



UNITED STATES COUNCIL FOR
INTERNATIONAL BUSINESS

Joint Industry and Trade Associations Statement on the Draft Guidelines for the Application of Article 102 TFEU

4 February 2025 -- As representatives of European and international industry and trade associations, we welcome the European Commission's initiative to provide guidance on the application of Article 102 TFEU to exclusionary abuses ('Draft Guidelines').

If designed carefully, this initiative has the potential to enhance legal certainty and predictability for businesses and Member States. A clear counselling framework to help firms and their advisers assess compliance has significant benefits, as demonstrated by the 2009 Enforcement Priorities Guidance, which provided a coherent set of principles helping firms make swift and effective compliance decisions.

We are concerned that the Draft Guidelines, in their current form, risk reducing legal certainty and predictability by granting **overly-broad discretion** to the Commission, and **departing from established case law principles**. This could ultimately hinder innovation, investment, and competitiveness in the EU.

We are committed to supporting the European Commission in its efforts to clarify the application of Article 102 TFEU. We set out our specific concerns below before offering several constructive suggestions to improve the Draft Guidelines.

A Concerning shift away from economic principles and legal certainty

The Draft Guidelines appear to move away **from an effects-based economic approach as endorsed by the Union courts, towards a more formalistic framework** that would increase the risk of false positives and create greater uncertainty for companies.

Specifically:

- **Competition on the merits:** This notion lacks a clear definition (in the Draft Guidelines and in the case law), and creates considerable uncertainty as a standalone first step test. Unless "competition on the merits" is directly tied to the notion of anti-competitive foreclosure capable of harming consumers, it effectively departs from established case law and lowers the standard for establishing exclusionary abuses. This would decrease legal certainty, which is likely to dampen pro-competitive conduct in and, in the realm of enforcement, may lead to **increased litigation**, rather than more competition and innovation in the markets.

- **As-efficient-competitor (AEC) test:** The recent *Intel II* judgment reaffirms that in order to characterise conduct as abusive, "it is necessary, as a rule, to demonstrate... that conduct has the actual or potential effect of restricting ... competition by excluding equally efficient competing undertakings" (para 176). A related price-cost test can be helpful in assessing certain pricing conduct. Beyond pricing conduct, the guidance should explicitly recognise that the foreclosure of less efficient rivals is often the consequence of competition on the merits and that any enforcement aimed at protecting less efficient rivals should be exceptional and based on a clearly articulated theory of harm.
- **Presumptions of harm:** The draft guidelines introduce presumptions that certain conduct inherently produces exclusionary effects, contrary to case law requiring an evidence-based effects analysis in all cases outside the narrow scope of "naked" restrictions. As a result, pro-competitive conduct, that benefits consumers, risks being classified as anti-competitive without proper justification.
- **Burden of proof:** The consequence of the proposed presumptions is the **reversal of the burden of proof** across a broad range of commercial conduct, imposing a high burden on businesses to rebut presumptions or economically justify their conduct, even in ambiguous cases. This **contradicts established case law**, risks chilling legitimate commercial activities, and **reduces certainty and predictability**. The absence of practical and specific rules also increases the likelihood of **protracted litigation and enforcement delays**.
- **Dominance and market definition:** The Draft Guidelines appear to diminish the role of market definition from being a prerequisite to assessing dominance to being "in general necessary". The Commission's recently revised notice on market definition should remain the reference framework for establishing the relevant market on which any finding of dominance is based.

Adverse impact on innovation and growth

Decisions on many of the pricing and go-to-market practices implicated by the Draft Guidelines are fundamental parts of daily commercial life for businesses. An overly formalistic approach would deter efficient and procompetitive business strategies, widening the EU's **competitiveness gap** with global markets. Clear and practical rules grounded in economic evidence are critical to fostering an **environment conducive to innovation and growth**.

Recommendations for improvement

To align with the stated objectives of enhancing legal certainty and efficiency, and to better maintain international convergence, we recommend that the European Commission:

- Maintain a robust, **effects-based** economic approach as the guiding principle, as reflected in the 2009 Guidance on the Commission's enforcement priorities
- Clarify key concepts by tying "competition on the merits" to "anti-competitive foreclosure" and consumer harm to reflect case law and economic analysis
- Reaffirm the AEC standard (with a price-cost test where relevant) as a central tool for assessing competitive effects
- Remove overly-broad presumptions of harm and provide **practical guidance and safe harbours** and, more broadly, ensure a clear evidentiary framework for assessing exclusionary conduct
- Eliminate the overly-broad discretion for the Commission to refuse efficiencies arguments

The European Commission's 2009 Guidance Paper provided a more coherent and predictable framework based on well-established principles, fostering compliance without hindering enforcement. Any update should build on these foundations to ensure clear, cross-sectoral rules that support innovation, growth, and competitiveness.

Conclusion

We invite the European Commission to revise the Draft Guidelines in line with these recommendations. A balanced approach—anchored in case law, economic analysis, and practical guidance—is key to providing legal certainty and to serving the goals of innovation, investment, and robust competition enforcement.

We remain committed to working constructively with the Commission and stakeholders to develop a just framework that promotes legal certainty, competitiveness, and growth in the EU economy.

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Computer & Communications Industry Association (CCIA Europe)

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