

DRAFT GUIDELINES ON EXCLUSIONARY ABUSES

Submission to European Commission's public consultation

October 2024

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the opportunity to provide feedback to the European Commission's public consultation on the Draft Guidelines on exclusionary abuses of dominance ("Draft Guidelines").

CCIA Europe [represents](#) large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. CCIA is committed to protecting and advancing the interests of our members, the industry as a whole, as well as society's beneficial interest in open markets, open systems and open networks.

CCIA Europe appreciates the European Commission's effort to offer companies clearer guidance on what constitutes exclusionary abuse and how to self-assess their practices, with the aim of enhancing legal certainty for all stakeholders. However, CCIA Europe is concerned that the current Draft Guidelines may have the opposite effect, likely reducing legal certainty and offering less clarity.

Therefore, CCIA Europe's submission to this consultation provides constructive suggestions as to how the Draft Guidelines could provide greater guidance and legal certainty to the benefit of consumers.

Below you will find our recommendations to the European Commission concerning:

- Principles that should be embodied in the Draft Guidelines;
- Evidence of dominant position;
- Criteria for establishing exclusionary abuse.

I. General principles applicable to the assessment of dominance

1. Reinstate a soft safe harbour of 40%

Section 2.2, paragraph 26 of the Draft Guidelines states that “the existence of very large market shares is generally – except in exceptional circumstances – evidence of a dominant position. This is particularly the case when an undertaking holds a market share of 50% or above. However, dominance may also be established even if the market share is below 50%.” This implies that the soft safe harbour established in the [2008 Guidance](#) on the Commission's enforcement priorities (“2008 Guidance”), which suggested that market shares below 40% were unlikely to indicate dominance, has been removed.

The only remaining safe harbour in the Draft Guidelines is found in footnote 41, which specifies that “market shares below 10% generally exclude the existence of a dominant position, except in exceptional circumstances.”

This lower soft safe harbour could have a chilling effect on pro-competitive behaviour. Companies may be deterred from engaging in competitive strategies or innovative practices due to concerns about being classified as dominant, even with relatively modest market shares. As a result, firms with market shares between 10% and 50% might become overly cautious, potentially stifling competition, innovation, and consumer choice

For those reasons, CCIA Europe recommends that the Commission brings back the 40% soft safe harbour in the Draft Guidelines.

II. General principles to determine if conduct by a dominant undertaking is liable to be abusive

1. Provide further guidance on what “competition on the merits” entails

Section 3.2.2 of the Draft Guidelines outlines two key criteria for determining an exclusionary abuse, namely:

- 1) Conduct departs from competition on merits; and
- 2) Is capable of having exclusionary effects.

However, the core term of “competition on the merits” is not clearly defined in the Draft Guidelines. The Draft Guidelines simply offer a compilation of instances in which the EU Courts found a conduct to be departing from competition on the merits, leaving businesses uncertain about the actual standards their practices should meet to be considered “competitive on the merits.”

Without clear and specific guidance on what constitutes "competition on the merits," it becomes difficult to assess whether particular actions will be considered anti-competitive. This ambiguity would inevitably lower the standard to establish exclusionary conducts, which would in turn create legal uncertainty and increased litigation, ultimately harming consumers and innovation. The lack of clarity may deter companies from engaging in competitive practices, out of concern for enforcers' scrutiny based on unclear standards, which could stifle innovation, lead to price increases, and limit consumer choice.

Therefore, CCIA Europe suggests that the Commission provides clearer guidance on what constitutes "competition on the merits" by introducing guiding principles. These principles should balance actual, rather than potential, competition risks with companies' freedom to conduct business, encouraging them to compete and innovate to the benefit of European consumers. This approach would serve as a more effective tool for distinguishing competitive behaviour from anti-competitive one, aligning enforcement with the core objective of competition policy which is to protect consumer welfare.

III. Capability to produce exclusionary effects

1. Maintain economic, not presumption-based enforcement

As part of the assessment of whether certain conduct constitutes an abuse under Article 102 TFEU, the Draft Guidelines (Section 3.3) introduce a new approach by categorising conduct based on its form or external formal characteristics, rather than relying on the theories of harm and an evidence-backed effects based approach, as was the case under the 2008 Guidance. This shifts the focus from the economic impact of practices to evaluating the conduct based on its formal characteristics. As a result, the draft guidelines distinguish among three groups of conduct:

- 1) **“Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects”;**
- 2) **“Conduct that is presumed to lead to exclusionary effects”;** and
- 3) **Naked restrictions**, where “certain types of conduct by a dominant undertaking have no economic interest for that undertaking, other than that of restricting competition.”

Classifying practices based on their formal features and favouring presumptions for certain types of conduct rather than evaluating practices based on their effects on the market undermines the effectiveness of Article 102 TFEU enforcement and could result in a long run in over-enforcement and less competition on the market to the detriment of consumers. This approach also risks misclassifying pro-competitive behaviours as abusive due to predetermined assumptions.

It ignores the complexities of market dynamics and the specific context of each case. The recent [report by Mario Draghi](#) on the future of Europe's competitiveness confirms that (pp

304; footnote 9) by stating that “excessive discretion on the finding of exclusionary abuses is left by the Draft Guidelines.”

Moreover, not referring to theories of harm - concepts well-grounded in economics and the case law constitutes a departure from an approach taken in other guidelines, e.g., the new [horizontal guidelines](#). By reversing the burden of proof, the presumption based approach is also in conflict with key legal principles.

Conversely, an effects-based analysis ensures that only genuinely harmful practices are targeted, preserving healthy competition and fostering innovation in the market to the benefit of consumers. This approach encourages companies’ deeper understanding of the risks their conduct entails, promotes proactive measures, and fosters a culture of accountability and awareness, ultimately leading to more effective compliance and risk management practices.

Therefore, CCIA Europe recommends that the European Commission reinstates an economic approach to assessing whether a conduct is capable of producing exclusionary effects. Theories of harm should be reinstated and clarified, including what they entail, the legal and evidence standards the European Commission should meet, and recommended standard of evidence to rebut them..

2. Keep consumer welfare at the core

Section 3.3.4 of the Draft Guidelines provides that “the finding of a conduct’s capability to produce exclusionary effects does not require actual harm to competition to be demonstrated,” and additionally, “it is also not necessary to prove that the conduct resulted in direct consumer harm.” This alteration signifies a notable departure from the notion of “anti-competitive foreclosure” as articulated in the 2008 Guidance, which maintained that consumer harm was a fundamental criterion for determining whether a company’s conduct resulted in the anticompetitive foreclosure of its competitors.

What we see in the Draft Guidelines implies a shift from “protecting competition” to “protecting competitors.” In fact, the abandonment of the “anticompetitive foreclosure” framework and the diminished emphasis on consumer harm contravene the objectives of Article 102 TFEU, which is designed to safeguard competition for the benefit of consumers, rather than to protect competitors or pursue other notions of “fairness.” In the context *Intel* (C-413/14 P, EU:C:2017:632, para 134.), the Court clarified that Article 102 does not extend protection to less efficient competitors, highlighting that not all exclusionary effects necessarily harm competition. This perspective underscores the principle that the primary focus of competition law should be the enhancement of consumer welfare rather than the mere preservation of existing market structures. This should be reflected in the Draft Guidelines. Moreover, established case law (see for example *Intel* cited above, para 137-139) requires the European Commission to demonstrate at least the capability of producing exclusionary effects, based on all relevant facts and circumstances

IV. Principles to determine whether specific categories of conduct are liable to be abusive

1. Enhance practical and positive examples throughout the guidelines

The stated objective of the Draft Guidelines (Section 1, para 8) is to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU. In this context, the Draft Guidelines, particularly Sections 4.2 and 4.3, offer a framework for understanding certain types of conduct deemed abusive based on judgments of EU courts. However, instead of providing clear guidance, the Draft Guidelines simply summarise those judgments. Moreover, in certain instances, the Draft Guidelines interpret case law in a manner that broadens the scope of abuse and/or diminishes the evidentiary burden on the European Commission. For example, with respect to tying and bundling practices, the Draft Guidelines appear to conflate the notion of competitive advantage with that of exclusionary effects. This is likely not enough to provide companies with guidance as to which conduct will be deemed anti-competitive under Art. 102 TFEU, and which not.

Furthermore, the Draft Guidelines lack practical examples of permissible conduct that companies can adopt—practices that are less harmful or align with normal competitive behaviour. It is essential that the guidelines provide companies with the ability to self-assess their conduct by offering clear guidance on which practices may constitute abuse and which do not. This should be a central objective of the guidelines, ensuring that companies can navigate compliance with greater certainty and confidence.

Finally, providing companies with clearer guidance also benefits consumers, as it promotes competition and reduces the likelihood of harmful market practices. When companies understand the boundaries of acceptable conduct, they are better positioned to innovate and compete effectively, leading to more choices, better quality, and potentially lower prices for consumers. Therefore, CCIA Europe recommends that, to enhance their effectiveness, the Draft Guidelines should incorporate more positive examples of business practices. Drawing from case studies would bring much-needed clarity.

Conclusion

CCIA welcomes the Commission's effort to offer guidance in respect to which conduct by dominant undertakings constitutes an exclusionary abuse under Art. 102 TFEU. CCIA Europe recommends that in order to meet its stated objective of providing more legal certainty and clarity for the companies, some parts of the Draft Guidelines should be revised. Key suggestions include providing clearer guidance on what constitutes "competition on the merits," returning to an economic, effects-based approach in assessing exclusionary conduct and prioritising consumer welfare over protecting competitors. We remain available to further discuss our comments.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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For more information, please contact:

CCIA Europe's Competition Policy Manager, Aleksandra Zuchowska:
azuchowska@ccianet.org