

**COMMENTS OF THE AMERICAN BAR ASSOCIATION
ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE
EUROPEAN COMMISSION'S DRAFT EXCLUSIONARY ABUSE GUIDELINES**

October 29, 2024

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) appreciate the opportunity to provide their comments on the European Commission (the Commission) Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings (the Draft Guidelines).¹ The Sections are available to provide additional comments or assistance in any other way that the Commission may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition and consumer protection law around the world.

The Antitrust Law Section (ALS) is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For more than thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.²

The International Law Section (ILS) is the American Bar Association section that focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law, which often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to

¹ European Comm'n, *Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings* (2024), available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en [hereinafter Draft Guidelines].

² Comments of the Antitrust Law Section are available online at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs.

debates relating to international legal policy.³ With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.⁴

Since the Draft Guidelines were published, the Sections note that intervening jurisprudence of the Court of Justice has addressed important issues discussed in the Draft Guidelines. This jurisprudence has the as-efficient-competitor (“AEC”) test is an important part of the factual matrix that “*must be assessed*” when determining whether conduct has the capability to exclude;⁵ (ii) competition on the merits and the AEC test may be regarded as two sides of the same coin;⁶ and (iii) that even conduct such as exclusive dealing may not be considered presumptively illegal, but rather a full consideration of the facts is required (including whether the short duration of the conduct means it does not have the capability to exclude).⁷ The Sections understand that the Commission will amend the Draft Guidelines to reflect intervening jurisprudence and have not attempted to address every point in the Draft Guidelines for which an update is appropriate. In view of the significance of these issues, a targeted consultation on these updates may be appropriate before the final guidelines are published.

These comments reflect the expertise and experience of the Sections’ members with antitrust laws and enforcement practices around the world. The Sections are available to provide additional comments, or otherwise to assist the Commission as it may deem appropriate.

EXECUTIVE SUMMARY

The Sections recognize the importance of providing increased legal certainty in relation to the application of Article 102 TFEU to abusive exclusionary conduct. The Sections support the Commission’s efforts to synthesize the large body of case law that has developed in this area but believe that the final guidelines could provide greater guidance and legal certainty in a number of respects. The Sections offer the following comments for the Commission’s consideration as it finalizes these guidelines.

With respect to the principles applicable to the assessment of dominance, the Sections respectfully recommend that the Commission remove the reference to a 10% market share offering a safe harbor “save in exceptional circumstances,” since the caveat undercuts the value of the “safe harbor.” With respect to collective dominance, the Sections recommend that the final guidelines discuss whether the rules for applying Article 102 TFEU to types of conduct differ in a collective dominance context (as opposed to single dominance) and if so how.

³ About Section Policy, Am. Bar Ass’n, https://www.americanbar.org/groups/international_law/policy/about/.

⁴ Past submissions are available online at https://www.americanbar.org/groups/international_law/resources/policy/blanket-authorities/.

⁵ Judgment of 24 October 2024, Case C-240/22 P, *Commission v. Intel*, para. 181, 331 and 340

⁶ Judgment of 24 October 2024, Case C-240/22 P, *Commission v. Intel*, para. 181 (The as efficient competitor test “*seeks specifically to assess whether such an as-efficient competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position and, consequently, whether that conduct must be considered to come within the scope of normal competition, that is to say, competition on the merits.*”)

⁷ Judgment of 18 September 2024, Case T-334/19, *Google and Alphabet v. Commission*, para. 700 and 715

With respect to the general principles to determine if conduct by a dominant undertaking is likely to be abusive, the Sections appreciate the Draft Guidelines' efforts to clarify the concepts of conduct departing from competition on the merits and the capability of such conduct to produce exclusionary effects. The Sections respectfully recommend, however, that the final guidelines elucidate the relationship between these two concepts rather than presenting them as two completely different criteria. The Sections also question whether the introduction of presumptions—unless specifically endorsed by the European Courts—contribute to the goal of increasing transparency and legal certainty absent clear criteria for invoking a presumption and as to the Commission's burden to establish that they are met. With or without such presumptions, the final guidelines should provide guidance on evidence that is relevant to the Commission's assessments. The Sections further offer comments on the discussion of certain individual conduct discussed in the Draft Guidelines.

With respect to the defenses of objective necessity and efficiency, the Sections suggest that the final guidelines include more complete discussion of the types of justification that will be relevant to the assessment of specific types of conduct. The final guidelines should also reflect the Commission's latest thinking in analogous areas such as the application of Article 101(3) TFEU in the context of horizontal and non-horizontal agreements.

COMMENTS

I. General Principles Applicable To The Assessment Of Dominance

A. Single Dominance

The Sections agree with the Commission that the existence of a dominant position is indicated by a combination of several factors that, taken separately, are not necessarily determinative; that the assessment of dominance should consider the specific circumstances of each case; and that the market shares of the undertaking concerned and of its competitors should also be compared, also considering that “[s]pecific characteristics of a market may allow more than one undertaking within the same market to be individually dominant.”⁸

The Sections also agree with the Commission that market shares are an important, but not conclusive or necessarily determinative, indicator of market power, and that other factors, such as barriers to expansion and entry and the degree of dominance, should also be considered. Nevertheless, market shares can be used as a first approximation of market power to reduce decision-making costs for both the authority and the undertakings.

As per the AKZO case, the Draft Guidelines provide that dominance is presumed “where an undertaking holds a market share of 50% or above.”⁹ However, the Draft Guidelines also refer to other thresholds, such as dominance possibly being found in cases where an undertaking has a market share below 50%.¹⁰ The Sections recommend that the Commission clarify, or remove, the statement in footnote 41 that “[m]arket shares below 10% exclude the existence of a dominant

⁸ Draft Guidelines, *supra* note 1, at 8 n.34.

⁹ *Id.* ¶ 26 (citing Case C-62/86, AKZO v. Comm’n, ECLI:EU:C:1991:286, ¶ 60 (July 3, 1991)).

¹⁰ *Id.* ¶ 26.

market position save in exceptional circumstances.”¹¹ While this footnote could imply that an undertaking with market shares below 10% can be presumed not to hold a dominant position, the caveat undercuts the value of this presumption.

B. Collective Dominance

The Draft Guidelines’ discussion of collective dominance provides a helpful summary of the law. The Draft Guidelines reflect that the concept of collective dominance has been forged in judgments relating not only to Article 102 but also to the European Union Merger Regulation (EUMR). Given what appears to be infrequent application by the EU Courts, the principles set out in the Draft Guidelines may be difficult to apply and thus provide less legal certainty for the antitrust authorities, the market and undertakings concerned than other sections of the Draft Guidelines.

Given the sparse and dated case law and the difficulties in applying the concept of collective dominance, the Sections encourage the Commission to include further guidance in the final guidelines, including further examples of cases that may, in the Commission’s view, lead to a finding of collective dominance, in particular regarding economic links or factors that might give rise to a “connection between the undertakings concerned.”¹²

As noted in the Draft Guidelines, where market characteristics “facilitate the adoption of a common policy by the undertakings concerned, collective dominance can [] be established without there being an agreement or structural links.”¹³

The Sections note that the principles to determine if the conduct by a dominant undertaking discussed in the Draft Guidelines appear to assume that the undertaking in question holds a single dominant position. The Sections respectfully recommend that the Commission consider whether and if so, how the determination may differ if the undertaking in question holds a collective dominant position and adapt the final guidelines accordingly.

II. General Principles to Determine if Conduct by a Dominant Undertaking is Liable to be Abusive

Once an undertaking is determined to hold a dominant position in an antitrust market, the Draft Guidelines set out a two-step test to determine whether conduct by the undertaking may infringe Article 102 TFEU, following the framework set out by the European Courts in judgments applying Article 102 TFEU. The Sections commend the Draft Guidelines’ elaboration of the criteria to be applied at each step but suggest that these elements should not be regarded as completely independent. The question whether a conduct departs from competition on the merits is often related to its potential to produce exclusionary effects. These elements often appear to be two sides of the same coin.

¹¹ *Id.* at 9 n.41.

¹² *Id.* ¶ 35.

¹³ *Id.* ¶ 36.

A. Conduct Departing From Competition on the Merits

The Draft Guidelines state that the finding of an abuse requires a distinct finding that the conduct departs from competition on the merits.

The phrase “competition on the merits” has been reiterated in many EU court judgments. In the Sections’ view, it is best understood as a general principle that informs whether the conduct in question is capable of having exclusionary effects.

To give more substance to the concept of competition on the merits and provide practical guidance that companies can use to understand their compliance obligations, the Sections recommend that the final guidelines explain that whether relevant conduct is considered as departing from competition on the merits will be assessed in light of the potential for such conduct to have exclusionary effects based on the criteria set out in the Guidelines and the relevant circumstances. This approach is in line with comments in paragraph 56, which state:

In the case of certain pricing practices, namely predatory pricing (section 4.2.4) and margin squeeze (section 4.2.5), a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits. Whenever a price-cost test is carried out to establish whether conduct departs from competition on the merits, the outcome of the test can also be relevant for the assessment of the capability of such conduct to produce exclusionary effects.¹⁴

The Sections recommend that the final guidelines also include a more detailed discussion of what constitutes competition on the merits, not only what conduct departs from competition on the merits. As the European Courts have stated, “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.”¹⁵ Where impugned conduct does qualify as competition on the merits, that should eliminate the concern that the conduct can be considered abusive.

Similarly, absent more specific criteria set out in the EU Court cases, the Sections respectfully submit that where an equally efficient competitor could engage in the same conduct, such conduct may be presumed not to depart from competition on the merits. The as efficient competitor (AEC) test contributes to legal certainty for the dominant firm in that the dominant firm does not need price information about the efficiency levels of its competitors to apply the test. The AEC test is also administrable, as it requires a comparison of whether actual prices are above or are not above costs and does not require a comparison between actual profits and the profits that the dominant firm would make in a hypothetical counterfactual.

¹⁴ *Id.* ¶ 56.

¹⁵ C-680/20, *Unilever Italia v. Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2023:33, ¶ 37 (Jan. 19, 2023); Case C-413/14 P, *Intel Corp. v. Comm’n*, ECLI:EU:C:2017:632, ¶ 134 (Sept. 6, 2017); Case C-209/10, *Post Danmark v Konkurrencerådet*, EU:C:2012:172, ¶ 22 (Mar. 27, 2012).

The Sections respectfully note that dominant undertakings cannot assess the effects of their conduct on actual competitors, much less potential competitors, because they do not have access to information on those competitors' costs and competitive advantages or disadvantages.

B. Capability to Produce Exclusionary Effects

The second part of the Draft Guidelines' two-step test combines two elements requiring further elaboration: the concept of "exclusionary effects" and the factors for determining whether the conduct in question is "capable" of producing such effects. Paragraph 6 defines "exclusionary effects" as "any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint on the dominant undertaking."¹⁶ As noted, the Sections recommend that the final guidelines discuss impugned conduct's capability to produce exclusionary effects in relation to the question whether such conduct represents, or departs from, competition on the merits.

The Sections recommend that the final guidelines clarify the evidentiary burden for each type of potentially abusive conduct. The evidentiary burden to show that a conduct is capable of producing exclusionary effects depends on the type of conduct, the likelihood that it will result in exclusionary effects and the relevant circumstances, as discussed in paragraphs 59 *et seq.* The Draft Guidelines distinguish between conduct for which it is necessary to demonstrate a capability to produce effects; conduct that is presumed to lead to exclusionary effects; and "naked" restraints that "have no economic interest for that undertaking, other than restricting competition. . . [and] are by their very nature capable of restricting competition."¹⁷ Whether or not a presumption applies, the final guidelines should state that the Commission has the burden of establishing that the criteria are satisfied and provide guidance on how the Commission will assess evidence presented by a dominant firm.

Paragraph 62 states that to demonstrate the capability of producing an exclusionary effect "it is sufficient to show that the conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct's implementation."¹⁸ The Sections recommend that the final guidelines clarify the circumstances in which removal of "the commercial uncertainty relating to the entry or expansion of competitors"¹⁹ may be a sufficient criterion for conduct to be considered as having exclusionary effects.

The Draft Guidelines note that exclusionary effects may be demonstrated by actual market developments if the conduct "has been in place for a sufficiently long period of time,"²⁰ but the absence of actual exclusionary effects cannot in itself disprove its capability to do so.²¹ The Draft Guidelines go on to say that in the absence of actual exclusionary effects the undertaking concerned must show that that "absence of [exclusionary] effects was indeed the consequence of the fact that that conduct was unable to produce [exclusionary] effects."²² The Sections submit that where

¹⁶ Draft Guidelines, *supra* note 1, ¶ 6.

¹⁷ *Id.* ¶ 60.

¹⁸ *Id.* ¶ 62.

¹⁹ *Id.* ¶ 62.

²⁰ *Id.* ¶ 63.

²¹ *Id.* ¶ 64.

²² *Id.* ¶ 64.

conduct has been in place for a sufficiently long period of time to produce exclusionary effects, but no such effects have occurred, it is for the Commission to show that the conduct is nonetheless capable of having such effects.

Paragraph 70(a) of the Draft Guidelines asserts a causal relationship between “the extent of the dominant position” and whether “conduct is capable of having exclusionary effects.”²³ However, paragraph 21 observes only that “the degree of dominance may be relevant.”²⁴ The Sections recommend that the relevance of an undertaking’s degree of dominance be clarified. In paragraph 70(f), it would be helpful for the final guidelines to explain the phrase “exclusionary strategy” further, in particular by elaborating on the point at which evidence of “subjective intent” of individual employees of a dominant undertaking becomes evidence of an “exclusionary strategy” of such undertaking.

Furthermore, the last sentence of paragraph 71 of the Draft Guidelines could be clarified. The point seems to be that the profitability of exclusionary conduct stems from its success, and since success need not be established, actual profitability need not be established.

The final guidelines may also benefit from further explanation of the statement in paragraph 75 of the Draft Guidelines that “there is no *de minimis* threshold.”²⁵ The *Post Danmark* judgment rejected a *de minimis* threshold on the grounds that an “anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition.”²⁶ *Post Danmark* further stated that there was “no need to show” an anticompetitive effect of a “serious or appreciable nature.”²⁷ However, recent judgments focused on “capability” may be read to imply that “capability” embodies a salience threshold.²⁸

III. Principles to Determine Whether Specific Categories of Conduct are Liable to be Abusive

A. Conducts Subject to Specific Legal Tests

1. Exclusive Dealing

The Sections appreciate the Commission’s effort to clarify the principles to determine whether exclusive dealing by dominant undertakings can be abusive under Article 102 TFEU, and to distinguish between different types of exclusive dealing, such as exclusive purchase or supply obligations, exclusivity rebates, and *de facto* exclusive dealing.

The Draft Guidelines state that “[e]xclusive dealing by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer’s or seller’s choice

²³ *Id.* ¶ 70(a).

²⁴ *Id.* ¶ 21.

²⁵ *Id.* ¶ 75.

²⁶ Case C-23/14, *Post Danmark v. Konkurrencerådet*, ECLI:EU:C:2015:651, ¶ 73 (Oct. 6, 2015).

²⁷ *Id.* ¶ 74.

²⁸ See Case T-235/18, *Qualcomm v. Comm’n*, ECLI:EU:T:2022:358 (June 15, 2022); Case T-286/09, *Intel Corp. v. Comm’n*, ECLI:EU:T:2022:19 (Jan. 26, 2022).

of possible sources of supply or demand. As such, exclusive dealing is presumed to be capable of having exclusionary effects.”²⁹ The Sections recommend that the Commission clarify several things:

- whether this means that all types of exclusive dealing (exclusivity rebates and any other type) will be subject to the presumption. This does not seem to be consistent with the fact that the Commission’s assessment of a conduct of a dominant undertaking must consider all relevant facts and circumstances;³⁰ and
- to what extent the Commission will also assess evidence demonstrating procompetitive effects arising out of exclusive dealing by a dominant player, such as – to the extent consumers are benefitted – enhancing efficiency, reducing transaction costs, ensuring quality or reliability, or preventing free-riding, and that such effects may justify or counterbalance the exclusionary effects of the conduct under certain conditions. The Draft Guidelines only refer to an assessment of any evidence produced by a dominant undertaking that the exclusive dealing at issue would not be capable of producing exclusionary effects to be carried out, with no reference to an objective justification defense. As mentioned below, Section V of the Draft Guidelines (on the general principles applicable to the assessment of objective justifications and the so-called “efficiency defense”) sets forth, as to conducts with a high potential to produce exclusionary effects, that it “must be given due weight in the balancing exercise to be carried out in this context,”³¹ with no additional clarifications or examples suitable for exclusive dealings. Therefore, the Sections recommend that the Commission provide more detail and examples on to that extent and how it will specifically assess objective justifications and efficiencies in relation to exclusive dealing.

The Sections suggest that the Commission provide more guidance (including examples) on how it will assess the evidence submitted by the dominant undertaking to rebut the presumption of exclusionary effects, and evidence that would be sufficient or insufficient to call this presumption into question. The Sections also suggest that the Commission clarify how it will balance the probative value of the presumption with the evidentiary elements demonstrating the capability of the conduct to have exclusionary effects and how it will consider the degree of dominance and the extent of the conduct in its analysis.

2. Refusal to Supply

The Draft Guidelines set out a useful guide to the circumstances in which refusal to supply may exceptionally be considered abusive.

It is essential to establish a clear framework for addressing refusal to supply abuses, particularly in light of the fundamental rights of the freedom of contract and the right to property. A well-defined framework not only protects these fundamental rights but also fosters a fair and competitive marketplace ensuring that businesses can operate without undue restrictions while promoting healthy economic relationships.

²⁹ Draft Guidelines, *supra* note 1, ¶ 82.

³⁰ See, e.g., Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:EU:C:2017:632, ¶ 139 (Sept. 6, 2017).

³¹ Draft Guidelines, *supra* note 1, ¶ 170.

Recent case law had narrowed the circumstances in which an outright/express refusal to supply standard is applicable, finding that a refusal to supply as part of a broader exclusionary practice is not assessed by this higher standard.³² It would thus be helpful to articulate more clearly the perimeter of outright refusal to supply so as to provide a clear guidance for circumstances in which firms are encouraged to invest and innovate without being forced to share the fruits of that investment with rivals.³³

In particular, the Draft Guidelines state that refusal to supply “is different from the access restrictions that are described in section 4.3.4,”³⁴ but they do not explain how companies should differentiate between the two.³⁵ This distinction is especially important given the Draft Guidelines classify refusal to supply (conduct subject to specific legal test) and access restrictions (conduct with no specific legal test) under different categories with a different allocation of the burden of proof.³⁶

The Draft Guidelines provide “examples of access restrictions.”³⁷

The final guidelines should ideally formulate clear criteria that companies can use when self-assessing their business practices. These criteria should clarify, among other things:

- whether the characterization of the behavior as “active” or “passive” is determinative for the distinction between refusal to supply and other access restrictions;³⁸
- whether the type of remedy is determinative – note that contrary to the CJEU’s finding that “[t]here could, after all, be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied,”³⁹ the Draft Guidelines emphasize that refusal to supply is necessarily linked with “an obligation to give access”;⁴⁰ and
- whether a more holistic approach should be applied – involving additional consideration of whether the undertaking expressly or implicitly (passively or actively) refuses access, assessing whether the need to protect the undertaking’s freedom of contract, right to property and incentives to invest and innovate merits the application of the stricter refusal

³² See Case C-48/22 P, *Google & Alphabet v. Comm’n (Google Shopping)*, ECLI:EU:C:2024:726, ¶¶ 111-113 (Sept. 10, 2024).

³³ The U.S. has traditionally set a high bar for refusal to deal for that reason. See *Verizon Commc’ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2003).

³⁴ Draft Guidelines, *supra* note 1, ¶ 97.

³⁵ There is a similar statement in section 4.3.4 on access restrictions: “‘Access restrictions’ refer to the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply.” *Id.* ¶ 163. No further explanation follows on how to differentiate between the two.

³⁶ *Id.* ¶¶ 60(a) and (b).

³⁷ *Id.* ¶ 166.

³⁸ See Case T-612/17, *Google & Alphabet v. Comm’n (Google Shopping)*, ECLI:EU:T:2021:763, ¶ 240 (Nov. 10, 2021). In contrast, the CJEU did not base its finding on characterizing Google’s conduct as “active behavior” as opposed to a “simple refusal of access.”

³⁹ Case C-48/22 P, *Google and Alphabet v Comm’n (Google Shopping)*, ECLI:EU:C:2024:726, ¶ 86 (Sept. 10, 2024).

⁴⁰ Draft Guidelines, *supra* note 1, ¶ 97.

to supply test and, in particular, the indispensability condition (as established in para 99(a)).⁴¹

The Sections note the statement in paragraph 104 that “[t]he exercise of an exclusive intellectual property right by a right-holder can also be found as liable to be abusive.”⁴² The concerns that imposing an obligation to supply “directly impinges on [the] freedom of contract and the right to property . . . [and] may also affect the incentives for . . . the dominant undertaking to invest in inputs”⁴³ are especially relevant where the exercise of a right inherent to exclusive intellectual property is alleged to be abusive. The examples provided reflect case law but do not provide a framework for applying the refusal-to-supply criteria to the specific case of intellectual property rights. The Sections also suggest that the Commission moderate the broad language employed, perhaps by stating that a dominant undertaking ordinarily cannot infringe Article 102 merely by enforcing exclusive property rights.

In the Sections’ view, a requirement that a refusal to license “limit[] technical development on the market”⁴⁴ to be found abusive does not fully satisfy the need for a framework to assess the exercise of intellectual property rights in a “refusal to supply” context. The Draft Guidelines suggest that Article 102 grants every competitor with an idea for a minor improvement full access to technology protected by a multitude of patents. The Sections recommend that the Commission provide more guidance in the final guidelines, taking account of the risk of undermining the incentives of dominant undertakings and their competitors, which may differ depending on the nature of the intellectual property right in question.

3. Predatory Pricing

The Sections respectfully recommend that the Commission consider refining the Draft Guidelines as they relate to predatory pricing. Pricing alleged to be predatory will by definition be lower than prices offered by competitors of the dominant undertaking. Since lower prices are a normal result of competition on the merits and benefit consumers, the final guidelines should not deter potentially dominant companies from aggressively competing on the basis of price.

Where a dominant company’s pricing does meet the criteria to be presumed predatory, the Draft Guidelines could provide more guidance on how dominant undertakings can establish “that the conduct is not capable of producing exclusionary effects.”⁴⁵

In particular, it is unclear from the Draft Guidelines how the Commission will address dominant undertakings’ below-cost pricing for legitimate business reasons (e.g., meeting a price set by a competitor; selling excess supply, obsolete, or perishable inventory; or inducing customers to try a new product). The Draft Guidelines leave the impression that such objective justifications for the conduct will be given less weight in the Commission’s assessment. But the Draft Guidelines

⁴¹ See *Id.* (the Commission explains the rationale of the strict conditions for finding that a refusal to supply is liable to be abusive).

⁴² *Id.* ¶ 104.

⁴³ *Id.* ¶ 97.

⁴⁴ *Id.* ¶ 105.

⁴⁵ *Id.* ¶ 112.

lack clarity on how the Commission will conduct such assessments and the weight given to legitimate business reasons, particularly when the burden of proof shifts to the undertaking concerned. This creates uncertainty for businesses and impacts their ability to effectively defend themselves against allegations of predatory pricing.

Third, and relatedly, it is unclear from the Draft Guidelines how the Commission will incorporate evidence that a dominant undertaking would be unable to recoup short-term losses from its allegedly predatory pricing conduct into its assessment of whether the allegedly predatory pricing has exclusionary effects. In line with the jurisprudence, the Draft Guidelines state that it is not necessary for the Commission to demonstrate that the predatory pricing conduct would enable the dominant undertaking to recoup its costs. If a dominant undertaking presents evidence that it would in fact be unable to recoup losses generated by alleged predatory pricing, however, the Commission must consider that evidence.

The Sections note that an ability to recoup costs is relevant to the analysis of predatory pricing (and indeed a pertinent part of the rationale for dominant firms engaging in predatory pricing) under other antitrust laws and the guidance that other antitrust agencies have issued on its basis (e.g., in the U.S. and Canada). For instance, the Canadian Competition Bureau's *Abuse of Dominance Enforcement Guidelines* state:

Predatory conduct involves a firm deliberately setting the price of a product(s) below an appropriate measure of its own cost to incur losses on the sale of product(s) in the market(s) for a period of time sufficient to eliminate, discipline, or deter entry or expansion of a competitor, in the expectation that the firm will thereafter recoup its losses by charging higher prices than would have prevailed in the absence of the impugned conduct.⁴⁶

Reflecting U.S. Supreme Court precedent, the U.S. Federal Trade Commission's guidance on predatory or below-cost pricing similarly note:

Pricing below your own costs is . . . not a violation of the law unless it is part of a strategy to eliminate competitors, and when that strategy has a dangerous probability of creating a monopoly for the discounting firm so that it can raise prices far into the future and recoup its losses.⁴⁷

While a showing of recoupment is not *necessary* under EU law to establish predatory pricing, it is still a factor in the analysis. Accordingly, the Sections recommend that the final

⁴⁶ COMPETITION BUREAU CANADA, ABUSE OF DOMINANCE ENFORCEMENT GUIDELINES ¶ 59 (Mar. 7, 2019), <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines>.

⁴⁷ *Predatory or Below-Cost Pricing*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost-pricing> (emphasis added). *See also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.").

Guidelines discuss how the Commission accounts for evidence on the inability to recoup costs in its analysis of predatory pricing.

4. Margin Squeeze

The Sections appreciate the Commission's efforts to clarify the conditions under which a margin squeeze by dominant undertakings can be abusive and to provide guidance on how to apply a price-cost test to determine whether a margin squeeze has the capability to produce exclusionary effects.

In footnote 283, the Draft Guidelines state that “[margin squeeze] also includes a situation in which the input is at the same level as or downstream from the market for which it is needed. This may, for instance, arise where one undertaking controls a downstream distribution level that is needed in order to access customers.”⁴⁸ The Sections recommend that the Commission clarify both the scenarios described by the footnote and the assessment for each of them.

In paragraph 122(c), the Draft Guidelines state that the third condition to determine whether a margin squeeze can be abusive is whether “the conduct is capable of producing exclusionary effects.”⁴⁹ The Sections recommend that the Commission reference section 3.3.3 titled “Elements that may be relevant to the assessment of a conduct's capability to produce exclusionary effects” and in particular paragraph 70, to clarify how to assess whether this condition is met.

In paragraph 127, the Draft Guidelines mention “making the entry of competitors onto the market concerned more difficult, or impossible”⁵⁰ as one way to assess whether the margin squeeze can have exclusionary effects. The Sections note that high entry barriers could be due to reasons unrelated to the conduct;⁵¹ a causal relationship must be established between the conduct and the elevated entry barrier.

In paragraphs 130-136, the Draft Guidelines describe how a price-cost test can be applied to demonstrate a margin squeeze that may be considered to be abusive. The Sections recommend that the Commission clarify whether and if so, how any product differentiation figures in at the downstream level. With product differentiation, rival firms at the downstream level can charge a higher price than the downstream price and still operate profitably.

⁴⁸ Draft Guidelines, *supra* note 1, at 42 n.283.

⁴⁹ *Id.* ¶ 122(c).

⁵⁰ *Id.* ¶ 127.

⁵¹ For example, certain industries require huge upfront capital investments with a high risk of failure which naturally creates high entry barrier, but such a barrier exists regardless of the dominant undertaking's pricing decision.

B. Conducts With No Specific Legal Test

1. Multi-Product Rebates

The Draft Guidelines' section on multi-product rebates mostly cross-refers to the section on exclusive dealing⁵² and conditional rebates that are not subject to exclusive purchase or supply requirements⁵³. Thus, the Sections' comments on those sections equally apply here.

While the discussion of multi-product rebates in section 4.3.2 of the Draft Guidelines groups the practice with others as to which the Commission does not propose a legal test,⁵⁴ section 4.3.2 acknowledges the potential application of the price-cost test discussed for conditional rebates.⁵⁵

Since rebates result in lower prices for customers (other things being equal), it is important that the Draft Guidelines provide clear tests based on case law and sound economics to avoid deterring dominant companies from engaging in what may be pro-competitive practices.

The Draft Guidelines present an opportunity to create a compliance framework for companies that need to evaluate appropriate rebate levels. The extensive range of tests to evaluate rebates risks creating uncertainty for businesses in navigating their obligations. The Sections recommend that the final guidelines indicate wherever possible which test should be applied in which circumstances.

U.S. antitrust decisions may be informative as to the application of a price-cost test to multi-product rebates, standing alone. The analytical rigor a price-cost test can provide to the assessment of multi-product rebates and other discounting devices by which a company incentivizes customers to purchase a range of products stems from the ubiquity of the commercial practice.⁵⁶ That ubiquity, in turn, reflects the reality that customer attainment costs, for example the cost a business expends to maintain a large and capable sales force, can be significant. When customer attainment costs are large relative to anticipated revenues from the sale of a particular product, rewarding the attained customer for purchasing multiple products rather than just one, absent coercion, is an efficient business practice.⁵⁷ As with other presumptively efficient discounting practices, "a solicitude for

⁵² Draft Guidelines, *supra* note 1, § 4.2.1.

⁵³ *Id.* § 4.3.1.

⁵⁴ *See Id.* ¶ 137 ("[Section 4.3] discusses specific types of conduct for which no specific legal test has been developed . . . but for which the Union Courts have provided guidance as to how to apply the general legal principles set out in section 3.").

⁵⁵ *Id.* ¶ 155 ("The guidance set out in section 4.3.1 can be relevant.") (footnote omitted).

⁵⁶ *Cascade Health Sols. v. PeaceHealth* (corrected opinion), 515 F.3d 883, 894 (9th Cir. 2008) ("Bundled discounts are pervasive, and examples abound. Season tickets, fast food value meals, all-in-one home theater systems—all are bundled discounts."); Herbert Hovenkamp & Erik Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 BUFF. L. REV. 1227, 1228 (2009) ("Bundled discounting is an exceedingly common practice in commercial contracts involving suppliers of multiple interrelated products.").

⁵⁷ *Cascade*, 515 F.3d at 895 ("Bundling can also result in savings to the seller because it usually costs a firm less to sell multiple products to one customer at the same time than it does to sell the products individually.").

price competition”⁵⁸ cautions against the application of a subjective legal rule that could deter efficient commercial conduct by dominant firms.

The Sections note that the Draft Guidelines appear to incorporate the concept of discount attribution with respect to conditional rebates.⁵⁹ While the Draft Guidelines’ discussion of multi-product rebates refers back to this material, it could be helpful to clarify that in performing the price-cost test for multi-product rebates subject to paragraph 155, the total of the rebates should be attributed to the products in which the undertaking has been accused of seeking to acquire or enhance its dominance.

2. *Self-Preferencing*

The Sections note that the term “self-preferencing” does not yet denote a well-defined category of conduct under Article 102 TFEU. Broad definitions of self-preferencing, including that in paragraph 156 of the Draft Guidelines, encompass conduct that is consistent with competition on the merits, e.g., where an undertaking promotes its brands on its fleet of trucks to the exclusion of all others. The description of potentially abusive self-preferencing also appears to encompass conduct covered by other categories of conduct discussed in the Draft Guidelines, such as refusal to supply or tying. The Sections recommend that the final guidelines clarify the types of conduct that may be considered as a stand-alone “self-preferencing” abuse and whether (and if so how) the standards for evaluating such conduct differ from those applicable to other potentially exclusionary conduct.

The Sections’ concerns are reinforced by potentially overbroad language in the Draft Guidelines. In paragraph 159, the Draft Guidelines provide several examples of preferential treatment, one of which is “manipulating consumer behaviour and choice.”⁶⁰ Additionally, in paragraph 161(ii), the Draft Guidelines state that if “the preferential treatment is likely to influence the behaviour of users, irrespective of the intrinsic qualities of the leveraged product,”⁶¹ this conduct may depart from competition on the merits. But it cannot be the case that any sort of influence a dominant undertaking has on its consumers’ choices departs from competition on the merits. The Sections recommend that the Commission clarify whether such scenario should be interpreted as departing from competition on the merits because the undertaking is manipulating consumer choices and influencing the behavior of users.

3. *Access Restrictions*

The Sections appreciate the Commission’s efforts to provide examples of cases in which imposing access restrictions by dominant undertakings could be considered abusive under Article 102 TFEU.

In paragraph 164, the Draft Guidelines clarify that “in the specific case at hand, it will need to be established that the conduct departs from competition on the merits and is capable of

⁵⁸ *Id.* at 903.

⁵⁹ Draft Guidelines, *supra* note 1, ¶ 150.

⁶⁰ *Id.* ¶ 159.

⁶¹ *Id.* ¶ 161(ii).

producing exclusionary effects.”⁶² The Sections respectfully suggest the Commission provide examples where access restrictions would not be considered as abusive. For instance, if a dominant undertaking experiences an abrupt shortage of the input that its competitors are seeking access to (that did not arise as a result of its own abuse), or if the dominant undertaking needs to restrict access to protect the data privacy of its own customers (in circumstances where less restrictive means to protect privacy are not available), then the Sections would appreciate more clarity on whether access restrictions in these scenarios should be considered as competition on the merits.

In paragraph 165, the Draft Guidelines mention that “the importance of the input for the access seeker will increase the likelihood that access restrictions will lead to exclusionary effects.”⁶³ The Sections suggest the Commission provide more clarity on how to establish the input’s degree of importance, and whether one should take a static approach of looking at the current importance of the dominant undertaking’s input, or one should take into consideration potential entry and the competitors’ ability to generate the input themselves.

IV. General Principles Applicable to the Assessment of Objective Justifications

The Sections welcome the Commission’s effort to provide guidance on the general principles applicable to the assessment of objective justifications that may lead to otherwise abusive conduct escaping the prohibition of Article 102 TFEU.

The Sections agree with the Commission that defenses must be based on evidence and specifically related to the investigated conduct. However, the Sections fear that the discussion in the Draft Guidelines provides less guidance to dominant undertakings than it could. The Draft Guidelines provide a useful review of cases in which a claim of objective necessity or an efficiency defense were rejected but provide little guidance on the Commission’s approach to assessing evidence offered to support such defenses or what evidence might be found sufficient in the context of different types of potentially abusive conduct.

The Draft Guidelines do not elaborate on the differences in the Commission’s assessment in each case or the types of evidence that will be required to establish a defense of objective necessity or efficiencies. The Sections respectfully suggest that the final guidelines could incorporate examples and specific guidance on such commonly asserted justifications as reducing production, distribution or transaction costs, enhancing quality or reliability of products, or preventing free-riding. The Sections also recommend that the Commission consider the potential relevance of recent updates to its guidance on the assessment of efficiencies under Article 101(3) TFEU to assessments of comparable criteria under Article 102 TFEU, for instance as regards the assessment of sustainability benefits).

Similarly, the Draft Guidelines mention that “[w]hile it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context.”⁶⁴ The Draft Guidelines do not

⁶² *Id.* ¶ 164.

⁶³ *Id.* ¶ 165.

⁶⁴ *Id.* ¶ 170.

elaborate on the differences in the Commission's assessment. The Sections respectfully recommend that the final guidelines incorporate examples and specific guidance on such common justifications as reducing distribution or transaction costs, enhancing quality or reliability of products, or preventing free-riding.

The Sections appreciate the opportunity to comment and remain available to respond to any questions regarding these comments or to provide additional assistance to the Commission as it may deem appropriate and helpful.