



**ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA –
AEDC**

**Contribution to the public consultation of the Commission on the Draft Guidelines on
the application of Article 102 TFEU to abusive exclusionary conduct
by dominant undertakings**

31 October 2024

On 1 August 2024, the European Commission (“**the Commission**”) launched a public consultation to gather comments on the Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (“**the Draft Guidelines**” or “**the Draft**”). This document conveys the views of the **Asociación Española para la Defensa de la Competencia – AEDC** on the Draft Guidelines¹.

As already stated when we submitted our views to the Call for Evidence published in March 2023, the AEDC welcomes the willingness of the Commission to adopt full-fledged Guidelines to increase the much needed legal certainty in this area. The current guidance

¹ These comments have been drafted by Rafael Allendesalazar, Nieves Bayón, Laura Cortés, Fernando Díez Estella, Carolina Fernández Bustillo, Diego García Adánez, Eduardo Gómez, Enrique Cañizares, Iñigo Igartua, Isaque Leite Mendes, Patricia Lorenzo, Yolanda Martínez, Borja Martínez, Irene Moreno-Tapia, Francisco Penas, Alberto Pérez, Rafael Piqueras, Javier Ramírez, Victoria Rivas, Jaime Rodríguez, Jesús Urriza, Ainhoa Veiga, Nadie Watson y Elena Zoido. We thank Pablo Solano Díaz for his comments on the draft.

provided by the Commission (“**the 2008 Guidance Paper**”²) proves insufficient and has been greatly superseded by the significant developments on the case law of the European Court of Justice (“**ECJ**”) and the challenges of the development of the digital economy.

The AEDC submits its views following the same structure of the Draft Guidelines. Together with general remarks about each section, the AEDC includes in some cases comments to specific paragraphs of the Draft.

1. Comments to Section 1 of the Draft

1.1. Consumer welfare and consumer harm as the guiding elements to determine an abuse of dominant position

Paragraph 5 of the Draft rightly establishes that, according to the case law of the EU Courts, Article 102 TFEU applies “*to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers*”. Paragraph 6 also refers to deviations from “normal competition” that cause “harm to consumers”. This, fully in line with economic theory, consistently implies that harm to consumers is a necessary condition for establishing an abuse.

However, this very important idea is not reflected in the rest of the document, where the references to consumer harm become almost inexistent. In particular, the two-step test that is described at paragraph 45 of the Draft indicates that an exclusionary abuse exists when two cumulative conditions hold: (i) the “*conduct departs from competition on the merits*” and (ii) is “*capable of exclusionary effects*”. As described in the Draft, none of these conditions requires considering consumer harm. This raises the risk of including within the scope of abusive conducts certain behaviours that do not reduce consumer welfare. From an economic perspective, this reference runs contrary to economic reasoning, as the effects on consumer welfare are essential to rigorously define an exclusionary abuse.

1.2. Legal certainty as the guiding principle of the Draft

Paragraph 7 of the Draft states that the objective of the Guidelines is to set out principles in the assessment that seek to “*enhance legal certainty and help undertaking self-assess*

² Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, p. 7–20).

whether their conduct constitutes an exclusionary abuse under Article 102, in the light of the case law of the Union Courts.” This objective is key for both economic operators and practitioners, as clear indications on how Article 102 is going to be construed by the authorities would significantly help companies to define economic and commercial policies. However, this objective is not fully attained with these Draft Guidelines, since the Commission, national competition authorities (“NCAs”) and Courts retain a great margin of discretion. For example, to be deemed exclusionary, the conduct in question must depart from “*competition on the merits*”. This concept is defined at paragraph 51 of the Draft: “*conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and wider choice of new or improved goods and services*”. This is too vague to provide any certainty to undertakings and stakeholders to evaluate in advance whether a conduct can or cannot be considered presumptively contrary to Article 102 TFEU.

The high degree of discretion that the Commission retains is best illustrated at paragraph 57 of the Draft, which states that “*conduct that at first sight does not depart from competition on the merits (e.g. pricing above average total costs (“ATC”)) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits based on all legal and factual elements, notably (i) market dynamics; (ii) the extent of the dominant position; and (iii) the specific features of the conduct at stake.*”

It is the view of the majority of contributors to this submission that, for undertakings to be able to effectively assess whether a conduct by a dominant company may be abusive, the as-efficient competitor (“AEC”) principle developed in the 2008 Guidance Paper should be maintained. It has proved to be a sensible test³, easily understood by companies, for identifying whether a conduct departs from competition on the merits would be to assess whether an as efficient competitor would be able to replicate it. However, this test has been demoted to just one of the “factors” relevant for the assessment of whether the conduct departs from competition on the merits set out in paragraph 55(f) of the Draft.

³ Even if the AEC test cannot always be applied automatically to certain conducts, we believe it is essential that only conducts that can exclude as-efficient competitors should be deemed exclusionary within Article 102 TFEU.

Other contributors to this submission however understand that the case law of the EU Courts has focused more on looking for effective competition constraints or contestability more than applying an AEC “principle”.

2. Comments to Section 2 of the Draft

2.1. General comments

The AEDC considers that the Section 2 of the Draft Guidelines, describing the general principles applicable to the existence of dominance, is relatively uncontroversial, as it essentially relies on principles relatively well established in case law.

Nevertheless, we believe that certain improvements could enhance legal certainty and help undertakings to self-assess, not only whether their conduct constitutes an exclusionary abuse under Article 102 TFEU, as indicated in paragraph 8 of the Draft Guidelines, but also, given their degree of market power, whether they can be considered having a dominant position and thus having their conducts subject to the prohibition contained in the said provision. These improvements would also clarify the scope of prohibition contained in Article 102 TFEU for the benefit of other stakeholders, NCAs and national courts.

We consider that refining the methodology to assess dominance is also important for at least two reasons:

- (i) although the Draft Guidelines refer specifically to the application of Article 102 TFEU to abusive exclusionary conducts, the principles it defines concerning the assessment of dominance will allow to better identify which undertakings are in principle subject to Article 102 TFEU as a whole, regardless of the nature of the alleged abuse; and
- (ii) in recent years the Commission has increasingly relied in its decisions on the vague notion of “special responsibility” of dominant companies to shoehorn an increasing array of conducts by a dominant company as prohibited under Article 102 TFEU, regardless of the same conducts being widespread in the market and considered unproblematic when practiced by a non-dominant companies; thus reinforcing the need to properly define which undertakings can be deemed to be in a dominant position. In this respect, we agree with Professor Pinar Alman’s recent comment that the concept of “special responsibility” adds nothing to distinguish or qualify that legal obligation imposed on dominant undertakings by Article 102 not to abuse their

dominant position; it does not illuminate which practices may constitute an abuse and thus for the purposes of legally establishing which conduct violates the prohibition and on which basis, “special responsibility” provides no advancement, either⁴.

In the following sections, we explain in depth the comments and suggestions in order to improve this part of the Draft Guidelines.

2.2. Redefine the role of Market Power on the Assessment of Dominance

The first area where we believe the Draft Guidelines must be refined refers to the role of market power in the assessment of dominance.

In this respect, it is worth noting that, in its 2008 Guidance Paper, the Commission embraced the idea that the assessment of dominance was a first step in the application of Article 102 TFEU that required evaluating, not only whether the undertaking was in a dominant position in a specific market, but also the degree of its market power (paragraph 9 of the 2008 Guidance Paper). This allowed for an incremental and holistic application of Article 102 TFEU, since the scope of the special responsibility attributed to the undertakings considered dominant, and thus of the conducts that could be considered abusive when carried out by a dominant undertaking, varied in a sliding scale depending on the level of dominance.

By contrast, paragraph 21 of the Draft Guidance reflects a binary approach to the application of Article 102 TFEU, where the degree of dominance “*is not as such decisive to determine its scope of application*” and only “*may be relevant, among other factors, for the purpose of analysing whether the conduct of the undertaking concerned is capable of producing exclusionary effects*” (paragraph 21 of the Guidance).

In this respect, we consider that, inasmuch as the Draft Guidelines are generally perceived as reducing the role of analysing the effects of the conduct when defining whether it is abusive or not, it would be important to maintain the analysis of the degree of market power as an integral part of the assessment of dominance as the first step in the application of Article 102 TFEU. This seems, for instance, the approach followed in paragraph 145.a) of the Draft in connection with conditional rebates, that indicates that, to establish whether a conditional rebate scheme could have abusive exclusionary effects, one must analyse, inter

⁴ Akman, Pinar, *A Critical Inquiry Into ‘Abuse’ in EU Competition Law* (February 5, 2024). Oxford Journal of Legal Studies, Forthcoming, Available at <https://ssrn.com/abstract=4720991> or <http://dx.doi.org/10.2139/ssrn.4720991>.

alia, the degree of market power held by the undertaking, which determines the extent of its dominant position.

2.3. Redefine the role of Market Shares in Determining whether an Undertaking is dominant

A second area in which we believe the Draft Guidelines could be refined refers to the role of market shares in determining whether an undertaking is dominant.

In this respect, we value favourably the fact that paragraph 26 of the Draft Guidelines declares that, as a rule and save in exceptional circumstances, market share must only serve as an indicator of dominance where an undertaking holds a market share of 50% or above, whereas the 2008 Guidance Paper referred to a 40% market share.

Nevertheless, we note that there are two important differences with regards to how the undertaking's market share is assessed in the 2008 Guidance Paper and in the Draft Guidelines.

First, in the 2008 Guidance Paper the 40% market share was mentioned as a relative safe harbour below which, except for specific circumstances, dominance is deemed unlikely, as low market shares are considered a good proxy for the absence of substantial market power (paragraph 14). In other words, market shares were useful to discard a dominant position which, in case of multi-product companies in sectors with narrow markets (e.g., life sciences), was extremely useful for determining the areas where the actions of the company should take into account Article 102.

By contrast, the Draft Guidelines do not refer to the 50% market share as a safe harbour. On the contrary, immediately after mentioning that threshold, the Commission states that dominance may also be found in cases where an undertaking has a market share below 50% (paragraph 26). What is more, the sole safe harbour mentioned in the Draft Guidelines applies to market shares below 10%, which the Commission recognizes exclude the existence of a dominant position "*save in exceptional circumstances*" (footnote 41).

This contrast between the 2008 Guidance Paper and the current Draft Guidelines is even more surprising if we take into account that the case law mentioned in footnote 41 was pronounced prior to the adoption of the 2008 Guidance Paper and that the Draft Guidelines do not mention new case law to support their novel and more restrictive approach. In fact,

of the many Article 102 TFEU cases decided by the Commission, dominance was in general found only at market shares above 70%. Solely in the British Airways (“BA”) case did the Commission declare that BA was dominant with market shares fluctuating from almost 50% to almost 40%, but then immediately stated other factors to corroborate BA’s market power, such as that BA’s market shares invariably constituted a multiple of the market shares of each of its five main competitors, and that its economic strength was reinforced by the world rank it occupied in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network. In our view, the possibility of an exemption should not deprive the companies from the benefits of a safe harbour.

Secondly, while the case law of the Court cited in paragraph 24 of the Draft Guidelines has repeatedly stated that the existence of a dominant position derives in general from a combination of several factors that, taken separately, are not necessarily determinative, paragraph 26 of the Draft seems to contradict this when stating that shares of 50% or more are “*in themselves –save in exceptional circumstances– evidence of the existence of a dominant position*”. Although this phrase quotes *verbatim* the judgment of the Court of 1976 in *Hoffmann-La Roche*, it is not consistent with the Commission’s own practice, as just indicated. Furthermore, recent case law has interpreted *Hoffmann-La Roche* as meaning that high market shares of the undertaking concerned are “valid **indicia** of a dominant position”⁵ rather than evidence in themselves of dominance (emphasis added).

In this respect, we consider that the Draft Guidelines should reintroduce, as in the 2008 Guidance Paper, a safe harbour based on a significant market share and should also explicitly state that high market shares are only indicia, which must be corroborated by other factors, of the existence of dominance.

2.4. Include the assessment of dominance in aftermarkets

A third area in which we believe the Draft Guidelines could be improved refers to the assessment of dominance in aftermarkets.

Paragraphs 20 and 24 of the Draft Guidelines provide that the definition of the relevant market and the assessment of whether the undertaking concerned holds a dominant position within that relevant market may be interrelated, that to assess dominance it is necessary to

⁵ Judgment of 30 January 2007, *France Télécom v. Commission*, Case T-340/03, EU:T:2007:22, paragraph 109.

consider a combination of factors (some of which are outlined in the Draft Guidelines in a non-exhaustive manner) and that further factors may be relevant for the assessment of dominance, depending on the specific circumstances of each case.

Then the Draft Guidelines include a brief footnote referring to some principles and case law applicable to the assessment of dominance in the case of aftermarkets.

However, given that the purpose of the Guidelines is to enhance legal certainty and help undertakings self-assess whether conducts by dominant companies are prohibited under Article 102 TFEU, and considering that the case law is settled in relation to aftermarkets, it would be extremely helpful that the Draft Guidelines elaborate this question in detail, rather than including a simple footnote.

In such context, the Draft Guidelines should be expanded to include the following considerations for the assessment of dominance (and abuse) in the case of aftermarkets:

1. A first step should consist of defining the relevant market either as (i) a systems market, (ii) multiple markets or (iii) dual markets in accordance with the principles contained in paragraphs 99 to 102 of the Notice on the definition of the relevant market for the purposes of Union Competition Law⁶.
2. In case a separate aftermarket is defined (either because of defining multiple markets or dual markets), then the second step should be to assess whether competition in the primary product (market) may constraint potential market power in the secondary product (market). For such purpose, it should be assessed (i) whether there is competition in the primary market and (ii) whether the primary and secondary markets are closely linked, which depends on meeting the four conditions set in the so-called EFIM test⁷.
3. According with the EFIM test, dominance in the aftermarket (secondary product) can be excluded to the extent that a customer (i) can make an informed choice including lifecycle pricing; (ii) and is likely to make such an informed choice accordingly, and that (iii) in case of an apparent policy of exploitation being pursued in one specific

⁶ C/2023/6789, OJ C, C/2024/1645, 22.2.2024.

⁷ Commission decision of 20 May 2009 rejecting the complaint in Case C-3/39.391 – EFIM (paragraphs 13 and ff.); confirmed in Case T-296/09 *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission*, EU:T:2011:693, paragraphs 60, 90 and 91 and Case C-56/12, EU:C:2013:575, paragraphs 12 and 36 and ff.

aftermarket, a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market (iv) within a reasonable time.

4. Moreover, for the assessment of dominance in the aftermarket, in addition to the existence of a close link with the primary market, it is necessary to consider whether competition on the secondary market also operates as a competitive constraint on the allegedly dominant undertaking (for example, whether compatible accessories exercise price pressure that limits the ability of manufacturers of original accessories to increase prices).
5. Finally, in cases where aftermarket dominance has been found, it will be necessary to undertake the competitive assessment of the practices taking place in the relevant market. Depending on the theories of harm that may be applicable, the usual legal tests will be applied when considering possible abuses. However, some of the considerations relevant in the analysis of interdependence of primary and secondary markets may need to be considered in the competitive assessment, even if the interdependence is not sufficient to conclude on the absence of aftermarket dominance. In addition, there may be acceptable efficiency justifications for the conduct on the secondary market by the manufacturer of the primary good⁸.

2.5. Additional specific suggestions

Together with the above, paragraph 25 of the Draft explains that the analysis of the market position of the undertakings during the period considered can be insightful. However, the Draft Guidelines do not provide any direction on (i) how to determine the relevant time periods; or (ii) whether the same time periods need to be considered in each of the four steps outlined in paragraph 14 of the Draft. Greater guidance on the relevant factors that need to be considered when determining the relevant time periods would ensure more robust and coherent assessments.

Additionally, paragraph 26 explains that both the value and the volume of sales or purchases provide useful information for assessing market power. In our view, it is unnecessary for the

⁸ See Section 4 of “Competition Issues in Aftermarkets – Note from the European Union” 13 June 2017 submitted by the European Commission for the 127th OECD Competition Committee on 21-23 June 2017.

Guidelines to make this assertion which, as illustrated in footnote 42, is not always the case. The relevant units to assess market shares are case specific.

3. Comments to Section 3 of the Draft

3.1. General appraisal of the “competition in the merits” test as opposed to the traditional EU case law.

The majority of the AEDC understands the Draft Guidelines as a welcomed initiative for the “codification” of the existing Article 102 TFEU case law, although falling well short of what one could reasonably expect from such an exercise. Some other members see the Draft Guidelines not as an exercise of “codifying” the existing case law, but rather as an attempt to rectify the principles that drive the enforcement of Article 102 TFEU by highlighting some aspects of the case law while casting a shadow over others.

With the 2008 Guidance Paper, the Commission set a series of general principles to determine when it is liable to find behaviour by a dominant undertaking abusive by reference to anticompetitive exclusionary effects. With the Draft Guidelines, the Commission can be seen as setting aside these principles and replacing them with different and ill-defined concepts, raising concerns that it is lowering the bar to enforcement and increasing administrative discretion. We understand that the Commission is aware that its proposed approach has attracted the attention and raised eyebrows across the diverse antitrust community.

In this regard, we would like to stress the lack of reference in the Draft Guidelines to two of the most clear and applied guiding principles for the last sixteen years: the concept of anti-competitive foreclosure effects (that was at the heart of the 2008 Guidance Paper and that now appears diluted, to the point that it is now almost unrecognizable and inapplicable), and the apparent distancing from the as-efficient competitor principle and test⁹.

These general principles and test had been broadly accepted and applied by most practitioners and stakeholders and can be considered reasonably endorsed by the case law of the ECJ. However, the Draft Guidelines introduce instead the vague notion of “competition

⁹ Indeed, from an economic perspective, the test of the as efficient competitor should be the main principle underlying the concept of “competition on the merits”, particularly considering that the objective of competition policy should be to ultimately protect consumer welfare, by ensuring that markets remain sufficiently competitive, not to protect (inefficient) competitors.

on the merits”, that neither the Commission nor the case law have ever been capable of defining positively¹⁰.

This shift is, in the opinion of the AEDC, one of the main shortcomings of the Draft Guidelines and for this reason, the Draft Guidelines may fall short of the goal (expressed by the Commission in paragraph 8) of enhancing legal certainty. As noted by Advocate General Rantos, *“the concept of ‘competition on the merits’ is therefore abstract, since it does not correspond to a specific form of practices and cannot be defined in such a way as to make it possible to determine in advance whether or not particular conduct comes within the scope of such competition”*¹¹.

In the same line, we understand that the Commission is moving away from the economic approach that it had embraced in the 2008 Guidance Paper and returning to an analytical framework where the enforcement of Article 102 TFEU relied on a formalistic approach based on categorisations and presumptions applicable only to conduct that has been already subject to the appraisal of the EU court. Therefore, the guidance provided refer to existing cases, but is not helpful with new situations or concerns.

Under the Draft Guidelines, the concept of abuse is objective and refers to any conduct that meets two conditions. First, the conduct departs from competition on the merits, and second, it is capable of having anticompetitive exclusionary effects.

It is widely recognized in the case law of the EU Courts that not every exclusionary effect results in anti-competitive foreclosure, in particular if it does not have an adverse impact on consumer welfare in any form, including an increase in prices, limitation of quality or reduction of consumer choice. The economic literature¹² also supports this notion. In this

¹⁰ In paragraph 77 of its judgment of 12 May 2022 in Case C-377/20, *Servizio Elettrico Nazionale*, EU:C:2022:379, the Court of Justice applied a “no-economic sense test” to define when a conduct departs from competition on the merits: *“any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits”*. However, in subsequent cases it has ignored this test. What is more, less than a year after *Servizio Elettrico Nazionale*, in paragraph 39 of *Unilever* (judgment of 19 January 2023 in Case C-680/20, ECLI:EU:C:2023:33), when discussing whether the conduct at stake was based on means other than competition on the merits, the Court specifically referred to four paragraphs of *Servizio Elettrico Nazionale*, including paragraphs 75 and 76, but surprisingly omitted mentioning the above-mentioned paragraph 77.

¹¹ Opinion of Advocate General Rantos, in Case C-377/20, *Servizio Elettrico Nazionale*, (ECLI:EU:C:2021:998), paragraph 55.

¹² Vickers, J., «Abuse of market power», *The Economic Journal*, núm. 115(504), 2005, págs. 244-261. O’Donoghue, R. - Padilla, J., *The Law and Economics of Article 102 TFEU*, 3ª edición, Hart Publishing, 2020.

regard, and as indicated in the introduction, the Draft Guidelines overly focus on exclusionary effects instead of on consumer harm which, at least from the economic perspective, should be the main concern.

The ECJ has repeatedly confirmed, as reflected in paragraph 51 of the Draft Guidelines, that Article 102 TFEU should not be enforced to protect less efficient competitors; competition may lead to the departure from the market or marginalization of less efficient competitors.

In cases such as *SEN* (paragraph 76), *Unilever* (paragraphs 37 to 39), and *European Superleague* (paragraph 129), the ECJ confirmed that conduct that falls outside the scope of competition on the merits because it is capable of foreclosing equally efficient competitors could be considered abusive. When a dominant firm's conduct has the capability to foreclose an equally efficient competitor, the ECJ has traditionally considered that the conduct departed from normal competition. That is why, over the past decade, the ECJ has typically analysed both conditions together¹³.

The ECJ conducted extensive analysis on whether specific conducts departed from competition on the merits in the context of anti-competitive foreclosure, affecting less efficient competitors or preventing market entry (effects on market structure). The ECJ typically found that conducts were abusive in that context because they departed from competition on the merits in markets where companies had exclusive/privileged rights granted by the State or in recently liberalized markets.

When anti-competitive effects attributable to the conduct impact on less efficient competitors, as Neven suggests¹⁴, the concept of competition on the merits becomes more relevant. Indeed, it is *a priori* difficult to conceive how a conduct that is replicable and may already be in place by equally efficient competitors, which can derive a similar advantage from it as the dominant company, can depart from competition on the merits¹⁵.

Some conducts clearly depart from “normal competition”¹⁶ and can therefore be considered “abnormal” in a specific market, such as a conduct that has no economic sense but for the foreclosure of competition, cannot be replicated by equally efficient competitors, or entails

¹³ Ibañez Colomo, P. “Competition on the merits”, *Common Market Law Review*, 61, 2024.

¹⁴ Neven, D.J. “The As Efficient Competitor Test and Principle. What Role in the Proposed Guidelines?”, *Journal of European Competition Law & Practice*, 2023.

¹⁵ See also Neven, D.J., “Competition on the Merits?”, *EU Law Live's Competition Corner* (<https://eulawlive.com/competition-corner/competition-on-the-merits-by-damien-j-neven/>)

¹⁶ See, in similar terms, OECD, “What is competition on the Merits”, *Policy Brief*, 2006.

profit sacrifice. However, other conducts are considered “normal”, a source of “pro-competitive” effects in specific markets and/or have an objective justification, so their legality under the new approach proposed in the Draft Guidelines is less clear when exclusionary effects are present.

Although paragraph 73 of the Draft Guidelines does not require evidence that the affected competitor is as efficient as the dominant company to assess whether a conduct is capable of having exclusionary effects, following the case law of the EU Courts, the capability to foreclose an equally efficient competitor should still be considered in most cases.

If, contrary to the consistent case law of the EU Courts, the exclusionary effects vis-à-vis equally efficient competitors are no longer required for the assessment of a conduct as an abuse, and the concept of foreclosure in Article 102 TFEU loses its rigour (see below), the vaguer concept of competition on the merits would inevitably play a greater role. However, the concept of “competition on the merits” or “departure from competition on the merits”, if decoupled from the concept of foreclosure of as-efficient rivals or economic irrationality, becomes a broad and abstract legal category that is difficult or impossible to evaluate *ex ante* and that allows too much discretion when enforced (or not enforced). The concept has never been defined as an operational principle; in practice, defining “competition on the merits” has always involved determining what is not “competition on the merits”, relative to the specific circumstances of a particular market.

Also, summarizing the assessment under the general concept of “competition on the merits” would imply an overlap with unfair competition rules, increasing the scope of Article 102 beyond the traditional understanding of the prohibition, as defined and construed by the EU Courts.

Therefore, it would be advisable to confine the application of the condition as an operational principle to specific contexts, such as those considered by the ECJ (former regulated markets or markets with exclusive rights) or by the Commission (in paragraph 2 of the Annex to the Amending Communication, which replaced the last sentence of paragraph 23 of the Guidance Paper with: “*With a view to preventing anti-competitive foreclosure, the Commission will generally intervene where the conduct concerned has already been or is capable of hampering competition from competitors that are considered to be as efficient as the dominant undertaking*”).

Otherwise, companies would have to assess *ex ante* and *in abstracto* whether their conduct departs from “normal competition” or “competition on the merits” in the specific circumstances of the case, if potentially excluding or marginalizing both equally efficient and less efficient competitors without any objective parameter. Therefore, Article 102 TFEU risks being abused by inefficient competitors, harming the competitive process and ultimately EU consumers.

3.2. Relevant Factors for Establishing Conduct Departing from Competition on the Merits

In relation to paragraph 51, the AEDC misses references to consumer harm, which as stated in paragraph 5 of the Draft, should be a necessary condition to establish an abuse. The single reference to consumer harm, in paragraph 51, indicates that competition on the merits “*in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and wider choice of new or improved goods and services*” (emphasis added). This confirms that, according to the Draft Guidelines, consumer harm is not necessary for the Commission to establish that undertakings are deviating from competition on the merits.

As to paragraph 53, the fact that a conduct has been analysed by the ECJ under a specific test has to take into consideration that, in its case law, the ECJ considered exclusionary effects on equally efficient competitors. The ECJ has only considered effects on less efficient competitors in exceptional circumstances (such as recently liberalized markets where the emergence of an as efficient rival is practically impossible). It would be contrary to the case law of the EU Courts to assume that all conducts in Section 4.2 of the Draft falls outside the scope of competition on the merits simply because the ECJ has analysed them under a specific test without also taking account of all the circumstances considered. Once again, we consider that, considering the objective of the Guidelines, the Commission should address the general principles, useful in most cases, and not draw the line for legal certainty in relation to the exceptional uncommon situations.

It is widely recognised, for example, that tying or bundling is commonplace and is often pro-competitive, depending on the case’s circumstances. On the other hand, were we to adopt a position more aligned with the “shortcut” introduced in this paragraph, one might question why other conduct for which the ECJ has developed so-called “specific tests” in a more

prescriptive and restrictive manner, such as vexatious/sham litigation, are not considered in Section 4.2¹⁷.

In relation to paragraph 55 of the Draft, we have separate comments for each subparagraph:

1. As to paragraph 55.a), a dominant undertaking may prevent consumer choice based on product merits (quality and price) by refusing access to an asset for a supplier or distributor. As confirmed by the ECJ, in assessing these situations, property rights and the freedom of undertakings to choose their trading partners, even dominant ones, must be taken into account in the balance.

Only in exceptional circumstances, when an asset is indispensable to competition on a given market, should a refusal to provide access be considered abusive. If the restriction of consumer choice is the result of a valid refusal to contract, the conduct should not be considered outside competition on the merits.

On the other hand, it is confusing that while the conduct falling within the specific test of “refusal to supply” in Section 4.2 is deemed not to be competition on the merits under paragraph 53 of the Draft, in footnote 119 accompanying paragraph 55(a), the Draft Guidelines precisely refer to a “refusal to supply” conduct. The problem with the proposed categorisation of conducts to decide when they can be found to depart from competition on the merits is that, at the end of the day, it is hardly conceivable to make such a determination outside the “specific circumstances of the case”, be the relevant conduct under Section 4.2 or not.

2. In relation to paragraph 55.b), this instance should only be considered abusive when involving a violation of another legal rule (see comment to paragraph 55.c)).
3. In relation to paragraph 55.c), the concept of a rule in other areas of law is also undefined and too broad.
4. As to paragraph 55.d), discriminatory treatment that favours itself over competitors has only been considered outside competition on the merits if it leads to exclusionary or anticompetitive effects. Otherwise, it is an unremarkable and rational conduct with potential pro-competitive gains. The possibility that such practices are a source of pro-

¹⁷ See Section 4.2 below.

competitive effects or are objectively justified must be considered when evaluating the economic and legal context (paragraph 58 of the Draft should not apply here). Biased treatment should, in any case, be analysed as the potential result of discriminatory treatment falling outside the scope of competition on the merits, not as a separate conduct.

5. In relation to paragraph 55.e), “abnormal” or “unreasonable” behaviour should be understood as conduct that “makes no economic sense” to be considered outside competition on the merits. In this respect, it is important to assess carefully whether, in the circumstances of the case, the conduct really does “make no economic sense” rather than based on assumptions or categorisations. For example, in a specific case, it may be entirely rational for a firm to sell a product below AVC or AAC absent exclusionary intent if the product has already been made and there are costs associated with storage or destruction.
6. Finally, in relation to paragraph 55.f). This condition should apply to the use of resources or means obtained under State protection but not “on the merits”.

As an author has recently stated¹⁸, *“allowing intuition and informal analysis to dominate the question of whether a practice is inherently at odds with normal competition could lead to the categorization of conduct as abnormal or irrational for purely arbitrary and capricious reasons, which are by definition immune to meaningful challenge by firms”*.

3.3. The substantive legal standard to establish a conduct’s capability to produce exclusionary effects

To infringe Article 102 TFEU, it is not sufficient that a given conduct deviates from competition on the merits, it must also be (at least) capable of producing exclusionary effects (paragraph 45 of the Draft)¹⁹.

As advanced in the introduction, the Draft Guidelines fall short of their aim to “*enhance legal certainty and help undertakings self-assess*” (paragraph 8) whether their conduct is capable of producing exclusionary effects.

¹⁸ See footnote 13.

¹⁹ See also e.g. Case C-377/20 *Servizio Elettrico Nazionale*, EU:C:2022:379, paragraph 103.

Instead of reflecting the effects-based approach endorsed by the case law of the EU Courts (paragraph 9), the Draft Guidelines introduce a novel analytical framework that can hardly ever fail to result in a finding of abuse. The AEDC is concerned with this arguably simplistic assessment of exclusionary effects under Article 102 TFEU and with the abandonment of the concept of anticompetitive foreclosure.

We caution against the Draft Guidelines' reliance on the "*elements that may be relevant to the assessment of both* [competition on the merits and capability to produce exclusionary effects]" to justify that in some cases "*it may be necessary to carry out a comparatively more detailed assessment of whether the conduct departs from competition on the merits or of whether the conduct is capable of having exclusionary effects*" (paragraph 46). The Commission and plaintiffs should always bear the burden of showing that conduct deviating from competition on the merits is at the very least capable of producing exclusionary effects.

The Draft Guidelines' categorisation of practices in three groups based on the conduct's formal characteristics (paragraph 60) is novel, departs from the now widely accepted effect-based approach, and has not been availed by the EU Courts' case law. The AEDC is concerned that the Commission's suggested allocation of the evidentiary burden and the introduction of presumptions for certain categories of conduct may turn the analysis of effects into a mere empty formality. This, rather than reduce, increase legal uncertainty, as the categorisation approach endorsed by the Draft Guidelines appears contrary to the case-by-case and all-relevant-circumstances approach consistently adopted by the EU Courts²⁰.

Firstly, for practices falling under the classification of "naked restrictions" (paragraph 60.c)), the Commission is considering relying on a presumption of capability to produce exclusionary effects. The Draft Guidelines (i) state that the undertaking will only be able to prove that the conduct was not capable of having exclusionary effects "*in very exceptional circumstances*"; (ii) provide three examples of practices that could fall under this category; and (iii) clarify that "*it is highly unlikely*" that the behaviour of the undertaking could be objectively justified. The AEDC must caution the Commission about the legal uncertainty

²⁰ According to the case law of the EU Courts, to assess whether the conduct was or not capable of restricting competition, "*the competition authority concerned is required to examine whether, in the particular circumstances, the conduct in question was indeed capable of doing so*" (see judgment of 12 May 2022 in Case C-377/20, *Servizio Elettrico Nazionale*, EU:C:2022:379, paragraph 51 and case law cited; and judgment of 10 September 2024 in Case C-48/22 P, *Google Shopping*, EU:C:2024:726, paragraph 166).

and the high margin of discretion that would result from the creation of an open and nebulous category of *per se* infringements.

Secondly, for practices falling under the classification of “conduct that is presumed to lead to exclusionary effects” (paragraph 60.b)), the Draft Guidelines foresee that “[o]nce the factual existence of the relevant conduct is established, if need be, under the conditions established in the specific legal test, its exclusionary effects can be presumed”. The Commission thus introduces a second layer of abuses by object²¹ that would enable the Commission, NCAs and plaintiffs to rapidly shift the evidential burden on to dominant undertakings: since the Commission has declared that it can rely on presumptions, it is for the undertakings to refute an (unformulated) analysis of effects and show that the “*circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical*”. This is unacceptable not just because it diminishes legal certainty, but also because it reduces the rights of defence of dominant undertakings by reversing the burden of the proof, contrary to the principle enshrined in Article 2 of Regulation 1/2003 that the burden of proving an infringement –which includes the capability of the conduct to produce exclusionary effects– rests on the party or the authority alleging the infringement. Thus, the very high burden imposed on the dominant undertaking to justify its conduct contrasts with the very low burden imposed on the Commission to show exclusionary effects and apply the prohibition, which depends “*on the scope and nature of the arguments and evidence submitted by the dominant undertakings*” and which “*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*”.

The AEDC cautions about the risk that the analytical framework preliminarily set out in the Draft Guidelines might give the Commission, the NCAs and the plaintiffs an overly broad margin of discretion (in practice, this approach reverses the burden of proof) and render it impossible for undertakings to rebut the presumption²². The future Guidelines should then

²¹ At first glance, such an ambitious introduction of multiple new categories of by object abuses seem hardly compatible with consolidated ECJ case law establishing that the by-object restriction concept must be interpreted restrictively (judgment of 2 April 2020 in Case C-228/18, *Budapest Bank*, EU:C:2020:265, paragraph 54).

²² See also José Luís da Cruz Vilaça, “The intensity of judicial review in complex economic matters - recent competition law judgments of the Court of Justice of the EU”, *Journal of Antitrust Enforcement*, 2018, 6, 173-188: “*But I think the regulator would be well advised in the future not to expect any special indulgence for relying on a presumption of any kind of infringement per se of Article 102 TFEU when seeking to prove the anticompetitive character of such a system. Indeed, it would be odd to submit the European Commission to a*

clearly establish that the presumptions will be rebuttable in practice, and the type of evidence that will be needed to rebut those presumptions.

Finally, as to practices falling under the classification of “conduct for which it is necessary to demonstrate a capability to produce exclusionary effects” (paragraph 60.a)), the Draft Guidelines state that the Commission shall “*as a general rule, demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects*”. The AEDC is however concerned with the low “substantive legal standard” that the Draft Guidelines require for the Commission to prove that a practice has exclusionary effects.

Firstly, and taking into account that paragraph 60.a) is intended to apply to all conduct that does not fit into the categories provided under paragraphs 60.b) and 60.c), we note that its current wording runs counter the overall purpose of the Draft Guidelines of promoting legal certainty. Demonstrating that a conduct has actual or potential exclusionary effects on equally efficient competitors is an essential element of the ‘general test’²³. Therefore, it must *always* be demonstrated²⁴ (i.e. as opposed to being demonstrated “*as a general rule*” per the current wording of paragraph 60.a)).

The Draft Guidelines broadly establish, based on Article 101 TFEU case law, that the Commission needs 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*” (paragraph 62)²⁵.

Under the analytical framework set in Sections 3.3.2 and 3.3.3, to show that a conduct is “*at least capable of producing exclusionary effects*”, the Commission (i) would *not* have to prove that the conduct has produced “*actual*” exclusionary effects (it is sufficient that effects are “*potential*”, paragraph 61); (ii) would *not* need to have regard to the “*actual reaction of*

stricter test when it carries out an analysis of all the circumstances than if it simply had relied on a per se infringement approach!”.

²³ Judgment of 10 September 2024 in Case C-48/22 P, *Google Shopping*, EU:C:2024:726, paragraph 165.

²⁴ “*That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects (judgment of 21 December 2023, European Superleague Company, C-333/21, EU:C:2023:1011, paragraph 130 and the case-law cited).*” (Judgment of 10 September 2024 in Case C-48/22 P, *Google Shopping*, EU:C:2024:726, paragraph 166).

²⁵ Note that the terms used in the Draft Guidelines are broader than those used by the General Court (“GC”) in the case referred to in the corresponding footnote 147 (judgment of 8 September 2016 in Case T-472/13 *Lundbeck*, EU:T:2016:449, paragraph 363).

third parties”²⁶ (paragraph 62) or to the “*actions that competitors may have taken - or could have taken - to limit the effects of the conduct*”²⁷ (paragraph 70.c)); (iii) would *not* have to conduct a full causality analysis (the Commission would not have to show that the conduct is the “*sole cause*” of the exclusionary effects, as it is sufficient that it establishes that the conduct “*contributes to increasing the likelihood of the exclusionary effects*”, paragraph 65); (iv) would *not* need to develop credible assumptions to define the benchmark situation/counterfactual which would have existed absent the conduct (it is sufficient that the Commission relies on “*an alternative hypothetical scenario*”, establishing “*a plausible outcome amongst various possible outcomes*”, paragraph 67²⁸); (v) would *not* need to conduct the counterfactual in cases where the conduct “*has made it very difficult or impossible to ascertain the objective causes of observed market developments*” (paragraph 67); (vi) would *not* need to prove in all cases that the conduct at issue is capable of foreclosing as-efficient competitors (paragraph 73); (vii) would *not* need to show “*direct consumer harm*” (paragraph 72); and (viii) would *not* need to show that the effects of the conduct are “*appreciable*” (paragraph 75).

To find an abuse under the framework set out in the Draft Guidelines (in situations where presumptions do not apply), the Commission would merely need to show that a rival (including in some cases less-efficient rivals) could potentially find it minimally harder to compete against a dominant undertaking for reasons partly attributable to the impugned conduct. Virtually every possible instance of conduct deviating from competition on the merits would meet this test breaking the traditional boundaries of Article 102 to encroach in the field of unfair competition. In other words, as currently set out in the Draft Guidelines,

²⁶ Note however that in its judgment of 1 July 2010 in Case T-321/05, *AstraZeneca*, EU:T:2010:266, paragraph 360, referred to in the Draft Guidelines (footnote 149), the GC appeared to be addressing by object infringements; it does not follow that the Commission can conclude that it cannot in certain circumstances consider the reaction of third parties as a relevant fact when assessing a conduct’s capability to produce exclusionary effects.

²⁷ The AEDC is concerned that the Draft Guidelines (footnote 168) extract a general principle from Case C-377/20 *Servizio Elettrico Nazionale*, EU:C:2022:379, paragraph 102, without having any regard to the specific factual background of the case.

²⁸ The Draft Guidelines specify that “[i]n 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”. In this regard, the Draft Guidelines should, to the extent possible, be more specific and provide detailed examples of these cases and likely developments; this is particularly important considering that the result of the analysis can be very sensitive to assumptions regarding the market development in the counterfactual scenario.” The AEDC also considers important that when defining this hypothetical scenario, the Commission does not rely “on the effects that [the] practice might produce or might have produced if certain specific circumstances - which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise - had arisen or did arise.” (see judgment of 12 May 2022 in Case C-377/20, *Servizio Elettrico Nazionale*, EU:C:2022:379, paragraph 70).

the requirement for conduct to be capable to have exclusionary effects would be an empty filter.

This situation is particularly concerning given that the Draft Guidelines have omitted (i) any guidance as to the elements that may be relevant to the assessment of whether a given conduct may not be capable of producing exclusionary effects (focusing mainly on those elements that could lead to a finding of abuse, Section 3.3.3); as well as (ii) any reference to the well-established foreclosure standard which the Commission has used in abuse of dominance cases and that the Commission regularly uses in merger control cases²⁹.

Ultimately, if the effects analysis becomes a mere formality, and the Commission is always able to show that a conduct affects competition, without any regard as to whether a specific conduct results in anticompetitive foreclosure (of as efficient rivals), then allegedly dominant undertakings will not be able to predict if a certain specific conduct which departs from competition on the merits is also capable of producing exclusionary effects.

The AEDC is therefore concerned that the Draft Guidelines as currently drafted result in legal uncertainty and a lack of coherence, clarity, and predictability. The Draft Guidelines adopt an arguably biased interpretation of the EU Courts' case law and ignore that the imposition of presumptions for pre-established categories of conduct requires that those categories be narrowly defined and that the presumptions (and the manner to refute them) be clearly set (without unreachable standards, or extra hurdles on the undertaking once the latter has already rebutted the imposed presumptions).

3.4. Other specific comments

Additionally, the AEDC would like to make two additional comments in relation to paragraphs 66 and 70.

- a) **Paragraph 66.** The discussion on causation suggests that the conceptual framework for establishing capability requires comparing “*the situation where the conduct was implemented with the situation absent the conduct*”. However, the draft then departs

²⁹ See the Commission's non-horizontal merger control guidelines [2008] OJ C 256/6, paragraph 18: “*In this document, the term ‘foreclosure’ will be used to describe any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies - and, possibly, some of its competitors as well - may be able to profitably increase the price charged to consumers. These instances give rise to a significant impediment to effective competition and are therefore referred to hereafter as ‘anticompetitive foreclosure’.*” (footnotes omitted)

from this framework by arguing that “*in certain cases*”, such hypothetical scenario may be replaced by one where the conduct would be absent, and where “*certain likely developments in the market are also taken into account*”. This is yet another example where the principle of legal certainty is violated. This simply leaves too much room for the Commission to develop a counterfactual that may, or may not, identify the capability of the conduct to have effects.

- b) **Paragraph 70** lists the “*relevant facts and circumstances to be taken into account in the analysis*” of whether a conduct is capable of having exclusionary effects. These include the position of the dominant undertaking and its competitors, the conditions of the relevant market, the extent of the conduct or the position of customers or input suppliers. All these factors may be helpful to demonstrate that the undertaking in question is dominant and would have the ability to engage in an effective exclusionary strategy. However, they do not help establish whether the dominant company had any incentive to engage in exclusionary conduct, which would then make it more likely that such exclusion took place, or that such exclusion is anticompetitive (i.e. that it has caused harm to consumers). Further, there is a circularity in the approach that the draft proposes, which will allow the Commission to rely on a finding of dominance to establish capability of effects almost automatically.

4. Principles to determine whether specific categories of conduct are liable to be abusive (Section 4 of the Draft)

4.1. General comments

The AEDC takes note of the efforts of the Commission to systematize the principles to determine whether specific categories of conduct are liable to be abusive, and to provide a general view of the possible infringements and its particular treatment. However, as competition law practitioners, when specifying the scope of those principles and/or defining new categories or legal tests, we would warn against (i) the risk of inconsistency among different sources of EU Law and (ii) the creation of new and/or sector-specific categories where consolidated existing case law would already tackle the relevant behaviour.

Regarding consistency among various sources of EU Law, the AEDC would like to raise the following two different concerns.

Firstly, as the ECJ has recently mandated, there is a clear need for consistency in the application of Articles 101 and 102 TFEU. Such need for consistency has been recently emphasized in general terms when applying both provisions of primary law, but also as regards specifically the treatment of by-object and by-effect infringements and concerning the applicability of objective justifications to potentially anticompetitive behaviour³⁰. Such quest for consistency among the two fundamental provisions of EU competition law is nowhere mentioned in the Draft Guidelines, despite being one important cornerstone of legal certainty and therefore an important guiding principle for Article 102 TFEU enforcers³¹.

Secondly, where there is sector-specific regulation tackling the same or remarkably similar behaviour as the one considered in the Draft Guidelines, concepts and legal tests should also be consistent, albeit eventually non-identical if regulatory needs so justify.

The most notable example may be found in the Digital Markets Regulation (“DMA”), which tackles behaviour that, whereas considered *ex ante* or *ex post*, refer to fairly numerous types of discriminatory practices by gatekeepers; practices that in one way or the other may tend to favour gatekeepers’ own products and services and that may be put in practice to the exclusion of competitive products. When considered *ex post*, such behaviour may indeed amount to an exclusionary abuse. While the specificity of behavioural requirements in the DMA may be justified on the *ex-ante* nature of such regulation, the use of the same concepts in the Draft Guidelines (notably, self-preferencing and access restrictions), with however significantly different definitions and scope³², undermines legal certainty.

This connects with the AEDC’s wider concern on the creation of novel categories of abuses which seem particularly devoted to address sector-specific concerns and where consolidated case law may sufficiently tackle the behaviour (at least while no clear tests are associated to such specific new categories).

³⁰ Judgment of 23 December 2023, case C-333/21 *European Superleague Company, S. L. v Fédération internationale de football association (FIFA) and Union des associations européennes de football (UEFA)*, EU:C:2023:1011, paragraphs 119, 186 and 201.

³¹ As part of this quest for consistency, the AEDC considers that the introduction of new categories of by object abuses should follow the same processes and procure the same guarantees as similar exercises undertaken by the Commission. For instance, in the context of the reviewing of the Block Exemptions for Horizontal Cooperation Agreements and the guidance provided by the Commission’s Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements of 2011, the Commission engaged antitrust experts to produce a report on “*purchasing agreements and the delineation between by object and by effect restrictions*”. It would be reasonable to expect that a such a revolution on the application of Article 102 as the one envisaged by the Draft Guidelines would require at least the same level of prudence and research.

³² See comments to Subsections 4.3.2 and 4.3.3 below.

As it will be further explained below in connection to Section 4.3. of the Draft Guidelines, several categories lacking specific legal tests (notably, self-preferencing and access restrictions) seem primarily related to the digital sector and they basically address discriminatory behaviour from dominant undertakings. Creating such sector-specific new categories without associated legal tests, with unclear boundaries among them³³ and, as indicated above, diverging from regulatory definitions risks both undermining legal certainty and getting out-to-date quickly as they involve rapidly evolving industries.

As the ECJ recently recalled, favourable treatment leading to exclusion may or may not depart from competition on the merits and qualify as abusive depending on the specific circumstances of the case, the economic and legal context of the behaviour, including, notably, the market power in upstream or related markets³⁴. Traditional case law on abusive discrimination and/or leveraging market dominance from one market to another may be wide enough to encompass such categories at least for so long as there is no clear legal test that deserves autonomous attention³⁵.

4.2. Exclusive Dealing

Paragraph 80 of the Draft Guidelines mention fidelity or exclusivity rebates as one of the potential forms of exclusive dealing. However, the Draft Guidelines do not propose a specific test to assess whether a particular system of rebates incentivises exclusivity or can lead to the exclusion of (equally efficient) rivals. It would be advisable to include further details on this test. In principle, such test should be aimed at assessing whether an AEC would be able to compete for marginal/additional volumes without incurring in losses. This would entail: (i) calculating the price/level of discount that rivals should offer customers to compensate for the discount from the dominant undertaking that they would lose by diverting a certain part of their purchases from the latter to the former; and (ii) assessing whether with that price/level of discount it would be possible to cover the average avoidable costs (AAC)

³³ According to the most recent case law, it seems unclear whether self-preferencing as defined in the Draft Guidelines might also qualify as access restrictions and how this distinction could be legally established. Judgment of 10 September 2024, case C-48/22P *Google Shopping*, EU:C:2024:726, paragraph 167; citing also Judgment of 23 December 2023, case C-333/21 *European Superleague Company, S. L. v Fédération internationale de football association (FIFA) and Union des associations européennes de football (UEFA)*, EU:C:2023:1011, paragraph 131.

³⁴ Judgment of 10 September 2024, case C-48/22P *Google Shopping*, ECLI:EU:C:2024:726, paragraph 186.

³⁵ In this connection, although the ECJ has clearly distinguished so-called self-preferencing from a refusal to supply and has confirmed the inapplicability of the stringent *Bronner* criteria to such behaviour, it has neither created nor validated a new autonomous category. Judgment of 10 September 2024, Case C-48/22P *Google Shopping*, EU:C:2024:726, paragraphs 110 to 114.

that the dominant undertaking or an equally efficient rival would incur in supplying the volume concerned.

Also, in paragraph 81, the Draft Guidelines mention that stocking obligations, understood as obligations to reserve a given space for the products of the dominant undertaking, is also a form of exclusive dealing. It would be advisable to acknowledge that this kind of practices may have an objective justification and lead to efficiencies (such as protecting investments by the dominant undertaking from free riding by competitors)³⁶.

Again, the AEDC insists on the fact that the Draft Guidelines do not consider in general consumer harm as a necessary condition (or even as a relevant factor) for finding that a particular conduct amounts to anticompetitive foreclosure. From an economic perspective, both objective justification/efficiencies and consumer harm should play a major role in the assessment.

Finally, paragraph 83(b) of the Draft Guidelines mention that “*even conduct affecting a small share of the market can be capable of having exclusionary effects, in particular where the customers or the market segment targeted by the conduct have strategic importance for entry or expansion*” and cites the *Google/Android* precedent. In the AEDC’s view, the Guidelines should tone down or qualify this statement. It would be advisable for the Guidelines to clarify that conducts affecting a small share of the market can lead to exclusionary effects only under very specific circumstances which are largely restricted to situations where the conduct targets customers or segments which are strategic for entry or expansion. Otherwise, it could be interpreted that this kind of conducts can lead to exclusionary effects more generally or in many other settings as well. In addition, it would be helpful if the future Guidelines could provide further guidance on the criteria to evaluate whether a particular set of customers or segment can be regarded strategic for entry or expansion.

4.3. Tying and Bundling

In relation to the requirements to find tying abusive, the Draft Guidelines provide that tying is liable to be abusive where several conditions are met, including that the undertaking concerned must be dominant in the market for the “tying product”³⁷. However, it further

³⁶ This comment is applicable more in general to other sections of/practices covered by the Draft Guidelines.

³⁷ See paragraphs 89 and footnote 209.

provides that *“in the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied aftermarket”*.

This statement may be read as providing that a tying abuse may be found where the undertaking is dominant in the “tied aftermarket” but not in the “tying primary product”. This position is, in our view, wrong.

The existing case law and economic literature, as it will be explained below, refer to leveraging a dominant position in the “tying market” to acquire market power in the “tied market”. Absence of dominance in the “tying market” was thus essential. In no case is it provided that having a dominant position in the “tied aftermarket” would suffice for a finding of abusive conduct.

As per the case law, the Draft Guidelines do not quote any precedent to substantiate the statement that, in the case of tying in aftermarkets, it would be sufficient that the undertaking is dominant in the market for the “tied secondary product” whilst not in the “tying primary product”.

This is likely because when reviewing case law concerning tying abuses in aftermarkets, it can be concluded that the EU Courts have only found the existence of tying abusive practices where the undertaking was dominant in the primary “tying product” (notwithstanding it may be (or not) also dominant in the tied aftermarket):

- In *Hilti*, the Commission found that making the sale of patented cartridge strips (primary product) conditional upon the purchase of Hilti’s nails and cartridge strips (secondary aftermarkets) violated Article 102 TFEU. The EU Courts³⁸ upheld those findings in the understanding that Hilti was dominant in the primary product market (the cartridge strips, the “tying product”) and was leveraging from such position to tie the aftermarket (the nails and the strips, the “tied aftermarkets”) by refusing to supply the nails and cartridge strips separately. Even if Hilti was also found to be dominant in the aftermarket of nails designed for Hilti nail guns, the finding of abusive tying conduct was built under the premise that the undertaking was dominant in the tying primary product, where it held a 55% market share and a strong IP protection.

³⁸ Judgment of 12 December 1991, Case T-30/89, *Hilti AG v Commission*, EU:T:1991:70.

- In *Tetra-Pak II*, the Commission found that Tetra Pak’s requirement that purchasers of its packaging machines had to use only Tetra Pak cartons was a violation of Article 102 TFEU. In that case, four different markets were defined (i.e. aseptic machines, aseptic cartons, non-aseptic machines, and non-aseptic cartons) and the Commission found dominance in the markets of aseptic machines and aseptic cartons. Whilst there was not a finding of dominance in non-aseptic machines and cartons, the Commission and the ECJ³⁹ found that the abuse may be extended to the non-aseptic markets given the prominent position of Tetra-Pak also in those non-aseptic markets and the direct association between those markets and the aseptic markets where Tetra-Pak was dominant. This implies that the Commission found a tying by leveraging from dominance in the aseptic markets (the tying product) to restrict competition also in the non-aseptic markets (the tied product)⁴⁰. But in no case was dominance in the tying market a pre-requisite for the finding of an abusive tying conduct in those other (tied) markets.

Given that the purpose of the Draft Guidelines is to set out principles to assess whether certain conduct constitutes an abuse in the light of the case law of EU Courts, the absence of any EU Courts decision providing that, in the special case of tying in aftermarkets, the condition is that the undertaking is dominant either in the “tying market” or the “tied aftermarket”, should be sufficient to exclude such specific reference to aftermarkets from the Draft Guidelines.

Moreover, when reviewing economic competition literature about tying, no different requirements are set for tying in general than for tying in aftermarkets. And all economic models showing that tying can be anticompetitive require considerable market power in the tying market. Furthermore, dominance in the tied market is not required, but the tied market must be subject to imperfect competition.

³⁹ Judgment of 6 October 1994, Case T-83/91, *Tetra Pak International SA v Commission*, EU:T:1994:246.

⁴⁰ The Commission argued that *Tetra-Pak* had “used the association which exists between the four markets in question to commit abuses on the non-aseptic markets, abuses which it could not have committed in the absence of its dominant position on the aseptic markets” (penultimate paragraph of recital 104 of the Decision). In paragraph 121, the Court ruled that “the Commission was entitled to find that the abovementioned links between the two aseptic markets and the two non-aseptic markets reinforced Tetra Pak’s economic power over the latter markets.”

In such context, economist Jorge Padilla recognizes⁴¹ that, among the conditions required to substantiate a tying abuse, the first one is that the firm engaging in the tying practices is dominant in the tying product market and that in the case of aftermarket, *“the usual principles should apply”*.

Importantly, he also refers that this is the position set out in OECD, Competition Issues In Aftermarkets, Background Note by the Secretariat, 21-23 June 2017, paragraph 72 and 73 (*“[...] prerequisites for establishing an illegal tying would be similar to other tying cases that do not involve an aftermarket”*)⁴².

In such document, the OECD Secretariat specifically provides that an unlawful tying arrangement in aftermarkets would include several elements, including *“proof that the seller had market power in the tying product market, or in the case of aftermarkets, in the market for the primary product”*.

This is different than being dominant only in the tied aftermarket but not in the tying primary product, which is the product that is generally assumed to be leveraged as “tying product” in the case of aftermarkets.

Therefore, in consistency with the above, we recommend that the position provided in the Draft Guidelines making a specific reference to aftermarkets is either removed or replaced by a reference providing that the same general principles apply in the case of aftermarkets. Alternatively, in consistency with the approach taken by the OECD, such statement should be at least, amended to provide that *“in the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or in the market for the primary product”*.

As to the assessment of exclusionary effects, the draft is not clear on when tying will be presumed to be anticompetitive and when it will not. Paragraph 95 and footnote 233 explain

⁴¹ Jorge Padilla, “The Law and Economics of Article 102 TFEU”. See Chapter 11, section 11.4 (Tying in Aftermarkets).

⁴² The document is available at [https://one.oecd.org/document/DAF/COMP\(2017\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)2/en/pdf). Here the OECD specifically refers to the European Commission’s position, by providing: “It is generally acknowledged that the supplier needs to be dominant in the primary market for the tying to be considered illegal. European Commission (2009) states that “[i]n the special case of tying in after-markets, the condition is that the undertaking is dominant in the tying market and/or the tied aftermarket”. This is consistent with the idea that the theory of harm from tying is leverage, namely, tying would be harmful if a dominant company distorts competition in the tied product market (i.e. in the context an aftermarket, the secondary market), by leveraging its market power in the tying product market (i.e. the primary market).”

that the presumption will apply when “*the inability of competitors to enter or expand their presence in the tied market is likely to be directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects.*”

This provides little guidance on the specific market features that will lead to such a conclusion, compared with others when market conditions need to be examined, and a presumption will not apply. This is a concern, given that tying is under many circumstances pro-competitive and benefits consumers and the current draft risks leading to excessive deterrence.

4.4. Refusal to supply

Refusal to supply is first approached in the Draft Guidelines as making part of “*certain types of conduct*” where the EU Courts have developed “*specific legal tests*” as “*an expression of the application of the general principles [i.e. competition on the merits and exclusionary effects] [...] to the specific conduct in question*” (paragraph 47 Draft Guidelines).

Following the proposed “decision tree” in the Draft Guidelines:

- As a conduct subject to a “specific legal test”, when the test is satisfied, there is a presumption that “refusal to supply” departs from competition on the merits (paragraph 53 of the Draft Guidelines).
- As regards the branch on the capability of the “refusal to supply” to have “exclusionary effects” and, ultimately, the evidentiary burden of the Commission and of other competent enforcers, unlike other conducts considered in Section 4.2, refusal to supply is not mentioned under the heading in paragraph 60(b) of the Draft Guidelines (“*Conduct that is presumed to lead to exclusionary effects*”). Neither is it included under paragraphs 60(a) or 60(c). But for paragraph 47, paragraph 60(b) would appear to implicitly say that a refusal to supply that meets the “specific legal test” cannot be presumed to be capable of having exclusionary effects.
- A clarification would be desirable as to whether a refusal to supply that meets the applicable “specific legal test” triggers a presumption under paragraph 60(b) only because the “specific legal test” already incorporates the burden of proof required to that effect. On the other hand, there are certain types of conduct by dominant companies in particular settings that, if not deployed as “choreographed” by the ECJ,

can be presumed to constitute an abuse and, actually, they can be conceptually closer to a “naked restriction”⁴³.

We would also recommend a redrafting and reordering of certain paragraphs in the Draft Guidelines so that the so-called “specific test” is better formulated, in particular paragraph 98 where, somewhat disjointedly and confusingly, one condition is singled out as sufficient to find abusive a refusal to supply: “*that a potential market or even a hypothetical market for the input can be identified*” (citing case C-418/01, *IMS v NDC Health*). Drawing from *Volvo*, *Magill* and *Bronner*, the judgment rendered in *IMS* (where the refused input was protected by IP rights) required three cumulative conditions (see paragraphs 38 and ff.).

On the other hand, we understand that the Commission will review the Draft Guidelines to incorporate new ECJ’s rulings relevant to the “specific test for refusal to supply” where the *Bronner* test⁴⁴ has been repeatedly invoked by dominant companies in very different factual scenarios⁴⁵. In this regard, first, it can be said that the scope of application of the conditions established in *Bronner* for the refusal to supply has been progressively limited by subsequent judgments, as not being suitable to establish an abuse in other cases concerning issues of access⁴⁶.

On the above, we would recommend that the future Guidelines address more systematically the significance or consequence, in terms of the strictest test in *Bronner* and in other “refusal to supply” tested cases, of the situation where the relevant input or infrastructure for which access is sought has been developed by the dominant company for the needs of its own business.

⁴³ See paragraph 104 in fine of the Draft Guidelines and accompanying footnote 249 referring to judgment of 16 July 2005, Case C-170/13, *Huawei Technologies v ZTE and ZTE Deutschland*, EU:C:2015:477. Without prejudice to consider that conduct such as the one at issue in Huawei should not be considered under the category of a “*refusal to supply*” exclusionary conduct, as regards injunctions sought by SEP holders against implementers, the Huawei judgment actually invites Article 102 enforcers to follow a somewhat formalistic approach limited to verify that the parties have performed a particular negotiation screenplay. See, in this regard, the Commission’s own understanding in its observations of 15 April 2024 as amicus curiae in Case *HMD Global Oy gegen VoiceAge EVS GmbH & Co. KG* before the Oberlandesgericht München (available at https://competition-policy.ec.europa.eu/document/download/07d62ef4-6795-4a24-99cb-032520c0360c_en?filename=2024_Amicus_Curiae_6U5066_22Kart_de.pdf).

⁴⁴ Judgment of 26 November 1998, C-7/97, *Bronner*, EU:C:1998:569.

⁴⁵ Judgment of 10 September 2024, C-48/22P, *Google Shopping*, EU:C:2024:726.

⁴⁶ See Opinion of Advocate General Medina of 5 September 2024 in Case C-233/23, *Google/Enel*, EU:C:2024:694, paragraph 34. With reference in particular to *Baltic Rail* (EU:C:2023:12): “*It stems from the latter, without ambiguity, that the Bronner conditions apply only to cases where the infrastructure at issue has been developed for the needs of the dominant undertaking’s own business and where that infrastructure is dedicated for its own use, to the exclusion of any other competitor*”.

In addition to these general comments, certain paragraphs deserve specific comments.

Thus, for example, paragraph 97 of the Draft states that a refusal to supply “*is a self-standing type of abuse which is different from the access restrictions*”. The so called “access restrictions” are addressed in Section 4.3.4 of the Draft Guidelines as part of “*Conducts with no specific legal test*”. This distinction between access restrictions that amount to a “refusal to supply” and those that do not is important. Indeed, according to the Draft Guidelines, the bar to find an abuse is understood to be higher for the former (i.e. when an access restriction consists of denying access to an input that “*the dominant undertaking has developed exclusively or mainly for its own use*”).

In order to distinguish more clearly the conducts under Section 4.2.3 from those under Section 4.3.4 of the Draft Guidelines, it would be desirable that the Draft Guidelines refine better the conditions that both the GC⁴⁷ and the ECJ have required to establish both (i) when we are before the “self-standing” type subject to a “specific test” (i.e. the identification of its constituent elements); and (ii) the actual test applicable to establish its abusive character.

An additional area in which we believe the Draft Guidelines could be refined refers to the specific legal test described to establish whether a refusal to license IP rights may infringe Article 102 TFEU.

The Draft Guidelines could be clearer by providing a better definition of the markets affected by the refusal to supply, which is not the market for the inputs themselves but an “adjacent market” for goods manufactured making use of such inputs. Even if some references are made in the Draft Guidelines to a “downstream market” (paragraph 99.a) or a “secondary market” (paragraph 106), there is no clear general distinction between the inputs market where the undertaking refusing to license its IP rights is dominant and the adjacent market for which the input is sought. The importance of such distinction is expressed in *Microsoft*, where it is stated that (emphasis added):

“it is appropriate to add that, in order that a refusal to give access to a product or service indispensable to the exercise of a particular activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a

⁴⁷ Judgments rendered by the GC to the extent the ECJ has not had the opportunity to review them, such as the *Microsoft* judgment of 17 September 2007, in Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289.

dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service.”⁴⁸

Moreover, paragraph 106 of the Draft Guidelines states that “*A refusal can limit technical development on the market if, for instance, it prevents the requesting undertaking from producing new products that are not offered by the dominant undertaking and for which there is a potential consumer demand (limitation of production or markets), even if such goods or services are in competition with those of the dominant undertaking.*”

The emphasized sentence (“*even if such goods or services are in competition with those of the dominant undertaking*”) should be deleted, as it could be interpreted as allowing the duplication of secondary goods to compete in the same market where the undertaking refusing to supply is dominant.

If the goods for which the supply of the input is sought are in competition with those where the refusing undertaking is dominant, then it means that the goods for which the supply of the input is required are similar to the ones previously offered and that no technical development has taken place. This is something widely unaccepted by EU case law, being explicitly said in *IMS Health*⁴⁹ that a refusal to supply may be regarded as abusive “*where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand*” (emphasis added). The same results from *Magill and Ladbrooke*⁵⁰.

Furthermore, for the sake of clarity, when the Draft Guidelines refer to the refusal to license intellectual property rights as an special case of refusal to supply (paragraph 104 and ff.), which is subject to the additional requirement of limiting technical development on the (adjacent) market, it should be further detailed that the same requirement is also applicable to the refusal to provide interoperability related information. In such regard, even if the *Microsoft*⁵¹ case is mentioned, it should be very clear that the requisites that apply for the

⁴⁸ Judgment of 17 September 2007 in Case T-201/04 *Microsoft*, EU:T:2007:289, paragraph 335. Moreover, *Commercial Solvents* is another example where the CJEU considered that the conduct in question in the market in which *Commercial Solvents* was dominant was likely to eliminate all competition in the adjacent market (judgment of 6 March 1974 in Case 6 & 7/73, *ICI & Commercial Solvents v. Commission*, EU:C:1974:18).

⁴⁹ Judgment of 29 April 2004 in Case C-418/01, *IMS Health*, EU:C:2004:257, paragraph 49.

⁵⁰ Judgment of 6 April 1995 in Joined Cases C-241/91P and C-242/91P, *Magill*, EU:C:1995:98, paragraphs 30 and 54; judgment of 12 June 1997 in Case T-504/93, *Tiercé Ladbrooke SA*, EU:T:1997:84, paragraph 131.

⁵¹ Judgment of 17 September 2007 in Case T-201/04 *Microsoft*, EU:T:2007:289, paragraphs 647-656.

supply of intellectual property rights (paragraph 105) also concern the supply of interoperability-related information.

Finally, in relation to paragraph 104 *in fine* and footnote 249, we would recommend a refinement of the Draft Guidelines when addressing the exercise of intellectual property rights since factual settings, such as in *Huawei*, as indicated above, not only do not fit the constituent elements of a “refusal to supply” case, but the ECJ has further set up a more prescriptive test. Indeed, many situations where an IP infringement action is brought have little to do with an exclusionary refusal to supply.

4.5. Predatory pricing

The first comment in relation to predatory pricing is that the future Guidelines should develop in greater detail the benchmarks of the price-cost test to assess whether a pricing conduct is predatory.

The Draft Guidelines refer to average variable cost (“AVC”) and average total cost (“ATC”) as relevant cost benchmarks to assess whether a pricing conduct is predatory, but they also recognize that in some circumstances the notions of average avoidable costs (“AAC”) and long-run average incremental costs (“LRAIC”) better capture the costs of the relevant dominant undertaking.

The 2008 Guidance Paper stated that in situations where common costs are significant, they may have to be considered. This means that, in these situations, LRAIC, which includes the fixed and variable costs of manufacturing a product, should be the benchmark for the price-cost test.

In *Post Danmark*⁵², the ECJ upheld the Danish authorities’ use of the concept “incremental costs” (i.e. LRAIC) for the purpose of carrying out a price-cost comparison since a notable feature of the case was that there were considerable common costs. Along the same lines, recently in *Qualcomm*⁵³, the GC stated, as the Commission did, that a price calculation based solely on variable costs is unsuitable for identifying predatory prices in a sector where there are high R&D costs (i.e. common costs). Given that the semiconductor industry is characterized by low variable costs and high fixed costs that are, for the most part, sunk at

⁵² Judgment of 27 March 2012 in Case C-209/10, *Post Danmark*, EU:C:2012:172, paragraphs 31 to 39.

⁵³ Judgment of 18 September 2024 in Case T-671/19, *Qualcomm*, EU:T:2024:626, paragraphs 438 to 440.

the time the products are marketed, using the AVC as a cost benchmark would entail not including product-specific sunk costs and would not reflect the reality of the market in terms of costs associated with market entry and competition in the market, making it very difficult, if not impossible, to detect predation. Accordingly, for this case, both the Commission and the GC considered LRAIC the most appropriate cost benchmark.

In this scenario, it would be very important for the future Guidelines, beyond referring to the case law in a footnote, to accurately explain in which cases and for what reasons LRAIC is better to be used rather than AVC or AAC.

Secondly, the Draft Guidelines (paragraph 111(b)) make a mistake by including LRAIC and ATC in the same scenario resulting of a price-cost test. In particular, the Draft Guidelines say that *“if prices are below ATC or LRAIC but above AVC or AAC, the pricing conduct can be regarded as predatory if it is part of a plan to eliminate or reduce competition in the relevant market”*.

According to the case law arising from *AKZO*⁵⁴, prices below AVC by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. Prices below ATC, including fixed costs and variable costs, but above AVC, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

The wording of the Draft Guidelines can lead to confusion on this issue, and it would be desirable for this second scenario to reflect what has been set forth by case law, i.e. only if prices are below ATC but above AVC is it necessary to show that this pricing practice is part of a plan to eliminate or reduce competition in the relevant market.

Thirdly, the definition of incremental costs as that proportion of common costs that would have been avoidable, had the undertaking decided not to provide the product in question is very simple and does not consider the whole picture of predatory behaviour, making it very difficult, if not impossible, to detect predation.

It is a well-established principle that the price of competitive services offered by an operator should cover the direct costs plus an appropriate proportion of the common costs and overhead costs of the operator⁵⁵. Objective criteria, such as volumes, time (labour) usage or

⁵⁴ Judgment of 3 July 1991 in Case C-62/86, *AKZO*, EU:C:1991:286, paragraphs 71 to 72.

⁵⁵ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, 6.2.1998, C(1998).

intensity of usage, should be used to determine the appropriate proportion. In *Post Danmark*⁵⁶, the ECJ upheld that, for the purpose of estimating what it described as average incremental costs, should be included, among other things, not only those fixed and variable costs attributable solely to the activity/product, but also elements described as common variable costs, attributable common costs, and non-attributable common costs.

As such, in order to assess whether there is predation, it is not enough that the LRAIC of a product covers its incremental costs as defined by the Draft Guidelines (i.e. if a proportion of the common cost is avoidable, this proportion is incremental); it is necessary to verify whether the prices of all products offer sufficient revenues to cover all the combined incremental costs of all the products (i.e. all LRAICs). This implies that the revenues derived from all the products of a company must cover all costs regardless of how the companies distribute their common costs.

Within this context, it would be desirable to develop the concept of “incremental” costs. Practical examples of some situations in different industries or sectors would be welcomed.

4.6. Margin Squeeze

In relation to the guidance on margin squeeze, in paragraphs 126 and 127 of the Draft Guidelines, the Commission states that “*it is also not necessary to demonstrate that the dominant undertaking is capable of recouping any losses it may suffer to squeeze the margins of its competitors*” and that “*it is not necessary to establish that the upstream input is indispensable for rivals to compete downstream*”.

In this regard, and even if there are differences between margin squeeze and predatory pricing (where recoupment may be a necessary condition) and refusal to supply (where essentiality of the input is a crucial element for the assessment), these statements of the Draft Guidelines imply in practice that it is not required to show that the dominant undertaking has incentives to engage in anticompetitive foreclosure.

This is particularly important in situations where the spread between the retail and wholesale prices is not negative, and the result of the price-cost test depends on somewhat subjective decisions on whether and to what extent certain categories of costs should be considered for the calculation of the LRAIC. In this kind of situations, evidence on apparent lack of

⁵⁶ Judgment of 27 March 2012 in Case C-209/10, *Post Danmark*, EU:C:2012:172, paragraph 33.

incentives to engage in anticompetitive foreclosure either because the losses incurred with this strategy could not be recouped or that the strategy is not marginally profitable because of the indirect competitive constraint exerted by suppliers of alternative inputs (which make that gains at the retail level not compensate losses at the wholesale level) should play a role in the assessment.

Secondly, according to paragraph 133 of the Draft Guidelines, “*where it is not possible to refer to the prices and costs of the dominant undertaking (e.g. if such data is not available or sufficiently reliable), then the prices and costs of competitors can be taken into account*”. In this regard, we understand that costs and specially prices of the dominant undertaking will in general be available and sufficiently reliable, so in principle the use of the costs and specially the prices of competitors will be very exceptional. In addition, the future Guidelines should clarify that prices and costs will likely have to be adjusted to carry out the test, considering that the spread between wholesale and retail prices should be calculated in any case considering the prices of the dominant undertaking, and that retail costs should reflect those of an equally efficient competitor. If the costs of the competitor are larger because of lack of scale or other reasons, they should be adjusted downwards to reflect as accurately as possible those of the dominant undertaking.

Finally, under paragraph 136 of the Draft Guidelines, it would be appropriate to apply the margin-squeeze test at a level of aggregation which corresponds to the relevant product market, although “[h]owever, in some circumstances, it may be appropriate to conduct the test at a more granular level, e.g. at the level of each individual offer.” In this regard, it must be noted that this approach is in general not justified if the relevant market is correctly defined and an equally efficient competitor can compete in general for the whole of the market. Besides, the application of this kind of tests, that sometimes require the adoption of relatively subjective decisions on how to distribute costs across different products or clients/segments, at a very disaggregated level may lead to erroneous conclusions. Therefore, it would be advisable to tone down this statement and clarify that this will be done only in very exceptional circumstances and that the potential impact of the criteria used to distribute costs across products, clients or segments will need to be assessed. It would be also advisable to provide further guidance on the specific circumstances under which the test could be applied at a more disaggregated level.

4.7. Conditional rebates/multiproduct rebates

According to paragraph 144(b) of the Draft Guidelines, the use of a price-cost test may not be appropriate when “*the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking’s very large market share or the presence of significant barriers to entry or expansion in the market, or the existence of regulatory constraints.*” In this regard, it should be noted that the circumstances under which the emergence of an as-efficient competitor is not possible are very restrictive, and in principle would be largely limited to markets with natural monopoly characteristics that are not dynamic and/or where the incumbent enjoys non-replicable advantages from current or past legal monopoly rights.

Considering this, the AEDC is of the view that the Guidelines should replace the rather generic description provided above that could in principle be applicable to many markets depending on how it is interpreted, by more restrictive and specific criteria or examples of the rather reduced set of situations or markets to which it would apply. Additionally, we respectfully submit that the price-cost test should be used even in this restrictive set of situations. In particular, the AEDC does not see any reason why a dominant undertaking could not apply rebates that would pass a price-cost test based on the cost of the (in this case, inefficient) competitors. The price-cost test using the costs of the incumbent should in any case also be used as a relevant piece of evidence in the assessment.

It would be also advisable to clarify that the criteria laid down in paragraph 145 of the Draft Guidelines for the assessment of the potential of rebates to lead to exclusionary effects should not be considered a “shopping list”. A given scheme of rebates cannot be considered exclusionary simply because it meets some or most of these criteria. The risk of competition authorities following this shopping list approach is high considering experience in the application of other Commission Guidelines (e.g. application of Guidelines on Horizontal Cooperation Agreements to information exchanges).

The assessment should always consider the specific characteristics of the system and the industry in question, as well as actual evidence on foreclosure of rivals based, e.g. on the evolution of sales-market shares. Besides, the AEDC considers that the size of the rebate, as a percentage of the total price (paragraph 145(b)) is not per se informative of its ability to produce exclusionary effects, considering that the same percentage rebate can be relatively low for a particular industry (e.g. one with significant economies of scale) and relatively

high for another one. A rebate can only be considered high or low as compared to an appropriate benchmark and this may change significantly across industries and cases.

According to paragraph 151 of the Draft Guidelines, the relevant cost standard for the price-cost test is the AAC. However, even if the AAC can be the relevant cost standard in many cases, depending on the case or industry involved (e.g. telecommunications) other cost standard may need to be considered (e.g. LRAIC).

4.8. Self-preferencing

The Draft Guidelines address a conduct that has not been analysed as a stand-alone abuse by the ECJ case law. For years now it has been argued (Bergqvist, 2020) that such practice was going to be the prevalent anti-competitive conduct in digital markets. However, there is still a long way to go in this figure, and in constructing a solid theory of harm that justifies its categorization as an anti-competitive practice. While neither the Commission, the GC or the ECJ defined the conduct as a stand-alone kind of abuse, it is surprising that the guidelines devote an entire section to it.

As a form of non-price discriminatory conduct with exclusionary effects, this behaviour is, as anticipated, prevalent in digital markets where prices are typically zero, making other forms of discrimination difficult. Additionally, the incentives to envelop services in neighbouring markets are, especially in digital markets, strong due to economies of scale and scope.

For the time being, the best existing clarification in this respect can be found in the well-known *Google Shopping* case, in which the Commission imposed a heavy fine (more than EUR 2,400 million) on the grounds that the popular Internet search engine falsified the search results provided through “adjustment algorithms” to give unjustified advantages to its own price comparison shopping services. The popular Internet search engine demoted the search results of its vertical search competitors and promoted its own vertical search result changing its conduct in an unjustified manner.

In the analysis in the Commission decision of this figure, there was a lack of a solid theory of harm based on data and facts, as has been expressed by leading academics (Akman, 2017). For this reason, as soon as this practice began to arouse the interest of the regulator, voices were raised calling for caution and the need to establish solid principles to analyse it (Ibañez

Colomo, 2020). As the practice also has pro-competitive effects, it was long considered that a company, even a dominant one, could treat its own business in other neighbouring markets differently, if the conduct did not have an exclusionary effect, or the efficiencies of the conduct were significant.

It is also true that a certain - and minority - doctrinal sector (Ahlborn, 2022) advocates a “restricted” concept of this practice of self-favouring, which, taken to the extreme, would limit it only to the conduct in the *Google Shopping* case.

In its 2021 ruling on the appeal against the Commission decision, which refer to the conduct as a “leveraging abuse”, the GC analysed Googles’ conduct, both the demotion and the promotion, as a discrimination that Google failed to justify. The GC missed the opportunity to outline the contours of a new category of abuse and, as in *SEN*, analysed Google’s combined conduct under the test of “competition on the merits” and exclusionary effects. In any case, it is a conduct implemented by algorithms, which is why a doctrinal sector (Bostoen, 2023) does not hesitate to describe Google's conduct as “algorithmic exclusion”.

In the opinion of Advocate General Kokott, everything pointed to the fact that this conduct will finally be “enshrined” in competition law as an autonomous category of abuse of dominant position contrary to Article 102 TFEU. References to Google's use of its adjustment algorithms (especially the one known as Panda) to improve its search results while harming those of its competitors are reiterated throughout the text.

In a recent doctrinal contribution, the former Chief Economist of the Commission from 2013 to 2016 has developed possible theories of the harm of this self-favouring conduct, which he categorises as “*situations in which an integrated platform discriminates in favour of its services or products to the detriment of those of a third party, for example, by making the latter less prominent, ranking them lower, degrading or delaying their access to the platform, or worsening their access conditions. As such, they may lead to partial or total exclusion*” (Motta, 2023:1).

Although the practice exists, like any other sort of discrimination, there is not a clear formulation of a theory of harm in the case law that would justify its mention in the Guidelines. Self-preferencing was not mentioned in the 2023 Call for Evidence and the Policy Brief that accompanied it.

However, in the text of the proposal finally published in 2024 there is an express section dedicated to self-favouring, or self-preference. It is succinctly defined (paragraph 156) as a situation in which “*a dominant undertaking actively grants preferential treatment to its own products compared to those of competitors, mainly through non-price behaviour*”.

Naturally, all this legal definition does is to codify the doctrine laid down by the GC in *Google Shopping*, to which the Draft Guidelines explicitly refer (footnote 330) in the text. Finally, paragraph 160 merely indicates that to determine whether such conduct may be abusive, the two conditions that it has been repeating for all abuses not subject to specific legal criteria must be met: that the granting of preferential treatment to own products departs from competition based on the merits, and that it is likely to produce exclusionary effects.

Although it does not settle the debate - as it does with the practice of margin squeeze - on whether this conduct can be classified as a stand-alone category of abuse, it at least takes a clear position on a debate opened by the *Google* case, stating that “[t]he importance of the product supplied by the dominant undertaking in the leverage market for competitors should not be understood as indispensability in the sense of refusal to supply, given that self-preference constitutes a different type of abuse; it is therefore not necessary for the criteria set out in the judgment of 26 November 1998 in *Bronner* to be met” (footnote 336).

However, in its recent judgment of 10 September 2024, despite ratifying the full validity of the Commission's reasoning as the GC does, the ECJ nevertheless avoids explicitly classifying the alleged conduct as self-preferential, limiting itself - as in the Draft Guidelines - to analysing whether it departs from competition based on the merits and produces an exclusionary effect.

Does it make sense, then, for the Guidelines to continue to consider this category of abuse as a stand-alone category, and how does the Guidelines' proposal on self-favouring tie in with the ECJ's statement in paragraph 186 that self-favouring by an undertaking in a dominant position is not, in itself, anti-competitive?

In general, and reiterating the comments made in the first part of this contribution, but applying them specifically to self-favouring, it does not seem that these Guidelines will alter much the analysis of the conduct of companies carried out by the Commission, which will be prudent, and without taking unnecessary risks will follow to the letter the jurisprudential doctrine emanating from the Union courts. In this sense, and despite slight grammatical

variations on some of the concepts used to date, the Commission will continue to carry out an analysis of the effects of the allegedly abusive conduct, before being able to conclude on its lawfulness or unlawfulness in accordance with Article 102 TFEU. As has rightly been pointed out (Peeperkorn, 2024), even with such a document the Commission could not go back on this effects-based approach that has been so clearly marked by the EU courts.

Indeed, as has already been pointed out (Killick et. al, 2024) in this regard, the Draft Guidelines suggest that the Commission is departing from this effects-based economic approach, insofar as it establishes a series of “presumptions of harm” for the anti-competitive conduct it sets out in the document. Some may consider that this is not a change of approach but simply a codification of existing case law and the extensive *acquis communautaire* on abuse of dominance.

It is true that the Commission's interpretation of the existing jurisprudence to configure its presumptions and the respective legal tests may be debatable, but that is precisely why it insists that they are rebuttable presumptions, and that companies can provide exculpatory evidence in their defence. In any case, the EU courts will have the last word on this, and on the validity of the proposed legal tests themselves.

On a similar note, and as already advanced in our introductory comments, self-preferencing seems to encompass different scopes of discriminatory behaviour in different sets of EU law.

Article 6(5) DMA defines self-preferencing in the following terms:

“The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.”

Conversely, paragraph 156 and ff. of the Draft Guidelines provide a much wider definition of self-preferencing, i.e. not only related to rankings or indexes, but involving any preferential treatment by a dominant undertaking of its own products. In theory and as some case law would confirm, the category would not be limited to the digital sector and would encompass leveraging dominance in one market to gain an advantage in a related market.

Even accepting that the behaviour can take place in different industries, the relevance of the conduct in the digital sector is beyond doubt. Therefore, providing different definitions in ex

ante digital regulation and ex post infringement guidance leads to industry confusion and seems unnecessary (see general comments on Section 4 above). Both dominant undertakings and third parties contracting with them need a clear legal framework in which legal concepts are homogeneous across different legal instruments irrespective of the competent authority and the moment (ex-ante/ex post) in which the said behaviour is under scrutiny.

Furthermore, the AEDC fails to see how the proposed category is different from traditional discriminatory abuses which indeed can produce effects in a connected market different to the one where the relevant undertaking holds a dominant position. For so long as no clear legal test is associated to such new category, nor has such test been provided or validated by the most recent case law of EU Courts, we would advocate for the elimination of the standalone category of self-preferencing.

4.10. Access restrictions

Once again, in access restrictions it is necessary to seek a consistent approach throughout the different EU law concepts. In this regard, Article 6(7) DMA defines interoperability obligations in the following terms:

“The gatekeeper shall allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant listed in the designation decision pursuant to Article 3(9) as are available to services or hardware provided by the gatekeeper. Furthermore, the gatekeeper shall allow business users and alternative providers of services provided together with, or in support of, core platform services, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features, regardless of whether those features are part of the operating system, as are available to, or used by, that gatekeeper when providing such services.”

The Draft Guidelines refer to interoperability case law in Section 4.2.3 related to refusals to supply. However, as acknowledged in the Draft Guidelines, refusals to supply are subject to a strict legal test and the ECJ recently reminded that such test is not applicable to situations other than absolute denials of access to indispensable infrastructure.

Bearing this in mind, the Draft Guidelines address other interoperability concerns in Section 4.3.4 devoted to access restrictions. This approach seems more in line with the “effective” interoperability concept included in Article 6(7) DMA and the recent ECJ ruling in *Google Shopping* which confirms the understanding of paragraph 165 of the Draft Guidelines: providing discriminatory access may be abusive even when the infrastructure is not indispensable. In this same vein, reference to failure to comply with a regulatory obligation as a form of access restriction in the Draft Guidelines may well include non-compliance with ex ante DMA obligations to provide effective interoperability.

In this framework, the Draft Guidelines fail to successfully identify clear boundaries between self-preferencing and access restrictions. It may well be that, as the ECJ suggests in *Google Shopping*, self-preferencing is a form of restricting access to an infrastructure or even that both behaviours amount simply to discrimination departing from competition on the merits. If such is the case, we would maybe suggest dealing with discrimination in Section 4.3 as a broader category of abuse that encompasses the different practices foreseen in both the self-preferencing and access restriction subsections, as well as many others that have been addressed in traditional case law or may come in the future⁵⁷.

⁵⁷ References: AHLBORN, C.; VAN GERVEN, G. and LESLIE, W. (2022): “Bronner revisited: Google Shopping and the Resurrection of Discrimination Under Article 102 TFEU”, *Journal of European Competition Law and Practice*, n° 2, pp. 87-98.
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4.9. Comments in relation to specific forms of abuse that are not present in the Draft Guidelines

The AEDC encourages the Commission again to take the opportunity to expand the guidance to certain specific types of abuse, which are not covered in the Draft Guidelines. In particular:

a) Abuse of economic dependence and abuse of relative market power (bilateral context)

There are circumstances in which a unilateral behaviour, which has the particular features and exploitative effects of certain abuses of dominance, is only possible in a bilateral context because one of them is economically dependent of the other, but not in the general market.

While differences in bargaining positions are common in most markets, and the fact that a trading partner is important for a company, or that it can exert heavy pressure in a commercial negotiation, this does not necessarily mean that the economic operator with more negotiation power is dominant vis-à-vis the other, or that it is dominant in the market in which it competes. In fact, in distribution or digital markets, there are many companies that compete fiercely and do not enjoy market power, while being able to behave independently from their suppliers or professional users (this is common in platforms and/or digital platform markets).

Therefore, we invite the Commission to provide further guidance as regards when a company is dominant in a bilateral relationship (using the abovementioned dependency analysis), and when the behaviour of a company can be an abuse in those bilateral uneven relationships would be helpful.

b) Abuse of proceedings or vexatious litigation as a form of abuse

In relation to the possibility of a dominant company may be considered to have abused its dominant position through the figure of abuse of proceedings or vexatious litigation, it may be of interest identifying whether there should be a higher standard of proof in the case of judicial action, as a fundamental right of the dominant company may be at stake and judicial organs may have already intervened in the dispute.

It would be desirable that the Draft Guidelines specifically include at least the minimum standard of assessment that competition authorities will consider in determining whether a dominant company's intervention in certain administrative procedures or complex litigation might constitute an abusive conduct by a dominant undertaking.

For this purpose, it may be helpful to further develop the elements identified as relevant by the competition authorities and the ECJ in previous cases, such as:

- i. the provision of deceptive and/or consciously misleading information to administrative or judicial authorities⁵⁸;
- ii. judicial action with inexistent winning prospects and/or with proven intention to foreclose the market and exclude competitors⁵⁹;
- iii. the (non-)necessity of a formal finding of judicial recklessness for a finding of abuse⁶⁰; or
- iv. the relevance of eventual diverging decisions or judgments by administrative or judicial bodies on the underlying facts (or law) which are the subject of the allegedly abusive litigation⁶¹.

5. General principles applicable to the assessment of objective justifications (Section 5 of the Draft)

Section 5 of the Draft Guidelines relates to the potential objective justifications of an otherwise abusive conduct, namely, that the conduct is objectively necessary or that it produces efficiencies that outweigh the effects of the conduct that benefit consumers. The burden of proof rests with the dominant undertaking.

As they stand, the Draft Guidelines establishes a much more stringent standard of proof to demonstrate efficiencies that to demonstrate capability of effects, including demonstrating

⁵⁸ Judgment of 6 December 2012 in Case-457/10P, *Astrazeneca v Commission*, EU:C:2012:770, paragraphs 93, 96 and 98.

⁵⁹ Decision of the Spanish National Markets and Competition Commission of 21 October 2022, S/0026/19 *Merck Sharp & Dohme, S.A.*

⁶⁰ Ibid.

⁶¹ Judgment of 13 September 2012 in Case T-119/09, *Protégé International Ltd v Commission*, EU:T:2012:421, paragraph 56.

that the efficiencies are the result of the conduct, that the conduct is necessary for achieving those efficiencies, that consumers will benefit. None of this is required under the notion of “capability of effects” that the draft describes. This imbalance is bound to increase the likelihood of false positives.

5.1. The need to develop a specific catalogue of objective justifications for each autonomous type of abuse

Article 102 TFEU does not include exemptions similar to those of Article 101.3 TFEU, but it is clear according to case law that before concluding the existence of an abuse, the conduct must be ascertained in order to confirm whether the potential efficiencies or objective justifications outweigh the potential negative effects of the conduct.

The case law sets forth that a company has the burden to evidence the justification that the conduct is objectively necessary or that it produces substantial efficiencies.

However, this need to confirm an objective justification is made once the conduct has been qualified as abusive, and not as an additional element when qualifying the conduct. We understand that the assessment of the potential infringement would be sounder and closer to the economic reality of the behaviour if advancing an efficiency defence or objective justification is not just a theoretical possibility but forces the Commission to engage with such arguments rather than merely dismissing them⁶².

In practice, the possibility of invoking objective justifications or efficiencies is more theoretical than practical, since in the vast majority of cases, these justifications have been rejected for lack of evidence and have not prevented the application of the prohibition.

Moreover, regarding the assessment of dynamic efficiencies by the Commission, it should also be really extended in practice to the field of abuse. Thus, competition authorities should consider not only static efficiencies- savings or cost reductions, evidenced by a short-term effects analysis, but also the so-called dynamic efficiencies, which are evidenced in a long-term analysis that, in addition to price, considers other parameters such as quality, investments, or time-to-market, innovation or structural changes in market conditions.

⁶² In this regard, an example of a too-easily-dismissed efficiency defense is arguably to be found in the *Qualcomm* (exclusivity payments) decision.

Thus, even if this could be challenging, it would be extremely useful to develop a specific catalogue of possible objective justifications, allowing companies to correctly identify objective justifications and efficiencies for each category of abuse (even in broad terms). In this way, a better understanding and focus will be achieved as to what type of conduct is supported, considering economic efficiency. In addition, having specific documentary support is paramount, as lack of evidence may lead to a wrong decision by the competition authorities. Likewise, the type of documentation required might vary with respect to different abuses, so it is convenient to know precisely what is expected in terms of evidence and documentation for each type of abuse.

5.2. The potential environmental defences as an objective justification

Moving on to the assessment of the objective justification, the AEDC would welcome an explicit reference on how certain types of abuse would be analysed in the light of sustainability criteria as an objective justification. Considering the importance of the subject within the Commission's regulatory and political agenda, this issue provides a perfect opportunity for the Commission to break ground on the matter.

The future Guidelines should detail the characteristics of sustainable practices of dominant undertakings that are suitable to be objectively justified. In this respect, the AEDC would welcome specific examples of practices that could be potentially considered an abuse but that, due to its sustainable nature, are suitable for objective justification. In this sense, the Commission should specify which are the relevant sustainable objectives that should “inspire” the conduct of dominant undertakings. As a (positive) consequence, dominant undertakings will have legal certainty when implementing their sustainable business plans and align its behaviour with the Green Deal objectives.

The Draft Guidelines should also detail which the relevant sustainable criteria would be in order to objectively justify the alleged anticompetitive effects of a given conduct. In this regard, the Commission should take the opportunity to clarify how a dominant undertaking should behave (i) in the most economically efficient way and (ii) in the least restrictive way, while (iii) achieving relevant sustainability objectives. The Commission should therefore clarify the standard of proof in order to counterbalance alleged hints of abusive conduct.

Clarifying these two points (i.e. types of eligible practices to be justified and sustainability criteria) is of particular relevance, as dominant undertakings with sustainable aims will be

granted (deserved) legal certainty. Moreover, clarifying these two points will prevent other undertakings from abusing their dominant position while claiming unrealistic sustainable objectives. In relation to the latter issue, by way of example, a dominant undertaking could limit the production shipped to a certain territory on the basis of sustainability criteria (lower transport costs, pollution, etc.).

We understand that these clarifications would be welcomed in a wide range of sectors but especially in the energy, manufacturing, and transport sectors. The inclusion of these specifications would give comfort to dominant undertakings that are aligned with the Commission’s sustainability goals. In this way, dominant undertakings would receive detailed guidance on how to implement sustainable practices that also respect competition law.

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