

European Commission's consultation on the draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

Executive Summary

Assonime welcomes this initiative and thanks the Commission for the opportunity to provide comments on the draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, published in August 2024.

In Assonime opinion, Article 102 TFEU is a pillar of EU competition law and a stepping stone for making enforcement **clear and predictable**. In this respect, as the Guidelines are an **essential mean** for antitrust enforcement, they shall address **meaningful limits to enforcement and ensure legal certainty** without depriving enforcers, practitioners, businesses and market actors of a clear reference to a standard of proof that results from well-established case law (thus expressing the *acquis communautaire*).

With this in mind, the Draft Guidelines:

- shall avoid the risk of embracing a **pure formalistic and interventionist approach**, retrospectively questioning well-established CJEU case law and sharply departing from consolidated economic theories;
- shall **refrain from emphasizing the possible relevance of market shares below 10%** for the perspective consequences in terms of legal certainty for market actors;
- shall clarify the **economic and legal grounds of the principle of competition on the merits**;
- shall favour a **more balanced approach**, acknowledging that those practices that might prove exclusionary under certain circumstances also can be part of normal competition on the merits;
- shall **refrain from making extensive reference to legal presumptions** that will put an **excessive burden** of undertakings without being grounded on solid economic theories.

We enclose some general remarks and more detailed comments, focusing on the main aspects that in our view need further clarification or improvement.

Assonime Response

General Remarks

Assonime welcomes the Commission's initiative to introduce Guidelines on the enforcement of Article 102 TFEU setting out principles to assess whether conduct by dominant undertakings constitute an exclusionary abuse under Article 102, in the light of the case law of the EU Courts.

We fully appreciate the Commission's efforts to codify and interpret the extensive and complex case law on exclusionary abuses and its own practice, with the aim to **enhance legal certainty** and **help undertaking self-assess** their unilateral conduct. Although they are not binding, the Guidelines will also **provide guidance to national authorities and courts** in their application of Article 102, promoting more consistent enforcement.

We also share the two key objectives of the Draft Guidelines to **ensure a vigorous and effective enforcement of Article 102** and, at the same time, that Article 102 is **applied in a predictable and transparent manner** to enhance legal certainty.

However, we are concerned that, as they currently stand, the Draft Guidelines risk failing to achieve both these objectives.

Although the Commission has remarked its commitment to an **effects-based approach** and its intention to only make it more workable¹, we note that the Draft Guidelines significantly depart from the 2009 Guidance Paper² whose aim was to introduce a more economic approach to the enforcement of Article 102, similar to that adopted by the Commission for merger control and Article 101 enforcement. Accordingly, the Guidance Paper placed great emphasis on the concepts of consumer harm and consumer welfare and recognized a prominent role to the as efficient competitor principle and the AEC test for the assessment of price-based practices. This helped to shape the evolution of the case law, which has gradually endorsed the effects-based approach, especially since the 2017 *Intel* judgment that can be viewed as a cornerstone in the acknowledgment of a more economic approach.

Many aspects of the Draft Guidelines, instead, signal a **shift towards a more formalistic approach**. The introduction of a **system of presumptions** and the **limited relevance** placed in the Draft Guidelines **to economic principles** and the need to develop proper theories of harms entail an **assessment mainly based on the form of conduct rather than its effects**³.

¹ *A dynamic and workable effects-based approach to abuse of dominance*, Policy Brief, 1 March 2023.

² Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

³ OECD (2024), "The use of structural presumptions in antitrust", OECD Roundtables on Competition Policy Papers, No. 317, OECD Publishing, Paris, <https://doi.org/10.1787/3b8c6885-en>; OECD (2017), "Safe Harbours and Legal Presumptions in Competition Law", OECD Roundtables on Competition Policy Papers, No. 210, OECD Publishing, Paris, <https://doi.org/10.1787/e5ace536-en>.

Moreover, the Draft Guidelines significantly **downplay the role of the AEC principle** and test and **no longer focus on** the fundamental concepts of **anticompetitive foreclosure**, **consumer welfare** and **consumer harm** which were key element of the framework underpinning the Guidance Paper.

We consider it important to emphasize that a shift away from an effects-based approach and from these fundamental concepts (e.g. consumer welfare, AEC principle) and well-established economic principles would be inconsistent with the important role that they play in the recent case law, thus leading to greater legal uncertainty.

On this respect we note that, notwithstanding the aim of codifying the case law, the Draft Guidelines **do not accurately reflect the jurisprudence**, especially the case law from *Intel* onwards. They systematically overlook statements from the case law that highlight an effects-based approach (e.g. the AEC principle) and place excessive emphasis on concepts (e.g. competition on the merits) that date back to a more formalistic approach of earlier judgments.

We believe that this lack of coherence with settled case law and principles risk **undermining the Draft Guidelines' stated objective of providing legal certainty and helping undertakings to self-assess the legality of their conduct**.

We are also concerned that the Draft Guidelines rely on principles established in settled case-law to set **uncertain and loose substantive standards** for the Commission to assess an infringement of Article 102 that rely on ambiguous concepts (e.g. departure from competition on the merits) which are too open for interpretation and lack operational value.

In our view, the lack of a clear legal framework to draw the boundaries between lawful and unlawful conduct entails that the Draft Guidelines fail to perform their own typical function, leaving the Commission with an **excessive margin of discretion**, instead of binding it to a clear analytical framework.

Additionally, the Draft Guidelines **do not provide sufficient safe harbours for dominant companies**, abandoning many of those offered by the Guidance Paper (e.g. for above cost pricing). This, again, unduly increase the degree of discretion for a finding of infringement, thus decreasing legal certainty and predictability and undermining the Draft Guidelines' stated objective.

This aspect was also emphasized in the recent Draghi Report, which criticized the Draft Guidelines precisely for the '*excessive discretion on the finding of exclusionary abuses left by the Draft Guidelines on the enforcement of Article 102*'⁴.

In light of the above considerations, we believe that there are still several areas of the Draft Guidelines that could be improved or need further clarification.

We submit some comments and suggestions on how to improve the current Draft Guidelines so that they can effectively achieve their objective and find the right balance between

⁴ See (2024) Draghi Report, The future of European Competitiveness – Part B: In-depth analysis and recommendations, p. 304, footnote 9.

ensuring an effective enforcement of Article 102 and providing legal certainty, by offering clearer guidance for dominant firms and for national authorities and courts.

1. Objective of Article 102 TFEU and notion of ‘exclusionary abuse’ (section I, paras 5 and 6)

The Draft Guidelines identify the general purpose of Article 102 TFEU in paragraph 5, stating that *‘Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers, including practices that may harm consumers by undermining an effective structure of competition’*.

The Draft Guidelines then introduce the concept of ‘exclusionary abuse’. According to paragraph 6, exclusionary abuse relates to any conduct by a dominant company that *‘can harm consumers by hindering, through recourse to means different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition’*. Paragraph 6 also defines the effects of such behaviour (i.e. exclusionary effects) as *‘any hindrance to actual or potential competitors’ ability or incentive to exercise a competitive constraint on the dominant undertaking, such as the full-fledged exclusion or marginalization of competitors, an increase in the barriers to entry or expansion, the hampering or elimination of effective access to markets or to parts thereof or the imposition of constraints on the potential growth of competitors’*.

We welcome the explicit reference in paras. 5 and 6 of the Draft Guidelines to consumer welfare. However, we note that these are the only paragraphs (together with para 51 relating to competition on the merits) in the draft document that mention the **concepts of consumer welfare and consumer harm**. These essential concepts are **not further detailed and integrated** into other sections of the Draft Guidelines. In particular, the Draft Guidelines **never mention the need to develop economically sound theories of harm** in order to demonstrate that a given conduct by a dominant company is abusive pursuant Article 102 TFEU.

This omission is concerning because it signals a significant departure from the 2009 Guidance Paper, which strongly emphasized the concept of consumer harm when applying Article 102 to exclusionary conduct by dominant firms.

Moreover, the Draft Guidelines abandon the principle of ‘anti-competitive foreclosure’⁵, set out in the 2009 Guidance Paper, which marked the shift from a formalistic to a more economic/effects-based approach in the enforcement of Article 102. The notion of ‘**anti-competitive foreclosure**’ has been a fundamental guiding criterion to draw the boundaries of exclusionary abuses, by distinguishing between protecting competition and protecting competitors. It means that what is prohibited under Article 102 TFEU is not foreclosure of competitors as such but rather *anticompetitive* foreclosure - that is a conduct of a dominant company that, by foreclosing actual or potential competitors, may have a negative impact on competitive variables (price, quality, choice, innovation) leading to consumer harm. Conversely, an exclusionary conduct is not abusive and can also be pro-competitive when the foreclosure of competitors does not lead to consumer harm.

The notion of anti-competitive foreclosure suggests that the assessment of whether an exclusionary conduct falls within the scope of Article 102 should be grounded on a theory of harm that looks at the impact of the conduct not just on competitors, but on competitive parameters, and ultimately on consumers.

However, the Draft Guidelines in paragraph 6 **replace the principle of anti-competitive foreclosure with the notion of ‘exclusionary abuse’**. Although the first sentence of paragraph 6 mentions consumer harm and conduct that depart from competition on the merits, the definition of exclusionary effects put forward in the rest of paragraph 6 seems more open-ended. It does **not link such effects to harm to consumers or explicitly mention their anticompetitive nature**. As a result, any exclusionary effect might be captured by the definition and be considered abusive, even if it is not detrimental to consumers and derives from pro-competitive conduct. Thus, the proposed notion of ‘exclusionary abuse’ does not seem to offer an adequate and clear substitute framework to guide the enforcement of Article 102.

⁵ See 2009 Guidance Paper, para 19: ‘*the aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that **dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having and adverse impact on consumer welfare**, whether in the form of higher price levels than would otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term ‘anti-competitive foreclosure’ is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers*’.

The departure from the guiding principle of anticompetitive foreclosure, along with the reduced emphasis put on concepts such as ‘consumer welfare’ and ‘consumer harm’, appear to **contradict the Commission’s stated goal of maintaining an effect-based approach** to Article 102 enforcement⁶. It also seems **inconsistent with the Court of Justice’s case law** that, from *Post Danmark I* and *II*⁷ to more recent judgments (e.g. *Intel I*, *Google Android*, *SEN*, *Unilever Italia*, *European Superleague*, *Intel II*⁸.), extensively relies upon the concept of anticompetitive foreclosure.

We invite the Commission to:

- **further clarify and integrate the concept of consumer harm** in the analytical framework and legal tests set out in the Guidelines, which should expressly recognize the relevance of formulating sound theories of harm (in the sections addressing both the general legal principles and the specific categories of conduct)
- **reintroduce the concept of anticompetitive foreclosure as a core guiding principle** in the Guidelines. The final text of the Guideline should at least **clarify that the exclusionary effects referred to in paragraph 6 are ‘anticompetitive’ exclusionary effects**, meaning exclusionary effects that lead to consumer harm, either directly or indirectly.

This would ensure consistency with the Commission’s enforcement practice and the approach adopted in other existing guidelines. It would also align with the recent case law that, as already recalled, has broadly endorsed the concept anticompetitive foreclosure. We believe that **maintaining clarity and consistency with established principles and case law is crucial for an effective and predictable enforcement of Article 102**.

2. Dominance and market share thresholds (Section 2, para 26)

In section 2 on the assessment of dominance, the Draft Guidelines, after recalling that ‘*the existence of a dominant position derives from a combination of several factors that, taken separately, are not necessarily determinative*’ (paragraph 24), in paragraph 26 state that ‘one

⁶ Policy Brief, see above.

⁷ *Post Danmark I*, case C-209/10, para 24; *Post Danmark II*, case C-23/14, paras 67 and 69.

⁸ *Post Danmark I*, case C-209/10, paras. 21-22; *Intel I*, case C-413/14 P, paras. 133-134; *Google Android*, case T-604/18, paras. 277-278; *Qualcomm (exclusivity)*, case T-235/18, para. 349, 351, *Servizio Elettrico Nazionale (SEN)*, case C-377/220, para. 73; *Unilever Italia*, case C-680/20, para. 37; *European Superleague*, case C-333/21, paras 126-127, *Intel II*, case C-240/22 P, para. 175.

important factor is the existence of very large market shares, which are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position. This is the case in particular where an undertaking holds a market share of 50% or above’, but ‘dominance may also be found in cases where an undertaking has a market share below 50%. In footnote 41 it is further specified that ‘market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances’.

We observe that, compared to the 2009 Guidance Paper, the draft Guidelines follow a rather different approach to market shares as an indicator of dominance. The Guidance Paper considered market shares only as a useful first indication for the existence of market power and created a *soft safe harbour*, stating that ‘low market shares are generally a good proxy for the absence of substantial market power’ and ‘dominance is not likely if the undertaking’s market share is below 40%’⁹.

Paragraph 26 of the draft Guidelines emphasizes instead that market shares are an ‘important factor’ when assessing a dominant position and introduces a ***de facto presumption for very large market shares*** – i.e. 50% and above – which would be ‘in themselves’, save in exceptional circumstances, evidence of the existence of a dominant position. Moreover, the Draft Guidelines **no longer provide a safe harbour for market shares below 40%**. The only reference to a market share threshold is found in footnote 41, which indicates that the existence of a dominant position is **excluded for market shares below 10%** save exceptional circumstances. The 10% threshold was derived from the Court of Justice’s judgment in the *Metro SB-Großmärkte* case¹⁰, in which, however, it is merely stated that a market share below 10% is too low to be regarded as evidence of a dominant position (save exceptional circumstances), but nothing is said about what the *safe harbour* threshold should be.

We believe that assuming the 10% threshold as a general standard, by lowering the *safe harbour* from 40% to 10%, would only create **unjustified legal uncertainty**. Article 102 TFEU should only apply to companies that enjoy significant market power. Such a low threshold does not appear to be consistent with the existence of a dominant position from an economic perspective and is not aligned with the market share thresholds (e.g. between 20% and 30%) envisaged as a *safe harbour* to exclude competition concern in other Commission guidelines (e.g. on horizontal mergers). Besides, such thresholds risks having enormous consequences in terms of **business strategies, making undertakings less confident about the competitive implications of their market behavior**.

⁹ 2009 Guidance Paper, paras 13 and 14.

¹⁰ *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, case C-75/84, paras 85 and 86.

In order to provide greater legal certainty Assonime invites the Commission to **maintain the approach adopted in the 2008 Guidance Paper and re-introduce a market share *safe harbour***, identifying a reasonable threshold below which the existence of a dominant position is considered unlikely. We suggest that the Guidelines **retain the Guidance Paper's soft *safe harbour* for market shares below 40%**, clarifying the specific circumstances in which dominance may be found even below that threshold (e.g. when competitors face serious capacity limitations).

3. General principles to determine if conduct by a dominant firm is liable to be abusive

The Draft Guidelines introduce a two-limb test to determine whether a given conduct by a dominant company is liable to constitute an exclusionary abuse under Article 102 TFEU. According to paragraph 45 it is necessary to establish (i) whether the conduct departs from competition on the merits; and (ii) whether the conduct is capable of having exclusionary effects.

If both limbs are satisfied the conduct is liable to be abusive, but the dominant company has the possibility to show that its conduct is either objectively justified or counterbalanced or outweighed by efficiencies (paragraph 48).

For certain types of conduct by dominant companies the case law of the EU Courts has developed specific analytical frameworks to establish whether they infringe Article 102 ('specific legal tests'). The Draft Guidelines in particular address five types of conduct: exclusive dealing and exclusivity rebates, tying and bundling, refusal to supply, predatory pricing and margin squeeze (section 4.2).

For this specific conduct, paragraph 47 states that if such conduct meets the condition of the specific legal test, it is deemed to depart from competition on the merits and capable of having exclusionary effects (i.e. both limbs of the *abuse* test are considered satisfied).

As outlined above, the Draft Guidelines propose a **two-limb test to demonstrate exclusionary abuse**. We believe that, as it currently stands, this conceptual framework **lacks sufficient clarity and unnecessarily increases complexity** in the enforcement of Article

102 TFEU¹¹. It is clear from case law that in the assessment of abuse the focus is on demonstrating exclusionary effect, not a departure from competition on the merits¹².

The greater emphasis the Draft Guidelines place on a **vague concept such as competition on the merits** may lead to divergent interpretations and **excessive discretion** for competition authorities. This could also impose a **disproportionate burden of proof** on the investigated undertaking and, more generally, create **uncertainty for undertakings seeking to self-assess their practices** and to establish in advance whether their conduct is lawful or not.

Furthermore, we consider it important to point out that, whilst the specific legal tests outlined for certain conduct in the draft guidelines are valuable tools, they should not be applied mechanically as a checklist and should **not replace the need for sound and well-developed theories of harm**. Even when competition authorities rely on legal tests in their assessment, they still should explain how the conduct, evaluated through the lens of the economic theory, departs from competition on the merits and may ultimately lead to consumer harm.

- Beyond the more detailed suggestions that will be provided in the following paragraphs, Assonime invites the Commission to **rethink the conceptual framework** proposed in the current Draft Guidelines in order to **improve their completeness and clarity and better orient undertakings**.
- We also invite the Commission to **elucidate the implications of satisfying the proposed legal tests**. We suggest that **paragraph 47 should be clarified**, by explaining whether meeting the conditions set out in a specific legal test actually implies a presumption that both limb 1 and limb 2 of the test of abuse are satisfied, and **how this presumption relates to the presumptions introduced in section 3.3., at paragraph 60.b)**.

a) Departure from competition on the merits (section 3.2, paras 49-58)

The Draft Guidelines contain a definition of competition on the merits in paragraph 51 which refers to a *‘competitive situation in which consumer benefit from lower prices, better quality and wider choice of new or improved goods and services. Article 102 TFEU does not preclude the departure from the market or the marginalization, as a result of competition on the merits, 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*

¹¹ The Draft Guidelines do not expressly address intermediate situations where: (i) the conduct of a dominant firm falls within competition on the merits but nevertheless has exclusionary effects; (ii) the conduct of a dominant firm is not competition on the merits, but it is not capable of excluding competitors.

¹² See *Post Danmark II*, case C-23/14, para 67.

and innovation'. Conversely, the Draft Guidelines do not clarify what constitutes competition 'off' the merits. Paragraph 55 provides, instead, a non-exhaustive list of factors that may be relevant to establish that conduct depart from competition on the merits. For conduct fulfilling the conditions of a specific legal test set out in the Draft Guidelines, paragraph 53 states that it is deemed as falling outside the scope of competition on the merits. For pricing practices, the Draft Guidelines indicate that a price-cost test is required for certain conducts, namely predatory pricing and margin squeeze (paragraph 56). In paragraph 57 it is also stated that conduct that at first sight does not depart from competition on the merits (e.g. because prices are above average total cost) may, in specific circumstances, be found to do so, based on an analysis of all legal and factual elements (e.g. market dynamics, extent of the dominant position, specific features of the conduct at stake).

As to limb 1 of the proposed test of abuse, we observe that, although the Draft Guidelines' definition of abuse is supported by some recent case law of the Court of Justice, notably the *SEN* judgment, it is not clear from the case law that the Court of Justice considers the departure from competition on the merits as an autonomous and operational element of abuse. In fact, it seems to be understood more as a component of the broader exercise of demonstrating the exclusionary effects of the conduct¹³.

Moreover, even in the case law, what is – or rather what is not – competition on the merits remains an intrinsically vague concept. The Draft Guidelines do not seem to offer greater clarity on how to distinguish lawful and unlawful conduct on that basis. As noted above, apart from the reference to consumer welfare in paragraph 51, **they do not define explicitly what constitutes a departure from competition on the merits**. Instead of anchoring the concept to clear guiding principles, the Draft Guidelines rely on a **non-exhaustive list of potentially relevant factors**, which largely correspond to practices that the EU courts in particular cases have considered inconsistent with competition on the merits. However, if taken out of context these examples may be misleading and risk leading to over-enforcement. Thus, in the current draft, the definition of a departure from competition on the merits remains unduly open-ended, undermining legal certainty.

We recommend that the final text of the Guidelines **clarifies the concept of competition 'off' the merits**, adopting a more principled approach. The definition should be closely

¹³ See the wording of para 61 of *SEN*, stating that: '(...) the characterization of an exclusionary practice as abusive depends on the exclusionary effects that that practice is or was capable of producing. Thus, in order to establish that an exclusionary practice is abusive, a competition authority must show that, first, the practice was capable, when implemented, of producing such an exclusionary effect, in that it was capable of making it more difficult for competitors to enter or remain on the market in question (...) and, second, that practice relied on the use of means other than those which come within the scope of competition on the merits'. See also *Post Danmark II*, para. 67 ('it follows that only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article 82 EC').

linked to the concepts of consumer harm and anticompetitive foreclosure: conduct departing from competition on the merits could be defined as conduct that has anticompetitive effects - that is, it leads (directly or indirectly) to consumer harm in form of higher prices, lower quality, or reduced choice. Such an approach would help ensure legal certainty by providing clearer guidance on which conduct departs from competition on the merits.

As acknowledged in the Draft Guidelines, a further conceptual framework that can be used to establish a departure from competition on the merits is the **As Efficient Competitor (AEC) principle** (and the related **notion of replicability**), whereby a conduct would be found to depart from competition on the merits if it cannot be replicated by a hypothetical competitor as efficient as the dominant company. This approach is consistent with economic principles and in line with the recent case law¹⁴. However, overlooking its role in the case law's adoption of an effect-based approach, the Draft Guidelines significantly downplays the AEC principle, relegating it to **only one of the factors considered relevant** to the assessment (paragraph 55, letter f).

We suggest that in the final text of the Guidelines a **higher relevance should be given to the AEC principle** in the assessment of the departure from competition on the merits in case of price-based conduct (in which the principle can generally be operationalized by means of an AEC test).

In the recent case law (e.g. *Intel II*, *SEN*), the Court of Justice has explicitly clarified that **pricing practices** (including loyalty rebates) must be assessed, as a general rule, using the AEC test and that the AEC test is a valid method to assess whether conduct departs from competition on the merits¹⁵.

Moreover, in relation to evidentiary burden, the Court of Justice has stressed the relevance of the AEC test both for pricing and non-pricing practices (e.g. exclusivity clauses), holding that *'(...) the use of an as efficient competitor test is optional. However, if the results of such test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results'*¹⁶.

More generally, the Draft Guidelines should **clarify when a departure from the AEC test may be justified**. This includes cases where even competitors that are **not yet AECs** should be given protection under Article 102 TFEU because they are expected to become more efficient in the future and exert significant competitive pressure on the dominant firm¹⁷.

¹⁴ See, for instance, *SEN*, case C-377/220, paras 78-79 and AG Rantos Opinion in *SEN*, para 81, pointing out that: *'(...) In principle, an exclusionary practice which can be replicated by competitors in an economically viable way does not represent conduct that may lead to anticompetitive foreclosure and thus comes within the scope of competition on the merits'*.

¹⁵ *SEN*, case C-377/220, paras 80-82; *Intel II*, case C-240/22 P, para 181.

¹⁶ *Unilever*, C-680/20, para. 62.

¹⁷ See *European Superleague*, C-333/21, para 131.

These situations, however, should be clearly circumscribed in order to **preserve the incentive of the dominant firm to compete on prices**.

We are particularly concerned that the statement in paragraph 57, which suggests that pricing above average total cost (ATC) may be abusive, would create uncertainty for dominant firms and risk discouraging price-based competition and leading to pro-competitive behaviour being prohibited ('false positive'). We submit that the final text of the Draft Guidelines should **establish a *safe harbour* for above-cost pricing**, providing dominant firms with greater legal certainty. This would also be in line with what was observed in the recent Draghi Report, which criticizes the Draft Guidelines for failing to provide a *safe harbour* for dominant firms setting prices above ATC¹⁸.

Furthermore, we submit that the Draft Guidelines should clarify how a finding that a given conduct departs from competition on the merits (under limb 1) can be rebutted, both for conduct subject to a specific legal test and conduct without a legal test.

We believe that dominant firms should be given the **possibility of rebuttal directly under limb 1** (by showing that their conduct is unlikely to lead to consumer harm) and not only at the stage of objective justification, as paragraph 58 seems to suggest. The Commission should at least explain what evidence would be accepted to rebut a finding under limb 1 and what evidence would be evaluated as part of objective justifications or efficiency defenses.

For conduct subject to specific legal test, we submit that the final text of the Guidelines should clarify whether the fulfilment of the conditions set out in the legal test effectively leads to a presumption that limb 1 is satisfied and what is the scope for rebuttal in this case.

¹⁸ See (2024) Draghi Report, The future of European Competitiveness – Part B: In-depth analysis and recommendations, p. 304, footnote 9.

Assonime recommends that the final text of the Guidelines should:

- **clarify the concept of competition ‘off’ the merits.** We suggest that the final text should define a conduct departing from competition on the merits as a **conduct which ultimately leads (directly or indirectly) to consumer harm**, aligning the definition with the concept of anticompetitive foreclosure
- **explicitly and fully adopt the AEC principle for all pricing conduct, in light of its relevance in the case law as an indicator of the effects-based approach.** Greater weight should be given to the AEC principle in the assessment of competition ‘off’ the merits.
- **clarify the role of the AEC test** in assessing departure from competition on the merits. We suggest that the Guidelines should: (i) **acknowledge the relevance of the AEC test in loyalty rebates cases**, in line with the recent case law (*Intel II*, *SEN*); (ii) clarify, based on the **principle set out in Unilever, para 62**, that *‘the use of an as efficient competitor test is optional. However, if the results of such test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results’*.
- **amend paragraph 57 and establish that pricing above ATC is generally lawful, thereby providing a clear safe-harbour to dominant firms**
- **clarify the process of rebuttal of a finding of a departure from competition on the merits**, both for conduct subject to specific legal tests and for conduct

b) Capability to produce exclusionary effects

The Draft Guidelines address separately the evidentiary burden (section 3.3.1) and the substantive legal standard (section 3.3.2) to demonstrate a conduct’s capability to produce exclusionary effects (limb 2 of the test of abuse).

i. Evidentiary burden (para 60)

One of the main features of the Draft Guidelines is that, in order to allocate the evidentiary burden between the Commission and the dominant undertaking, they identify three categories of conducts based on the degree of presumptions they are subject to regarding their capability to produce exclusionary effects. Paragraph 60 identifies the following categories: a) conduct for which no presumption is applied, and the capability needs to be demonstrated on the basis of specific, tangible points of analysis and evidence (paragraph 60.a); b) conduct that is presumed to lead to exclusionary effects (i.e. types of conduct

regarded as having a high potential to produce exclusionary effects). This presumption applies to a subset of the five conducts subject to a specific legal test, which includes: exclusive dealing, exclusivity rebates, predatory pricing, margin squeeze with negative spreads and certain forms of tying (paragraph 60.b). For these types of conduct, the evidentiary burden is on the dominant firm to rebut the probative value of the presumption by submitting that the conduct is not capable of having exclusionary effects; c) certain types of conduct that have no economic interest for the dominant firm, other than that of restricting competition ('naked restrictions'). These practices are subject to a stronger presumption of capability to have exclusionary effects, which can be rebutted only in exceptional circumstances, and are also deemed unlikely to be justified on the basis of objective justifications or efficiencies¹⁹.

In principle we believe that an effects-based approach is compatible with the use of quick look assessments or 'by object' characterizations, entailing a lighter evidentiary burden for competition authorities, for those conduct which settled experience and economics indicate as intrinsically harmful to competition.

These are tools that, if well-designed and grounded on economic knowledge of which types of conduct are likely to lead to anticompetitive exclusionary effects, can be useful to **reconcile an impact-based approach with the need to ensure effective enforcement** and the administrability of the rules, in line with the Commission's objective to make the effects-based approach more 'workable'.

However, the Draft Guidelines, on the one hand, **do not contain any reference to the concept of 'theory of harm'**, in contrast to all the other existing EU guidelines. On the other hand, they revert to focusing on a **categorization of practices** which seems **mostly form-based** and discretionary. It is unclear why certain conducts are covered by a presumption and other similar ones are not. The criterion of categorization appears to be based only on the formal characteristics of a certain practice, with the result that practices which have (or are likely to have) similar effects on competition from an economic point of view are treated differently and subject to different legal tests, based solely on their form. For example, whilst self-preferencing is subject to an effects-based analysis, certain forms of tying are subject to a presumption, although tying could be considered as a form of self-preferencing.

As mentioned above, we believe that 'presumptions' (in a broad sense) can be justified only if they are grounded on **economic evidence of a likelihood of anticompetitive impact**. This is not the case for all practices for which presumptions are put forward by the Draft Guidelines. **Tying**, for example, is a practice that can lead to procompetitive effects and

¹⁹ OECD (2021), "Economic Analysis and Evidence in Abuse Cases", OECD Roundtables on Competition Policy Papers, No. 269, OECD Publishing, Paris, <https://doi.org/10.1787/63e6d5f0-en>.

consumer benefits (e.g. transaction cost savings, introduction of new or improved products) in many cases. Accordingly, we submit that it **should not be included in the category of conduct liable to be abusive**. Otherwise, the Commission should at least clarify, as the Draghi Report also invites it to do²⁰, under which conditions tying can be presumed to be abusive and clearly explain what distinguishes the forms of tying that are covered by the presumption from those which are not.

As they currently stand, the Draft Guidelines entail a high degree of discretion in the categorization of practices provided for in paragraph 60, generating uncertainty for undertakings seeking to self-assess their conduct.

Furthermore, for most types of conduct the Draft Guidelines introduce **presumptions of capability to produce exclusionary effects** which are **not reflected by the case law** of the Court of Justice.

The statement in footnote 131 of the Draft Guidelines, arguing that for each one of the practices mentioned in paragraph 60.b) the case law has developed tools which can be broadly described and conceptualized as presumptions, does not provide any reference to a judgment that explicitly establishes a presumption concerning the evidentiary burden to demonstrate the capability of having exclusionary effects²¹.

Besides the *Akzo* case, concerning predatory pricing below average variable costs (AVC)²², there do not seem to be other case-based legal precedents establishing presumptions of this type.

The only category of abuse for which the case law had endorsed a purely formalistic assessment, close to a presumption of foreclosure effects, was that of loyalty rebates (i.e. rebates conditional upon exclusivity)²³. However, it was precisely for this type of conduct that the Court of Justice clarified its jurisprudence in *Intel I*²⁴.

In this respect, the Draft Guidelines appear to overlook the **significance of the *Intel* line of case law** which reflects a systemic view, whereby the temptation to adopt a strictly

²⁰ Draghi Report, see above, p. 304, fn. 9.

²¹ OECD (2019), “The Standard of Review by Courts in Competition Cases”, OECD Roundtables on Competition Policy Papers, No. 233, OECD Publishing, Paris, <https://doi.org/10.1787/69008bd2-en>; OECD (2024), “The Standard and Burden of Proof in Competition Law Cases”, OECD Roundtables on Competition Policy Papers, No. 318, https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/11/the-standard-and-burden-of-proof-in-competition-law-cases_bf304240/0199f63f-en.pdf.

²² *Akzo Chemie BV*, C-62/86, para 71.

²³ See *Hoffmann-LaRoche*, C-85/76, para 89.

²⁴ *Intel I*, C-413/14 P, paras 138-139, where the Court of Justice has clarified that, where the dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing the alleged foreclosure effects, ‘the Commission is not only required 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, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; 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’. See also *Intel II*, C-240/22 P, paras. 328 and 330-331.

formalistic approach in the assessment of an infringement under Article 102 – evident in the General Court’s ruling in *Intel* - should be rejected.

The presumption system, as envisaged in the Draft Guidelines, does not seem consistent with this view and the requirement that *‘the demonstration that conduct has the actual or potential effect of restricting competition, which may entail the use different analytical templates depending on the type of conduct at issue in a given case, **must be made, in all cases, in the light of all the relevant factual circumstances**’²⁵.*

It is also unclear what the **relationship is between conduct for which a specific legal test has been developed by EU case law** (discussed in section 4.2) **and conduct covered by a presumption according to paragraph 60.b)**, given that the scope of these two sections does not fully coincide. Although paragraph 47 of the Draft Guidelines states that practices which satisfy the conditions of a specific legal test are ‘deemed to be liable to be abusive’, only a subset of these practices are also subject to the presumption in para. 60.b). For example, margin squeeze is subject to the presumption in para. 60.b) only in case of negative spreads, refusal to supply is subject to a specific legal test but is not subject to the presumption in para. 60.b).

We recommend that the final text of the Guidelines better clarify how those two sections of the Guidelines should be reconciled.

In our view, one of the most critical aspects of the Draft Guidelines concerns the **rebuttal of the presumption** of capability to produce exclusionary effects. The Draft Guidelines do not clarify what **standard of proof** a dominant undertaking needs to satisfy to rebut the presumption and, at the same time, suggest that the standard for rebuttal could be quite high. In fact, with regard to the Commission’s burden of proof in cases where the dominant undertaking has submitted evidence to rebut the presumption, paragraph 60.b) specifies that *‘the evidentiary assessment must give **due weight to the probative value of the presumption**, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects’*. We recommend that this statement be deleted in the final text of the Guidelines, since it **unduly lowers the Commission’s burden of proof** to overcome the evidence submitted by the dominant company to rebut the presumption.

On this regard, we also note that *Intel I* and *Intel II* have clarified that, when the dominant undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing the alleged foreclosure effects, the Commission is required to carry out an analysis to determine the existence of that capability, taking into account several factors (e.g. extent of the dominant position, coverage, duration etc.)²⁶. It is not clear why the Draft Guidelines apply those factors, referring to paragraph

²⁵ *Intel II*, C-240/22 P, para. 179.

²⁶ *Intel I*, C-413/14 P, paras 138-139; *Intel II*, C-240/22 P, paras 330-331.

138 of *Intel I*, only to exclusive dealing and exclusivity rebates (paragraph 83) and not in other cases of conduct subject to a presumption.

We submit that a **greater consistency with the *Intel I* and *Intel II* judgments** should be ensured in the final text of the Guidelines and that the evidentiary requirements set out in para 138 of *Intel I* should apply (with appropriate adaptations) to all conduct subject to a presumption, where the dominant undertaking submits that its conduct is not capable of restricting competition.

The main concern with regard the Draft Guidelines' approach is that, depending on how high the evidentiary burden is for rebuttal, the presumption may entail a ***de facto* shift of the burden of proving** the (absence of) exclusionary effects to the dominant company.

Such approach is not supported by the existing case law which does not allow for 'hard' presumptions and consistently holds that the burden of proving an infringement of Article 102 lies with the Commission²⁷. It is only at the stage of objective justifications and efficiencies that the burden of proof shifts to the dominant company²⁸. A reversal of the burden proof would also be in breach of Article 2 of Regulation 1/2003 and violate fundamental principles of due process and fair trial.

²⁷ In the recent *Intel II* judgment, the Court of Justice restates that '(...) it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement' (para. 328). See OECD (2021), "Economic Analysis and Evidence in Abuse Cases", OECD Roundtables on Competition Policy Papers, No. 269, OECD Publishing, Paris, <https://doi.org/10.1787/63e6d5f0-en>.

²⁸ *Post Danmark I*, C-209/10, para. 42; *UK Generics*, case C-307/18, para 166; *Google Android*, T-604/18, para. 602

Assonime invites the Commission to **reconsider the approach to using presumptions** adopted in the Draft Guidelines, as it raises doubts about its legality, leaves the Commission with excessive discretion and risks undermining legal certainty and fundamental principles of due process.

- We recommend that **any categorization of different types of practices be based not on their formal characteristics but on their different potential impact on competition** (i.e. different theories of harm).
- The **scope of application of presumptions** should, on the one hand, be clarified, by specifying the **legal basis** on which certain conduct are subject to a presumption and, on the other hand, it should be **justified on economic grounds**. We suggest that the final text of the Draft Guidelines makes sure that ‘presumptions’ (in a broad sense) are established **only for those conduct which settled experience and economic evidence indicate as having a high potential to produce exclusionary effects**. We submit that – even where a presumption is established for certain conduct – the Commission’s allegation should be supported by a **theory of harm** based on actual or potential impact on competitive variables, taking into account all the factual circumstances.
- We recommend that **tying should not be included in the category of presumptively abusive conduct** referred to in paragraph 60.b) and, instead, be subject in all cases to an effects-based analysis. Otherwise, we suggest that the final text of the Guidelines should **at the very least clarify under which conditions tying can be presumed to be abusive** and explain what differentiates the forms of tying which fall under the presumption and those which do not.
- We also recommend that the final text of the Guidelines **clarifies the relationship between practices subject to specific legal tests (discussed in section 4.2) and conduct covered by a presumption under paragraph 60.b.**
- Regarding the **process of rebuttal**, we suggest that the final text provides more **detailed guidance on the evidentiary burden** that needs to be satisfied to rebut the presumptions, providing examples of the type of evidence that the dominant company can submit to this end.
- For **conduct which is subject to a specific legal test** and for **naked restrictions**, the Guidelines should clarify that the **possibility of rebuttal exists** not only for the presumption concerning the **capability to produce exclusionary effects** (limb 2) but also for that relating to the **departure from competition on the merits** (limb 1)
- We recommend that, in all cases in which a presumption is established, **the Commission’s evidentiary burden to overcome the evidence** submitted by the dominant company to rebut the presumption **should not be unduly reduced**. We suggest that paragraph 60.b should be rectified accordingly. We also suggest that the final text incorporates the evidentiary requirements set out in para 138 of *Intel*.

ii. Substantive legal standard (paras 61-75)

The Draft Guidelines at paragraph 61 set out the substantive legal standard to demonstrate a conduct's capability to produce exclusionary effects (limb 2) in cases where a presumption is not applicable. It is stated that *'the Commission needs to demonstrate that a conduct is **at least capable of producing** exclusionary effects'* and that *'while the effects in question must be more than hypothetical, establishing that a conduct is liable to be abusive does not require proof that the conduct at issue has produced actual exclusionary effects'*. As to the counterfactual, the Draft Guidelines explain that *'it is sufficient to establish a plausible outcome amongst various possible outcomes'* (paragraph 67). Then, the Draft Guidelines recall the facts and circumstances that may be relevant to assess the capability of producing exclusionary effects (paragraphs 68-70). Finally, the Draft Guidelines also list the elements that do not need to be demonstrated, explaining that it is not necessary to show that the conduct resulted in direct consumer harm (paragraph 72), that actual or potential competitors affected by the conduct are as efficient as the dominant undertaking (paragraph 73), that the conduct is enabled by the dominant position (paragraph 74) or that exclusionary effects are appreciable (paragraph 75).

We submit that, as they currently stand, the Draft Guidelines set a **low standard** for demonstrating exclusionary effects.

The Draft Guidelines states that, in order to satisfy limb 2 of the test of abuse, the Commission is required to show that the conduct at issue is at least **capable** of producing exclusionary effects and that the exclusionary effects are **'more than hypothetical'**.

However, the meaning of this expression is not clear. The Draft Guidelines do not link it to a 'more likely than not' standard, whereby it would need to be demonstrated that the exclusionary effects are more likely than not compared to the relevant counterfactual scenario (which would prevail absent the conduct).

The proposed standard seems too low compared to the one endorsed by the EU case law²⁹ and do not provide sufficient legal certainty.

Thus, we recommend that the final text of the Draft Guidelines sets a higher standard for demonstrating exclusionary effects consistent with case law, clarifying the meaning of the 'more than hypothetical' standard.

As already mentioned, the Draft Guidelines seem to **systematically omit any refence to the concept of consumer harm and the AEC principle** as limiting principles for the assessment

²⁹ The EU Courts have used several terms to qualify the threshold that is relevant for a finding of abuse and referred, for example, to 'likely', 'probable' (*Post Danmark II*, para 74) or 'capable' (*Intel I*, para 114).

of exclusionary abuses, while on the other hand they emphasize at paragraphs 72 and 73 that, in order to demonstrate exclusionary effects, it is not necessary to prove direct harm to consumers or that the competitors affected are as efficient as the dominant undertaking.

Notably, when referring to ‘exclusionary effects’ in the general formulation of limb 2 of the test of abuse (capability to produce exclusionary effects), the Draft Guidelines make no reference to the AEC principle, with the result that any potential exclusionary effects (not just anticompetitive ones) on any competitors (not just as-efficient ones) would be sufficient to find an abuse of dominant position.

This omission is in **stark contrast to the recent case law** which consistently held that ‘(..) *in order to find, in a given case, that conduct must be categorized as abuse of dominant position, it is necessary, as a rule, to demonstrate [...] that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market*³⁰.

Similarly, although the Draft Guidelines rely on the *SEN* judgment for the proposed legal framework, they omit the reference to consumer welfare and to the AEC principle contained in paragraph 73 of *SEN*, where the Court of Justice stressed that ‘(...) *not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient, and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation*³¹.

Considering the **relevance of the AEC principle in the recent case law**, both for price and non-price conduct³² and its central role in the acknowledgment of a more effects-based approach to the assessment of exclusionary abuses, this systematic omission clearly signals an attempt by the Commission to depart from the approach established by the Court of Justice, in order to adopt a more formalistic one. We submit that the Draft Guidelines’ inconsistency with settled case law on this regard would unduly create legal uncertainty.

We believe that the final Guidelines, on the one hand, should clarify that the assessment of capability of producing exclusionary effects does not concern any exclusionary effects but **only anticompetitive effects** (i.e. effects which may ultimately lead to consumer harm). On the other hand, they should **reinstate the relevance in such assessment of the AEC principle**, namely the notion that only the exclusion or marginalization of as-efficient competitors is anticompetitive and can be qualified as abusive. They should also clarify in

³⁰ *Google Shopping*, C-48/22, para 165; *European Superleague*, C-333/21, para 129; *Intel I*, C-413/14 P, paras 139-140; *Intel II*, C-240/22, para 176; *Unilever*, C-680/20, para 39; *Post Danmark I*, para 25.

³¹ *SEN*, C-377/20, para. 73; *Unilever*, C-680/20, para. 37.

³² *SEN*, C-377/20, para. 79.

which circumstances the protection of not (yet) as-efficient competitors from exclusionary conduct can justify a departure from the AEC principle.

- Assonime recommends that the final text of the Draft Guidelines should adopt a **higher standard for demonstrating exclusionary effects in line with the case law and clarify the meaning of the ‘more than hypothetical’ standard.**
- We also suggest that the final Guidelines clarify that the assessment of capability to produce exclusionary effects should focus **only on anticompetitive exclusionary effects** (i.e. reinstating the concept of anticompetitive foreclosure).
- We recommend that the final text of the Guidelines **reinstate the fundamental role of the AEC principle as a guiding criterion and its relevance in the assessment of exclusionary effects.** It should also **clearly identify the circumstances under which a departure from the AEC principle would be justified.**