

**PUBLIC CONSULTATION ON THE DRAFT GUIDELINES ON THE
APPLICATION OF ARTICLE 102 TO ABUSIVE EXCLUSIONARY
CONDUCT BY DOMINANT UNDERTAKINGS**

CONSULTATION RESPONSE

8 November 2024

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1. INTRODUCTION

- (1) This response represents the views of Allen Overy Shearman Sterling LLP on the European Commission (EC) consultation on the Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) to Abusive Exclusionary Conduct by Dominant Undertakings (**Draft Guidelines**), dated 1 August 2024.
- (2) We welcome the opportunity to respond to this consultation and would be happy to discuss any of the points made in this response if the EC would find this helpful.
- (3) We confirm that this response does not contain any confidential information, and we are happy for it to be published on the EC website.
- (4) The purpose of the Draft Guidelines is to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU, as well as to provide guidance to national competition authorities and courts in their decision-making. The Draft Guidelines purport to restate the case law of the European Union (EU) Courts. However, while we welcome this effort, a thorough reworking is needed to achieve the stated purpose and to correctly reflect recent Article 102 TFEU case law.
- (5) In particular, the Draft Guidelines do not faithfully represent the case law of the EU Courts on important points. In multiple instances, considerations in judgments are generalized without accounting for the specific factual circumstances of the case at hand, creating at times the (false) impression that a general rule would exist. In this regard, the EC should be aware that the Draft Guidelines will be perceived at national level as a restatement of the case law and be relied on by national courts and competition authorities in this way.
- (6) The failure to provide the needed legal certainty also stems from a lack of explanation of key concepts such as “*competition on the merits*”, “*price-cost models*”, and others. It would be helpful to include examples in the text (see, e.g., paragraph 40 of the Vertical Guidelines¹), and provide guidance based on examples derived from the EC’s decision-making practice, including any sector-specific considerations, to make the text more instructive and practical (e.g. concerning conduct where there is no specific legal test). The EC should explicitly state where it has made choices when interpreting the case law, clearly setting out why it prefers a specific interpretation.
- (7) We set out below our comments on various sections of the Draft Guidelines. We have refrained from commenting on the Draft Guidelines paragraph by paragraph and have adopted a selective approach. Therefore, absence of input on an issue does not necessarily reflect our agreement.

2. GENERAL PRINCIPLES APPLICABLE TO THE CONCEPT OF DOMINANCE

- (8) The 2008 Guidance states that, save for specific cases, dominance is unlikely if an undertaking's market share is below 40% in the relevant market.² Enforcement by the EC where the relevant market share is below 40% is, therefore, expected to be exceptional.
- (9) The Draft Guidelines maintain the presumption that a market share of 50% or above is evidence of the existence of a dominant position, but then state in Paragraph 26 that dominance may also be found in cases where an undertaking has a market share below 50%, and, in footnote 41 to that Paragraph, that market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances.

¹ Communication from the Commission – Commission Notice – Guidelines on vertical restraints, OJ 2022, C 248/1.

² 2008 Guidance, para. 14.

- (10) This lowering of the *de facto* safe harbour to a 10% market share is unnecessary and unhelpful. It undermines the aim of providing legal certainty. The EC should maintain its 2008 Guidance on this point, but could helpfully add examples of exceptional circumstances where the EC may find dominance below the 40% threshold. While the EC refers to cases in support of its statement that dominance may also be found below the 50% market share threshold, none of these involve a finding of dominance significantly below 40%, and certainly not below 30%.

3. GENERAL PRINCIPLES TO DETERMINE IF CONDUCT BY A DOMINANT UNDERTAKING IS LIABLE TO BE AN ABUSE

3.1 The generalization of a two-limb test

- (11) The Draft Guidelines set out a two-limb test to determine whether conduct of a dominant undertaking is likely to constitute an abuse under Article 102 TFEU. The test consists of demonstrating (i) a departure from ‘*competition on the merits*’ and (ii) the capability of producing exclusionary effects. While some evidence for such an approach can be found in the case law, the proposed two-limb test is not useful for all types of conduct and should not be applied in a general manner.
- (12) The case law of the EU Courts is not as clear-cut on this point as the EC suggests. It is only the judgment in *Servizio Elettrico Nazionale and Others* that explicitly states that competition on the merits and the capability of producing exclusionary effects are two independent requirements that must both be fulfilled;³ the judgment in *European Superleague Company* emphasises the capability of producing exclusionary effects and refers to the “*actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned*”.⁴ Moreover, in *Unilever Italia*, the Court of Justice considers competition on the merits and the capability of producing exclusionary effects as alternatives, only adding to the confusion: “*abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or where that conduct was based on the use of means other than those which come within the scope of ‘normal’ competition, that is to say, competition on the merits*”.⁵
- (13) Further, when analysing conduct for which a specific legal test exists, the Draft Guidelines seem to imply that competition off the merits does not always need to be shown and that a departure from competition on the merits can be inferred from finding exclusionary effects (e.g. exclusive dealing, refusal to supply). For certain types of conduct described in the Draft Guidelines, competition on the merits and capability of producing exclusionary effects are collapsed into one single test (e.g., predatory pricing below AVC or AAC, margin squeeze with negative spreads). We also note that in case of so-called naked restrictions, departure from competition on the merits appears to suffice according to the Draft Guidelines, i.e., capability to produce exclusionary effects is not a requirement.
- (14) Therefore, we suggest that the EC refrain from adopting a general two-limb test. We would welcome clear guidance on when a two-limb test would be necessary, and when it would not. Examples may help to make this more concrete.
- (15) Furthermore, the concept of ‘*competition on the merits*’ suffers from a lack of clarity for it to be useful for the purposes of self-assessment. The list of factors in Paragraph 55 of the Draft Guidelines does not provide the necessary guidance on how to apply this concept since the factors are (i) not exhaustive and (ii) generalized, without due regard to the specific context of the case(s) from which they are inspired. For example, Paragraph 55, f) refers to “*whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies*

³ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, [EU:C:2022:379](#), para. 103.

⁴ Judgment of 21 December 2023, *European Superleague Company*, C-333/21, [EU:C:2023:1011](#), para. 131.

⁵ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, [EU:C:2023:33](#), para. 39.

on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market” as a factor to determine whether competition is off the merits. However, this factor is based on the very specific circumstance in which a former monopolist leverages resources linked to that former legal monopoly position to gain market share on another market. Like other factors listed in Paragraph 55, it is merely an example of a specific instance in which a departure from competition on the merits was found. We believe that a mere list of examples, albeit presented in a generalized way, is not helpful to self-assess whether conduct departs from competition on the merits; clear guidance on the notion of competition on the merits is also needed.

3.2 Presumptions and burden of proof

- (16) The Draft Guidelines set out presumptions that five types of conduct are capable of leading to exclusionary effects: (i) exclusive supply or purchasing, (ii) rebates conditional on exclusivity, (iii) predatory pricing, (iv) margin squeeze in the presence of negative spreads, and (v) certain forms of tying.
- (17) Presumptions may help undertakings to self-assess the antitrust risk of their behaviour, but they should not allow the regulator to escape the burden of proof and evidence requirements imposed by the case law. As explained below, the approach to presumptions in the Draft Guidelines is not fully supported by the EU Courts. Furthermore, the Draft Guidelines do not make clear how such presumptions may be challenged and, if challenged, what the EC then has to prove to establish an infringement.
- (18) The EU Courts seem to have applied a somewhat lighter test for finding exclusionary effects for some of these practices. However, we note (as the EC itself acknowledges in footnote 131 of the Draft Guidelines) that, at least for some of these practices, the EU Courts have not used the notion of presumption. Moreover, there is a risk that presumptions may lead to overenforcement, notably at national level. Therefore, we encourage the EC to show restraint in considering these lighter tests as equivalent to general presumptions or, at the very least, to define narrowly, notably by reference to the relevant economic context, the categories of conduct that are presumed exclusionary.
- (19) It is important for the EC to explain clearly what the application of a presumption means in an investigation and, in particular, what is the standard of proof applicable to an undertaking wishing to challenge the presumption. A presumption is only a tool to help the EC discharge its burden of proof, to which the usual evidentiary rules continue to apply. This means that if the defendant undertaking is able to cast doubt on the presumption, whether in light of the particular circumstances of the case or on the basis of new economic evidence, the burden of proof is not met and it will fall on the EC to prove the exclusionary effects based on the guidance given by the Court of Justice in *Intel Corporation v Commission*⁶ and *Unilever Italia*.⁷
- (20) However, we have the impression that the EC sees this differently. In Paragraph 60 (b) of the Draft Guidelines, it is stated that “[a] dominant undertaking can seek to **rebut** the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects” and reference is made to the need to “overturn” a presumption. Similar wording can be found in Paragraphs 83, 95, 112 and 128 of the Draft Guidelines. This seems to suggest that it is not sufficient for the defending undertaking to cast doubt on the probative value of the presumption, but that the presumption must be rebutted in full, i.e. demonstrating that the conduct is not capable of having exclusionary effects instead of creating doubt that the conduct falls within the presumption. Importantly, these are different things.

⁶ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, [EU:C:2017:632](#), paras 138-141.

⁷ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, [EU:C:2023:33](#), paras 47-55.

- (21) If the EC intends to require an undertaking to provide conclusive proof that conduct is not capable of having an exclusionary effect, this would be tantamount to requiring proof of a negative, a near impossible feat.
- (22) Furthermore, EU Court case law clearly accepts that casting doubt on the probative value of a presumption is sufficient to engage the EC's full evidentiary burden. In *Intel Corporation v Commission*,⁸ the Court of Justice imposed an obligation on the EC to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market where the defending undertaking submits, supported by evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. While *Intel Corporation v Commission* remains silent on the quality of that evidence, the judgment in *Unilever Italia* refers to "evidence capable of demonstrating the inability to produce restrictive effects" and to an undertaking "disputing", rather than rebutting or overturning, a presumption.⁹ This means that the evidence submitted by the defending undertaking need not be conclusive; it is sufficient that it casts a reasonable doubt on the probative value of the presumption.
- (23) This interpretation is also in line with the EU general principle of the presumption of innocence, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union, which applies to procedures relating to infringements of the competition rules that may result in the imposition of fines or periodic penalty payments. This principle implies that, where the EU Courts have a doubt, the benefit of that doubt must be given to the undertaking accused of the infringement.¹⁰ The Court of Justice confirmed this again in its 2024 judgment in *Commission v Intel Corporation*.¹¹
- (24) Where the defending undertaking casts doubt on the probative value of the presumption, it is then for the EC to prove that the conduct is capable to produce exclusionary effects. According to the 2017 judgment in *Intel Corporation v Commission*, this requires the EC "to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, (...); it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market"¹². The Court of Justice thus imposes an obligation on the EC to rely on an 'as-efficient-competitor' (AEC) test in such a case.¹³ This seems to put a significantly higher burden on the EC than is now reflected in Paragraph 60, b), (ii) of the Draft Guidelines, which merely refers to "evidentiary elements demonstrating the capability of the conduct to have exclusionary effects". While we are aware that *Intel Corporation v Commission* only concerned rebate schemes, we believe, in line with *Unilever Italia*,¹⁴ that in all cases in which the EC relies on a presumption, it should be required to carry out a fully-fledged effects analysis, taking into account the relevant economic and legal context.

3.3 The price-cost test

- (25) We have the impression that the EC is down-playing the importance of price-cost tests, in particular the AEC test. The Draft Guidelines rely heavily on certain statements of the EU Courts that a price-cost test is not appropriate or required in certain circumstances, and disregard case law that states that the use of the AEC test, not just any price-cost test, is required in relation to certain practices.
- (26) Paragraph 73 of the Draft Guidelines states that "[t]he assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking". In support of this, the EC

⁸ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, [EU:C:2017:632](#), para. 139.

⁹ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, [EU:C:2023:33](#), para. 54.

¹⁰ Judgment of 22 November 2012, *E.ON Energie v Commission*, C-89/11 P, [EU:C:2012:738](#), paras 72-73.

¹¹ Judgment of 24 October 2024, *Commission v Intel Corporation*, C-240/22 P, [EU:C:2024:915](#), paras 183-208.

¹² Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, [EU:C:2017:632](#), para. 139.

¹³ See also judgment of 10 September 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P, [EU:C:2024:726](#), para. 265;

Judgment of 24 October 2024, *Commission v Intel Corporation*, C-240/22 P, [EU:C:2024:915](#), paras 180-181.

¹⁴ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, [EU:C:2023:33](#), paras 59-60.

refers to paragraphs 540-541 in the judgment of the General Court in *Google and Alphabet v Commission (Google Shopping)*.¹⁵ However, this case was an exceptional situation in which it was not possible to obtain objective and reliable results on the efficiency of Google's competitors in the light of the specific conditions of the market in question, so that the AEC test was not relevant.¹⁶

- (27) In relation to pricing practices, the Court of Justice held in *Servizio Elettrico Nazionale and Others* that it follows from the case law “*that those practices must be assessed, as a general rule, using the ‘as-efficient competitor’ test*”.¹⁷ Moreover, it follows from paragraph 59 of *Unilever Italia* that the AEC test cannot be ruled out in relation to non-pricing practices.¹⁸ We note that this paragraph in the *Unilever Italia* judgment appears in a footnote of the Draft Guidelines¹⁹ whereas paragraph 57 of the same judgment, which states that “[a] test of that nature may be inappropriate in particular in the case of certain non-pricing practices” appears in the main body of the Draft Guidelines (see Paragraph 56 of the Draft Guidelines), and incorrectly extends that Court of Justice’s finding to all non-pricing practices (“*a price-cost test is generally inappropriate for assessing whether non-pricing practices depart from competition on the merits*”). More generally, the Court of Justice held in *Google and Alphabet v Commission (Google Shopping)* that the EC “*must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, inter alia, the as-efficient competitor test, where that test is relevant*”.²⁰
- (28) We suggest that the EC reconsiders its approach to price-cost tests, in particular the AEC test. When doing so, we encourage the EC to set out clearly its thinking on price-cost tests (in particular the AEC test) in a separate section instead of inserting a number of paragraphs on price-cost tests in the section on predatory pricing. We note that price-costs tests can be a helpful way for undertaking to self-assess and this consideration should guide the EC’s approach in the Draft Guidelines given the objectives they seek to pursue.

3.4 Incorrect presentation of the case law

- (29) We consider that, in various sections of the Draft Guidelines, the case law of the EU Courts is not always correctly presented. We only touch on a selection of these instances below. We invite the EC to review the Draft Guidelines to ensure that the case law is properly presented and that particularities are appropriately contextualised instead of generalized.
- (30) Paragraph 49 of the Draft Guidelines states that “*a dominant undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it*”. This seems to imply that a dominant undertaking would not be allowed to increase its market share in a non-abusive way, which is at odds with the case law. The judgments cited in the accompanying footnote also do not support this statement. In all these cases, the EU Courts held that a dominant company may take reasonable steps to protect its commercial interests provided that the actual purpose is not to strengthen its dominant position and to abuse it. This is an important difference.
- (31) In Paragraph 55, f) of the Draft Guidelines, a relevant factor in assessing conduct departing from ‘competition on the merits’ is “*whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market*”. This is again a confusing statement, as it seems to imply that an undertaking using resources or means that come from holding a dominant position to strengthen that position may constitute conduct departing from ‘competition on the merits’.

¹⁵ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, [EU:T:2021:763](#).

¹⁶ Judgment of 10 September 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P, [EU:C:2024:726](#), paragraphs 266-268.

¹⁷ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, [EU:C:2022:379](#), para. 80.

¹⁸ Judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, [EU:C:2023:33](#), para. 59.

¹⁹ Footnote 128.

²⁰ Judgment of 10 September 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P, [EU:C:2024:726](#), para. 266.

When looking at the underlying case law (*Servizio Elettrico Nazionale and Others*), it appears that Paragraph 55, f) reflects a very specific situation, namely that of an undertaking holding exclusive rights that uses resources available to it through those exclusive rights for the purpose of extending the dominant market position that it only holds as a result of those exclusive rights on another market. This is an important element of contextualisation that should be added, otherwise Paragraph 55, f) gives the impression that a dominant undertaking cannot use the advantages that come with its dominant position (e.g. economies of scale) to strengthen its market position. More generally, where the EC relies on case law relating to regulated markets (e.g. *Post Danmark*), it should clearly identify that context.

4. PRINCIPLES TO DETERMINE WHETHER SPECIFIC CATEGORIES OF CONDUCT ARE LIABLE TO BE ABUSIVE

4.1 Exclusive dealing

- (32) In Paragraph 83, d) of the Draft Guidelines, the EC refers to “*the possible existence of a strategy aimed at excluding actual or potential competitors of the dominant firm*” as one of the relevant elements typically to be considered when the dominant undertaking challenges the presumption in relation to exclusive dealing. The EC fails to include the requirement spelled out in the case law that this should be a strategy aimed at excluding actual or potential ‘as efficient competitors’.²¹ This is an important nuance because it means that the EC must rely on an AEC test in order to establish the exclusionary effect of the conduct when faced with evidence to the contrary by the undertaking.

4.2 Tying and bundling

- (33) The Draft Guidelines would benefit from a more extensive discussion of the recognised benefits tying and bundling may produce. In particular, given the relevance of this type of conduct in digital and technology markets, we would encourage the EC to provide more guidance on how consumer welfare should be assessed not only in relation to the tying and bundling of products or services, but also in the context of more complex ecosystems. The same applies to establishing what constitutes a ‘new product’ in the context of tying or bundling.
- (34) Paragraph 93 of the Draft Guidelines suggests that, while exclusionary effects in tying cases may appear “*in both the tied market and the tying market*”, in principle, the effects in the tied market are predominant for assessing abusive tying behaviour. Further to this, Paragraph 93 states that “*the tying may have the aim of [...] protecting the dominant undertaking’s position in the tying market, by producing exclusionary effects on the tied market*”. Neither of these statements is supported by case law, illustrating how these principles apply in practice. The Draft Guidelines would benefit from including concrete examples to facilitate self-assessment.
- (35) Paragraph 95 of the Draft Guidelines states that tying practices in certain product markets have a high potential to produce exclusionary effects, which may lead to a presumption. However, the scope of this presumption is vague, as the context or cases where this presumption might apply are only loosely defined as “*situations where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects*.” This undermines legal certainty and the ability for undertakings to self-assess. In addition, the EC relies on relatively old case law for this definition, in particular *Hilti v Commission*²² and *Tetra Pak International v Commission*.²³ Considering how thinking on the practice of tying and bundling has evolved in the meantime, as well the general evolution of the case law applicable to abusive conduct, we would encourage the EC to reconsider

²¹ Judgment of 10 September 2024, *Google and Alphabet v Commission (Google Shopping)*, C-48/22 P, [EU:C:2024:726](#), para. 265; Judgment of 24 October 2024, *Commission v Intel Corporation*, C-240/22 P, [EU:C:2024:915](#), paras 180-181.

²² Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, [EU:T:1991:70](#).

²³ Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, [EU:T:1994:246](#).

whether it is still appropriate to presume that certain forms of tying are capable of producing exclusionary effects. If the EC would maintain this presumption, the Draft Guidelines would benefit from more detailed examples to clarify when the presumption arises, and on what bases the presumption may be challenged. In the current version, given the importance of tying/bundling as an often pro-competitive and efficient commercial practice, including in digital markets, the Draft Guidelines fail to provide sufficient legal certainty on this point.

4.3 Refusal to supply

- (36) This section in the Draft Guidelines could benefit from (i) clear examples of what constitutes an indispensable input and what does not, (ii) examples of circumstances in which the EC is likely to find that a potential substitute exists, and (iii) elaboration on what “elimination of all effective competition” actually means, if only by providing some examples or indicators.

4.4 Predatory pricing

- (37) It would be helpful if the Draft Guidelines could elaborate on the circumstances in which a particular cost benchmark will be used by the EC. This particularly concerns the LRAIC cost benchmark, as it is typically only used in very specific sectors, such as telecommunications. It would also be helpful if the EC could indicate the reasons why it considers certain cost benchmarks *a priori* irrelevant for assessing predatory pricing.
- (38) Regarding Paragraphs 119-120, we believe that the quality of the Draft Guidelines could be improved by adding examples.

4.5 Conditional rebates

- (39) Paragraph 143 of the Draft Guidelines is a good illustration of a point made earlier (see above, heading 3.3), namely that the Draft Guidelines downplay the importance of a price-cost test, in particular the AEC test, in contradiction with the case law of the EU Courts.
- (40) It follows from the case law of the EU Courts that pricing practices such as conditional rebates must be assessed as a general rule using the AEC test.²⁴ Regrettably, the Draft Guidelines rather focus on listing exceptions to this general rule. However, these exceptions relate to very specific situations. This is especially so for the exception set out in Paragraph 144, b), ii) of the Draft Guidelines: “*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 these circumstances, even a less efficient competitor may also exert a genuine constraint on the dominant undertaking*”. While presented as a general exception, the wording is based on *Servizio Elettrico Nazionale and Others*,²⁵ which concerned a former monopolist in the energy sector, and *Post Danmark*,²⁶ which concerned a former monopolist in the postal sector. They both relate to the situation where an ‘as-efficient competitor’ cannot exist because the conduct relies on the use of resources or means inherent in the holding of the dominant position that was obtained through exclusive rights. This also qualifies the reference to the competitive constraints of a ‘less efficient competitor’, as this should also be seen in that particular context.²⁷ In general, the application of the ‘as-efficient competitor’ test, thus, remains the general rule and the Draft Guidelines should reflect this.

²⁴ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, [EU:C:2022:379](#), para. 80.

²⁵ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, [EU:C:2022:379](#).

²⁶ Judgment of 6 October 2015, *Post Danmark*, C-23/14, [EU:C:2015:651](#).

²⁷ Judgment of 6 October 2015, *Post Danmark*, C-23/14, [EU:C:2015:651](#), para. 60: “Furthermore, *in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.*”

- (41) Trying to downplay the relevance of a price-cost test by omitting case law to the contrary and by generalizing specific cases in which a price-cost test was not appropriate is not very helpful and may undermine trust in the value and wider aim of the Draft Guidelines.
- (42) Paragraph 144, a) states that “[t]he use of a price-cost test is required to assess standardised volume-based incremental rebates, given that these specific rebates are considered not to depart from competition on the merits, unless they result in pricing below cost”. We believe it would be helpful if the EC could set out how it will assess in this context whether pricing is below cost.

4.6 Multi-product rebates

- (43) Paragraph 86 of the Draft Guidelines equates mixed bundling to multi-product rebates, whereas Paragraph 139 of the Draft Guidelines does the same for conditional rebates related to the purchase of two or more different products. In addition, multi-product rebates are a category by themselves (section 4.3.2). In that section, Paragraph 153 states that “*the guidance provided by the case-law in relation to exclusive dealing and conditional rebates, depending on the cases, applies by analogy*”. In doing so, the Draft Guidelines seem to distinguish multi-product rebates from tying and bundling in terms of the analysis of exclusionary effects, even these types of conduct are said to be equivalent in Paragraph 86 of the Draft Guidelines. We believe the Draft Guidelines would benefit from further clarification on this point.

4.7 Self-preferencing

- (44) The term ‘*self-preferencing*’ is new and has not (yet) been used by the EU Courts. It is still not clear what this category of conduct encompasses. However, Paragraph 156 of the Draft Guidelines defines self-preferencing as consisting of “*a dominant undertaking actively giving preferential treatment to its own products compared to those of competitors, mainly by means of non-pricing behaviour*”. This definition is broad and leaves many questions unanswered. We consider that the Draft Guidelines should, *inter alia*, address (i) whether the promotion of the dominant undertaking’s products/services suffices or whether the further demotion of a competitor’s products/services is also necessary, and (ii) what kind of ‘advantage’ the practice should or may confer on the dominant undertaking.
- (45) We note that the wording of the Draft Guidelines casts doubt on whether self-preferencing is always a leveraging practice. We believe that this is the case and that the Draft Guidelines should state clearly that a leveraging practice is a prerequisite to find self-preferencing to be abusive, in line with the EC’s decision in *Google Search (Shopping)*²⁸.
- (46) The examples provided in Paragraph 159 of the Draft Guidelines are too broad and cannot serve as guidance for identifying potential self-preferencing abuses. In particular, the example relating to manipulation of consumer behaviour is very broad, as marketing activities often contain an element of manipulation. We suggest that the EC should explain more in detail what it understands by ‘manipulating of consumer behaviour and choice’.
- (47) Further to this, we note that it is generally unclear at which point self-preferencing departs from competition on the merits. The factors listed in Paragraph 161 of the Draft Guidelines are only of limited use in this regard. They are generalizations from the decision in *Google Search (Shopping)*, and we are unsure whether they can provide meaningful guidance for self-assessment outside of that specific context, let alone outside the tech sector.

²⁸ Commission Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 – Google Search (Shopping)), C(2017) 4444 final, para. 649.

4.8 Access restrictions

- (48) Paragraph 163 of the Draft Guidelines does not accurately define the scope of access restrictions. The examples listed in Paragraph 166 could also qualify as ‘self-preferencing’ or instances of refusal to supply. We believe that this section would benefit from properly distinguishing access restrictions from similar conduct.

5. JUSTIFICATIONS

- (49) This section could benefit from illustrations of the types of justifications that may be invoked in relation to the types of conduct covered in the Draft Guidelines. This could either be done under this section or directly in the section dealing with the conduct concerned.

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8 November 2024