

EU exclusionary abuse of dominance and beyond

EU Competition Law Briefing

Agenda



Story of EU antitrust law on exclusionary abuse



Overview of the 2024 draft guidelines



Relevance of AEC test

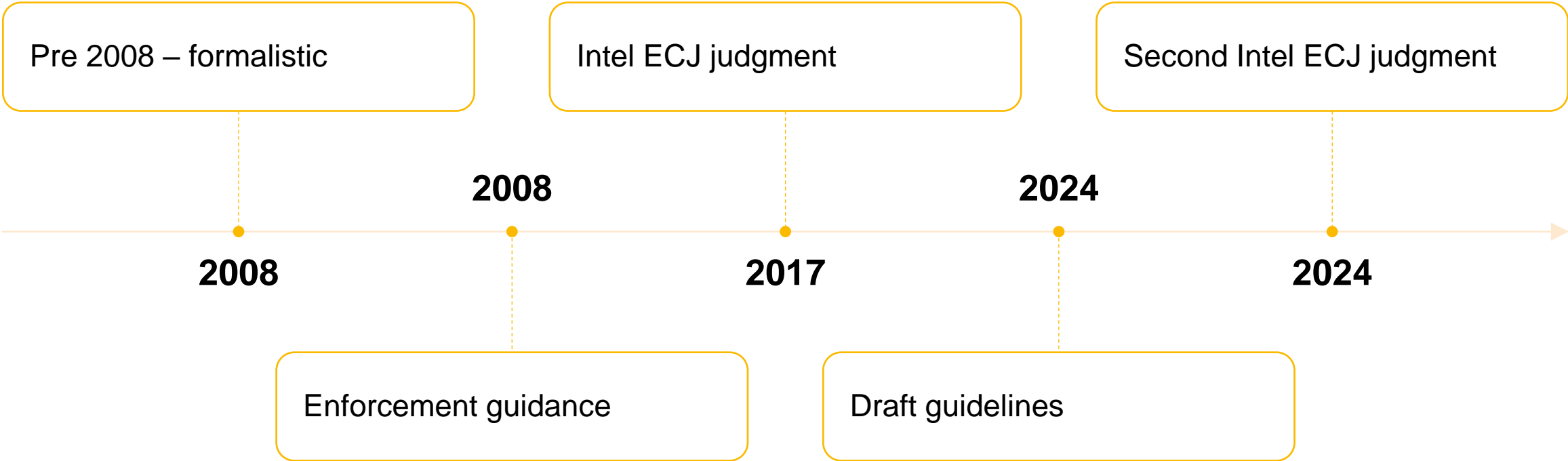


“Hiving off” of exclusive rebates within the guidelines

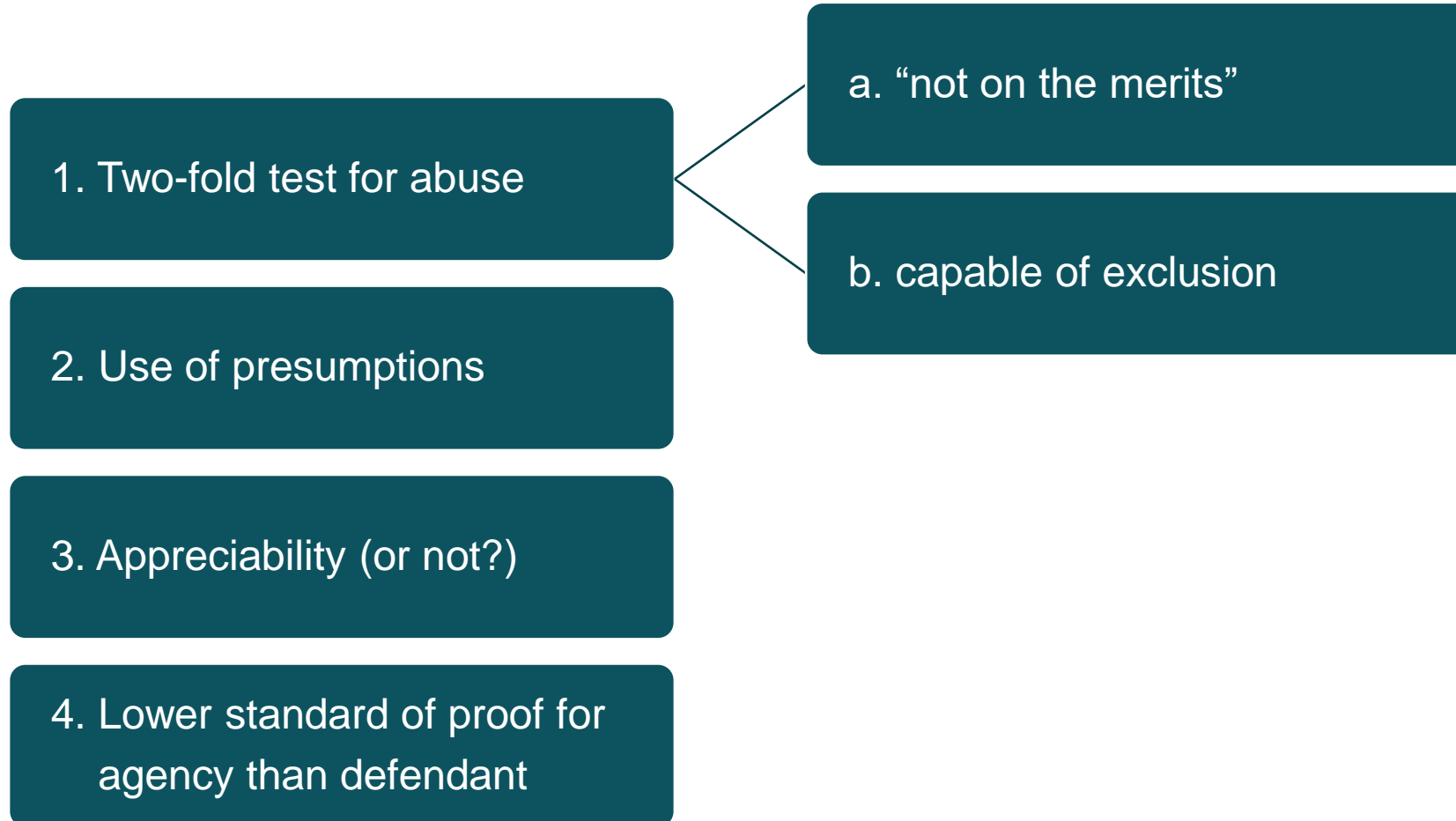


Focus: non-exclusionary abuse

Story of EU antitrust law on exclusionary abuse



Overview of the 2024 draft guidelines



Overview of the 2024 draft guidelines

| | Type of conduct | Does it amount to competition on the merits? | Presumption of exclusionary effects | Need to demonstrate exclusionary effects |
|---------------------|---|--|-------------------------------------|--|
| Specific legal test | Naked restrictions | No | ✓✓ | |
| | Exclusive dealing (including exclusivity rebates) | No | ✓ | |
| | Predatory pricing | No | ✓ | |
| | Classic tying (Hilti) | No | ✓ | |
| | Other tying (MSFT) | No | | ✓ |
| | Margin squeeze (negative spread) | No | ✓ | |
| | Margin squeeze (positive spread) | No | | ✓ |
| No specific test | Refusal to deal | No | | ✓ |
| | Other access restrictions | To be assessed | | ✓ |
| | Conditional rebates (different from exclusivity) | To be assessed | | ✓ |
| | Self-preferencing | To be assessed | | ✓ |

Relevance of AEC test

1. As-efficient competitor (**AEC**): hypothetical, equally efficient

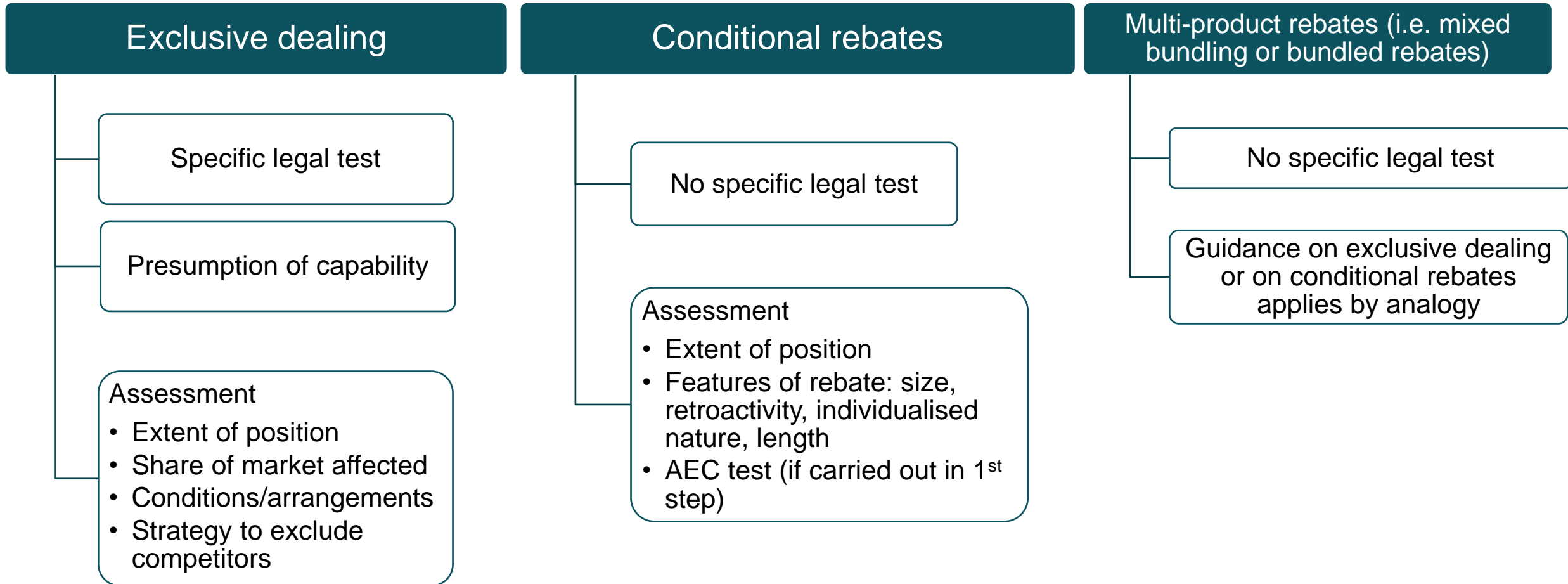
2. Discrepancy over relevance of the AEC test

a. Case law: Relevant to both limbs of test

b. Draft guidelines: not necessary to demonstrate capability

3. Difficulties in implementation (contestability)

“Hiving off” of exclusive rebates within the guidelines



Focus: non-exclusionary abuse

- **EU COM against Mondelēz** - Fine of **EUR 337.5m**
- Allegation: **Territorial supply constraints**
- **Anticompetitive agreements/concerted practices** (Article 101)
 - Limiting the territories or customers to which wholesale customers could resell Mondelēz' products.
 - Preventing distributors active in certain Member States from replying to sale requests from customers located in other Member States
- **Abuse of dominant position** (Article 102):
 - **Refusing to supply a broker in Germany** to prevent the resale of chocolate tablet products in the territories of Austria, Belgium, Bulgaria and Romania where prices were higher.
 - **Ceasing the supply of chocolate tablet products in the Netherlands (delisting)** to prevent them from being imported into Belgium, where prices were higher.
 - Fines (for this part): **EUR 26.6m**



Focus: non-exclusionary abuse

- **Criteria to establish abuse in case of stop of supplies to exporters**

- Existing customer
- Requests were "ordinary" (proportionality test)
- Motivation to prevent exports (?)

- **Criteria to establish abuse in case of ceasing supplies of products to countries (delisting)**

- Existing business
- No extraordinary orders
- Motivation to prevent exports (?)

- **Impact on other practises?**

- E.g.: Requests from customer in country A to supplier's subsidiary in country B.
Referral from customer to supplier's subsidiary in country A.
 - No existing relation
 - Extraordinary orders
 - Motivation to prevent cannibalisation

- **Watch-out**

- Change of language on packaging (EU COM AT.40134 – 13.05.19 – AB InBev)

– *... an undertaking occupying a dominant position on the relevant market ... which, in order to put a stop to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet ordinary orders from those wholesalers, is abusing its dominant position.*

– *It is ... to ascertain whether the orders are **ordinary** in the light of both the **size of those orders in relation to the requirements of the market in the first Member State** and **the previous business relations** between that undertaking and the wholesalers concerned.*

– (ECJ C-468/06 – 16.09.2008 - Sot. Lelos vs GSK)



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