). This is repeated in more general terms by the

³ AG Szpunar in Case C-650/22, *FIFA v BZ*, EU:C:2024:824, refers to these as ‘arrêts de principe’ by which the Grand Chamber has invested ‘a considerable effort of synthesising and summarising prior case-law’ (para 30).

⁴ *Unilever* para 39 is wrong in setting out two alternatives, departing from *SEN*, compare *Superleague* para 124.

ECJ in *Generics* at 161: “it is not the place of a dominant undertaking to dictate how many viable competitors are to be allowed to compete with it.” The importance of this passage for the overall philosophy of Article 102 TFEU should not be underestimated. Below are two thought exercises to explain it:

- a. Domco holds an essential facility and shares it with four others. There are now five firms in the downstream market (domco and four rivals). If an additional firm requests access, this must be provided even if the downstream market is competitive. Domco cannot determine how many rivals enter. It is of no consequence that with five players the market is already benefiting consumers and the entrance of a sixth does little to enhance consumer welfare.
 - b. Domco engages in pricing conduct (e.g. loyalty rebates) targeted at one small enterprise which is a family-owned business that is unlikely to scale up but whose presence affects domco’s profits adversely. It is no answer for Domco to state that this is only one rival and that there are other firms that will remain in competition. Domco has no right to select which rivals merit staying in the market. This view is actually confirmed by the ECJ in the latest *Intel* judgment. When discussing the AEC test, the Court states that the “analysis in question may therefore demonstrate that the contested rebates were, in breach of Article 102 TFEU, capable of foreclosing a competitor presumed to be as efficient as Intel in terms of costs, choice, quality and innovation, even if AMD had not itself been foreclosed.”⁵ In other words, exclusionary conduct is an abuse even if some of the rivals are not excluded by that conduct. The point of EU competition law is that any measure to exclude a rival it can be considered an abuse even if there are other rivals on the market. The test for this might be framed in terms of asking of conduct is likely to exclude an as efficient rival, but the outcome is designed to sustain a wider range of rivals than those who are as efficient.
10. This does not mean that Art 102 TFEU protects competitors and not competition. It means that domco is not in charge of regulating market access.
 11. In practical terms, I think the statement in *Generics* referred to above means that some of the discussion in para 83 is too restrictive. Here, when discussing the capability of exclusive dealing to have anticompetitive effects, emphasis is placed on whether customers have strategic importance and the coverage of a practice. This may be useful to reveal overall economic effects, but may risk tolerating the exclusion of some firms simply because other firms are able to remain in the market, which may run counter to the purpose of Article 102 TFEU. As a matter of enforcement priority, we should be more worried when exclusionary conduct is part of a strategy to eliminate the most capable rival, but this is not the only firm that merits protection. Here economics has to give way to the legal standard. As mentioned, openness is key, not efficiency.
 12. That openness trumps efficiency is also found in para 169(d): the efficiency defence is only applied if the conduct “does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.” In other words, some exclusion may be tolerated if there are positive economic effects, but not the complete sealing off of a market by the dominant firm. This is consistent with the final requirement in Article 101(3) TFEU. Emphasising the importance of maintaining alternative sources of competition to the dominant firm should be developed further.

1.3 The general standard and the concept of competition on the merits

13. The choice of a twofold test for abuse (competition not on the merits + capacity to exclude) represents, in my view, the major change from the 2009 Guidance Paper, which had a different two

⁵ Case C-240/22 P, *Commission v Intel*, EU:C:2024:915, para 343.

stage test (foreclosure + harmful effects on consumer welfare).⁶ This move is in line with the emphasis on open markets discussed above. However, I don't see a clear conceptualization of what competition not on the merits is in the Draft Guidelines. Nothing in section 3.2.1 of the Draft Guidelines provides a clear definition of what it means for conduct to depart from competition on the merits.

14. Moreover, the Draft Guidelines identify five types of conduct where there is a specific legal test. If this is so, why is it that it is impossible to reformulate the specific legal tests by reference to the general legal standard. If there is a specific legal test, it should be possible to identify which elements of the test correspond to the merits analysis and which elements correspond to the effects analysis.
15. Here, I offer a suggestion to fit the case-law into the twofold test that the Draft Guidelines favour. My suggestion is both procedural and substantive.
 - a. Procedurally: conduct that is not competition on the merits gives one a first indication that there may be an abuse. The second limb, capacity to exclude, allows one to test whether the indication provided is confirmed by the application of the effects-based approach in the Draft Guidelines. This makes the first limb of the general standard much less weighty, it fits with the threefold classification of evidentiary burdens in the Draft Guidelines, and can be operationalised by reference to all five categories of abuse where there is a specific legal test.
 - b. Substantively: competition is not on the merits when "conduct give[s] rise to a legitimate concern for competition."⁷ Another formulation which could also work is to state that conduct is not competition on the merits when it is inherently suspect. These two alternatives fit with the first test serving as a filter.
16. The five types of abuse for which there is a specific legal test can be made to fit in this paradigm whereby we can spot conduct which is *prima facie* a competition concern:
 - a. Exclusive dealing gives rise to legitimate concerns when carried out by domco because if domco's products were really so attractive, the customer would buy from it exclusively anyway, without the need for a contractual obligation. This then requires a closer look.
 - b. Tying gives rise to legitimate concerns for the same reason: a customer would buy the tying and tied product sold by domco together without the need for any obligation if this was the most desirable option. The coercive element (para 89(c)) signals a lack of competition on the merits: why must the customer be forced to buy? The effects test (para 89(d)) then verifies if indeed there is an adverse effect.
 - c. Refusals to supply: the first condition in para 99(a) (defined in para 100) is about the absence of competition on the merits: domco knows it can eliminate competition by not dealing, making its refusal inherently suspect. But verification is needed by testing the effects (para 99(b)).
 - d. Predatory pricing: Selling below cost gives rise to competition concerns because domco is not recovering its costs. This is then verified by looking more closely at the pricing strategy to determine its exclusionary potential (e.g. para 108 with references to selective price cuts).

⁶ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 para 19: "In this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers." This refers to the 2009 version – the text was amended in 2023 in a manner that is closer to that found in the Draft Guidelines.

⁷ *Unilever*, para 51, Case T-334/19, *Google AdSense*, EU:T:2024:634, para 406.

- e. Margin squeeze: establishing a negative margin reveals that domco can reasonably foresee that this will harm rivals and is inherently suspect for this reason. One then checks if the conduct is likely to foreclose.
17. The exercise carried out above can apply to all forms of conduct. Competition is not on the merits when it gives rise to a legitimate concern for competition. This legitimate concern is a reasonable inference from the legal and economic context in the relevant market. This approach is to the advantage for domco: it makes it easy to self-assess if conduct is likely to be viewed with suspicion and then the firm can run some tests to diagnose the likely exclusionary capacity (e.g. an AEC test for discounts) of their chosen business strategy. It also helps the enforcer identify quickly which cases raise concerns and it can move to the effects analysis, which may be more or less extensive as discussed in the Draft Guidelines.
 18. As suggested above, starting with a diagnostic like the one suggested here saves resources. This is comparable to the HHI test in merger control, where a rough indicator serves to inform a decision to proceed. Concomitantly, evidence of high concentration is also useful in the second limb, the effects analysis.
 19. Moreover, the concept of inherently suspect conduct also fits well with the list of forms of conduct in para 55. Each of the elements there, individually, raises suspicion when carried out by a dominant firm. It also fits with the approach in *SEN* when we turn to the discussion of how the ECJ applies the law to the facts (paras 91 and 92 of the judgment): use by domco of resources unavailable to rivals to enter a market that is supposed to be open to competition is inherently suspect because it looks as if domco is trying to use its superior power to exclude rivals, going against what the legislator opening the energy retail market intended should happen.
 20. This approach is also preferable to the detailed discussion of competition on the merits in *SEN*. At paras 77-83 of the judgment the Court provides what seems a set of diverse criteria to determine that conduct is not competition on the merits: the no-economic sense test at 77, a practice that cannot be replicated by an as efficient rival at 78-79, and it seems that at points 81-83 of the judgment, the Court opts for a non-replicability standard to explain why conduct is not competition on the merits: an as-efficient rival cannot respond to domco's challenge either because it cannot afford to offer similar discounts or it cannot find an alternative source of supply. But non-replicability does not fit all cases necessarily (tying practices and exclusivity agreements can be replicated, for example). A standard based in conduct that is inherently suspect or gives rise to competition concerns is more generally applicable.
 21. By using the notion of competition on the merits as a tool to provide a first impression of a competition risk, we can also account for the fact that the Draft Guidelines spend a lot more energy in explaining how to diagnose the effects of conduct than they do in discussing competition on the merits. The merits inquiry as a preliminary diagnostic requires less evidence than the effects assessment.
 22. This suggested approach does not take the view that conduct is not competition on the merits in the abstract: it places it in its economic and legal context. For example, exclusive dealing by a firm without market power can be efficient, but domco's use of this practice is inherently suspect because its market power makes it foreseeable that such conduct risks closing markets to competition. Likewise for predatory pricing, the sale of one unit below cost cannot be inherently suspect while the sale of all units below cost for a significant period of time raises credible competition concerns. Thus, conduct is only inherently suspect when judged in its overall context.

23. Importantly, the Draft Guidelines (as well as the approach canvassed here) provide that a finding that domco's acts are not competition on the merits is never a sufficient condition to establish an abuse. This is clear from para 4 of the operative part of *SEN*: the test has two limbs.
24. Finally, the suggestion made here is that the Draft Guidelines should only define what it means for conduct to be characterised as competition not on the merits. It should not define what competition on the merits is. In other words, the Draft Guidelines should not contain statements of what conduct is lawful. In a liberal society laws prohibit conduct. If it is not forbidden, it is allowed. Thus, a test that explains what is lawful conduct would hamper the economic freedom of market participants unnecessarily. At best one can offer some safe harbours, which mean either that the Commission announces that it will not exercise its discretion to enforce those or that there is an understanding that generally such conduct is not an abuse, neither of which preclude a finding of abuse in a specific case.

1.4 The threefold classification of abuses to drive the evidentiary burden (section 3.3.1)

25. I agree that the evidentiary burden on the enforcer requires a showing of effects (para 60(a) referring to a 'general rule') but that in certain defined categories, the burden is lighter. Arguably, there is a sliding scale rather than three distinct classes (this is acknowledged at para 95 where the effects analysis is more or less intense depending on the facts), but classification as provided in the Draft Guidelines has the advantage of clarity. However, I have some comments on how this is executed.
26. I also support the use of a burden-shifting approach whereby the authority is entitled to make a prima facie case based on a relatively limited set of considerations. The burden then shifts to the defendant to challenge the prima facie validity of the case against it, which shifts the burden back to the authority to make a fuller case to establish an abuse. Whether the first step is properly labelled as a presumption or a prima facie case is not that significant in my view as embedding a logic of shifts in the evidentiary burden and the notion of presumption is used here.

Para 60(b): on rebuttable presumptions

27. The text could be improved, in particular the phrasing around sub-parts (i) and (ii). The point that should be made here is the following. If domco submits rebuttal evidence, then one of these three findings may be made: (1) the evidence provided is so compelling that there is no abuse; or (2) the evidence is enough to rebut the presumption, thus requiring the Commission to run an effects analysis; or (3) the evidence provided by domco is insufficient to rebut the presumption and an abuse is established, subject to domco providing a defence.
28. In other words, there should be a clear statement that domco's successful rebuttal might either end the case (there is no abuse) or require the enforcer to run an effects test to establish an abuse. At present, this is only hinted at indirectly in the manner it is phrased. It might help to explain that the Commission is both the party prosecuting and adjudicating the case. When rebuttal evidence arrives from the firm, the Commission acts as adjudicator, determining its validity and if valid, then it looks as to what this rebuttal evidence does to the case. If the Commission (acting as adjudicator) decides the evidence is strong enough to call into question the presumption, then the Commission changes role and now acts as a prosecutor to carry out an effects-test.
29. I do not think that the sentiment expressed in the penultimate segment of para 60 (that in an effects analysis when the presumption is rebutted one "must give due weight to the probative value of the presumption, reflecting the fact that the conduct at stake has a high potential to

produce exclusionary effects”) is correct. If a presumption is rebutted then all inferences go away and the case starts from scratch.

30. A final comment is whether this approach is going to prove helpful. I understand the logic from the enforcement perspective: shift the evidentiary burden to the parties. However, it is likely that the enforcer will ex ante already have to prepare the analysis of effects by considering the relevant legal and economic context surrounding the conduct at play. The cost savings should be estimated and I am unable to do so.

Para 60(c) on manifest restraints

31. On the one hand, this segment has a relatively modest list of conduct that is considered a manifest restriction. I think some of the conduct listed in para 55 could be said to fall in this category. For example, the two abuses in *Astra Zeneca* are not only inherently suspect when carried out by domco but, in the relevant legal and economic context, reveal in themselves a harm to competition. A refusal to continue to deal (*Continental Can*) is also one that could fall in para 60(c).
32. On the other hand, while the Draft Guidelines acknowledge that a finding of a manifest abuse can be rebutted (à la *Intel*), I am not sure it is wise to take the view that this rebuttal will work “[o]nly in very exceptional cases.” This seems to prejudge an issue which is left open. If the right to rebut is part of the rights of the defence (*Unilever*), any hint that the enforcer is prejudiced may be risky. In other words, it might well be that category 60(c) does not really exist because it carries a hard presumption but is only a manifestation of cases where much less evidence is required to trigger a presumption than for the cases in para 60(b).
33. I wonder if another way of characterising manifest restraints is that we completely abandon any economic effects analysis and condemn the conduct simpliciter. In criminal law we speak of conduct that is *malum in se*. If we apply this notion, then the conduct that qualifies as manifest abuse is not presumptively incompatible with the internal market, it is always so if proven. However, this risks creating a relatively small set of conduct. Nor is it clear that it makes sense to bring into the concept of abuse an approach that condemns conduct absent a reflection that conduct is harmful in the specific case.

1.5 Categories of abuse (Section 4.2)

34. It is not clear to me if these five types of conduct are the only ones where the EU Courts have designed specific legal tests and why these five are selected.
35. When considering the effects test for these five kinds of conduct, the Draft Guidelines present a range of options:
 - a. Exclusive dealing is always presumptions-based
 - b. For tying and margin squeeze, some manifestations are presumption-based and some manifestations are subject to an effects analysis. For margin squeeze the distinction is clear (is the price-cost test is negative, then a presumption of abuse kicks in), but the distinction in tying cases is less clear.
 - c. Refusal to deal is always effects-based (unless perhaps there may be settings where the conduct is a manifest restraint, like in *Lithuanian Railways*).
36. When it comes to the fifth category, predatory pricing, the Draft Guidelines are less clear on whether this conduct is presumptions-based or effects-based. Para 112 suggests a presumption. But then for prices above AVC the indirect evidence that may be used (footnote 265) brings this

analysis fairly close to an effects-test. Footnote 265 refers to “the duration, the continuity and the scale of the below cost sales, as well as the targeted nature and the importance of the market (segment) in which the below-cost pricing takes place” and para 70 refers to extent of the conduct and the targeting of selected customers. Moreover, paras 107 and 108 also suggest that not any below-cost price is forbidden, but only those in specific configurations. In my view, this can be fixed in two ways.

a. One option is to reformulate the section on predatory pricing either by moving it to 60a: an effects analysis is required.

b. Another option is to acknowledge that there is a sliding scale in para 60 and that predatory pricing is not at either end of the scale: neither requiring a full effects analysis under 60a nor benefiting from a presumption at 60b. Rather, depending on the facts of the case, the evidentiary burden is either lighter (e.g. a selective, targeted, below AVC pricing campaign is closer to a presumption because of the high level of competition concerns) or heavier (e.g. a comprehensive, above AVC campaign raises fewer prima facie concerns).

1.6 Dominance and Collective Dominance (section 2.3)

37. On dominance, I regret the choice to water this notion down. It would be preferable to create a safe harbour whereby Article 102 TFEU only applies to firm that enjoy significant market power. I would favour a safe harbour below a 50% market share.
38. On collective dominance: as there has been hardly any enforcement for some twenty years, it is not clear why this section is necessary. But good to include horizontal shareholding, I agree that there are configurations where there may be collective dominance.
39. You can prove collective dominance in three ways: (i) structural links; (ii) economic incentives; (iii) both structural links and economic incentives. If one agrees with this, then I wonder if the Draft Guidelines might be more clear by creating two sub-sections: collective dominance evidenced by certain structural links (para 35) and collective dominance established by reference to the economic position of the parties (paras 36 onwards and the *Airtours* criteria). This may allow one to specify that the two ways to demonstrate collective dominance are distinct and that one does not necessarily need the elements listed in 2.3.1 etc. to establish collective dominance in the cases where one applies para 35. For example, in *Irish Sugar* the structural links sufficed. Conversely, as is noted in the text to footnote 89, the existence of structural links may help in establishing collective dominance by reference to the economic position of the parties.
40. It would also help to explain if the framework for establishing collective dominance by reference to the economic position of the parties is the same as under the EUMR. There are some references to the Horizontal Merger Guidelines and to merger case-law so it seems that the criteria are the same – why not spell that out and even perhaps refer the reader to those Guidelines instead of redrafting them here?

1.7 The as-efficient competitor principle: concept and exceptions

41. A principle is a general concept which provides a reason for a finding of abuse of dominance. In my view, the AEC principle does not exist. In spite of the ECJ’s frequent references to a hypothetical as efficient rival, the Court has never explained it by reference to a principle, nor defined this principle.

42. The best definition of the AEC principle I can come up with is the following: domco should not be penalised for conduct that may be also carried out by a hypothetical rival whose costs of production and capacity to innovate are the same as those of the dominant firm. Examples: (i) if domco offers above-cost discounts, an as-efficient rival should be able to match these; (ii) if domco invents a better widget, rivals are lawfully excluded they should also be able to innovate.
43. The principle thus phrased helps self-assessment by domcos: they know that as long as they use conduct that could be replicated by someone with their cost and innovation capacities without any economic losses then a finding of abuse is unlikely.
44. Is this principle capable of explaining some abuse doctrines? It can help explain why we use the as-efficient competitor *test* for rebates and predation, but it also explains that the AEC test is not sufficient to tell a complete story as to why conduct is likely to exclude rivals as efficient as domco. For example, coverage and duration of a particular pricing strategy may also be necessary to satisfy the principle. If so, then the question arises if these two criteria are part of the legal standard.⁸ They are definitely part of the as efficient competitor principle as defined above because only if these are met can we state that the dominant firm is capable of excluding as efficient rivals.
45. What is of more importance, however, is that the AEC principle is not one of general application. Here are some examples of when it does not apply.
- a. *Google Shopping*: how do we know that when a dominant platform promotes its services and demotes those of rivals that this conduct excludes only hypothetically as-efficient rivals? It excludes all rivals, condemnation does not depend on knowing that the conduct rescues as efficient rivals from exclusion. No reference to hypothetical as efficient competitors helps here.
 - b. In cases of predatory pricing, prices above AVC and below ATC (which could conceivably be set by an as productively efficient competitor) may be an abuse if part of a plan to exclude. The ECJ explains it in this way: “Such prices can drive from the market undertakings which are *perhaps* as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”⁹ The Court is clear that in this scenario the target is ‘perhaps’ as efficient but the rationale for the abuse finding is not found in the application of the AEC principle.
 - c. Consider also *Superleague*. While the Court refers to the efficiency of rivals several times (paras 126, 127, 129), at para 131 it states that abuse also applies when you block entry ab initio, with reference to a pay for delay strategy. And this is right because market access for rivals should be provided irrespective of the rival’s abilities: everyone deserves a chance to participate. Consumers will decide the fate of the new entrant, not the dominant firm.
46. At most, the AEC principle is sometimes useful, but it is not a necessary condition to find an abuse. I think this was also clear when looking at the 2009 Guidance Paper on predation (paras 68 and 69) where the document draws on economic literature to explain that below-cost pricing can be exclusionary without reference to the relative efficiency of the rival (e.g. predatory pricing by reputation excludes any new entrant, hypothetically as efficient or not).
47. The real question is how general the application of the AEC principle is. It may thus be helpful to offer guidance on this point: when to apply it and when is it appropriate to depart from this principle? This was already vague in the 2009 Guidance (para 24) and not clarified much in the 2023 revision of this paragraph.

⁸ An affirmative answer is given in the latest *Intel* judgment (above n 5), see esp paras 180, 181 and 202.

⁹ *Akzo*, para 72, my emphasis.

48. My suggestion is that this principle is not useful at all. Nobody seriously thinks that there is an abuse if domco has the best widget in the market and all rivals exit. Nobody will condemn domco for above cost discounts except in highly restrictive circumstances. But we punish domco if, even if it has the best widget, it engages in conduct that accelerates foreclosure of rivals who might become successful or uses that dominance to leverage onto another market.
49. Consider a refusal to deal foreclosing competition downstream. It might be that domco is the most efficient provider of downstream services so that no entrant will be successful. But if domco denies access this is an abuse of dominance. It is no argument for domco to state that even if it were to grant access on FRAND terms, no rival would be able to offer as attractive a service as the one domco provides and thus a new entrant will eventually exit the market. Domco has a duty to support entry by giving access. The market will determine if a new entrant is successful, not the dominant undertaking.
50. Thus: a finding of abuse is not explained by showing that the conduct excludes a hypothetical as-efficient rival. A finding of abuse shows that the dominant firm has taken up the role of market regulator which does not belong to it and has engaged in conduct likely to exclude rivals. The latter statement might be a more valid general principle to explain the case-law.

1.8 Single, complex infringements

51. One element that emerges from the case-law is that a firm will try multiple strategies to exclude rivals. The case-law has accepted the notion of a single, complex infringement and guidance on this notion would be welcomed. Presently, the document focuses on discrete abuses but some discussion of how what kinds of linkages are useful in determining that two or more forms of conduct are part of a single abuse may be useful.

1.9 Avoiding abuse arbitrage

52. I hope we all agree that domco can exclude the same rival by selecting multiple methods: it can acquire the rival, offer discounts to customers, or tie products. In other words, there is more than one kind of commercial conduct by which exclusion is possible. The Guidelines should avoid settings that encourage arbitrage: selecting one tactic simply because it is harder for the Commission to prove than another while achieving the same anticompetitive effect.
53. In this light, what the Draft Guidelines seem to achieve is arbitrage based on the burden of proof. It may be that firms are deterred from selecting conduct that is presumed an abuse and will thus shift to conduct where the evidentiary burden on the Commission is heavier. This may well be a good result if presumed abuses are more likely to cause harm than those where an effects-test is required. For example firms might be less likely to engage in below-cost pricing but might be more interested in designing conditional rebates without requesting exclusivity. But there is a risk of abuse arbitrage if conduct is not categorised properly. Such risks may well be inherent in the case-law but they should be recognised and mitigated by assigning all high risk conduct to the presumption category. The suggestion is to check that this is indeed the case.

2. PARAGRAPH-SPECIFIC COMMENTS

- 2.1 Paras 2 and 5:** I see these two paras as important statements of the purpose of Art 102 TFEU.

54. One could consider greater alignment in the ideas expressed in these two paragraphs. In para 2 some case-law is cited for the proposition that dominance can harm competition 'to the detriment of the public interest, other market players and consumers.' But then at para 5 the document switches to consider effects on consumers. And it does so in two ways: (1) direct and indirect harm to consumers; (2) harm to the competitive structure as causing harm to consumers. Presumably the point in (2) can be subsumed into indirect harm mentioned at point (1) so the point of these two passages is unclear. Could (2) simply be an example of indirect harm and are there others?
55. More specifically does the Court in *Telia Sonera and Roquettes Frères* define consumers in the same way found in the Draft Guidelines (footnote 2)? I applaud the definition of consumers in the Draft Guidelines, but it is not always clear if the Court took this view in some of the early cases. For example, at **para 18** when the Draft Guidelines refer to *United Brands*, the Court distinguished between customers and consumers so it likely had a narrower understanding of what consumers are than what is applied in the Draft Guidelines. It may be worth specifying that the definition in the Draft deliberately departs from the use in some earlier cases.
56. My main point is that there is a misalignment between para 2 (an abuse of dominance is conduct that harms the competitive process to the detriment of a set of interests) and para 5 (an abuse of dominance is conduct which may harm consumers). The two will mostly lead to the same conclusion, but not always. And more significantly the legal test that matches these two different ambitions is different. Para 2 stops a stage earlier than para 5. Para 2 is consistent with the overall approach I see in the Draft Guidelines: anchor these on the fundamental aim of keeping markets open to rivals. Conversely, para 5 is more reminiscent of the zeitgeist that informed the Art 102 Guidance Paper.

2.2 Paras 4 and 8: here the document gives some motivations for the Guidelines.

57. I see three: (1) market trends (concentration, digital, winner take all); (2) align decentralised enforcement; (3) allow for self-assessment. Perhaps these two paras can be combined so that the motivations are all in one place.
58. Substantively, I am not convinced about offering up motivation (1) for the following reasons: (a) you should not use a general guideline document to highlight possible priority fields, this should be left to other formal documents and flexibility should be retained to apply Art 102 TFEU in any industry; (b) moreover since the document is also designed to facilitate decentralised enforcement, it will be necessarily the case that NCAs may have other priorities: in some state controlled enterprises may pose greater competition concerns than tech giants.

2.3 Points on other specific paragraphs

59. **Para 16:** I would also add, for completeness, that conduct by a dominant undertaking which does not hold a "dominant position within the internal market or in a substantial part of it" (Art 102 TFEU) also falls outside the scope of these Guidelines. It is also covered in the Guidelines on the effect of trade concept (paras 97-99).
60. **Para 17:** the first sentence repeats (unnecessarily) the first line of para 2. By this section of the document the reader should be clear that dominance is not unlawful.
61. **Section 2.1 and 2.2, presentation:** I am not sure one learns very much in 2.1 that is not repeated in 2.2.

62. **Section 2.1 and 2.2, substance:** If one is going to widen the concept of abuse of dominance, one easy safeguard against Type 1 errors is to reduce the probability of firms being found dominant. In the Guidance Paper I very much appreciated the commitment in para 11: an undertaking is dominant if it can profitably increase price above the competitive level. This can easily be adjusted to fit non-price elements if needed – recall that price is just shorthand for welfare reduction. A narrower concept of dominance is also in line with the objectives of Art 102 TFEU discussed above: keeping markets open. Art 102 TFEU is only necessary when markets are not open by the presence of a firm with significant economic power. This narrower concept would not prevent the Commission from taking any of the cases that it has selected since 2009.
63. **Para 44:** text in footnote 98 is not elaborated upon sufficiently. What do you mean that the actual scope of the special responsibility depends on the circumstances of each case?
64. **Para 47 first comment:** “The specific legal tests relating to five types of conduct...” Is the claim that section 4.2 contains an exhaustive list of specific legal tests that are to be found in the case-law or are these mere illustrations? If they are illustrations, why are these selected? I think these questions need an answer in the document.
65. **Para 47 second comment:** the paragraph misquotes the *Superleague* judgment. In the judgment at para 130 the Court said that there are “different analytical templates depending on the type of conduct at issue in a given case.” Furthermore, the Draft Guidelines do not do justice to the spirit of this passage because the Court says that even if there are different approaches, all facts matter. The burden is on the Commission to demonstrate an abuse, says the Court, “in the light of all the relevant factual circumstances.” (para 130).
66. **Para 49:** this seems to discuss the so-called ‘meeting competition defence’ – it is not the most helpful way to start an account of the meaning of competition on the merits.
67. **Para 49 again:** “Such an undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, *provided however that its purpose* is not to strengthen its dominant position or to abuse it.” This sentence makes no sense and it is best removed. As is rightly written in the Draft Guidelines, intent is not necessary. The proviso, to stay consistent with the approach used here, could be “provided that the conduct does not take the form of competition that is not on the merits.” However, given that this idea is already in para 50, consider deleting the passage quoted above.
68. **Paras 50 to 52** do nothing to provide a general definition of what it means for there to be competition on the merits or what it means for there to be competition which is not on the merits. The Court has not helped either but if one is unable to provide a general definition, then just listing some indicators (section 3.2.2) does not help one elicit the general meaning of the first limb of the test for abuse. See above (1.3) for an attempt to provide a definition of competition on the merits.
69. **Para 53** – this is logical but as discussed above and below, the Draft Guidelines are not always able to explain which elements of these specific legal test are part of the competition on the merits assessment and which parts are about the effects. Yes, there can be overlaps but there would also have to be something exclusively showing that competition is not on the merits.
70. **Para 54** is the closest one comes to a conceptualization of conduct that is not competition on the merits. I agree that this should not be the only way of thinking about this concept generally, but it begs the question of how to subsume the no economic sense test in this paragraph with a general concept of conduct that is not competition on the merits.

71. **Para 55:** it is not clear why the list of elements here should not, at times, be considered also as setting out a specific legal test. Related: footnote 118 does not seem to offer a lot by way of guidance!
72. **Para 58** seems to compare apples with bananas: this section is still discussing competition not on the merits. It states that domco can challenge a finding that competition is not on the merits by proving that consumers benefit. I can understand how consumer benefit can serve to reject a finding of anticompetitive effects, but it is not clear how it can also rebut a finding that competition is not on the merits unless this too is an effects-based test in all but name. This further confirms that the concept of competition not on the merits is not well defined in the Draft.
73. **Para 83.** For clarity: after the first sentence the document should read differently. Suggestion: “If the Commission determines that this evidence is insufficient to rebut the presumption, an abuse of dominance will be deemed to be established unless the dominant undertaking establishes one of the defences listed in section 5. If the evidence submitted suffices to rebut the presumption, the Commission will carry out an assessment of the capability of exclusive dealing to produce exclusionary effects. In doing so the relevant elements to be considered typically include...” - in other words, specify what happens if the rebuttal is successful and if it is not.
74. **Para 99b:** I welcome the rephrasing in line with the *Oscar Bronner* judgment.¹⁰
75. **Para 109:** it may be preferable, if the intention is to provide guidance, to explain when above cost pricing could be penalised (e.g. by reference to certain market attributes).
76. **Para 121:** should this read “sets its upstream *and/or* downstream prices”? (see, e.g. *Telia Sonera* para 98: “that squeeze may be the result *not only* of an abnormally low price in the retail market, *but also* of an abnormally high price in the wholesale market.” See also Draft Guidelines, para 122b).
77. **Section 4.3.3:** I would omit this section, not least as there seems to be only one case that represents this kind of abuse. Moreover, in my view the abuse consists of two forms of conduct: promotion of one’s service and demotion of the rival ones.¹¹ If the Guidelines are about codification of case-law then there is not yet an abuse based only on self-preferencing as defined at para 156.
78. **Para 162:** “If the self-preferencing takes the form of a combination or succession of practices, the analysis of effects should take into account the overall effects of those practices.” Is this statement not one of general application to potentially any abuse inquiry? That is, there may be multiple acts which, cumulatively, serve to exclude. Should there be some guidance on the assessment of overall effects?
79. **Para 163, footnote 340 and para 96:** I sympathize with the attempt to distinguish in a general way between cases where we apply the *Bronner* test and those where the test is not applicable. I would

¹⁰ In contrast the Guidance Paper had not followed the judgment, stating “the refusal is likely to lead to the elimination of effective competition on the downstream market” and requiring consumer harm (para 81). To recall, *Bronner* states (para 41): “the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market *on the part of the person requesting the service.*” AG Medina in Case C-233/23, *Google v AGCM*, EU:C:2024:694 (para 28) also seems not to follow the case-law on this: “secondly, the refusal by the dominant undertaking must be likely to eliminate all competition in that market.” This underscores my point in 1.2 that the aim of Art 102 is not to achieve an efficient outcome in the downstream market, but rather to allow access to any firm that wishes to participate. In this vein, both AG and the Guidance Paper give mistaken interpretations of the judgment.

¹¹ Case C-48/22 *Google LLC*, EU:C:2024:726, paras 97, 187, 244-247.

be more comfortable with a case-by-case analysis of refusals to cooperate with rivals, but if the approach in the Draft Guidelines is to be retained, then I suggest a more granular definition of “refusals to supply.” I would add some text to note 340 and para 96, as follows: “refers to situations where a dominant undertaking has developed an input exclusively or mainly for its own use *without state subsidies, and has not yet shared this input with anyone.*” This means that *Bronner* applies only when there is a risk that by finding an abuse one harms incentives to invest.

80. **Para 166(c):** “degrades or delays the existing *or promised* supply”? In other words, domco might also have made a commitment to supply which is then de facto reneged.
81. **Paras 164 and 166:** should there be a presumption of effects for some or all of these instances?
82. **Para 168, note 355:** the added defence seems to create a risk of making competition law overly political. My concern is also that given the *Superleague* judgment finding that no public interest defences are allowed if it is a restriction by object, how does this play out in Article 102 TFEU? My take is that *Superleague* is wrongly decided: all forms of conducts should benefit from a public interest defence.
83. **Para 169(c):** query whether proportionality is required under an efficiency defence. True that this is the legal test but if the conduct ‘counteracts’ any negative effects then there is no harm. If there is no harm, should domco really have to prove that there could have been another way not to cause harm? Conversely, proportionality is necessary for the objective justification defences because the harm remains but we excuse the conduct.
84. **Para 170:** I agree with the spirit of the claim, but I don’t get the point. Does it mean that if the case is run as a manifest restraint then efficiencies are given greater weight than if the case is run as an effects case? Or the other way around?
85. **Para 171:** I think the intention here is to state that the evidentiary burden of proof is on the domco, but the legal burden remains on the Commission/NCA to determine matters. This might be different in systems where the NCA is a prosecutor so if the Guidelines are of general application this might be a factor to consider in drafting.

ANNEX I – categories of abuse

The Draft Guidelines provide several classifications of kinds of conduct:

1. that which is subject to specific legal tests (4.2)
2. cases of manifest abuse (para 60.c)
3. cases where the EU Courts have not provided a specific legal test (4.3)
4. factors relevant to assessing if competition is not merits-based (3.2.2.) where other types of abuse are introduced

As discussed above, these four classifications do not seem to be particularly helpful or well-motivated: are these comprehensive lists? Do these lists overlap? What, besides classifying case-law do these four lists achieve or explain?

But more fundamentally, it seems impossible to deduce from these lists how discrete forms of conduct can be made to fit into the two part test for abuse (merits + effects). In the table below, I have picked out nearly every abuse listed in the Draft and explained how it might play out under the overall framework suggested in the Draft. I have left out a few of the forms of conduct described in para 55

sections a, d and f as these are fairly general descriptions of conduct that may apply to other types listed in the table below.

The purpose of this exercise is to reinforce the point that if one believes there is a general legal standard that applies to all exclusionary abuses, then it should be possible to apply that to all exclusionary abuses explicitly. Having done so, one can then be more sure-footed in explaining what features make the conduct an abuse and allow a firm to identify the factors necessary for self-assessment. As may be seen, for many of the types of conduct the merits element is not described and I have suggested how this may be done.

The table also combines all the lists of abuses in one place as well as the assessment in para 60 about whether there are presumptions or effects are required. I think presenting the five separate lists in a unitary manner helps to think about whether the policy choices are the right ones. For example, it should allow for a reflection on whether the categories of presumed effects are well-justified, comprehensive, and avoid abuse arbitrage.

TABLE 1: mapping the categories of abuse

Legend for the table

In plain type is what emerges from the Draft Guidelines.

In italics what is not found in the Draft and might be inserted, where I have especially tried to verbalise the notion of competition off the merits.

[In square brackets where I am not certain that the Draft Guidelines are consistent with the case-law or where a change may be warranted]

	Conduct type	Not on merits	Effects: prove or presume
1	Exclusive dealing, including exclusivity rebates (specific test) 4.2.1	<i>Because if the product was popular a dealer would buy all of it from domco anyway</i>	Presume 60(b)
2	Tying 1 (specific test) 4.2.2	<i>Because if the tied product was popular the buyer would not need a tie to have a reason to buy both</i> <u>Or</u> <i>Coercion (89.c)</i>	Prove 60(a)
2a	Tying 2 (specific test) 4.2.2	<i>Because if the tied product was popular the buyer would not need a tie to have a reason to buy both</i> <u>Or</u> <i>Coercion (89.c)</i>	Presume 95 [Example (n233) should be clarified!]
3	Refusal to supply (specific test) 4.2.3	<i>Because indispensability makes it foreseeable that there will be exit if access is denied</i>	Prove 60(a)
4	Predatory pricing (specific test) 4.2.4	If $P < AVC$ or $P < AAC$: there is no economic sense except eliminating rivals (111.a) At higher P levels but $P < ATC$ then evidence of a plan is required (111.b), <i>the plan is the</i>	Presume 60(b)

		<i>off merits competition indicator</i>	
5	Margin squeeze 1 (specific test) 4.2.5	Price-cost test yields a negative margin 128. <i>Not on the merits because domco is clearly placing rival at a disadvantage</i>	Presume 60(b), 128
5b	Margin squeeze 2 (specific test) 4.2.5	Price-cost test yields a positive margin but not sufficient to cover domco's product-specific costs downstream 129. <i>Not on the merits because domco is clearly placing rival at a disadvantage</i>	Prove, 129
6	Payments to customer to cancel the launch of products of rivals (manifest restraint) 60(c)	<i>Because there is no plausible explanation except the wish to eliminate a rival</i>	Strong presumption 60(c)
7	Domco dismantling its infrastructure when this is being used by a rival (manifest restraint) 60(c)	<i>Because there is no plausible explanation except the wish to eliminate a rival</i>	Strong Presumption 60(c)
8	Misuse of regulatory procedures 55b	<i>Because it is foreseeable that in the specific context misuse yields a competitive advantage</i>	[effects test? Probably yes, see Astra Zeneca paras 105-112)]
9	Infringement of other areas of law 55c	<i>Because it is foreseeable that in the specific context infringing the law yields a competitive advantage</i>	[effects test? Or should this be a manifest restraint?]
10	Unjustified termination of existing business relationship 55e	<i>Because there is no good reason to terminate a profitable relationship</i>	[effects test? Or should this be a manifest restraint?]
11	Conditional rebates w/o exclusivity 4.3.1	Possibly a price-cost test (143-144) <i>to show the high risk of exclusion</i> <i>Or an assessment of whether domco can foresee that the rebates, in the current legal and economic context, risk denying rivals access to the market</i>	Prove: all relevant circumstances 145
12	Multi-product rebates w/o exclusivity 4.3.2	<i>Either 4.2.1 if akin to tying because there is coercion, otherwise if conduct presents a leverage risk or other foreseeable harm to competition</i>	Prove: either 4.2.1 or 4.3.2
13	Self-preferencing 4.3.3	161	Prove: 157, 160
14	Access restrictions 4.3.4	(a) Terminating an existing client when these sales are	[Prove, 164. But this kind of conduct

		profitable <i>because there is no economic sense in doing this</i> (b) Refusing to comply with regulatory duties <i>because there is a risk this is done to gain an advantage</i> (c) pretends to deal but with unfair terms <i>because this undermines the pro-competitive impact of its promise</i> (d) manifests a willingness to provide access but then denies it <i>because it risks sending a signal that it is not a reliable partner</i>	probably benefits from a presumption.]
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Some comments that emerge from this exposition

Abuses 2 and 2a are not distinguished in a manner that is particularly convincing.

Abuses 8 and 10 seem to me to be those where we have a legal test and so could fall into category 4.2.1.

Abuse 8 is *Astra Zeneca* where we know there is an effects test, the ECJ explains that the General Court had looked at the effects. One may argue that this conduct should be presumed anticompetitive.

Abuse 10 is *Commercial Solvents* where the Court at the time did not see fit to look for effects, see for example para 26 where the question of whether Zoja had an urgent need for the chemical or if it had spare capacity were “not relevant to the consideration of the conduct of the applicants.” This may no longer be good law, however.

Abuse 9 is based on the recent *Meta* judgment and there seems to me to be insufficient decisional practice to be able to provide guidance. Some cases may well merit a presumption: e.g. if the purpose of the regulatory framework is to facilitate new entry, then breach of the law may lead to a presumption of abuse. If the aim of the law is to protect the environment, then an effects test may be more apt to show how such rule-breaking harms competition.

Thank you for taking the time to review these comments – as indicated I am happy to continue the discussion if so desired.