

DRAFT GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE – OBSERVATIONS FROM THE ITALIAN ANTITRUST ASSOCIATION

The Italian Antitrust Association ('AAI') particularly welcomes this initiative and thanks the European Commission ('Commission') for the opportunity to submit comments to the draft Guidelines on exclusionary abuses of dominance ('draft Guidelines'), and hopes that its observations would be useful to the finalisation of a set of guidelines that strike the right balance between ensuring an effective protection of competition and providing legal certainty by assisting businesses and the legal and economic professions in the assessment of dominant positions under the UE competition rules.

For each section of the draft Guidelines, this submission provides a mixture of high-level comments, and more detailed comments on specific points covered in the draft Guidelines.

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Introduction

Although the Guidelines are not binding under EU law, it can be expected that they will have a significant impact on business practices within the EU. When adopted, they will represent a fundamental milestone on several aspects: (i) they will provide stakeholders with increased transparency, predictability and legal certainty; (ii) they will help national authorities and courts in pursuing a consistent enforcement of Article 102 across different jurisdictions; not least (iii) they will help undertakings self-assess whether their conduct constitutes an exclusionary abuse.

To this end, it is valuable that the draft Guidelines contain a comprehensive summary of the principles underpinning the application of Article 102 TFEU and provide helpful guidance as to how the Commission intends to apply those principles in its enforcement to exclusionary abuses.

On several aspects, the draft Guidelines do achieve such a high expectation by setting out explicitly the principles which will lead the Commission's intervention against unilateral conduct of dominant firms. However, for the reasons illustrated below, other aspects merit further consideration to improve guidance to undertakings and enable a better formation of realistic expectations for intervention.

The general approach in the draft Guidelines represents a significant departure from the paradigm underpinning the Guidance Paper issued by the Commission in 2008, aimed at aligning art. 102 analysis to the *more economic approach*. As a consequence, the Guidance emphasized the role of the effect of the practices on the ultimate consumer through a widespread reference to

consumer welfare; gave relevance to the contestability characteristics of markets; and introduced the As efficient Competitor test for the evaluation of price based practices.

The draft Guidelines look instead more centred on the effect of unilateral conducts on the competitive process, while effects on consumer welfare seem only one of the relevant factors for the analysis and attention is given to exclusionary effects stemming for conducts non based on competition on the merits. While this approach does not rule out the relevance of economic analysis, the AAI wants to emphasize that the Commission should refrain to take a too formalistic approach, and still consider consumer welfare as a relevant parameter for verifying whether or not the competitive conduct of an undertaking in dominant position is genuinely on the merits

It seems that the main novelties contained in the draft Guidelines are (i) a taxonomy of unilateral conducts liable to be anticompetitive, based on analysis of competition on the merits developed in European Courts precedents; (ii) a two-step test based to determine if in the specific context the conduct by a dominant undertaking is abusive (para. 45); (iii) the reliance of the analysis on presumptions about the capability of the practices to cause exclusionary effects (para. 47).

The explicit reliance on the findings of precedent cases and the principles established in settled case law to set a less restrictive legal threshold for the Commission to assess – under the right circumstances – an infringement of Article 102 can contribute to reducing the time lag between identifying anti-competitive behaviour and being able to initiate formal intervention procedures by the European Commission. In such a way, it can contribute to decreasing the likelihood of false negatives and to guaranteeing fair and contestable markets, especially in innovative industries.

This notwithstanding, it cannot be concealed the concern that the tenor set by Draft Guidelines could be too open for interpretation.

While it seems that the effects analysis will remain central in the Commission's enforcement of Article 102 TFEU, there are undoubtedly elements of the draft Guidelines which could be understood as a distancing from the effects-based approach in favour of a more form-based approach hinged upon past Commission decisions or the Commission's interpretations of case law. Clear examples are the use of presumptions (para. 47), the lack of safe harbours for dominant undertakings (para. 57 and footnote 41) and the presence of a significant level of discretion in the Commission's assessment of conduct (Section 3.3.4).

In particular, the draft Guidelines lack sufficient guidance as to the type and quality of relevant evidence the Commission deems adequate and necessary to call presumptions into questions. It is also not sufficiently determined when and how undertakings can rebut the allegedly exclusionary effect of some practices. Without further clarity in this regard, the concrete risk is that undertakings may attempt to cope with the uncertainty by producing untargeted and thus potentially unhelpful evidence. The lack of guidance may thus result in either the Commission needing to devote substantial resources to assess this increased pool of (inadvertently potentially unhelpful) evidence, and/or undertakings seeking clarity on the standard of proof for rebuttals by the courts. Neither outcome is favourable for ensuring an effective right of defence to undertakings or achieving the policy objective of more timely intervention.

To avoid such an unintentional and detrimental repercussion AAI deem necessary to introduce a number of changes to the draft Guidelines, expanded below, alongside recommendations as to how to improve the current the Guidelines.

1. DRAFT GUIDELINES' SECTION I: INTRODUCTION

The AAI acknowledge the importance of the draft Guidelines' **purpose**: the protection of genuine and undistorted competition in the internal market, the **effective competition**. To this regard AAI consider it essential the **notion** of **consumer** and **consumers welfare** and we believe that the draft Guidelines takes into consideration these latter concepts already in the Section I (see, for instance, paras. 2 and 5 and footnote n. 2). However, we strongly believe that the Commission might go into more detail on the consumer harm notion.

The draft Guidelines' Section I does indeed refer to consumer and consumer welfare, but they are mentioned together with other factors (e.g. public interest, market players, effective structure of competition) and not considered *per se*.

Therefore, at a first reading, the draft Guidelines seem to move the attention away from **consumer harm**, which was one of the focal points of the 2008 Guidance on enforcement priorities in applying article 102 TFUE to abusive exclusionary conduct by dominant firms ('2008 Guidance').

Although it will be further discussed in the Section III comments, it is worth anticipating now that the draft Guidelines explicitly state that there is no need to prove a **direct consumer harm** in order to identify a conduct capable of producing exclusionary effects (see para. 72).

In this respect, we noted that the draft Guidelines no longer rely on the concept of “anti-competitive foreclosure”, *i.e.* foreclosure of competitors that produces consumer harm, as opposed to pro-competitive foreclosure. Somewhat surprisingly, the Draft Guidelines do not mention the notion of “anti-competitive foreclosure” which, conversely, had a key role under Guidance on Enforcement Priorities (para. 19: “*The aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by **foreclosing their competitors in an anti-competitive way***”).

In fact, in the 2008 Guidance, the concept of anticompetitive foreclosure was used instead “*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 might be a symptom of a **switch to a more form-based approach as opposed to the economic-based** one prevailing under the Guidance on Enforcement priorities. Reintroducing the concept of “anti-competitive foreclosure” would align the final guidelines more closely with case law and enforcement practice.

Accordingly, we also suggest the Commission to further clarify the definition of consumer and consumer harm to the benefit of consumers and society as overall and since we acknowledge that, in this field, guidance providing **legal certainty** is **pivotal**.

In terms of more specific comments on draft Guidelines’ Section I concerning the introduction, the AAI would like to note the following:

- **The replacement of the concept of anti-competitive foreclosure with that of exclusionary abuse**

Page 4, para. 6 – the draft Guidelines replaces the concept of anti-competitive foreclosure with that of exclusionary abuse, defined as conduct that “*can harm consumers by hindering, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition*”.

It is thus a wider concept than anti-competitive foreclosure. Since 2009, the principle of anti-competitive foreclosure has guided the enforcement of Article 102 TFEU: not the protection of competitors as such, but the

foreclosure of competitors that leads to consumer harm. The draft Guidelines, however, no longer seem to follow this guiding principle. The new concept of exclusionary abuse contained in the Draft Guidelines also does not seem to provide a substitute framework on which basis to assess the impact of an Article 102 infringement.

The AAI believes that it seems, therefore, that to assess an exclusionary abuse, the draft Guidelines no longer require that the conduct caused actual harm to competition or resulted in direct consumer harm. It also does not require that actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking, nor that the conduct was made possible because of the dominant position.

2. DRAFT GUIDELINES' SECTION II: GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF DOMINANCE

In line with the existing 2008 Guidance, the **definition of dominance** remains largely unchanged. However, we appreciate that some considerations have been added to take into account the challenges that especially digital markets face, in terms of barriers to entry and expansion: see, for instance, the reference to data-driven advantages, network effects and behavioral biases (para. 30). This can be further expanded by including reference to **new competition challenges** such as the use of algorithms, artificial intelligence, innovation etc.

The AAI welcomes the reference to the most recent cases the EC has investigated, and as a general recommendation, suggests providing examples of specific cases of abuse of dominance that reflect the characteristics of current and evolving markets.

In terms of more specific comments on draft Guidelines' Section II on general principles applicable to the assessment of dominance, the AAI would like to note the following:

- **Existence of a dominant position**

Page 9, para. 26 – the draft Guidelines states that “*One important factor is the existence of very large market shares, which are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position. This is the case in particular where an undertaking holds a market share of 50% or above.*”

While the draft Guidelines suggest that “the existence of a dominant position derives in general from a combination of several factors that, taken separately, are not necessarily determinative” (para 24, emphasis added), the AAI believes that too much emphasis is put on **high market shares** which would be “in themselves” evidence – rather than indication – of the existence of a dominant position.

The draft Guidelines indicate that “very large” market shares constitute an “important factor” when assessing the existence of a dominant position (para. 28), marking a notable shift from the 2008 Guidance.

The only caveat appears to be related to dynamic or differentiated markets (para. 28).

Page 9, footnote 41 – the draft Guidelines also set forth that “*market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances*”.

The 10% figure was derived from the earlier judgment of 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, Case 75/84. In this judgment, the percentage was not cited as a threshold with any general value. Rather, it was incidental to the case, corresponding to the market share held by the examined undertaking (SABA) in a highly fragmented market.

The AAI is concerned that the 10% threshold has now been elevated to a general standard, which would render it essential to determine which economic principles and which factors must be taken into account when evaluating the hypothesis of dominance even with market shares that previously did not raise concerns (such as those between 20 and 30%).

The AAI would return to the more economically sound approach of the 2008 Guidance, which emphasized the importance of assessing market power and viewed market shares as a useful starting point or indicative proxy.

The 2008 Guidance stated that “*The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant*”;¹ and “*Market shares provide a useful first indication for the*

¹ Paragraph 11, 2008 Guidance.

Commission of the market structure and of the relative importance of the various undertakings active on the market.”²

In line with this, the AAI would avoid specifying any rigid market share threshold in the draft Guidelines. If any threshold were to be included, the “safe” threshold should be at least aligned to 25% (i.e., the relevant threshold to rule out concerns in horizontal mergers as per § 18 of the Commission Guidelines on Horizontal Mergers).

- **Collective dominance**

Page 13, para. 34 – the draft Guidelines refer to the concept of collective dominance stating that *“A finding of collective dominance requires that two or more economic entities that are legally independent of each other present themselves or act together on a particular market as a collective entity from an economic point of view. Once this has been established, the assessment of dominance is based on essentially the same factors that are relevant for single dominance. Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, that the undertakings concerned adopt identical conduct on the market in all respects or that the abuse involves all the undertakings concerned. It is sufficient that the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position.”*

While the notion of collective dominance was only briefly mentioned in the 2008 Guidance³, the draft Guidelines dedicate an entire section to it. The need for this is unclear, as exclusionary conduct typically involves single-firm behavior. Furthermore, there seem to be no recent instances where collective dominance has been established, with the only cases cited in the draft Guidelines dating back to 1999 and 2003.

Additionally, the definitions provided in the draft Guidelines align with the economic theory behind tacit coordination, which primarily relates to Article 101. This suggests that the concept of collective dominance in the draft Guidelines may overlap significantly with areas already covered under Article 101, rather than focusing on exclusionary conduct.

3. DRAFT GUIDELINES’ SECTION III: GENERAL PRINCIPLES TO DETERMINE IF CONDUCT BY A DOMINANT UNDERTAKING IS LIABLE TO BE ABUSIVE

² Paragraph 13, 2008 Guidance.

³ Paragraph 4, 2008 Guidance.

According to the new draft Guidelines, to determine whether a conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is generally necessary to establish whether the conduct departs from **competition on the merits** and whether the conduct is capable of **having exclusionary effects**.

As regards the **competition on the merits**, the AAI highlights the need of more specific clarification, as indicated below.

With regard to the **capability to produce exclusionary effects**, the AAI notes that the most innovative aspect of the draft Guidelines compared to the current 2008 Guidance may be found here. In fact, the new draft Guidelines introduce a **shift in the evidentiary burden**, as a consequence of introduction a real **categorization of the conducts**.

In general, the AAI appreciates the new categorization of conducts, as well as the approach in the revised burden of proof. However, our concern is that, with the introduction of a system of **presumptions**, the traditional effects-based approach may be compromised.

While we acknowledge that everything is rebuttable, the rebuttal process might be cautiously blunted to avoid incurring in **excessive formalism** (see, for instance, the case of naked restrictions).

In fact, our concern is that the Guidelines significantly **broaden the understanding of exclusionary effects** and exaggerate the extent to which the Commission is relieved from **proving exclusionary effects**, misaligning with established case law that requires clear evidence, particularly in cases like Intel.

Moreover, the draft Guidelines create an **uneven burden of proof**, requiring the Commission to present only specific points of analysis, while dominant firms must provide a comprehensive body of evidence for justifications.

Our proposed changes for clarity include (i) establishing precise presumptions for anti-competitive conduct, ensuring a clear distinction between aggressive competition and harmful practices, and maintaining a consistent standard for demonstrating exclusionary effects; (ii) more clarity, particularly in **defining when certain conduct is presumed exclusionary**, is vital in order to preserve companies' ability to self-assess compliance.

In terms of more specific comments on draft Guidelines' section III on the general principles to determine if conduct by a dominant undertaking is liable to be abusive, the AAI would like to note the following:

- **Two-step assessment**

Page 16, para. 45 et seq. – the draft Guidelines states that *"To determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse, it is generally necessary to establish whether the conduct departs from competition on the merits (see section 3.2 below) and whether the conduct is capable of having exclusionary effects (see section 3.3 below)"*

The draft Guidelines provide for a **two-step assessment** in order to prove the existence of an exclusionary abuse, *i.e.* to establish (i) whether the conduct departs from competition on the merits and (ii) whether the conduct is capable of having exclusionary effects.

This initial conceptualisation may, however, give rise to potential gaps in the application of the test, and again lack of sufficient clarity. The draft Guidelines do not delineate two additional intermediate cases where:

- a dominant undertaking that competes on merits but can also exclude (it is understood that the objective of any undertaking, whether dominant or otherwise, is the downsizing of competitors);
- a dominant undertaking that does not compete on the merits but is unable to exclude competitors (*i.e.*, what happens if exclusionary effect is lacking but some demerit of conduct persists?).

The AAI believes that a more detailed description of which conduct falls under these two cases, and which principles (including economic principles) are to be considered in their assessment may improve the completeness and clarity of the Guidelines and better orient undertakings.

The AAI believes that the two-step assessment could lead to **unnecessary complexity in enforcement**. Indeed, EU court judgments did not require departure from competition on the merits, but merely to prove exclusionary effects (*Post Danmark II*, C-23/14, § 67).

Moreover, given the quite abstract concept of "**competition on the merits**", this assessment could, on one hand, lead to **uncontrolled discretion for competition authorities** and, on the other hand, impose an **unsustainable burden of proof on the investigated**

undertaking, even in establishing in advance whether their conduct complies with competition law or not.

- **Conduct departing from competition on the merits**

Page 17, para. 50 – the draft Guidelines states that “*Consequently, although dominant undertakings can defend themselves against their competitors, they must do so by using means which fall **within the scope of competition on the merits**. For this reason, the Union Courts have established that only conduct that deviates from competition on the merits can constitute an exclusionary abuse within the meaning of Article 102 TFEU.*”

The AAI deems that proposing a framework that hinges of a **vague concept** such as the one of “**competition on the merits**” cannot be reasonably expected to deliver better outcomes than a framework based on whether a given conduct is likely to have “*an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice*” as set out by the 2008 Guidance.⁴ Therefore the AAI suggests the Commission to answer in the first place the question “what is “*competition on the merits*. In this respect, in the recent *Intel* ruling (case C-240/22 P) the Court of Justice somehow recalled that consumer welfare still plays a crucial role when approaching the notion of competition on the merits, as it fairly allows undertakings to be “*attractive to consumers from the point of view of, among other things, price, output, choice, quality or innovation*” (§.175).

In addition, from the AAI point of view, the Commission should refrain from an interpretation of the competition on the merits which imposes on dominant undertakings to follow difference procedures in evaluating their conduct from those applied to other undertakings.

According to our interpretation, in the *Servizio Elettrico Nazionale* judgement, the ECJ stated that the “special responsibility” laying with the undertaking in a dominant position is to “pre-empt” the intentions of third parties by not precluding their attempts to enter the market. On the other hand, the ECJ case-law did not necessarily pretend that the undertaking in a dominant position shall ensure competitiveness in the market. If that had been the case, the Guidelines could have the effect of culling any attempt of the undertaking to conduct themselves in a competitive way to reach a dominant position in the market. In other

⁴ Paragraph 19, 2008 Guidance.

words, the Guidelines' interpretation of the competition on the merits should not result in an artificial fragmentation of the market.

The AAI has also the impression that, for the assessment of competition on the merits, the use of the AEC test is somehow downplayed, being listed as only one of several factors considered relevant to the assessment. And this despite EU Courts have repeatedly uphold its importance in price-related cases: "since the Commission is required to demonstrate the infringement of Article 102 TFEU, it must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, inter alia, the as-efficient competitor test, where that test is relevant, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judicature" (Google Shopping, § 266; Intel, § 140).

At the very least, the final Guidelines should (i) embody the principle set out in *Unilever*, § 73, whereby "*the use of an 'as efficient competitor test' is optional. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority **is required to assess the probative value of those results***" and (ii) set forth the relevance of the AEC test in loyalty rebates cases (see, *Servizio Elettrico Nazionale*, §§ 79-80).

- **Switching from an economic-based approach to a form-based one**

Page 21, para. 60 – the draft Guidelines states that "In particular, the following categories of conduct can be identified: a) *Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects: [...]*; b) *Conduct that is presumed to lead to exclusionary effects [...]*; c) *Naked restrictions [...]*."

As anticipated, the draft Guidelines contain no reference to the concept of "anti-competitive foreclosure" nor to the notion of "theory of harm". The draft Guidelines instead distinguish between **three categories of conducts** ("*naked restrictions*"; "*conducts for which there is a rebuttable presumption of exclusionary effects*"; "*conducts for which the Commission bears the burden of proof*").

First of all, the AAI thinks that such categorization – although could be *prima facie* viewed positively in allowing more uniformity of criteria - does not reflect case law, which just outlines a difference between "by object" (i.e., the "naked restrictions") and "by effect" restrictions.

For conducts under (a) it is stated that “[w]hile the effects in question must be more than hypothetical, establishing that a conduct is liable to be abusive does not require proof that the conduct at issue has produced actual exclusionary effects” and “that the fact that a conduct has failed to produce actual exclusionary effects cannot in itself disprove its capability to produce exclusionary effects”.

Now, the notion of “*capability to produce exclusionary effects*” is in itself very nebulous and the Commission does not explain what this means in practice.

According to the AAI, it is necessary to recognise the advantages of restrictions “by object”, since they do allow for prompt intervention by the authorities and provide a greater benefit for the competitive game. Indeed, the lack of a possibility to resort to treatment by object may eventually lengthen the authorities' time for intervention. In this regard, in recent Community practice, the Commission itself, to overcome the high standard required by the previous Guidelines to establish conduct, has made extensive use of commitments under Article 9 of Regulation 1/2003.

In certain instances it is unclear whether certain conducts are covered by the presumption and other similar ones are not. By way of examples, tying is qualified as a “type-2” conduct whereas in respect to self-preferencing the presumption does not apply (though tying could be considered as a form of self-preferencing). There seems to be an **excessive degree of discretion** in allocating the conducts to the different categories, so creating complexity and uncertainty in self-assessment by undertakings.

Moreover, there is no correspondence between conducts for which a specific legal test is set forth by EU case law and conducts covered by the presumption (e.g., margin squeeze is subject to a presumption only in case of negative spread).

The most critical aspect concerns the principle whereby in cases involving conducts subject to presumptions, it is on the dominant undertakings **to prove the absence of effect**. Such approach is not in line with case law, as the EU Courts consistently made clear the burden of proving the abuse lies with the Commission (i.e., there are no “hard” presumptions), whilst it is on the dominant companies to prove efficiencies/objective justification.

- **New presumption, reversal of the burden of proof and legal certainty**

Page 21 – par. 60(b) - the draft Guidelines state that *"the evidentiary assessment must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects, as part of the overall assessment of the body of evidence in the light of all the relevant legal and economic circumstances"*.

The AAI believes that this statement seems to **lower the burden of proof lying with the Commission** in all cases for which a presumption exists, regardless of the fact that the undertaking has submitted evidence to rebut the presumption.

Such approach should not be confirmed as the final Guidelines should **ensure an equality of arms between the Commission and the dominant undertaking**; hence, once the dominant undertaking has rebutted a presumption (e.g., by proving the conduct is not capable to determine exclusionary effects), the Commission's burden to overcome the evidence submitted by the former should not be reduced.

AAI expects the final guidelines to set a higher standard for the proof of exclusionary effects, consistent with case law and clarify the meaning of the "more than hypothetical" standard. The final guidelines could connect this concept to the "more likely than not" standard, which has been used by ECJ in past cases.

It is recommended that the scope of **application of** the above-mentioned **presumptions be clarified** (by providing a case-based legal precedent to be relied on as reference).

The classification of conduct proposed by the Commission - considering the overcoming of the distinction between restrictions by object and restrictions by effect - is also considered interesting. In this regard it is advisable to **provide more elements that would make it possible to establish clear boundaries** between the cases referred to in subparagraphs (b) and (c) of paragraph 60.

On the other hand, the AAI does not agree with the Commission's argument that on this matter the ECJ's case law led to the development of tools described as "presumptions", as is stated in **footnote n. 131**.

More specifically, we disagree with the resulting effect that these presumptions would have on the undertakings, making them the sole entities required to submit evidence concerning the capability of having (or not having) any exclusionary effects. As a matter of fact, this interpretation of the draft Guidelines could lead to an **inversion of the**

burden of the proof, in breach of Articles 6 and 7 ECHR in their criminal heads.

Under the *Grande Stevens*, *Valico SRL*, *Georgouleas* and *Nestoras* case law, the “presumption system” provided by the Commission should not result in a violation of the right to be informed promptly and in detail, concerning the nature and cause of the charge from which the company must defend itself and, the right to be accused of the violation of accessible and, foreseeable rules of law.

- **Legal standard too low**

Page 23, para. 61 - the draft Guidelines states that, in order to prove the abuse, the Commission is just required to demonstrate that exclusionary effects are “*more than hypothetical*”.

However, the AAI would like to note that it is unclear if this expression has the same meaning of “capable to”, which is used across the draft Guidelines.

Such **standard seems too low** compared to the one upheld by the EU courts, which referred to the concepts of “probable” (*Post Danmark II*, C-23/14, § 74) or “capable to” (*Intel*, C-413/14, § 140).

In this respect, it is useful to recall the principles stated in *Unilever*, § 42: “*a competition authority may find that there has been an infringement of Article 102 TFEU by establishing that, during the period in which the conduct in question was implemented, that conduct had, in the circumstances of the case, the ability to restrict competition on the merits, despite its lack of effect. However, that demonstration must, in principle, be **based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice***”.

- **The substantive legal standard to establish a conduct’s capability to produce exclusionary effects and counterfactual analysis**

Page 24, para. 66-67 – the draft Guidelines states that “*Conceptually, the analysis of the capability of the conduct to produce exclusionary effects requires a comparison of the situation where the conduct was implemented with the situation absent the conduct. This can generally be done by comparing the market situation before the conduct was implemented with the market situation after the implementation of the conduct*”

"In certain cases, it may be appropriate to use as a basis for the comparison an alternative hypothetical scenario where the conduct would be absent and where certain likely developments in the market are also taken into account. Given the difficulty to develop credible assumptions, it is not necessary to account for all possible changes and combinations of outcomes and circumstances that could have arisen absent the conduct. It is sufficient to establish a plausible outcome amongst various possible outcome. In any event, such comparison may not be required in particular where the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments."

The Commission draws down two comparisons between "market situation" (para. 66) and "outcomes" (par. 67).

In the first place, the AAI thinks that the Commission should better qualify the meaning of "situation", with regard to "implementation of the conduct", by specifying the metric to be looked at for the counterfactual analysis.

The AAI believes that the Commission seems proposing a framework revolving around the concept of "*capability to produce effects*" but then suggests that – in practice – conducts must be assessed based on comparison of "*situations*" or "*outcomes*", ultimately actual effects. This fundamental tension / inconsistency / confusion is in itself evidence of how the proposed approach is inappropriate and hardly implementable in practice.

In the end, inspired by the Google Shopping case, the draft Guidelines employ **counterfactual analysis** to assess potential exclusionary effects by comparing market conditions before and after specific conduct. However, using hypothetical scenarios can complicate the evaluation and raise legal uncertainties.

- **The use of presumptions for expediency must remain anchored in the established effects-based approach**

Page 25, paras. 68 et seq. – the draft Guidelines refers to the "*Elements that may be relevant to the assessment of a conduct's capability to produce exclusionary effects*"

First, while the draft Guidelines details elements for the Commission to meet its burden of proof for conducts without presumptions of exclusionary effects (Section 3.3.3 of the draft Guidelines), their **guidance is more limited on how the defendants evidence needs**

to be considered in the assessment. The Commission's assessment standard will therefore *de facto* calibrate the difference between "strong" and "light" presumptions, as well as determine the risks of false positives.

Second, the categorisation of conducts and the different evidentiary standards for each category proposed in the draft Guidelines could lead **to assess differently conducts which are otherwise similar on economic grounds**. This risk seems to be tangible given that the legal test provided for some conducts leaves substantial room for interpretation.

Here below two examples:

- for tying and bundling, the draft Guidelines give undertakings little guidance about the likelihood that their conduct could be seen as an infringement of Article 102 TFEU and where the burden of proof lies. For example, self-preferencing, which in many cases can be viewed as a form of tying, is subject to no presumption of exclusionary effects, while tying is;
- a presumption of illegality is applied to all types of exclusivity arrangements, both in the form of exclusive dealings (contractual exclusivity) and of exclusivity rebates (which would amount to a *de facto* exclusivity), despite the fact that, from an economic perspective, different theories of efficiencies and harm apply to these two categories of exclusivity arrangement;

These cases exemplify how allocating practices in categories and setting out legal and evidentiary standards which vary across categories could cause the unwarranted result of reducing certainty and guidance for undertaking, courts and authorities.

Third, the draft Guidelines state that, where effects must be proven, such effects must be more than hypothetical on the basis of specific and tangible points of evidence: conduct must be "at least capable" of producing "potential" exclusionary effects, and there is no need to prove "actual exclusionary effects". It is therefore no longer required to prove that exclusionary effects must be "likely" or "potential", as was the case in the Guidance Paper and in the 2023 Policy Brief. On the other hand, defendants must provide a "cogent and consistent body of evidence" to substantiate objective necessity or countervailing efficiencies, which sets an asymmetric evidentiary burden for anti- and pro-competitive effects.

Thus, while it is clear that the policy implication is a shift of the burden of proof, it remains the concern that it is undefined what threshold the burden has been shifted to.

The AAI suggests that

1. **conduct categorisation** must be based on their economic function and according to appropriate theories of harm. In other words, for each category a **clearly-defined, well-formulated and compelling mechanism should be set out**, whereby the dominant undertaking's conduct is deemed to cause appreciable and likely anti-competitive effects and illustrate the incentive behind the conduct. The advantages of such a categorisation are twofold. First, the economic setting would constitute the framework against which all the parties involved could interpret and assess presumptions, evidence and potential justifications. Second, it would help achieve consistency in the assessment of conduct which have the same aim and economic rationale.
 2. **more detailed guidance** on which **rebuttal** evidence the Commission deems sufficient to rebut the presumption as well as on the principles on which such evidence will be assessed should be provided. The Draft Guidelines would benefit from utilising and making explicit the concrete insights gained from the Commission's case experience and its interpretation of the case law on the specific facts and circumstances that motivate why certain presumptions are appropriate on legal and economic grounds.
- **Failure to duly take into account of the concept of "consumer welfare" among the factors that can help assess harm to competition**

Page 28, para. 72 - the draft Guidelines, in this paragraph included in the section on the *"elements that are not necessary to show the capability to produce exclusionary effects"*, states that *"it is equally not necessary to prove that the conduct resulted in direct consumer harm, in other words that the dominant undertaking has effectively influenced, **to the detriment of consumers, prices or other parameters of competition such as output, innovation, variety or quality of goods or services**"*.

The AAI has the impression that para. 72 does not seem fully in line with case law and the Draft Guidelines overall seems to omit references to the notion of consumer welfare, a guiding principle for the assessment of

exclusionary abuses. The concept is indeed just briefly mentioned in paras. 5 and 51.

Indeed, the EU Court of Justice has consistently upheld that competition enforcement should protect the competitive process in itself, **as a way to ensure consumer welfare**. In line with the principles underlying the As Efficient Competitor Test, conducts by dominant undertakings which results in the exclusion or marginalization of less-efficient competitors should not qualify as abusive. In this respect, it is useful to recall, among others, § 73 of the *Servizio Elettrico Nazionale* judgment (C-377/20) where it has been stressed that: “*it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, on account of its skills and abilities in particular, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalization 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***” (see also 73 of the *Unilever* judgment, C-680/20).

The AAI believes that the final guidelines should clarify that protecting competition and consumer welfare, rather than individual competitors, is the primary objective of competition enforcement. Therefore, the Guidelines should require antitrust authorities to investigate the effects of the conduct and prove capability to harm the market and consumers (see the ECJ judgment 10 September 2024, C-48/22, *Google Shopping*, where the Court found that the Commission failed to substantiate claims that Google’s AdSense contracts foreclosed competition, deterred innovation, or harmed consumers; see also the ECJ judgment of 21 December 2023, *European Superleague Company*, C-333/21).

Such approach would also be in line with the current Guidance on Enforcement Priorities which, at § 19, sets forth that “*the aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having **an adverse impact on consumer welfare***”.

- **The As-Efficient Competitor standard and the capability to produce exclusionary effects**

Page 28, Para. 73 and 75 – the draft Guidelines states respectively that: “*The assessment of whether a conduct is capable of having*

exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking” and “finally, there is no de minimis threshold for the purposes of determining whether a conduct infringes Article 102 TFEU. Any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU. Once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature”.

Paragraph 73 shows that – in principle - the draft Guidelines intends to dispose of the AEC test (in practice, the Draft Guidelines still suggest relying on the AEC for some pricing conducts).

While the AEC test (as set out in the 2008 Guidance) may be imperfect and possibly too restrictive, the AAI believes that the AEC test should be the starting point of the economic assessment, taking into account the specificities of the case at hand, to establish whether conduct departs from competition on the merits for price-based conduct, such as predatory pricing, margin squeeze, and rebates (but not for exclusivity rebates).

Moreover, as the related principle, the AEC test is not associated with any specific theory of harm. The test in itself is neutral as to the possible anti- or pro-competitive effects behind the conduct and merely clarifies whether such conduct is capable of excluding a hypothetical as-efficient competitor and by referring only to the cost of the dominant undertaking, it has the merit to provide clear guidance on the difference between acting aggressively and pursuing conduct liable to have adverse competitive effects.

The AAI suggests avoiding drawing distinction between cases in which the test should be applied and cases where the use of the test would be pointless, as this could prove to be a difficult exercise. For example, the dichotomy between exclusivity or loyalty rebates (for which the AEC test would not be suitable) and non-exclusivity rebates (for some forms of which it would be appropriate to make use of a price-cost test) is not always obvious⁵ and seems to bear no relation to their capability of having anti-competitive effects.

⁵ The draft Guidelines acknowledge that “*Exclusive dealing refers to various forms of obligation to purchase or sell all **or most** of a customer or a supplier’s requirements from/to the dominant undertaking*” (see draft Guidelines, Section 4.2.1, para. 78; emphasis added).

The draft Guidelines seem also to abandon the concept of **appreciability of the effects** in paragraph 75, thereby negating a de minimis threshold for applying Article 102 TFEU.

While, in some circumstances, the not (yet) as-efficient competitors could represent a significant competitive constraint on the dominant undertaking, the draft text can be interpreted as significantly diminishing the required evidentiary standards to find an infringement of Article 102 TFEU. This however seems contradictory to the prominent importance of the effects-based analysis in all recent judgements on abuse cases (Intel, SEN, Super League, Google Shopping) and would go beyond the caution to “avoid an unduly strict and dogmatic application of [the as-efficient competitor] standard” called for in the 2023 Policy Brief.

If this scenario materialises, the implementation of the Draft Guidelines risks leading to engaging resources, on the agency side and on the undertakings’ side, on conducts that are prima facie as well as factually unlikely to give rise to consumer harm.

The AAI proposes to restore the AEC standard as the fundamental guiding principle would make the interpretation of the proposed two-limb test clearer. This, in turn, should facilitate clarifying the Commission’s interpretation of the circumstances in which the protection of the competitive process should be the primary focus of its action.

In this regard, it could be also set out in which circumstances the protection of less efficient competitors from exclusionary conduct is deemed beneficial for consumers and the scenarios in which, on the contrary, such protection is not warranted. For example, it could be specified that intervention is needed when relevant competitors are currently below minimum efficient scale due to the presence of strong network effects, economies of scale or some form of monopoly of the dominant firm.

4. DRAFT GUIDELINES’ SECTION IV: PRINCIPLES TO DETERMINE WHETHER SPECIFIC CATEGORIES OF CONDUCT ARE LIABLE TO BE ABUSIVE

On one hand, the amendments to the 2008 Guidance bring the draft Guidelines closer to EU case-law as they reflect its interpretation and the **valuable Commission's experience** gained from applying the rules regarding the

abuse of dominance; on the other hand, from the AAI's point of view, they also show the Commission's intention to achieve **more discretion** and room for action in its investigations.

In fact, while the courts are the ultimate interpreters of Article 102 TFEU, the **Commission enjoys substantial discretion** in determining compliance with its standards.

This power enhances the Commission's role in both investigating and adjudicating competition law cases.

Therefore, if the draft Guidelines are meant to advance and streamline the antitrust analysis on the abuse of dominant position in the market, the Commission should try to **better focus those key issues that will govern its future implementation of Article 102 TFEU**, in a changing landscape governed by new priorities and substantial changes of traditional patterns in antitrust enforcement.

Moreover, as we know that the Commission generally welcomes the effects-based approach, the categorisation of conducts and the introduction of presumptions for some categories of practices with respect to others might represents, as already anticipated above, a **departure from the effects-based approach** and a certain **formalism** as well as a more categorical framework, contradicting recent trends in EU case-law (Case C-680/20, Unilever Italia Mkt. Operations, EU:C:2023:33, para. 41-42; Case C-413/14 P Intel Corporation Inc. v Commission).

However, despite the Commission's suggestion of a shift in the burden of proof, in particular in cases falling into the category where a conduct is subject to a specific legal test and the conduct is presumed to have exclusionary effects, the Commission will still be required to consider any evidence submitted by the dominant undertaking showing that the conduct is not capable of having exclusionary effects. In framing the following comments, AAI observes that the forthcoming Guidelines will establish the 'principles' for both effective ex post enforcement and ex ante self-assessment by operators.

The enforcement balance entails a comparative analysis between the potential for erroneous detection of non-existing anti-competitive conduct (i.e., false positives), and the possibility of overlooking actual anti-competitive behavior (i.e., false negatives).

Moreover, in order to provide appropriate guidance in the self-assessment, it is crucial to evaluate the interconnection between competition and pivotal

aspects of consumer welfare and society, including innovation.

As Shapiro (2012)⁶ observed, the motivation to innovate is basically shaped by three underlying principles: contestability ('the extent to which a firm can gain profitable sales from its rivals by offering greater value to customers'), appropriability ('the extent to which a successful innovator can capture the social benefits from its innovation') and synergies (because 'firms typically cannot innovate in isolation').

The AAI recommends further consideration of these latter aspects alongside defining principles, particularly in the following cases.

In terms of more specific comments on draft Guidelines' Section IV on principles to determine whether specific categories of conduct are liable to be abusive, the AAI would like to note the following:

- **Exclusive dealing**

Page 30, para. 82 – the draft Guidelines states that "*Exclusive 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 of possible sources of supply or demand. As such, exclusive dealing is presumed to be capable of having exclusionary effects (see paragraph 60(b) above).*"

Exclusive dealing is **presumed to be abusive** (i.e., "*presumed to be capable of having exclusionary effects*").

The AAI refers to a key economic point that was covered in the 2008 Guide: "*[i]f competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation*".⁷

Dominant undertaking may need exclusive dealing to secure a certain stream of expect profits and undertake investments (this may be seen as

⁶ Shapiro, C. *Competition and innovation: Did Arrow Hit the Bull's Eye?*, in Lerner, J. and Stern, S. (eds) *The Rate and Direction of Inventive Activity Revisited*, University of Chicago Press (2012).

⁷ See paragraph 36, 2008 Guidance.

an objective justification). Currently the presumption set by the draft Guidelines may discourage investments and incentivise free-riding.

- **Refusal to supply**

Page 35, para. 97 – the draft Guidelines states that *“Refusal to supply is a self-standing type of abuse, which is different from the access restrictions that are described in section 4.3.4. A finding that a dominant undertaking has abused its dominant position through a refusal to supply an input to an actual or potential competitor places that undertaking under a duty to give access to the requested input to that competitor. This obligation directly impinges on freedom of contract and the right to property of the dominant undertaking. It may also affect the incentives for competitors to develop competing inputs and the incentives for the dominant undertaking to invest in inputs²³⁸. Consequently, the Union Courts has set up relatively strict conditions for finding that a refusal to supply is liable to be abusive and, therefore, that an obligation to give access can be imposed”*

The AAI believes that this section is a summary of (paraphrasing the EC’s wording at paragraph 97) the conditions that courts have set up for finding that a refusal to supply is liable to be abusive. These are:

- The input must be indispensable to the requesting firm; and
- The refusal is capable of having exclusionary effects, which in this specific context means the capability to eliminate all competition on the part of the requesting undertaking.

The AAI suggests that future Guidelines emphasise the importance of a thorough analysis of both the dominant undertaking's economic incentives for refusing to supply and the benefits that it would not have obtained without refusing to supply.

This additional analysis seems important to avoid creating a disincentive to investment by allowing non-dominant firms to "free ride" on the dominant firm's investments.

Finally, the AAI notes that a refusal to supply is essentially an extreme version of a “margin squeeze” (i.e., economically a refusal to supply makes the price of the input increase to infinity). In the draft Guidelines, the two types of conducts are discussed separately. The AAI believes that additional clarification is required with respect to both the rationale for this distinct treatment and the commonalities between the two conduct scenarios from an economic analysis perspective

- **Predatory prices**

Page 41, para. 117 – the draft Guidelines states that *“The price-cost test is generally carried out on the basis of the price and cost data of the dominant undertaking itself, rather than of the price and cost data of actual or potential competitors. This is in line with the principle of legal certainty to enable dominant undertakings to assess the lawfulness of their conduct.”*

At the outset, the AAI notes that EC is – based on case law – proposing price-cost tests to be *“carried out on the basis of the price and cost data of the dominant undertaking itself, rather than of the price and cost data of actual or potential competitors”*. These are AEC tests. There is a tension with paragraph 73 where the EC states it is not necessary to show that competitors *“affected by the conduct are as efficient as the dominant undertaking”*

The AAI believes that an ambiguous approach to a relatively well-defined case such as predatory pricing does not contribute to more effective enforcement (the nature of competition on the merits in many sectors is likely to marginalise less efficient competitors) or self-assessment (instead essential for defining operators' pricing strategies).

Second, the AAI believes that the draft Guidelines are overlooking a key economic aspect, i.e. the importance of theories of harm..

The 2008 Guidance stated that: *“consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice”*.⁸

Assume that a dominant undertaking implemented a predatory strategy (i.e., that satisfies the AEC test) but then – for whatever reason – failed to “recoup” (e.g., through an increase in prices). According to the draft Guidelines, that undertaking has infringed Article 102 even if the conduct ended up being beneficial for consumers (as they benefited from an initial period of low prices but were not exposed to a period of high prices).

To conclude, the AAI believes that the approach to predatory pricing must remain firmly rooted in an effect-based approach.

- **Predatory prices – costs benchmark**

Page 41, para. 118 – the draft Guidelines state that *“In this regard, it is appropriate to consider the data in the dominant undertaking’s accounts”*

Page 42 – para. 124 - the draft Guidelines state that *“The condition under paragraph 122(b) requires it to be established, by means of a price-cost test, that the spread between the price that the dominant undertaking charges to competitors upstream and the price that it charges to its customers downstream is either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs that that undertaking has to incur to supply its downstream products. The first step of the analysis consists in determining the extent of the spread. If the spread is negative, the price-cost test is not met and it is not necessary to consider the downstream costs in detail. If, on the other hand, the spread is positive, a second step in the analysis is required in order to determine whether the spread is sufficient to cover the dominant undertaking’s product-specific costs at the downstream level. If the spread is not sufficient (i.e. it leads to a negative margin), the price-cost test is not met.”*

Page 42 – footnote 289 - the draft Guidelines state that *“The margin corresponds to the downstream price minus the upstream price minus the downstream costs. The computation of the margin takes into account the cost of capital.”*

The AAI would like to underline that the draft Guidelines refer to the **full range of costs** used in antitrust practice (AVC, ATC, AAC, LRAIC) as relevant, and also state that *“it is appropriate to consider the data in the dominant undertaking’s accounts”* (para. 118).

In practice, however, it is often the case that corporate accounting does not follow the concepts of avoidable short or long-term costs: such concepts have to be reconstructed “off the peg”, with large margins of discretion (and thus uncertainty).

This picture is further complicated by the assumption that so-called **opportunity costs**, which are certainly not reflected in company accounts and which the draft guidelines do not identify or even illustrate, should also be taken into account. Thus, even if the dominant undertaking’s prices pass the test based on its accounting costs, the outcome could be challenged or undermined by recourse to these undefined “opportunity costs”.

From this perspective, the inclusion of the **cost of capital** (para. 124, footnote 289) as a cost in the assessment of the margin squeeze also seems to introduce additional uncertainty into the price-cost test. The cost of capital is not strictly a cost element, but rather understood as the value of the cost/return of the asset, at most to be assessed in relative terms as the opportunity cost value of the cost/return of a better alternative investment with the same degree of risk.

Again, a conceptual explanation of the economic principles underlying the relevant costs in price tests could improve the practice, as could the indication that cost data readily available in the company's official accounts should be preferred.

- **Access restrictions**

Page 51, para. 165 - the Draft Guidelines present “*access restrictions*” as a form of refusal to supply where “*the input at stake is not indispensable*”.

Effectively the only condition for access restrictions is that they depart from competition on the merits and are capable of producing exclusionary effects.

One interpretation of the draft Guidelines would therefore be that a dominant undertaking cannot – under any circumstances - cease to supply a non-dominant firm (paragraph 166: “*dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market, if the customers abide by regular commercial practices and the orders placed by them are in no way out of the ordinary*”).

The AAI believes that this interpretation needs to be limited in order to avoid disincentives to invest / innovate to both dominant firms and non-dominant firms (as they anticipate that whatever input they want – but not need – they can obtain it from vertically integrated competitors). Access restrictions should be allowed if they don't harm consumers.

**5. DRAFT GUIDELINES’ SECTION V: PRINCIPLES GENERAL PRINCIPLES
APPLICABLE TO THE ASSESSMENT OF OBJECTIVE JUSTIFICATION**

By contrast with the current 2008 Guidance, the AAI welcome the Commission’s decision to dedicate an **independent section** setting out the principles applicable to the assessment of the objective justifications that the dominant undertaking may invoke (including technical necessities such as

improving or maintaining the quality/performance of a product or service) and efficiencies that, under certain conditions, may justify or counterbalance the effects of conduct that may be abusive.

Although this is a much-appreciated section, the Commission may want to consider expanding it in the final version of the new draft Guidelines in order to allow undertakings to have **precise and extensive guidance** to better justify their conducts.

In terms of more specific comments on draft Guidelines' Section V on the general principles applicable to the assessment of objective justifications, the AAI would like to note the following:

- **General principles applicable to the assessment of objective justifications**

Page 53, para. 169 - the draft Guidelines require that *"An efficiency defence requires to demonstrate that the exclusionary effects resulting from the dominant undertaking's conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers [...]"*.

The AAI addressed the question of how a dominant undertaking can do so if a conduct's actual effects do not need to be assessed / quantified as all it matters is the *"capability of producing effects"*.

Effectively the notion of *"capability of producing effects"* prevents dominant undertaking to put in place a credible efficiency defence.

We suggest the EC to be clearer on this point.

- **Burden of proof for an objective necessity or efficiency defence**

Page 54, para. 171 – the draft Guidelines states that *"The burden of proof for an objective necessity or efficiency defence is on the dominant undertaking. Vague, general and theoretical claims or those which rely exclusively on the dominant undertaking's own commercial interests are not sufficient to demonstrate an efficiency defence³⁶⁵. Similarly, whether the practices at issue were deliberate or, on the contrary, only accidental is not relevant for the assessment of an efficiency defence. In addition, proving an objective necessity or efficiency defence requires a cogent and consistent body of evidence, especially where the dominant undertaking is naturally better placed than the Commission to disclose its existence or demonstrate its*

relevance, which is typically the case in the context of the application of Article 102 TFEU."

The draft Guidelines touch upon **objective justification**, stating that dominant firms must prove their conduct is necessary or brings efficiencies that outweigh competitive harm. The burden of proof is placed on these companies, and vague claims will not suffice.

The draft Guidelines create an **uneven burden of proof**, requiring the Commission to present only specific points of analysis, while dominant firms must provide a comprehensive body of evidence for justifications.

The AAI suggests that the Commission should strive to provide a more exhaustive explanation concerning the **burden of proof** requested to a dominant undertaking to escape antitrust liability; this would substantially improve predictability and would enhance the guidelines' effectiveness.