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The European Commission's Draft Article 102 Guidelines Under Fire: Examining the Substance and the Roots of the Criticism

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The European Commission's Draft Article 102 Guidelines Under Fire: Examining the substance and the roots of the Criticism

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Abstract

Recently, the European Commission published Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings that provoked considerable criticism and raised concerns from commentators. The main concerns are raised about the shift away from the established effects-based approach and in that context particularly the downplaying of the As-Efficient Competitor (AEC) principle; and the introduction of presumptions, which may diminish legal certainty by shifting the burden of proof onto companies. This paper provides a critical analysis of the Draft Guidelines, evaluating their consistency with the existing legal framework and case law. It is focused on addressing the concerns expressed publicly by different stakeholders, evaluating their validity and whether they are fully sustainable. While some concerns may have merit, this paper argues that the criticisms are not entirely justified. The goal of the paper is formulating recommendations that both reflect stakeholders' concerns and remain practical and balanced in application.

I. INTRODUCTION

On 27 March 2023, the European Commission published a communication proposing amendments to its Article 102 TFEU Guidance Paper in response to recent judgments by the EU Courts on exclusionary abuses. In its amended Guidance and the accompanying Policy Brief, the Commission outlines changes in four key areas: the definition of anti-competitive foreclosure, the application of the as-efficient competitor (AEC) test, the assessment of loyalty rebates, and the treatment of refusals to supply and margin squeezes. The Commission launched a process for adopting guidelines on exclusionary abuses through a Call for Evidence.[2] The feedback from that process has informed the preparation of the Draft Guidelines, which aim to incorporate EU courts' case law and reflect the Commission's experience enforcing Article 102 TFEU. In September 2024, the Commission published the Draft Guidelines and opened a public consultation to collect further input.

While the Draft Guidelines mark an important step towards clarifying the application of Article 102 TFEU, many legal and economic practitioners and academics have expressed concerns regarding the significant departure from the effects-based approach that was central to the 2009 Guidance.[3] In their view, the Commission

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[2] EU competition law – guidelines on exclusionary abuses by dominant undertakings – Public Consultations and Feedback https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en > accessed 04 November 2024.

[3] See e.g. Nothing has changed? The Commission's draft Article 102 guidelines and the "new" effects-based approach to Article 102 enforcement: Nothing has changed? The Commission's draft Article 102 guidelines and the "new" effects-based approach to Article 102 enforcement | LinkingCompetition | Blog | Insights | Linklaters > accessed 11 October 2024; Reflections on the draft article 102 guidelines: Bringing clarity or creating room to manoeuvre?

risks adopting a very strict approach which is likely to lead to overenforcement because, some practices may be prohibited as abusive when they are pro-competitive – these are the so-called 'false positives' or type I errors.[4]

Another theme of the critiques is related to the introduction of presumptions for certain types of potentially exclusionary conduct, such as exclusivity agreements. Some commentators argue that this presumptive approach may unfairly shift the burden of proof to companies who now need to demonstrate that their conduct is not anti-competitive.[5] According to this view, this represents a fundamental departure from the established effects-based analysis, which required the Commission to demonstrate anti-competitive effects. By simplifying the assessment of certain practices through presumptions, the guidelines risk diminishing the role of economic evidence, leading to less rigorous assessments of exclusionary effects and possibly over-enforcement.

A related issue is the potential of increased legal uncertainty for businesses, as it becomes more difficult for companies to assess whether their conduct complies with Article 102 TFEU.[6] According to this view, the introduction of presumptions and formalistic tests without clear guidance on how to rebut them leaves businesses uncertain about compliance because they cannot predict enforcement outcomes.[7] This could lead to increased litigation and enforcement risks, undermining the principle of legal certainty that has been central to the enforcement of competition law.

Another major concern is the reduced focus on the AEC test. Some commentators point out that the AEC test has been recognised by the EU Courts and by limiting its application, the Draft Guidelines may conflict with established case law, including the *Intel* and *Post Danmark I* rulings, which emphasized the importance of the AEC test for evaluating whether a dominant company's conduct results in the exclusion of equally efficient

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https://www.slaughterandmay.com/insights/new-insights/reflections-on-the-draft-article-102-guidelines-bringing-clarity-or-creating-room-to-manoeuvre/ accessed 11 October 2024; European Union: Article 102 TFEU and the European Commission's 2025 Guidelines: what to expect and what to ask forLisa Kaltenbrunner and Dervla Broderick, Ropes & Gray, 30 June 2023> accessed 11 October 2024; ICLE Comments on Art. 102 TFEU Draft Guidelines, Geoffrey A. Manne, Dirk Auer, Lazar Radic, & Mario A. Zúñiga <https://laweconcenter.org/resources/icle-comments-on-art-102-tfeu-draft-guidelines/ > accessed 4 November 2024.

[4] The symmetrical situation occurs when a practice is considered legal despite being anticompetitive – this is known as a Type II error. It is usually accepted that the cost of type I errors in competition law is greater than type II errors – when a practice is considered legal despite being anti-competitive - because it might lead to discouraging a dominant company's incentive to innovate and to provide better services – an outcome typically described as a 'chilling effect,' See e.g Christian Ahlborn and Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Claus-Dieter Ehlermann and Mel Marquis (eds) European Competition Law Annual, A Reformed Approach to Art. 82 EC, 2007 (Hard publishing 2008); See also John Temple Lang, 'The Requirements for a Commission Notice on the Concept of Abuse under Article 82 EC' CEPS Special Reports (2008) 32, who claims that: 'the economic costs if innovation is restricted by exclusionary conduct are likely to be much greater than the economic costs of monopoly pricing.'); Frank Easterbrook, 'The Limits of Antitrust' 63 (1984) Texas Law Review 1, 3, who claims that 'judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.'

[5] James Killick, Antonio Fuentes Máiquez, Marta Teixeira Pires and Peter Citron, The European Commission moves away from economics and proposes a presumption-based approach in its draft guidelines on exclusionary abuses, https://www.whitecase.com/insight-alert/european-commission-moves-away-economics-and-proposes-presumption-based-approach-its accessed 11 October 2024; From effects to presumptions? The EC Draft Guidelines on exclusionary abuse https://www.aoshearman.com/en/insights/from-effects-to-presumptions-the-ec-draft-guidelines-on-exclusionary-abuse; To Prove or Presume? The EC's Draft Guidelines on exclusionary abuses | Stibbe>accessed 11 October 2024; The Draft Article 102 Guidelines: A Somewhat Confused Attempt to Partly Roll Back the Effects-based Approach of the Union Courts, Luc Peeperkorn (Brussels School of Competition)/September 4, 2024, accessed 11 October 2024.

[6] The Draft Article 102 Guidelines: A Somewhat Confused Attempt to Partly Roll Back the Effects-based Approach of the Union Courts, Luc Peeperkorn (Brussels School of Competition)/September 4, 2024>accessed 11 October 2024; To Prove or Presume? The EC's Draft Guidelines on exclusionary abuses | Stibbe > accessed 11 October 2024; https://www.linkedin.com/pulse/draft-article-102-guidelines-some-initial-giulio-federico-q0qze/> accessed 11 October 2024.

[7] Georgio Monti, Comments on Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertaking.

competitors.[8] For that reason, it has been argued that the Draft Guidelines' are not aligned with the effects-based analysis endorsed by the courts.[9]

This paper examines the concerns raised and offers recommendations on how the European Commission could address them. The analysis begins by reviewing the concept of an effects-based approach, emphasizing how it inherently requires a distinction between mere foreclosure and anticompetitive foreclosure. This distinction underpins the AEC Principle, which provides the conceptual framework for ensuring competition policy focuses exclusively on conduct that results in anticompetitive foreclosure.

To enhance clarity, the paper differentiates the AEC Principle from the "AEC test," often associated with the application of price-cost tests as a practical method for evidencing anticompetitive foreclosure.[10] The discussion then traces how the case law of the European Courts has evolved to fully endorse the AEC Principle while recognizing that price-cost tests are only relevant in specific scenarios of alleged abuse. It argues that this does not indicate a departure from the AEC Principle but rather acknowledges that the evidentiary tools needed to assess anticompetitive foreclosure may vary based on the nature of the conduct under scrutiny.

The paper concludes that much of the criticism stems from confusion between the AEC Principle as a benchmark for assessing conduct and the specific evidence used in its application. To address this, the Commission could reaffirm its commitment to anticompetitive foreclosure as the core concern of competition law, emphasizing the continued relevance of the AEC Principle as a guiding framework for market analysis, even as the evidentiary methods employed in specific cases may differ.

II. EFFECTS-BASED APPROACH V FORMED BASED APPROACH

As noted in the introduction, many commentators are concerned that the Draft Guidelines represent a substantial departure from the effects-based approach that was central to the 2008 reform of Article 102. They argue that the Draft Guidelines downplay the AEC test, that the new guidelines deprioritize an effects-based analysis focused on protecting efficient competitors it '*marks the end of the 'more economics-based approach' to competition law*.'[11] In this section I will evaluate this claim and make recommendations on how the Commission could address these concerns. To do so I first review what precisely is meant by an effects-based approach, discuss how this necessarily leads to a distinction between foreclosure and anticompetitive foreclosure and explain why the AEC Principle is the conceptual framework that justifies that competition policy should only address anticompetitive foreclosure.

2.1 The notion of the effects-based approach and anti-competitive foreclosure

[8] Case C-209/10 *Post Danmark A/S v Koncurrenceråd*et [2012] ECR I-172, EU:C:2012:172 (*Post Danmark I*). and Case C-413/14 *Intel Corp. v Commission*, EU:C:2017:632 (*Intel I*).

[9] Akman, Pinar and Motta, Massimo and Fumagalli, Chiara, Reflections on the European Commission's Draft Guidelines on Exclusionary Abuses (October 30, 2024). Available at SSRN: https://ssrn.com/abstract= > accessed 1 November 2024.

[10] The distinction between the AEC principle as a conceptual framework and its implementation through price-cost tests was first articulated by Marinova: see M. Marinova, *Fidelity Rebates in Competition Law: Application of the 'As Efficient Competitor' Test* (Wolters Kluwer, 2018) and K-U. Kühn and M. Marinova, '*The role of the 'as efficient competitor' test after the CJEU judgment in Intel*' (2018) 4(2) *Competition Law & Policy Debate* 64. Four years later, similar conclusions were reached by G. Gaudin and D. Mantzari: '*Google Shopping and the as-efficient-competitor test: Taking stock and looking ahead*' (2022) 13(2) *Journal of European Competition Law & Practice* 125, and more recently by Pinar Akman: '*A Critical Inquiry into "Abuse" in EU Competition Law*' (2024) 44(2) *Oxford Journal of Legal Studies* 405.

[11] From Guidance to Guidelines: Article 102 TFEU and the new EU competition law https://chillingcompetition.com/2023/03/27/from-guidance-to-guidelines-article-102-tfeu-and-the-new-eu-competition-law/ > accessed 11 October 2024.

The so-called 'effects-based' approach was introduced as a result of the European Commission modernisation of the EU competition law regime proclaiming a shift from a formalistic approach towards a more economic/evidence based approach, which would focus on the effect of the conduct of companies on the market rather than the form of such conduct.[12] The shift in approach was motivated by the recognition that many practices previously prohibited under the form-based approach, were often efficiency-enhancing, and that rigid enforcement risked deterring legitimate and beneficial business conduct.[13] The 2008 Guidance Paper emphasised that the protection of the competitive process is the goal of the Commission's enforcement efforts, because effective competition is a guarantee that the consumers will not be harmed. Further, the Commission's Paper clarifies that the conduct of a dominant company should be considered abusive if it is likely to lead to an anti-competitive foreclosure.[14] In order to establish anti-competitive foreclosure, the Commission must find that a competitor is foreclosed and that consumers could be harmed as a result from foreclosure (in terms of increase of price or when other parameters of competition – such as, innovation, the variety (i.e. consumer choice) or quality of goods or services.[15]

This interpretation of the legal framework for exclusionary behaviour clarified the European Commission's understanding of the effects-based approach as a standard for guaranteeing the protection of competition on the market.[16]From the above it can be concluded that anti-competitive foreclosure is a situation where a dominant firm's actions restrict or eliminate the ability of actual or potential competitors to access markets or essential supplies, thereby impeding their ability to compete effectively. Conduct leading to foreclosure of competitors from the market can allow the dominant firm to maintain or increase its market power, leading to adverse effects on consumers, such as higher prices, reduced quality, limited choice, or stifled innovation.

The 2008 framework for Article 102 TFEU emphasized the importance of distinguishing anticompetitive foreclosure - conduct that harms consumer welfare - from mere foreclosure, which may affect less efficient competitors but does not necessarily harm consumers.[17] This focus on consumer harm was fundamental, with the Commission explicitly addressing how anticompetitive foreclosure could result in higher prices, lower quality, or reduced consumer choice. The 2008 approach thus placed significant emphasis on analysing how a dominant firm's behavior affected consumer welfare but it emphasizes that it does not require direct proof of consumer harm, focusing instead on the anti-competitive effect on competition. The 2008 framework, proposed that the assessment of an anti-competitive foreclosure should start from an evaluation of the following factors: the position of the dominant undertaking; the conditions of the relevant market; the position of the dominant undertaking's

[12] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] O.J. C 45/7 (2008 Guidance Paper),
[13] These are empirical evidence on this, see e.g. Francine Lafontaine and Margaret E Slade, '*Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*' (2008) 45 Issues in Competition Law and Policy 391.
[14] Ibid, para 20.
[15] The Guidance Paper, para 11.
[16] It was also the guiding principle for adopting the effects-based approach as reflected in Council Regulations and soft law instruments for the assessment of vertical restraints, horizontal agreements, and EU Merger Control.
[17] This distinction is crucial for fostering long-term competitiveness, as it ensures that enforcement focuses on protecting competition, not competitors. Growth in productivity often relies on the exit of inefficient firms and the expansion of more efficient ones. Policies that fail to distinguish between these forms of foreclosure risk protecting inefficient firms, thereby stifling innovation and productivity improvements. As it will be seen later in the paper, the AEC Principle is pivotal in this context, as it provides a structured framework by which inefficient firms are not protected so that they inefficiently stay in the market.

competitors; the position of the customers or input suppliers; the extent of the allegedly abusive conduct; possible evidence of actual foreclosure; direct evidence of any exclusionary strategy.[18]

In contrast, it looks like the Draft Guidelines place less emphasis on consumer harm. This is because concepts like “anti-competitive foreclosure” and “consumer welfare,” central to the 2008 Guidance, are either absent or downplayed in the new draft Guidelines. Instead, the Draft Guidelines introduce the concept of conduct departing from competition on the merits as the central standard for assessing whether conduct by a dominant firm constitutes an abuse under Article 102 TFEU.[19]

According to the Draft Guidelines, while dominant undertakings have a special responsibility not to impair effective competition, they are not precluded from protecting their own commercial interests if attacked.[20] However, their actions must fall within the scope of competition on the merits, which refers to competition based on factors like price, quality, choice, and innovation, where the consumer benefits from the competition between economic operators. Thus, conduct that departs from competition on the merits is the one that distorts the competitive process.

Looking at the definition of competition on the merits of the Draft Guidelines, where it is defined as:

[…conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services. Article 102 TFEU does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.][21]

one can observe that it is not significantly different from the meaning attached to the approach under the 2008 Guidance Paper.[22] It looks that the Draft Guidelines' emphasis on "competition on the merits," which includes conduct that may exclude "less efficient competitors," aligns with the 2008 Guidance Paper focus on safeguarding the competitive process rather than merely protecting competitors, recognizing that those offering less in terms of price, quality, choice, or innovation may justifiably exit the market. It appears that both frameworks ultimately aim to identify conduct that has exclusionary effects harmful to consumers, and thus can be considered anti-competitive. The case law clearly supports this interpretation, using "competition on the merits" as a critical qualifier for determining which exclusionary effects fall under Article 102 TFEU.[23]

Next, in paragraph 70 of the Draft Guidelines, the Commission listed various relevant facts and circumstances to be considered in the analysis, noting that their relative importance may vary depending on the specifics of each case. These may include, among other factors, one or more of the following elements: the position of the dominant undertaking, market conditions, position of competitors, extent of the allegedly abusive conduct, position of customers or input suppliers, evidence of an exclusionary strategy, evidence of actual market developments. It

[18] The Guidance Paper, para 20.
[19] Draft Guidelines, para 45.
[20] Draft Guidelines, para 49.
[21] Draft Guidelines, para 51.
[22] See text accompanying footnote 13.
[23] *Case C-377/20 Servizio Elettrico Nazionale SpA and Others v Autorità Garante della Concorrenza e del Mercato EU:C:2022:359 (SEN)*, para. 61

looks that the Draft Guidelines and the 2009 framework share similar core factors in assessing anti-competitive foreclosure/ assessment of a conduct's capability to produce an exclusionary effect, though the Draft Guidelines introduce additional specificity and nuances. Both frameworks start by evaluating the position of the dominant undertaking, recognizing that a stronger position increases the likelihood of exclusionary effects. Market conditions, such as entry barriers and economies of scale, are also similarly emphasized as factors that impact competitors' ability to enter or expand. The position of competitors is considered in both frameworks, with the Draft Guidelines adding nuance by clarifying that competitors' responses to the conduct do not negate its exclusionary impact. When examining the extent of allegedly abusive conduct, both frameworks agree that the scope and duration of the conduct matter, but the Draft Guidelines are more specific in noting the strategic importance of targeted customers or segments.[24] Additionally, the role of particular customers or input suppliers is acknowledged in both frameworks, with the Draft Guidelines further specifying that targeting certain customers can influence market entry. Evidence of an exclusionary strategy is valued in both, though the Draft Guidelines emphasize that proving intent is not strictly necessary to establish abuse. Lastly, while both frameworks consider actual market developments or foreclosure as valuable evidence, the Draft Guidelines do not require such evidence, allowing a more objective assessment of exclusionary capability. Overall, the Draft Guidelines refine and expand on the 2008 framework by clarifying each factor's operational importance and adding detail to the assessment criteria.

However, to ensure clarity and consistency in application, the new guidelines would benefit from a more explicit emphasis that conduct that departs from competition on the merits refers specifically to conduct leading to distortion of the competitive process, which ultimately will harm consumers.[25]

2.2 The AEC principle as a conceptual framework

As outlined above, concerns are raised about the shift away from the established effects-based approach and in that context particularly the downplaying of the AEC principle. This section explains why the AEC Principle is the conceptual framework that justifies that competition policy should only address anticompetitive foreclosure and will distinguish the AEC principle from the "AEC test", which is often interpreted as the application of a price-cost-test as evidence for anticompetitive foreclosure. The analysis will start with the introduction of the AEC test in the 2008 Guidance Paper and will contrast with the approach adopted in the Draft Guidelines.

In the 2008 framework the Commission took the view that anticompetitive foreclosure can be operationalized with reference to the 'as efficient competitor test.' According to the Commission, the consumers could be harmed only if the foreclosed competitor is as efficient as the dominant company.'[26] Further, the Commission considers that this test could be practically implemented by comparing costs and prices of a dominant company in order to assess whether the dominant company is sacrificing profits by its conduct. If the prices of the dominant company are below cost, a hypothetical as efficient competitor with the same cost structure would not be able to match its prices and, thus, to compete without incurring a loss. From this perspective, if a hypothetical as efficient competitor cannot survive, the aim of the conduct can safely be presumed to constitute anti-competitive

[24] The critical assessment of the Draft Guidelines regarding the duration and the coverage of the conduct is in section 5 of this paper.
[25] The factors relevant to establishing that conduct departs from competition on the merits fall outside the scope of this paper. Instead, this analysis centers on addressing the criticisms of the Draft Guidelines, with the goal of formulating recommendations that both reflect stakeholders' concerns and remain practical and balanced in application.
[26] The Guidance Paper, para 23.

foreclosure, regardless of how efficient the actual rivals are because it is unlikely that there is a pro-competitive reason for pricing below costs.[27] Thus, the test can be considered as a screening devise. The Commission considered the price-cost test that purely assesses whether a firm with the same cost structure is foreclosed as a specific instrument to verify whether an as efficient competitor could survive or not. The logic of the test is that if a dominant company's pricing is below costs, its intention is to foreclose an as efficient competitor, which ultimately will harm the competitive structure. In introducing the AEC test, the European Commission sought to distinguish between pro-competitive and anti-competitive practices, to depart from the presumptions of illegality '*per se*' for certain types of behaviour and to create coherence with the reform of vertical restraint, horizontal agreements and mergers. This is how the AEC test (which is fundamentally a price-cost test) has come to embody the effects-based approach, with the prevailing view that applying Article 102 aligns with economic theory only if the AEC test forms part of the legal standard. As it will be seen below, the conflation of the AEC principle with the price-cost test represents a misunderstanding, as the AEC test (as a principle) was never intended to be limited to a specific empirical procedure but rather serves as a broader conceptual framework for assessing anticompetitive foreclosure.

Unlike the 2008 framework, the Draft Guidelines introduces additional clarifications about what is not required to establish that conduct is capable of producing exclusionary effects[28] and specify that showing that affected competitors are as efficient as the dominant undertaking is not necessary.[29] This statement was criticized by many who considered that the Commission is removing the importance of the AEC test. However, upon reviewing the footnote accompanying this statement, it looks that the Commission considered paragraphs 540-541 from the *Google Shopping* judgment, where the GC clarified that assessing whether a dominant firm's practices distort competition does not require proving that the firm is "more efficient" than its rivals. This is because, in situations where competition is already distorted, an objective comparison of efficiency among competitors is impossible. Instead, the focus should remain on the potential exclusionary effects of the conduct. However, this statement must be understood in the context of the previous paragraph 539 of the judgment, where the GC discusses pricing practices and refers to *TeliaSonera*. The Court is addressing the AEC test as a hypothetical framework that examines whether a competitor with the same cost structure as the dominant firm could remain viable under the same pricing conditions. In *Google Shopping*, the Court deemed the AEC test irrelevant because the alleged harm arose from non-pricing practices, rendering price-cost comparisons unsuitable for evaluating the competitive effects of the conduct. This suggest that what the GC had in mind was the price-cost test that measure efficiency of a competitor with the same cost structure and in this case, the price-cost was irrelevant because the alleged harm was not related to pricing practices but to other forms of competitive distortion, making price-cost comparisons inappropriate.[30] This is what the Commission removed from the Draft Guidelines which does not signify a departure from the AEC Principle but reflects the recognition that the type of evidence required to evaluate anticompetitive foreclosure may differ depending on the nature of the conduct being examined. Therefore, much of the criticism arises from a misunderstanding between the AEC Principle, which

[27] Nicholas Banasevic and Per Hellström, '*When the Chips are Down: Some Reflections on the European Commission's Intel Decision'* (2010) 1(4) Journal of European Competition Law & Practice 301, 304.
[28] Draft Guidelines, section 3.3.4.
[29] Draft Guidelines, para 72.
[30] This was confirmed by the CJEU, which upheld that the AEC test (in terms of price-cost test) was neither mandatory under Article 102 TFEU nor relevant in the context of Google Shopping, given the market conditions and the inability to reliably assess competitors' efficiency, see CASE C-48/22 *P Google and Alphabet v Commission* ECLI:EU:C:2024:726 , paras 268-69.

serves as the standard for assessing conduct, and the specific evidentiary tools employed in its implementation. Therefore, the Commission should make this clear.

This mischaracterization of the AEC test has introduced significant ambiguity in the case law developed after the reform of Article 102 which offers mixed interpretations - some decisions diverging from the idea that the AEC test is purely a price-cost test, suggesting instead that it represents a broader concept. The following section will examine this evolving perspective in detail.

2.3 The AEC test in the case law[31]

The role of the AEC test as a reflection of the effects-based approach became central when the Commission's method faced judicial scrutiny, notably in the *Intel* case.[32] Here, the Commission conducted an in-depth analysis of the effects of fidelity rebates under Article 102, including a price-cost test, though it stated this analysis was unnecessary and done for completeness. Upon appeal, the General Court upheld the Commission's decision, concluding that a price-cost test was not essential to finding an infringement of Article 102. The Court differentiated between price-based and non-price-based abuses, suggesting that test may be a necessary part of the assessment of price-based abuses, because '*it is impossible to assess whether a price is abusive without comparing it to other prices and costs'*.[33] However, in cases involving exclusivity rebates, the Court found that it is the exclusivity condition itself, rather than the rebate amount, that restricts market access and constitutes abuse. This perspective indicates that the Court consider the AEC test as a price-cost test that is applicable primarily in a price-cost context.[34]

Next, the General Court clarified that the test is inadequate for capturing the anticompetitive nature of rebates, because foreclosure effects could still arise even if an equally efficient competitor could theoretically enter the market. This stance implies that the General Court viewed the test as susceptible to false negatives, suggesting that passing the test by the dominant company does not negate the possibility of foreclosure effects.[35] This statement could be interpreted, in the context of the *Intel* case, as suggesting that even if the test is passed by the dominant company, the existence of other evidence, such as unavoidable trading partner status, the significant part of demand secured for the dominant company, retroactivity of rebates in combination with additional anticompetitive conditions, i.e. naked restrictions, would be sufficient for considering Intel's practice as capable of harming competition.

Next, the GC held that the price-cost test is also not required for the evaluation of 'other' types of rebates because the assessment of all the circumstances was considered enough to demonstrate the existence of a loyalty mechanism, which was deemed to amount to an anticompetitive effect that did not have to be demonstrated by means of a price-cost test. This position was adopted in AG Kokott's opinion[36] and repeated in the *Post Danmark II* judgement where the CJEU considered the AEC test neither legally required nor decisive for establishing an

[31] This section is part of previously published paper, see Marinova, Rethinking the '*As-Efficient Competitor Test': Assessing the wider impact of the CJEU's judgment in Unilever Italia and its implications in shaping the European Commission's agenda to reform Article 102 TFEU'*
[32] Case COMP/37.990 Intel (13 May 2019) [2009] O.J. C 227/13 (Intel Decision).
[33] Intel Decision, para. 152.
[34] The General Court reached the same conclusion in Case T-612/17 *Google LLC and Alphabet, Inc. v Commission (Google Shopping)* EU:T:2021:763, para. 583.holding that the application of the AEC test is warranted only in the case of pricing practices (e.g., predatory pricing or margin squeeze) and was thus irrelevant here.[34] This perspective indicates again that the Court consider the AEC test as a price-cost test applicable primarily in a price-cost context.
[35] Intel (GC (2014)), para. 150.
[36] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* (Post Danmark II), Opinion of AG Kokott, EU:C:2015:343, para. 56.

abuse, which might be seen as limiting its usefulness in general.[37] The CJEU considered the application of a price-cost test was not necessary to assess rebates that fall into the third category, for which an examination of 'all the circumstances' of the case was sufficient, which represents a clear effects-based approach, although the application of the price-cost test was considered irrelevant.[38] The CJEU rejected the implementation of the price-cost test as irrelevant in practice for this particular case because the market structure in Denmark was unlikely to accommodate the existence of an as efficient competitor.[39] In addition to this statement, in *Post Danmark II* the CJEU suggested that the price-cost test could be used as one tool amongst others, which means that the application of the test is not rejected in general. At the same time, the CJEU left open the question as to the circumstances in which the test could be usefully applied, or how it should be applied.

Similarly, in the highly anticipated 2017 CJEU judgment in *Intel*, the CJEU specified that the Commission is required to examine all the circumstances of the case, encompassing the extent of the undertaking's dominant position in the relevant market, the coverage and duration of the practice, and the conditions for granting the rebates. It also called for an assessment of the potential existence of a strategy aimed at excluding from the market competitors that are at least as efficient as the dominant undertaking.[40] The Court did not mention the outcome of a price-cost test or an exclusion of 'a hypothetical as efficient competitor.' This might suggest that according to the CJEU, a strategy aimed at excluding competitors who are at least as efficient as the dominant undertaking can be assessed through a comprehensive evaluation of all the circumstances of the case, thereby enabling an assessment of the conduct's potential anticompetitive effects. This indicates that the CJEU endorses an approach that considers the possible adverse effects of fidelity rebates within the broader market context.

Such an interpretation suggests that the AEC test is not strictly limited to a price-cost test but instead functions as a broader analytical framework, assessing whether conduct might exclude equally efficient competitors without reducing the analysis solely to pricing metrics. According to this interpretation, an analysis of the capacity to foreclose competitors which are at least as efficient as the dominant undertaking represents a clear effects-based approach and is applicable to all cases – this is the AEC principle. The CJEU remitted the case to the General Court, instructing it to review whether the rebates in question were capable of restricting competition, which required an examination of the relevant factual and economic evidence.[41] This statement influenced the EU Court who refer to the *Intel* judgments in numerous occasions in all forms of abusive behaviour.[42]

However, the CJEU held that when the Commission conducts an in-depth assessment of all relevant circumstances, including an AEC price-cost test (even if not legally required to do so and performed for

[37] J. Venit, '*Making Sense of Post Danmark I and II: Keeping the Hell Fires Well Stoked and Burning'* (2016) 7(3) Journal of European Competition Law & Practice 165.
[38] Later, in the *Unilever* judgment, para 59, the CJEU clarified that the application of the price-cost test in the case of non-pricing practices, such as exclusivity clauses, can be relevant only where the consequences of the practice in question can be quantified and it referred specifically to a situation of exclusivity clauses, Case C-680/20 *Unilever Italia Mkt. Operations Srl v Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:33.
[39] *Post Danmark II*, para 60.
[40] *Intel I*, para. 139.
[41] Intel I, para 149.
[42] In its case law, the CJEU has consistently held that assessing the anti-competitive effects of a dominant undertaking's conduct requires a detailed evaluation of relevant facts, without mandating a price-cost test as part of this assessment. For instance, in , Case C-525/16 *Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*(MEO) EU:C:2018:270, the Court emphasized an approach, assessing the effects on the market without reference to a price-cost analysis. Similarly, in Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority*, ECLI:EU:C:2020:52, para 154, and in Case C-165/19 P *Slovak Telekom a.s. v European Commission*, ECLI:EU:C:2021:239, para 51, the CJEU underscored that anti-competitive effects should be evaluated in light of specific factual and economic circumstances, citing paragraph 139 of *the Intel* I, as authority.

completeness), and the defendant submits evidence challenging the validity of the Commission's findings, then the General Court is obligated to examine all of these arguments.[43] The CJEU clarified that the accuracy of the test's application must be reviewed, as it was included in the Commission's decision and directly contested by the defendant with evidence questioning its correctness. Consequently, the case was sent back to the General Court on procedural grounds, because the judgment failed to take into account Intel's arguments in exercising its rights of defence.

This suggests that the CJEU's approach in *Intel* is applicable only in situations where the Commission has conducted price-cost test and the dominant firm contests its application. The *Intel* decision thus primarily addresses a procedural point, emphasizing the requirement for judicial review when a defendant challenges the Commission's methodology. From a normative legal perspective, this underscores the principle that when an authority includes specific economic tests in its analysis - whether or not these are legally mandated - the courts are obligated to rigorously evaluate the methodology and evidence if contested by the defendant. The ruling reinforces procedural safeguards within competition law, ensuring that defendants have the opportunity to fully exercise their rights of defense when the Commission's assessments are questioned. However, the CJEU did not address whether the test results, even if correctly applied (which remains questionable, as discussed in the previous section), could serve as a supportive or decisive factor for establishing a violation of Article 102. The Commission should therefore clearly outline in the new Article 102 Guidelines when the price-cost test is appropriate and exercise caution in its application, as including the test can trigger procedural obligations and judicial scrutiny if challenged.

On appeal, the 2022 General Court judgment in *Intel* added further confusion. The Court stated that categorizing the rebates as "exclusivity rebates" (a non-price abuse) did not remove the need for an AEC test. It was still necessary to evaluate whether these rebates could restrict competition. This reasoning is somewhat confusing, as it conflicts with the Court's own 2014 judgment in *Intel* and prior case law, which generally reject the application of a price-cost test in non-price abuses, such as exclusivity rebates. Nonetheless, this could imply that the Court views the AEC test as a broader principle, suggesting that competition is harmed only when an equally efficient competitor is excluded. The GC further clarifies that the AEC test is not an indispensable part of the assessment in examining the foreclosure capability of all rebate systems but can be a relevant factor where the Commission has carried it out as part of its assessment of the anti-competitive effects of the rebate schemes. Here, the GC considers the AEC test as a price-cost test. Indeed, a considerable part of the GC's decision was devoted to assessing the evidence used by the Commission in the application of the price-cost test and the arguments submitted by the applicants.[44] This statement adds complexity to the case, as the General Court continued to address a test that had been conducted by the Commission for completeness, which was not an essential part of the assessment and did not contribute value to the overall evaluation. Instead of questioning the Commission's decision to conduct the test initially, the General Court instead engaged with its intricacies.

In contrast to its previous judgment in *Intel*, the General Court's 2022 *Intel* ruling did not differentiate between price and non-price abusive practices. It did not confirm that the AEC price-cost test might be essential for evaluating price-based abuses but not be applicable to exclusivity rebates. Additionally, the General Court

[43] *Intel I*, paras 141-142.
[44] Ibid, paras 128-149.

refrained from addressing whether the Commission should have employed a price-cost test in this specific case - a test that is highly intricate, susceptible to implementation errors and, to date, has not received endorsement from any court as being appropriate for identifying an abuse. In essence, the General Court did not engage with the substance of the case, but instead adhered to the framework established by the CJEU and scrutinized the correctness of the price-cost test conducted by the Commission.

However, despite the careful review of the price-cost test conducted by the Commission, the 2022 GC's decision in *Intel* left more questions than answers as it remains unclear how the results of the test, even if applied correctly, fit with the rest of the evaluative criteria/market conditions. In addition, the question of as to whether the price-cost test is a supportive or decisive factor in finding an infringement of Art. 102 is also omitted. Next, does the positive result of the price-cost test mean that the conduct is not an abuse of dominance even if the other circumstances suffice to show the risk of anticompetitive foreclosure? The correct question was whether the Commission's decision to use the price-cost test in this particular case was appropriate at all?'[45]

Next, in *Google Android*, the General Court stated that the Commission was required to assess whether the practice excludes competitors that are at least as efficient as the dominant undertaking: '*using a test known as the 'as efficient competitor'*, which can be useful, but did so without clarifying whether this test is always necessary. [46] However, the General Court was clear that where the Commission applies the AEC test, it must do so 'rigorously.'[47] In addition, the General Court expressed '*doubts as to the correctness and validity of the AEC test carried out by the Commission*.'[48] As a result, the General Court found the Commission's analysis using this test to be erroneous, and largely for procedural reasons annulled the Commission's decision.[49] For similar reasons, the Commission's decision in *Qualcomm* was annulled by the General Court.[50]

In the *SEN* judgment, the CJEU for the first time acknowledged the distinction between the AEC principle, which applies broadly to all forms of abuse, and the price-cost test, which is specifically relevant to pricing abuses.[51] The question referred to the CJEU by Italy's Supreme Administrative Court, the *Consiglio di Stato*, regarding the AEC test was abstract in nature.[52] The court essentially asked whether a competition authority is obligated to consider evidence showing no actual anti-competitive effects and arguments indicating that the conduct lacks the capacity to foreclose as-efficient competitors - reflecting the broader concept of the AEC principle. However, the Italian Court did not inquire about the applicability of a price-cost test in this context. This distinction highlights that the *Consiglio di Stato* was more focused on the general principle of ensuring that conduct does not exclude equally efficient competitors, rather than specifically on whether a price-cost test should be used to evaluate such conduct. The CJEU's response in *SEN* thus underscores the broader application of the

[45] For a colourful explanation of the inapplicability of the test see David Foster's note: The Almost Exsanguinated Corpse (AEC) and other crimes: the Intel saga returns, Published on January 27, 2022 at https://www.linkedin.com/pulse/almost-exsanguinated-corpse-aec-other-crimes-intel-saga-david-foster/ .accessed 01 December 2024.
[46] *Case T-604/18 Google LLC and Alphabet, Inc. v. Commission (Google Android),* , paras 640 -641.
[47] *Google Android*, para. 644.
[48] *Google Android*, para. 752.
[49] *Google Android*, para. 802.
[50] Case T-235/18 *Qualcomm Inc. v. Commission* EU:T:2022:358.
[51] Ibid, para 80; AG Rantos in para 73 of his opinion explained the AEC principle as a test aims to determine whether a dominant firm's conduct would foreseeably prevent an equally efficient competitor from remaining economically viable in the market. This assessment asks if a competitor, based on information available to the dominant firm, would have had similar access to essential market resources, such as customer lists, to compete effectively. This test applies not only to pricing abuses but also to non-pricing practices, evaluating whether a competitor could realistically replicate the dominant firm's market position.
[52] A. Komninos , *'A Steady Course Towards the Effects-Based Approach: Case C-377/20 Servizio Elettrico Nazionale'* (2023) 14(5) Journal of European Competition Law & Practice 290.

AEC principle across various types of abuse, reserving the price-cost test for cases specifically involving pricing practices.

The Court referenced the AEC principle as a key criterion for identifying abuse of dominance, describing an abusive practice as one that a hypothetical competitor - equally efficient but not holding a dominant position - would find materially or rationally impossible to replicate because that practice relies on the use of resources or means inherent to the holding of such a position.[53] With this statement, the CJEU developed the 'replicability test' for abuse of dominance cases, holding that that the ability of an as efficient competitor to replicate the conduct of the dominant company is relevant to establishing that the conduct departs from competition on the merits in non-price context.[54] The test examines whether a competitor could realistically access the same essential resources or opportunities the dominant firm uses to secure its position. It assesses if, based on what the dominant firm knew or should have known, a competitor could viably access comparable advantages, like customer lists or entry points, even without price-based competition. If a competitor cannot replicate these advantages, the dominant firm's conduct may unfairly limit competition by making sustainable operation impossible for rivals. This test is particularly relevant in the specific context of the case but nevertheless highlights the concept of the AEC principle applicable in non-price context.

Further, the CJEU clarified that in the context of price-related exclusionary practices - such as loyalty rebates, selective or predatory pricing, and margin squeezes - the possibility of replication is assessed using the "as-efficient competitor" test.[55] An interesting aspect of the CJEU's approach is its grouping of loyalty rebates with other price-related practices, such as predatory pricing and margin squeeze, thereby treating loyalty rebates as forms of pricing conduct (the CJEU in referring only to *TeliaSonera* – a price-based abuse).[56] However, an alternative line of case law suggests that loyalty rebates may also be linked to exclusivity conditions, aligning them with non-pricing practices that focus on contractual commitments rather than pricing alone - cases where the price-cost test may be less suitable. This distinction implies that loyalty rebates could be evaluated either as pricing or non-pricing practices, depending on the specific context, yet the Court did not address this differentiation. By categorizing loyalty rebates with price-based practices, the Court effectively misclassified them and created ambiguity. This misclassification led to a problematic statement in the following paragraph, according to which, the AEC price-cost test is merely one possible method for showing that a dominant undertaking has employed methods outside the realm of "normal" competition, even within price-related practices.[57] However, in cases of pricing practices such as margin squeeze, the price-cost test is considered a requirement rather than an optional tool, given its established role in determining whether conduct aligns with "normal" competition.[58]

[53] SEN, , para. 78.
[54] Ibid, paras 79–84.
[55] Ibid, para 80.
[56] The CJEU accepted this suggestion from the AG Rantos opinion, para 70. In a footnote 54 to this paragraph AG clarified that: The Court has established that there is no legal obligation to systematically base a finding that a practice is abusive on the EEC test, that test being regarded as one tool amongst others. Indeed, that test is of no relevance when the structure of the market makes the emergence of an as-efficient competitor practically impossible, as in the context of a market, on the one hand, in which the holder of a statutory monopoly has a very large market share and, on the other hand, access to which is protected by high barriers (judgment in *Post Danmark II* (paragraphs 57 to 61)).
[57] Ibid, para 81.
[58] Case C-209/10 *Post Danmark A/S v Koncurrenceråd*et [2012] ECR I-172, EU:C:2012:172 (Post Danmark I); Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, EU:C:2011:83; Case C-280/08 *P Deutsche Telekom v Commission* [2010] ECR I-955, EU:C:2010:603.

Similarly, the CJEU in *Unilever* reiterated that the purpose of Article 102 is to ensure that effective competition is not distorted, clarifying that a dominant undertaking is not prevented from competing on the merits, and that not every exclusionary effect is necessarily detrimental to competition, since competition on the merits may, by definition, lead to the departure from the market or the marginalization of less efficient competitors and so are less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.[59] The CJEU interprets the AEC principle as encompassing various methods to assess whether a company's behavior could exclude a hypothetical equally efficient competitor, thereby affirming that the broader principle applies to non-pricing practices, such as exclusive dealing. Importantly, this broader AEC principle should not be conflated with the price-cost test, that been subject to a different line of case law, that addresses the relevance of price-cost tests as evidence whether the as efficient competitor principle is violated.

This distinction clarifies that the AEC principle sets the overarching standard for evaluating exclusionary effects across all types of conduct, while the price-cost test serves as one form of evidence to assess whether this standard is met. The relevance of the test depends on the specific case, not the type of conduct, emphasizing the need to distinguish between the evaluation framework (AEC principle) and the evidentiary tool (price-cost test). However, the Court further stated that this assessment involves determining whether such a competitor could realistically match the dominant firm's pricing or incentives, effectively treating the AEC principle as a price-cost test that should be part of the assessment. At the same time, the CJEU acknowledges that the price-cost test may not be appropriate for non-pricing practices or in markets with substantial barriers, as it centers on price competition. This position appears to contradict the earlier emphasis on the test's inclusion, generating confusion. One interpretation could be that the Court emphasized that the price-cost serves as the evaluation standard to determine whether a competitor could realistically match the dominant firm's pricing or incentives but at the same time considering taht the price-cost test can generate evidence relevant to this standard. The CJEU acknowledges that it may not be appropriate in certain contexts, such as non-pricing practices or markets with substantial barriers, where the test may not effectively address the competitive dynamics at play. This distinction underscores that the price-cost test is merely one evidentiary tool to assess the AEC principle, not the evaluation standard itself.

The CJEU's latest judgment in *Intel* (October 29, 2024) introduces additional ambiguity regarding the application of the effects-based approach.[60] This is because in its interpretation of the 2017 judgment, the Court suggests that the Commission is required to assess whether a dominant company's strategy excludes equally efficient competitors only if the company provides evidence during the administrative procedure demonstrating that its conduct was not anti-competitive or lacked foreclosure effects.[61] This might suggests that the CJEU consider that the AEC test is only necessary if the dominant firm presents evidence challenging the Commission's assessment. This confirms that the price-cost test is a tool rather than a requirement within the broader AEC principle, which ensures an effects-based analysis. The CJEU's approach supports the view that the AEC principle is distinct from, and not limited to, the price-cost test, allowing the Commission to flexibly apply an effects-based analysis across diverse contexts of abuse. In addition, the CJEU considered that even if the Commission does not establish the AEC test standard, it can be possible that exclusivity agreements could make trading partners more hesitant to accept comparable offers from competitors due to the commitments and dependency created around the non-

[59] *Unilever* , para 37. The CJEU referred to its judgment in SEN, para. 73 and the case law cited therein.
[60] Case C-240/22 *P, European Commission v. Intel Corporation Inc*. ECLI:EU:C:2024:915 (*Intel II*).
[61] Ibid, para 144; see also para 180.

contestable share of their purchases.[62] This statement can be interpreted as suggesting an alternative approach closely aligned with older case law. Interestingly, rather than outright rejecting this alternative approach, the Court offers a procedural response: it states that the General Court cannot substitute its own reasoning for the Commission's decision if the Commission did not coherently present this alternative reasoning in its original decision.[63]

Although the *Intel* judgment primarily addresses procedural matters, it also provides a clear endorsement of the effects-based approach. This approach mandates an analysis of the anti-competitive effects of a practice on competitors that are at least as efficient as the dominant firm, requiring that such an assessment consider all relevant facts of the case.

The analysis of the case law in this section reveals that the European Courts have evolved to fully endorse the AEC Principle as the overarching standard for evaluating exclusionary conduct, but has found price-cost tests relevant only in some cases of potential abuse. This does not mean the case law has set aside the AEC principle, but that the type of evidence needed to assess anticompetitive foreclosure may have to vary depending on the type of behaviour. The confusion about the difference of the benchmark for evaluating behaviour (the AEC principle) and the concrete evidence put forward has led to the concern expressed by many that the Commission is abandoning the AEC principle. The Commission could thus address these concerns by clarifying that it is still concerned about anticompetitive foreclosure and endorses the AEC principle as a conceptual framework for market analysis – even if evidence in specific cases may vary.

IV. THE PRESUMPTION-BASED APPROACH V LEGAL CERTAINTY

The Draft Guidelines introduce three categories of conduct, each with distinct evidentiary burdens for proving potential exclusionary effects, tailored to the type of conduct and likelihood of exclusion. This categorization, however, has faced criticism as some argue that this approach unfairly shift the burden of proof onto companies, requiring them to demonstrate that their conduct is not anti-competitive. The prevailing position on those who criticise the Draft Guidelines is that by relying on presumptions, there is a risk of reducing the role of economic evidence, potentially leading to less rigorous assessments of exclusionary effects and the possibility of over-enforcement. For example, the presumption that certain practices - such as exclusivity rebates or specific tying arrangements - are inherently capable of exclusionary effects, which the dominant firm must then refute, is a point of contention among commentators.[64] Critics argue that the introduction of presumptions, without clear guidance on how companies can rebut them, makes it more difficult for firms to assess whether their conduct complies with Article 102 TFEU. According to this view, the lack of clear rebuttal guidance could lead to increased litigation and enforcement risks, ultimately undermining the legal certainty that has been central to competition law enforcement. This section will explore the implications of the presumptive approach towards the three categories of conduct and its potential to affect the balance between effective competition enforcement and business predictability.

4.1 *Category one: Conduct for which it is necessary to demonstrate a capability to produce exclusionary effects*

[62] Para 323.
[63] Para 339.
64 European Commission's draft guidelines on exclusionary abuses of dominance: an attempt to settle the question of who needs to show what https://riskandcompliance.freshfields.com/post/102jfjm/european-commissions-draft-guidelines-on-exclusionary-abuses-of-dominance-an-at

According to the Draft Guidelines, the first category includes conduct for which it is necessary to demonstrate a capability to produce exclusionary effects in order to conclude that conduct is liable to be abusive.[65] For this category, the Commission considers all the circumstances test developed by the CJEU in its 2017 judgment in *Intel*.[66] These include: the strength of the firm's dominant position (where greater dominance suggests a higher likelihood of exclusionary effects); market conditions, such as economies of scale or network effects, which may hinder competitor entry or expansion; the role of competitors, particularly smaller but significant competitors who may exert competitive pressure; the scope and duration of the conduct, with larger or longer-lasting actions being more likely to exclude rivals; and the strategic importance of targeted customers or suppliers, which can affect market entry or expansion. Additionally, evidence of an exclusionary strategy or intent, such as internal documents showing plans to exclude rivals, and observable market developments - such as rising market share or competitor exit - can further indicate the potential for exclusionary effects.

At the same time, the Commission listed elements that are not necessary to show the capability to produce exclusionary effects.[67] Firstly, it is not required to demonstrate actual harm to competition or that the conduct has successfully excluded competitors. Similarly, it is unnecessary to establish the profitability of the conduct or to prove direct consumer harm, such as adverse impacts on prices, output, or innovation. The assessment also does not depend on whether affected competitors are as efficient as the dominant undertaking or whether the conduct is directly enabled by the dominant position. Finally, it is outlined that there is no *de minimis* threshold for exclusionary effects under Article 102 TFEU; any actual or potential exclusionary effect that deviates from competition on the merits is sufficient to constitute an infringement, regardless of its severity or whether a limited number of competitors remain viable in the market. While this position aligns with case law and provides clear guidance of the factors that the Commission will consider, the *de minimis* threshold requires further clarification.

In paragraph 75 of the Draft Guidelines, the Commission considers that '*there is no de minimis threshold for the purposes of determining whether conduct infringes Article 102 TFEU. Any actual or potential exclusionary effect of a conduct that departs from competition on the merits will constitute a further weakening of competition, and as such will be captured by Article 102 TFEU. Once an actual or potential effect has been established, there is no need to prove that it is of a serious or appreciable nature*' referring to the relevant case law. Given the factors outlined in the previous section, such as the importance of coverage and duration, the Commission should clarify the extent and circumstances in which these factors are significant in assessments and how they relate to the de minimis threshold. This is because the lack of de minimis threshold means that, even limited coverage could be deemed anti-competitive. Thus, it is essential for the Commission to provide clear guidance on when and why coverage and duration are crucial elements in evaluating exclusionary conduct.

Indeed, in the 2014 judgment in *Intel*, the GC considered the relevance of the coverage of the practices in consideration and concluded that in markets where the structure of competition is already weakened by the mere presence of a dominant company, even a small further weakening of the degree of competition may constitute an abuse of dominant position.[68] On the other hand, AG Wahl considered the size of the tied part of the market as

[65] Draft Guidelines, para 60 (a).
[66] Draft Guidelines, para 70.
[67] Draft Guidelines Section 3.3.4.
[68] Intel (GC (2014)), para. 116.

relevant, because the likelihood of anti-competitive effects increases with the size of the tied share of the market.[69] AG Wahl did not say that the 14% coverage may or may not be sufficient to bring about anti-competitive foreclosure but that the position of the GC was inconclusive.[70] This is in line with the view that the economic effects of a conduct need to be established, which require a particular degree of foreclosure to be shown.

A half-way position seems to have been adopted in the *Post Danmark II* judgement, where CJEU stated that a large proportion of customers covered by the rebate scheme '*does not, in itself, constitute evidence of abusive conduct by that undertaking*'[71] but that it might be considered as a '*useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect*.[72] Thus, the CJEU held that it was not appropriate to create a *de minimis* threshold above which a practice should be considered anti-competitive merely because competition was already weakened by the presence of the dominant company.[73]

However, the GC's position in *Intel* seems to be reasonable and is in line with the economic theories of exclusion and the explanation that in some markets characterized by high fixed costs and constant demand a rival needs to achieve minimum efficient scale (MES) in order to enter the market or to compete effectively with the dominant company if it is already in the market. In these markets, the dominant company might tie an insignificant part of the demand, which might nonetheless be large enough to prevent its rivals from achieving MES.[74] This position is reflected in Guidelines on Vertical Restraints, where it is considered, in the context of the assessment of single branding, that if a dominant undertaking is involved, '*even a modest tied market share may lead to significant anti-competitive effects*.'[75] In these circumstances, an intervention might be appropriate irrespective of the percentage of the foreclosed market.[76] As such, the GC reasoning regarding the (in)significance of the market coverage seems to be in line with the economic theory, which would seem to indicate that it may be more appropriate for a limited rather than a detailed economic analysis to be conducted for the evaluation of the possible anti-competitive effects of fidelity rebates in these circumstances.

The GC also refused to accept the duration of exclusivity rebates as short, based on the duration of individual agreements, accepting the Commission's position that the cumulation of multiple agreements exists, which can be contrasted with the AG Wahl's position. The GC concluded that the incentive for customers to purchase exclusively from Intel was based on the existence of a financial incentive, which in practice would prevent them from terminating the contract, regardless of the possibility of termination.[77] Arguably, the relevance

[69] Opinion of AG Wahl, para 140.
[70] Ibid, paras 141-46.
[71] *Post Danmark II*, para 44.
[72] *Post Danmark II*, para 46.
[73] *Post Danmark II*, paras 70-73. The position of the CJEU in Intel not to consider the second ground of Intel's appeal which dealt with the market coverage 'may be a signal that it still rejects, or is at least uncertain about, the possibility of a de minimis threshold under Article 102': see J. Venit, '*The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?*' (2017) 13(2) European Competition Journal 172, p.186.

[74] This position is based on the economic theory of raising rivals' costs, according to which small amount of foreclosure might create strategic barriers and, as such, be enough to marginalize the competitors of a dominant company by preventing them from reaching a minimum efficient scale. According to this economic theory, the degree of foreclosure and that intervention might be appropriate irrespective of the percentage of the foreclosed market: see Jacobson, 'Exclusive Dealing, "Foreclosure," and Consumer Harm' (2002) 70(2) Antitrust Law Journal 311.

[75] Communication from the Commission: COMMISSION NOTICE: Guidelines on vertical restraints 2022/C 248/01, C/2022/4238, OJ C 248, 30.6.2022, para 309.
[76] J Jacobson, '*Exclusive Dealing, "Foreclosure," and Consumer Harm'* (2002) 70(2) *Antitrust Law Journal* 311, 369.

[77] Intel (GC (2014), para. 113.

of the reference period had been acknowledged by the EU Courts, although the case law does not provide clear indications on how long is enough for an anti-competitive effect to be presumed.[78]

According to some empirical studies in the economic literature, the duration of the reference period (even though it is an essential part of any rebate system) cannot be endorsed as a part of the economic assessment of retroactive rebates and their potential foreclosure effect because the rebate percentage, the threshold and the amount already bought is sufficient for the conclusion in that respect.[79] Other empirical models have reported that looking only at the length of the contract is misleading; instead, it is important to assess 'to what extent a contract of a given length locks the parties into a relationship' due to the penalties that a customer has to incur in order to terminate a contract.[80]

These statements could be interpreted as suggesting that the reference period in itself is not a sufficient indicator to be taken into account; instead the possibility for termination of the agreement with a short notice period and without penalties, such as a termination of the contract or a requirement to return the rebates, would suggest that the practice is capable of harming competition.[81] From this perspective, the General Court's reasoning in its 2024 decision in Intel not to accept the duration of the contracts as short was based on the existence of a financial incentive, which, in practice, prevented customers from terminating the contract.[82] From this perspective, an evaluation of the reference period in itself seems to be redundant.

In any event, the Draft Guidelines emphasize that evaluating all relevant circumstances is essential to demonstrate a conduct's capability to produce exclusionary effects before concluding that it is abusive. This approach represents the AEC principle, which - as explained in section 3 above - aligns with the effects-based approach, according to which conduct would be unlawful only if its 'probable effect' is likely to substantially lessen competition in the relevant market, which requires an evaluation of a possible anti-competitive effect.

4.2 Category Two: Conduct that is presumed to lead to exclusionary effects/Conduct with Specific Legal Tests

According to the Draft Guidelines, the second category includes conduct presumed to lead to exclusionary effects, recognized as highly likely to restrict competition. This presumption applies to (i) exclusive supply or purchasing agreements, (ii) exclusivity-based rebates, (iii) predatory pricing, (iv) margin squeezes with negative spreads, and (v) certain tying practices.[83] Once the conduct is factually established, its exclusionary effect is presumed under applicable legal tests. The Draft Guidelines suggest this approach appropriate for practices with a high probability of being capable of harming competition. The Commission's approach implies that it will consider several factors like the firm's market power, the extent of market share affected by exclusivity obligations, specific terms and

[78] Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR I-346, EU:C:1983:313, para. 81; Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-407, EU:T:2003:250, para. 88.

[79] F. Maier-Rigaud, '*Switching Costs in Retroactive Rebates-What's Time Got to Do with it?*' (2005) 26(5) European Competition Law Review 272; G. Faella, '*The Antitrust Assessment of Loyalty Discounts and Rebates'* (2008) 4(2) Journal of Competition Law and Economics 375, p.405; See also Jacobson (n 75) p.352. According to Jacobson, in some of the recent US cases, 'the duration of the agreements had little to do with the real-world lack of any credible ability of the affected customers to switch to alternatives.'

[80] P. Aghion and P. Bolton '*Contracts as a Barrier to Entry'* (1987) 77 American Economic Review 388, 389.

[81] See Jacobson (n 76), p.352.

[82] Intel (GC (2014)), para. 113.

[83] Draft Guideline, para 80.

conditions of exclusivity, and any evidence of a strategy to exclude competitors in assessing the capability of conduct to produce exclusionary effects, regardless of whether the dominant firm proactively submits evidence to counter these effects. If the dominant firm does provide such evidence, however, the Commission is required to evaluate it as part of its broader assessment.

It is useful to thing about exclusive dealing/exclusivity-based rebates in this context, as these areas have historically generated the most ambiguity within case law.[84],[85] This approach is reasonable, for example, in cases when a company possesses significant market power; offering rebates on condition of exclusivity; rebates are retroactive; the product is 'must have', which puts the dominant company in a position of an unavoidable trading partner and separates the market into a contestable and non-contestable part, which means that competitors are not able to compete for the customers whole demand; there are economies of scale and barriers to entry. When all these conditions are met, the anti-competitive effect can be presumed with high probability, which means that the conduct is capable of strengthening and maintaining the dominant position.

The criticism that this approach ignores the possible pro-competitive effect leading to type I errors is diminished by the possibility for the dominant company to rebut the presumption of illegality if it is able to provide sufficient evidence that the conduct is not anti-competitive and creates efficiencies. The 2017 CJEU judgment in *Intel* made it clear that the presumption of illegality of fidelity rebates stands but also clarified that now it can be rebutted if the defendant provides supportive evidence that its conduct is not capable of restricting competition. In those cases, the Commission is required to evaluate all the circumstances in order to assess the possible existence of a strategy aiming to exclude an as efficient competitor, including a price-cost test as an element of the assessment, if the Commission or the defendant can substantiate that the rebates at issue are price-based conduct. For example, a dominant company should consider whether to conduct a price-cost test in the case of fidelity rebates, which contain exclusivity clauses, without mentioning supportive arguments in economic terms in order to explain what differentiates those rebates from an exclusive dealing (or single branding obligation). This is because a price-cost test can be a useful tool for the evaluation of possible anti-competitive effects if the price is the mechanism of exclusion in price-based conduct. If fidelity rebates contain a combination of discounts and other provisions leading to exclusivity, they should be evaluated under the law of exclusive dealing, in which case the existence of a strategy aiming to exclude an efficient competitor does not require a price-cost test.

However, given that dominant companies will presumably always present economic evidence asserting that the examined conduct is not anti-competitive, the application and consideration of the AEC price-cost test might become an inevitable element in all abuse of dominance cases. For that reason, to reduce enforcement costs and improve predictability, the Commission should specify circumstances where it will not accept such evidence.[86] This clarification is crucial, as in some cases the use of complex economic assessments, such as price-cost

[84] The Commission considered that 'a system of incentives consisting of the grant of a rebate or other advantages conditional on the customer or supplier purchasing or supplying exclusively from or to the dominant undertaking, even in the absence of formal contractual obligations as "exclusivity rebates"'. This analysis focuses solely on exclusive dealing and exclusivity-based rebates, as these areas have historically generated the most ambiguity within case law. The Commission referred specifically to the *Hofmann-La Roche, Intel I and Unilever* cases.

[85] Judgment of 13 February 1979, Hoffmann-La Roche v Commission, C-85/76, EU:C:1979:36, paragraph, 89; *Intel I*, para 137; *Unilever* para 46.

[86] See M. Marinova, *Rethinking the 'As-Efficient Competitor Test': Assessing the wider impact of the CJEU's judgment in Unilever Italia and its implications in shaping the European Commission's agenda to reform Article 102 TFE*U the section discussing the differences between incremental and retroactive rebates and suggested framework for their assessment depending on whether they can be categorized as pricing or non-pricing conduct.

analyses, may be inappropriate. When dominant companies present such assessments, the Commission is required to evaluate them, which runs counter to the principle of administrability by increasing enforcement time and costs.

4.3 Category Three: Naked restrictions

The Draft Guidelines categorize "naked restrictions" as conduct that has no economic interest for an undertaking beyond restricting competition – are deemed to fall outside the scope of competition on the merits and can be presumed to be capable of exclusionary effects. The naked exclusion has been defined in the academic literature as a conduct that '*has the sole or overwhelmingly predominant purpose of harming competition, has no conceivable redeeming virtue by way of economic efficiency…and is reasonably capable of causing competitive harm as the most egregiously anti-competitive conduct*.'[87]

From the definition, three elements of the test can be extracted: the dominant company's conduct must impair the competitive process, the conduct must not *prima facie* create efficiencies, and the conduct must be capable of causing consumer harm. This definition seems to align the concept of naked abuse with the 'by object' restriction of competition category.[88] It is useful to think about Art. 101 in this context. Some collusive agreements such as price-fixing, lack any cognisable efficiency justification and could be prohibited by object, whereas others can plausibly create efficiencies and, hence, require a further detailed analysis to determine whether the agreement is anti-competitive.[89] The idea behind the naked abuse test is that the same distinction can be drawn among different forms of exclusionary conduct.[90]

In some cases, the negative effect of a conduct can be presumed, as for example in naked exclusionary conduct in standard-setting process,[91] some tortious conduct[92] and some abuses of governmental process.[93] However, it looks that this approach aligns with recent judgments, such as *SEN*, where the CJEU held that practices solely aimed at eliminating competition to increase prices cannot be deemed competition on the merits.

It seems, there are good reasons for the implementation of the naked abuse test, as it is easy to administer and saves enforcement costs. Moreover, the existence of such a standard creates legal certainty, so dominant companies are able to predict with reasonable certainty whether their conduct might violate competition law provisions.[94] However, the test is appropriate only if it is possible to identify a conduct that is harmful without engaging in a thorough economic analysis. Still, the Commission introduces rebuttable presumptions for 'naked restrictions'. According to some prominent scholars, this test is appropriate where:

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[87] Renato Nazzini, *The Foundations of European Union Competition Law* (OUP 2011) 59.
[88] Anders Jessen, *Exclusionary Abuse after the Post Denmark I Case: The Role of the Effects-Based Approach under Article 102 TFEU* (Wolters Kluwer 2017) Ch 4. See also Pablo Ibanes Colomo, *On the Article 102 TFEU Guidelines (II): 'naked restrictions' (or 'by object' abuses)* who considers that the term "by object" abuses is preferable to "naked restrictions" as it aligns with consistent Court terminology since *Generics* and mirrors the scope of "by object" infringements under Article 101(1) TFEU, making case law clearer and more navigable, < https://chillingcompetition.com/2024/11/19/on-the-article-102-tfeu-guidelines-ii-naked-restrictions-or-by-object-abuses/> accessed 1 December 2024.
[89] Susan Creighton and others, '*Cheap Exclusion'* (2005) 72(3) Antitrust Law Journal 975, 977.
[90] Ibid.
[91] Ibid, 987-89 (This could be an opportunistic behaviour in a private standard-setting process where the dominant company adopts a standard to confer its market power)
[92] Ibid, 989-90 (This could be the case when the dominant company is engaged in deception, as for example disparaging the quality of rival's products. The deceptive conduct can immediately damage a competitor ability to operate. An extreme example could be when a dominant company is engaged in destroying or damaging rival's property to hamper them from making or distributing their products); See also Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253, 281.
[93] Creighton and others (n 80), 979 (It means that the dominant company is using the rules of government against its competitors, such as obtaining a patent by perpetrating fraud on the Patent Office. It could be the case of engaging in abusive litigation when the lawsuit could very costly for the rival than for the dominant company with the aim of exclusion).
[94] Whish, '*Intel v Commission: Keep Calm and Carry on*!' 2.

[e]xperience and logic suggests that the benefit/harm resulting from a practice is so clear and unambiguous that there is no point in wasting court or regulatory resources in investigating its effects; and (2) the risk of false positives or false negatives is small.[95]

As outlined in the introduction, this approach has been criticised, because the prohibition of a conduct without evaluating its economic effect may give rise to a high risk of over enforcement (false positives). As a consequence, companies may not engage in pro-competitive, efficiency-oriented activities for the benefit of consumers, '*for fear of becoming embroiled in costly, lengthy litigation*.'[96] However, even when conduct is presumed abusive, the dominant firm may still present evidence showing that the conduct generates efficiencies beneficial to consumers, thereby justifying its behavior. The Guidelines specify that this presumption can only be rebutted in "very exceptional circumstances" but do not provide concrete examples of such cases. Additionally, they state that it is "highly unlikely" that such conduct could be objectively justified. Despite these strict limitations, this type of presumed abuse does not amount to a 'per se' violation of Article 102.

The same approach is adopted under Art. 101, where an agreement falling within the scope of the provision might be exempted by the prohibition if the defendant provides supportive evidence that its conduct is not capable of restricting competition. Arguably, the possibility for the dominant company to rebut the presumption of illegality if the defendant provides supportive evidence that its conduct is not capable of restricting competition was confirmed by the CJEU in *Intel*.[97]

It should be noted that while US courts have adopted 'per se' liability rules as regards some conduct which cannot be justified, they also developed the so-called 'quick look' approach applicable in cases, where a conduct may be considered as anti-competitive without applying a full rule of reason analysis.[98] The 'quick look' test was considered appropriate when a monopolist creates economic inducements, related to its monopoly/market position, making its customers buy the monopolist's products exclusively.[99]

Overall, this approach streamlines enforcement and enhances legal certainty. Although critics caution that the lack of economic analysis could lead to over-enforcement, the Guidelines consider the possibility of rebuttal in very exceptional circumstances, allowing justifications in rare cases where consumer benefits can be demonstrated.

V. RECOMMENDATIONS AND CONCLUSION

This paper highlights the distinction between the AEC Principle as a benchmark for assessing anticompetitive foreclosure and the practical evidentiary tools, such as price-cost tests, used in its application. The analysis demonstrates that the European Courts have evolved to endorse the AEC Principle while recognizing that evidentiary methods must adapt to the nature of the conduct under scrutiny. The analysis reveals that the courts view the AEC principle and the price-cost test as distinct concepts, with the broader AEC principle serving as a

[95] Robert O'Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU* (2th edn, Hart Publishing 2013) 225.
[96] Hewitt Pate, '*Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts' Testimony before the Antitrust Modernization Commission* (September 29, 2005) 1.
[97] GC judgement, para 139.
[98] Maurice Stucke, '*Does the Rule of Reason Violate the Rule of Law?*'(2009) 42 University of California Davis Law Review 1375; Herbert Hovenkamp, '*The Rule of Reason'* (2017) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885916> accessed 15 January 2018.
[99] Jonathan Lave, '*The Law And Economics of de facto Exclusive Dealing'* (2005) 50(1) The Antitrust Bulletin 143.

flexible, effects-based framework for assessing aal forms exclusionary conduct. Much of the criticism directed at the Draft Guidelines arises from a misunderstanding of this distinction. To address these concerns and enhance legal certainty, the European Commission should reaffirm its commitment to anticompetitive foreclosure as the central focus of competition law. By explicitly acknowledging the AEC Principle as the guiding framework, while allowing flexibility in evidentiary methods, the Commission can align enforcement practices with both economic theory and the principles of fairness and predictability.

The general idea is that competition law should only protect competitors who are at least no less efficient than the dominant company and that this will guarantee an effective competitive process to the benefit of final consumers. This is the AEC principle that is now the establishes standard to Art. 102. This foundational idea is rooted in the belief that competition among efficient companies inherently leads to increased efficiency and greater consumer welfare. The rationale behind this idea is that conduct that excludes less efficient rivals is a consequence of effective competition, the so-called competition 'on the merits'; in these circumstances, even if some competitors are excluded from the market, effective competition is not eliminated. In this sense the AEC principle encapsulates the idea that competition policy should protect competition and not competitors. Consequently, the test is consistent with the main objective of the EU competition law - maximizing consumer welfare.[100]

The AEC principle is abstract and flexible, encompassing situations where competitors may impose competitive constraints on the dominant company even if they are not strictly as efficient. This includes competitors who might be less efficient or not yet fully efficient. This is particularly relevant in certain industries characterized by high fixed costs, particularly in research and development, and very low variable costs.[101] Likewise, within markets exhibiting economies of scale and scope, where the dominant company's average cost decreases with increased output (economies of scale) or the joint production of two or more products (economies of scope), commentators argue that the dominant company's cost structure will inherently differ from those of its competitors due to these economies.[102] In such scenarios, when a new competitor enters the market, at the beginning their costs will be higher than the dominant company's because the rival has not yet reached its MES.[103] During this early stage, the new entrant may operate less efficiently than the incumbent. However, this dynamic could shift if the entrant successfully establishes itself in the market, eventually attaining economies of scale and scope comparable to those of the dominant company.[104] Nonetheless, if the competitor is currently less efficient, the dominant company may set prices above cost but a competitor would still not be able to match this price because of the absence for it of economies of scope and scale, which does not necessarily imply that the less efficient entrant cannot impose competitive constraints in the market.[105] On the contrary, even the entry of a less

[100] Explicitly mentioned in *SEN*, para 46.
[101] S. Gates, '*Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts'* (2013) 79(1) Antitrust Law Journal 99.

[102] B. Sher, '*Leveraging Non-Contestability: Exclusive Dealing and Rebates under the Commission's Article 82 Guidance'* (2009) 2(1) Antitrust Chronicle 1, p.9.

[103] R. O'Donoghue, '*Verbalizing a General Test for Exclusionary Conduct under Article 82 EC*'. in C-D. Ehlermann and Isabella Atanasiu (eds) European Competition Law Annual 2003: *What is Abuse of Dominant Position* (Oxford, Bloomsbury Publishing. 2006) 327, p.339.

[104] A. Renda and J. Temple Lang, 'T*reatment of Exclusionary Abuses under Article 82 of the EC Treaty: Comments on the European Commission's Guidance Paper*' (2009) Centre for European Policy Studies 31.

[105] N. Economides, '*Tying, Bundling and Loyalty/Requirement Rebates'*, in E. Elhauge (ed.) Research Handbook on the Economics of Antitrust Law (Cheltenham, Edward Elgar Publishing, 2010) 33; P. Rey, 'Abuses of Dominant Position and Monopolization: An Economic Perspective'. in A. Moreira Mateus and T. Coelho Moreira (eds) Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America (Cheltenham, Edward Elgar Publishing, 2010) 189, p.191.

efficient rival can stimulate competition and can decrease prices if an incumbent was charging monopoly prices before the entry.[106] The dominant company's reaction to the new entry could be to reduce its price in order to deter the entry, which means that consumers will benefit from the lower prices. In this sense, the entry of a less efficient competitor may impose a competitive constraint on the dominant company and enhance consumer welfare.[107] The same observations may apply to markets where the dominant company has first mover advantages, benefits from a statutory monopoly or is a state-owned or privileged enterprise.[108] In those markets, the only competition that dominant firms are likely to face is competition from less efficient rivals.[109] Indeed, in its 2008 Guidance Paper the Commission described some circumstances in which a less efficient rival can stimulate competition, and explained that this should be taken into account.[110] Therefore, a competitor should be considered efficient if it can effectively impose a competitive constraint on the dominant company.[111] This concept is outlined in paragraph 70(c) of the Draft Guidelines, which includes the requirement for the Commission to demonstrate that the conduct is "at least" capable of producing exclusionary effects. However, clarification is needed to indicate that exclusion is anti-competitive only if it forecloses a competitor who can impose an efficient competitive constraint on the dominant company, as only in this case will consumers be harmed.

By incorporating this broader notion, the AEC principle helps to distinguish between genuine competition on the merits - where actions are driven by efficiency - and conduct that harm competition by unfairly excluding rivals, regardless of their efficiency level. This interpretation reflects the current case law under Article 102 as the AEC principle has been consistently reaffirmed by the EU Courts as indicated above.[112] These rulings emphasize that the primary concern under Article 102 is the exclusion of equally efficient competitors, ensuring that dominant firms compete on the merits without distorting effective competition.

However, in academic discussions, there is often a conflation between the AEC principle and the price-cost test, leading to misunderstandings about their application and scope. The AEC principle, as underscored by case law, serves as a broad standard in assessing whether a dominant firm's conduct unduly excludes equally efficient competitors. However, it is not synonymous with a price-cost test. For pricing conduct, such as predatory pricing or non-exclusivity rebates, the AEC principle supports using price-cost tests (e.g., Long Run Average Incremental Cost or Average Total Cost) to determine legality, thereby creating a "safe harbor" for prices above these thresholds. Yet, for non-pricing behaviors like exclusive dealing or tying, the principle does not translate directly into an operational test. In these cases, the principle serves more as an indicator within an effects-based

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[106] I. Lianos, '*The Price/Non Price Exclusionary Abuses Dichotomy: A Critical Appraisal'* (2009) No.2 Concurrence Review, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398943 [accessed 4 April 2024].

[107] S. Salop, '*Avoiding Error in the Antitrust Analysis of Unilateral Refusals to Deal'* (21 September 2005), available at: https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Salop_Statement_Revised%209-21.pdf; S. Salop, '*Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard'* (2010) 73 Antitrust L.J. 311, pp, 328-329; J. Temple Lang and R. O'Donoghue, *'Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC'* (2002) 26 Fordham International Law Journal 83; H. Hovenkamp, '*The Antitrust Standard for Unlawful Exclusionary Conduc*t' (2008), available at https://scholarship.law.upenn.edu/faculty_scholarship/1777, pp.9, 14.

[108] John Temple Lang, '*The Requirements for a Commission Notice on the Concept of Abuse under Article 82 EC'* CEPS Special Reports' (2008) CEPS Special Report, p.28, available at https://www.ceps.eu/ceps-publications/requirements-commission-notice-concept-abuse-under-article-82-ec [accessed 3 April 2024].

[109] M. Lao, '*Defining Exclusionary Conduct under Section 2: The Case for Non-universal Standards'* in Barry Hawk (ed) International Antitrust Law & Policy: Annual Proceedings of the Fordham Competition Law Institute (New York, Juris Publishing, 2006) 433, p.446.

[110] 2008 Guidance Paper, para. 24. The CJEU shared a similar approach in Post Danmark II, paras 59-60.

[111] For a similar interpretation see Jorge Padilla reply to the Commission's public consultation, WHAT IS AN EXCLUSIONARY ABUSE?.

[112] *Post Danmark I, Intel I);Qualcomm.*

analysis rather than a prescriptive metric. This suggests that critics may have misinterpreted the AEC principle by narrowly equating it with the price-cost test, overlooking the flexibility embedded within the case law to assess dominance based on context-specific factors rather than solely on pricing metrics.

Based on that, it is recommended that the Commission should explicitly incorporate the AEC principle, either as a core principle or as a conceptual tool to assess whether conduct by a dominant firm constitutes abuse. Even if the Commission opts for a broader "competition on the merits" framework, it is essential to provide clarity on how the AEC principle will continue to be relevant and applied in future enforcement actions, ensuring alignment with existing case law and maintaining legal certainty. However, those who criticize the Draft Guidelines for downplaying the role of the AEC test especially outside the context of pricing abuses like margin squeezes and predatory pricing considered the AEC test as a price-cost test and not the principle. For that reason, the Commission should clearly distinguish the AEC principle from the AEC price-cost test that is only one type of evidence that can be used in pricing practices.