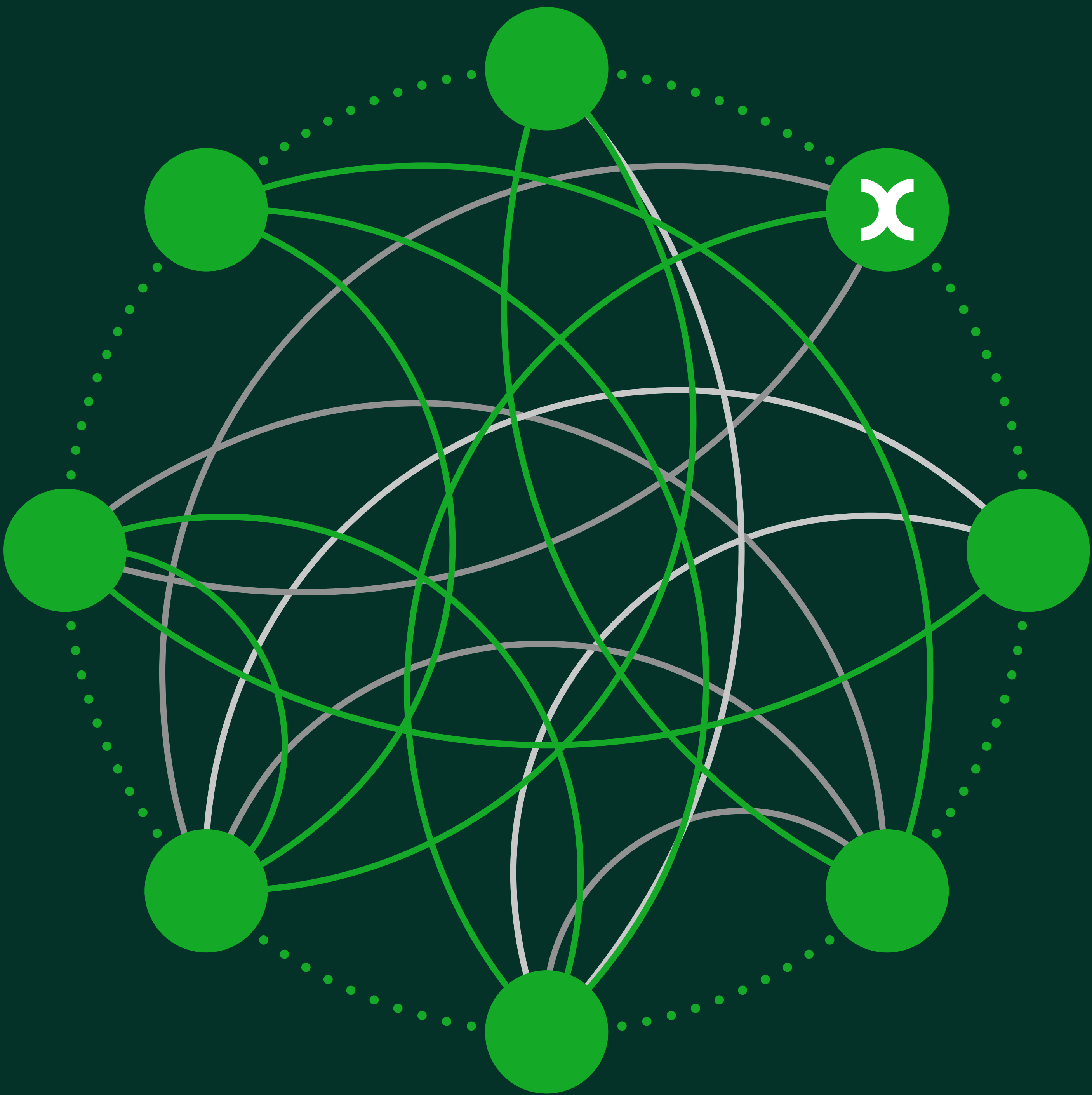
European Commission Draft Guidelines on Exclusionary Abuse under Article 102

Oxera Response to the Public Consultation

31 October 2024



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Executive Summary

Oxera welcomes the European Commission's initiative to provide formal guidelines in the area of exclusionary abuse under Article 102. We agree with the stated objectives to enhance legal predictability and to provide a workable effects-based approach to enforcement. In our response, we highlight a number of areas where the guidelines could be improved by using well-established economic principles to provide clearer guidance for dominant firms, national authorities, and courts, and to improve the quality and effectiveness of enforcement.

Our response highlights four main areas where the Draft Guidelines should be improved.

1. *The Draft Guidelines do not focus on the likely effects of exclusionary conduct on consumer welfare*. Neither the proposed legal framework nor the specific legal tests set out in the Draft Guidelines require the articulation of a clear theory of (consumer) harm. This is not in line with a sound effects-based approach to enforcement. More generally, the Draft Guidelines place only limited reliance on economic principles for the identification of conduct potentially leading to the anticompetitive exclusion of rivals.

2. *The proposed legal framework is unduly open-ended*. It relies on a relatively loose definition of what constitutes departures from 'competition on the merits' coupled with a low bar for establishing exclusionary effects. The Draft Guidelines also do not provide sufficient safe harbours for dominant firms (e.g. for above-cost pricing). As a result, the framework put forward in the Draft Guidelines implies an unduly high degree of discretion for a finding of infringement. This runs contrary to the stated aim to provide legal certainty and risks chilling incentives to engage in procompetitive conduct.

3. *The Draft Guidelines do not engage sufficiently with the As-Efficient Competitor (AEC) principle*. The AEC principle, and related AEC test, have been prominent in the recent case law on Article 102, and in the Commission's 2009 Guidance Paper on enforcement priorities. The Draft Guidelines do not set out sufficiently clearly the circumstances where the principle applies, and the possible exceptions to the principle (for both price- and non-price conduct). This risks adding to legal uncertainty, in light

of the important role played by this principle in the jurisprudence. In the area of pricing conduct, a departure from the AEC principle and test would be inconsistent with well-established economic principles and would not support sound enforcement.

4. *The presumptions introduced in the Draft Guidelines are unduly restrictive.* The proposed presumptions of exclusionary effects do not require an assessment of the appreciability of coverage and duration of the practice, and as such may capture conduct unlikely to result in competitive harm. The Draft Guidelines also put forward a presumption of exclusionary effects for certain forms of tying which is not sufficiently well defined, and risks reducing incentives for product innovation.

Our recommendations

We make a number of specific recommendations in our response. The spirit of these recommendations is to improve the Draft Guidelines to support the articulation of a genuine—and yet workable—effects-based approach, building on the lessons learnt since the publication of the 2009 Guidance Paper on enforcement priorities and the principles identified in recent jurisprudence.

There are three core elements of our recommendations.

1. *We recommend that the Draft Guidelines fully embed the concept of consumer harm as a guiding standard*. A departure from competition on the merits should be defined as conduct that is likely to ultimately harm consumers through the exclusion of rivals. The articulation of an explicit theory of harm should be a requirement of the legal framework set out in the Draft Guidelines, enabling a focus on *anticompetitive* exclusionary effects in line with the Guidance Paper and with recent case law. This approach should apply also to conduct subject to a presumption of anticompetitive exclusionary effects.

2. *We recommend giving more prominence to the AEC principle and test, in line with recent jurisprudence and sound economics*. The AEC test should be clarified as generally necessary and sufficient for showing a departure from competition on the merits in the case of pricing conduct (defined to include predatory pricing, margin squeeze, and rebates not based on exclusivity). This would establish a safe harbour for pricing above cost, and avoid the risk

of deterring procompetitive pricing conduct. For non-price conduct (defined to include exclusivity rebates), the Draft Guidelines should clarify the relevance of the AEC principle, carefully explain the circumstances where the principle may *not* apply, and set out how the Commission will handle evidence of replicability by an as-efficient competitor if submitted by a dominant firm in the process of rebuttal. This would ensure consistency with economic principles and recent case law, and enhance predictability.

3. *The assessment of capability of producing exclusionary effects should be subject to an appreciability standard for coverage and duration.* In order to properly detect anticompetitive exclusionary conduct, the capability analysis should focus on conduct with appreciable market coverage and duration. These requirements should also apply to conducts subject to a presumption of exclusionary effects.

We believe that taking on board these recommendations would enable the Draft Guidelines both to achieve greater legal predictability and to adopt an effective framework for enforcement, in line with the Commission's stated objectives. The integration of sound economic principles can help make the evaluation of abusive conduct more coherent, targeted, and effective. There does not need to be a trade-off between workability and the adoption of a genuine effects-based approach to Article 102 enforcement.

Overview of Oxera's recommendations

Box 1.1 Summary of Oxera's recommendations

Purpose and objectives of the Guidelines

1. Embed the objective of consumer welfare throughout the Guidelines.
   The concept of consumer harm recognised in paragraphs 5 and 6 of the Guidelines needs to be properly and directly embedded in the legal framework and tests put forward by the Commission.

2. Focus on 'anticompetitive' exclusionary effects.
   The Guidelines should clarify that the relevant exclusionary effects to consider under Article 102 are those that are 'anticompetitive', i.e. lead to (direct or indirect) consumer harm. The Guidelines should also explicitly recognise the need for a causal link between structural changes (e.g. full or partial exclusion of competitors) and consumer harm.

Dominance

3. Provide an economic definition of dominance.
   To ensure that the legal concept of 'dominance' remains connected to the economic concept of 'market power', the Guidelines should define dominance as 'significant market power' and add a definition of market power in line with the Market Definition Notice and the Guidelines on Horizontal Co-operation Agreements.

4. Reintroduce market share safe harbours.
   The Guidelines should define a reasonable market share threshold below which dominance is considered unlikely (e.g. 40%). This should be defined alongside any appropriate limitations to the application of such a safe harbour.

Departures from competition on the merits

5. Define an overarching principle, based on the concept

of consumer harm, to determine whether conduct departs from competition on the merits.
The Guidelines should provide an overarching definition of a departure from competition on the merits, and should base it explicitly on the concept of consumer harm. An explicit theory of (consumer) harm should be required for a finding that competition is not on the merits, both for conducts with and without a specific legal test.

6. Clarify the role of the AEC principle and test in defining departures from competition on the merits.
The AEC principle should have greater prominence in the assessment of competition on the merits, especially for pricing conduct (including predatory pricing, margin squeeze, and rebates not based on exclusivity). The AEC test should be applied consistently across these pricing conducts, on the basis of consistent cost benchmarks. A safe harbour should be recognised for pricing above Average Total Cost (ATC) or Long Run Average Incremental Cost (LRAIC) (depending on the context), to avoid chilling procompetitive conduct.

7. The process of rebuttal of a finding of a departure from competition on the merits needs to be clarified.
The Guidelines should clarify the process of rebuttal of a finding of a departure from competition on the merits, including through specific legal tests. Dominant undertakings should be able to rebut such a finding by showing that their conduct is unlikely to lead to consumer detriment and that therefore the Commission's theory of harm does not apply.

Capability to produce exclusionary effects

8. The evaluation of capability to produce exclusionary effects should focus only on 'anticompetitive' exclusionary effects, with an explicit treatment of the AEC principle.
The Guidelines should clarify that the assessment of capability to produce exclusionary effects should consider only 'anticompetitive' effects, i.e. effects ultimately leading to consumer harm. In order to ensure consistency with the recent case law and sound economic principles, the Guidelines should explain the

relevance of the AEC principle and test in the assessment of effects and clearly justify when the Commission might depart from the AEC principle.

9. Adopt a materiality standard in the assessment of the likelihood of effects, taking into account the degree of dominance.
   The Guidelines should adopt a materiality standard when considering the probability of anticompetitive exclusionary effects, relative to a sufficiently likely counterfactual scenario absent the conduct. This can take into account the degree of dominance and hence the magnitude of harm to consumers in the event of exclusion.

10. Require appreciable coverage and duration of the conduct for a finding of capability to lead to exclusionary effects, also for conducts subject to a presumption.
   Appreciable coverage and duration of a conduct should be seen as a pre-condition for a finding of capability to lead to exclusionary effects. This pre-condition should also apply to any conduct subject to a presumption of anticompetitive exclusionary effects.

Specific categories of conduct

11. Establish a clear theory of harm for all categories of conducts.
   The Guidelines should provide an explicit theory of (consumer) harm for each category of conduct, including those subject to a presumption of exclusionary effects.

12. Introduce a requirement of appreciable coverage and duration for exclusive dealing, predatory pricing, and margin squeeze.
   The presumption of exclusionary effects for exclusive dealing, predatory pricing, and margin squeeze should be premised on a finding of appreciable coverage and duration of the conduct.

13. Explain the role of the AEC test for exclusive dealing and exclusivity rebates.
   Whilst the AEC test is not necessarily suitable for

exclusive dealing and exclusivity rebates, the Guidelines should clearly explain the role to be played by the AEC test in the assessment of these practices and in the process of rebutting a finding of exclusionary effects.

14. Remove the presumption of exclusionary effects for certain forms of tying.
    The Guidelines should not apply a presumption of exclusionary effects to certain forms of tying, to enhance legal predictability and avoid deterring procompetitive conduct.

Objective justifications

15. Provide concrete examples of relevant objective necessities and efficiencies.
    To help firms collect and provide the right evidence, the Guidelines should provide concrete examples of possible objective necessity and efficiency defences, with guidance on the types of evidence required.

16. Address the asymmetry in standards of proof to demonstrate effects.
    Ensure consistency in the standards of proof by aligning the low threshold for proving capability of exclusionary effects with the apparently higher standard of proving efficiencies or objective justifications. A symmetric standard of proof should also apply to conducts subject to a presumption of exclusionary effects (other than naked restrictions).

17. Clarify the balancing test for efficiencies.
    Clarify how a balancing exercise would be conducted for any efficiencies that may be demonstrated by the dominant undertaking. Introducing explicit theories of harm under the proposed legal framework for conduct that is liable to be found abusive would help rectify this issue and allow for a proper balancing test.

1 Introduction

This document presents Oxera's response to the public consultation on the Draft Guidelines for the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) to abusive exclusionary conduct ('the Draft Guidelines').

1.1 General reflections

We welcome the Commission's efforts to provide clarity and guidance on the enforcement of Article 102 and to reflect recent developments in jurisprudence. We also support the initiative to provide formal guidelines in the area of Article 102 enforcement, ideally building on the Commission's Guidance Paper on enforcement priorities[1] ('the Guidance Paper') which was a comprehensive and influential document, and which has helped shape the recent evolution of the case law.

As recently emphasised in the recent Draghi Report, vigorous competition policy ensures the undistorted functioning of the internal market and protects European consumers and businesses against abuses of economic power.[2] As part of this, Article 102 is instrumental in disciplining the conduct of dominant undertakings. On the other hand, the enforcement of Article 102 should not dilute the incentives by dominant firms to compete vigorously in the market place, by innovating their products and offering good deals to consumers. A balance needs to be struck between preventing entrenched market positions through effective enforcement of Article 102 on the one hand, and promoting productivity-enhancing market dynamics by enabling incumbent firms to compete, even if this comes at the expense of less efficient rivals. Getting this balance right is particularly important in Europe, in light of the productivity and competitiveness challenges highlighted in the Draghi report.

In our response, we aim to contribute constructively to the discussion on how reform the enforcement of Article 102 by highlighting areas where the Draft Guidelines could be improved to better align it with established economic principles and sound enforcement. We focus on the economic aspects of the Draft Guidelines, within the overall framework of the recent case law on Article 102 (which has gradually

[1] European Commission (2009), 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 24 February (hereafter, referred to as "the Guidance Paper").
[2] Draghi, M. (2024), 'The Future of European Competitiveness – Part B: In-depth analysis and recommendations', September (Section 2: Horizontal policies, Chapter 4, 'Revamping competition').

embraced several of the elements of the effects-based framework originally set out in the Guidance Paper).

Our overall concern with the Draft Guidelines is that they present a legal framework that does not focus on the likelihood that allegedly exclusionary conduct would result in competitive harm. The concept on consumer harm was at the centre of the Guidance Paper, and in our view it should be the key element of any effects-based approach. Departure from this concept would be a significant change in policy stance, and risks moving away from a genuine effects-based approach. Similarly, the legal framework proposed in the Draft Guidelines and the specific legal tests rely only partially on economic principles and as such do not support the articulation of proper economic theories of (consumer) harm. In addition, the open-ended nature of the currently proposed legal framework does not promote legal certainty, which would, if maintained, undermine one of the stated aims of the Draft Guidelines.

The recommendations that we present in this response aim to introduce a greater reliance on sound economic principles, while explicitly staying true to our understanding the case law. We suggest amendments to the proposed general framework and specific legal tests which would ensure that only exclusionary conduct that is likely to ultimately lead to consumer harm is liable to be abusive under Article 102. We believe that our recommendations, if adopted, would enhance the legal certainty provided by the Draft Guidelines, while at the same time promoting a *genuine* and *workable* effects-based approach—in line with the stated objectives of the Draft Guidelines and the case law.

1.2 Outline

The structure of this document follows the structure of the Draft Guidelines. For each section, we first briefly summarise our understanding of the Draft Guidelines, followed by our comments and specific recommendations. Key recommendations are summarised in a box at the end of each section.

1.3 About Oxera

Oxera is a European economic consultancy with a long track record in competition policy. We have acted as advisers and experts in a range of cases before the European Commission, national competition authorities, and courts involving mergers, restrictive agreements, abuse of dominance and state aid. We act for corporate clients involved in these cases, and at times for competition authorities or as court-appointed experts.

Oxera regularly contributes to the policy debates in competition law and to the competition economics literature. The Oxera Economics Council, which consists of leading European academics, interacts twice a year with policymakers and competition officials on policy questions in competition and regulation.[3]

We regularly provide competition economics training to law firms, competition authorities and judges. Oxera assisted the European Commission with a study on quantifying antitrust damages, which formed the basis for the Commission's 2013 guidance to national courts.[4]

[3] We benefitted from a session on the reform of Article 102 with the Oxera Economics Council in spring 2024 (Oxera background paper available here: Oxera-Economics-Council-background-paper-towards-Art-102-guidelines-.pdf). The views expressed in this document are that of Oxera and not of the Council members.
[4] Oxera (2009), 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission', *Publications Office of the European Union*, December; European Commission (2013), 'Practical guide on quantifying harm for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', Staff working document, June.

2 Purpose and objectives

2.1 Summary of the Draft Guidelines (Section 1)

The Draft Guidelines summarise the general objective of Article 102 in paragraph 5, stating that Article 102 applies to all practices which may directly or indirectly harm the welfare of consumers, including practices which may harm consumers by undermining an 'effective structure of competition'.

The Draft Guidelines also clarify in paragraph 6 that exclusionary abuse relates to any exclusionary effects achieved through means or resources that depart from competition on the merits. Exclusionary effects are broadly understood to refer to any hindrance to actual or potential competitors' ability or incentive to exercise a competitive constraint, including also the marginalisation of competitors (and not just outright exclusion).

Finally, the Draft Guidelines emphasise the need for a predictable application of Article 102 (paragraph 4), and the stated objective to enhance legal certainty for firms (paragraph 8). At paragraph 4, the Draft Guidelines also note the need for an effective and vigorous application of Article 102, in light of greater concentration in the economy (including, in particular, in digital markets). This is connected to the general objective by the Commission to apply a 'workable effects-based' approach to Article 102 enforcement.[5]

In this section, we reflect on the formulation of the objective of consumer welfare and of protection of an effective structure of competition (Section 2.2) and the definition of exclusionary effects (Section 2.3). We conclude with reflections on the objective to promote legal certainty and workability (Section 2.4).

2.2 Consumer welfare and structure of competition

The general objective of Article 102, as formulated in paragraph 5, relates to both consumer welfare and the protection of an effective competitive structure. However, we consider that the relationship

[5] European Commission (2023), 'A dynamic and workable effects-based approach to abuse of dominance', Competition Policy Brief, Issue 1, March (hereafter, referred to as the Policy Brief); and 'Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association', 6 September 2024.

between the two concepts should be developed further, and we provide some suggestions on how to do so in this section of our response.

2.2.1 Preventing consumer harm

We welcome the explicit reliance on the concept of consumer welfare in paragraphs 5 and 6 of the Draft Guidelines (and later in paragraph 51 when considering the notion of competition on the merits), in line with sound economic principles and well-established case law.[6]

However, we note that these are the only substantive references to consumer harm in the Draft Guidelines. The rest of the document does not further develop or operationalise the concept, and it is not included in any of the legal tests and principles.[7] In particular, there is a clear omission of the need to develop theories, or narratives, on exactly how, and under what conditions, a particular conduct leads to (direct or indirect) consumer harm (in short these are commonly referred to as 'theories of harm').[8]

This is a regrettable omission in light of the Commission's own objective of ensuring that Article 102 enforcement remains effects-based, and a significant departure from the recent case law as well as the original Guidance Paper (which had placed significant emphasis on the concept of consumer harm). Sound economic principles suggest that a theory of harm must be articulated in abuse of dominance cases.

Later, we will return to the need to embed the objective of preventing consumer harm through the articulation of theories of harm for effective effects-based enforcement, both in relation to the general principles set out in the Draft Guidelines (Section 4), and to the assessment of specific conducts (Section 5).

Finally, we observe that the definition of consumers in footnote 2 of the Draft Guidelines, although it correctly includes not just final consumers but also intermediate customers, omits any reference to upstream trading partners, including labour. We consider it appropriate that the

[6] *Post Danmark*, Judgment of the Court of 27 March 2012, C-209/10 (hereafter, referred to as *PostDanmark I*), paras. 20 and 24; *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, C-377/20 (hereafter, referred to as *SEN*), para. 44.
[7] The only exception is para. 72 of the Draft Guidelines, which states that 'it is not necessary to prove that the conduct resulted in direct consumer harm'. Whilst this is correct, it does not mean that the likelihood of (direct or indirect) consumer harm should not be established.
[8] We have identified only one indirect reference to the need to consider the underlying theory of harm, in the section of collective dominance, para. 42: 'The analysis of the four elements set out in sub-sections 2.3.1 to 2.3.4 [coordination, monitoring, deterrence, external stability] should not be undertaken mechanically and in an isolated and abstract manner, but should take the overall mechanism of a hypothetical tacit coordination into account.'

Draft Guidelines should also recognise that Article 102 can be used for the protection of the competitive process in upstream markets, and hence that the notion of consumer welfare should be interpreted broadly, to include also upstream trading partners.[9]

2.2.2 Role of structural effects

We agree that abusive conduct may harm consumers both directly and indirectly. Indirect harm to consumers is particularly relevant for exclusionary abuse, where harm is typically premised on the exclusion of competitors and the subsequent reduction of competitive constraints on the dominant firm. Consumer harm in these circumstances will often materialise only after the exclusion of the rival, and will not be an immediate consequence of the anticompetitive conduct.

However, under a proper effects-based approach, we consider it important to emphasise that even in cases where harm to consumers is indirect, there should also be a causal link between the abusive conduct and the ultimate harm to consumers. Put differently, to demonstrate that conduct is harmful and abusive, it is not sufficient to show that changes in market structure and an increase in concentration levels. This is because—as well established in basic economic principles and in the jurisprudence—procompetitive conduct ('competition on the merits') by a dominant firm (say, the introduction of a new, innovative product) may well lead to lower market shares for its rivals, and a higher degree of market concentration.[10] Consequently, changes in market structure alone are not a good indicator of whether a conduct is harmful for consumers/customers.

We therefore suggest that the Commission clarifies that the reference to an 'effective structure of competition' in paragraph 5 of the Draft Guidelines does not imply that cases can be pursued *solely* on the basis of structural effects, but that this requires establishing a *causal* link between any effect on the structure of competition and the (expected) harm on consumers.[11]

[9] This would be in line with Commission's practice in other areas of competition policy, including mergers. See, for example, Case M.9409—*Aurubis/Metallo Group Holding*, para. 376.
[10] *PostDanmark I*, para. 22; *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P (hereafter, referred to as *Intel I*), para. 134.
[11] Such an approach would be consistent with case law, e.g. see *Superleague*, which requires that Article 102 'prevent[s] competition from being restricted to the detriment of the public interest, individual undertakings and consumers, by sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition'. See *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21 (hereafter, referred to as *Superleague*), para. 124.

2.3 Anticompetitive exclusionary effects

While the Draft Guidelines appropriately defines exclusionary effects more broadly than only outright exclusion (to also include partial exclusion and marginalisation of rivals), it falls short of appropriately explaining that not all exclusionary effects are harmful to consumers, as we set out below.

2.3.1 Full versus partial exclusion

We agree that the definition of exclusionary effects should include not just full-fledged or outright exclusion of rivals, but also their marginalisation. This is because the competitive constraint exercised by a rival to the dominant firm may be impaired also in the presence of partial exclusion.

However, it is important to bear in mind that not all instances of partial exclusion will be associated with a reduction in the competitive constraint faced by the dominant firm, and an increase in its market power.[12] The reference to marginalisation in paragraph 6 should therefore not be interpreted as implying that any shift in market shares (to the benefit of the dominant firm) would qualify as an exclusionary effect for the purposes of the enforcement of Article 102.

2.3.2 Exclusionary effects vs anticompetitive exclusionary effects

The definition of 'exclusionary effects' contained in paragraph 6 of the Draft Guidelines does not include an explicit reference to the anticompetitive nature of such effects. Whilst the first sentence in paragraph 6 refers to the concept of consumer harm, and to the fact that in order to be abusive, exclusionary conduct would depart from competition on the merits, the actual definition of exclusionary effect set out in the rest of paragraph 6 does not include the qualification that only 'anticompetitive exclusionary effect' should be captured by Article 102.

This drafting leaves open the possibility that the definition of exclusionary effects at paragraph 6 would capture any shift in market share toward a dominant undertaking, including changes in market structure that may be caused by procompetitive conduct (e.g. product innovation by the dominant undertaking).

We suggest that in the definition put forward in paragraph 6, the final text of the Guidelines refer explicitly to 'anticompetitive exclusionary

[12] See also Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*, pp. 85–107.

effects', that is, exclusionary effects that are to the direct or indirect detriment of consumers. This definition would ensure that enforcement action is only aimed at exclusionary effects that lead, directly or indirectly, to consumer harm.[13] It would also be in line with the concept of 'anticompetitive foreclosure' set out in the Guidance Paper (paragraph 19)[14], and would therefore ensure continuity of the Commission's approach. Finally, this definition would also promote consistency with the recent case law, which has embraced the concept of anticompetitive foreclosure.[15]

2.4 Legal certainty and a workable effects-based approach

The two key stated objectives of the Draft Guidelines are to promote legal certainty and to preserve the effectiveness (or workability) of an effects-based approach to enforcement. We are concerned that the current text risks falling short from achieving both objectives.

2.4.1 Legal certainty and discretion

The Draft Guidelines seek to enhance legal certainty by putting forward the Commission's interpretation of the extensive recent case law in the area of exclusionary abuse under Article 102.[16] Given the complexity of recent jurisprudence in this area, this inevitably reflects a policy judgment by the Commission, and to some extent it provides a measure of its enforcement priorities. Whilst this is a legitimate purpose of guidelines, our concern is that in exercising this policy judgment the Commission draws conclusion from the case law which result in ambiguous and uncertain standards for the substantive assessment of abusive conduct. We will discuss the specific reasons for this concern later in our response.

The proposed legal tests are—in our view—unduly open-ended, and the Draft Guidelines provide only limited safe harbours to help companies determine the legality of unilateral conduct. The Draft Guidelines therefore risk doing little to promote legal certainty and to allow companies to self-assess their behaviour. This is problematic not only

[13] The concept of consumer harm should be interpreted widely, reaching beyond price effects to cover other negative impacts on consumers (individuals, households and businesses) and trading partners of the dominant firm.
[14] The Guidance Paper also states that "The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure" (para. 20). The Draft Guidelines do not contain an equivalent statement.
[15] For example the recent judgment of the Court in *Intel* relies extensively on the concept of anticompetitive foreclosure, mentioning it over 25 times (*Intel v. Commission*, Judgment of the Court of 24 October 2024, Case C-240/22 P (hereafter, referred to as *Intel II*)).
[16] See European Commission (2024), 'Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses' (press release), 1 August. See also 'Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association', 6 September 2024.

because it undermines one of the stated purposes of the Draft Guidelines, but also because it may chill procompetitive and innovative conduct, to the detriment of consumers.

The lack of clear standards to determine the line between legal and abusive conduct also implies that one of the typical benefits of guidelines (which is to bind the competition agency to a specific framework of assessment) is not achieved. The Draft Guidelines, in their current form, do not self-commit the Commission to a well-defined analytical framework, and give it an excessively wide margin of discretion. This in turn would not assist national competition agencies and courts in their evaluation of possible exclusionary abuses under Article 102 in a consistent manner.

2.4.2 A 'workable' and 'effects-based' approach

The second stated aim of the Draft Guidelines is to preserve the effects-based approach originally introduced in the Guidance Paper (and generally accepted by the courts in recent cases[17]), but to make it 'workable'.[18]

The impression given by this stated objective is that the effects-based approach put forward in the Guidance Paper is not workable, and that, as such, it may undermine effective enforcement.[19] However, in the

[17] European Commission (2024), 'Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses' (press release), 1 August: 'In its 2009 Guidance on the Commission's enforcement priorities, the Commission set out its enforcement priorities with regard to exclusionary abuses of dominance. The 2009 Guidance contributed to promote an approach focused on the potential effects of alleged abusive conduct, through the analysis of market dynamics ("effects-based approach"). Since the adoption of the 2009 Guidance, the Court of Justice of the European Union has delivered 34 judgments on exclusionary abuses. This rich body of case law endorsed the effects-based approach to Article 102 TFEU promoted by the Commission and substantially clarified the scope of the rules'.

[18] See 'Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association', 6 September 2024: 'we will not depart from the effects-based approach. On the contrary, the effects-based approach remains front and centre in the current draft. At the same time, sticking to an effects-based approach does not mean you cannot learn from experience. And it certainly should not lead us to overlook the case law. The Draft Guidelines lay out a coherent framework of assessment. That framework is based on the case law and our practice. This is what we call a "workable" effects-based approach'; and 'Opening speech delivered by Olivier Guersent, Director General of DG Competition at the VI Lisbon Conference', 8 November 2023: 'The main purpose of the Guidelines is to clarify how the effects-based approach – by now well-established – applies. So, when thinking of the post-Guidelines world, I would expect to see a fair degree of continuity in our current approach to Article 102 enforcement. We will continue to run cases based on effects, and we will rely on the insights and assistance of economic analysis, if appropriate. Economics definitively plays a role in our competition law assessment and can assist in the identification of sound theories of harm. That said, economic analysis is only a part of an overall assessment of all the relevant facts and circumstances. It also needs to remain within the boundaries of a "workable" standard and not be treated as a scientific proof of the existence or absence of anticompetitive effects'.

[19] The other impression that is given is that the application of the Guidance Paper since its introduction has led to slower and less effective cases. The reality, however, is that the Commission has actually not relied on the Guidance Paper in most of its antitrust enforcement in recent years, partially because it was presented as a statement of its enforcement priorities rather than a binding framework on how to legally assess cases.

attempt to make an effects-based approach more workable, the Draft Guidelines actually depart from the core of the effects-based approach in significant ways. In particular, the Draft Guidelines remove key elements from the general framework that had been put forward in the Guidance Paper, most notably the focus on the likelihood of consumer harm and of anticompetitive foreclosure.[20]

Additionally, the Draft Guidelines eliminate from the proposed framework most of the descriptions of economic mechanisms for harm that had been explicitly set out in the Guidance Paper for specific conducts (e.g. in the discussions of exclusive dealing, tying, predation and refusal to supply).

In doing so, the Draft Guidelines de facto move away from an effects-based approach to Article 102, and return to a more formalistic assessment of legal tests. Whilst this may promote the 'workability' of enforcement (by helping the Commission and national authorities to reach findings of infringement mainly based on the form of the conduct rather than its effects), it would come at the cost of accuracy and sound evidence-based enforcement. This would run contrary to the one of the original aims (and, in part, achievements) of the Guidance Paper, which was to introduce greater economic principles in Article 102 enforcement, in turn contributing to modernising it in the same way as merger control and Article 101 enforcement.[21] Indeed, a shift away from an effects-based framework would run counter to the greater acceptance by the courts in recent cases of the economic principles introduced by the Guidance Paper,[22] and as such risks leading to greater legal uncertainty.

This is not to say that the Guidance Paper should be preserved as it is, for the purpose of adopting formal Guidelines on Article 102. There have

[20] See Guidance Paper, para. 20 (quoted above). More generally, when announcing the Guidance Paper, the Commission had placed significant emphasis on the concept of consumer harm, see e.g. European Commission (2008), 'Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings' (press release), 3 December (which states that 'The guidance sets out the Commission's determination to prioritise those cases where the exclusionary conduct of a dominant undertaking is liable to have harmful effects on consumers'; and that 'the Commission does not need to establish that the dominant undertaking's conduct actually harmed competition, only that there is convincing evidence that harm is likely'). A focus on likelihood of consumer harm is missing from the Draft Guidelines and related communications by the Commission.

[21] See European Commission (2008), 'Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions', 3 December: 'The Guidance Paper is intended to contribute to the process of introducing a more economics based approach in European competition law enforcement. Such an approach has already been formulated and implemented in the area of Article 81 and mergers since the late 1990s'.

[22] Niels, G., Jenkins, H. and Kavanagh, J. (2023), *Economics for Competition Lawyers*, 3rd edition, Oxford University Press, August, Section 5.1.2 (hereafter, referred to as Niels et al. (2023)).

been significant lessons learnt in Article 102 cases since the Guidance Paper was published, and a significant evolution of the case law. There is certainly scope for simplification and refinements of some of the approaches that had been put forward in the Guidance Paper, in order to make them more workable and effective, in line with the Commission's stated objective. However, abandoning the fundamental elements of the framework underpinning the Guidance Paper, and more generally reducing the reliance on sound economic principles, risks undermining the effectiveness of the enforcement of Article 102.

The proper use of economics in Article 102 cases can help focus investigations on the salient facts, provide a coherent account of the overall body of evidence, and to target the most harmful type of conduct. This can make investigations more efficient and targeted, and hence more effective. More reliance on economic theories of harm can also ensure that investigations can flexibly adjust to novel forms of conduct in the modern economy, without having to shoe-horn them in established legal tests. There does need to be a trade-off between workability and an effects-based approach, provided that the effects-based approach is targeted, well-defined, and based on sound economics.

Box 2.1 Recommendations on purpose and objectives

1. Embed the objective of consumer welfare throughout the Guidelines.
   The concept of consumer harm recognised in paragraphs 5 and 6 of the Guidelines needs to be properly and directly embedded in the legal framework and tests put forward by the Commission.

2. Focus on 'anticompetitive' exclusionary effects.
   The Guidelines should clarify that the relevant exclusionary effects to consider under Article 102 are those that are 'anticompetitive', i.e. lead to (direct or indirect) consumer harm. The Guidelines should also explicitly recognise the need for a causal link between structural changes (e.g. full or partial exclusion of competitors) and consumer harm.

3 Dominance

3.1 Summary of the Draft Guidelines (Section 2)

The Draft Guidelines define dominance as 'a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers.'[23] A dominant position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance).

The Draft Guidelines clarify that, once dominance has been established, the degree of dominance does not as such determine the scope of application of Article 102, but may be relevant, among other factors, for the purpose of analysing whether the conduct is capable of producing exclusionary effects.

Factors that are relevant for the assessment of dominance include: (i) a company's market position, as evidenced in particular by market shares, but also by an analysis of the competitive dynamics on the market and the degree of differentiation between competitors; (ii) the extent of any barriers to entry or expansion; (iii) the extent of any countervailing buyer power.

Collective dominance additionally requires an examination of the economic links or factors giving rise to the connection between the undertakings concerned. For this, the Draft Guidelines refer to the *Airtours* criteria (coordination, monitoring, deterrence, and external stability).

In relation to market shares, the Draft Guidelines state that market shares of 50% or above are in themselves—save in exceptional circumstances—evidence of the existence of a dominant position, but that dominance can also be found where an undertaking holds a market share below 50%. Market shares below 10% exclude the existence of a dominant position save in exceptional circumstances.

In the rest of this section, we reflect on the legal definition of dominance and its link to the fundamental economic concept of market power

[23] Draft Guidelines, para. 18.

(Section 3.2), the lack of safe harbours involving market shares (Section 3.3), and the treatment of collective dominance (Section 3.4).

3.2 Economic definition of dominance and market power

We welcome the Commission's overall approach to dominance, in that it correctly identifies many of the relevant factors in the economic assessment of dominance (e.g. existing position in the market, barriers to entry, countervailing buyer power).

However, while the definition of dominance in the Draft Guidance is consistent with long-standing case law, we note that it lacks clear economic interpretation. In the Guidance Paper, the Commission had correctly clarified that an undertaking can generally be regarded as dominant 'if it is capable of profitably increasing prices above the competitive level for a significant period of time', where 'increase prices' is used as short hand for the various ways in which the parameters of competition (e.g. prices, output, innovation, variety and quality of goods) can be influenced to the detriment of consumers.[24]

We consider such a definition, or a definition similar to this, to be a useful framework for conceptualising what the Commission would consider to be, in practice, 'the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers'.

More generally, while dominance is a legal classification for the purpose of establishing whether Article 102 applies, the underlying economic concept is that of market power—which instead of a binary classification is a matter of degree.[25] In other words, dominance refers to a high degree of market power (above a certain threshold).

As explained inter alia in the recent Guidelines on Horizontal Co-operation Agreements and in the Market Definition Notice, market power is defined as 'the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time'.[26] In this context we consider it

[24] 2009 Guidance Paper, para. 11.
[25] Niels et al. (2023), Section 4.2.2.
[26] European Commission (2023), 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2023/C 259/01), July, fn. 40; and European Commission (2024), 'Commission Notice on the definition of the relevant market for the purposes of Union competition law' (C/2024/1645), February, fn. 14.

would be helpful to define dominance explicitly as a 'significant degree of market power'.[27]

The advantage of having an economic definition of dominance is that the Commission would be able to identify both the source and the degree of market power more clearly from the outset. This, in turn, can facilitate targeted and effective enforcement, given that these are all relevant factors for the subsequent assessment of the effects of any alleged exclusionary conduct.

Adopting an economic definition is also consistent with the way in which the Commission proposes to approach the dominance assessment in other parts of the Draft Guidelines. For example, when discussing barriers to entry and expansion, the Draft Guidelines rely on the concept of 'applying prices or other conditions above the competitive level' as well as the 'persistency' of such circumstance.[28]

3.3 Market share thresholds

The Draft Guidelines present an asymmetric approach in the use of market shares as a screening tool for dominance, with a de facto presumption of dominance applying to market shares above 50%, but no corresponding thresholds for 'safe harbours'.

For example, the Guidance Paper noted 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% in the relevant market', although there 'may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominance undertaking, for example where they face serious capacity limitations'.[29]

Conversely, the Draft Guidelines do not provide any indication of a market share level below which the Commission will consider that dominance is unlikely to be present. The only reference to such threshold is provided at footnote 41, where the Commission reports that

[27] Related, we note that para. 21 refers to 'the degree of dominance'. From an economic perspective, this should rather refer to 'the degree of market power', with market power as the continuous variable that underlies dominance, and dominance as a binary classification that applies above a particular market power threshold. A similar point applies to para. 70(a), which refers to 'the extent of dominance' as an element potentially relevant for establishing a capability to produce exclusionary effects; and elsewhere.
[28] The Draft Guidelines note that 'Easy expansion and entry in a market limits the ability of an undertaking in that market to behave independently, as applying prices or other conditions above the competitive level would attract expansion or new entry by rivals' (para. 29) and that 'Persistently high market shares of the undertakings concerned over a prolonged period may in themselves indicate the existence of barriers to expansion and entry' (para. 32).
[29] 2009 Guidance Paper, para. 14.

'market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances'. However, from an economic perspective, such a low market share cannot be seen as consistent with the existence of a dominant position. In our view, finding such a low market share, while simultaneously pursuing an abuse of dominance case, would indicate either: (i) an error in the definition of the relevant market (e.g. the market should be narrower, and corresponding market share higher); and/or (ii) a tenuous case for anticompetitive effects detrimental to consumers, given that abuse allegations with only 10% share would likely be untenable and not supported by reasonable assumptions on market coverage/reach of the conduct.[30]

In order to ensure a balanced approach and to provide greater legal certainty, we propose that the Commission reintroduces a market share 'safe harbour' at a level that the Commission considers appropriate based on its enforcement experience, alongside any limitations to the application of this safe harbour, where appropriate (the capacity constraints mentioned in the 2009 Guidance is an example of such limitation, but the Commission could consider other situations).

We consider the previously referenced 40%, while in itself somewhat arbitrary, as a workable threshold, maintaining the clarification that this is not a hard threshold and that, depending on the circumstances of the case and in exceptional circumstances, dominance can be identified at lower shares.

3.4 Collective dominance

In contrast to the Guidance Paper, the Draft Guidelines now include a section on collective dominance, under which the conduct of two or more economic entities can be assessed under Article 102. The Draft Guidelines refer, in particular, to the need to examine the economic links or factors giving rise to a connection between the undertakings concerned that enable them to act together independently of their competitors, their customers, and consumers.

The case law cited in this section is generally quite dated, often between 20 and 25 years old (i.e. before the 2009 Guidance Paper). However, we consider the inclusion of this section helpful, given that there exists case law on collective dominance and various national

[30] Moreover, the case cited in support refers to the 10% as 'insufficient' (save in exceptional circumstances) for a finding of dominance, and as such does not actually indicate anything about what safe harbour might or should be.

authorities and courts have more recently considered Article 102 cases under collective dominance.[31]

We also consider the discussion of the various elements relevant to establish collective dominance on the basis of (tacit) coordination (i.e. coordination, monitoring, deterrence, and external stability) appropriate, as this directly refers to established and general economic mechanisms around coordination or collusion between competing undertakings,[32] as well as legal principles established within merger control.[33]

However, these elements generally relate to the theory of harm and hence the (collective) capability of leading to exclusionary effects. In fact, in paragraph 42, the Commission recognises the importance of taking into account the overall 'mechanism' of a hypothetical tacit coordination (i.e. a theory of harm). As such, we consider it appropriate to clarify that these elements are not only relevant to establish collective dominance, but also for establishing liability.[34] Moreover, we consider it necessary that a similar recognition of the relevance of theories of harm is adopted in other sections of the Draft Guidelines (notably in the discussion of the general legal principles and of categories of conduct).

[31] See, for example, *KPN/Vodafone v ACM* (Case 18/2103, 18/2251, 18/2351, and 18/2501), ECLI:NL:CBB:2020:177, judgment of the Trade and Industry Appeals Tribunal of the Netherlands of 17 March 2020. See also 'Décision relative à des pratiques mises en œuvre dans le secteur du traitement de la dégénérescence maculaire liée à l'âge (DMLA)' (Case 20-D-11), Decision of the French competition authority of 9 September 2020.
[32] Oxera (2021), 'Package deal: why the Airtours criteria are also relevant for understanding cartels', *Agenda*, 27 October.
[33] See European Commission (2004), 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004/C 31/03), February, paras. 39–57 about coordinated effects.
[34] This link between the factors determining collective dominance and relevant factors for establishing a collective capability to produce exclusionary effects can already be made through para. 21, which notes that 'the degree of dominance' may be relevant, among other factors, for the purpose of establishing capability. However, we consider that this link can be made stronger and more explicit.

Box 3.1 Recommendations on dominance

3. Provide an economic definition of dominance.
   To ensure that the legal concept of 'dominance' remains connected to the economic concept of 'market power', the Guidelines should define dominance as 'significant market power' and add a definition of market power in line with the Market Definition Notice and the Guidelines on Horizontal Co-operation Agreements.

4. Reintroduce market share safe harbours.
   The Guidelines should define a reasonable market share threshold below which dominance is considered unlikely (e.g. 40%). This should be defined alongside any appropriate limitations to the application of such a safe harbour.

4 General principles for determining liability of abuse

4.1 Summary of the Draft Guidelines (Section 3)

The Draft Guidelines put forward a structured two-limb framework for determining whether a given exclusionary conduct is liable to be abusive under Article 102:

- The first step of the test examines whether the conduct departs from competition on the merits ('Limb 1').
- The second step assesses whether the conduct is capable of producing exclusionary effects ('Limb 2').

If both limbs are met, a conduct is liable to be abusive, unless objectively justified. The proposed legal framework is based on recent case law.[35]

Separately, the Draft Guidelines propose specific legal tests for five forms of conduct: exclusive dealing (including exclusivity rebates), tying and bundling, refusal to supply, predatory pricing, and margin squeeze. If conduct meets the conditions of the relevant legal tests, it is deemed to depart from competition on the merits and capable to produce exclusionary effects (i.e. both limbs are satisfied).

4.1.1 Limb 1: departure from competition on the merits

The Draft Guidelines state that competition on the merits should be generally understood as conduct which benefits consumers (paragraph 51). However, the Draft Guidelines do not offer a definition of what constitutes competition *not* on the merits.

The Draft Guidelines go on to identify a non-exhaustive list of potentially relevant factors that may establish that conduct departs from competition on the merits.[36]

[35] *SEN*, para. 61; *Superleague*, para. 129. The test set out in *Superleague* has also since been followed in *Google Shopping*, Judgment of the Court of 10 September 2024, Case C-48/22 P (hereafter, referred to as *Google Shopping*), para. 165; and in *Intel II*, para. 176.
[36] This includes, for example, whether the conduct holds no economic interest other than of restricting competition (para. 54) and the AEC principle (i.e. whether the conduct cannot be replicated by a hypothetical as-efficient competitor, para. 55(f)); but also more specific factors, for example whether the conduct prevents consumers from exercising their choice based on the merits of the products, whether the dominant undertaking provides misleading information to authorities, and whether the dominant undertaking violates rules in other areas of law and thereby affect a relevant parameter of competition.

For the case of pricing conduct, the Draft Guidelines explain that a 'price-cost test' is required to show that competition departs from competition on the merits—without however linking the concept of a price-cost test to the As Efficient Competitor (AEC) principle.

The Draft Guidelines also note that conduct which 'at first sight' does not depart from competition on the merits (e.g. because prices are above average total cost) may, in specific circumstances, still be found to do so, based on an analysis of all legal and factual elements, notably: (i) market dynamics, (ii) extent of the dominant position, and (iii) the specific features of the conduct at stake.

4.1.2 Limb 2: capability to produce exclusionary effects

The Draft Guidelines set out the proposed interpretation of the evidentiary burden and substantive legal standards necessary for showing a capability to produce exclusionary effects.

On the evidentiary burden, the Draft Guidelines identify three categories of conducts, each with different degrees of presumptions as to their respective capability to lead to exclusionary effects.

- **Conducts where capability needs to be assessed**, based on specific analysis and evidence (i.e. no presumption is applied).
- **Conducts for which the capability is presumed.** These conducts are a subset of the five conducts for which a specific legal test is put forward and include: exclusive dealing (including through exclusivity rebates), specific forms tying and pure bundling, predatory pricing, and margin squeeze with a negative spread between wholesale and downstream prices.
- **Naked restrictions.** These include types of conduct that have no economic interest other than that of restricting competition. These conducts are subject to a stronger presumption of exclusionary effects, which can be overturned only in exceptional circumstances. The presumed harm from this conduct is also deemed unlikely to be counterbalanced by efficiencies.

On the substantive legal standard for showing capability, the Draft Guidelines note that it is sufficient to show that conduct has contributed to increasing the likelihood of exclusionary effects relative to any plausible counterfactual ('it is sufficient to establish a plausible outcome amongst various possible outcomes', paragraph 67).

The Draft Guidelines then list the possible factors that may be relevant to satisfy Limb 2, largely following those set out in the jurisprudence (e.g. paragraph 139 of *Intel I*) and in the Guidance Paper (paragraph 20).

The Draft Guidelines also discuss elements that are *not* necessary to fulfil the requirement of Limb 2 (e.g. there is no need to show that actual or potential competitors are as efficient as the dominant undertaking, that there is direct consumer harm, that the conduct is enabled by the dominant position, or that exclusionary effects are appreciable).

4.1.3 Outline of the rest of this section

In this section, we provide an assessment and overall comments on the general principles behind the two-limb framework put forward in the Draft Guidelines (Section 4.2), after which we focus respectively on Limb 1 (Section 4.3) and Limb 2 (Section 4.4). Annex A1 provides more background on the AEC principle and AEC test, given its general relevance to the proposed legal framework (in light of economic principles and the jurisprudence).

4.2 Overall comments on the general principles

In this section, we set out our general critique of the two-limb framework included in the Draft Guidelines.

As we have noted above, the two-limb legal framework is based on recent case law, notably *SEN* and *Superleague*.

In *Superleague*, the Court of Justice put forward two necessary conditions for a finding of abuse, namely that the conduct departs from competition on the merits, and that it excludes equally efficient competitors.[37] This has since been emphasised in *Google Shopping* and in *Intel II*.[38]

In *SEN*, the Court presents a similar two-step approach at paragraph 103. Whilst the overall legal test set out in SEN does not include the explicit qualification that exclusionary effects shall relate to as-efficient competitors, the judgment identifies *sufficient* conditions for a conduct to be seen as a departure from competition on the merits, including whether the conduct holds no economic interest but for the exclusion of a rival,[39] and whether the conduct can be replicated by a hypothetical equally efficient rival.[40]

[37] *Superleague*, para. 129.
[38] *Google Shopping*, para. 165; *Intel II*, para. 176.
[39] *SEN*, para. 77.
[40] *SEN*, para. 78.

The Draft Guidelines appear to rely primarily on this recent case law for the proposed legal framework. However, they omit some of the safeguards and limiting principles that the Court of Justice also put forward in its recent judgements.

Notably, the AEC principle is omitted from the proposed Limb 2 of the proposed legal framework (contrary to *Superleague* and, more recently, *Google Shopping* and *Intel II*). Similarly, the significant emphasis placed by the Court in *SEN* (and in the Opinion by the Advocate General)[41] on replicability by an equally efficient competitor for the definition of competition on the merits is not retained in the Draft Guidelines. We return to the relevance of the AEC principle in our discussion of Limb 1 below.

By contrast, the notion of competition on the merits put forward by the Draft Guidelines under Limb 1 is relatively loose, with no overarching principle of assessment. In addition, the definition of exclusion under Limb 2 does not contain clear limiting principles, and can in theory capture any potential loss of market share by a rival to the dominant firm (with no significance given to whether the rival is as-efficient as the dominant firm, and to the probability or extent of the exclusionary effects).

The combination of a weak filter for departure from competition of the merits under Limb 1 and a low bar for the assessment of effects on competitors under Limb 2, implies that the overall substantive test proposed in the Draft Guidelines is unduly open-ended, and could easily capture procompetitive or competition-neutral conduct, as well as anticompetitive ones. It therefore does not represent a sound test for legality, and it does not promote one of the stated aim of the Draft Guidelines, which is to enhance legal certainty. Moreover, it risks weakening the position of authorities when faced with likely rebuttals by dominant undertakings, and subsequent judicial scrutiny.

4.3 Departure from competition on the merits ('Limb 1')

Limb 1 aims to deal with the concept of competition on the merits. In what follows, we suggest that the Draft Guidelines could improve its treatment of this concept by explicitly defining what constitutes a departure from competition on the merits and clearly setting out

[41] Advocate General Rantos's Opinion of 9 December 2021 in *SEN* (hereafter, referred to as AG Rantos's Opinion in *SEN*), paras. 69 and 81.

theories of harm under Limb 1. We also consider the different possible standards for showing a departure from competition on the merits.

4.3.1 Definition of competition *not* on the merits

The Commission's definition of competition on the merits as conduct that benefits consumers (through lower prices, better quality, and enhanced choice) is a welcome inclusion in the Draft Guidelines (paragraph 51).[42]

However, the Draft Guidelines do not actually offer a corresponding definition of what constitutes competition that is *not* on the merits, and that would therefore meet the requirements of Limb 1 of the proposed legal framework. In the current draft, the definition of a departure from competition on the merits remains relatively open-ended and largely based on a set of non-exhaustive examples. This risks undermining legal certainty, and unduly loosening the analysis to be carried out under Limb 1.

We recommend that the final text of the Guidelines adopts a clear and explicit definition of what constitutes a departure from competition on the merits. *This definition should include a direct link to the concept of consumer harm* (whether in the form of higher prices, reduced quality, lower innovation, or diminished product variety).

For example, by reference to paragraph 51 of the Draft Guidelines, conduct that departs from competition on the merits could be defined as 'conduct which may, directly or indirectly, lead to consumer detriment in the form of higher prices, lower quality and reduced choice.'

The concept of competition on the merits can—and should—be closely tied to the notion of 'anticompetitive foreclosure' (i.e. exclusion) set out in the Guidance Paper. That is, conduct that departs from competition on the merits should be understood as conduct which, if applied by the dominant firm to an appreciable extent (see the discussion of coverage and duration below—Section 4.4.3), is likely to lead to anticompetitive exclusion. Anticompetitive exclusion should be understood as a situation where 'effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking […] to the detriment of consumers' (paragraph 19 of the Guidance Paper). This approach would ensure continuity with the

[42] This definition is based on *SEN*, para. 85, and on AG Rantos's Opinion in *SEN*, para. 63. The Advocate General Opinion in turn relies on the Guidance Paper, para. 5.

Commission's position in the Guidance Paper as well as consistency with the emphasis on consumer detriment contained in recent case law.[43]

The concept of consumer harm should constitute the overarching principle to assess departures from competition of the merits, guiding not only the assessment by the Commission and national authorities, but also the process of rebuttal by the firm under investigation.

4.3.2 Theories of consumer harm under Limb 1

Building on our suggestion to clearly define the concept of conduct that departs from competition on the merits (see previous sub-section), we also consider that the Draft Guidelines should—for the benefit of promoting a workable effects-based approach—require a clear exposition of the competition authority's 'Theory of Consumer Harm' (or 'theory of harm') under the proposed Limb 1.

The concept of theory of harm refers to the articulation and explanation of the mechanism through which a specific conduct is likely to (ultimately) lead to consumer detriment.[44] As set out already, consumer harm does not need to be direct or immediate, but the theory of harm should explain why the exclusion of rivals is likely to eventually lead to consumer harm, and is not simply the outcome of procompetitive conduct.

Theories of harm are already commonly relied on in the context of merger control, ensuring that enforcement is focused on the most relevant concerns in a particular case.[45] Additionally, in the context of Article 101 TFEU, theories of harm play a central role in for example the recently updated Guidelines on Horizontal Co-operation Agreements.[46]

In the context of an exclusionary abuse of dominance, a well-specified theory of harm typically sets out the following three elements: (i) why a dominant firm has the incentives to engage in the conduct, (ii) why that

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[43] *SEN*, para. 44; *Superleague*, para. 124; *Google Shopping*, para. 87; and the numerous references to anticompetitive foreclosure contained in *Intel II*.

[44] Fumagalli, C. and Motta, M. (2024) characterise 'the formulation of an explicit theory of harm as indispensable in any abuse case'.

[45] European Commission (2004), 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004/C 31/03), February and European Commission (2008), 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2008/C 265/07), October.

[46] For example, the section on information exchange in the Guidelines on Horizontal Co-operation Agreements focuses explicitly on the ability the information exchange to resolve the coordination and stability problem inherent in reaching and maintaining a tacit or explicit anti-competitive outcome. European Commission (2004), 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2023/C 259/01), July, Section 6.

conduct is likely to lead to the exclusion of rivals (which relates to the ability of a dominant firm to exclude rivals), and (iii) how it would adversely impact consumers.[47]

While not an objective in itself, introducing theories of harm under Limb 1 of the proposed test (and then under each of the conducts with specific assessment) would also ensure greater consistency – and continuity - with the Guidance Paper, which devoted significant attention to the concept of consumer harm, not only in the definition of anticompetitive foreclosure, but also in the assessment of individual conducts.

The articulation of a theory of harm under Limb 1 would also allow the Commission to evaluate in a coherent fashion the evidence to be assessed under Limb 2, including potentially conflicting or ambiguous evidence.

Requiring an explicit formulation of a theory of harm would support the overall objective of a workable effects-based enforcement of Article 102 in several ways.

- It would allow the Commission and national authorities to **build a convincing narrative** for why the conduct under investigation is anticompetitive, which can help present the case to the courts and persuade judges about the validity of the competitive concerns, also in light of likely arguments for rebuttal by the dominant undertaking.
- It would enable a **more coherent and holistic assessment of exclusionary behaviour** that is based on multiple—and mutually reinforcing—individual conducts (say, a combination of tying and exclusivity rebates, as in *Google Android*). By contrast, applying a separate legal test to each conduct under investigation without an overarching conceptual framework would not easily enable the competition authority to provide an overall assessment of the combined effects of the conducts under investigation.
- It would allow the Commission and national authorities to craft a **competitive assessment that is well tailored to the specific circumstances of the conduct**. In the modern digital economy exclusionary conduct can take different shapes and does not

[47] One manifestation of this is the 'incentive-ability-effects' framework used in the assessment of foreclosure effects in non-horizontal mergers. See European Commission (2008), 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2008/C 265/07), October, paras. 32 and 59, for input and customer foreclosure respectively.

always neatly fall into the categories of conduct identified in the Draft Guidelines. A theory of harm is a flexible tool, that can be easily adapted to the specific features of a case.

- It would put the Commission and national authorities in a **stronger position to craft any remedies**, especially in situations where a simple 'cease-and-desist' order would not be sufficient to restore competition and benefit consumers. Without clearly identifying the mechanism for competitive harm from a conduct, it is much harder to then design remedies that are able to eliminate and offset that harm.
- It would enable the Commission and national authorities **to better target enforcement actions** toward cases where exclusionary conduct is most likely to cause substantial harm detriment to competition and consumers.
- Finally, it would permit an **effective balancing of anti- and procompetitive effects**, in cases where the dominant firm provides an efficiency defence (see further in Section 6).

4.3.3 Substantive standards to establish a departure from competition on the merits

As noted, the Draft Guidelines do not put forward an overarching principle for the assessment of departures from competition on the merits. We believe that this omission should be rectified, with the adoption of a **consumer harm standard** as the overall guiding principle.

This implies that the Commission or national competition authority would need to show that the conduct may lead to consumer harm (provided that the assessment under Limb 2 is satisfied), according to a well-articulated theory of harm. This would avoid setting out an unduly open-ended standard for assessment under Limb 1, with no limiting principle and only a set of non-exhaustive illustrations (as is the case under the current Draft Guidelines).

In certain cases, standards other than a consumer harm test can be used to establish a departure from competition on the merits . To this effect, the Draft Guidelines present two possible conceptual standards.

- **The 'No Economic Sense' (NES) test.** Under this standard, conduct that holds no economic interest for the dominant firm except for its exclusionary effects on competitors would be found to depart from competition on the merits (paragraph 54). This is particularly relevant for naked restrictions.
- **The 'As-Efficient Competitor' (AEC) principle.** Under this standard, conduct which cannot be replicated by a hypothetical rival that is as efficient as the dominant undertaking would also

be found to depart from competition on the merits (paragraph 55(f). See our general discussion of the AEC principle in Annex A1.

We agree that these two standards can be seen as informative for determining whether conduct departs from competition on the merit and can help determine whether a conduct is likely to ultimately lead to consumer harm. This approach is in line with recent case law (e.g. *SEN*), and economic principles.[48]

However, particularly given its prominence in the recent jurisprudence but also on the basis of economic principles, the AEC principle should be given more weight in the assessment of Limb 1, by discussing the principle separately rather than being relegated in a list of relevant factors for the assessment (in paragraph 55 of the Draft Guidelines).

This is notably the case for price-based conduct, given the desirability to encourage price-based competition from a policy perspective and the increased risk Type 1 errors (i.e. firms being discouraged to price competitively), and because it is generally possible to operationalise the AEC principle through the AEC test in such cases (see discussion in the next sub-section and in Annex A1). Moreover, it is clear from recent case law (including the very recent judgement in *Intel II*), that the AEC test as a general rule is a suitable method to determine a departure from competition on the merits in the case of pricing abuses.[49]

More generally, the Draft Guidelines should clearly explain when and why departures from the AEC principle may be warranted (both under Limb 1 and Limb 2), including for non-price based conduct.[50] This includes cases where strict adherence to the AEC principle (and, where applicable, the AEC test) might allow the exclusion of competitors that are reasonably expected to become more efficient in the future and to act as an important constraint to the dominant firm, and therefore merit protection. This is a limitation to the AEC principle explicitly recognised in *Superleague*.[51]

[48] Vickers, J. (2005), 'Abuse of Market Power,' *Economic Journal*, **115**:504. *SEN*, paras. 77 and 78. See also AG Rantos's Opinion in *SEN*, para. 81 (stating that 'in principle, an exclusionary practice that 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').
[49] *Intel II*, para. 181.
[50] The AEC principle has been characterised as relevant for both price and non-price based conduct, see *SEN*, para. 79.
[51] *Superleague*, para. 131.

We return to this issue in the context of Limb 2 in Section 4.4.1.

4.3.4 Pricing conduct: role of a price-cost test

The Draft Guidelines correctly recognise the centrality of price-cost tests (as a quantitative application of the AEC principle in the case of pricing conduct) to establish whether pricing conduct departs from competition on the merits. This applies to predation, margin squeeze, and non-exclusivity rebates (i.e. rebates that do not reference rivals). Exclusivity rebates are treated differently – we return to this issue in our discussion of exclusive dealing in Section 5.2.

The Draft Guidelines however do not provide a definition of the price-cost test, nor explain how price-costs generally relate to the AEC principle and the AEC test. We consider it helpful to define the AEC test as simply a quantitative application of the AEC principle. The price-cost test (or AEC test), in turn is defined as a test looking at (i) the effective price that a competing undertaking needs to charge in order to compete with the dominant undertaking and (ii) whether this effective price is higher than the relevant costs incurred by the dominant undertaking.

In particular, the Draft Guidelines should clarify that the price in the price-cost test refers to the effective price that an as-efficient competitor would need to charge to persuade customers from diverting away from the dominant undertaking. In simple pricing conduct such as predatory pricing and margin squeeze, this is simply the actual price charged. In more complex pricing conduct, including conditional rebates, the effective price may need to take into account any discounts lost on the non-contestable share of demand.

On costs, the Draft Guidelines should explain that price-cost tests should generally be computed by using the costs of the dominant firm. Reliance on the costs of the dominant undertaking would enhance legal certainty, allow for the detection of 'profit sacrifice' (which is an important element of any pricing abuse), and *de facto* align the price-cost test with the AEC test (ensuring consistency with the case law).

More generally, the Draft Guidelines should put forward a uniform treatment of pricing abuses. The current treatment is not consistent: the concept of legal certainty is emphasised for predation and margin squeeze (paragraphs 117 and 133 respectively), but not for rebates (whilst it is relevant for all pricing abuses); the AEC test is explicitly adopted for margin squeeze (paragraph 134), but not for predation (even though it is implicit), and nor for rebates (in the case of rebates the AEC test is actually rejected—paragraph 144(b); or at most applied asymmetrically—paragraph 145(f)); and different cost benchmarks are put forward (Average Variable Cost (AVC)/Average Avoidable Cost (AAC) and Average Total Cost (ATC)/Long Run Average Incremental Cost (LRAIC) in the case of predation; only LRAIC in the case of margin squeeze; and only AAC in the case of rebates).

We recommend a consistent application of price-cost tests to all pricing abuses under Limb 1 of the proposed framework (in the same vein as under the Guidance Paper—Section III.C). This consistent application would adopt the AEC principle to all pricing conduct, and use cost benchmarks in the same way (adapting them to the theory of harm depending on the facts of the case).

We also consider that the absence of a safe harbour for above-cost pricing under paragraph 57 of the Draft Guidelines should be rectified. The final text of the Guidelines should adopt a clear safe harbour for all price conduct: a finding that incremental (or effective) prices are above ATC and/or LRAIC (depending on the context) should be sufficient evidence that the conduct represents competition on the merits and hence that Limb 1 is *not* met.[52] This is necessary in particular in order to avoid chilling incentives for procompetitive price conduct by dominant firms, and to balance Type 1 and Type 2 errors.[53]

In our opinion, the only exception to this safe harbour should relate to particularly complex forms of rebates (e.g. individualised retroactive rebates), if it can be shown that the design of the rebates lead to *de facto* exclusivity, and hence that these rebates should be analysed as exclusivity rebates. This is because from an economic perspective the exclusionary potential of exclusivity rebates is higher than the one of pricing conduct that does not reference rivals, and an AEC test may not be able to detect all instances of anticompetitive conduct. We return to this discussion in Section 5.2.

4.3.5 Role of specific legal tests and process of rebuttal under Limb 1

The Draft Guidelines put forward specific legal tests for five conducts. It is important to note at the outset that these legal tests should not substitute for a well-articulated theory of harm. Legal tests are valuable tools, yet they must not become a mere tick-box exercise. We therefore recommend that even when the Commission or national competition authority rely on legal tests, they should still explain the specific manner

[52] This is line with one of the observations included in the recent Draghi report on Europe's competitiveness. See Draghi, M. (2024), 'The Future of European Competitiveness – Part B: In-depth analysis and recommendations', September, p. 304.
[53] This would be in line with the use of the AEC test in *Intel II* (see paras. 181 and 202).

in which the conduct departs from competition on the merits, and hence is likely to harm consumers. This would avoid situations where the courts are not able to understand or support the theory of harm put forward by the competition authority and reject its analysis.[54]

The Draft Guidelines should also clarify the process for rebuttal of a finding that a given conduct departs from competition on the merits, both in the case of conduct subject to a legal test, and conduct without a legal test.

In the former case, the scope for rebuttal should not be limited to the factual existence of the conduct (as may be implied by analogy by paragraph 60(b), in the context of Limb 2), but it should also include a more general assessment of whether the conduct is likely to lead to consumer harm. That is, the dominant firm should be able to rebut a finding under Limb 1 not only by showing that the conduct did not take place (e.g. a given rebate scheme was not premised on exclusivity), but also by showing that the conduct was actually competitively-neutral or procompetitive.[55] This type of rebuttable should be possible directly under Limb 1 (where we understand that the Commission would bear the burden of proof) and not only at the stage of objective justifications. This is because a rebuttal of this kind would directly relate to the underlying mechanism for consumer harm, and would not rely on countervailing effects (which are properly assessed as objective justifications or efficiencies).

Similar considerations apply to conduct without a legal test. For these conducts, the Commission would need to show that that conduct departs from competition on the merits, by explaining the mechanism leading to consumer harm. The dominant undertaking should be able to

[54] For example, in *Qualcomm*, the Commission de facto applied the proposed legal test for exclusivity to the conduct at stake, without explicitly articulating a theory of harm. The General Court annulled the Commission's decision, in part because of the lack of evidence that the exclusivity rebates precluded the growth of Qualcomm's main rival into a larger segment of the market (see Judgment of the General Court of 15 June 2022, Case T-235/18 (hereafter, referred to as *Qualcomm (exclusivity)*). Similarly, in the *Google AdSense* case, the General Court annulled the Commission's decision on exclusivity contracts (see Judgment of the General Court of 18 September 2024, Case T-334/19 (hereafter, referred to as *Google AdSense*)), given the lack of evidence of a 'leveraging effect' due to the exclusivity contracts (in line with para. 36 of the Guidance Paper). The Court confirmed in *Intel II* that it cannot substitute its own reasoning with that of the Commission.

[55] For example, in the case of exclusive dealing, economic theory suggests that if competitors are relatively symmetric, competition between exclusive offers may benefit consumers. Similarly, as set out in the Guidance Paper, if competitors can compete on equal terms for each individual customer's entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition (para. 36).

rebut this finding, by explaining why the conduct is intrinsically procompetitive (or competition-neutral).

We consider that paragraph 58 of the Draft Guidelines should be modified to account for this point, and distinguish between those rebuttals which would be accepted under Limb 1, and those that would be evaluated as part of objective justifications or efficiencies. At the very least, the Commission should clearly explain what evidence it would take under consideration for the purposes of rebuttal of any findings under Limb 1.

More generally, the Draft Guidelines should also clarify whether satisfying any of the proposed legal tests effectively leads to a presumption that Limb 1 is satisfied, and how this relates to the presumptions introduced under Limb 2 (which we discuss further below). In particular, paragraph 47 of the Draft Guidelines[56] should be clarified in this regard.[57]

[56] According to para. 47, 'when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed to be liable to be abusive because it falls outside the scope of competition on the merits and is capable of having exclusionary effects'.
[57] It is also unclear which parts of the proposed legal test apply to the assessment of competition on the merits and which parts apply to the evaluation of exclusionary effects. For some of the legal tests (e.g. tying and bundling; and margin squeeze), Limb 2 is actually one of the conditions listed in the test, but it is unclear whether the remaining conditions therefore relate only to Limb 1. For other conducts (e.g. exclusive dealing; and predation) there is a unique condition in the proposed legal test, and it therefore must capture both Limb 1 and Limb 2. In these cases though, it is unclear why there would be a presumption for Limb 2 (as set out at para. 60(b) of the Draft Guidelines) but not for Limb 1. A consistent treatment would be warranted, with a clear explanation of the rebuttal process.

Box 4.1 Recommendations on departures from competition on the merits

5. Define an overarching principle, based on the concept of consumer harm, to determine whether conduct departs from competition on the merits.
   The Guidelines should provide an overarching definition of a departure from competition on the merits, and should base it explicitly on the concept of consumer harm. An explicit theory of (consumer) harm should be required for a finding that competition is not on the merits, both for conducts with and without a specific legal test.

6. Clarify the role of the AEC principle and test in defining departures from competition on the merits.
   The AEC principle should have greater prominence in the assessment of competition on the merits, especially for pricing conduct (including predatory pricing, margin squeeze, and rebates not based on exclusivity). The AEC test should be applied consistently across these pricing conducts, on the basis of consistent cost benchmarks. A safe harbour should be recognised for pricing above Average Total Cost (ATC) or Long Run Average Incremental Cost (LRAIC) (depending on the context), to avoid chilling procompetitive conduct.

7. The process of rebuttal of a finding of a departure from competition on the merits needs to be clarified.
   The Guidelines should clarify the process of rebuttal of a finding of a departure from competition on the merits, including through specific legal tests. Dominant undertakings should be able to rebut such a finding by showing that their conduct is unlikely to lead to consumer detriment and that therefore the Commission's theory of harm does not apply.

4.4 Capability to produce exclusionary effects ('Limb 2')

On Limb 2, our main comments relate to the need to clarify which competitors are protected under Limb 2, the need to show the appreciability of anti-competitive effects both in terms of their likelihood and extent (independently of the application of a presumption of effects).

4.4.1 Which competitors are we protecting under Limb 2?

We understand that, under Limb 2 of the proposed substantive test put forward in the Draft Guidelines, any potential exclusionary effect on any competitor would be captured. That is, the focus of the assessment would not only be on anticompetitive effects. Similarly, the analysis would not only consider effects on (hypothetical) as-efficient competitors to the dominant undertaking, in apparent contrast to the recent case law.[58]

In principle, the analysis to be carried out under Limb 1 (departure from competition on the merits) should ensure that only anticompetitive exclusionary effects are then captured under Limb 2 (assuming that the two limbs are applied sequentially, and the Limb 2 would only be assessed for conduct that meets Limb 1). However, in addition to our comment on the lack of a consumer harm principle under Limb 1 and its open-ended nature, we recommend that Limb 2 explicitly focuses only on anticompetitive exclusionary effects (in line with the notion of anti-competitive foreclosure set out in the Guidance Paper). We see no reason to depart from this notion under Limb 2, and no inconsistency with the case law. This is in line with our recommendations to amend the definition of exclusionary effects under paragraph 6 of the Draft Guidelines as set out in Section 2.3.

The proposed assessment under Limb 2 also does not focus on exclusionary effects on as-efficient competitors. The Draft Guidelines rightly note that the assessment of capability to exclude does not require showing that actual or potential competitors are as efficient as the dominant firm (paragraph 73).[59] This is however not the formulation

[58] For example, at para. 129 of *Superleague* (which presents a succinct version of the two-limb test) the Court states as follows: 'In order to find, in a given case, that conduct must be categorised as "abuse of a dominant position", it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by **excluding equally efficient competing undertakings** from the market(s) concerned (see, to that effect, *Post Danmark I*, para. 25), or by hindering their growth on those markets' [emphasis added]. The same statement was subsequently repeated in both *Google Shopping* (para. 165) and *Intel II* (para. 176), which are judgments published by the Court after the publication of the Draft Guidelines. A similar statement also appears in *Unilever Italia*, Judgment of the Court of 19 January 2023, Case C-680/20 (hereafter, referred to as *Unilever Italia*), para. 39. Similarly, in *Intel I*, the Court centred the analysis of anticompetitive effects on foreclosure of as-efficient rivals (paras. 139–140).

[59] On the other hand, in the discussion of rebates (see para. 145(f) and fn. 325), the Draft Guidelines actually reject the relevance of whether hypothetical as-efficient competitors can match the rebate offered by the dominant firm, and state that the conduct needs to be assessed in relation to actual or potential competitors. This is a direct rejection of the AEC principle, in apparent contrast with the case law.

of the AEC principle. The AEC principle instead asks the question of whether the conduct is capable of foreclosing a *hypothetical* competitor that is as efficient as the dominant undertaking.[60] The Draft Guidelines sidestep this issue in the general formulation of Limb 2, despite the prominence of the AEC principle in recent jurisprudence, including in the case law which the Draft Guidelines directly rely upon for the formulation of the proposed two-step approach.[61] This is a significant omission, which is likely to generate legal uncertainty, given the importance of the AEC principle in the recent jurisprudence. The issue affects both price- and non-price conduct,[62] and therefore goes beyond the application of the AEC test for pricing abuses (see our discussion of Limb 1 above).

Our recommendation is that the Draft Guidelines address the relevance of the AEC principle head-on in the formulation of Limb 2 (in addition to explaining the relevance of the AEC principle to establish a departure from competition on the merits), and clearly set out the circumstances under which the Commission would focus its assessment of effects on as-efficient competitors, and the cases where it would depart from this principle.

As discussed in Section 4.3.4, the AEC principle (and related AEC test) should be used, as a general rule, for pricing abuses.[63] In cases where the AEC principle is *not* used (e.g. for some types of non-price conduct), the Commission should put forward alternative limiting principles for its analysis, in order to focus only on anticompetitive exclusionary effects. Recent case law appears to open the door for an alternative standard to the AEC principle (e.g. *Superleague*, paragraph 131; *Google Shopping*, paragraph 167), based on outright impediments to the entry of competitors (e.g. conduct that blocks entry of rivals). This concept is related to the category of 'Naked restrictions' put forward in the Draft Guidelines. The Commission should explain whether departures from the AEC principle would only apply to naked restrictions, or whether they will also apply to other forms of non-price conduct. As we have set out

[60] *SEN*, para. 78.
[61] See fn. 58. It is notable that the Draft Guidelines (see para. 70) follow closely the list of relevant factors set out in para. 20 of the Guidance Paper and embraced by the Court in *Intel I* (see para. 139), including 'evidence of an exclusionary strategy' (para. 70(f) of the Draft Guidelines). However, in *Intel I* (and subsequently in *Intel II*), the Court refers to the need of the 'possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking'. The qualification that competitors should be as-efficient as the dominant firm is omitted in the Draft Guidelines.
[62] *SEN*, para. 79.
[63] This would also be in line with the case law, see *SEN*, para. 80.

above (Section 4.3.2), we believe that in an overall consumer harm test should be applied in these circumstances.

The Draft Guidelines should also explicitly clarify whether and how the AEC test can be used to rebut presumptions of exclusionary effects (see our discussion of presumptions below), particularly in light of some of the recent case law (e.g. *Intel I* and *II*).

4.4.2 Likelihood of effects

The capability threshold proposed in the Draft Guidelines implies a low standard for establishing exclusionary effects. As the text stands, any increase in the probability of exclusionary effects on rivals, demonstrated in a single plausible counterfactual scenario can meet the test under Limb 2.[64] The lack of a *de minimis* threshold for exclusionary effects[65] exacerbates this issue (see Section 4.4.3).

The Draft Guidelines do not adopt a 'balance of probabilities' standard,[66] whereby exclusionary effects on competitors would need to be shown to be more likely than not (relative to the relevant counterfactual but for the conduct, i.e. the scenario most likely to prevail absent the practice).

In the context of abuse of dominance, adopting a balance of probabilities approach may well result in under-enforcement, as there may be situations where the probability of exclusion of a rival is relatively low, but the harm from that effect is nonetheless large. We therefore do not object in principle to a departure from a balance of probabilities standard under Article 102.

However, if the Draft Guidelines seek to depart from a balance of probabilities standard for exclusionary effects, they should replace it with a coherent alternative, and articulate what that alternative should be. Otherwise, any exclusionary effect, however unlikely or small, would in principle fall under the definition put forward in Limb 2. In addition to making the enforcement of Article 102 unworkable (by not providing any legal certainty or limiting principles), it would also run counter to some of the recent case law.[67]

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[64] Draft Guidelines, para. 67.
[65] Draft Guidelines, para. 75.
[66] Draft Guidelines, paras. 65 and 69.
[67] As stated in the Policy Brief, 'the Union Courts have used several terms to qualify the threshold that is relevant for a finding of abuse and referred to "capable" or "potential", "probable" and "likely" effects, or to conduct that has the "capability" or that "tends" to harm competition' (pp. 2–3).

We recommend that the Draft Guidelines adopt an explicit materiality threshold for the assessment of exclusionary effects. This would require the competition agency to establish a *material* probability of exclusion relatively to a *sufficiently* likely counterfactual absent the conduct. The assessment of the materiality threshold should take into account the degree of dominance of the dominant undertaking and the resulting magnitude of harm from the possibility of exclusion, following a sliding-scale approach.[68] That is, a lower probability of exclusion would be sufficient to establish an abuse in case of particularly dominant firms, where the prospect of entry is especially valuable in terms of expected consumer benefits. This would allow the Commission to intervene in cases where the probability of exclusion of a given competitor is small (say, because entry by a new competitor itself is unlikely in a counterfactual absent the conduct), but that the benefits of competition would be large (say, because the dominant firm has strong and durable market power).[69]

4.4.3 Coverage, duration and appreciability

At paragraph 75, the Draft Guidelines state that there is no *de minimis* threshold for the purposes of infringements of Article 102, and that there is therefore no need to show that actual or potential (anticompetitive) exclusionary effects are of an appreciable nature.

This statement is based on jurisprudence (e.g. *Post Danmark II*) finding that the presence of a dominant firm already represents a weakening of the competitive structure of the market. Any further reduction of competition via exclusionary conduct may therefore represent an abuse of market power.

From an economic perspective, the absence of a *de minimis* threshold for anticompetitive effects (or consumer harm) under Article 102 can make sense, as it is particularly important to preserve competition in the presence of a dominant firm. However, the absence of a *de minimis* threshold for harm to competition should not be confused with the absence of a *de minimis* threshold on the capability and likelihood of

[68] This approach would be similar to a 'balance of harm' method—for example, see Furman, J., Coyle, D., Fletcher, A., Marsden, P. and McAuley, D. (2019), 'Unlocking digital competition', *Report of the Digital Competition Expert Panel*, March; and Fumagalli and Motta (2024). For a discussion and a simple numerical example in the context of a merger, see Federico, G., Morton, F.S. and Shapiro, C. (2020), 'Antitrust and Innovation: Welcoming and Protecting Disruption', in J. Lerner and S. Stern (eds), *Innovation Policy and the Economy*, Vol. 20, University of Chicago Press (pp. 142–144). The same principle applies to conduct, and is well known in context of 'pay-for-delay' cases (see, for example, Shapiro, C. (2003), 'Antitrust Limits to Patent Settlements', *RAND Journal of Economics*, **34**:2).

[69] See, for example, *U.S. v. Microsoft Corp.*, US Court of Appeals for the District of Columbia Circuit, 253 F.3d 34 (D.C. Cir. 2001), indicating that 'it would be inimical to [...] allow monopolist free reign to squash nascent, albeit unproven, competitors at will'.

the practice under examination to generate anticompetitive effects in the first place (e.g. in terms of the probability of exclusion of a rival, relative to a sufficiently likely counterfactual, and of the coverage and duration of the practice).

For example, a conduct with limited coverage (say, predatory prices or exclusive dealing that apply to only 10% of market, and not to particularly strategic buyers) or limited duration (say, applying only for a few months) is unlikely to hamper the ability of rivals to compete, and weaken the competitive constraint exercised on the dominant firm. In these circumstances, the conduct would not generate anticompetitive exclusionary effects, and would not be capable of ultimately leading to a reduction of competition and consumer detriment. By contrast, sufficiently high coverage and/or coverage of strategic buyers should a key requirement for anticompetitive foreclosure.[70] Similarly sufficient duration of the conduct should also be a requirement to show a capability to produce anticompetitive exclusionary effects.[71]

It is therefore important that the Draft Guidelines clearly distinguish between the appreciability of the *anticompetitive exclusionary effects* that result from the conduct (to which no *de minimis* applies) and the appreciability of the *coverage* and *duration* of the conduct, the *probability* of producing exclusionary effects (relative to a sufficiently likely counterfactual), and *other factors* that go into determining the capability to produce exclusionary effects. Paragraph 75 of the Draft Guidelines should be clarified accordingly.

Similarly, the discussion of coverage and duration in paragraph 70(d) should be expanded to clarify the importance of these two factors in the Commission's assessment of anticompetitive exclusionary effects.[72]

[70] This would reflect standard economic models of exclusion In these models, the customer dealing with the dominant firm and that is subject to the conduct (say, an exclusive deal) typically benefits from the conduct (i.e. the customer needs to be compensated for the restriction implied by exclusivity), and other customers suffer because of the resulting weakening of competitors (e.g. this is known as a 'divide & conquer' strategy). This mechanism can lead to harm if the coverage of buyers under the exclusive contract is sufficiently high, so that the rival is weakened and/or does not enter the market, and the dominant firm can therefore extract higher prices from the remaining customers. It would be wrong, however, to infer that the sub-set customers covered by the conduct are harmed. In other economic models, all buyers covered by the conduct may be harmed, due to so-called buyer mis-coordination. In these models too, coverage of the conduct needs to be sufficiently high to generate anticompetitive effects (i.e. by preventing entry). For a discussion on the general importance of appreciability, see Fumagalli and Motta (2024).

[71] The duration of the conduct should not be confused with the legal duration of the contracts under examination. For example, a series of short exclusivity contracts can lead to anticompetitive effects if the overall duration of the sum of the contracts is sufficient, and if each contract leverages the non-contestable part of the dominant undertaking's sales (see para. 36 of the Guidance Paper).

[72] We also note that in the recent *Google AdSense* decision, the General Court recognised the importance of the substantial coverage of the conduct for a finding of abuse. See *Google AdSense*, paras. 631, 632 and 641.

In particular, the Commission should explain the implications of conduct affecting a *small share* of the market and affecting customers that are *not of strategic importance* for entry. We suggest that in these circumstances the final version of Guidelines clearly state that the coverage would be found to be *not appreciable*, and hence that anticompetitive exclusionary effects would generally unlikely to materialise.[73] Similarly, the Commission should clarify that conduct of *short* duration is unlikely to lead to anticompetitive exclusionary effects. This position would be consistent with the most recent judgment of the Court in *Intel II*[74] and would ensure a degree of consistency across exclusionary practices (at least as a matter of enforcement priorities).

4.4.4 Use of presumptions under Limb 2

The Draft Guidelines put forward a number of presumptions under Limb 2 (e.g. for naked restrictions, exclusive dealing, predation, and some forms of tying and margin squeeze).

Presumptions, when applied appropriately, can serve as valuable tools in competition enforcement by shifting the burden of proof to the party with better access to information. This can streamline the administrative process and reduce enforcement costs, particularly when they build on generally accepted economic insights on which types of conduct lead to high likelihood of exclusionary effects.

For presumptions to be effective in the context of a workable effects-based approach, it needs to be clear how they can be rebutted. Additionally, presumptions should apply to only conduct likely to generate appreciable effects (e.g. due to its characteristics in terms of coverage and duration).

Standards and scope for rebuttal and consistency with *Intel I* and *Intel II*

Recent case law (notably, *Intel I* and very recently *Intel II)* has clarified previous jurisprudence, and explained what evidence the Commission is required to analyse in those cases where the dominant undertaking

[73] While in the recent *Qualcomm (predation)* judgment the General Court found that there was no need for the Commission to examine coverage of conduct (para. 522), this conclusion should be read in context of the Commission's evidence of existence of intent and the importance of the customers targeted by the conduct, which were further upheld by the General Court. Therefore, we consider that the General Court's ruling as to the need to examine coverage should be interpreted in case specific circumstances and not applied in a broader sense. See *Qualcomm (predation)*, Judgment of the General Court of 18 September 2024, Case T-671/19 (hereafter, referred to as *Qualcomm (predation)*).

[74] In *Intel II*, the Court explicitly identified the importance of sufficient coverage and duration for a finding of anticompetitive conduct (see paras. 130 and 202 (which refers to 'sufficiently pronounced characteristics' of loyalty rebates with respect to, among other factors, coverage and duration)).

submits, on the basis of supporting evidence, that its conduct is not capable of leading to anticompetitive effects.

It is not clear whether the approach put forward in the Draft Guidelines is actually consistent with *Intel I*. The requirement set out in the Draft Guidelines that the dominant firm prove that the circumstances of the case are 'substantially different from the background assumptions upon which the presumption is based'[75] appears to set a higher bar for rebuttal than what was applied by the Court in *Intel I* (and just very recently in *Intel II*[76]), going beyond the requirements set by the Court.

It is also uncertain whether the scope of rebuttals that would be accepted by the Commission concerns only the *form* of the conduct (e.g. has an exclusive deal been signed?) or would also include the assessment of alleged exclusionary *effects*. We consider that, in line with *Intel I* and *Intel II*, the possibility for rebuttal should be sufficiently broad, going beyond a mere formal assessment of the conduct.

Finally, the evidentiary requirements set out in *Intel I* in cases where the dominant firm submits that its conduct is not capable of restricting competition should apply to all conducts subject to a presumption (with the appropriate adaptations to the specific conduct) and not just to exclusive dealing (which was the specific conduct assessed in *Intel I*). There is no reason to apply these factors only to exclusive dealing and exclusivity rebate just because this was the conduct under examination in *Intel*.[77]

We recommend that these three issues (the standard for rebuttal; the scope of rebuttal; and requirements on the competition authority in case the dominant firm submits that its conduct is not capable of restricting competition) are clarified in the final version of the Guidelines.

[75] Para. 60(b) of the Draft Guidelines states that the dominant firm can rebut the presumption 'by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical.'
[76] In *Intel II*, the Court appears to suggest that characteristics like coverage and duration may need to be assessed by the Commission independently of the rebuttal by the dominant firm (see para. 130 ('the share of the market covered by the contested rebates and their duration are among the factors which the Commission must assess in order to establish that the undertaking concerned committed an abuse of a dominant position')).
[77] The Draft Guidelines closely follow *Intel I* in the case of exclusive dealing (see para. 83 of the Draft Guidelines, which is in turn based on para. 139 of *Intel I*), but do not do so in other cases where a presumption is introduced (predation; certain forms of tying; certain forms of margin squeeze). This inconsistency should be rectified.

Requirements to apply a presumption: theory of harm and appreciability

For cases where the Draft Guidelines introduce a presumption of exclusionary effects, only a partial investigation of the evidence would be carried out by the Commission or national competition authority under the approach proposed in the Draft Guidelines. This is particularly the case for naked restrictions and for exclusive dealing, where only the factual existence of the conduct would need to be established.

We recommend that any presumption under Limb 2 (at least for the conduct described under paragraph 60(b) of the Draft Guidelines—that is, conduct subject of a presumption other than naked restrictions) is accompanied by at least two additional elements: a clear articulation of the theory of consumer harm under Limb 1 (see discussion in Section 4.3.2); and evidence that the coverage and duration of the conduct is sufficiently appreciable to be able to generate anticompetitive exclusionary effects (see discussion in Section 4.4.3).

These two requirements would ensure that enforcement actions are directed at conduct that is most likely to lead to consumer harm. It will also reduce the risk of putting forward cases that are insufficiently grounded in the market evidence, and hence more vulnerable to rebuttal by the dominant firm, and eventually more fragile in court. The effectiveness of enforcement would be strengthened if the Commission were to 'front-load' some of the analysis of market circumstances when putting forward a potential case of exclusionary conduct also in those cases where a presumption is applied. The recent Court annulments of the Commission decisions in *Qualcomm (exclusivity)* and *Google AdSense* illustrate the risk of relying on a presumption of abuse for exclusive dealing, and not engaging sufficiently with an assessment of all market circumstances in the context of a well-developed theory of harm.

We address the use and relevance of presumptions for specific conducts in Section 5 of this paper. In particular, whilst there is some economic justification for the application of presumptions in case of exclusive dealing and predation (subject to the additional requirements set out above), we do not consider that a presumption is warranted in the case of tying and bundling.

Finally, as mentioned above in the context of Limb 1, the relationship between presumptions under Limb 2 and the proposed legal tests should be clarified. For two of the proposed legal tests, Limb 2 (that is, capability to produce exclusionary effects) is actually part of the test (this is the case for margin squeeze and tying/bundling). For these cases, the application of a presumption actually means that only part of the legal test would need to be applied by the Commission or national competition authority. For the other conducts subject to a presumption of exclusionary effects (exclusive dealing and predation), the Draft Guidelines should clarify the process of rebuttal of the legal test (e.g. how would this overlap with the proposed rebuttal process for the presumption under Limb 2?).

Box 4.2 Recommendations on capability to produce exclusionary effects

8. The evaluation of capability to produce exclusionary effects should focus only on 'anticompetitive' exclusionary effects, with an explicit treatment of the AEC principle.
   The Guidelines should clarify that the assessment of capability to produce exclusionary effects should consider only 'anticompetitive' effects, i.e. effects ultimately leading to consumer harm. In order to ensure consistency with the recent case law and sound economic principles, the Guidelines should explain the relevance of the AEC principle and test in the assessment of effects and clearly justify when the Commission might depart from the AEC principle.

9. Adopt a materiality standard in the assessment of the likelihood of effects, taking into account the degree of dominance.
   The Guidelines should adopt a materiality standard when considering the probability of anticompetitive exclusionary effects, relative to a sufficiently likely counterfactual scenario absent the conduct. This can take into account the degree of dominance and hence the magnitude of harm to consumers in the event of exclusion.

10. Require appreciable coverage and duration of the conduct for a finding of capability to lead to exclusionary effects, also for conducts subject to a presumption.
    Appreciable coverage and duration of a conduct should be seen as a pre-condition for a finding of capability to lead to exclusionary effects. This pre-condition should also apply to any conduct subject to a presumption of anticompetitive exclusionary effects.

5 Assessment of specific categories of conduct

5.1 Summary of the Draft Guidelines (Section 4)

Section 4 of the Draft Guidelines categorises various types of conduct by dominant firms and outlines how the Commission will assess them in the context of Article 102. Categories of conduct are distinguished on the basis of whether a specific legal test is relevant, and whether a presumption of exclusionary effects under Limb 2 applies. Conducts can be further conceptually characterised on the basis of whether the AEC test is applicable according to the Draft Guidelines.

The Draft Guidelines discuss nine distinct categories of conduct, in addition to naked restrictions:

- Exclusive dealing (including exclusivity rebates);
- Tying and bundling;
- Refusal to supply;
- Predatory pricing;
- Margin squeeze;
- Non-exclusivity rebates;
- Multi-product rebates;
- Self-preferencing; and
- Access restrictions.

Table 5.1 summarises how these conducts are categorised and the relevant framework applied for establishing abuse.

Table 5.1 Categorisation of exclusionary abuses under the Draft Guidelines

Conduct	Legal test	Departure from Comp. on the merits under Limb 1	Effects presumed (Limb 2)	Price-cost test (AEC test)
Naked restrictions	Yes	Yes, if test is met	Yes	N/A
Exclusive dealing	Yes	Yes, if test is met	Yes	Not relevant
Tying and bundling	Yes	Yes, if test is met	Depending on conduct	N/A
Refusal to supply	Yes	Yes, if test is met	No presumption	N/A
Predatory pricing	Yes	Yes, if test is met	Yes	Yes
Margin squeeze	Yes	Yes, if test is met	Yes if spread is negative	Yes
Non-exclusivity rebates	No	To be assessed	No presumption	Partially applicable
Multi-product rebates	No	To be assessed	No presumption	Partially applicable
Self-preferencing	No	To be assessed	No presumption	N/A
Access restrictions	No	To be assessed	No presumption	N/A

Source: Oxera

The treatment of each specific conduct under the current Draft Guidelines is as follows.

Conducts subject to a specific legal test

1 **Exclusive dealing** is liable to be abusive by its very nature, i.e. if the conduct amounts to exclusivity. The Commission presumes a high potential for exclusionary effects under Limb 2.[78] Following *Intel I*, if the dominant undertaking submits evidence that its conduct is not capable to lead to exclusionary effects, the Commission will typically assess factors such as the extent of market power, coverage, duration, the terms of the rebates (in case of exclusivity rebates) and the possible existence of the exclusionary strategy. This broadly follows the factors listed in *Intel I* (paragraph 139), and originally set out in the Guidance Paper (paragraph 20).

[78] Reference is made to *Hoffmann-La Roche*, Judgment of the Court of 13 February 1979, Case C-85/76 and *Intel I*.

2 **Tying and bundling** are liable to be abusive if the following cumulative conditions apply: (i) the tying and tied products are two separate products; (ii) there is dominance in the tying market; (iii) customers are only given the choice to buy the tying and tied products together ('coercion'); and (iv) the tying is capable of having exclusionary effects. A presumption of exclusionary effects (i.e. part (iv) of the test is presumed to be met) applies to specific cases. These cases appear to relate to instances where competitors cannot enter or expand in the tied market due to the conduct.[79] The presumption does not apply in other cases, e.g. typically where alternatives to the tied product are easy to obtain and the tied product is free.

3 **Refusal to supply** does not constitute competition on the merits where the well-known *Bronner*[80] conditions are satisfied: the input is indispensable; and the refusal eliminates all effective competition downstream. A presumption of exclusionary effects is not applicable in this case.

4 **Predatory pricing** is liable to be abusive when a price-cost test is failed (following *AKZO*[81]). In this case, exclusionary effects are presumed. The principle of legal certainty implies that the cost of the dominant firm should be used in the price-cost test. Proof of the possibility of recoupment is not required under the proposed legal test, in line with the case law.

5 **Margin squeeze** is liable to be abusive where a three-step test is met: (i) the dominant firm is vertically integrated and dominant upstream; (ii) the spread[82] between the dominant firm's input price and its downstream price cannot be profitably replicated by an equally efficient competitor; and (iii) the conduct is capable of leading to exclusionary effects. A negative spread between the dominant firm's input price and its downstream price triggers an presumption of exclusionary effects (i.e. the third condition above is presumed to be met).

Conducts not subject to a specific legal test

6 **Rebates that are not subject to exclusivity**. This category of conduct include rebates that may be differentiated across a number of dimensions (e.g. retroactive vs. incremental;

[79] Draft Guidelines, para. 95 and fn. 233.
[80] *Bronner*, Judgment of the Court of 26 November 1998, Case C-7/97 (hereafter, referred to as *Bronner*).
[81] *AKZO*, Judgment of the Court of 3 July 1991, Case C-62/86.
[82] This is the case where the spread is (i) negative or (ii) positive but insufficient to cover the additional cost that the as-efficient competitor incurs to supply the product.

standardised vs. individualised; and with different types of discount thresholds). The Draft Guidelines require the use of a price-cost test for standardised volume-based incremental rebates, but not for other types of rebates. More generally, the fact that a hypothetical equally efficient competitor may be able to compensate the loss of the rebate is not deemed as a necessarily a relevant factor in the assessment. If a price-cost test is carried out the Draft Guidelines follow the approach set out in the Guidance Paper for retroactive rebates (which requires the computation of an effective price on contestable volumes).

7 **Multi-product rebates (or mixed bundling)**. These types of rebates are to be assessed in a similar fashion as other types of rebates, depending on the context (in particular whether they are conditional on de facto exclusivity or not).

8 **Self-preferencing**. This is conduct that may enable a dominant firm to leverage its market power from a given market, to gain an advantage in a related market by granting preferential treatment to its product. This is typically relevant in vertically related markets. Based on the *Google Shopping* precedent, the Draft Guidelines identifies a number of relevant elements to establish whether self-preferencing departs from competition on the merits (e.g. the leveraging market represents an important source of business for competitors in the leveraged market; preferential treatment is likely to affect the behaviour of users; and the conduct is likely to be distort the conduct of the dominant undertaking's activities in the leveraging market).

9 **Access restrictions**. This conduct includes constructive refusal to supply; disruption of supply to existing customers; and failures to comply with regulatory access obligations. According to the Draft Guidelines, the indispensability criterion for outright refusal to supply cases does not apply to this category of conduct.

5.2 Exclusive dealing and exclusivity rebates

5.2.1 Need for an explicit theory of harm

While economic literature shows that exclusive dealing can harm consumers under specific conditions,[83] the Draft Guidelines fail to

[83] Key relevant factors include asymmetries between dominant firms and competitors, economies of scope, and contract coverage/duration. The literature identifies two main theories of harm for exclusive dealing: (i) contractual externalities, where incumbents act as first movers to extract rents from entrants (Aghion, P. and Bolton, P. (1987), 'Contracts as a Barrier to Entry', *American Economic Review*, **77**:3, pp. 388–401); and (ii) economies of scale, where signing exclusivity with

articulate these circumstances. Currently, the legal test focuses only on the nature or form of conduct, despite the fact that recent case law has embraced an effects-based approach for exclusive dealing (notably in *Intel I* and *Intel II*).

In line with our recommendation in Section 4.3.2, we recommend articulating an explicit theory of harm as part of the assessment under Limb 1. This should include an explanation of the factors which are more likely to lead to anticompetitive foreclosure, for example as succinctly outlined in paragraphs 20, 34 and 36 of the Guidance Paper. These factors include: whether the conduct has significant coverage (and hence can prevent the entry or expansion of competitors); whether competitors are not yet present on the market or unable to compete for all of the customers' requirements; and/or whether exclusivity arrangements are of significant duration.[84] Considerations of these factors would enable the Commission to focus on the cases where 'it is likely that consumers as a whole will not benefit'[85] from exclusive dealing.

5.2.2 The role of the AEC test for exclusivity rebates

The Draft Guidelines do not require the use of an AEC test to demonstrate that the exclusivity rebates are anticompetitive. That is, there is no requirement to show that a hypothetical equally efficient competitor would be able profitably compensate a buyer for the loss of exclusivity rebates offered by a dominant firm.

This is a useful clarification compared to the Guidance Paper, and the Commission's own use of the AEC test in the *Intel* case.[86] This position is supported by recent economic articles on this topic[87], and generally by

enough buyers can foreclose entrants (Segal, I.R. and Whinston, M.D. (2000), 'Naked Exclusion: Comment', *American Economic Review*, **90**:1, pp. 296–309). More recent research shows dominant firms can profit from exclusive dealing, leading higher prices at the same time as foreclosing rivals (Calzolari, G., Denicolò, V. and Zanchettin, P. (2020), 'The demand-boost theory of exclusive dealing', *The RAND Journal of Economics*, **51**:3, pp. 713–738).

[84] In the *Google AdSense* judgment, the General Court has referred to para. 36 of the Guidance Paper several times in its assessment of the conduct (see paras. 384, 406, 696, 712 and 779). It notably found that the Commission did not establish that the exclusivity contracts were anticompetitive, in light of the short duration of the contracts, and absence of evidence that Google was leveraging a non-contestable part of the customers' requirements (see paras. 722–725).

[85] Para. 34 of the Guidance Paper.

[86] The position of the Draft Guidelines on this issue is arguably in line with the Guidance Paper (see treatment of 'Exclusive purchasing' in section IV.A.(a)), but this reading was subject to some ambiguity, in particular given the extensive use of the AEC test in the *Intel I* decision.

[87] See Calzolari, G. and Denicolò, V. (2020), 'Loyalty discounts and price-cost tests', *International Journal of Industrial Organization*, **73**(C) which shows that, whereas exclusivity rebates may or may not be anticompetitive (depending on the level of 'dominance'), the AEC test can give rise to both Type 1 and Type 2 errors. See also: Fumagalli and Motta (2024), who advocate a stricter approach to exclusive dealing (and exclusionary rebates) that does not rely on the AEC test, based

the fact that exclusivity contracts have greater exclusionary potential than discounts that are not premised on exclusivity.[88] The risk of Type 1 errors is also lower in the case of rebates conditional on exclusivity (i.e. firms being discouraged to price competitively), as the dominant firm may be able to offer the same or a similar level of discounts without the exclusivity (absent efficiency justifications for exclusive dealing).

However, in particular in the wake of the two judgements on *Intel* by the Court of Justice (including the judgment of 24 October 2024), the absence of a requirement to apply the ACE test in the case of exclusivity rebates would not be a straightforward position to maintain in the final version of the Guidelines. In *Intel II*, the Court found that the AEC test should be used 'as a rule' to establish whether exclusivity rebates depart from competition on the merits (paragraph 181).[89] In light of this context, it is essential that the Draft Guidelines clearly explain the relevance of the AEC principle and test in the assessment of exclusive dealing and exclusivity rebates. The case law also clearly stipulates that if a dominant firm presents the AEC test results during the rebuttal process, the Commission is required to engage with that evidence. The Draft Guidelines should therefore explain how evidence that effective prices are above costs (and hence that a rival may be in principle able to match the exclusivity rebate offered by the dominant firm) will be taken into account.

From an economic perspective, while some of the recent economic literature has argued against safe harbours for the prices above costs in the case of exclusive dealing, this does not imply that the AEC test is always uninformative. Different economic models can be applied to

on a rebuttable presumption of harm; and Fumagalli, C. and Motta, M. (2017), 'On the use of price-cost tests in loyalty discounts and exclusive dealing arrangements', *Antitrust Law Journal*, **81**:2, pp. 537–586—which explains why price-cost tests are not suited to the case of exclusive dealing, including exclusivity rebates.

[88] For example, exclusivity rebates deter experimentation with rivals' products, by directly 'taxing' any sales made by a rival (see Farrell, J., Pappalardo, J.K. and Shelanski, H. (2010), 'Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior', *Review of Industrial Organization*, **37**, pp. 263–277). Exclusivity rebates with an intermediary or a party that is not the final customer that suffers from the loss of competition (e.g. a travel agent in a case like *British Airways*; or an OEM in a case like *Google Android*) may be a way to efficiently share the rents of market power and foreclose entry. This may be profitable for the dominant firm, and yet not replicable by a rival, since the rival is not able to offer a share of monopoly rents (this is known as a 'monopoly persistence' or 'efficiency effect'). For an illustration of this mechanism, see Federico, G. (2013), 'SAA II: Abuse of dominance in the South African skies', *Journal of Competition Law and Economics*, **9**:3, pp. 709–737. For a general discussion, see Salop, S.C. (2017), 'The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test', *Antitrust Law Journal*, **81**, pp. 371–421.

[89] See also para. 202 of *Intel II*, where the Court found that the result of the AEC test is liable to indicate whether a pricing practice such as loyalty rebates is capable of foreclosing an as-efficient competitor and hence being detrimental to competition (as long as the practice has sufficiently pronounced characteristics in terms of factors such as duration and coverage).

exclusivity rebates, and an AEC test is more relevant in some of these models.[90]

5.2.3 Application of a presumption under limb 2 and the role of coverage and duration

As discussed in Section 4.4.3, for exclusive dealing to have anticompetitive effects, it must cover a significant portion of the market, and/or strategic buyers. Exclusive arrangements covering a limited share of the market, involving non-strategic buyers, are unlikely to hinder rivals or weaken competition. In such cases, exclusionary effects and consumer harm are unlikely. Similarly, exclusive dealing conduct of limited overall duration is unlikely to exclude rivals.[91]

We therefore recommend that the presumption of exclusionary effects set out in the Draft Guidelines for the case of exclusive dealing should be premised on a finding of appreciable coverage and duration of the practice (see our general discussion of presumptions and appreciability in Sections 4.4.3 and 4.4.4). This recommendation is in line with the implications of *Intel II* (see notably paragraph 130).

5.3 Tying and bundling

5.3.1 Need for an explicit theory of harm

While we welcome the recognition in the Draft Guidelines that tying and bundling are practices that 'can provide customers with better products or offerings in more cost-effective ways', we find that this is not carried through to the Commission's proposed assessment of tying conduct. Indeed, tying appears to be a good example of where the departure from the definition of 'anticompetitive foreclosure' that harms consumers to the looser standard of 'exclusionary effects' (discussed in Section 2.3) is problematic from an economic perspective and could increase the probability of Type 1 errors (i.e. lead to overenforcement and to a chilling of procompetitive conduct).

The potential competitive benefits of both bundling and tying practices are well-documented in the economic literature. These include both supply-side efficiencies and demand-side efficiencies. Some of these efficiencies can have direct consumer benefits (e.g. cost efficiencies that are passed on, quality controls, introduction of new and improved

[90] For example, if the strategic advantage of the incumbent relative to the rival is not too large (in the sense that the rival can offer an alternative contract to the buyer at the same time as the dominant firm), the fact that the competitor would be able to profitably compensate a buyer for the loss of an exclusivity rebate is relevant to assess the exclusionary impact of an exclusivity rebate.

[91] This should not be confused with the case of a series of exclusive contracts each with a short duration (see para. 36 of the Guidance Paper).

products, transaction cost savings, consumption synergies, and one-stop shopping). When new products are introduced, they are often brought to market as enhancements to existing products, in particular in the digital economy (e.g. new features or services can be added to digital platforms over time by the platform owners).[92] In such circumstances, it is important that enforcement appropriately weighs the potential consumer benefits of these new products against the foreclosure risks faced by standalone providers that do not wish to or are not able to offer a similarly combined product proposition.

The specific legal test for tying and bundling set out in the Draft Guidelines relies almost entirely on structure-based arguments, with no explicit link to a theory of harm connecting the conduct to likely consumer detriment. While we agree that the factors listed in the Draft Guidelines (i.e. dominance in the tied market, the presence of barriers to entry, the link between the tying and tied product, and the degree of consumer inertia or bias) increase the likelihood that a dominant undertaking is able to exclude competitors, they do not in themselves demonstrate that consumers are likely to be harmed. The proposed approach risks lowering the bar for finding an abusive tie to any situations where a dominant position is deemed to have 'leveraged' or strengthened its position, as opposed to identifying situations that are likely to lead to consumer harm.

While the test for 'separate products' is aligned with the Guidance Paper, we note that the Draft Guidelines further loosen the conditions for fulfilling this test.[93] While we understand that there are good reasons to set a relatively low bar for the Commission to meet the 'separate product' test (e.g. to the extent that the test only acts as a first screening tool for conduct that is unlikely to be problematic), the combined effect of setting a low bar for both the 'separate product' test and for 'exclusionary effects' is problematic. The Draft Guidelines should recognise that, while the products can still be viewed as separate, features such as complementarity, technical integration or natural link/prevailing commercial usage mean that product integration is more likely to generate (at least some) consumer benefits, which

[92] Niels et al. (2023), Chapter 5.8.
[93] For example, the Draft Guidelines explicitly state that: (i) 'complementary products can constitute separate products, as customers may wish to obtain them together, but from different sources'; (ii) 'the technical integration of one product into another does not mean that the two products can no longer be considered separate'; and (iii) 'when tying two products is consistent with commercial usage or when there is a natural link between the two products, they may nonetheless be separate products' (para. 90).

should then be explicitly considered as part of the assessment of 'exclusionary effects'.

In line with the general considerations set out in Section 4.3.2 of this response, the Draft Guidelines should articulate clear theories of harm for tying and bundling conduct, to establish a departure from competition on the merits.

Examples of theories of consumer harm due to tying could include situations of so-called 'imperfect rent extraction', i.e. where constraints on one product increase a dominant undertaking's incentives to engage in tying and raise the price of a related product above the competitive level. One such instance could be 'regulatory evasion' of the form described in the 2009 Guidance Paper.[94]

Another example could be a two-sided market situation in which rent extraction is constrained on one side of the market (e.g. due to a 'zero-price' constraint), in which case the dominant undertaking may have an incentive to extract rents from the other side of the market (e.g. this mechanism may be relevant to the *Google Android* case, in which the tying of Google Play with Search/Chrome was alleged to have been used to preserve market power in search in order to extract rents from the advertising market).

Other possibilities for a sound theory of harm include theories of defensive leveraging, where tying is used to deter entry and protect market power in the tying product.[95]

5.3.2 The proposed presumption for some forms of tying is not warranted

The Draft Guidelines do not articulate a clear and convincing enough distinction between tying conduct that justifies the application of a presumption and tying conduct that requires capability to be shown by the Commission. The Draft Guidelines provide, at best, some indicators that make it more or less likely that anticompetitive effects may result from the conduct (i.e. that the inability of competitors to enter or expand likely results from the conduct; whether the product is offered

[94] See Guidance Paper, para. 57: 'If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market'.
[95] See Carlton, D.W. and Waldman, M. (2002), 'The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries', *RAND Journal of Economics*, **33**:2, pp. 194–220.

for free; and whether it is easy or difficult to obtain alternatives to the tied product).

From an economic perspective, and given the potential consumer benefits described above, it is difficult to define, ex ante, which forms of tying have a sufficiently high anticompetitive foreclosure potential to justify the triggering of a presumption. The inability of competitors to enter/expand, the pricing of the tied product and the availability of alternatives to the tied product are all relevant factors, but do not in themselves articulate a coherent theory of consumer harm that would justify the application of a presumption. We consider that tying and bundling conduct is an example where the use of presumptions is not justified from an economic perspective.[96] We also consider that the presumption set out in the Draft Guidelines is not workable or administratively advantageous, in the sense that the presumptively abusive conduct cannot clearly be identified ex ante.

5.4 Pricing conduct

This section discusses the treatment of pricing conduct in the Draft Guidelines (i.e. predation, rebates that are not based on exclusivity, margin squeeze and mixed bundling). We treat all forms of pricing conduct together as there are several common themes that are applicable to each type of pricing conduct.

5.4.1 Relevance of the AEC principle and AEC test to pricing conduct

For reasons set out in Section 4.3.4, and explained in more detail in Annex A1, we believe that all forms of pricing conduct should be subject to an application of the AEC principle, in the form of an AEC test. This would imply, as a general principle, that pricing above cost (defined as LRAIC or ATC depending on the context) should not be liable to be abusive. This would preserve the principle of legal certainty (allowing the dominant firm to base its prices on its costs—as the Draft Guidelines recognise in the case of predation and margin squeeze), and would also align with the AEC principle as endorsed by the Courts. From a policy perspective, the main rationale for this stance would be not to chill procompetitive pricing conduct by dominant undertakings (i.e. discourage them to set low prices).[97]

[96] This is line with one of the observations included in the recent Draghi report on Europe's competitiveness. See Draghi, M. (2024), 'The Future of European Competitiveness – Part B: In-depth analysis and recommendations', September, p. 304.
[97] In the case of pricing conduct, the counterfactual absent the abuse is simply a higher price. Therefore, in order not to deter lower prices by dominant firms, it is important to restrict the cases where low prices are found to be anticompetitive to only instances of pricing below cost.

The Commission broadly follows the AEC principle in its proposed treatment of predatory pricing (besides the apparent contradiction introduced by the lack of safe harbour for above-cost pricing (paragraph 57), which would need to be rectified in our opinion). The same is the case for the proposed treatment of margin squeeze, where the AEC principle is explicitly articulated (paragraph 124).

However, the Commission departs from the AEC principle and test in the case of rebates that are not based on exclusivity, with the exception of standardised volume-based incremental rebates.[98] For all other forms of rebates, the Draft Guidelines indicates that 'the use a price-cost test may not be appropriate'[99] and the 'fact that a hypothetical as-efficient competitor would be able to compensate the loss of the rebates is not necessarily a relevant factor showing that the rebates scheme is incapable of producing exclusionary effects'.[100] In carving out this exception, the Commission seeks to focus on the competitive constraint that may be exercised by actual (but less efficient) competitors as opposed to hypothetical as-efficient competitors.[101]

This is a direct contradiction of the AEC principle, and *de facto* removes a safe harbour for above-cost pricing in the case of rebates. It is not clear why the Draft Guidelines consider that above-cost pricing may be an issue for some types of rebates, but not for other pricing conduct (i.e. for the case of predation and margin squeeze). Moreover, there are no clear limiting principles for when the Commission would consider that pricing above costs would be problematic in the case of rebates. This has the potential to create significant legal uncertainty and chill procompetitive pricing conduct.

We recommend instead that the Draft Guidelines consistently apply the AEC principle and AEC test to all types of pricing conduct, including rebates. The only exception would be the case of rebates that are designed in such a way to achieve *de facto* exclusivity (in which case the framework for exclusivity rebates should apply – see discussion in Section 5.2). We also recognise that for some types of rebates (e.g. retroactive individualised rebates), the measurement of effective prices and the application of the AEC test may be particularly complex. In this case, the competition authority should not be required to use a AEC

[98] Draft Guidelines, para. 143.
[99] Draft Guidelines, para. 144(b).
[100] Draft Guidelines, fn. 325.
[101] Draft Guidelines, para. 144(b) and fn. 325.

test, but should still demonstrate that the AEC principle is satisfied through alternative methods.

As a fall back, if the Commission seeks to depart from the AEC principle for some types of pricing conduct, it should articulate more explicitly the reasons for doing so, and the specific factors that it would take into account in its assessment.

5.4.2 Mechanics of the AEC test: cost benchmarks and relevance of intent

The Draft Guidelines do not present a consistent way of applying the AEC test (or price-cost test) to different types of pricing conduct. Whilst this partially reflects the case law, the Draft Guidelines should still seek to introduce greater consistency to the use of the AEC test to pricing conduct, at least as a matter of enforcement priorities.

As currently presented, the AEC test would be based on AAC/AVC in the case of predation without evidence of intent; LRAIC/ATC in the case of predation with evidence of intent; LRAIC/ATC in the case of margin squeeze (with no reference to evidence of intent); and AAC/AVC in the case of rebates. [102]

In order to further harmonise the treatment of pricing conduct, we recommend at the very least that the Draft Guidelines are updated with an explanation of these differences in approach, and of the economic rationale for the differences. Moreover, for the case of rebates (where the case law appears less prescriptive), the case of effective prices lying in the range between AAC/AVC and LRAIC/ATC should be explicitly discussed.[103] Evidence of intent could be introduced as relevant in this case, in line with the treatment of predation.

The case of bundled rebates also needs further clarification on which cost benchmark is to be utilised. The Draft Guidelines do not mention any specific cost benchmark in the case of bundled rebates (whilst the Guidance Paper had put forward a price-cost test based on LRAIC). The case of bundle-to-bundle competition should also be covered, as it was

[102] The measure of prices under the AEC test also need to be adjusted depending on the specific pricing conduct, but this is not conceptually difficult: (i) in the case of predation, the relevant measure of price is readily observable (as it corresponds to the price charged by the dominant firm); (ii) in the case of margin squeeze, in order to establish whether below cost pricing is taking place, it is necessary to consider the spread between the wholesale price and the dominant firm's downstream price (rather than directly looking at a comparison between the downstream prices of the dominant firm and its overall costs); and (iii) in the case of rebates, it is necessary to consider effective (or incremental) prices rather than average prices. The Draft Guidelines capture these differences across conducts correctly.

[103] This was actually the case in the Guidance Paper (para. 44).

in the Guidance Paper (which correctly suggests looking at whether the price of the bundle as a whole is predatory in this case).[104]

5.4.3 Need for explicit theories of harm

As discussed in Section 2.2, the concept of consumer harm is not operationalised or connected to any of the legal tests for pricing conduct. For example, in the case of predatory pricing, no explanation is provided of the factors relevant to the risk of prices increasing (to the detriment of consumers) after a predatory phase. Whilst we understand from the case law that *proof* of the possibility of recoupment is not required, this does not imply that articulating a theory of harm is not warranted, at the very least as a matter of enforcement priorities.

A theory of harm for pricing conduct would consider factors such as the presence of barriers to (re-)entry following the conduct, coverage and duration of the practice, and the impact of the conduct on the ability and incentives of rivals to compete.[105] These factors are applicable to all pricing conduct, including predation, rebates and margin squeeze. Additionally, in the case of selective predation (paragraph 108 of the Draft Guidelines),[106] coverage of strategic customers should be a pre-condition for a finding of harm. In the case of margin squeeze, additional considerations on vertical foreclosure effects are warranted (e.g. the market share of the dominant firm downstream; the degree of substitutability between the products of the dominant firm and those of competitors; and vertical foreclosure incentives[107]).[108]

5.4.4 Presumptions under the Limb 2 and the role of coverage and duration (for predation and for margin squeeze)

The Draft Guidelines introduce a presumption of exclusionary effects under Limb 2 of the proposed legal framework for predation and for certain types of margin squeeze. As in the case of exclusive dealing, we consider that any presumptions for predation and margin squeeze should be premised on the presence of appreciable coverage and duration of the conduct.

[104] Guidance Paper, para. 61.
[105] Relevant factors here include whether the conduct deprives the entrant of significant economies of scale, and whether the predatory conduct allows the dominant firm to signal a cost advantage, establish a reputation for aggressive behaviour and/or deprive the entrant of external financing (see Guidance Paper, para. 68).
[106] The Draft Guidelines note that selective predation can be effective as it limits the losses incurred by the dominant firm during the predatory phase. Whilst this is correct, selective predation will only be effective in excluding competitors if it covers particularly strategic buyers or a sufficiently large part of the market.
[107] For example, the margin squeeze may be motivated by the desire to evade a regulatory constraint upstream, or by an incentive to prevent upstream entry by existing rivals downstream.
[108] For a discussion of these factors, see Guidance Paper, paras. 85 and 88.

5.5 Access restrictions and related conduct

This section deals with forms of conduct which can be categorised as 'access restrictions'. Concern relating to such conduct would generally arise in instances where there is a vertically integrated firm which is dominant in one (or more) upstream markets; and the firm uses this position to degrade the ability of competitors (or potential competitors) at the downstream level. This might take several forms.

- **Refusal to supply:** where the dominant firm simply refuses to supply an essential input (produced by its upstream activities) to rivals in the downstream market.
- **Constructive refusal to supply:** where the dominant firm does not outright refuse to supply such an input, but might effectively seek to do so (for instance via impractical contract terms or service levels).
- **Margin squeeze:** where the dominant firm seeks to raise the price of the input to a level such that the rival would simply not be able to effectively compete in the downstream market. [109]
- **Self-preferencing:** where the dominant firm utilises its position in one market to favour its own products (above competitors') in another (typically via non-pricing means).

5.5.1 Need for explicit theories of harm

As discussed in the case of other categories of conduct, the Draft Guidelines do not set out possible theories of harm for access restrictions and related conduct. In line with our recommendation in section 4.3.2, we recommend articulating an explicit theory of harm as part of the assessment under Limb 1 for all types of access restriction, independently of the proposed legal test.

There are several relevant theories of harm applicable to access restrictions, which all fall under the general heading of vertical foreclosure.[110] The Guidance Paper explicitly considers possible theories of harm for access restrictions and the need to balance (for consumers) 'the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply' (in terms of dynamic incentives to invest).[111]

[109] We discuss margin squeeze in Section 5.4 above.
[110] For a summary, see Fumagalli, C. and Motta, M. (2024).
[111] See Guidance Paper, para. 86-88. Concerns on dynamic incentives to invest and related free-riding concerns are also set out in para. 75.

We recommend that these considerations on possible theories of harm are introduced in the Draft Guidelines for all types of access restrictions, independently of the form of the conduct.

5.5.2 Indispensability of the upstream input

According to the Draft Guidelines, the *Bronner* criteria for input indispensability apply for outright refusal to supply and do not apply to other forms of access restrictions, i.e. constructive refusal to supply including margin squeeze, because an intervention in the context of an outright refusal to supply would directly impinge on freedom of contract and the right to property of the dominant undertaking.[112] However, this creates an asymmetry in legal treatment: a dominant company runs fewer legal risks when simply refusing to deal outright than when it deals, but on terms that could be seen as disadvantageous to rivals.

While a legal debate falls outside of the scope of this response, we note that introducing such distinction runs counter to economic principles. Where intervention in constructive refusal to deal is warranted, then it is also should be warranted (and possibly even more so), in outright refusal to deal.[113] If the objective in managing intervention thresholds in vertical foreclosure cases is to balance appropriability (i.e. dynamic incentives to invest) and contestability, the exact form in which refusal to deal occurs (e.g. outright or constructive) should be irrelevant. Requiring an explicit theory of harm under Limb 1 assessment may mitigate the asymmetries in enforcement resulting from the case law in this area.

[112] Draft Guidelines, para. 165.
[113] See Fumagalli, C. and Motta, M. (2024).

Box 5.1 Recommendations on conducts

11. Establish a clear theory of harm for all categories of conducts.
    The Guidelines should provide an explicit theory of (consumer) harm for each category of conduct, including those subject to a presumption of exclusionary effects.

12. Introduce a requirement of appreciable coverage and duration for exclusive dealing, predatory pricing, and margin squeeze.
    The presumption of exclusionary effects for exclusive dealing, predatory pricing, and margin squeeze should be premised on a finding of appreciable coverage and duration of the conduct.

13. Explain the role of the AEC test for exclusive dealing and exclusivity rebates.
    Whilst the AEC test is not necessarily suitable for exclusive dealing and exclusivity rebates, the Guidelines should clearly explain the role to be played by the AEC test in the assessment of these practices and in the process of rebutting a finding of exclusionary effects.

14. Remove the presumption of exclusionary effects for certain forms of tying.
    The Guidelines should not apply a presumption of exclusionary effects to certain forms of tying, to enhance legal predictability and avoid deterring procompetitive conduct.

6 Objective justifications

6.1 Summary of the Draft Guidelines (Section 5)

The Draft Guidelines outline two potential approaches to objective justification: (i) an 'objective necessity' defence and (ii) an 'efficiency' defence.

The Draft Guidelines provide some examples of possible objective justifications, and emphasise the need for proportionality (i.e. the proportionality condition is not met if the same aim would be achieved by conduct that is less restrictive of competition).

For efficiencies, the Draft Guidelines broadly confirm the four conditions already contained in the Guidance Paper (with some surgical amendments).[114]

The Draft Guidelines also indicate that the bar for demonstrating these defences is higher in the case of conduct subject to presumptions (paragraph 170), and that the burden of proof lies on the dominant undertakings (paragraph 171).

In this section, we provide our assessment and comments on objective justifications, focussing in turn on the type of evidence and standards of proof (Section6.2), the asymmetry between the standard of proof under Limb 2 and under objective justification (Section 6.3), and the need to conduct a weighting exercise based on consumer welfare (Section 6.4).

6.2 Type of evidence and standards of proof

More detail as to type of evidence and standards of proof could be provided in the Draft Guidelines.

In terms of objective necessity, the Draft Guidelines currently lack clear benchmarks and examples for assessing when conduct is deemed 'proportionate' to the objective pursued.

Similarly, for the efficiency defence, more guidance would be helpful on specific examples of efficiencies that are acceptable, as well as guidance on how these efficiencies should be assessed and balanced

[114] For example, the reference to 'consumer welfare' contained in the Guidance Paper (para. 30), is replaced by a more general reference to 'the interest of consumers' in the Draft Guidelines (para. 169(a)), which might reflect a desire to move away from a focus on the consumer welfare standard, even though this has limited practical implications in this section of the Draft Guidelines.

against anticompetitive effects.[115]Outlining the types of evidence required would provide firms with clearer expectations for justifying their conduct.

6.3 Asymmetry with the standard of proof under Limb 2

There appears to be an asymmetry in the required standards of proof for establishing capability for exclusionary effects and for demonstrating an objective justification.

For capability under Limb 2, the Commission needs to demonstrate only an increase in the probability of exclusion, by reference to any plausible counterfactual, as discussed in Section 4.4.2.

In contrast, the Draft Guidelines places greater emphasis on direct consumer benefits and on efficiency gains 'likely to result from the conduct', on the basis of a 'cogent and consistent' body of evidence. It is not clear from the text whether a similar standard of proof will be applied to effects under Limb 2 and to possible procompetitive effects, but the current approach appears to be inconsistent, with a higher standard of proof demanded for efficiencies. Relatedly, the Draft Guidelines refer to 'likely negative effects on competition and on the interest of consumers' in the discussion of balancing (paragraph 169(a)), whilst the standard for effects under Limb 2 does not require to demonstrate likely effects on competitors (let alone on consumers). This another source of internal inconsistency.

These inconsistencies needs to be addressed to ensure a balanced approach to assessment, and avoid biasing the analysis towards Type 1 errors.

We also consider that the symmetry of standards of proof should apply to conducts subject to a presumption of exclusionary effects (other than naked restrictions), both for economic reasons but also following the relatively limited weight of presumptions in the recent case law (e.g. see *Intel I* and *Intel II*).

6.4 Balancing based on consumer welfare

Finally, the Draft Guidelines need to clarify how a balancing exercise would be conducted for conduct that is found liable to be abusive under

[115] For example, for the case of exclusive dealing, the Draft Guidelines could provide as an example the promotion of relation-specific investment as a possible source of efficiency (see Guidance Paper, para. 46).

the proposed two-limb legal framework, but for which the dominant firm would put forward an objective justification or efficiency defence.

The Draft Guidelines helpfully contain an explicit reference to consumer benefit in the context of efficiencies (paragraph 169), but do not explain how any such benefits could be balanced against the harm from the conduct. Even if objective justifications or efficiencies are demonstrated by the dominant undertaking, the absence of a clear theory of harm in the Draft Guidelines would hinder the ability of the Commission, national authorities, and dominant firms to balance anti- and procompetitive effects and evaluate the overall competitive impact of the conduct. Introducing explicit theories of harm under the proposed legal framework for conduct that is liable to be found abusive would help rectify this issue, and allow for a proper balancing test.

Box 6.1 Recommendations on objective justifications

15. Provide concrete examples of relevant objective necessities and efficiencies.
    To help firms collect and provide the right evidence, the Guidelines should provide concrete examples of possible objective necessity and efficiency defences, with guidance on the types of evidence required.

16. Address the asymmetry in standards of proof to demonstrate effects.
    Ensure consistency in the standards of proof by aligning the low threshold for proving capability of exclusionary effects with the apparently higher standard of proving efficiencies or objective justifications. A symmetric standard of proof should also apply to conducts subject to a presumption of exclusionary effects (other than naked restrictions).

17. Clarify the balancing test for efficiencies.
    Clarify how a balancing exercise would be conducted for any efficiencies that may be demonstrated by the dominant undertaking. Introducing explicit theories of harm under the proposed legal framework for conduct that is liable to be found abusive would help rectify this issue and allow for a proper balancing test.

A1 AEC principle and test

This annex summarise our overall considerations on the AEC principle and test, in light economic principles and the relevant case law. It supplements the discussion of the appropriate definition and application of the AEC principle and test in the main body of our response.

A1.1 Definition of the AEC principle

It is widely recognised that Article 102 does not have as an objective the protection of less efficient rivals, and that competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient.[116]

This makes sense from an economic perspective: protecting less efficient rivals risks undermining the beneficial effects of competition on market dynamism and productivity, by keeping in the market those firms that are less efficient (i.e. with lower productivity).

In recent judgments, Courts have established that for conduct to be liable to be abusive it should have the actual or potential effect of excluding equally efficient competing undertakings from the market or markets concerned, or hindering their growth on those markets.[117]

In *Superleague*, it is additionally recognised that conduct may also be categorised as abusive where it has the actual or potential effect, or even the object, of impeding potentially competing undertakings at an earlier stage through means that depart from competition on the merits.[118]

The Draft Guidelines currently provide, in paragraph 55(f), the following definition of the AEC principle: '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'.

[116] *Google Shopping*, para. 164; *Intel II*, para. 175; *Superleague*, para. 127, *Post Danmark I*, para. 22.
[117] *Intel II*, para. 176.
[118] *Superleague*, para. 131.

Although this definition of the AEC principle is generally appropriate, we have three comments on this definition:

- The AEC principle and its definition should be generalised beyond Limb 1, given its general prominence in the case law.
- The definition of AEC principle should recognise, in line with *Superleague*, that—in certain cases—also not-yet-as-efficient competitors merit protection, in particular in the case where they can reasonably be expected to become more efficient in the future.
- Although the AEC principle is necessary, 'as a rule', the Draft Guidelines should recognise that the ability to robustly operationalise the AEC principle in the form of an AEC test (or price-cost test) depends on the context of the case.

A1.2 Definition of the AEC test and price-cost test

The Draft Guidelines currently refer to the price-cost test in paragraph 56 and in some of the specific legal tests (predation, margin squeeze, rebates without exclusivity).

However, the Draft Guidelines do not provide an overarching definition of the price-cost test, nor do they link this test to the AEC principle.

Although historically the AEC principle grew from the specific price-cost test as set out in the Guidance Paper, the current case law as developed since has adopted the AEC principle more generally, independent of its test. For full clarity on the role and limitations of the AEC principle and AEC test separately, the Draft Guidelines should set out much more clearly the definition of each, their relationship, and their respective limitations.

Building on the general definition for the AEC principle as set out above, we propose that the Draft Guidelines clarify that the AEC principle can, in certain cases, be tested empirically using an AEC test, where the AEC test is defined as a quantitative application of the AEC principle in the form of a price-cost test.

The price-cost test (or AEC test), in turn is defined as a test looking at (i) the effective price that a competing undertaking needs to charge in order to compete with the dominant undertaking and (ii) whether this effective price is higher than the relevant costs incurred by the dominant undertaking.

In pricing conduct that does not reference rivals, the effective price generally refers to the actual price charged by the dominant undertaking. In conditional rebates, the effective price may need to take into account the compensation required for any loss of discounts on the non-contestable share of demand.

On the relevant cost benchmark, this can and should be generalised to refer to AAC/AVC or LRAIC/ATC; where cases involving effective prices between AAC/AVC and LRAIC/ATC should additionally consider intent.[119]

A1.3 Necessary, sufficient, or merely informative?

In our the main body of our response to the consultation, we conclude that, based on economic principle and supported with case law references, the AEC test should be clarified as (i) generally necessary and sufficient for showing a capability to produce exclusionary effects (i.e. Limb 2) in case of pricing conduct, but (ii) generally informative in case of non-pricing conduct, with its probative value depending on the ability to operationalise the test and the wider context of the case.

There are two key reasons for this asymmetric treatment of the AEC test for pricing and non-pricing conduct that merit emphasis.

First, conduct in the form of price competition (i.e. low pricing) is generally desirable from a competition policy perspective, whereas for non-pricing conduct such as exclusive dealing, refusal to supply, or other access restrictions this is not necessarily the case. Relatedly, the threat of being found to infringe Article 102 on the basis of an AEC test comes with a larger risk of chilling procompetitive behaviour in the context of pricing behaviour, as firms cannot avoid having to set at least a price. This is not the case in non-pricing conduct (e.g. because firms an simply abstain from requiring exclusivity or displaying competitor products less prominently). The risk of Type 1 errors is therefore higher in the case of pricing conduct.

Second, pricing conduct comes with the general ability to robustly operationalise the AEC principle into a test, given that its constituent variables (effective price, cost) can generally be proxied well. In contrast, this is not (or at least not always) the case with non-pricing conduct.

[119] For example, in *Qualcomm (predation)*, the argument that pricing was above AAC (and therefore also above AVC) but below LRAIC was considered to be irrelevant by the Commission since internal documents showed Qualcomm's intent to exclude a competitor.

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