

The Misunderstood AEC Principle: Conceptual Clarity behind a Contested Label

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AEC principle v AEC test

- The focus of this presentation is to clarify the distinction between the AEC test and the AEC principle and evaluate whether the Draft Guidelines correctly codify it.
- One key concern raised regarding the Draft Guidelines is their diminished focus on the AEC test, particularly in evaluating whether a dominant company's conduct excludes equally efficient competitors.
- Critics argue this shift diverges from the effects-based analysis established in case law.
- At the same time, confusion persists regarding the so-called AEC principle - a concept used in court by defendants to argue that conduct is only abusive if it excludes a hypothetical, equally efficient competitor.
- According to some lawyers, however, the so-called "AEC principle" never existed. They argue that it was invented by improperly combining two distinct doctrines: the AEC test and the objective of Article 102 to protect competition rather than competitors.

What is the AEC Principle? Conceptual Distinction

- The AEC principle refers to the broader benchmark that Article 102 protects the competitive structure, not individual competitors.
- The central concern is whether the conduct is capable of producing exclusionary effects that distort effective competition.
- Where a competitor is excluded or marginalized, the concern is not whether the competitors are as efficient, but whether the exclusion results in a loss of competitive pressure more broadly.
- Even less efficient rivals (in terms of cost structure) may still constrain a dominant firm, particularly in industries with high fixed costs, economies of scale, or first-mover advantages.
- The principle recognizes that only a competitor that can impose competitive constraints on the dominant firm poses a legitimate competitive threat, even if they are not strictly as efficient, i.e., the same cost structure as the dominant firm.

What is the AEC Test?

- The AEC test, in contrast, is a price-cost analysis that compares a dominant firm's price and costs to determine if a hypothetical rival could compete under the same conditions.
- Endorsed by courts in price-related abuse cases such as *TeliaSonera*, *Deutsche Telekom*, and *Post Danmark I*. Even when applied, the AEC test forms only one element in a broader effects-based analysis.
- **Do the Draft Guidelines correctly codify the AEC test regarding price-based abuses? The answer is yes**
- However, its application is not legally required in some cases. The test is described as optional (*Unilever*), one tool among others (*Post Danmark II*), and inappropriate for non-pricing conduct (*Google Shopping*).
- Passing the test does not preclude a finding of anticompetitive effects - it must be weighed within the full analysis of all the factors.

Do the Draft Guidelines correctly codify the AEC principle and test regarding Exclusive dealing?

- In exclusive dealing cases, the Commission relies on a rebuttable presumption of harm.
- Relevant factors include dominance, coverage, duration, and potential exclusionary strategies (Draft Guidelines, para. 83; see also Intel, para. 139).
- The reference to an as-efficient competitor has been removed, indicating that efficiency does not need to be assessed.
- Draft Guidelines (para 73) confirm that showing affected competitors are as efficient as the dominant firm is not required.
- Clarification is still needed: the price-cost test is not applicable in these cases and should be stated more explicitly.

Do the Draft Guidelines correctly codify the AEC principle and test regarding Conditional Rebates?

- The classification of conditional rebates remains complex.
- If the rebate is incremental, the price-cost test may apply.
- For retroactive rebates, the Commission proposes a modified test that evaluates whether competitors can match loyalty discounts on contestable demand.
- However, defining contestable demand varies across markets and customers, making the test difficult to apply, leading to unpredictability.
- It does not meet the requirements of administrability and legal certainty, and therefore, its use should be reconsidered.
- The modified price-cost test is not a decisive factor in assessing conditional rebates (*Intel II*).

Operational Role of the AEC Principle

- Yes, the AEC principle underlines that Article 102 is about protecting the competitive structure and ensuring that effective rivals are not excluded, even when those rivals are not efficient in terms of cost structure but effectively impose competitive constraints on the dominant company.
- It supports the effects-based analysis.
- It applies across all forms of abuse, even when a price-cost test is not suitable or used.
- A distinction exists between the AEC principle that serves as a standard of proof for the Commission and as a standard for a successful rebuttal of a presumption regarding a specific behavior. The benchmark applied is the same.

What is the role of the AEC test after *Intel II*?

General Court 2014 Judgment

- Exclusivity rebates are inherently capable of restricting competition.
- The AEC test is unnecessary in this context.
- Distinguished between price and non-price abuses;

CJEU 2017 Judgment

- If a defendant provides AEC-based evidence, the Commission must assess all relevant circumstances (Paragraph 139), including a strategy to exclude a competitor as efficient as the dominant company, but it did not mention whether the price-cost test, as a specific tool should be applied.
- Did not rank the factors in paragraph 139, which suggests that their importance may vary by case
- Remitted case on procedural grounds.

General Court 2022 Judgment

- Annulled Commission decision due to failure to assess Intel's AEC arguments.
- Reviewed AEC test in detail but didn't clarify whether it was appropriate in non-price contexts.

CJEU 2024 Judgment

- Reaffirmed *Intel I* principles: only exclusion of an equally efficient competitor is abusive.
- Stated AEC test must be applied to assess capability of foreclosure **as a general rule.**
- But also noted AEC is only one of several possible methods.
- Raises contradiction: general rule or optional tool (principle v test)?
- Concerns: The test is hypothetical and may indicate either the capability or the lack of ability to foreclose as an efficient competitor; the result is not reflective of actual market dynamics. Broader context and market realities should guide assessment.
- This is what the Commission codified in the Draft Guidelines, albeit only in a footnote, that even if a hypothetical as-efficient competitor passes the price-cost test, it does not prove the conduct is non-exclusionary.

The role of the AEC test after *Intel II*

- The real takeaway - the result of a price-cost test, whether positive or negative, is not a decisive factor. What matters is the broader analysis of how the conduct affects the competitive structure.
- This raises questions about the role of the AEC test in the overall assessment.
- If the test does not add meaningful value to the analysis or if it contradicts findings from the examination of all circumstances, its utility becomes questionable.
- Introduces concerns about administrative burdens and costs.