Input to the public consultation on the EU Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings

1. Introduction

Connect Europe welcomes the opportunity to comment on the Draft Guidelines on the Application of Art. 102 TFEU. We appreciate the aim of the Commission to reflect the EU courts case law on exclusionary abuses in order to provide more legal certainty to the benefit of businesses and consumers. Regrettably, we believe that the current draft of the Guidelines does not achieve either of these goals, it does not reflect the case law accurately nor does it enhance legal certainty for businesses.

In its attempt to codify EU courts judgments on exclusionary abuses, the Commission has adopted a quite selective approach and, in some cases, has even introduced new concepts. In particular, the attempt to move towards a more formalistic approach with legal presumptions is not supported by the EU courts case law. Below, we further elaborate on how the precedents, including the latest Intel decision, are clear in stating that the burden to prove an abusive exclusionary conduct lies with the Commission. Beyond that, it seems to be contrary to what the Commission has announced in in its communication from 27.03.2023 on the amendment of the Guidance Paper, namely that it wanted to stick to the effect-based approach adopted by the Union Courts over the years.

Furthermore, very specific cases and conducts with exceptional or particular circumstances should not be turned into a general rule. This is especially important given that the Guidelines are meant to provide guidance to national competition authorities and national courts, who may be not familiar with the underlying cases. In addition, the Guidelines should bring together established case law on the various subjects, for reasons of transparency, legal certainty and predictability of decisions. They should, therefore, refer to the highest ruling available on a case and on questions which are recurrent. Otherwise, this would lead to an overly broad application of Art. 102 TFEU, generalisation of isolated cases and in turn would make the self-assessment for businesses more burdensome.

Overall, the presumptive approach, the broadening of the scope of fundamental concepts or, conversely, downplaying their importance, the lowering of the evidentiary threshold for the Commission, the lack of focus on consumer harm in the Draft Guidelines would result in a too wide application of Art. 102 TFEU. The Commission recognised the very important role of Art. 102 TFEU for society, however, the easier workability and accelerated enforcement which the Commission aims to obtain with these Draft Guidelines would not be achieved as they go beyond established case law and in their current shape would stifle innovation and economic initiative for dominant companies.

There must be a calibrated approach by carefully balancing the different challenges. The current proposal will lead to over-enforcement and a bias towards type 1 errors, increase legal uncertainty for dominant undertakings, and heighten the compliance burden, which would ultimately have a chilling effect on EU competitiveness. Furthermore, this approach would likely result in a rise in opportunistic complaints, leading to lengthy and burdensome proceedings. Moreover, since it lacks endorsement from case law, the Commission's decisions are likely to be challenged in court, resulting in prolonged judicial reviews.

In light of the above, Connect Europe believes that in order to achieve a clear and accurate overview of the state of case law on the application of Art. 102 TFEU and thereby provide legal certainty to all stakeholders the Draft Guidelines need to fundamentally change. Below, Connect Europe has provided some detailed observations, which we kindly ask the Commission to consider in such a fundamental revision.

2. General principles applicable to the assessment of dominance

As a preliminary remark, Connect Europe notes that in this section the Commission correctly summarises some of the basic principles applicable in the assessment of dominance (e.g. the TFEU does not prevent companies from acquiring a dominant position and recap from United Brands and Hoffmann-La Roche judgments on the definition of dominance) which are established in the case law and are uncontroversial.

However, the Commission introduces a presumption on market shares which is not based on settled case law. This is objectively unreasonable and creates legal uncertainty.

In this respect, firstly, it is important to note that the Commission should analyse the relevance of market shares on a case-by-case basis - and that it should recognise that there are factors other than market shares which should also be considered for the assessment of market power and dominance. For example, in bidding markets, markets where players double count captive sales or nascent and dynamic markets, market shares tend to be very high and are not representative of dominance. Therefore, the assessment of other criteria on top of market shares would allow to conclude on dominance or exclude it.

Secondly, on the one hand, the Commission states that "absence" of a dominant position can be presumed when the market share is below 10%, while, on the other hand, it states that "evidence" of a dominant position can be inferred when the market share of the concerned undertaking is above 50%. Both thresholds are not justified and represent a relevant departure with no clear justification from the approach the Commission has adopted in 2008 and confirmed in the Guidance paper in 2023.

As regards the threshold of 10 %, i.e. the presumption of "no dominance", it is observed that this threshold is a consistent deviation from settled case law and even from the threshold the Commission has adopted and confirmed so far in the 2008 Guidance paper, where "*dominance is not likely if the undertaking's market share is below 40 % in the relevant market*".

This is even more true since in its 2008 Guidance, the Commission, referred to the Metro SB 1986 case, recalls the statement of the Court that a threshold of 10% - which was Saba's share on the market – is "*insignificant*" and "*precludes the existence of a dominant position*". Besides, it was never the intention of the Court to set 10% as a threshold to exclude dominance, it was

rather to state that even if Saba was the largest actor in the market, its market shares were too low to reach dominance as the market was fragmented.

As regards the threshold of 50% to presume dominance, the 1991 Hilti court decision, cited in the Draft Guidelines, identifies much higher percentages of "*between 70 and 80%*" for dominance.

At the same time, it should be reminded that the Hoffman La Roche judgment stipulates that even with high market shares other factors should be assessed before concluding on dominance "*A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned*". [1] The same approach is adopted in the recent Astrazeneca judgment, where even if the market shares were very high, the capacity of Astrazeneca to behave independently of its competitors was still examined.[2]

As regards the threshold of 40%, it should be reminded that in the United Brand case cited by the Commission, while the dominant position was identified with market shares between 40 and 45%, other factors were also taken into consideration "*this percentage does not however permit the conclusion that UBC automatically controls the market. Must be determined having regard to the strength and number of the competitors*"[3]

In other words, even with a "substantial" market share – and 50 % can arguably be considered as being (already quite) "substantial" – the existence of a dominant position cannot yet be considered as sufficiently proven. As a consequence, it should also not be considered sufficiently proven, if the market share is below said 50 % and definitely not if it is below 10 %, which again the Court had found "insignificant".

Thirdly, the prohibition of "abuse of a dominant position", which has two constitutive elements, i.e. the existence of a dominant position and the fact of making abuse of this position, requires both constitutive elements to be demonstrated by the Commission. This cannot be reconciled with the Commission's decision that, in the future, only one of these elements would need to be demonstrated, the other being simply presumed, even without any further need for the Commission to demonstrate that other indices support such presumption. This is particularly relevant for types of behaviour that are considered abusive if the company has a dominant position, while not, if the company has no dominant position. Ultimately, this would mean that a company may get significant fines on the basis of mere presumptions, which only the EU legislator has the power to create by proper legislative acts.

For these reasons, Connect Europe proposes to modify point. 26 as follows:

[1] Hoffman La Roche, 13 February 1979, recital 40
[2] Astrazeneca, 6 December 2012, recitals 176 -178
[3] Judgment of 14 February 1978, United Brands, recitals 108 -110

26. One important factor is the existence of very large market shares, which ~~are~~ **may** in themselves ~~– save in exceptional circumstances –~~ **be an indication** ~~evidence~~ of the existence of a dominant position **which, however, should be assessed in light of other factors of dominance.**
~~This is the case in particular where an undertaking holds a market share of 50% or above.~~ **Dominance is not likely if the undertaking's market share is below 40% in the relevant market.** ~~Dominance may also be found in cases where an undertaking has a market share below 50%~~ Generally, both the value of sales or purchases and the volume of sales or purchases provide useful information for assessing market power. Typically, market shares based on sales value are the most appropriate indicator, but in other instances, sales volumes or other indicators may better reflect the competitive strength of undertakings.

a. Barriers to expansion and entry

Connect Europe is greatly appreciates that this chapter has been modernised with updated concepts and case law compared to the same chapter in the modified Guidance on enforcement priorities.

Also, there is a different point of view in the two texts on the definition of barriers to entry and expansion. On the one hand, the old Guidance applies the concept of "to be sufficiently profitable" for the competitor to expand or enter and try to define "sufficient". On the other hand, the Draft Guidelines looks more at the examples, which are increased, and clarify the effect on the capacity of the undertaking to "act independently".

The draft positively provides an extended list of examples of "factors" which may cause barriers to expansion or entry. These include legal and regulatory barriers and data-driven advantages. The draft also provides explanation of possible network effects in "platform markets".

However, barriers to entry in the digital sphere around data-driven advantages should encompasses other types of control over data such as data accumulation and access to non-replicable data.

Also, other parameters that might create barriers to entry in the digital economy should also be taken into consideration, such as closed ecosystems, vertical and conglomerate integration of platforms, existence of bottlenecks, control over essential sharable inputs (such as data) or capabilities (such as computational power or skilled staff), unavailability of alternative routes to reach end-users.

b. Countervailing buyer power

The Commission specifies that countervailing buyer power, if sufficiently strong, may deter the exercise of market power. However, if buyer power regards a limited segment of buyers it cannot be considered sufficiently strong to rule out dominance. In this instance, given that it must be deemed an exceptional case – that instead the Draft Guidelines transpose as imperative

("cannot be considered") –, it would be preferable to eliminate this principle altogether to not risk that it becomes a way for easily evading the requirement of the countervailing buying power. Alternatively, the affirmative phrase could become hypothetical, i.e. from "cannot" to "might not" be considered. Regarding the case law cited in support, Motorola 2014 and Qualcomm 2019, they are again Commission (not Union Court) case law, from which this principle, expressed in such a determined way as in the draft, is not derived.

Therefore, Connect Europe asks to modify point. 33 as follows:

33. Competitive constraints may be exerted not only by actual or potential competitors of the undertaking concerned, but also by customers with countervailing buyer power. Countervailing buyer power can prevent even an undertaking with a high market share from acting to an appreciable extent independently of customers. Buyer power of this sort may result from the customers' size or their commercial significance for the undertaking concerned. Countervailing buyer power differs from general bargaining or negotiation power, which refers to the ability to favourably influence the outcome of a negotiation. Countervailing buyer power refers to the ability of customers to switch quickly to competing suppliers, to promote new entry or to vertically integrate, or at least the ability to credibly threaten to do so. If countervailing buyer power is sufficiently strong, it may deter or defeat an attempt by the undertaking concerned to exercise market power. ~~However, buyer power which only ensures that a particular or limited segment of customers is shielded from the market power of the undertaking concerned cannot be considered a sufficiently effective constraint to rule out dominance.~~ (...).

Like the old Guidance, the Draft Guidelines correctly recognises that countervailing buyer power can compensate high market shares, preventing the undertaking from acting independently (same point 33).

Finally, the definition of dominance should reflect the capacity of the undertaking to maintain high level of prices above competition level without taking into consideration the tariffs of competitors. As rightfully mentioned, dominance is the power to behave independently from competitors and consumers and in markets where competition based on price, it is difficult to imagine dominance without the capacity to maintain high prices no matter the price evolution in the market. This criteria was included in the previous Guidance, but is now omitted. The new Guidelines should also take this into account.

c. Collective dominance

The Commission in its Draft Guidelines explains that collective dominance can be established on the basis of several alternative factors and even without an agreement between companies or any existing structural links. The conditions to establish whether there is joint dominance (following bullets) are taken from the Horizontal Merger Guidelines which, however, cannot be applied "tout-court" in an Art. 102 assessment. Consequently, there are two different situations; one in which companies are merging, and another in which the possibility of a link

should be established. In the former, structural changes are assessed in a forward-looking perspective, in the latter a past conduct is investigated.

In the footnote 74, the cited case law referring to "*A collective market share above 50 % is, in the absence of evidence to the contrary, a strong indication of the ability of the collective entity to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers"* has to be taken into consideration together with the whole context of the reasoning of the Court. In the 'Atlantic Container Line and Others v Commission' case for example that specific phrase is alleviated by the statement that " *a collective entity is of course composed of undertakings between which a certain amount of competition may subsist and whose market shares may be somewhat asymmetrical. […] such a circumstance is capable where appropriate of precluding a collective assessment of the position of those undertakings on the relevant market*". And in 'Gencor v Commission' judgment the Court states that *"the fact that the parties to the oligopoly hold large market shares does not necessarily have the same significance, compared to the analysis of an individual dominant position, with regard to the opportunities for those parties, as a group, to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers".*

It is important to point out, something the Guidelines are missing, that as stated in 'Atlantic Container Line and Others v Commission', although "*Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated", "significant internal competition may also be capable of showing that in spite of the various links or factors of correlation existing between the members of a [….group of undertakings] they are not in a position to adopt the same course of conduct on the market such as to give third parties the impression that they are a single entity and thus justify a collective assessment of their position on the market under Article 86 of the Treaty".*

Connect Europe therefore proposes point 34 to be adjusted as follows:

> A finding of collective dominance requires that two or more economic entities that are legally independent of each other present themselves or act together on a particular market as a collective entity from an economic point of view. Once this has been established, the assessment of dominance is based on essentially the same factors that are relevant for single dominance. Collective dominance does not necessarily require that competition between the undertakings concerned be completely eliminated, that the undertakings concerned adopt identical conduct on the market in all respects or that the abuse involves all the undertakings concerned. It is sufficient that: **internal competition is not significant enough to prevent the undertakings from adopting the same course of conduct on the market despite links or factors of correlation existing between them and** the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position[76].

Furthermore, although the Court states that "*the abuse does not necessarily have to be the action of all the undertakings in question*" but "*it need only be capable of being identified as one of the manifestations of such a joint dominant position"* it is still important to consider that, as stated in 'Atlantic Container Line and Others v Commission', "*the fact that one party to the joint position did not follow the conduct adopted by the other parties might show that that party did*

not participate in an infringement of the Treaty, should it transpire that the conduct adopted by the other parties constituted an abuse for the purposes of that provision".

As regards the elements to be assessed in order to establish collective dominance on the basis of (tacit) coordination between the undertakings, it must be indicated clearly that in 'Airtours v Commission' (par. 63) it is stated that "*As the Commission itself has emphasised, at point 104 of its decision of 20 May 1998 Price Waterhouse/Coopers & Lybrand (Case IV/M.1016) (OJ 1999 L 50, p. 27), it is also apparent from the judgment in Kali and Salz that,] where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators."* and that *"it must none the less establish that deterrents exist, which are such that it is not worth the while of any member of the dominant oligopoly to depart from the common course of conduct to the detriment of the other oligopolists"*[4]. Therefore, the burden of proof lies with the Commission to show the lack of effective competition between the members of the alleged collective body, the weakness of the external competitive pressure and the sustainability of common behaviour.

The following text is proposed for point 35:

To establish collective dominance, it is necessary to examine **and prove** 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.

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

Connect Europe welcomes the Commission's effort to clarify the general principles to determine if conduct by a dominant undertaking is liable to be abusive. However, Connect Europe rejects the reliance on presumptions and would like to point out that there are some concepts that are not yet clear in the new Draft Guidelines:

First, point 45 of the Guidelines establishes that for the conduct to be abusive the conduct should "generally" depart from competition on the merits and be capable to have exclusionary effects. It is not clear the reference to "generally" as it seems it should always be the case. It is also not clear why depending on a case one criterion could be more important than the other.

Second, Connect Europe notes that the case law of the Courts have relied on specific analytical frameworks to establish whether certain types of conduct by dominant undertakings infringe Article 102. This should be accurately reflected in the new Guidelines as further detailed below.

[4] Airtours recital. 195

a. Conduct departing from competition on the merits

Point 49 states that a dominant undertaking may take the reasonable and proportionate steps it deems appropriate to protect its commercial interests, provided however that **its purpose is not to strengthen its dominant position or to abuse it**. Connect Europe considers that reinforcing dominance is legitimate to the extent the dominant company does not abuse it.

Therefore the following ,modifications are proposed for point 49:

49. Dominant undertakings have a special responsibility not to allow their conduct to impair effective competition on the internal market. At the same time, the fact that an undertaking is in a dominant position does not disqualify it from protecting its own commercial interests, if they are attacked. Such an undertaking may take reasonable and proportionate steps as it deems appropriate to protect its commercial interests, provided however that its purpose ***is not to abuse its dominance*** ~~strengthen its dominant position or to abuse it~~

Point 51 describes the concept of competition on the merits as a "competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new improved goods and services". However, by relying on this concept - which is not a widely accepted definition - the Commission runs the risk of establishing precedents that determine what is competition on the merits and thus, the structure of competition on the different markets. Competition on the merits should, however, be determined by market dynamics set by the interplay between demand and supply. The Commission should therefore limit its assessment to whether a company is abusing its dominance which is an economic analysis, not a theoretical or dogmatic one.

While the new parameters introduced in point 55 of the Draft Guidelines might give more clarity on what firms should look at to understand if the conduct departs from competition on the merits, it is also harder for companies to self-assess based on those factors on a case-by-case basis. Extrapolating certain case law available to self-assess competition on the merits is also reductionist, as the Court has never provided a list of factors that are relevant for the assessment of competition on the merits, but only assessed this concept within the relevant circumstances of specific cases.

In addition, in point 57 the reference to the fact that some conduct that at first sight does not depart from competition on the merits but can nevertheless be found to depart from competition on the merits in "specific circumstances" causes concern, because it allows for a large margin of discretion and uncertainty. It should therefore be deleted or clear guidance should be provided in which specific circumstances this would apply.

Finally, Connect Europe welcomes the clarification in point 51 that the concept of competition on the merits is compatible with the departure from the market of competitors that are less efficient than the dominant company: "*Article 102 TFEU does not preclude the possibility the departure from the market or the marginalization, as a result of competition on the merits, of competitors that are less efficient that the dominant undertaking and so less attractive to consumers form the point of view of, among other things, price, choice, quality or innovation*"

Likewise, we are pleased that point 55 includes the AEC principle as one of the relevant factors to consider when determining whether behaviour departs from competition on the merits "*f) whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct…*".

b. Capability to produce exclusionary effects

In point 60, the Draft Guidelines introduce three categories of conduct: (i) conduct for which it is necessary to demonstrate a capability to produce exclusionary effects, (ii) conduct that is presumed to lead to exclusionary effects, and (iii) naked restrictions.

- *Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects*

Logically, the **first category** should comprise most cases. However, when looking at the second category, it seems to cover most of the typical cases of possible exclusionary conducts. This generates a serious doubt regarding the categorisation proposed by the Draft Guidelines as well creates legal uncertainty regarding the application of the **sub-sections 3.3.2, 3.3.3., 3.3.4.**

Furthermore, point 61 makes clear that for conducts falling under this first category the **Commission needs to demonstrate** that a conduct is at least capable of producing exclusionary effects.

Nevertheless, some phrases in the same section limit this principle and should be eliminated.

The relevant sections should be adapted as follows:

Point 64. However, the fact that a conduct has failed to produce actual exclusionary effects cannot in itself disprove its capability to produce exclusionary effects. (…) ~~**The undertaking concerned must supplement such indicia by evidence showing that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects**~~.

Point. 65. The actual or potential exclusionary effects identified in the analysis need to be attributable to the conduct at issue. However, the conduct does not need to be the sole cause of those exclusionary effects. ~~**It is sufficient to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market.**~~

- *Naked restrictions*

Additional guidance would be welcome as regards the evidence needed to justify the third category, naked restrictions, as the way it stands in point 60c) - "while it is in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification it is highly unlikely that such behaviour can be justified in this way" it seems that in practice there would be no acceptable evidence to justify such conduct.

- *Conduct that is presumed to lead to exclusionary effects*

With regard to the second type of conduct – presumed to lead to exclusionary effects - point 60b explains that "certain types of conduct are *generally recognised as having a high potential to produce exclusionary effects. Accordingly, they are subject to a presumption concerning their capability of producing exclusionary effects*" and that "*once the factual existence of the relevant conduct is established, if need be under the conditions established in the specific legal test, its exclusionary effects can be presumed"* (emphasis added). This point lists **5 types of conduct** (i.e. exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeeze in the presence of negative spreads and certain forms of tying), and for further discussion on this presumption for each type of conduct it refers to section 4.2.

Point 47, introducing the specific legal tests described in section 4.2., states that "*the case law of the Union Courts has developed specific analytical framework to establish whether certain types of conduct by dominant undertakings infringe Article 102 TFEU (specific legal tests*)" and therefore "*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*" (emphasis added), which implies that the presumption of exclusionary effects applies to **all conducts** that fulfil one of the specific legal tests **mentioned in section 4.2** (this includes also refusal to supply which is not mentioned in point 60b.

Between points 47 and 60 b the contradiction is manifest.

On form, Connect Europe believes that the relationship between the fulfilment of a specific legal test by a conduct and the presumption about its capability to produce exclusionary effects is not clear throughout the Draft Guidelines.

In Connect Europe's understanding the Draft Guidelines aim to frame this matter in the following way; there is no automatic link between a conduct satisfying a specific legal test (all those examined in section 4.2) and the presumption of exclusionary effects.

Indeed, this reading is based on points 45 and 53.

According to point 45, there are two necessary conditions for the existence of an exclusionary abuse which are (i) the conduct departs from competition on the merits and (ii) it is capable of having exclusionary effects.

According to point 53, the fulfilment of a specific legal test guarantees the first criterion of abuse i.e. the conduct departs from competition on the merits. This means that the second one, which is the capability to produce exclusionary effects, is still to be demonstrated.

And, finally, point 60b establishes and lists cases where there is a presumption of effects. In summary, not all specific legal tests imply a presumption, but only a subset of them (this excludes refusal to supply, certain forms of tying and bundling and margin squeeze with positive spread).

If this understanding is assumed, then point 47 contradicts these provisions by stating that "*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.*". In other words, it establishes an automatic relationship between the fulfilment of a specific legal test (any of the 5 in section 4.2) and the presumption of exclusionary effects, which is inconsistent with the other points of the Draft Guidelines.

This means that point 47 should be modified to align with point 53 and with the entire framework.

The following part of point 47 **should be modified**: « *when a given conduct meets the conditions set out in a specific legal test, such conduct is deemed ~~to~~ **to** ~~be liable to be abusive because it~~ falls ~~outside the scope of competition on the merits and is capable of having exclusionary effects.~~* »

That said, in substance, Connect Europe considers that the presumption concerning the capability attributed to certain conducts of producing exclusionary effects just because they fulfil a certain legal test is unwarranted according to the existing case law.

Connect Europe takes the view that the Commission is reinterpreting certain legal tests in case law as presumptions, but there are no grounds for doing so.

Indeed, in the judgment of 21 December 2023 *of European Superleague Company* quoted by the Draft Guidelines, the Court clearly stated that while there *may be* different analytical templates to demonstrate abuse for different types of conduct, the demonstration *must be made in light of all the relevant factual circumstances and be aimed at establishing the capability of the conduct to produce exclusionary effects based on specific, tangible points of analysis and evidence*[5]. (emphasis added)

[5] Judgment of 21 December 2023, European Superleague Company, C-333/21, recitals 129- 130

Therefore, although case law has suggested a price-cost test for certain conducts (such as predatory pricing or margin squeeze) and established certain criteria to determine whether a conduct is abusive, in no instance has case law ruled out an effect-based assessment based on the factual circumstances of the case.

This is also somehow acknowledged by the Commission in footnote 131, which states that while "*the Union Courts have not always made explicit use of the term "presumption" for each one of these practices*". Nevertheless, the Commission considers that "*the case law has developed tools which can be broadly described and conceptualised*". The Draft Guidelines further explain that the expression of presumptions is used in the guidelines for the purposes of "*allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts*".

The case law cited in the Draft Guidelines does not support such a broad conceptualisation which would allow to assert that certain types of conduct have a high potential to produce exclusionary effects, and therefore, such effects can be presumed. Furthermore, such broad conceptualisation is by principal contrary to legal certainty. Such case law does not support either a shift of burden of proof from the Commission to the dominant undertaking for certain types of conduct as suggested by the Commission. The only exception pertains to one type of predatory pricing, as discussed in detail below.

(i) Presumption in exclusive dealing

The Commission considers that exclusive dealing by a dominant firm has a high potential to produce exclusionary effects as it is likely to deprive or restrict the customer's or seller's choice of possible sources of supply or demand. Consequently, exclusive dealing is presumed to be capable of having exclusionary effects (point 82).

While the cited case law recognises that exclusive dealing is incompatible with the objective of undistorted competition[6], this alone is insufficient to support the notion of a presumption of exclusionary effects to the extent suggested by the Draft Guidelines.

Indeed, in the *Intel* case the Court reminded that "*although a system of rebates set up by an undertaking in a dominant position on the market may be characterised as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition, the fact remains that what is involved is, in that regard, a mere presumption and not a per se infringement of Article 102 TFEU, which would relieve the Commission in all cases of the obligation to conduct an effects analysis*[7]*; and in* the Unilever case the Court clarified that "*it must be held that, although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic*".[8] (emphasis added)

Furthermore, in the *Intel* case, the General Court did not uphold the Commission's interpretation of the Hoffman-la-Roche case law, stating that it is an error of law to assume that the Commission does not need to demonstrate effects in cases of exclusivity to establish

[6] Judgment of 13 February 1979 Hoffman – la-Roche v. Commission, recital 90
[7] Intel Corp. v. Commission, recital 124
[8] Judgment of 19 January 2023, Unilever Italia Mkt Operations, recital 51

an infringement of Article 102 TFEU. Indeed, the Court stated that "*the Commission inferred from the Hoffmann-La Roche case-law, first, that the rebates at issue were by their nature anticompetitive, with the result that there was no need to demonstrate foreclosure capability in order to establish an infringement of Article 102 TFEU. Second, although the contested decision contains an additional analysis of the foreclosure capability of those rebates, the Commission took the view that, in accordance with that case-law, it was not required to take that analysis into account in order to conclude that those rebates were abusive…*[9] However, the Court held *that "It must be stated that that position is not consistent with the Hoffman-La Roche case-law, as clarified by the Court of Justice in points 137 to 139 of the judgment on the appeal. It must therefore be found that the applicant and ACT are correct in maintaining that the Commission vitiated the contested decision by an error of law in taking as a starting point the premise that, in essence, the Hoffman-La Roche case-law allowed it simply to find that the rebates at issue infringed Article 102 TFEU on the ground that they were by their very nature abusive, without necessarily having to take account of the capability of those rebates to restrict competition in order to reach the conclusion that they constituted an abuse*."[10] (emphasis added)

This decision of the General Court has been recently endorsed by the Court of Justice which insisted on the importance of effect-based assessment and has annulled the Commission's decision in the absence of it demonstrating the capability of the contested rebates of Intel to have an anticompetitive foreclosure effect[11].

Therefore, point 82 should be deleted or aligned with applicable case law.

Point 82 **should be deleted or modified**:

Exclusive dealing by a dominant firm **may be characterised as a restriction of competition, since, they may have restrictive effects on competition** ~~has a high potential to produce exclusionary effects as it is likely to~~ **by** depriv**ing** or restrict**ing** the customer's or seller's choice of possible sources of supply or demand. **However, their ability to exclude competitors is not automatic and the Commission should conduct an assessment of their capability to produce exclusionary effects taking into consideration all factual circumstances of the case**. ~~As such, exclusive dealing is presumed to be capable of having exclusionary effects~~..

(ii) Presumption in tying and bundling

Point 95 of the Draft Guidelines suggests that, in certain circumstances, it may be possible to conclude that, due to the specific characteristics of the market and products at hand, tying has a high potential to produce exclusionary effects and those effects can be presumed.

[9] Judgment of General Court of 26 January 2022, Intel v. Commission, recital 144
[10] Judgment of General Court of 26 January 2022, Intel v. Commission, recital 145
[11] Judgment of the Court of 24 October 2024, Intel Corp, recitals 136

In other cases, however, an assessment of exclusionary effects is required. The cases falling under the presumption are not explicitly identified, but the Commission explains in footnote 233 that "*this is notably the case in the situation where the inability of competitors to enter or expand their presence in the tied market is likely to directly result from the tying conduct due to the absence of clearly identifiable factors that could offset the exclusionary effects*".

First, it is not clear from the Draft Guidelines in which circumstances the exclusionary effects of tying can be presumed and when they cannot, as there is little guidance in point 95 of the Draft Guidelines in this respect.

Second, and more importantly, recent case law does not support the Commission's assertion. Indeed, in the *Microsoft* case, both the Commission's decision and the judgment confirm the need for an effect-based assessment, which was conducted by the Commission in that case: "*there are … circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case… There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition*"[12].

It is unclear why the legal standard should be lowered for certain types of tying, as the Draft Guidelines propose.

Connect Europe therefore proposes to modify point 95 as follows:

Point 95 **should be modified**:
~~The depth of the analysis required to show that the tying is capable of having exclusionary effects depends on the specific circumstances of the~~ case. ~~In certain circumstances, it may be possible to conclude that, due to the specific characteristics of the markets and products at hand, the tying has a high potential to produce exclusionary effects and those effects can be presumed. In other circumstances,~~ **A** close~~r~~ examination of actual market conditions ~~may be~~ **is** warranted **to show that the tying is capable of having exclusionary effects.**

(iii) Presumption in predatory pricing

Based on the Akzo judgement, point 111 of the Draft Guidelines establishes two cost benchmarks, AVC (average variable cost) or AAC (average avoidable cost) and ATC (average total cost) or LRAIC (long-run average incremental cost), with different implications as regards the proof of abuse.

If prices are below AVC or ACC, the pricing conduct can be considered predatory as, in applying such prices, a dominant undertaking is presumed to pursue no economic objective other than eliminating its competitors. If prices are below ATC or LRAIC but above AVC or ACC, the pricing conduct can be seen as predatory if it is part of a plan to eliminate or reduce competition.

AKZO judgment states that the only case where predatory pricing can be presumed as abusive is when the prices are below AVC.

[12] Judgment of 17 September 2007, Microsoft v. Commission, recital 977

However, point 112 of the Draft Guidelines asserts that *predatory pricing has a high potential to produce exclusionary effects and is therefore presumed to do so.* Against this backdrop, we would encourage the Commission to clarify the relationship between point 111(b) which states that pricing conduct below ATC or LRAIC can be regarded as predatory *if it is part of a plan to eliminate competition*, and point 112 which says that predatory pricing has a high potential to produce exclusionary effects and is therefore *presumed* to do so. In our view, point 112 may need to be revised to align with the Akzo judgment, as follows:

> Predatory pricing has a high potential to produce exclusionary effects **if prices are below AVC or ACC** and is therefore presumed to do so. If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess that evidence.

(iv) Presumption in margin squeeze

According to the Draft Guidelines, margin squeeze is considered abusive where the conduct is capable of producing exclusionary effects (among other criteria), for instance by making the entry of competitors onto the market concerned more difficult, or impossible (point 127).

The Draft Guidelines also state that where the price-cost test indicates a negative spread, *"margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed"* (point 128). However, when reviewing the case law referenced by the Draft Guidelines, it becomes clear that such case law does not suggest a "high potential to produce exclusionary effects", but rather a "probability for a potential exclusion", which is a subtle yet significant distinction.

Indeed, the *Teliasonera* judgment states that, "*if the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss"*[13]. This is to be understood as part of a wider analysis that the Commission must carry out taking into account *"all the specific circumstances of the case"*[14] (emphasis added).

As to the cases where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, the Draft Guidelines suggest that "*this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects"* (point 129). In this situation, i.e. a positive spread, we agree with the Commission that there is no presumption and therefore, the Draft Guidelines should be more explicit that exclusionary effects need to be assessed as also endorsed by case law.

Indeed, according to the Teliasonera judgment, which is also referenced in the Draft Guidelines, " *if … such a margin remains positive, it must then be demonstrated that the*

[13] Judgment of 17 February 2011, TeliaSonera Sverige, recital 73
[14] Judgment of 17 February 2011, TeliaSonera Sverige, recital 68

application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned".[15] (emphasis added)

Furthermore, for the margin squeeze case the Commission has already tried to reverse the burden of proof in the Deutsche Telecom case which has been ruled out by the Court of Justice. Indeed, as clarified by the Court, "*the General Court correctly **rejected** the Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article 82 EC, and that it is not necessary for an anti-competitive effect to be demonstrated*".[16] (emphasis added)

In short, in no case of margin squeeze (whether the margin is negative or insufficient) can the effects of exclusion simply be presumed.

It follows that points 128 and 129 should be revised to align with the mentioned case law, as follows:

Point 128: In addition, in circumstances, where the price-cost test indicates a negative spread, **a potential exclusionary effect is at least probable but which should be assessed based on the factual circumstances of the case.** ~~the margin squeeze has a high potential to produce exclusionary effects and those effects can be presumed.~~ If the dominant undertaking submits evidence that the conduct is not capable or producing exclusionary effects, the Commission will assess that evidence.

Point 129: In circumstances where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects. **The Commission shall demonstrate that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.**

Furthermore, the Draft Guidelines consider that whenever the undertakings rebut the probative value of the presumption on the basis of supporting evidence, the conduct is not capable of having exclusionary effects, "*the submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation*". What is more, the Commission considers the capability to produce exclusionary effects is established if the Commission either (i) shows that the arguments and supporting evidence are insufficient to call into question the presumption, or (ii) provides evidentiary elements demonstrating the capability of the conduct to have exclusionary effects – however, "*reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects*" (point 60b).

[15] Judgment of 17 February 2011, TeliaSonera Sverige, recital 74
[16] Judgment of 14 October 2010, Deutsche Telecom v. Commission, recital 250

To support this assertion, the Guidelines refer to case law on exclusive dealing and claim that it applies "by analogy" to other types of conduct.

First, this shift of burden of proof to the dominant undertaking directly contradicts established case law (including case law on exclusive dealing). Second, there is no objective justification for applying case law on certain types of conduct "by analogy" to other types of conduct. Third, no case law endorses such a "restricted" rebuttal possibility for the dominant undertaking and a significant restriction of the Commission's duty to conduct a thorough examination.

Indeed, the *Unilever* judgment (regarding exclusive dealing) holds that "*it is for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position… That demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice*.[17] This is also underlined by the Court in the *Slovak Telecom* judgment (regarding margin squeeze), "*it must be recalled that it is for the authority alleging an infringement of the competition rules to prove it*"[18].(emphasis added)

In the *Teliasonera and Deutsche Telecom* judgments (regarding margin squeeze), the Court states that margin squeeze "*constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned*"[19]; *"the anti-competitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market*[20]. (emphasis added)

This is also confirmed in the recent decision of the Court of Justice in the *Intel* case, where the Court held that the burden of proof regarding the capability of conduct to have exclusionary effects lies with the Commission: "*it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement*"[21]. (emphasis added)

Even the case law in *Intel* and *Unilever* cited by the Draft Guidelines explicitly endorses a full effect-based assessment by the Commission in case of a rebuttal (which concerns in practice all cases) by stating that *"in a situation where an undertaking in a dominant position submits, during the administrative procedure, with evidence in support of its claims, that its conduct*

[17] judgment of 19 January 2023, Unilever Italia Mkt Operations, recitals 40 and 42
[18] Judgment of 25 March 2021, Slovak Telecom v. Commission, recital 72
[19] Judgment of 17 February 2011, TeliaSonera Sverige, recital 63
[20] Judgment of 14 October 2010, Deutsche Telecom v. Commission, recital 252
[21] Judgment of the Court of 24 October 2024, Intel Corp, recitals 328

*was not capable of restricting competition and, in particular, of producing the alleged exclusionary effects… In that situation, the competition authority is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount, it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (*emphasis added*).* [22]

Furthermore, in the recent Unilever judgment, the Court clarified that "*where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using exclusivity clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market*"[23], *therefore "Article 102 TFEU must be interpreted as meaning that, where there are exclusivity clauses in distribution contracts, a competition authority is required, in order to find an abuse of a dominant position, to establish, in the light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition".*[24] (emphasis added)

This is also confirmed in the recent decision of the Court of Justice in the Intel case, as the Court held that "… *the fact that that undertaking submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing an anticompetitive foreclosure effect means that the Commission is under a specific obligation to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as that undertaking from the market*[25].

Therefore, contrary to what the Draft Guidelines state, based on established case law, it is the Commission's responsibility to prove that the conduct is abusive. Furthermore, the Commission cannot artificially ease its administrative burden by limiting itself solely to the examination of the arguments and supporting evidence submitted by the dominant undertaking while at the same time adopting a presumptive approach by default. It must rather assess all the factual circumstances of the case to demonstrate the capability of conduct to produce exclusionary effects.

In addition, the Draft Guidelines do not clearly mention how dominant undertakings can overturn the presumptions. They suggest that a dominant undertaking could submit 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*". However, the very concept of a presumption relies on the premise

[22] Judgment of 6 September 2017, Intel v. Commission, recitals 138- 139; judgment of 19 January 2023, Unilever Italia Mkt Operations, recitals 47-48
[23] Judgment of 19 January 2023, Unilever Italia Mkt Operations, recital 52
[24] Judgment of 19 January 2023, Unilever Italia Mkt Operations, recital 62
[25] Judgment of the Court of 24 October 2024, Intel Corp, recital 130

that there are no background assumptions as such concerning the case at hand. Instead, the conduct is presumed to be capable of producing exclusionary effects per se, making any rebuttal purely theoretical and granting the Commission significant discretionary power in establishing exclusionary effects and consequently exclusionary abuses.

It follows from the above that the Commission should abandon the category of conducts that are presumed to lead to exclusionary effect, as this approach violates established case law and creates a significant shift in the burden of proof, in favour of the Commission andto the detriment of dominant undertakings.

The category *(ii) conduct that is presumed to lead to exclusionary effects* should be eliminated from the draft guidelines (with implications in point 60 and section 4.2) as it corresponds to an approach that does not find support in case law and shifts the burden of proof to the dominant undertaking without basis.

All in all, this new approach of the Draft Guidelines makes the assessment of abuse of dominant position overly formalistic, based on the external characteristics of the conducts and devaluing the economic analysis. This is a step backwards and contradicts established case law. Indeed, as the Commission recognises in its communication of 27.03.2023 on the amendment of the Guidance Paper (1923, point 7) “the case law of the Union Courts has confirmed an effects-based approach to Article 102 TFEU” and this principle should be reflected in the new Guidelines.

It is also relevant to highlight that the presumptive approach increases the risk of false positives. Any discussion on presumptions cannot ignore the risk of false positives. Even rebuttable presumptions create this risk, as even if a conduct is pro-competitive, presumption might have a deterrent effect as companies might become hesitant to engage in certain competitive activities for fear of triggering a presumption. Therefore, Connect Europe rejects the reliance on presumptions and asks the Commission to re-think its approach.

4. Principles to determine whether specific categories of conduct are liable to be abusive

a. Conducts subject to specific legal test – additional comments

(i) Exclusive dealing

The Draft Guidelines tend to downplay the role of the AEC test for non-pricing practices, while established case law has consistently reaffirmed the importance of this test not only for price abuses but also in certain cases for non-price abuses.

As per point 83d, when conducting an effect-based assessment, the Commission should establish the possible existence of a strategy aimed at excluding "actual or potential competitors of the dominant firm". Furthermore, in the same point, the Draft Guidelines state that such an exclusionary strategy is not legally required to establish the conduct’s capability to produce exclusionary effects.

This approach is not compliant with established case law.

Indeed, in the Unilever case, the Court held that *"even in the case of non-pricing practices, the relevance of such a test [AEC] cannot be ruled out. A test of that type may prove useful where the consequences of the practice in question can be quantified. In particular, in the case of exclusivity clauses, such a test may theoretically serve to determine whether a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts."*[26] (emphasis added)

In the same vein, the Court stated "*Thus, abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors that were as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate, quality, or where that conduct was based on the use of means other than those which come within the scope of 'normal' competition, that is to say, competition on the merits*"[27]. (emphasis added)

In the 2017 Intel judgment, the Court stated that "*In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU (…) to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market* (…)" and "*Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation*" [28]. (emphasis added)

Similarly, in the Google shopping case - not exactly a case of exclusive dealing, but still a case of non-price practice - the Court held that "*the objective of that article [102] is not to ensure that competitors less efficient than the dominant undertaking remain on the market*"[29].

To reverse this position would not only create legal uncertainty, but would also directly conflict with the Commission's intention to help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102.[30] It is therefore important for the Draft Guidelines to give sufficient weight to the AEC principle and test in accordance with established case law.

[26] Judgment of 19 January 2023, Unilever, recital 59
[27] Judgment of 19 Jan 2023, Unilever Italia Mkt. Operations, recital 39
[28] Judgment of 6 Sept 2017, Intel Corp. v. Commission, recitals 133 and 134
[29] Judgment of 10 September 2024, Google and Alphabet v. Commission (Google shopping), recital 263
[30] Draft Guidelines, point 8.

Consequently, Connect Europe proposes that point 83 d be amended as follows:

d) the possible existence of a strategy aimed at excluding ~~actual or potential competitors of the dominant firm~~ **as efficient competitors as the dominant firm**. ~~Such exclusionary strategy is not legally required to establish the conduct's capability to produce exclusionary effects, but may play an important role in the assessment in those cases where it is established.~~

(ii) Tying and bundling

The specific legal test for tying and bundling fails to identify the circumstances under which such conduct is presumed to be exclusionary, i.e. those "certain forms of tying" referred to in point 60 b. It also does not distinguish them from those where a closer examination of actual market conditions is necessary to identify evidence confirming the capability of the tying to have exclusionary effects, leaving uncertainty about where the burden of proof lies.

This criticism is made without disregarding that the case law does not support the presumption of effects but, on the contrary, confirms the need for an effects-based assessment, as mentioned in point 3.b.

(iii) Refusal to supply

Refusal to supply is presented in the Draft Guidelines as a stand-alone type of abuse, whereas in the Guidance from2008 it was treated together with margin squeeze and other constructive refusals of access, which all had to meet the same criteria, i.e. the essentiality of input. The Draft Guidelines distinguish a pure case of refusal to supply from other cases of access restrictions.

In Connect Europe's view, a negative consequence of this approach is that other types of abuse are now presented with less demanding standards of proof, which generates uncertainty as conducts which do not meet the requirements of the specific legal test may still be deemed abusive, e.g. "access restrictions" (section 4.3). This aspect is further developed below.

Furthermore, there are some inconsistencies in regards to established case law.

Indeed, point 98 of the Draft Guidelines states that for a refusal to supply to be considered abusive*, "it is sufficient that a potential market or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers"*. However, according to cited case law[31], an abusive refusal occurs only when there is *an actual demand for the input* (rather than potential) *on the part of undertakings which seek to carry on the business for which they are indispensable*. The point should be

[31] Judgment of 29 April 2004, IMSv. NDC Health, recital 44

aligned with the case law, eliminating references to potential and hypothetical markets or purchasers.

Point 98 should be modified:
~~To find that a~~ refusal to supply is abusive, **when there is an actual demand for the input on the part of undertakings which seek to carry on the business for which they are indispensable.** ~~it is sufficient that a potential or even a hypothetical market for the input can be identified, which may be the case when there is demand for the input from potential purchasers.~~

Regarding the test for refusal to supply set out in point 99, the conditions that must be met focus on the elimination of the competitor requesting access and not on the elimination of effective competition. Point 101 iii) expresses the same idea (unlike the Guidance 2008, point 81). Connect Europe considers that competition enforcement should protect competition in the markets rather than the competitors (as also confirmed by established case law[32]) and as a consequence the wording of these provisions should be adjusted accordingly.

Point 99 should be modified:
A refusal to supply is liable to be abusive where the following conditions are met:
a) the input is indispensable ~~for the undertaking requesting access to compete with the dominant undertaking~~ ***to be able to compete effectively*** *in a downstream market; and*
b) the refusal is capable of having exclusionary effects, which in this specific context means the capability to eliminate ~~all competition on the part of the requesting undertaking~~ **effective competition in the downstream market**.

Additionally, when defining the indispensability of the input, the Draft Guidelines assert the condition that "*access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint*" (point 101 (iii)). None of the case law support this criterion, in particular there is no mention of viability or effective competitive pressure and it should therefore be removed.

Point 101 should be modified:

101. iii. access to the input is necessary ~~for the requesting firm to remain viably on the market~~ **to be able to compete effectively on the market** ~~and exert an effective competitive constraint~~.

[32]Judgment of 9 September 2009, Clearstream v Commission, recital148; Judgment of 17 September 2007, Microsoft v Commission, recital 563.

(iv) Predatory pricing

Based on the Akzo judgement, point 111 of the Draft Guidelines establishes two cost benchmarks, AAC (avoidable average cost) and LRAIC (long-run average incremental cost), with different implications regarding the proof of abuse.

Concerning LRAIC, defined in point 116, we dispute the inclusion of common costs in the incremental cost, i.e. *"…, but also the increase in all common costs insofar as the increase is caused by the production of that product".*

In principle, there is no increase in common costs caused by the production of the product, because common costs occur even if one of the products is not produced, and for this reason a common cost is not a specific cost. In this regard, it is worth stressing that point 116 also states that "LRAIC include product specific fixed costs", which seems to stand in contradiction.

The position that LRAIC generally excludes common and joined costs between two or more products is anchored in economic literature[33].

Unlike AAC, LRAIC captures not only the short-run costs but also the long-term costs of entering and remaining in a market, including sunk costs which are important in the case of network industries, as long as they are specific to the product.[34]

We note that the 2008 Guidance is more consistent with the economic concept, stating that "true common costs are not taken into account in LRAIC" (footnote 2). If this were not the case, there would be no distinction between total cost (ATC) and incremental cost (LRAIC) in multi-product companies.

Connect Europe suggests the Draft Guidelines clarify that as a general rule the LRAIC does not include common costs and that in exceptional cases a careful assessment should be made to verify whether the provision of the product may have caused any increase in these costs.

We agree with point 117, which states that "The price-cost test is generally based on the price and cost data of the dominant undertaking itself". Indeed, it is "in line with the principle of

[33] Robert O'Donoghue and A Jorge Padilla, The law and economics of article 82 EC; Ricardo Junqueiro, Abusos de posição dominante.

[34] « The LRAIC of a product is defined as "the firm's total production cost (including the product) less what the firm's total costs would have been had it not produced the product divided by the quantity of the product produced". In simple terms, LRAIC measures the total costs, both capital and operational, of supplying a *specific* product or service rather than a larger category of sales, i.e. all cost that are causally related to a specific product. » (Robert O'Donoghue and A Jorge Padilla, the law and economics of article 82 EC, page 269)

"LRAIC is thought by certain commentors to be superior to short-run costs measures, since it (1) includes all product-specific cost incurred in the research, development and marketing of the allegedly predatory output, even if they are sunk; (2) avoids the need to classify costs as fixed or variable,…; (3) does not require courts to allocate joint and common costs,…; (4) includes any cost incurred to effectuate the predatory scheme following formation of the predatory strategy; and …" (idem)

"LRAIC is the average of all the costs (fixed and variable) that a company incurs to produce a given product. It includes all the specific costs incurred to produce the product, even before the predatory pricing period. It does not include common costs not attributable to the product in question. The LRAIC is equivalent to the ATC of companies that produce only one product." (Ricardo Junqueiro, Abusos de posição dominante, page 225).

legal certainty to enable dominant undertakings to assess the lawfulness of their conduct", as indicated in Draft Guidelines, and in addition it reflects the principle of the equally efficient competitor.

Concerning the opportunity costs referred to in point 118, Connect Europe considers they should not be included, firstly because of the difficulty and uncertainty of calculating them and also because they do not constitute a real cost specific to the product. Furthermore, no case law is presented to support their accounting.

The following excerpt from point 118 should be deleted from the Draft Guidelines : "Furthermore, it may be appropriate to account for opportunity costs of the dominant undertaking."

As for the scope of the predation test, in the context of point 119, it would be useful to have more guidance on when the test should be done separately for each product and when altogether.

(v) Margin squeeze

Connect Europe welcomes that the specific legal test is based on the "as efficient competitor" standard. Indeed, it becomes clear from the second condition presented in point 122 and from points 124 and 133 that the as efficient competitor (AEC) test applies. . Accordingly, the test uses the dominant undertaking's product-specific costs at the downstream level.

In the opposite direction, the essentiality of the input is abandoned as a requirement for this conduct to be considered as abusive, as follows from point 127 (compared to Guidance 2008).

Connect Europe considers that it is important to maintain the condition of objective necessity of the input so that competitors can compete effectively on the downstream market in cases of margin squeeze, even if this conduct constitutes an independent form of abuse distinct from refusal to supply. In fact, if there are substitute inputs that downstream competitors can rely on, the practice of margin squeeze by e.g. rising the wholesale price will be unsuccessful, because buyers will switch to those substitutes and therefore the practice will not be able to restrict competition.

Indeed, in the cited *Teliasonera* case, the General Court did not assess the case on its merits, but only responded to the preliminary questions referred by the Swedish Court. In this context, the Court clarified that when the input is indispensable, at least potentially anti-competitive effects of a margin squeeze is probable, However, when the input is not indispensable, it is for the court to satisfy that the practice may be capable of having anti-competitive effects: "*where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors … who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage … In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable. However, taking into account the dominant position of the*

undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned " (emphasis added)"[35].

Therefore, the Guidelines should be nuanced on this point.

Regarding the level of product aggregation (points 135 and 136), Connect Europe agrees that it should correspond to the relevant product market, but considers that more guidance is needed in circumstances where it may be justified to apply the test on the level of each individual offer as mentioned in the Draft Guidelines.

b. Conducts with no specific legal test

In general, it is questionable whether these conducts, that do not have a specific legal test should be treated any different from conducts where effects need to be demonstrated, i.e. the conduct referred to in point 60 a). There should be no shortcuts to establishing that a conduct deviates from competition on the merits and is capable of producing exclusionary effects.

Beyond that, given that there is no specific test, it may be even more difficult for companies to judge whether a certain conduct falls into these categories, which can lead to these categories being interpreted too wide. These are very specific examples which should follow the general rule without making it a precedent.

(i) Conditional rebates that are not subject to exclusive purchase or supply requirements

For these cases the AEC test should be still the most important test, as it gives companies a reliable reference to assess their conducts, and establishes the appropriate standard for the defence of competition, not competitors.

Connect Europe does not agree with the Commission's assessment that in certain circumstances, "*even a less efficient competitor may also exert a genuine constraint on the dominant undertaking"*, which is set out in point 144 in the context of situations in which a price-cost test may not be appropriate. This point denotes a decreased emphasis on the notion of equally efficient competitors.

Connect Europe's view is that even in situations where a price-cost test is not appropriate, the AEC standard should be followed, as if an as-efficient competitor is able to replicate the actions of the dominant company then consumer's interests will be protected by effective competition. Consequently, those actions should not be seen as an abuse.

[35] Judgment of 17 February 2011, TeliaSonera Sverige, recitals 70-72

As a matter of fact, case law actually provides guidance contrary to point 144, namely an abuse can only be established when the conduct produces exclusionary effects of competitors that are *as efficient as* the dominant firm. It is not the purpose of Article 102 TFEU to ensure that less efficient companies remain on the market. We refer in this respect to the citations presented in the section on exclusive dealing above in the Intel and Unilever cases[36].

There is a single case, the Post Danmark Judgment, in which the European Court of Justice discarded the AEC standard and it should not justify the Commission's deviation from the approach based on the exclusion of competitors as efficient as the dominant firm enshrined in all other case law ("*the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market*" [37]). Indeed, it is important to bear in mind the very particular circumstances of the Post Danmark case, namely the position of a former statutory monopolist protected by high entry barriers, applying a rebate scheme simultaneously to monopoly mail and liberalised mail.

Connect Europe proposes to delete point (ii) of b) from the Point 144

Footnote 325 of point 145) of the Draft Guidelines should also be underscored. Indeed, no judgment of the Courts means that the assessment of exclusionary effects is made in relation to existing actual or potential competitors. On the contrary, the Court of Justice made it clear in the cases cited above, namely Unilever, Intel and Google shopping, that the capacity to exclude equally efficient competitors is the decisive consideration. Moreover, this footnote seems to contradict its own point 145f and the point 73 to which it refers to.

(ii) Multi-product rebates

Since multi-product rebates are different from exclusive dealing and conditional rebates, it is not legally justified to consider the same rules apply by analogy to multi-product rebates as suggested by point 153. Clear guidance should be provided with regards to multi-product rebates.

(iii) Self-preferencing

The concept of self- preferencing as currently described in the Draft Guidelines, is a very vague concept, especially concerning conduct that may be capable to produce exclusionary effects. Connect Europe considers that the Draft Guidelines do not provide clarity or guidance on this matter.

[36] Judgment of 6 Sept 2017, Intel Corp. v. Commission, recitals 133 and 134; Judgment of 19 Jan 2023, Unilever Italia Mkt. Operations, recital 39

[37] Judgment of 6 October 2015, Post Danmark A/S v Konkurrencerådet, recital 60

iv. Access restrictions

The Draft Guidelines introduce a new category of conduct, access restrictions.

Point 166 of the Draft Guidelines provides a non-exhaustive list of access restrictions which could be considered as contrary to Article 102 TFEU. However, this list seems problematic, because it either tries to generalise one or two isolated cases which had a specific context (e.g. point 166a - disruption of supply of existing customers) or refers to an abusive conduct which is already addressed in a separate section of the Guidelines (the conducts mentioned in points 166 b, c and d refer in reality to margin squeeze, refusal to supply or self-preferencing).

With such a broad category of abuse, there is a risk of artificially extending the application of Article 102 TFEU to any conduct that does not meet the conditions established by case law for different types of abusive conduct (e.g. refusal to supply, margin squeeze, or self-preferencing). It is particularly serious that the requirement of the indispensability of the input, which is mandatory in the refusal to supply, has been waived.

In practice, this means defining new types of abuse which include other types of abuses. However, with less demanding standards of proof, which generates uncertainty as conducts that do not meet the requirements of the specific legal test may still be deemed abusive.

This concern is particularly relevant in a context where the Guidelines do not explicitly outline the exclusionary effects that conducts falling under access restrictions may produce, nor do they provide an assessment framework for each type of conduct based on established case law.

As a result, there is a risk of creating a situation in which the dominant undertaking, to avoid abuse of dominant position, would be obliged to provide access to its input, regardless of whether it is indispensable. Furthermore, if this broad category of abuse were to be maintained, the conditions for granting access could become so restrictive that it would be more advantageous for the dominant undertaking to retain the input for its exclusive use.

More generally, such an extensive category of abuse contradicts the principle of freedom of contract, is not endorsed by established case law, and could negatively impact incentives to invest as well as overall legal certainty.

Connect Europe, therefore, urges the Commission to abandon this category to ultimately avoid contestable decisions followed by lengthy litigations.

5. General principles applicable to the assessment of objective justifications

This chapter does not provide any more or new guidance on the 2 different criteria for objective justification of a conduct, i.e. the objective necessity defence or the efficiency defence. It would be helpful if the Commission would provide more examples on efficiencies that would be acceptable.

While it is clear that the burden of proof should remain with the parties, there is no clarity with regard to the standard of proof. Although it seems that under the Draft Guidelines the evidentiary threshold for the parties to prove efficiency claims is higher than the assessment standard for the Commission for the capability to produce exclusionary effects. In the case of certain categories of conduct the standard of proof seems to be significantly higher, as suggested in point 170. Such an asymmetry in standards of proof lacks any justification and is also not merited in existing case law. There needs to be a balanced approach, meaning the same standard of proof for abusive conduct should be applicable as for efficiencies. Currently the wide discretion for the Commission to not accept efficiencies leads to a bias that results in over-enforcement.

That said, there have been developments that efficiencies beyond price and quality can be recognised, in particular with regard to innovation, sustainability and investment. This could further explained in the Draft Guidelines. In particular, by giving clear guidance on which evidence will ultimately be satisfactory. Further to this, there could also be more clarity on which cases out-of- market efficiencies could be recognised.

For questions and clarifications regarding this submission, please contact Benedict Gromann, Public Policy Manager (gromann@connecteurope.org).