31 October 2024

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON DRAFT GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The French *Association des Avocats Pratiquant le Droit de la Concurrence* ("**APDC**") welcomes the European Commission's (the "**Commission**") draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the "**Draft Guidelines**") and the opportunity to comment.

2. The APDC provides detailed comments on dominance (**II**) and the general principles set out in the Draft Guidelines (**III**) as well as on specific abuses (**IV**). However, as a starting point, the APDC would like to draw the Commission's attention to the key overarching points immediately below.

3. Overall, the APDC welcomes the initiative. To the extent that it aims to enhance transparency, legal certainty and help undertakings' self-assessment, the guidelines are essential to compliance work and Article 102 TFEU itself has so far been lacking in this respect. Unfortunately, as set out below, the APDC considers that the Draft Guidelines currently fall short on a number of points.

4. ***First***, **one of the Draft Guidelines' stated objectives is to codify the case law**, however:

- such an approach runs the inevitable risk of a certain rigidity and quick obsolescence, as both case law and economic tools to assess the foreclosure potential of a given conduct continue to develop. The Commission itself appears to acknowledge this,[1] which has also very recently been demonstrated by the Courts' September and October judgments in *Google Shopping*[2], *Google AdSense*[3] and *Intel*[4], which in many respects, as detailed below, run counter to the Commission's proposed interpretation in the Draft Guidelines, which must therefore be changed in all these respects; and

- moreover, in some respects, the Draft Guidelines appear to be based on a questionable and selective interpretation of the case law, in particular, as detailed below, with respect to:

    - the reference to newly created presumptions in respect of a number of practices; and

    - the departure from the AEC test and the notion of anticompetitive foreclosure.

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1 See Draft Guidelines, para. 9: "*These Guidelines are based on the case law of the Union Courts at the time of their adoption. These Guidelines are without prejudice to the interpretation that the Union Courts may give to Article 102 TFEU through relevant developments in the case law*."

2 CJEU, 10 September 2024, *Google Shopping*, C-48/22.

3 General Court, 18 September 2024, *Google AdSense*, T-334/19.

4 CJEU, 24 October 2024, *Intel*, C-240/22 P.

5. ***Second*, by contrast, the Draft Guidelines lack a clear statement of policy and guiding principle, in particular, to the extent that they**:

   - fail to define concepts and to provide concrete examples (for example, regarding the capacity to produce exclusionary effects, in particular when such effects are merely potential). In this respect, the APDC notes that, while it is not the Commission's role to legislate and go beyond the available case law, it can, as a matter of policy, clarify its interpretation of key concepts in the case law and the matters it considers worth pursuing, much as it did in the context of its 2008 guidance on enforcement priorities; and

   - the APDC notes that this concern also appears to be shared by others within the legal community, beyond the Bar, as evidenced, for example, by judge Nils Wahl's comments at Fordham Law School in September.[5]

6. In this context, the current Draft Guidelines appear to be a missed opportunity for the Commission to clarify a number of key concepts and to provide much-needed guidance, as it has valuably done in other areas of competition law (for example, in relation to vertical and horizontal agreements), especially in light of an abundance of Article 102 case law in recent years that is not always easy to reconcile.

7. ***Third*, the Draft Guidelines adopt an excessively flexible stance,** which the APDC considers is not in line with the case law and which also undermines the stated objective of legal certainty.

8. Substantively, it is clear that at least one of the objectives of the Draft Guidelines is to facilitate the application of Article 102 TFEU. However, in the APDC's view, this apparent move away from an economic approach and return to a more formalistic approach is both regrettable as a matter of principle and is not in line with jurisprudence as a matter of law. Key examples of this excessively flexible stance include:

   - **lowering of the safe harbour from 40% to 10%** – this both constitutes a notable departure from the Commission's existing guidance on the Article 102 enforcement priorities and creates an unnecessary significant "*grey zone*" for undertakings which hold market shares ranging from 10% to 50%, thereby directly undermining the Commission's stated objective of providing clarity and legal certainty;

[5] As reported by Mlex, Wahl warns of EU court's 'slippery slope' on antitrust abuses and effects, 12 September 2024: "*Whereas other commission documents might set out enforcement priorities or breakdown how the Commission undertakes technical steps like market definition, the court's case law ought to clearly establish the law on dominance abuses, he said, asking: 'Why do we need these guidelines*?'

- **the move away from the AEC test and anticompetitive foreclosure** – this departs from the effects-based approach previously advocated for by the Commission and consistently endorsed by the Courts as a prominent feature of Article 102 cases;[6]

- **extensive "catch-all" provisions** to enable the Commission to characterise conduct as abusive in cases where the relevant criteria for an abuse are not met;[7] and

- the introduction of **presumptions** which, as we outline below, in the APDC's view, are not established in the case law and run counter to the general allocation of the burden of proof for the application of Article 102 TFEU;

  Further, while the introduction of legal presumptions is questionable as a matter of principle, the APDC is concerned with the lack of clarity in the Draft Guidelines with respect to how these may be rebutted, as well as, in practice, the broad margin of discretion which the Commission appears to give itself in the Draft Guidelines.

9. In light of the above, the APDC is concerned that the Draft Guidelines do not strike an appropriate balance between, on the one hand, the Commission's understandable aim of more effective enforcement and, on the other hand, the need, in this context, to safeguard undertakings' rights of defence and legitimate expectations of legal certainty, but also to avoid the prohibition of practices which in the end may prove pro-competitive and benefit consumers (e.g., in the form of rebates and therefore lower prices).

10. Substantively, the Draft Guidelines currently appear to be very one-sided since:

    - while, on the one hand, the evidentiary burden on the Commission is significantly lowered and the Commission retains a broad discretion to intervene even in cases which do not strictly fall within the criteria set out in the Draft Guidelines, there is, on the other hand, no clear statement of limits to enforcement and of situations in which an abuse can be excluded; and

    - the Draft Guidelines fail to refer to dominant undertakings' fundamental rights.[8]

11. The result, in the APDC's view, is an overly low standard for intervention (with a return to a formalistic approach based on the form of the conduct and not its likely effects) and insufficient guidance (for example, regarding what constitutes a deviation from competition on the merits, on the evidentiary standards linked to the presumptions and on how they may be displaced).

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6 See, *e.g. Google Android*, T-604/18, paras 299 and 643; *Qualcomm*, T-235/18, para 414; *Intel renvoi*, T-286/09, paras 287, 335, 457, 481, 525; *Google Shopping* T-612/17, para 615; *Lithuanian Railways*, T-814/17, para 98.

7 See, in particular, para. 57 of the Draft Guidelines.

8 CJEU, 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, para. 42.

12. This is all the more regrettable as, contrary to what follows from the Draft Guidelines and the European Competition Network's Joint Statement, the trend in the case law is to interpret strictly the competition authorities' burden of proof rather than to lighten the evidentiary efforts required from them.[9] Overall, the APDC considers that, in seeking to give the Commission maximum discretion and flexibility for enforcement, the Draft Guidelines effectively undermine the Commission's stated objective of increasing transparency and legal certainty.

13. Other comments on scope and methodology

- **With respect to scope,** the APDC regrets that the Draft Guidelines:
    - still fail to address exploitative abuses, despite their growing importance in the case law;
    - do not discuss sustainability objectives as part of the objective justifications, in particular in view of the profile and mission of the new Commissioner; and
    - most importantly, do not address the interactions with the DMA, which is clearly complementary to the enforcement of Article 102 TFEU, as well as, more widely, theories of harm for the digital economy, which are of hugely significant importance in today's landscape. This is unfortunate since (*i*) the APDC notes that this had already been called for in responses to the call for evidence; (*ii*) it is likely the Courts will not have the opportunity to address this question before a few years, so that having guidance on the Commission's enforcement policy would be key to providing legal certainty both for gatekeepers and potential complainants.[10]
- **Finally, with respect to methodology** for adopting the proposed Guidelines, the APDC also regrets that no impact assessment was carried out. This was expressly called for by the APDC in its response to the call for evidence.

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9 See, most recently, CJEU, 24 October 2024, *Intel*, C-240/22 P and General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 107, in which the Courts made a strict application of the Commission's duty to demonstrate the capacity of, respectively, loyalty rebates and exclusivity provisions to produce anticompetitive effects in light of all the relevant circumstances.

10 See, *e.g.* submissions by: Orange; the Spanish Competition Association; Anne Witt; and AFEC – in response to the Commission's call for evidence seeking feedback on the adoption of guidelines on exclusionary abuses of dominance.

II. DOMINANCE

2.1. Essential importance of market definition

14. In its introductory comments on dominance, the Commission states that "*it is in general necessary to define the relevant market*" in order to assess dominance. In the same paragraph, the Commission also emphasises that "[T]*he definition of the relevant market and the assessment of whether the undertakings concerned hold a dominant position within that relevant market may therefore be interrelated*".[11]

15. This implies that market definition is not an indispensable step to establish dominance. The position of the Commission is particularly surprising as it has very recently revised its communication on market definition[12] to give guidance as to how it defines markets in competition law enforcement, explaining that "[t]*he Commission generally uses market definition where there is a need to assess the relative competitive strength of undertakings as part of the competitive assessment and, most notably, to assess whether an undertaking holds market power*".[13]

16. The APDC considers that a finding of dominance necessarily takes place on a relevant market that should be precisely defined, as it "*makes it possible to calculate market shares*",[14] which is an essential criterion in establishing a dominant position. It also involves "*identifying in a systematic way the immediate competitive constraints exerted on the undertakings concerned when they offer products in a certain area*",[15] as acknowledged by the Commission in the Draft Guidelines. In other words, identifying the relevant market is necessary to determine whether the undertaking is in a position to behave, to an appreciable extent, independently of its competitors and customers.

17. In addition, the case law cited by the Commission in the Draft Guidelines in support of its statement explicitly upholds the importance of defining the relevant market to establish a dominant position. In *Europemballage*, the Court of Justice ruled that in appraising a dominant position, "*the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products*".[16] More recently, the Court of Justice considered that "*the definition of the relevant market, in the application of Article 102 TFEU, is, as a general rule, a prerequisite of any assessment of whether the undertaking concerned holds a dominant position*".[17]

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11 Draft Guidelines, para. 20 (emphasis added).

12 Commission Notice on the definition of the relevant market for the purposes of Union competition law, 22 February 2024.

13 *Ibid*., para. 8 (emphasis added).

14 *Ibid*., para. 10 (emphasis added).

15 Draft Guidelines, para. 20 (emphasis added).

16 CJEU, 21 February 1973, *Europemballage*, C-6/72, para. 32 (emphasis added).

17 CJEU, 30 January 2020, *Generics UK*, C-307/18, para. 127 (emphasis added).

18. Consequently, the APDC would suggest clarifying that the definition of the relevant market is essential when assessing whether the undertaking concerned holds a dominant position.

2.2. Dominance threshold and "safe harbour"

19. The Draft Guidelines provide that: (i) market shares above 50% constitute evidence of the existence of a dominant position (save in exceptional circumstances); and (ii) market shares below 10% exclude the existence of a dominant market position (save in exceptional circumstances).[18]

20. ***First***, while the Commission's 2009 communication stipulated that "*dominance is not likely if the undertaking's market share is below 40% in the relevant market*",[19] the Draft Guidelines no longer mention the 40% threshold and seem to lower the safe harbour threshold to no more than a 10% market share.

21. This would amount to a drastic reduction of the threshold establishing a safe harbour. Moreover, this appears to be the result of a questionable reading of the *Metro* ruling referenced in footnote 41 of the Draft Guidelines, in which the Court of Justice simply held that a market share of less than 10% is "*too small to be regarded as evidence of a dominant position on the market*".[20] The *Metro* ruling does not, however, suggest that an undertaking with a market share in excess of 10% is more likely to be dominant. In other words, the Commission erroneously infers from this case that the safe harbour threshold could be lowered to a 10% market share. This would considerably increase legal uncertainty.

22. In addition, the safe harbour is further undermined by the fact that there are "*exceptional circumstances*" in which a market share of less than 10% would not exclude the existence of a dominant position.[21] To the best of the APDC's knowledge, this has never been the case. The APDC also fails to see in which exceptional circumstances could an undertaking with market shares below 10% be dominant.

23. As a result, the APDC suggests deleting the reference to the 10% market share threshold and the *Metro* precedent from footnote 41.

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18 Draft Guidelines, para. 26 and footnote 41.

19 Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 24 February 2009, para. 14.

20 CJEU, 22 October 1986, *Metro*, C-75/84, para. 85.

21 Draft Guidelines, footnote 41.

24. ***Second***, the Draft Guidelines provide that "*very large market shares* […] *are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position*".[22] The Draft Guidelines specify that this is in particular the case when an undertaking has a market share of 50% or more.[23] This means that market shares above 50% create a presumption of dominance and that undertakings with market shares between 10% and 50% are in a "grey zone" – which would be significantly broader than under the Guidance, in which the "grey zone" was limited to market shares between 40% and 50%.

25. The APDC notes that such an approach is inconsistent with the Commission's objective of providing companies with legal certainty through the publication of the Draft Guidelines.[24] The APDC considers that the introduction of a 40-percentage-point "grey zone" is all the more prejudicial as, based on the current Draft Guidelines, businesses whose market share falls within it may be subject to presumptions that their behaviour constitutes an abuse prohibited by Article 102 (see section 3.4 below).

26. Consequently, the recognition by the Commission of a presumption of dominance for undertakings with a market share of 50% or more (save in exceptional circumstances, which is consistent with the case law[25]) should encourage the Commission to either (i) introduce a presumption of absence of dominance below 50% or (ii) at a minimum come back to the wording of the Guidance and recognise that it is unlikely that an undertaking with a market share of less than 40% can hold a dominant position. This would be consistent with the Commission's objective of granting businesses legal predictability.[26]

2.3. Assessment of dominance

27. The APDC observes that the Draft Guidelines do not give a detailed explanation of the factors which the Commission would assess in order to characterise a dominant position when an undertaking's market share is below 50%. The Draft Guidelines only contain a single sentence in that respect mentioning that "*factors other than the market share of the undertaking concerned, such as the strength and number of competitors need to be considered*".[27] The APDC therefore calls for the sparse indications on this point, what's more mentioned in a footnote, to be developed, in order to provide companies with a more transparent analysis framework and enable a self-assessment of their market position.

28. Similarly, the Draft Guidelines do not give details as to how the presumption of dominance for undertakings with a market share of 50% or more may be rebutted in exceptional circumstances.[28] In the interest of legal predictability, the APDC believes it would be appropriate to give companies more guidance on this point.

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22 Draft Guidelines, para. 26.

23 Draft Guidelines, para. 26.

24 Draft Guidelines, para. 8.

25 CJEU, 6 December 2012, *AstraZeneca*, C-457/10, para. 176; CJEU, 3 July 1991, *AKZO*, C-62/86, para. 60.

26 Draft Guidelines, para. 4.

27 Draft Guidelines, footnote 41.

28 Draft Guidelines, para. 26.

2.4. Dominance on a secondary market

29. The APDC notes that in the Draft Guidelines, the Commission mentioned that "*in the presence of aftermarkets, effective competition on the primary markets may constrain an undertaking's market power in the secondary market*".[29] The APDC considers that it would be appropriate to include a few additional paragraphs describing the criteria that should be used to assess (the absence of) dominance in a secondary market. Consistent with the case law of the Court of Justice, the Commission could clearly state that:

- primary and secondary markets constitute separate markets;[30]

- horizontal competition on the primary market excludes any dominant position on the secondary market when the primary and secondary markets are closely linked;[31] and

- this is the case when four conditions are met: (i) customers can make an informed choice, including lifecycle-pricing, between the various manufacturers in the primary market; (ii) customers are likely to make an informed choice accordingly; (iii) if an apparent policy of exploitation is being pursued in the aftermarket, a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market; and (iv) customer's adaptation of their purchasing behaviour would take place within a reasonable timeframe.[32] These criteria were confirmed by the Court of Justice in its *EFIM* ruling.[33]

2.5. Collective dominance

30. The APDC welcomes the inclusion of a section dedicated to the concept of collective dominance in the Draft Guidelines. Nevertheless, the APDC calls for a cautious application of this notion under Article 102 TFEU, insofar as it is a concept that amounts to applying this provision to undertakings that are not individually dominant on the relevant market. The competition authorities' decisional practice also suggests that it is only rarely possible to conclude that collective dominance is present.

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29 Draft Guidelines, footnote 41.

30 Commission, 29 July 2014, *Watch Repair*, AT. 39097, para. 99; Commission, 13 December 2011, *IBM Maintenance Services*, COMP/C-3/39692, para. 20; Commission, 22 September 1999, *Pelikan/Kyocera*, IV/34.330, para. 54; CJEU, 2 March 1994, *Hilti*, C-53/92 P, paras. 11-16; CJEU, 31 May 1979, *Hugin Kassaregister*, 22/78, para. 7.

31 General Court, 24 November 2011, T-296/09, *EFIM*, para. 91 confirmed by CJEU, 19 September 2013, *EFIM*, C-56/12, paras. 12 and 36-42.

32 Commission, 4 March 2024, *Apple Music Streaming*, C (2024) 1307, para. 337; Commission, 7 January 1999, *Info-Lab/Ricoh*, IV/E 2/36.431, paras. 37-51; Commission, 22 September 1999, *Pelikan/Kyocera*, IV/34.330, para. 61.

33 CJEU, 19 September 2013, *EFIM*, C-56/12, paras. 12 and 36-42.

31. The APDC also notes that the Commission refers to merger control case law[34] in support of its statements in the Draft Guidelines that are nonetheless dedicated to the application of Article 102 TFEU to abusive exclusionary conduct. However, the APDC queries to what extent a reasoning applicable to merger control can be transposed to Article 102 TFEU, insofar as a merger control assessment is made prospectively to determine whether a transaction is likely to create a collective dominant position, whereas a reasoning under Article 102 TFEU aims at assessing the *ex-post* existence of a collective dominant position.

2.6. Link between the dominant position and the abuse

32. The APDC notes that the Draft Guidelines do not contain any development regarding the link between the dominant position and the abuse. This point is, however, essential to the assessment of a potential violation of Article 102 TFEU, in particular in order to determine if the legal test concerns the abuse of a dominant position or an abuse in a market characterised by a dominant position. The APDC notes that EU Courts considered in the past that a causal link between the dominant position and the abuse was not necessarily required.[35] However, there is only scarce and relatively old case law in that respect, which focuses on very specific types of abuse (for example, *AstraZeneca*). The APDC considers that the Draft Guidelines should clarify that there must be a causal link between the dominant position and the abuse, except in exceptional circumstances. In any event, the APDC would welcome more guidance on this topic in the Draft Guidelines.

III. GENERAL PRINCIPLES FOR ESTABLISHING AN ABUSE

33. In the following section, the APDC comments on the following general principles for establishing an abuse, as set out in Section 3 of the Draft Guidelines:

(i) the setting in stone of a rigid two-step test to determine if conduct by a dominant undertaking is liable to be abusive, which the APDC considers is not explicitly required by law and risks being unclear in practice;

(ii) the notion of deviation from competition on the merits, in respect of which, given its importance to the analysis of abuse of dominance, the APDC would welcome further clarification and practical examples;

(iii) extensive catch-all provisions, without reference to any limiting principles nor to guiding case-law, which the APDC is concerned may give the Commission an excessively broad discretion to intervene, even outside the criteria for abuse set out in the Draft Guidelines;

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34 General Court, 25 March 1999, *Gencor*, T-102/96. See in particular Draft Guidelines, footnote 74.

35 General Court, 1 July 2010, *AstraZeneca*, T-321/05, para. 267: "*in order to be classified as an abuse of a dominant position, behaviour does not necessarily have to result from, or be made possible by, the economic strength of the undertaking, since no causal link is required between the dominant position and the abuse of that position*". See also CJEU, 13 February 1979, *Hoffmann-La Roche*, C-85/76, para. 91; CJEU, 21 February 1973, *Europemballage*, C-6/72, para. 27.

(iv) the questionable introduction of presumptions and the need to, at least, clarify and circumscribe their application in practice; and

(v) the legal test for effects, which in the APDC's view, should also be clarified in the final version of the Guidelines.

3.1. Setting in stone of a rigid two-step test

34. The Draft Guidelines set in stone a rigid two-step test to determine if conduct by a dominant undertaking is liable to be abusive:

- *first*, the conduct must depart from competition on the merits; and
- *second*, the conduct must be capable of exclusionary effects.[36]

35. The APDC queries the practical purpose of such an approach, which in its view is both:

(i) *unwarranted by the case law*, including the most recent judgments, which has tended to treat these requirements as two sides of the same coin, with a focus on the need to prove exclusionary effect;[37] and

(ii) *unclear as a matter of practice*: paragraph 46 of the Draft Guidelines in particular draws a distinction between the two limbs of the test ("*the assessment of whether the conduct departs from competition on the merits is conceptually different from the assessment of whether the conduct is capable of having exclusionary effects*"), but then somewhat confuses them in the analysis ("*certain factual elements may be relevant to the assessment of both*"). In practice, the introduction of this distinction suggests (*a*) that conduct may depart from competition on the merits but not be abusive; and conversely (*b*) that conduct may cause exclusionary effects without departing from competition on the merits. However, the Draft Guidelines do not give

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36 Draft Guidelines, para. 45.

37 See for example, CJEU, 27 March 2012, *Post Danmark*, C-209/10, para. 24; CJEU, 21 December 2023, *European Superleague Company*, C-333/21, paras 129-131 and 24 October 2024, *Intel*, C-240/22 P, para. 176: "*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*" (emphasis added). The relevance of two distinct and cumulative criteria seems also contradicted by the recent *Google AdSense* judgment: General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 106: "*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*" (emphasis added). See also CJEU, 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, para. 39 and the case-law cited.

any concrete example of either of these scenarios and the APDC would welcome clarification in this respect in the final version of the Guidelines.

3.2. Deviation from competition on the merits

36. The Draft Guidelines regrettably provide limited practical guidance on the concept of "*deviation from competition on the merits*": this concept is dealt with in general terms in section 3.2. of the Draft Guidelines, without clear guidance or concrete examples beyond those mentioned at paragraph 55 of the Draft Guidelines.

37. In the interest of clarity and transparency and facilitating self-assessment by undertakings, the APDC would welcome further practical guidance on this key concept for the establishment of an abuse. In this respect, a list of factors indicating when conduct does amount to competition on the merits would be helpful to enhance legal certainty and help undertakings' self-assessment.

38. Moreover, the APDC is concerned with the apparent suggestion, in the opening paragraph to the section relating to departure from competition on the merits, that *any increment* in a dominant undertaking's market share could amount to a deviation from competition on the merits,[38] which would not be in line with the general principles of Article 102 TFEU or with the case law cited. Indeed:

- an undertaking is not prohibited (i) from gaining a dominant position; or (ii) from strengthening its dominant position, provided that its conduct does not depart from competition on the merits;[39]

- the Draft Guidelines appear to misrepresent the case law in this respect:

    - *first*, the case law cited at footnote 104 of the Draft Guidelines does not deal with the protection of dominant undertakings' legitimate commercial interests *as part of an assessment of competition on the merits*, but rather *as a general principle.*[40] The reference to this principle and related case law under the heading of "competition on the merits" is therefore, at the very least, confusing; and

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38 Draft Guidelines, para. 49: *"Such an undertaking may take reasonable steps as it deems appropriate to protect its commercial interests, provided however that its purpose is not to strengthen its dominant position or to abuse it"* (emphasis added).

39 See, to that effect, Draft Guidelines, para. 17: "*Article 102 TFEU does not prevent an undertaking from acquiring on its own merits, in particular on account of its skills and abilities, a dominant position on a given market. It only prohibits the abuse of such a dominant position*" and CJEU, 3 July 1991, *AKZO*, C-62/86, para. 70: "*It follows that Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality"* (emphasis added).

40 See, for example: CJEU, 2 April 2009, *France Télécom SA*, C-202/07 P, para. 46 : *"In particular, the Court recalled that, although the fact that an undertaking is in a dominant position cannot deprive it of the right to protect its own commercial interests if they are attacked and such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, it is not possible,*

- *further*, the wording in the Draft Guidelines misrepresents the consistent statements of the Courts in this respect, to the effect that "*it is not possible (…) to countenance [the protection of a dominant company's commercial interests] if its actual purpose is to* ***strengthen that dominant position and abuse it***". The erroneous use of the alternative "*or*" in the final sentence of paragraph 49 of the Draft Guidelines therefore results in a more extensive interpretation of this principle than that consistently used in the case law cited.

- In any event, the APDC notes that such an approach also seems at odds with the very notion of "competition on the merits", to the extent that competition through quality or innovation may have the objective and effect of strengthening a dominant undertaking's position.

3.3. Extensive "catch-all" provisions

39. Another concerning feature of the Draft Guidelines is the very broad margin of discretion which the Commission appears to retain to intervene, even when the criteria to establish an abuse are not met.

40. Paragraph 57, in particular, suggests that "*conduct that at first sight does not depart from competition on the merits (…) and therefore does not normally infringe Article 102 TFEU may, in specific circumstances, be found to depart from competition on the merits, based on an analysis of all legal and factual elements*".

41. The APDC is concerned that such a broadly-worded provision, with no limiting principles or concrete examples, gives the Commission a very significant scope to intervene even beyond the criteria set out in its own Guidelines, thereby undermining the Commission's objective of legal certainty. The APDC notes that such a concern was also recently expressed in Mario Draghi's report on the future of European competitiveness.[41] The APDC submits that the Commission should, at the very least, provide concrete examples of the conduct which it considers may depart from competition on the merits in these circumstances.

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however, to countenance such behaviour if its actual purpose is to strengthen that dominant position and abuse it"

41 Mario Draghi, Report on the future of European competitiveness, Part B, footnote 9 p.304: "(…) ***[E]xcessive discretion on the finding of exclusionary abuses is left by the draft Guidelines*** *on the enforcement of article 102 released in August 2024. As an example, tying can be presumed to have exclusionary effects, but the Guidelines do not detail under which conditions; similarly, there is no safe harbor for dominant firms setting prices above average total cost*." (emphasis added)

3.4. Introduction of presumptions

42. Undoubtedly, the most obvious sign in the Draft Guidelines of the Commission's proposed return to a formalistic approach is the introduction of a presumption of abuse in respect of the following practices: (i) exclusive supply or purchasing agreements; (ii) conditional rebates; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying[42] - as well as in respect of certain types of conduct which "*have no economic interest for that undertaking, other than that of restricting competition*" (so-called, "*naked restrictions*").[43]

43. However, as the Commission itself acknowledges[44] and as we outline in more detail below in relation to each practice at issue, with the exception of pricing below AVC in predatory pricing cases[45], the notion of "presumption of abuse" is not established in the case law and further, in the APDC's view, sits at odds with certain fundamental principles of Article 102 TFEU, in particular:

- the general principles of Article 102 TFEU, according to which *not all exclusionary effect is anticompetitive*;[46]

- the burden and standard of proof which, as the Courts have consistently emphasised, rests with the Commission and national competition authorities, who must assess a conduct's capacity to produce exclusionary effects *in light of all the relevant circumstances*;[47] and

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42 Draft Guidelines, para. 60(b).

43 Draft Guidelines, para. 60(c).

44 Draft Guidelines, footnote 131.

45 General Court, 18 September 2024, *Qualcomm*, T-671/19, para. 521 and CJEU, 3 July 1991, *AKZO*, C-62/86, para. 71.

46 See, to that effect, CJEU, 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, paras. 72-73: "*Given that the abusive nature of a practice does not depend on the form it takes or took but presupposes that that practice is or was capable of restricting competition and, more specifically, of producing, on implementation, the alleged exclusionary effects, that condition must be assessed having regard to all the relevant facts (...). That said (…), it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits – on account of its skills and abilities in particular – a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. Indeed, not every exclusionary effect is necessarily detrimental to competition since competition on the merits may, by definition, lead to the departure from the market or the 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*". (emphasis added). See also CJEU, 24 October 2024, *Intel*, C-240/22 P, para. 175: "*not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, output, choice, quality or innovation*".

47 See, most recently: CJEU, 24 October 2024, *Intel*, C-240/22 P, para. 179; General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 107.

- the presumption of innocence and the principle according to which doubt must, in any event, benefit the undertaking.[48]

44. Thus, while the introduction of such presumptions in the Draft Guidelines is at least questionable as a matter of law, the APDC submits that in this context, the final Guidelines should, at a minimum, clarify in practice:

- *<u>when</u> a presumption can be triggered*: as the Courts noted recently in *Intel*[49] and *Google AdSense*[50] for example with respect to loyalty rebates and exclusivity clauses, such conducts do not necessarily lead to exclusionary effects and there is a need to take into account the overall context, including, for example, their duration and market coverage; and

- *where applicable, <u>how</u> any such* presumption *may be rebutted*. In the APDC's view, it is indeed the most concerning aspect of the presumptions in the Draft Guidelines that they:

    - lack clarity on the means for the dominant undertaking to rebut any such presumption – with only a vague reference to the need for the undertaking to show that "*the circumstances of the case are substantially different from the background assumptions upon which the presumption is based*"[51] – without any explanation, however, of what these assumptions are;

    - in any event, give the Commission a very wide margin of discretion so as to appear to be, in practice, nearly irrebuttable. In this context, the APDC finds the final sections of paragraph 60(b), which refer, in the abstract, to the need to give "*due weight to the probative value of a presumption*" particularly concerning;[52] and

    - ultimately, introduce an unjustified procedural limitation by stating that "*the submissions put forward by the dominant undertaking during the administrative procedure determine the scope of the Commission's examination obligation*".[53] While this statement is not supported by any appropriate references to the case law in the Draft Guidelines, the APDC submits, in any event, that such a restrictive approach to the burden of proof and the assessment of evidence undermines the general principles of sound administration and of the Commission's duty to establish the alleged abuse *in light of all relevant circumstances*.

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48 CJEU, 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, para. 42.

49 CJEU, 24 October 2024, *Intel*, C-240/22 P.

50 General Court, 18 September 2024, *Google AdSense*, T-334/19.

51 Draft Guidelines, para. 60(b).

52 The same approach is also found at para. 170, in respect of objective justification: "*While it remains open to the dominant undertaking to justify any conduct that is liable to be abusive, whether the conduct has a high potential to produce exclusionary effects or whether it is a naked restriction must be given due weight in the balancing exercise to be carried out in this context.*"

53 Draft Guidelines, para. 60(b).

45. With respect to the introduction of **naked restrictions** at paragraph 60(c) of the Draft Guidelines, which refers vaguely to conduct "*having no economic interest [for the dominant undertaking] other than restricting competition*" and to a non-exhaustive list of examples, given the severe implications for businesses of a given practice qualifying as a (quasi-irrebuttable) presumption of abuse, the APDC would welcome, at least, a more precise generic definition of practices likely to fall within this category.

3.5. Substantive legal standard for determining the capacity to produce exclusionary effects

46. As the Draft Guidelines correctly set out as part of the legal test, a conduct's capacity to produce exclusionary anticompetitive effects is a fundamental constituent element of any abuse. In this context, the APDC considers that the following points in the Draft Guidelines, relating to the analysis of effects, ought to be clarified and emphasised.

47. **The requirement for a causal link between the abuse and its alleged effects.** The Draft Guidelines appear to take a minimalist approach to causation, simply stating in this respect that "*it is sufficient to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market*".[54] However, as the Court of Justice recently re-emphasised in its *Google Shopping* ruling, "*the causal link is one of the essential constituent elements of an infringement of competition law*".[55] With this in mind, the APDC submits that it would be appropriate for the final version of the Guidelines to state more clearly the need to establish a causal link between the abuse and its alleged effects, which it is for the Commission to prove.

48. **Reaction of third parties**: The Draft Guidelines state that, "*where it is established that a conduct is objectively capable of restricting competition, this cannot be called into question by the actual reaction of third parties*".[56] The APDC is concerned that, if taken out of the context of the General Court's *AstraZeneca* judgment on which it is based (which dealt with conduct that was "*objectively of such a nature as to restrict competition*",[57] (*i.e.* akin to a "naked" restriction, in the wording of the Draft Guidelines) this statement may be misinterpreted as suggesting that third parties' ability to react is irrelevant to the assessment of effects. The final version of the Guidelines should make it clear conversely that, bar these exceptional circumstances where it can be proven that it could be expected when the practice was put into effect that third parties have the ability to react, such practice cannot be considered capable of producing exclusionary effects. The APDC therefore considers that this sentence should be removed from the final Guidelines, or at least moved to paragraph 64 and clarified to be understood without ambiguity as only referring to the *ex post* concrete assessment of third parties' actual reactions, not to the reactions which could be expected at the time of implementation of the conduct.

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54 Draft Guidelines, para. 65 (emphasis added).

55 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 224 (emphasis added)

56 Draft Guidelines, para. 62.

57 General Court, 1 July 2010, *AstraZeneca*, T-321/05, para. 360.

49. **The circumstances in which the Commission may depart from the AEC test.** Paragraph 73 of the Draft Guidelines appears to give the Commission a sweeping discretion to depart from the AEC test: "*The assessment of whether a conduct is capable of having exclusionary effects also does not require showing that the actual or potential competitors that are affected by the conduct are as efficient as the dominant undertaking*".[58]

50. However, the APDC submits that such an unqualified statement:

(i) is inconsistent with other references to the AEC test elsewhere in the Draft Guidelines, in particular:

- paragraph 51: "*Article 102 TFEU does not preclude the departure from the market or the marginalization, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking*", which suggests that the AEC test is relevant to both the definition of competition on the merits and the assessment of anticompetitive effects; and

- paragraph 55(f) which explicitly lists the AEC test as one of the relevant factors to determine whether conduct departs from competition on the merits,

(ii) goes beyond the case law of the EU Courts in allowing the Commission to depart from the AEC test, including, in particular, the Courts' most recent judgments of September and October 2024 in *Google Shopping*, *Google AdSense* and *Intel*:

- in *Intel*, the Court of Justice firmly asserted the importance of the AEC test in the case of loyalty rebates: "*The capability of such rebates to foreclose a competitor as efficient as the dominant undertaking, which competitor is supposed to meet the same costs as those borne by that undertaking, must be assessed, **as a general rule**, using the AEC test*" [59]**;**

- in *Google Shopping*, the Court of Justice limits the Commission's discretion in this respect, emphasising the fact that any such departure will be subject to review by the Courts : "*since the Commission is required to demonstrate the infringement of Article 102 TFEU, it must establish the existence of an abuse of a dominant position in the light of various criteria, by applying, inter alia, the as-efficient competitor test, **where that test is relevant**, its assessment of the relevance of such a test being, where appropriate, subject to review by the EU judicature*";[60] and

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58 Draft Guidelines, para. 73.

59 CJEU, 24 October 2024, *Intel*, C-240/22 P, para. 181.

60 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 266.

- similarly, in *Google AdSense*, and while acknowledging the ability for the Commission to depart from the AEC test, the Court of Justice nonetheless notes that:

    - such departure is more likely to be justified in the case of "*certain non-pricing practices*"; [61] and

    - even then, the Court limits the possibility for the Commission to depart from this test, noting in particular that (i) "*even in the case of non-pricing practices, the relevance of such a test cannot be ruled out*";[62] and further (ii) "*where an undertaking in a dominant position suspected of abuse provides the Commission with an analysis based on the as-efficient competitor test, that institution cannot disregard that evidence without even examining its probative value.*"[63]

51. **Actual vs potential effects.** Finally, the APDC would welcome clarifications in the final version of the Guidelines, in particular, of:

- **potential vs hypothetical effects**[64], in particular, when an effect may be deemed purely hypothetical; and

- the extent to which the existence of **actual anticompetitive effects (or on the contrary, lack thereof)**, may be relevant to the assessment of potential effects.[65] In particular, it would be helpful for the Guidelines to provide some concrete examples in this respect.

61 General Court, 18 September 2024, *Google AdSense*, T-334/19, §105-112, 381-385, 651.

62 Id., para. 662.

63 Id., para. 663 (emphasis added).

64 Draft Guidelines, para. 61.

65 Draft Guidelines, paras. 63-64.

IV. SPECIFIC CATEGORIES OF ABUSE

52. In accordance with the structure of the Draft Guidelines, the APDC has provided feedback on conducts subject to specific legal tests (**4.1.**) and conducts with no specific legal test (**4.2.**).

4.1. Conducts subject to specific legal tests

4.1.1 Exclusive dealing

53. **The combination of exclusive purchasing arrangements and conditional rebates in the Draft Guidelines is confusing**: The existing Article 102 enforcement guidance currently distinguishes between the two categories in question (exclusive purchasing arrangements and conditional rebates) and specifies the applicable tests to establish an abuse and the most likely factors prompting an intervention from the Commission. However, the Draft Guidelines now confusingly combine both types of conduct and apply the same considerations to both, despite one concerning a legal or *de facto* exclusivity obligation (i.e., exclusive purchasing) and the other concerning an option to purchase according to specific conditions (i.e., conditional rebates). [66]

54. **Application of presumption**: The Commission refers to the Court of Justice's ruling in *Unilever Italia* to justify the use of presumptions when assessing exclusive dealing arrangements. However, this judgment explicitly provides that "*although, by reason of their nature, exclusivity clauses give rise to legitimate concerns of competition, their ability to exclude competitors is not automatic, as, moreover, is illustrated by the Communication from the Commission entitled 'Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings* (OJ 2009 C 45, p. 7, paragraph 36)."[67]

55. **Application of the AEC test**: In relation to conditional rebates, the Commission's existing guidance on enforcement priorities sets out a framework for considering evidence submitted by the dominant undertaking to demonstrate that its rebate system does not hinder the entry or expansion of equally efficient competitors (i.e., the application of an "*as efficient competitor*" test[68]). However, the Draft Guidelines make no specific reference to dominant undertakings being able to put forward such evidence in relation to conditional rebates and do not establish a clear framework for evaluating the probative value of such evidence. At paragraph 83, the Draft Guidelines consider that "*If the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the Commission will assess such evidence*" and lists a number of factors it will typically consider in its analysis, without however mentioning the price/cost AEC test as a relevant element. This contradicts the historically significant relevance of such evidence in cases involving conditional rebates, as well as the Court of

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66 Draft Guidelines, para.78-80.

67 CJEU, 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, para. 51. See also, more recently: General Court,, 18 September 2024, *Google AdSense*, T-334/19, para. 384.

68 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, para. 41.

Justice's October 2024 final ruling in *Intel*, which firmly establishes that the Commission is required to thoroughly assess the merits of such evidence put forward by the dominant undertaking[69].

4.1.2 Tying/Bundling

56. The Draft Guidelines distinguish between behaviours for which the Commission is required to demonstrate a capacity to produce exclusionary effects and behaviours that, once factually established, could be presumed to lead to exclusionary effects, thereby shifting the burden of proof to the dominant undertaking. Tying is classified within the second category[70] set out by the Commission in the Draft Guidelines. However, the presumption applies only to "*certain forms of tying*",[71] and not all forms of such behaviour, and the Commission indicates that "*a presumption can exist depending on the specific characteristics of the markets and products at hand*".[72] The Commission then reiterates that "*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*" and that, in certain circumstances, exclusionary effects can be presumed.[73]

57. Firstly, the APDC notes that the presumption that certain forms of tying can produce exclusionary effects (which the dominant undertaking can then rebut) is not settled case law, nor is it the result of well-established experience. It is also controversial in economic science.

58. Secondly, and in any event, it is key for economic operators' legal certainty that the Commission clarifies the circumstances in which a tying/bundling practice could be presumed to be capable of restricting competition. Indeed, for tying/bundling behaviour, which is not covered by a presumption, the burden of proof remains with the Commission, as with other forms of conduct not covered by these presumptions.

59. In the APDC's view, the Commission does not provide clear guidance as to which "*specific characteristics*" would justify the application of a presumption, and those cases in which a presumption may not be applied. In that regard, in the Draft Guidelines,[74] the Commission refers to a list of factors that "*may be relevant*" for the assessment of exclusionary effects, "*in addition to the elements mentioned in section 3.3*". The role that will be played by these other elements is not clear. The APDC invites the Commission to clarify whether the presumption of exclusionary effects will only apply in cases where (one or more of) the elements listed in the Draft Guidelines[75] are shown.

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69 CJEU, 24 October 2024, *Intel*, C-240/22 P, paras. 180-181.

70 Draft Guidelines, para. 60 b.

71 Draft Guidelines, para. 60 b.

72 Draft Guidelines, ft. 136.

73 Draft Guidelines, para. 95.

74 Draft Guidelines, para. 94.

75 Draft Guidelines, para. 94.

60. The few "*notably*" included references in the Draft Guidelines[76] are not sufficient in providing clarity and predictability, and it is noted that the Commission solely refers to the requirement of a causal link between the conduct and the exclusionary effects.

61. Accordingly, the application of a presumption to certain forms of tying/bundling seems even more inadequate than for other types of conduct. In any event, the precise elements that the dominant undertaking can validly use to rebut such a presumption should be also clearly identified. Therefore, should the Commission keep a presumption with respect to such practices in the final version of the Guidelines, the APDC suggests that the latter should more precisely and tangibly identify: (i) the forms of tying/bundling for which exclusionary effects could be presumed from the Commission's standpoint, making it clearer that it is only in exceptional circumstances that such conduct could be presumed to be capable of having exclusionary anticompetitive effects (it being noted that, in the APDC's view, the EU Courts have not explicitly recognised such presumptions as regards certain forms of tying/bundling); and (ii) the elements that the dominant undertaking can put forward to rebut such a presumption.

4.1.3 Refusal to supply

62. The APDC seeks clarification on the reason for the Draft Guidelines requiring that the input be necessary for the requesting firm to "*remain viably on the market*".[77] The existing Article 102 enforcement guidance rightly provides a more reasonable standard by clarifying that when examining whether a refusal to supply deserves its attention, the Commission will consider whether the supply of the refused input is "*objectively necessary for operators to be able to compete effectively on the market*". The Commission further clarifies that "*this does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter - at least in the long-term - the negative consequences of the refusal.*"[78]

4.1.4 Predatory pricing

63. The Draft Guidelines' specific section on predatory pricing contains useful explanations about the cost benchmarks and the data to be considered by dominant undertakings. However, as clarity and predictability are key for economic operators, the APDC considers that some aspects could be clarified or further developed.

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76 Draft Guidelines, ft. 233.

77 Draft Guidelines, para. 101(iii).

78 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, para. 81.

64. As regards, firstly, the relevant cost benchmarks, the Draft Guidelines mention that the notions of average avoidable costs ("AAC") and long-run average incremental costs ("LRAIC") may, "*depending on the circumstances*"[79], better capture the dominant undertaking's costs than average variable costs ("AVC") and average total costs ("ATC"), which have been recognised as the relevant cost benchmarks in the case-law on predatory pricing. The Commission refers to the Court of Justice's judgment of 27 March 2012 in *Post Danmark*, which was handed down upon a preliminary reference by a Danish court.

65. The APDC notes that the use of benchmarks other than those previously defined by the Court of Justice was justified by the specific circumstances in the *Post Danmark* case. Indeed, it allowed the Danish competition authority to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail and, in particular, to distinguish the costs inherent to that activity to those costs that were incurred by Post Danmark's universal services obligations. In many cases, the use of AAC is likely to penalise the dominant undertaking, to the extent that AAC may include additional (fixed) costs compared to AVC, as noted by the Commission.[80]

66. The Draft Guidelines also refer to the Commission's decision in *Qualcomm*. The APDC notes that the General Court handed down its judgment in this case on 18 September 2024. Even though the General Court considered LRAIC to be a relevant cost benchmark, in that case, it reminded that it was justified by the specificities of the semiconductor industry, which is "*characterized by low variable costs (for example, the costs of manufacturing chipsets) and high fixed costs (for example, the costs of R&D investment necessary to design and develop chipsets)*".[81]

67. In the APDC's view, the Guidelines should make it clear (both in the introduction on predatory pricing and for the purposes of the test in paragraphs 114-120) that the cost benchmarks defined by the case-law (AVC and ATC) normally remain the relevant benchmarks, and that it is only in specific circumstances (such as the necessity to identify the costs incurred by a dominant undertaking which exercises both universal service activities and activities on a market) that AAC and LRAIC could be relevant substitutes. The APDC thus encourages the Commission to provide more details about such "specific circumstances" that could justify the application of other cost benchmarks, in order to preserve economic operators' legal certainty.

68. Secondly, the Draft Guidelines refer to a presumption of exclusionary effects, which applies once predatory pricing is factually established ("*Predatory pricing has a high potential to produce exclusionary effects and is therefore presumed to do so*"[82]). The APDC notes that the cases referred to in footnote 267 of the Draft Guidelines did not concern cases of predatory pricing, but exclusive dealings and exclusivity rebates.

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79 Draft Guidelines, para. 110.

80 Draft Guidelines, para. 115.

81 General Court, 18 September 2024, *Qualcomm*, T-671/19, para. 439.

82 Draft Guidelines, para. 112.

69. Therefore, the APDC invites the Commission to refer to the relevant case-law on predatory pricing and suggests that the Commission clarify that the so-called presumption of exclusionary effects applies only in the case referred to in paragraph 111(a) of the Draft Guidelines, i.e. when prices are below AVC (or AAC, as the case may be). However, in the case referred to in paragraph 111(b) of the Draft Guidelines, i.e. when prices are above AVC (or AAC) but below ATC (or LRAIC), such prices "*must be regarded as abusive if they are determined as part of a plan for eliminating a competitor*",[83] as the General Court reminded in its recent judgment in *Qualcomm*. In other words, in such a case, prices as such are not enough to create any presumption of exclusionary effects.

70. Finally, in the APDC's view, in paragraph 118 of the Draft Guidelines, the Commission should explain what is meant by "*opportunity costs*" and what circumstances would justify that costs incurred on both sides of a two-sided market could be taken into consideration for assessing a potential predatory pricing. The Commission does not provide concrete examples and, to the best of the APDC's knowledge, there are indeed no such precedents approving this approach in the case-law.

4.1.5 Margin squeeze

71. The APDC would welcome the Commission's clarification on the following points:

- the indispensable nature of the input produced on the upstream market shall be analysed to assess the foreclosure effects of the margin squeeze practice;[84]
- distinction between the consequences of a negative margin and a positive margin on the exclusionary effects of the margin squeeze practice;[85]
- the methodology relating to the possibility of using a non-integrated competitor downstream as a benchmark using the AEC test;[86] and
- whether the AEC test shall be carried out on an offer-by-offer basis, on a product range basis, or on a relevant market basis.[87]

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83 General Court, 18 September 2024, *Qualcomm*, T-671/19, para. 433.

84 Draft Guidelines, para. 127.

85 Draft Guidelines, para. 128-129.

86 Draft Guidelines, para. 133.

87 Draft Guidelines, para. 135-136.

72. **Application of a presumption**. According to the Commission, when the price-cost test indicates a negative difference, foreclosure effects would be presumed, and the dominant undertaking then would bear the burden of proving the contrary.[88] However, the decision-making practice cited in support of this argument merely states that in such a case the effects are "*probable*". The APDC considers that by applying such a presumption, the Commission wrongly construes the exact meaning of the Court's case law.

73. Separately, according to the Commission, the test should be applied "*in general*" at a level of aggregation corresponding to the relevant product market, in line with the case law of the Court of Justice.[89] However, the Commission retains the option, "*in certain circumstances*", of applying the test at a more detailed level, for example, at the level of each individual offer.[90] As far as it would mainly concern new offers in a forward-looking approach, without more guidance from the Commission, such a statement seems to be hardly compatible with legal certainty and the self-assessment obligation on dominant undertakings. The APDC considers that the Commission should provide a more precise definition of those "*certain circumstances*" in which such a disaggregated approach would be appropriate (for example, market contestability).

4.2. Conducts with no specific legal test

74. As a first general comment, the APDC is concerned that, for some of the practices detailed in section 4.3 of the Draft Guidelines, the Commission tends to extract general principles from specific situations. This appears to be the case, in particular, for certain self-preferencing practices and certain forms of access restrictions, which primarily concern certain sectors of the economy only and/or have generated very little case law to date.

75. Besides, objective justifications are dealt with in a separate section and generally across all the practices examined in the Draft. However, it would seem appropriate to dedicate specific developments to the objective justifications that may be put forward in the context of the practices referred to in section 4.3, since these objective justifications may potentially differ from those relevant to practices "subject to a specific legal test", for instance with regard to access restrictions.

88 Draft Guidelines, para. 128.

89 Draft Guidelines, para. 136.

90 See example under Draft Guidelines, footnote 306; see also Commission, 4 July 2007, *Wanadoo España vs. Telefónica*, Case COMP/38.784, under footnote 386.

4.2.1 Conditional rebates not subject to exclusive purchase or exclusive supply requirements

i. Unclear application of a price-cost test vs a broader "context-sensitive" analysis (paragraphs 143-145 of the Draft Guidelines)

76. On the one hand, the Commission recommends using a price-cost test for conditional rebates (paragraph 143) and even considers it necessary for the assessment of standardised volume-based incremental rebates (paragraph 144(a)). Paragraph 144(b) tends to consider a price-cost test less appropriate **only in two very specific cases** (when the inducements are not monetary or cannot easily be convertible and when the emergence of an as-efficient competitor would be practically impossible), where it proposes applying the "general principles" from Section 3.2 instead.

77. On the other hand, in paragraph 145, which seems to deal with **any** system of conditional rebates, the Commission chooses a **broader context-sensitive analysis** – considering the overall context, including market structure, the position of the dominant company, the conditions attached to the rebates and the potential exclusionary effects on competitors. Without clear guidance on how to weigh the numerous factors listed in paragraph 145, the assessment of conditional rebates may become more subjective. Dominant companies may find harder to predict whether their rebate schemes will be considered abusive, given the broader set of criteria and market-specific analyses.

78. The interaction between these two paragraphs is unclear and could lead to confusion, as the price-cost test's applicability becomes uncertain. According to paragraph 145, the AEC test seems insufficient to prove exclusionary effects. In particular, paragraph 145(f) emphasises that while the AEC test may be useful in determining whether a competitor could match the rebates without being foreclosed, it is not determinative. The Commission shifts the focus to actual market conditions and competitors, implying that less efficient competitors may still constrain the dominant company. This position downplays AEC test's significance, creating inconsistency with the case-law which stresses the important role of the AEC test in pricing cases.[91]

79. This two-step approach for conditional rebates in paragraphs 143 to 145 would lead to increased complexity and create legal uncertainty for dominant firm wishing to implement rebates that are not subject to exclusive purchasing or supply requirements.

80. As the Commission points out in paragraph 141, conditional rebates are a common business practice, therefore the APDC invites the Commission to clarify its approach.

ii. Absence of safe harbour for above-cost rebate schemes.

81. The AEC test promotes a high level of predictability for companies implementing rebates schemes, which is extremely valuable to them.

[91] CJEU, 27 March 2012, *Post Danmark I*, C-209/10, paras. 29 and 38; 6 September 2017, *Intel*, C-413/14 P, paras. 137-140.

82. Paragraph 27 of the 2008 enforcement priorities states that "*If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, **in principle**, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene*".

83. This predictability is no longer a primary concern for the Commission in its Draft Guidelines. Footnote 325 rejects a clear safe harbour for above-cost rebate schemes. While the Draft Guidelines may reflect a more flexible approach to market dynamics, the rejection of a safe harbour for above-cost pricing and the sidelining of the AEC test is inconsistent with EU case law.[92]

84. In *Google AdSense*, the ability for the Commission to depart from the AEC test is regarded as more likely to be justified in the case of "*certain non-pricing practices*"[93]. Denying this safe harbour to dominant companies would leave them in great uncertainty in determining their rebate schemes.

85. In addition, contrary to what the Draft Guidelines indicate (paragraph 144(b)), even if market entry or expansion for an AEC is "practically impossible" due to the dominant firm's large market share or significant barriers, a price-cost test may still be appropriate to determine how close the rebated price is to cost. If the prices are significantly above costs, the exclusionary effect is unlikely.[94] The Commission cannot disregard an analysis based on the as-efficient competitor test.[95] **The APDC therefore is concerned that the Commission's objective is to lower the standard of proof for the finding of an abuse in cases where the AEC test does not conclude to any exclusionary effect**.

4.2.2 Multi-product rebates

86. The APDC is concerned about the lack of clarity and legal certainty resulting from the passage dedicated to multi-product rebates within the Draft Guidelines.

87. In particular, paragraph 155 of the Draft Guidelines appears, by means of a 'sweeping' formula, to expose any company in a dominant position which practices multi-product rebates to sanction, since the two conditions likely to make it possible to identify an abuse are extremely general, namely that the company has adopted a conduct (i) which departs from competition on the merits and (ii) is likely to produce exclusionary effects. Paragraph 155 is also illustrated by a very general example and states that the guidelines set out in the section on conditional rebates "may" be applied by analogy, so that undertakings are left without any clear guidance here.

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92 CJEU, 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, paras. 81 et 82; 6 September 2017, *Intel*, C-413/14 P, para. 138; General Court, 14 September 2022, *Google Android*, T-604/18, paras. 643 et 645.

93 CJEU, 19 January 2023, *Unilever Italia mkt operations*, C-680/20, para. 57; General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 661.

94 CJEU, 6 September 2017, *Intel*, C-413/14 P, para. 142; General Court, 14 September 2022, *Google Android*, T-604/18, para. 642.

95 CJEU, 6 October 2015, *Post Danmark*, C-23/14, para. 57; General Court, 18 September 2024, *Google AdSense*, T-334/19, para. 663.

88. For the rest, the APDC relies on the comments made on the sections on conditional rebates and exclusivity where they are considered by the Commission to be applicable "by analogy".

4.2.3 Self-preferencing

89. The APDC acknowledges the Commission's willingness to provide guidance on how so-called "self-preferencing" practices may be apprehended. Clarity and predictability are key for economic operators, and there were only a few cases concerning such practices so far.

90. The APDC considers that some of the aspects of the Draft Guidelines' specific section on "self-preferencing" conduct could be clarified or further developed.

91. The APDC also notes that self-preferencing practices are mostly seen (or at least apprehended) in the digital sector and that the Digital Markets Act (DMA) already allows the Commission to tackle self-preferencing practices that are implemented by the most important players. It would be welcome if the Commission recognised this situation, as well as the fact that the application of Article 102 TFEU to self-preferencing in the digital sector should therefore be residual.

i. Types of conduct which may be apprehended as "self-preferencing"

92. The Commission mentions that self-preferencing practices are implemented "*mainly by means of non-pricing behaviour*"[96]. This wording suggests that from the Commission's standpoint, self-preferencing practices could also be implemented through pricing behaviour. However, the Commission does not refer to any concrete example of pricing practices that could potentially form part of an abusive self-preferencing conduct.

93. To the best of the APDC's knowledge, there are currently no precedents in which a pricing behaviour would have been regarded as an abuse of dominance, whether it be as a standalone abuse or as part of a single and complex infringement. The APDC notes that the only case concerning a pricing behaviour which is quoted in the specific section on self-preferencing is the *TeliaSonera* judgment of 17 February 2011, which concerned a margin squeeze practice, i.e. a practice which is precisely subject to a specific legal test.[97] This seems at odds with the Commission's approach, which is to consider that self-preferencing is a conduct with no specific legal test.

94. The APDC considers that this should be further clarified in the final version of the Guidelines. In particular, the Guidelines already apprehend pricing practices such as predatory pricing or margin squeeze, which are subject to a specific legal test and are accordingly treated in section 4.2. of the Guidelines. Therefore, economic operators assess their pricing behaviour in the light of those specific legal tests provided for by the case-law.

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96 Draft Guidelines, para. 156.

97 Draft Guidelines, ft. 336.

95. Should it be anticipated that a particular pricing behaviour might be apprehended as a self-preferencing abuse, and thus not be subject to a specific legal test, it is key for economic operators that the Commission clarify in what circumstances a pricing behaviour could be regarded as self-preferencing, and what type of pricing conduct could be concerned, for example, selective pricing or excessive pricing. Presumably, and in any event, such pricing behaviour should be different in nature than the types of pricing behaviour which are already subject to a specific legal test (such as predatory pricing and margin squeeze).

96. As regards non-pricing behaviours, the Draft Guidelines refer to several examples in paragraph 159. Whilst it acknowledges that the list may not be exhaustive, the APDC invites the Commission to provide the most detailed possible list to provide for sufficient predictability for undertakings.

97. The Commission also refers to "*a combination or succession of different practices over time*" which could altogether form a single abusive self-preferencing practice. The APDC notes that in the *Google Shopping* case to which the Commission refers, Google's conduct consisted in the combination of two practices, that is "*the promotion of specialised results from Google's comparison shopping service and the simultaneous demotion of results from competing comparison services by adjustment algorithms*"[98]. These two practices were in fact the same form of conduct and appear to have been nothing but two steps within one and the same practice.[99]

98. In the APDC's view, the final version of the Guidelines should clarify whether different categories of conduct could, in the Commission's view, form part of a single self-preferencing abuse. For instance, as the Commission seems to contemplate the possibility of apprehending pricing behaviours as self-preferencing (see above), the APDC wonders whether a non-pricing behaviour and a pricing behaviour could, together, form a single self-preferencing abuse, whilst they are different in nature and whilst pricing behaviours are usually subject to a specific legal test.

ii. Circumstances in which a "self-preferencing" behaviour may be found to infringe Article 102 TFEU

99. The Guidelines' specific section on "self-preferencing" conduct contains many references to the General Court's judgment in *Google Shopping*. The APDC notes that the Court of Justice's Grand Chamber handed down its judgment on appeal in this case on 10 September 2024. The APDC submits that this judgment should be reflected in the Guidelines (as should be, more generally, any judgment issued by EU Courts since the publication of the Draft Guidelines on 1st August 2024).

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98 General Court, 10 November 2021, *Google Shopping*, T-612/17, para. 187. See also para. 329: "*Consequently, recitals 26 to 35 of the contested decision must be considered to provide sufficient grounds for concluding that Google's comparison shopping service has taken several forms, that is to say, a specialised page, most recently called Google Shopping, grouped product results, which evolved into the Product Universal, and product ads, which evolved into the Shopping Unit*."

99 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 24: "*Similarly, the Commission stated that it did not object, as such, to the promotion of specialised comparison shopping results that Google considered to be relevant, but to the fact that the same promotion effort was not made in respect of both Google's own comparison shopping service and competing comparison shopping services*."

100. In particular, the Court of Justice held that, as for any exclusionary conduct, the assessment of self-preferencing practices under Article 102 TFEU must consider all relevant circumstances to establish that the conduct both departs from competition on the merits and is capable of producing exclusionary effects.[100]

101. The Court of Justice held that preferential treatment is not prohibited *per se*:

> "*It is important to add that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case*."[101]

102. The APDC invites the Commission to reflect these findings in the Guidelines and to more generally indicate that the effects of self-preferencing can sometimes be pro-competitive: self-preferencing practices can improve the quality of services offered, strengthen inter-platform competition and benefit consumers through a greater variety of products and lower prices.

103. The Court of Justice also provided a reminder that Google's self-preferencing conduct was found to infringe Article 102 TFEU because of three specific circumstances, i.e. "*(i) the importance of traffic generated by Google's general search engine for comparison shopping services, (ii) the behaviour of users when searching online and (iii) the fact that diverted traffic from Google's general results pages accounted for a large proportion of traffic to competing comparison shopping services and could not be effectively replaced by other sources*".[102]

104. Therefore, the APDC suggests that the Guidelines should clarify that it is only in exceptional circumstances that preferential treatment, or a so-called "self-preferencing" could be regarded as an abuse of dominance.

105. In that regard, the APDC notes that the Court of Justice's judgment of 10 September 2024 concluded that Google's discriminatory conduct did not involve a duty to deal with third parties and was thus not subject to the indispensability requirement set out in the *Bronner* judgment.[103] The Commission indicates in footnote 336 of the Draft Guidelines that "*the importance of the product provided by the dominant undertaking in the leveraging market for competitors should not be understood as indispensability as required under refusal to supply abuses, given that self-preferencing constitutes a different type of abuse; accordingly, the criteria established in the judgment of 26 November 1998, Bronner, Case 7/97, EU:C:1998:569 need not be met*" (emphasis added).

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100 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, paras. 165-166.

101 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 186.

102 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 141.

103 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 186.

106. The APDC submits that even though this indispensability requirement is not applicable to self-preferencing (in the absence of a refusal to deal), the application of the general test for exclusionary abuses (including taking into consideration all circumstances, as set out in *Intel*) necessarily implies that the importance of the dominant position on the leveraging market is an important factor to be considered in the assessment of the conduct. As regards self-preferencing practices, this means that the dominant firm's conduct should not be found to constitute an abuse in cases where the leveraging market is not a very important source of business for competitors, or where competitors on the leveraged market can easily find alternative sources of business.

107. Therefore, the APDC encourages the Commission to clarify that paragraph 161(i) of the Draft Guidelines is not merely an indicative circumstance, among others, but is in fact decisive in most cases. Footnote 336 of the Draft Guidelines should also be amended accordingly.

108. The APDC agrees with the Commission that the influence on the behavior of users, which is mentioned in paragraph 161(ii) of the Draft Guidelines, should not be enough to find a self-preferencing abuse.

109. Finally, the APDC submits that paragraph 161(iii) of the Draft Guidelines should be clarified. In particular, the APDC invites the Commission to define more precisely what is meant by the "*underlying business rationale*" of the dominant undertaking. The General Court's judgment in *Google Shopping*, which is quoted in footnote 338 of the Draft Guidelines, referred to the "*intended purpose*"[104] of Google's general search engine, rather than to "*its interests or those of its customers in that market*"[105].

4.2.4 Access restrictions

110. Imposing a requirement to grant access should remain exceptional and be interpreted restrictively. As the Commission[106] and the Court of Justice[107] recognised, imposing on a dominant undertaking to grant access or to modify the conditions for access to an "open infrastructure"[108] restricts that undertaking's freedom to contract (even if it does so less than in cases concerning a refusal of supply to a "closed infrastructure"). Freedom to contract (or to not contract) is a fundamental principle under EU law. From that point of view, any qualification of a restriction of access as an abuse should be limited to clearly identified and foreseeable circumstances. By contrast, in the Draft Guidelines, the Commission (i) does not positively define what this category of access restriction covers; (ii) does not provide guidance on

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104 General Court, 10 November 2021, *Google Shopping*, T-612/17, para. 184: "*Thus, the practices at issue enabled Google to highlight its own comparison shopping service on its general search results pages while leaving competing comparison shopping services virtually invisible on those pages, which, in principle, is not consistent with the intended purpose of a general search service*."

105 Draft Guidelines, para. 161 (iii).

106 See, in particular, para. 165 of the Draft Guidelines.

107 CJEU, 10 September 2024, *Google Shopping*, C-48/22 P, para. 112.

108 An open infrastructure refers to a company that provides access to its infrastructure, while a closed infrastructure refers to a company that has reserved the infrastructure for the needs of its own business (as defined at para. 11 and 12 of CJEU, 10 September 2024, *Google Shopping*, C-48/22 P).

how to apply the general principles of Article 102 TFEU to restrictions of access; and (iii) provides a list of examples that appear to depart from existing case law.

111. ***First,* the Draft Guidelines should positively define the notion of restriction of access,** however, the APDC considers that it is not clear to which category of abuse of dominance the notion of access restrictions corresponds:

- The Commission defines this category by opposition to the category of "*refusal of supply*" as defined in *Bronner*, but nowhere does it provide a positive definition of what the category of restriction of access could cover, and what the rationale for having a separate category of abuses in the Draft Guidelines is;[109]

- The Commission refers to various precedents: *Commercial Solvents* (refusal to supply, in that case to give preference to the dominant undertaking's downstream activity), *IBM* (imposition of unreasonable supply conditions – commitment decision which has no real value as a precedent), *Google Shopping* (self-preferencing), *Slovak Telekom* (margin squeeze). These precedents relate to different categories of abusive practices. As they have little in common, they do not seem to constitute a new and distinct category.

112. At times, it is not entirely clear whether the notion of access restrictions relates to exclusionary or exploitative abuses:

- the Draft Guidelines refer to "*unfair access conditions*".[110] This seems to refer to Article 102(a) TFEU, i.e. a legal basis often described as referring to exploitative rather than to exclusionary conducts; and

- the APDC notes that for instance, the French Competition Authority has developed a line of cases relating to unfair conditions to access key digital infrastructures pursuant to Article 102(a) TFEU in exploitative circumstances (for example *Google Ads*, 19-D-26[111] and *Meta / Adloox*, 23-MC-01[112]).

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109 See, in particular, para. 163 and 165 of the Draft Guidelines.

110 See, in particular, para. 166(c) of the Draft Guidelines.

111 According to the French Competition Authority, Google Ads is governed by operating rules unilaterally established and imposed by Google that were unfair to publishers because (i) they were opaque, (ii) they were difficult to understand, and (iii) Google applied them in an unfair and arbitrary manner. Such rules distorted competition: there were no credible alternatives. Publishers who lost access to Google Ads were disadvantaged as compared to publishers who did not lose access.

112 According to the French Competition Authority, Meta refused to fully integrate Adloox into its ecosystem without providing any precise or coherent justification. Such an integration was necessary for Adloox to be able to provide ad verification services in relation to Meta's inventories. In its interim relief decision, the French Competition Authority considered that Meta's behavior constituted an abuse of a dominant position in view of the non-objective, non-transparent and discriminatory nature of the conditions of access.

113. ***Second*, the Commission should provide guidance on how to apply the general principles of Article 102 TFEU to the category of access restrictions**, instead of merely reiterating the conditions presented as being generally applicable to any types of conduct (*i.e.*, the requirement that the conduct (i) departs from competition on the merits and (ii) has the ability to produce exclusionary effects).

114. In addition to the conditions (i) and (ii) above, the Draft Guidelines should also specify that it is for the Commission to demonstrate that there is a causal link between the conduct and the anticompetitive effects, in line with the Court's judgment in *Google Shopping*.[113]

115. However, the APDC is of the opinion that indeed, the Commission does not provide any concrete indication as to, for example, the factors it will take into account to assess whether restrictions to access depart from competition on the merits. The list of examples in the Draft Guidelines does provide some indications in a few concrete cases.[114] Yet, these examples are debatable and provide no general framework to analyse restrictions to access. From this perspective, it may even be difficult to understand why the Commission provides in its Draft Guidelines a section on a category of abuses only to state that the general principles of Article 102 TFEU apply, without providing sufficient guidance on how to apply these general principles to that specific category.

116. This can create uncertainty. By way of example:

- the Draft Guidelines set out that a disruption of supply could amount to a restriction of access; when the dominant undertaking's client is also their downstream competitor, its orders are ordinary and it abides by regular commercial practices;[115]

- however, even when these circumstances are met, supplies may be disrupted without any conduct on the part of the dominant undertaking departing from competition on the merits. For instance, this could be the case when a dominant undertaking needs to adapt to changing market conditions (to take an extreme example, when supplies are disrupted worldwide due to, *for example*, an incident on the Suez Canal). This is why, in the APDC's view, the examples on access restrictions in the Draft Guidelines[116] provide little useful guidance and do not allow undertakings to understand what factors the Commission will assess to determine whether they departed from competition on the merits or not.

117. *Third*, the examples in paragraph 166 of the Draft Guidelines appear challengeable and create new and uncertain legal concepts.

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114 See, in particular, para. 166 of the Draft Guidelines.

115 See, in particular, para. 166(a) of the Draft Guidelines.

116 See, in particular, para. 166(a) of the Draft Guidelines.

118. The APDC welcomes the Commission's initiative to clarify the circumstances in which access restrictions are abusive, but unfortunately this clarification falls short in that it raises a number of issues instead. For instance:

- the Commission introduces the notion of "reasonable" and "transparent" conditions.[117] This seems to be based on FRAND conditions but does not include the notion of non-discrimination. Yet, precedents shed a useful light on the FRAND conditions and provide guidance on how this notion is to be applied by competition authorities.[118] Moreover, the Commission itself, following the *Samsung* and *Motorola* commitment decisions in relation to FRAND terms, highlighted that these two decisions provide "*clarity to the industry on what constitutes an appropriate framework to settle disputes over 'FRAND' terms in line with EU antitrust rules*".[119] The APDC regrets that no reason has been provided for either the Commission's intention to depart from the notion of FRAND or the omission of a specific reference to FRAND in the context of access restrictions. In this context, it is difficult to understand the objective pursued by the Commission. The notion of non-discrimination seems to be more important than the "reasonable" nature of the conditions, at least when it relates to prices. Either the dominant company competes with its customers, and its commercial conditions may be assessed as a potential squeezing practice, or it does not and the "reasonable" nature of its prices is not relevant as long as they are not discriminatory, except in case of exploitative abuse but this is not the subject matter of these Guidelines.

- The Draft Guidelines envisage a situation where an input is developed by a dominant undertaking to be shared with third parties, but the latter's access to this input is later restricted by the dominant undertaking.[120] Nevertheless, in providing such an example of access restrictions:

    - the Commission does not refer to any precedents (except by analogy to *Google Shopping*, a case of self-preferencing). This suggests that the type of abuses contemplated have not yet been analysed in practice. The example provided by the Commission seems to relate to the Court's case law on "open infrastructures", although the Court has not referred to "*any declared purpose of sharing [an infrastructure] widely with third parties*"[121] ; and

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117 See, in particular, para. 166(c) of the Draft Guidelines.

118 CJUE, 16 July 2015, *Huawei*, C-170/13; Commission, 29 April 2014, *Motorola - Enforcement of GPRS standard essential patents*, AT.39985; Commission, 29 April 2014, *Samsung - Enforcement of UMTS standard essential patents*, AT.39939.

119 Commission, Press release, 29 April 2014, "*Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions*" See: https://ec.europa.eu/commission/presscorner/detail/en/ip_14_490.

120 See, in particular, para. 166(d) of the Draft Guidelines.

121 As stated at para. 166(d) of the Draft Guidelines.

- the Draft Guidelines do not explain what is meant by "*declared purpose*", or "*shared widely*"[122], it is thus difficult for undertakings to assess what the legal standard could be for such a new category of potential abuses. The strategy of a company, even dominant, might change.

[122] See, in particular, para. 166(d) of the Draft Guidelines.