CRA response to draft Article 102 guidelines

Prepared for

European Commission

Directorate-General for Competition
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INTRODUCTION

1. We welcome the opportunity to contribute to the formulation of the Commission's updated Article 102 TFEU guidelines.[1] Since the publication of the 2008 guidance paper, there have been substantial developments in the case law and in market conditions, not least because of the growing importance of digital markets and services. As such we agree that it is appropriate to take stock of these developments and provide updated guidance.

2. Our submission is structured as follows.

   - Section 1 comments on the guidelines' "general principles" to identify abuse, which is the most novel, and potentially the most significant, of the Commission's updates to the 2008 guidance paper.
   - Section 2 comments on the guidelines' general principles to the assessment of dominance.
   - Section 3 comments on the guidelines' approach to some of the individual conducts where we identified specific issues.[2]
   - Section 4 comments on the guidelines' approach to objective justification.

3. An overarching comment is that, while there are aspects of the draft guidelines that are welcome, there are opportunities to provide further clarity; to provide a more rigorous basis for categorising different conducts as falling within or outside *"competition on the merits"*, and to explain how case law developed in more traditional markets will be applied to the technologies of the future.

4. Perhaps unsurprisingly, several of our comments call for a better integration of economic principles into the assessment. We believe that doing so would provide a sounder basis for the guidelines and one that would, in several cases, align better with the case law. Contrary to some, we do not see economics as inherently pro-defendant or anti-enforcement. Rather it provides a framework to ensure that competition enforcement is best targeted at conducts which are most likely to harm the competitive process and, ultimately, consumers.

5. These comments have been prepared by staff within CRA's European Competition Practice including Ugur Akgun, Matthew Bennett, Raphaël De Coninck, Dan Donath, Mikael Herve, Diana Jackson, Oliver Latham, Matteo Foschi, Sam Marden, Sara Ross, Domilė Butkevičiūtė, Christian Michel, Chara Tzanetaki and Liam Connolly. They do not necessarily reflect the views of CRA as an organisation or of CRA colleagues in other jurisdictions. While our comments reflect our experience from A102 cases we have worked on in front of the Commission and elsewhere, the views held within this response are

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1 European Commission *Competition Policy Brief*, Issue 1, March 2023. Available at https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf

2 For the avoidance of doubt, the fact that we don't discuss a specific conduct or aspect of the guidelines shouldn't be read as a full endorsement of the text.

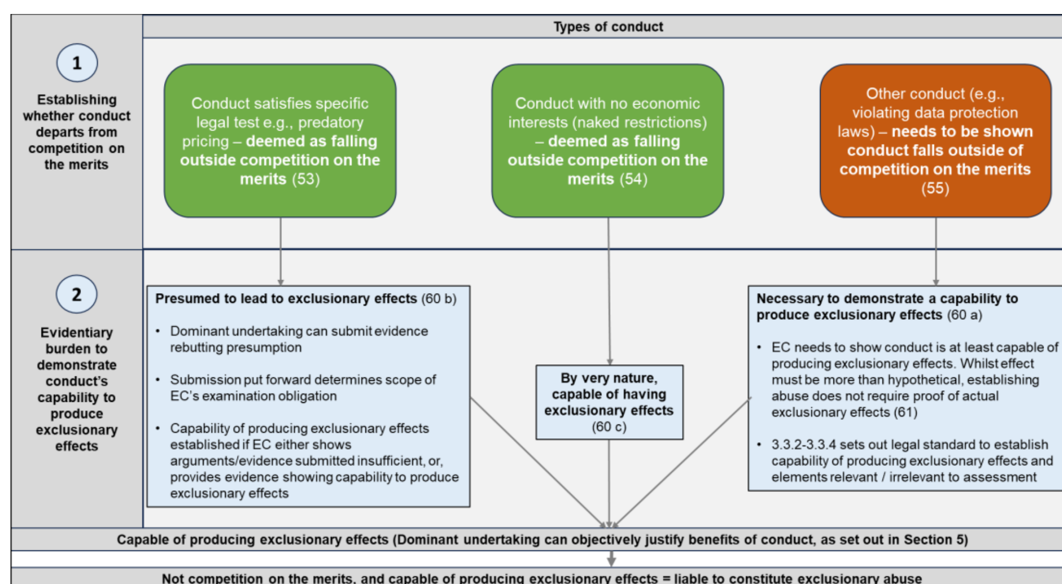
independent of any external advice or recommendations. This document was solely reviewed by employees of Charles River Associates.[3]

1. COMMENTS ON THE GUIDELINES' GENERAL PRINCIPLES FOR IDENTIFYING AN ABUSE

6. The main innovation of the guidelines is to frame its analysis around two concepts: (i) whether a conduct departs from competition on the merits; and (ii) whether it is capable of exclusionary effects.[4] The guidelines appear to view *both* as necessary conditions to identify an abuse while noting potential commonalities between these concepts and that their relative importance will differ across cases.[5]

7. The guidelines then delineate between: i) abuses with a pre-existing legal test to determine whether these two conditions are met; ii) naked restrictions which can only be explained by anticompetitive objectives; and iii) all other conducts where the guidelines list factors, based on the case law, that might point towards a conduct being inconsistent with competition on the merits or exclusionary. This two-step approach and the different approach across the three categories is illustrated in the Figure below.

Figure 1: The two-step process towards establishing exclusionary abuse



Source: CRA review of draft 102 guidelines

8. We agree with having different thresholds for different conducts and having scope for streamlined intervention against conduct that is "beyond the pale". It is economically reasonable to have a less stringent analysis of effects for conducts which are prima facie distortionary to competition and have no obvious competitive justification. In this respect

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3 In recent years staff in CRA's European Competition Practice have worked on multiple A102 cases advising firms including Amazon, Apple, Broadcom, Kelkoo, Microsoft, News Corp, Sabre, Unilever, Trainline, Viatris, Visa and Yelp. This includes work adverse to Google and Meta.

4 Para 45.

5 Para 46.

the singling out of a small number of behaviours in the context of naked exclusion is reasonable.[6]

9. We also agree that there is a wide body of law and a number of effective economic tests and any framework should incorporate these.

10. Finally, where the conduct is not obviously a naked abuse, and there is not established case law and economic tests, we agree that it makes sense for the Commission to consider both whether the behaviour is likely to exclude competition, and whether it is inconsistent with normal competition.

11. However, we are unconvinced by there being a two-step methodology that covers all potential abuses. In this respect we consider that the focus on the concept of "competition on the merits", as distinct from exclusionary effects, is not well defined. Our concerns apply across the three categories of conduct considered in the guidelines.

12. First, it is hard to map the guidelines' two-step approach to the existing tests in the case law. When conducts fail the tests established in the case law it is difficult to work out which of the two stages are being failed. For example in predation, if pricing is below AVC, is this not competition on merits, likely to lead to exclusionary effects or both? The guidelines appear to say the latter,[7] but, if that is the case, what is the value of splitting out these elements into a two-step test?

13. Second, the analysis of naked exclusions also does not map cleanly to a two-step test. Our read is that naked restrictions are those which are clearly not competition on merits, but this leaves the question of whether such conducts are capable of exclusionary effects? We would expect there to be some instances where exclusionary effects are unlikely or hard to establish (e.g. because it applies to a narrow segment of the market or the path towards exclusionary effects is more indirect or uncertain). In such cases, the requirement to fulfil both steps seems to add complexity more than it adds clarity – and runs contrary to the Commission's apparent aim to simplify the treatment of such restrictions.

14. Third, in the case of non-established tests, we assume the two-step test means that it is necessary to show that a behaviour is both a deviation from competition on the merits and capable of exclusionary effects. However, having to show both steps is going to make it more complicated than the previous guidance which simply considered whether there was going to be anti-competitive foreclosure. In this sense we consider that it is likely to make future cases more difficult rather than easier – as there are now two hurdles to clear.

15. Overall, the two-step process seems unnecessarily complicated, and confusing for the purposes of guidance. We would suggest simply moving back to the concept of anticompetitive foreclosure. If the EC is minded to retain the new two-step framework, further guidance on its application is required.

16. More guidance is needed on how the Commission will analyse conducts in the "non-established" bucket, those which are neither naked restrictions nor conducts with specific legal tests, particularly when it comes to "competition on the merits". Will they be handled more like naked restrictions or like the conducts subject to specific legal tests, which

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6 Para 60.

7 Para 47.

typically require a quantitative assessment of effects and issues like market coverage, and, in several cases, formal price-cost tests?

17. This uncertainty is underlined by the fact that the list at paragraph 55 mixes conducts which appear much more clearly objectionable (e.g. misleading or misusing regulatory processes) with ones which could be much vaguer or subjective (e.g. *"prevent[ing] consumers from exercising their choice"* or *"discriminatory treatment that favours [the dominant firm] over its competitors"*).

18. The Commission should make clear that conducts which are less obviously objectionable will warrant a more careful analysis of effects and that the analysis of competition on the merits should be linked to a formal theory of harm. Relevant questions in our view would include:

    - Whether there are potential benign explanations for the conduct.
    - Whether the conduct will impact competitors regardless of how efficient or capable they are (e.g. as is the case when the dominant firm has a market regulating role).
    - Whether there is evidence of anticompetitive intent (noting that this is not necessarily required to find an abuse).
    - Whether the conduct is an ordinary commercial practice (noting that conduct which is normal for non-dominant firms may still become abusive for dominant ones).
    - Whether there is a natural path for the conduct in question to result in consumer harm.

19. Providing this sort of guidance would also help strengthen the link between the guideline framework and the approach to conducts with specific legal tests (e.g. predation, margin squeeze, and tying). Our read is that the case law has set a higher bar for evidence on anticompetitive effects for conducts which represent normal commercial practices or which have potential positive justifications. The guidelines should reflect this.

20. We appreciate that consumer welfare is not a fashionable concept nowadays, but, it should play a role in deciding whether conducts deserve being treated more like naked restrictions or more like predation/margin squeeze. It would be wrong in our view to save these questions purely for the final analysis of objective justification.[8]

21. **Regardless of how the guidelines are structured, they would benefit from greater clarity as to when the AEC *principle* applies and when it doesn't.** The guidelines cite the case law to make clear that competition on the merits can result in the exit of *"competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice quality or innovation".*[9] Several of the established legal tests (e.g. predation and margin squeeze) use price-cost tests explicitly based on an as efficient competitor standard.

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8 Para 58.

9 Para 51.

22. However, the guidelines also state that price/cost tests are less relevant outside of pricing abuses and that it is not necessary to show that *"actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking".*[10]

23. This leaves multiple unanswered questions about the AEC *principle* (as distinct from the AEC *test)* and how it should be applied.

24. First, it would be good to clarify that exclusionary conduct typically requires the capability to foreclose as efficient competitors (i.e. that the AEC principle generally applies even if an AEC test may not be available or useful). The guidelines never really say this in terms, but it seems now to be a pretty clear message from the case law, particularly in light of the latest judgment in Intel.[11]

25. Second, it would be good also to clarify how the AEC principle maps to the concept of competition on the merits: is exclusion of AECs a sufficient condition to identify an abuse, for example, even if it is not a necessary one?

26. Third, it would be good to clarify the circumstances where the AEC principle will be departed from. These could include instances where:

- the dominant firm is in a quasi-regulatory role and is able to foreclose competitors no matter how efficient they are (e.g. the Super League case).
- the conduct is clearly "beyond the pale" (e.g. a case of naked exclusion) and the question of whether the conduct impacts as efficient firms is a distraction.
- the conditions of the market/conduct are such that the prevention of entry of a less efficient competitor is problematic.[12] For example, this could apply in a market with very strong scale or network effects and where the conduct makes it impossible for a rival to obtain the scale they need to become as efficient as the incumbent, or instances where a less-efficient competitor is an important competitive constraint.

27. The last point appeared in the 2009 guidance paper[13] and the EC's recent competition brief.[14] It seems to us a key policy question, especially in digital markets, and the guidelines would benefit from setting out the Commission's views on this issue.

28. We feel that the guidelines need to grapple with them in order to provide a coherent picture in light of the case law. Otherwise, one is left in a peculiar situation where some categories of conduct (e.g. predation and margin squeeze which both rely on price/cost tests using the dominant firm's own costs) are judged on an AEC standard and others are not, with no economic rationale presented for why this difference in treatment should exist.

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10 Para 74.

11 Judgement of 24 October 2024, *Intel v Commission,* C-240/22 P, C:2024:915, paras 328-331. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CJ0240

12 Judgement of 6 October 2015, *Post Danmark,* C-23/14, C:2015:651, paras 59-61. Available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62014CJ0023

13 European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Para 24. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XC0224(01)

14 European Commission *Competition Policy Brief*, Issue 1, March 2023. Available at https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf

29. **How should evidence on actual market developments feed into the assessment?** The guidelines state that an abuse finding only requires that a conduct is *capable* of anticompetitive effects and does not require evidence of actual effects.[15] This is consistent with the case law and, if competition enforcement is to be timely and effective, we agree it needs to be possible to intervene before anticompetitive effects have manifested. However, we have two key observations.

30. First, the guidelines should clarify that, while it is not necessary to show that the conduct actually had foreclosing effects, it is necessary to document a mechanism by which such effects could manifest from the impugned conduct. In most cases we would anticipate this to involve empirical analysis and market data. This requirement is consistent with established case law on e.g. margin squeeze, where a conduct is presumed to be capable of anticompetitive effects subject to an empirical imputation test among other circumstances.[16] It seems to have been clearly set out in the recent Shopping Judgment.[17]

31. Second, in many circumstances evidence on actual market developments will be useful to shed light on the likely effects of the conducts. Our concern is that the guidelines could be interpreted as saying that actual market developments are relevant when they support a finding of anticompetitive effects, but not when they refute it. Specifically, the guidelines say that, if the conduct has been in place for a long time, evidence of market developments *"may provide evidence of the conduct's capability to have exclusionary effect"*.[18] Such an asymmetry would be illogical and the text should be altered to more neutral language such as *"may provide evidence of whether the conduct is capable of having exclusionary effect".*

32. **Is there a de-minimis threshold?** Paragraph 75 relies on Post Danmark II to say that there is no de-minimis threshold for finding an abuse stating that *"any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition"*.[19] This statement risks causing confusion given the guidelines elsewhere accept that the analysis of whether a conduct is capable of exclusionary effects will often involve empirical analysis (e.g. paragraph 62 points to evidence of the extent of the allegedly abusive conduct as a factor determining whether it has exclusionary effects). As above, we think that the extent of evidence necessary to find anticompetitive effects should depend on the nature of the conduct being considered, with less evidence needed for conduct more akin to naked exclusion and more evidence needed for conduct which reflects normal commercial activity or which has a potential benign justification.

33. The lack of a *de-minimis* threshold for exclusionary effects seems particularly undesirable from a policy perspective for self-preferencing and, to a lesser extent, access restrictions. As the Draft Guidelines explain, self-preferencing is commonplace in certain sectors of the

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15 Para 62.

16 Judgement of 17 September 2011, *TeliaSonera*, C-52/09, C:2011:83 para 61-74. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0052

17 Judgement of 10 September 2024, *Google Shopping*, C-48/22, ECLI:EU:C:2025:726, para 224-225. Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=289925&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2058632

18 Para 71(g).

19 Para 75.

economy and there is no established legal test for self-preferencing.[20] In this context, the lack of a *de-minimis* threshold for self-preferencing is likely to lead to significant uncertainty for businesses and even businesses making efforts to avoid self-preferencing may find it impossible to ensure they are competition law compliant. While access restrictions may be less commonplace, according to the guidance they include a wide range of conducts including changes to the way existing inputs are supplied. It is not uncommon for firms to make changes to the terms under which products are supplied for legitimate commercial reasons and in many cases these changes will make at least some market participants worse-off. A *de-minimis* threshold would provide legal certainty for firms considering the way they supply inputs to downstream competitors.

2. COMMENTS ON "GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF DOMINANCE"

2.1. Single Dominance

34. The guidelines' discussion of dominance is mostly uncontroversial. For single dominance it outlines the role of market shares, barriers to entry/expansion, and countervailing buyer power. However, there are important areas where changes are warranted.

35. **The guidelines should provide more clarity on the level of market share below which dominance is unlikely.** The previous guidelines were valuable not only because they provided guidance for when a firm was likely to be dominant, but also for when a firm is unlikely to have market power and therefore not be dominant. The current guidelines no longer provide this latter insight. In the previous guidance the Commission helpfully pointed out that low market shares are generally a good proxy for the absence of substantial market power – and set out that the Commission's experience is that dominance is not likely if the undertaking's market share is below 40% in the relevant market. The Commission also made clear however, that this was not a safe harbour, and that there could be instances where shares below 40% will still be dominant (giving the example of capacity constraints).

36. The draft guidelines remove the statement regarding shares below 40% and note only that shares below 10% have been found to exclude the existence of a dominant position save in exceptional circumstances. In our view this is unnecessarily conservative.

37. Without guidance on what level of market share implies dominance is unlikely, some of the new statements regarding relative market shares risk being interpreted incorrectly. Specifically whilst we agree that dominance is more likely when an undertaking holds a high market share and this share is much larger than that of its competitors, it cannot be true that dominance is likely in a market in which one firm holds 15% market share whilst all the other firms in the market hold 3% market shares.

38. In our view providing guidance on when dominance is unlikely to be true is particularly important in the area of Article 102, as absent such guidance it may lead to firms curtailing behaviour that is beneficial to competition and consumers. This is because many of the behaviours that may be considered potential abuses when a firm is dominant, have significant benefits in competitive markets or where a firm is not dominant. For example, we would not want to dissuade firms from pricing aggressively in order to win market share, or provide bundled discounts, because they were concerned that at market shares above

20 Paras 156-157.

10% they would be potentially found to be dominant. Nor would it be desirable for firms with low market shares to be made to undertake complicated self-assessment exercises, simply due to there being a risk of them being found dominant.

39. As such we would strongly urge the Commission to provide clear guidance on when dominance is unlikely to be a concern.

40. **Areas where the discussion of entry barriers could be clarified and nuanced.** We have two main comments on the new section on barriers to entry.

41. First, the previous guidance paper considered equally both the instances in which a dominant company may be constrained in its position through entry or expansion, as well as the role that barriers to entry and expansion might play in finding dominance. The current draft appears to focus more on the role of barriers to entry and expansion in creating dominance, rather than how ease of entry and expansion may constrain dominance. Specifically, the previous guidance was helpful in articulating the necessary conditions for expansion or entry to be considered as a constraint on market power and dominance. It talked about the requirement for entry and expansion to be sufficiently likely, timely, and significant enough to deter or defeat the exercise of substantial market power. This guidance language appears to have been dropped from the draft guidelines. Reinstating these conditions to make it clear what a firm would have to show in order to not be viewed as dominant would be helpful.

42. Second, we welcome the additional guidance on the factors that may contribute to barriers to entry and expansion and agree with those factors, including the inclusion of behavioural biases of consumers as a potential barrier to entry and expansion. We also welcome the additional paragraph on platform markets and network effects, given the increasing number of cases in this area.

43. However, the discussion of network effects should be more nuanced. Currently, the guidelines correctly note that network effects can create entry barriers, particularly in the presence of single homing,[21] but network effects are not monolithic, and their impact will depend on market context. Relevant questions include the salience of network effects to a product's quality as compared to other factors, whether network effects are "local" or "global" in nature, whether network effects are subject to decreasing returns such that a smaller network can be a viable alternative to a larger one, and whether customer demand is such that network effects can be "ported" from one supplier to another (e.g. because a business can shift a large volume of users from one supplier to another en masse).[22] At the moment, the guidelines risk giving the impression that the mere existence of network effects contributes to significant entry barriers when this is in fact a context specific question.

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21 Paragraph 31 "*In particular in platform markets, network effects can also create barriers to entry and expansion. This is because a rival platform that wishes to enter the market may have to persuade a critical mass of users to switch platform. In the case of direct network effects the willingness of users to switch to a new platform is dependent on the willingness of users on the same side of the platform to switch whereas in the case of indirect network effects, the willingness of one group of users to switch to a new platform depends on the willingness of the group of users on the other side of the platform to switch. A market entrant can thus face the difficulty of simultaneously attracting a sufficient number of users on both sides of the platform65. Entry barriers resulting from network effects may be even higher when users single-home*".

22 For an accessible discussion see Zhu, F and Iansiti, M. 2019. "Why some platforms thrive and others don't", *Harvard Business Review*.

44. **The guidelines on buyer power should be further refined to capture how large counterparties can exert bargaining leverage.** The section on countervailing market power is largely unchanged with respect to the previous guidance paper. The most significant change is an additional statement that "*Countervailing buyer power differs from general bargaining or negotiation power, which refers to the ability to favourably influence the outcome of a negotiation."* with a supporting reference to paras 242, 243 and 257 in the Motorola Decision. We found this statement somewhat cryptic, and believe the draft guidelines would be improved by explaining succinctly what the difference between general bargaining and countervailing buyer power is.

45. The Motorola Decision reference appears to argue that the fact that a customer has a strong bargaining position due to the existence of its own market power, is not sufficient to show countervailing buyer power.[23] We consider that this is a relatively contentious argument that has not been thoroughly tested and has potentially significant implications in a range of cases. For example, it could be taken to imply that in a case where there is an upstream monopolist of an input, faced with a monopoly distributer of that input, the upstream monopolist cannot be said to be facing countervailing buyer power. This is inconsistent with a standard bargaining model which would generally predict that the downstream monopolist would negotiate lower input prices from the upstream firm compared to when there are multiple distributors.[24] As such we suggest that the Commission either clarifies this statement or removes it.

2.2. Collective Dominance

46. We welcome the Commission's guidance on collective dominance. We also agree with the framework set out in the guidelines – that for collective dominance to exist absent structural links, one must demonstrate that (i) reaching terms of coordination is feasible (ii) coordination can be sustained internally and (iii) coordination can be sustained in the face of external forces.

47. We note that there is extremely limited case law in applying this framework to collective dominance, with most of the case law being in the context of finding coordinated effects in merger investigation. Given the test for mergers is understandably different to that of collective dominance (considering how the merger changes the criteria rather than merely whether they exist) we consider this is an area which should be left relatively open.

23 Specifically the passage gives the example of Motorola having one set of essential patents that a customer needs, whilst the customer has another set of essential patents that Motorola needs. The decision argues that the fact that Motorola may reduce the price of its patent in order to secure the use of the customer's patent, does not imply that it does not have market power, merely that it is willing to take some of the payment 'in kind'.

24 Most bargaining models predict that reduced concentration downstream will reduce bargaining leverage if it results in there being "diminishing returns" to coming to agreement with multiple counterparties. This will be the case if, for example, agreeing to work with one distributor but not another will result in sales from the latter distributor being diverted to the former. See, for example, Chipty T. and Snyder C., 1999. "The role of firm size in bilateral bargaining: a study of the cable television industry", *The Review of Economics and Statistics*.

3. COMMENTS ON (SOME) SPECIFIC CONDUCTS

3.1. Tying and bundling

48. Paragraph 89 of the guidelines sets out legal tests established in the 2007 Microsoft case and subsequently applied in the 2022 Google Android case. These are that: (i) the tying and tied products must be separate products; (ii) the undertaking concerned must be dominant in the tying product; (iii) the dominant firm "*must not give customers a choice to obtain the tying product without the tied product (a situation referred to as 'coercion')*"; and (iv) the conduct must be capable of having exclusionary effects.

49. The underlying case law is well established, but there are places where more guidance could be provided and the guidelines could be better future proofed.

50. **How would features of existing products and history determine whether the tying and tied products are two separate products?** The draft guidelines recognise that *"[t]ying and bundling are common practices which may provide customers with better products or offerings in more cost-effective ways"*.[25] However, when discussing the issue of whether two products are separate or not, there is no recognition of how those efficiencies shape firms' offerings. The guidelines seem to assume that, if there is a separate demand for the tied product, then selling it as a bundle with the tying product would be motivated by a desire to exclude. In our view, the assessment of whether the tying and tied products are separate cannot be complete without considering whether bundling is a reasonable tool to serve the consumers' needs.

51. A challenge is that the case law is based on the combination of distinct applications (the Windows OS and the Internet browser, the Google Play Store and the Google search application). Future cases will likely involve the integration of *functionality* within an existing product (e.g. the addition of AI-powered functions to existing products and services). There is an important open question about how the Commission will distinguish potential anticompetitive behaviour from incremental product improvements akin to the addition of a digital camera to a smartphone.

52. **What is coercion?** Relying on the Microsoft case law the draft guidelines state *"[as] coercion only requires that customers are not given the choice to obtain the tying product without the tied product it can still exist even if the party accepting the tied product is not forced to use it or is not prevented from using the equivalent product supplied by a competitor of the dominant undertaking*".[26] We have three concerns about the draft guidelines' approach to coercion.

53. First, the draft guidelines do not explicitly state when any coercion stops. Our interpretation of the case law is that coercion would no longer exist when the tying product is made available standalone, but this is not made clear in the guidelines.

54. Second, the draft guidelines do not clarify whether the customers who are not given a choice need to be *all customers* of the dominant firm or whether the coercion criteria would be satisfied if customers in a specific market segment were not given a choice.

55. Third, the degree of consumer inertia and bias was an important feature of the Microsoft and Android cases that the draft guidelines rely on extensively. Such behavioural biases

25 Para 89.

26 Para 92.

can be very relevant for products purchased by consumers, but they are not universal. In particular, they may be less relevant for products purchased by businesses who are likely to approach product procurement decisions more rationally.

56. **What scale of competitive advantage is required to identify exclusionary effects?** The draft guidelines state *"[t]his may be the case if the tying confers a significant competitive advantage on the dominant company in the tied market that is unrelated to the quality of the tied product, where that advantage is unlikely to be offset by competitors"*.[27] The presence of economies of scale or scope and the presence of network effects are mentioned as potential sources of this type of advantage. However, how the assessment of these factors would proceed is vague and would benefit from clarification. Given that product integration often creates benefits (e.g. in terms of price reductions and greater customer convenience) it would be wrong to set too low a threshold for identifying exclusionary effects. Indeed, the classic literature on tying would say that tying will typically increase consumer welfare unless it risks the exit of standalone rivals.[28]

57. **How to use evidence on market developments?** As in the section on general principles the draft guidelines imply an asymmetric use of evidence of ex-post market developments with such evidence able to confirm anticompetitive effects, but not refute them.[29] As discussed above, we would urge the Commission to take a more neutral approach.

58. We believe this neutral perspective is particularly critical for assessment of tying and bundling which can benefit consumers. Such an approach would also align the assessment of tying with the analysis of conglomerate mergers where it is recognised that there is a potential trade-off between positive and negative effects.[30]

3.2. Predatory pricing

59. Analysis of predation in "vanilla" product markets is well understood and the draft guidelines do a good job summarising the relevant tests and cost metrics. However, more novel settings, particularly in digital markets, generate new potential rationales for below cost pricing, which need to be considered.

60. It would be good for the guidelines to acknowledge these possibilities and provide some steer as to how they will be assessed. At a minimum, the guidelines should specify that they are reflecting a case law which has in mind traditional one-sided markets.

61. We see the following key outstanding questions.

62. **How will the EC approach below cost pricing in two-sided markets where monetisation occurs indirectly?** We doubt anyone would seriously suggest Google or Facebook is predating because its user-facing price (typically zero) is below cost. Rather it

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27 Para 93.

28 Whinston, MD. 1990. "Tying, foreclosure and exclusion", *American Economic Review.*

29 Para 95 states that *"when the tying practice at stake has been in place for a long period the Commission may have a more complete evidentiary basis to assess whether such tying has been capable of having exclusionary effects. Where it is carried out, this closer examination of actual market developments aims to identify any evidence confirming the capability of the tying to have exclusionary effects"* (emphasis added).

30 European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, para 92. Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC1018%2803%29

is recognised that these services are monetised in related markets.[31] This should be clarified.

63. **How will the EC approach below-cost pricing which is motivated by spillover benefits to complementary products or a broader ecosystem?**

64. **How will the EC approach below cost pricing motivated by building scale economies or market penetration?** In traditional markets one might assume that a dominant firm will already be operating at an efficient level of scale, but this may not be true in digital markets. One can think of examples from ride hailing, to social media, to artificial intelligence of even well-established firms making significant losses.[32] Similarly, how will the EC approach freemium offerings in which a firm is willing to offer a free version potentially at a loss with a view to converting a sufficient proportion of consumers to make the offering profitable overall?

65. **What is the role of opportunity costs?** The draft guidelines state *"..it may be appropriate to account for opportunity costs of the dominant undertaking*."[33] We are not aware of precedent covering opportunity costs in a predation setting. It is not clear in what circumstances opportunity costs would be considered and how they would be accounted for as part of established predation tests. Specifically, some guidance on how they would be estimated and included in a cost measure such as the AVC or LRAIC would be helpful. We also note that opportunity costs can also be negative if spillovers or scale/penetration benefits exist (i.e. opportunity costs can provide a justification for low prices).

66. While it may not be realistic for the guidelines to enumerate all these possibilities, it would be desirable for the EC to acknowledge the potential for benign drivers of below cost pricing and to give a sense of how it would approach and test such justifications. The current discussion of scope and reference period provides no guidance on how the tests would apply in less vanilla settings.

3.3. Margin squeeze

67. As for predation, the guidelines give, we believe, a balanced summary of the legal test on margin squeeze including the role of price/cost tests. Our only comment relates to a practical issue that may become more relevant going forward.

68. Margin squeeze is most relevant in telecom markets. As telecom markets converge towards bundled offers the relevance of some standalone products can diminish for entry of competitors. Yet, the dominant firms still need to make sure they do not create a margin squeeze. When a firm is dominant in supply of both the upstream input and retail product the need to include the product also in competitive bundled offers can make this a more challenging task compared to a situation without those bundles. A lower downstream price for the standalone product makes it less likely that mixed bundling raises leveraging concerns, but it makes it more likely that a margin squeeze occurs for the standalone product. It would be helpful for the draft guidelines to discuss the approach to margin squeeze for products that are also sold as part of a bundle.

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31 The impact of two-sidedness on predation tests is discussed in the literature. See, for example, Wright, J. 2004. "One-sided logic in two-sided markets", *Review of Network Economics.*

32 See, for example, "Blitzscaling" by Reid Hoffman.

33 Para 118.

3.4. Exclusive dealing and rebates

69. The draft guidelines contain different sections on exclusive dealing (which is deemed to be subject to a specific legal test), conditional rebates that are not subject to exclusive purchase or supply requirements, and multi-product rebates (which are not). The guidelines argue that exclusive dealing is presumptively anticompetitive with a need to look at all the circumstances only when evidence is provided that the conduct is not capable of such effects.[34] By contrast, other categories of discount require an analysis of the Intel conditions and in the case of a volume discount, require an application of price-cost tests.

70. The case law on rebates has moved on since the draft guidelines were published with the latest Intel judgment of 24 October 2024 and we would urge the Commission to rework its guidelines to provide clarity on how it sees these latest developments.[35]

71. To our mind the following edits would improve the clarity and coherence of the guidelines.

72. First, it would be good to acknowledge that the concerns around exclusive dealing and rebates share a common economic mechanism: that a dominant firm can leverage its position to tie up a sufficient proportion of customer demand to foreclose rivals, and hence can be considered in a common economic framework.

73. Second, rather than relying on form-based categorisation, the guidelines should set out the full range of economic factors that will be relevant to determine whether a given discount scheme is likely to have anticompetitive effects and provide a sense of how these would be balanced.

74. Third, the Commission should provide clarity on how it views the relevance of the AEC principle and test. As discussed in Section 1 above on general principles, the guidelines would benefit from saying explicitly that the AEC principle is the typical standard and setting out the specific circumstances where it will be departed from (e.g. instances where the conduct itself makes it impossible for AECs to emerge and that the foreclosure of less efficient competitors will have negative welfare effects).

75. Fourth, the discussion of competition on the merits should take into account of the industry context in which a practice occurs. There seems to us a marked difference between exclusivities with the potential effect of leveraging must have demand to foreclose competition or otherwise prevent rivals from achieving scale[36] vs. situations where customers prefer to source their demand from a single provider, there are multiple scaled competitors capable of competing ex-ante for the contract, and there might be benefits (e.g. in terms of relationship-specific investments) from such forms of contracting.

76. We believe that this more streamlined approach would better reflect the case law and the underlying economic principles.

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34 Paras 82-83.

35 Judgement of 24 October 2024, *Intel v Commission*, C-240/22 P, C:2024:915. Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=291567&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6983619

36 For a classic reference see Rasmusen, EB. Ramseyer, MR. Wiley, JS. 1991. "Naked Exclusion", *American Economic Review.* This shows how exclusivity provisions can be used to exclude competition if they make it unviable for any other rival to reach their minimum efficient scale.

3.5. Self preferencing

77. Self preferencing is defined and discussed only briefly. The examples of self-preferencing given are "*the positioning or display of the leveraged product in the leveraging market, manipulating consumer behaviour and choice or manipulating auctions*." The first example is linked to the Google Shopping and Amazon Buy Box cases which both concerned the presentation of third-party offerings; the second to Servizio Elettrico Nazionale where customer consents for marketing communications were apparently gathered in a way which limited competitor marketing to customers.

78. Abusive self-preferencing is to be identified with references to the general criteria for competition on the merits and whether the conduct is capable of exclusionary effects. For determining whether self-preferencing is competition on the merits three additional criteria are set out, whether:

    1. *"the preferential treatment takes place on a leveraging market that constitutes an important source of business for competitors in the leveraged market"*

    2. *"the preferential treatment is likely to influence the behaviour of users, irrespective of the intrinsic qualities of the leveraged product"*

    3. *"the preferential treatment is likely to be contrary to the underlying business rationale"* of the dominant firm.

79. The second criteria is, in our view, unnecessarily broad. Any behaviour departing from perfect symmetry is likely to influence the behaviour of users to some extent, but it is recognised in para. 157 that self-preferencing is widespread in certain sectors of the economy and, as such, is not in and of itself a clear candidate for a departure from competition on the merits. It would be helpful if the degree to which the behaviour of users would need to change were clarified or alternatively, 55(a), which frames the departure from competition on the merits, could be relied upon to make the same point.

80. Our concerns over the broad definition of self-preferencing that departs from competition on the merits is reinforced by the apparent lack of a *de minimis* threshold for exclusionary effects where *"once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature*".[37] We are concerned that, particularly in conjunction with the low standards indicated for a finding of not reflecting competition on the merits, the result is a lack of certainty for firms and would in effect outlaw conduct that in most circumstances is normal conduct.

81. Self-preferencing can also arise for reasons that benefit consumers. For example:

    1. Consumers of a service are likely to already have some degree of affinity for the service's operator. In such a case, it might be desirable for the service to more prominently display its other offerings.

    2. Unequal treatment can in some cases reflect the internalisation of externalities. For example, digital platforms have a stronger incentive to ensure a good experience for their customers than individual participants on the platform.

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37 Para 75.

3. Firms may face lower transaction and monitoring costs for promoting their products on their own properties than elsewhere and the wedge between these costs can mean it is economically efficient for firms to self-promote.

82. Indeed, there is a range of papers showing that self preferencing can create benefits and can have ambiguous welfare effects which are driven by context-specific factors such as a service's monetisation model.[38]

83. While these benefits can in principle be used as part of an objective justification defence, we believe it is appropriate for them to feature also in an assessment of competition on the merits. We believe it is appropriate to allow self-preferencing to a "normal" extent, saving enforcement for more egregious cases of self-preferencing including those with an intent to foreclose, a large negative impact on rivals, or some other aggravating factor.

84. We note in this respect that the test for Margin Squeeze, which is essentially a form of price-based self-preferencing, requires the use of a price-cost test using the dominant firm's own costs. Similarly, the case law on discriminatory conduct requires a level of appreciability.[39] There should be some alignment in the standards across conducts or at least an explanation for why they merit different treatment.

4. COMMENTS ON OBJECTIVE JUSTIFICATION

85. The guidelines note that conduct that is liable to be abusive can still be objectively justified and summarises the conditions that the conduct must be necessary to achieve a legitimate aim, be proportionate, and outweigh anticompetitive effects.[40]

86. Our main comment is that it would be wrong to confine analysis of the economic benefits stemming from a conduct to the assessment of objective justification. Rather, such analysis should be considered relevant to the guideline's key question of whether a conduct reflects competition on the merits. Conduct which can be shown to have a positive rationale and/or prima facie beneficial effects should be treated differently during the initial analysis of abuse (e.g. by requiring a higher standard for whether it is likely to have anticompetitive effects).

87. Allowing for such evidence to be used in at least some form during the initial analysis of abuse would be in line with the guidelines' proposed segmentation of conduct into different categories (e.g. with naked exclusion treated differently from more ambiguous conducts) and would bring things more in line with Article 101 cases where treating an agreement as *"by object"* requires an analysis of the economic context within which it occurs.

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38 A literature review by Martin Peitz summarises the situation as follows *"while more empirical work is needed, there are strong indications that some platforms engage in practices that may be called self-preferencing, but this is not always consumer welfare detrimental"* (emphasis added). See Peitz, M. 2022. "The prohibition of self-preferencing in the DMA, *CERRE.* For a non-exhaustive list of academic articles see, for example: Bourreau, M. and Gaudin, G. 2021. "Streaming platform and strategic recommendation bias", *JEMS.* Etro, F. 2020. "Product selection in online marketplaces", *JEMS* and Lee, KH. Musolff, LA. 2023. "Entry into two-sided markets shaped by platform guided search".

39 Judgement of 20 December 2017, *Meo – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, Case C-525/16, C :2017:1020. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CC0525

40 Paras. 167-9.