FROM GUIDANCE TO GUIDELINES ON EXCLUSIONARY ABUSES: IMPLICATIONS FOR THE ENFORCEMENT OF ARTICLE 102 TFEU

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Abstract: *This article examines the final text of the European Commission's Guidelines on the application of Article 102 TFEU to exclusionary abuses and assesses their significance for the evolution of EU abuse of dominance law. It analyses the extent to which the Guidelines reflect existing case law, recognise and endorse the effects-based approach, and clarify the role of economic evidence, rebuttable presumptions, and the as-efficient competitor principle. The article concludes that the Guidelines represent a significant step in the evolution of Article 102 TFEU, successfully balancing legal certainty and effective competition enforcement while leaving some questions open for future clarification.*

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Key-Words: Article 102 TFEU; Abuse of Dominance; Exclusionary Abuses; European Commission Guidelines; Antitrust Enforcement; Effects-based Approach; Consumer Welfare; Rebuttable Presumptions; As-efficient Competitor Principle; As-efficient Competitor Test.

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1. INTRODUCTION

On 27 March 2023, the European Commission ("Commission") announced its intention to undertake a major policy initiative concerning the application of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") in relation to abusive conduct by dominant undertakings.[1] This development is unsurprising, given the significant period that has elapsed since the adoption of the Guidance on enforcement priorities in applying Article 102 TFEU to exclusionary abuses in 2008 ("Guidance Paper" or simply "Guidance")[2], as well as the substantial evolution of the case law of the EU Courts.[3]

The main focus of the so-called "102 Package" has been the adoption of guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings ("Guidelines on exclusionary abuses" or simply "Guidelines"), which have been adopted on 3 September 2026.[4] The Guidelines are based on Union Courts' case law and the Commission's experience on key issues relating to exclusionary abuses by dominant undertakings under Article 102 TFEU[5], which is one of the few core areas of EU competition law for which no comprehensive guidelines previously existed.

Now that the Guidelines have been adopted, it is possible to assess the policy choices reflected in their final text. In particular, the prominence accorded to the notion of "competition on the merits", the two-pronged test for establishing an abuse, the role assigned to rebuttable presumptions, as well as the clarifications provided regarding the relevance of the "as-efficient competitor principle" ("AEC principle") and the application of the

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1 In the press release issued on 27 March 2023, the Commission refers to the "102 Package" as "[…] *the first major policy initiative in the area of abuse of dominance rules since 2008*". See: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_23_1911/IP_23_1911_EN.pdf.

2 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings.

3 For the purposes of this article, the terms "EU Courts" and "Union Courts" collectively designate the Court of Justice and the General Court, constituting the Court of Justice of the European Union pursuant to Article 19(1) of the Treaty on European Union ("TEU").

4 Communication from the Commission – Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings.

5 European Commission, Application of Article 102 TFEU, Competition Policy website: "*The Guidelines are based on the EU Courts' case law and the Commission's experience and practice on various key issues concerning exclusionary abuses by dominant operators*". See: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en.

price-cost test, commonly referred to as the "as-efficient competitor test" ("AEC test").

Against this background, the present article examines the implications of the Guidelines on exclusionary abuses for the enforcement of Article 102 TFEU. In particular, it evaluates how the Commission's attempt to systemise the principles emerging from judicial and administrative practice may reshape the analytical framework employed in the enforcement of said provision, including the role of effects-based analysis, the treatment of presumptions and evidentiary standards, and the interaction between legal form and economic assessment.

Furthermore, it considers whether the Guidelines are expected to consolidate a more structured and predictable enforcement practice, or instead introduce a degree of flexibility in the Commission's discretion. By situating the new instrument within the broader trajectory of Article 102 TFEU enforcement since the 2008 Guidance, the article aims to evaluate its potential to enhance legal certainty while maintaining the effectiveness of competition law intervention against exclusionary conduct.

Following this introduction (section 1), the article examines the key concepts, scope, and objectives underlying the enforcement of Article 102 TFEU (section 2), traces the evolution from the Guidance Paper to the Guidelines on exclusionary abuses (section 3), analyses the implications of the Guidelines for enforcement practice (section 4), and concludes by summarising the main findings (section 5).

2. THE ENFORCEMENT OF ARTICLE 102 TFEU: CONCEPTS, SCOPE AND OBJECTIVES

Article 102 TFEU prohibits undertakings from abusing their dominant position in any given market in a manner that may harm consumer welfare.[6] This includes practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition.[7]

6 Among others, Case C-377/20, Servizio Elettrico Nazionale and Others, EU:C:2022:379, §§44 and 46.

7 Among others, Case 6/72, *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22, §26; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §24; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §44.

A dominant position refers to a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition from being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers.[8]

The mere holding of a dominant position is not prohibited under Article 102 TFEU; rather, it is the abuse of that position that is sanctioned.[9] Dominant undertakings may infringe Article 102 TFEU where they hinder, through recourse to means or resources different from those governing normal competition, the maintenance of the degree of competition existing in a market or the growth of that competition.[10]

In this regard, the Court of Justice has consistently held that Article 102 TFEU places a "special responsibility" on dominant undertakings not to impair genuine and undistorted competition in the internal market.[11]

Although the wording of Article 102 TFEU has remained unchanged since the Treaties of Rome (1957), the Commission's approach to its enforcement has evolved significantly over time. That approach has been endorsed in many instances by the case law of the Union Courts – both in the context of appeals against Commission decisions[12] and preliminary rulings requested by national courts[13] – which remains central to shaping the interpretation and application of this provision.

Most abuse of dominance cases concern conduct capable of producing exclusionary effects on actual or potential competitors, such as predatory pricing, refusal to deal, or tying and bundling.[14] However, equal consideration

8 Among others, Case 27/76, *United Brands v Commission*, EU:C:1978:22, §65.

9 Among others, Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §73; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §37.

10 Among others, Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §27; Case C-549/10 P, *Tomra Systems and Others v Commission*, EU:C:2012:221, §17; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §§44 and 68; Case C-252/21, *Meta Platforms and Others (General terms of use of a social network)*, EU:C:2023:537, §47; Case C-333/21, *European Superleague Company*, EU:C:2023:1011, §131.

11 Among others, Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §135; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §74; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §28.

12 See Article 263 TFEU.

13 See Article 267 TFEU.

14 Exclusionary effects refer to situations such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion, restricting or eliminating the access to markets or parts thereof or otherwise constraining the growth of competitors.

should be given to so-called exploitative abuses that directly harm consumers. In recent years, both the Commission and national competition authorities ("NCAs") have shown increased willingness to pursue exploitative abuses, such as cases involving excessive pricing or the imposition of unfair trading conditions.[15]

The effective enforcement of competition rules seeks to ensure that consumers benefit from products and services that are competitive in terms of price, choice, diversity, quality and innovation. Although competition authorities have traditionally focused on price effects, the increasing prominence of the consumer welfare standard has encouraged the exploration of novel non-price effects. While consumer welfare remains a central objective, it should be interpreted broadly. In this regard, former Commissioner for Competition Margrethe Vestager has stated:

> "*By basing our policy intent and action on principles that stem directly from the Treaties, EU competition policy is able to pursue multiple goals, such as fairness and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy*".[16]

This broader understanding of competition law objectives has also been reflected in the case law. In *Google Android*, the General Court recognised that competition law may contribute to broader policy objectives. In particular, it stated that protecting consumer choice, privacy and diversity may be necessary to ensure plurality in a democratic society.[17] The case did not concern anticompetitive pricing; rather, it sought to prevent rival search engines from being excluded from the market, thereby preserving consumers' ability to choose how they access information online.

Similarly, in *Servizio Elettrico Nazionale*, the Court of Justice emphasised that Article 102 TFEU forms part of a broader body of rules aimed at preventing distortions of competition to the detriment of the public interest,

15 Decision (EC) AT.40394 – *Aspen*; Decision (Italian Competition Authority) A-480 – *Aspen*; Case C-372/19, *SABAM*, EU:C:2020:959; Decision (EC) AT.40437 – *Apple Music Streaming*.

16 Keynote of EVP Vestager at the European Competition Law Tuesdays: A Principles Based approach to Competition Policy, 25 October 2022.

17 Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §1028.

individual undertakings and consumers, thereby promoting well-being in the European Union.[18]

Although the fundamental objectives and concepts underpinning Article 102 TFEU have remained broadly stable, the methodology used to identify exclusionary abuses has evolved considerably. In particular, the growing emphasis on competitive effects, consumer welfare and economic analysis has progressively transformed the assessment of abusive conduct. The Commission's attempt to articulate and systematise that evolution through soft-law instruments ultimately culminated in the transition from the Guidance Paper to the Guidelines on exclusionary abuses.

3. FROM GUIDANCE TO GUIDELINES ON EXCLUSIONARY ABUSES

3.1. The 2008 Guidance: the emergence of the effects-based approach

In 2008, the Commission adopted the Guidance on enforcement priorities when applying Article 102 TFEU to exclusionary abuses.[19] Its objective was to provide greater clarity and predictability regarding the general analytical framework used by the Commission to determine whether to investigate a particular conduct, as well as to assist undertakings in assessing the risk of intervention in relation to certain types of behaviour.

In the Guidance, the Commission moved away from a predominantly formalistic approach to enforcement, promoting instead a more economic and evidence-based assessment of exclusionary abuses of dominance. This approach, commonly referred to as the "effects-based approach", focuses on the actual or potential effects of the conduct on the competitive process and, ultimately, on consumers.

The Guidance was not intended to, and did not, constitute a statement of the law.[20] It did not provide an interpretation of the notion of abuse of a dominant position, but rather set out the Commission's approach to prioritising cases for enforcement under Article 102 TFEU.[21] In this regard, the

18 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §41.

19 The Guidance was subsequently published in the *Official Journal of the European Union* on 24 February 2009.

20 Guidance, §3.

21 Competition Policy Brief – A dynamic and workable effects-based approach to abuse of dominance, March 2023, p. 2.

Commission indicated that it "*will focus on those types of conducts that are most harmful to consumers*".[22]

Since the adoption of the Guidance, the EU Courts have delivered more than 30 judgments addressing exclusionary conduct[23], while the Commission has adopted over 30 decisions in this field.[24] This substantial body of decisional practice and case law has significantly reshaped the interpretation and application of Article 102 TFEU in relation to exclusionary conduct.

In recent years, the effects-based approach promoted by the Commission has been largely confirmed by the Union Courts and is now firmly embedded in the case law.[25] At the same time, that case law has refined a number of key legal concepts and clarified the evidentiary standards applicable to exclusionary abuses. While many judgments have endorsed the Commission's analytical framework, others have identified shortcomings in its application, thereby prompting a reassessment of certain aspects.

The long-running *Intel* litigation provides perhaps the clearest illustration of this development. In its 2017 judgment, the Court of Justice held that, where the dominant undertaking submits evidence that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, the Commission is required to examine all the relevant circumstances.[26] These include, *inter alia*, the extent of the undertaking's dominant position on the relevant market, the share of the market covered by the challenged practice, the conditions and arrangements for granting the rebates, their duration and their amount and the possible existence of a strategy aimed at excluding competitors that are at least as efficient as the dominant undertaking.[27]

The Court of Justice accordingly set aside the General Court's initial judgment and referred the case back to it, finding that the latter had failed to adequately examine Intel's arguments seeking to challenge the Commission's

22 Guidance, §5.

23 Competition Policy Brief, p. 2.

24 McCallum & Kadar, 2025: 290.

25 Among others, Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83; Case C-23/14, *Post Danmark II*, EU:C:2015:651; Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, Case C-165/19 P, *Slovak Telekom v Commission*, EU:C:2021:239; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33.

26 Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §138.

27 Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §139.

assessment of the rebates' capability to foreclose competitors, including its AEC analysis.[28] The litigation ultimately culminated in the Court of Justice's 2024 judgment dismissing the Commission's appeal and thereby confirming the General Court's finding that the Commission had failed to establish, to the requisite legal standard, that the rebates were capable of producing anti-competitive foreclosure effects.[29]

Similarly, in *Qualcomm (Exclusivity Payments)*, the General Court annulled the Commission's decision imposing a fine for exclusivity payments. The Court found both serious procedural irregularities, which infringed Qualcomm's rights of defence, and deficiencies in the Commission's assessment of the conduct's capability to restrict competition.[30] In particular, it considered that the Commission had failed to take account of all relevant factual circumstances in its effects-based analysis.[31]

A comparable approach can be observed in *Google Android*. Although the General Court largely upheld the Commission's decision finding that Google had abused its dominant position in several Android-related markets, it annulled the part relating to the revenue-sharing agreements (RSAs). In the Court's view, the Commission had failed to establish, on the basis of a sufficiently robust analysis of the market coverage of the RSAs and its AEC assessment, that those agreements were capable of producing the alleged foreclosure effects.[32]

In reaching that conclusion, the General Court identified deficiencies both in the Commission's assessment of market coverage and in its AEC analysis, including assumptions concerning the contestable share of search traffic and the ability of an as-efficient competitor to match Google's payments across

28 Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §§140-147.

29 Case C-240/22 P, *Commission v Intel Corporation*, EU:C:2024:915, operative part and §§121-125, 128-139, 203-208 and 389-426.

30 Case T-235/18, *Qualcomm v Commission (Exclusivity Payments)*, EU:T:2022:358, §§202-208, 224, 252, 256-260 and 290-296.

31 Case T-235/18, *Qualcomm v Commission (Exclusivity Payments)*, EU:T:2022:358, §511: "[…] *characterising the payments concerned as constituting an abuse of a dominant position is unlawful, in that, first, the examination of the capability of the payments concerned to have anticompetitive effects is founded on an analysis which was not carried out in the light of all the relevant factual circumstances and, second, the examination of the actual effects of the payments concerned is founded on an analysis which does not make it possible to support the findings made by the Commission*".

32 Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §§1003-1017.

the portfolio of devices covered by the agreements.[33] The Court concluded that these shortcomings prevented the Commission from establishing the foreclosure capability of the RSAs to the requisite legal standard and therefore annulled that part of the decision, reducing the fine accordingly.[34]

On appeal, the Court of Justice upheld the General Court's judgment and reaffirmed that the assessment of exclusionary conduct under Article 102 TFEU must be conducted in light of the relevant economic and factual context, without requiring either an AEC test or a counterfactual analysis in every case.[35]

Finally, in *Unilever Italia*, the Court of Justice clarified that, where a dominant undertaking submits economic evidence intended to show that exclusivity arrangements were not capable of excluding equally efficient competitors, the competition authority must examine that evidence and assess all the relevant circumstances in order to determine whether the conduct was capable of producing exclusionary effects.[36] The Court further held that, although the use of an AEC test is not mandatory, where such evidence is relied upon by the undertaking concerned the authority must assess its probative value as part of the overall evaluation of the conduct's capability to restrict competition.[37]

Taken together, these judgments confirm the continued relevance of the effects-based approach while at the same time requiring a more rigorous assessment of economic evidence and competitive effects than may have been apparent from the original Guidance Paper.

3.2. Potential anticompetitive effects as the applicable legal standard

The Union Courts have used a variety of expressions to describe the threshold for establishing an abuse, referring to conduct that is "capable"[38] or "likely"[39]

33 Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §§679-693, 733- 799.

34 Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §§1016-1029.

35 Case C-738/22 P, *Google and Alphabet v Commission (Google Android)*, EU:C:2026:533, §§189-190, 225-226, 272-274 and 278.

36 Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §§52-55 and 60.

37 Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §62.

38 Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §268; Case C-23/14, *Post Danmark II*, EU:C:2015:651, §31; Case C-165/19 P, *Slovak Telekom v Commission*, EU:C:2021:239, §109; Case C-42/21 P, *Lietuvos geležinkeliai v Commission (Lithuanian Railways)*, EU:C:2023:12, §134.

39 Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §268; Case C-209/10, *Post Danmark I*, EU:C:2012:172, §44; Case C-23/14, *Post Danmark II*, EU:C:2015:651, §67.

to restrict competition, that "tends to"[40] produce such effects, or that has, at least, the "potential"[41] or the "ability"[42] to do so, or may "potentially"[43] exclude competitors, while also requiring that the anticompetitive effects be sufficiently "probable".[44]

Notwithstanding these differences in terminology, the notion of "potential effects" appears best to capture the applicable legal standard. It allows for a meaningful distinction between purely hypothetical effects and those that are sufficiently plausible to merit intervention, without requiring proof of actual effects.[45] This understanding is consistent with the case law of the EU Courts, which has progressively clarified the evidentiary requirements for establishing an abuse under Article 102 TFEU.

First, the Union Courts have made clear that the assessment of potential effects is neither simplistic nor purely formalistic. Although Article 102 TFEU does not require proof of actual anticompetitive effects, the identification of potential effects cannot be reduced to a purely abstract exercise. Rather, the Commission must demonstrate that the anticompetitive effects are sufficiently plausible and likely to occur, and not merely hypothetical.[46]

Second, while requiring more than hypothetical effects, the case law equally makes clear that the Commission is generally not required to establish the existence of actual anticompetitive effects in order to demonstrate an abuse.[47] It is sufficient to show that the conduct is capable of producing exclusionary effects.[48] Accordingly, where a dominant undertaking has implemented such conduct, the fact that the intended exclusion does not ultimately materialise

40 Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §268; Case T-814/17, *Lietuvos geležinkeliai v Commission (Lithuanian Railways)*, EU:T:2020:545, §80.

41 Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §438.

42 Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §41.

43 Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §64; Case C-23/14, *Post Danmark II*, EU:C:2015:651, §66.

44 Case C-23/14, *Post Danmark II*, EU:C:2015:651, §74.

45 Competition Policy Brief, p. 3.

46 Among others, Case C-23/14, *Post Danmark II*, EU:C:2015:651, §65; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §§70 and 98; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §42.

47 Competition Policy Brief, p. 3.

48 Among others, Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §64; Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §268; Case C-23/14, *Post Danmark II*, EU:C:2015:651, §66; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §53; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §41.

does not preclude a finding of abuse under Article 102 TFEU.[49] Only practices that produce no appreciable effects on the market fall outside the scope of that provision.[50]

Third, the case law indicates that, when assessing the conduct of a dominant undertaking, the Commission must take into account all the relevant facts and circumstances, including any evidence and arguments advanced by the undertaking concerned to rebut the alleged capability of the conduct to produce anticompetitive effects.[51] This requirement reflects the evolution of Article 102 TFEU enforcement towards a more effects-based approach, under which the capability of the conduct to restrict competition must be established by reference to all relevant circumstances of the case.

Finally, the case law confirms that establishing the capability of conduct to produce exclusionary effects does not require the Commission to engage in a purely speculative counterfactual exercise based on hypothetical scenarios that might have arisen in the absence of the conduct at issue.[52]

3.3. The Commission's policy response and the adoption of the Guidelines

The launch of the process leading to the adoption of the Guidelines on the application of Article 102 TFEU to exclusionary abuses in March 2023 must be seen in the light of the developments outlined above. The Guidelines aim

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49 Among others, Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, §254; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §65; Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §272; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §53; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §442: "[…] *the Commission was not required to identify actual exclusionary effects on the grounds that Google was allegedly not dominant on the national markets for comparison shopping services, that its conduct was part of improvements in its services for the benefit of consumers and online sellers and that that conduct had lasted for many years. Such a requirement of the Commission would be contrary to the principle, confirmed by the Courts of the European Union, that the categorisation of a practice as abuse within the meaning of Article 102 TFEU cannot be altered because the practice at issue has ultimately not achieved the desired result*".

50 Among others, Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, §254; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §66; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §438: "[…] *in the absence of any effect on the competitive situation of competitors, an exclusionary practice cannot be classified as abusive vis-à-vis those competitors*".

51 Among others, Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, §175; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §28; Case T-336/07, *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, §175; Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §139; Case C-165/19 P, *Slovak Telekom v Commission*, EU:C:2021:239, §42; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §§439-441; Case T-235/18, *Qualcomm v Commission (Exclusivity Payments)*, EU:T:2022:358, §§396-398 and 511; Case C-240/22 P, *Commission v Intel Corporation*, EU:C:2024:915, §179.

52 Among others, Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §§376-378; Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §§892-893.

to reflect on the evolution of the case law of the Union Courts on exclusionary conduct, as well as the considerable enforcement experience gained by the Commission in applying Article 102 TFEU. They also take into account recent market developments, including growing market concentration in a number of industries and the digitalisation of the EU economy.[53]

On the day the "102 Package" was announced, the Commission published a Policy Brief ("Competition Policy Brief" or simply "Policy Brief") and adopted a Communication amending the Guidance on enforcement priorities ("Amending Communication"). The Communication revised certain sections of the Guidance with immediate effect, to the extent that those sections no longer reflected the Commission's enforcement approach when determining whether to prioritise investigations into particular forms of exclusionary conduct ("Amended Guidance").[54]

However, the Commission also acknowledged that the developments in the case law extended well beyond the issues addressed in the Amending Communication. It therefore announced its intention to incorporate and systemise the case law on exclusionary abuses, together with its decisional practice based on that case law, in a new set of Guidelines. A first draft of the Guidelines was published for public consultation on 1 August 2024 ("draft Guidelines").[55]

The Policy Brief highlights how the EU Courts' case law has clarified and, in certain respects, reshaped the substantive legal standard governing the application of Article 102 TFEU. It further expands on specific topics, namely the notion of anticompetitive foreclosure, the relevance of the AEC principle, the role of the AEC test, the legal framework applicable to certain types of refusal to supply, and the qualification of margin squeeze as a separate category of abuse.[56]

At the same time, the Commission recognised that the move towards a more effects-based enforcement of Article 102 TFEU raises the question of whether the heightened substantive legal standard articulated by the Union

53 Competition Policy Brief, p. 2; Guidelines, §4.

54 Communication from the Commission – Amendments to the Communication from the Commission: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings, p. 2.

55 European Commission, Guidelines on exclusionary abuses of dominance, Competition Policy website. See: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

56 Competition Policy Brief, pp. 4-8.

Courts may "*inadvertently lead to undesirable outcomes*".[57] It was in this context that the Commission considered it necessary to refine its enforcement practice and recalibrate its priorities in order to promote "*a dynamic and workable effects-based approach to Article 102 TFEU*"[58], one that combines sound economic analysis with the need to ensure effective and timely enforcement.[59]

On 3 September 2026, the Commission published the final version of the Guidelines. The adoption of the Guidelines also marked the formal withdrawal of the 2008 Guidance.[60] From the Commission's perspective, the Guidelines are intended to enhance legal certainty, facilitate compliance by dominant undertakings and promote greater consistency in the enforcement of Article 102 TFEU, including by NCAs and national courts.[61] This objective is particularly important given the increasingly decentralised enforcement of Article 102 TFEU.[62] Approximately 85% of decisions applying Article 102 TFEU are adopted by NCAs.[63]

The remainder of this section provides an overview of the Guidelines, focusing on section 3, which sets out the general principles governing the assessment of whether conduct by a dominant undertaking is liable to distort effective competition.

The introductory section of the Guidelines (section 1) sets out the purpose of the Guidelines, underlining that not all exclusionary conduct may infringe Article 102 TFEU, but only practices that result from recourse to methods different from those governing normal competition, thereby hindering the maintenance of the degree of competition existing in a market or the growth of that competition.[64]

The section on general principles applicable to the assessment of dominance (section 2) provides guidance on single-firm dominance and collective

57 *Ibid*, p. 4.

58 *Ibid*.

59 McCallum & Kadar, 2025: 292.

60 Guidelines, §246.

61 In the press release issued on 3 September 2026, the Commission sets out the objectives of the Guidelines. See: https://ec.europa.eu/commission/presscorner/detail/en/ip_26_1769.

62 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, p. 1, Articles 1, 3, 5 and 6.

63 McCallum & Kadar, 2025: 292.

64 Guidelines, §6 and the case law cited therein.

dominance. With respect to single dominance, the Guidelines refer to the traditional indicators, namely market shares[65], barriers to entry or expansion (e.g., data-driven advantages, network effects and ecosystems)[66], countervailing buyer power[67], and competitive constraints in the context of after-markets.[68] As regards collective dominance, the Guidelines outline that such dominance may arise either through economic links between undertakings (in the form of structural, contractual, or other links)[69] or on the basis of tacit coordination.[70]

With respect to the general principles for determining whether conduct by a dominant undertaking distorts effective competition (section 3), the Guidelines underline that this assessment must be made in the light of all the relevant factual circumstances.[71] The Guidelines add that, to identify the factors that are relevant for this assessment, the Commission considers it helpful to set out, for explanatory purposes, the economic mechanism through which the conduct is capable of harming consumers, commonly referred to as the "theory of harm".[72]

The Guidelines state that, at a conceptual level, conduct by a dominant undertaking distorts effective competition when it: (i) departs from competition on the merits; and (ii) is capable of having exclusionary effects.[73] To establish that conduct distorts effective competition, there is no legal requirement to demonstrate direct harm to consumers.[74] The Guidelines further clarify that there are situation where there is no need to assess the two limbs of the test separately.[75]

65 Guidelines, §§23-28.

66 Guidelines, §§29-35.

67 Guidelines, §§36-37.

68 Guidelines, §§38-40.

69 Guidelines, §§45-47.

70 Guidelines, §§48-53.

71 Guidelines, §56 and the case law cited therein.

72 Guidelines, §57. A theory of harm can be articulated by reference to a conduct's impact on the competitive market structure and process and by reference to a conduct's potential impact on any of the relevant parameters of competition.

73 Guidelines, §59 and the case law cited therein.

74 *Ibid*.

75 Guidelines, §§62-65 and the case law cited therein.

As regards the concept of "departure from competition on the merits", the Guidelines state that this concept refers to conduct within the scope of normal competition based on the performance of economic operators, which typically translates into a competitive situation in which consumers benefit from lower prices, better quality and wider choice of new or improved products, both in the short and long run.[76] The Guidelines add that conduct that has the effect of broadening consumer choice, by putting new goods on the market or by increasing the quantity or quality of the goods on offer, generally falls within the scope of competition on the merits.[77]

The Guidelines clarify that there is a strong indication that conduct departs from competition on the merits where it consists of: (i) providing misleading information to administrative or judicial authorities or other public bodies; (ii) misusing regulatory procedures or legal proceedings to prevent or make it more difficult for competitors to enter the market; or (iii) violating rules in other areas of law (e.g., relating to data protection or sustainability) and thereby affecting a relevant parameter of competition, such as price, choice, quality or innovation.[78]

Still with respect to the notion of conduct departing from competition on the merits, the Guidelines indicate that other factors may be relevant for the case specific assessment.[79] Furthermore, the dominant firm has the possibility to submit evidence which either seeks to show that (i) its conduct did not depart from competition on the merits; or (ii) there are benefits resulting from its conduct which counterbalance, or even outweigh, its adverse effects on competition because it pursues a legitimate objective or brings about efficiencies.[80]

With respect to the notion of "exclusionary effects", the Guidelines state that conduct must be capable of having exclusionary effects.[81] The Guidelines clarify that this notion covers a broad range of possible hindrances to the normal competitive process, including the total exclusion or marginalisation of competitors, an increase in barriers to entry or expansion, the hampering or elimination of effective access to markets or to parts thereof, the

76 Guidelines, §67 and the case law cited therein.

77 *Ibid*.

78 Guidelines, §72 and the case law cited therein.

79 Guidelines, §74.

80 Guidelines, §77.

81 Guidelines, §80 and the case law cited therein.

imposition of constraints on the potential growth of competitors and the elimination or reduction of competitors' ability or incentive to exert a competitive constraint on the dominant undertaking.[82]

The threshold of intervention requires that the effects are more than hypothetical, but no proof of actual exclusionary effects or profitability of the conduct is required.[83] The Guidelines clarify that there is no *de minimis* threshold under Article 102 TFEU, although insignificant effects remain outside the scope of the provision.[84]

With respect to the type of exclusionary effects analysis to be applied in each case, the Guidelines underline that the Union Courts have held that, as a rule, it is necessary to show that the conduct of the dominant undertaking is capable of excluding or hampering the growth of equally efficient competitors.[85] They add that evidence of the capability to exclude a hypothetical equally efficient competitor has predominantly been considered relevant by EU Courts in relation to pricing abuses.[86]

The Guidelines consider that a differentiated approach is necessary for the analysis of exclusionary effects in pricing, non-pricing and multi-faceted conduct.[87] In accordance with the Guidelines, pricing conduct relates to conduct consisting of the application of pricing policies, covering predatory pricing[88], margin squeeze[89], and conditional rebates[90], but elements of the assessment may also apply to non-pricing conduct (e.g., price-cost test for exclusive dealing).[91]

In addition, they underline that the actual or potential exclusionary effects identified in the analysis must be attributable to the conduct at issue and that it is sufficient to establish that the conduct contributes to increasing

82 Guidelines, §81 and the case law cited therein.

83 Guidelines, §82 and the case law cited therein.

84 Guidelines, §83 and the case law cited therein.

85 Guidelines, §85 and the case law cited therein.

86 *Ibid*.

87 Guidelines, §87.

88 Guidelines, section 4.2.

89 Guidelines, section 4.3.

90 Guidelines, section 4.4.

91 Guidelines, §88 and footnote 172.

the likelihood of the exclusionary effects materialising on the market.[92] In accordance with the Guidelines, there is no need to show that the conduct has caused actual effects, neither that it is the sole cause of such effects.[93]

The analysis of the capability of the conduct to produce exclusionary effects entails a comparison of the situation with the conduct as implemented with the situation absent the conduct, which often implies an analysis of the market situation before and after the conduct.[94] In certain cases, it may be appropriate to use as a basis for the comparison an alternative hypothetical scenario.[95]

The assessment of exclusionary effects must be based on specific, concrete elements of analysis and evidence and such assessment must take into account all relevant facts and circumstances.[96] The Guidelines provide a list of elements that may generally be considered relevant in assessing a conduct's capability to produce exclusionary effects, including, for instance, the position of the dominant undertaking, the conditions on the relevant market (including conditions of entry and expansion) or the position of the dominant undertaking's (actual or potential) competitors.[97]

The following section of the Guidelines on the principles for determining whether specific categories of conduct are liable to be abusive (section 4) provides guidance on the assessment of specific categories of conduct. This section distinguishes between: (i) abuses for which the case law of the Union Courts has developed specific analytical frameworks to establish whether certain types of conduct distort effective competition[98]; and (ii) abuses for which no such framework exists[99], but to which general principles set out in section 3 still apply.[100]

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92 Guidelines, §99 and the case law cited therein.

93 *Ibid*.

94 Guidelines, §100 and the case law cited therein.

95 Guidelines, §101.

96 Guidelines, §105 and the case law cited therein.

97 Guidelines, §106(a) to (g) and the case law cited therein.

98 The first category covers predatory pricing, margin squeeze, exclusive dealing, tying and bundling and refusal to supply.

99 The second category presents guidance on access restrictions, rebates that are not conditional on exclusivity and self-preferencing.

100 Guidelines, §107.

In addition, section 4 provides guidance on conduct that is by its very nature harmful for competition[101], which is the case for instance when it has no economic interest for the dominant undertaking, other than that of restricting competition.[102] Such conduct is deemed to fall outside competition on the merits and is therefore very unlikely to produce consumer benefits.[103]

The Guidelines provide a few examples of conduct that, depending on the circumstances, can be considered by their very nature harmful to competition.[104] When it is established that the conduct is by its very nature harmful to competition, the conduct is deemed as such to distort effective competition.[105] The Guidelines provide that the dominant undertaking can submit evidence seeking to demonstrate that its conduct is not by its very nature harmful to competition, but in the absence of case law of the EU Courts confirming this possibility, the Commission considers that such challenge only very exceptionally be successful.[106] Furthermore, the dominant undertaking can seek to demonstrate that such conduct is justified on the basis of objective necessity or efficiencies, although the Commission's own experience indicates that such defences are unlikely to be successful given the nature of the conduct that falls in this category.[107]

The final section of the Guidelines sets out general principles applicable to the assessment of objective justifications (section 5), including the so-called "objective necessity defence" and the "efficiency defence".[108] The burden of proof for such defences lies with the dominant undertaking.[109]

As regards the objective necessity defence, the Guidelines state that it must be based on evidence that the behaviour of the dominant undertaking is objectively necessary to achieve a certain aim that may stem from legitimate

101 *Ibid*.

102 Guidelines, §197.

103 Guidelines, §197 and the case law cited therein.

104 Guidelines, §198(a) to (d) and the case law cited therein.

105 Guidelines, §199.

106 Guidelines, §200.

107 Guidelines, §201.

108 Guidelines, §202 and the case law cited therein.

109 Guidelines, §204 and the case law cited therein.

commercial considerations, technical justifications or relate to a genuine and objectively defined public interest objective.[110]

With respect to an efficiency defence, the Guidelines set out that the dominant firm is required to demonstrate that the distortion of effective competition resulting from its conduct is counterbalanced (or even outweighed) by advantages in terms of efficiency that also benefit consumers.[111] In this respect, the Guidelines establish four cumulative conditions that have to be fulfilled in order to successfully rely on an efficiency defence.[112]

In conclusion, the Guidelines represent the most comprehensive attempt to date to systematise the principles governing exclusionary abuses under Article 102 TFEU. While they largely codify developments emerging from the case law of the Union Courts over the last few years, they also contain a number of policy choices regarding the interpretation of concepts such as competition on the merits, exclusionary effects, evidentiary presumptions and the role of economic analysis. The extent to which those choices merely clarify existing law or, conversely, influence the future direction of enforcement is examined in the following section.

4. IMPLICATIONS FOR THE ENFORCEMENT OF ARTICLE 102 TFEU

The Commission's initiative to adopt Guidelines on the application of Article 102 TFEU should be welcomed. It represents an important opportunity to enhance clarity regarding the enforcement of this provision and, thereby, strengthen legal certainty for all relevant stakeholders. The Guidelines are also noteworthy for addressing more recent forms of exclusionary conduct, such as access restrictions and self-preferencing.[113] The inclusion of these practices as autonomous categories subject to dedicated guidance constitutes a significant development, reflecting both the evolution of the case law and the growing importance of enforcement in digital markets.

110 Guidelines, §§207-210 and the case law cited therein.

111 Guidelines, §212 and the case law cited therein.

112 Guidelines, §220 and the case law cited therein. The dominant firm needs to show that: (i) the conducts allows efficiencies to be achieved; (ii) those efficiencies counteract any negative effects of that conduct on competition and consumers on the market(s) concerned; (iii) the conduct is necessary for the achievement of those efficiencies; and (iv) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

113 Guidelines, sections 4.7 and 4.9.

The Commission's original intention in preparing the Guidelines appears to have been to pursue a broader objective. It seemed prepared not merely to update the analytical framework contained in the 2008 Guidance Paper, but also to provide a more comprehensive and systematic restatement of the principles governing the application of Article 102 TFEU. In this sense, the Guidelines seemed designed to systematise and, to some extent, codify the extensive and evolving body of case law developed by the Union Courts on exclusionary abuses.

The Commission's final presentation of the Guidelines, however, adopts a noticeably more cautious approach. Rather than describing the instrument as a codification of the case law, the Commission states that the Guidelines are "*based on the Union Courts' rulings and the Commission's experience on key issues concerning exclusionary abuses by dominant companies*".[114] This shift in emphasis is significant. It may reflect the inherent difficulty of codifying a body of jurisprudence that remains both extensive and dynamic and is characterised by fact-specific assessments and a continuing evolution of the legal standards applicable under Article 102 TFEU. The Guidelines therefore appear less as an authoritative codification of the case law and more as an attempt to distil, explain and organise the principles emerging from judicial and administrative practice, while indicating how the Commission interprets and intends to apply them in future cases.

This broader ambition is apparent in the Guidelines, where the Commission states that while the Guidelines primarily reflect the settled case law of the Union Courts, they also set forth the Commission's position regarding matters hitherto unaddressed by jurisprudence or remaining open to interpretation.[115] This constitutes a significant departure from the 2008 Guidance Paper, which was explicitly framed as an enforcement-priorities document. Whereas the Guidance Paper focused primarily on the circumstances in which the Commission would intervene, the new Guidelines seek to provide a broader interpretative framework for the application of Article 102 TFEU.

It should nevertheless be borne in mind that Guidelines can shape competition policy but cannot alter the substance of competition law itself. This is the reason why the Guidelines expressly note that the interpretations contained therein remain strictly without prejudice to any future judicial rulings

114 European Commission, Application of Article 102 TFEU, Competition Policy website. See: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en.

115 Guidelines, §8.

of the EU Courts.[116] Nevertheless, if carefully designed, they may influence its future development. In this respect, the Commission's effort to systematise and conceptualise the Union Court's case law, while adapting the interpretation of Article 102 TFEU to evolving market realities, may be regarded as a core part of its role in implementing and guiding EU competition policy.[117]

4.1. Areas requiring further clarification

The Commission's stated objective in adopting the Guidelines on exclusionary abuses is to facilitate vigorous, active and robust enforcement of Article 102 TFEU, an objective that merits full support.[118] The text also suggests an intention to promote a flexible, economically grounded and workable approach to the assessment of abusive conduct, which is equally commendable.[119] Nevertheless, certain aspects of the enforcement of this provision would have benefited from further clarification and development.

One notable omission concerns exploitative abuses. Despite important developments in the case law on these issues, especially at the national level, the Commission has so far provided only limited guidance in this area. Given the increasing enforcement interest in exploitative abuses, the absence of more detailed guidance in the Guidelines represents a missed opportunity to clarify the analytical framework applicable to such practices.

In this regard, the Guidelines merely state that the principles governing the assessment of dominance (section 2) and objective justifications (section 5) are also relevant to the assessment of exploitative abuses. They further acknowledge that conduct by a dominant undertaking may produce both exclusionary and exploitative effects.[120] Beyond these brief observations, however, the Guidelines provide no substantive guidance on the assessment of exploitative abuses. The Commission further clarifies that it will continue pursuing these cases where appropriate and may provide guidance on that type of conduct at a later stage.[121]

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116 *Ibid*.

117 Schweitzer & De Ridder, 2024: 227.

118 Autoridade da Concorrência, 2024: §3.

119 Autoridade da Concorrência, 2024: point 2.2.

120 Guidelines, §10.

121 In the press release issued on 3 September 2026, the Commission states the following: "*While today's guidelines concern the application of Article 102 TFEU to exclusionary conduct, the Commission will continue*

Second, the Guidelines appear to move away from, or at least downplay, the notion of anticompetitive foreclosure, which constituted a central guiding principle under the earlier Guidance. That concept emphasised that enforcement should focus not on protecting the commercial freedom of competitors as such, but rather on conduct capable of foreclosing rivals in a manner likely to harm consumers.[122] In other words, it allowed authorities to distinguish between exclusion resulting from procompetitive conduct and exclusion that is anticompetitive.[123] This shift is somewhat surprising given the continued prominence of the concept of anticompetitive foreclosure in recent case law.[124]

According to the case law, the relevant question is not whether rivals are (or may be) driven out of the market, but whether their ability and incentive to compete are (or may be) affected to such an extent that the competitive constraints on the dominant firm are reduced. The definition proposed by the Commission in the Amended Guidance largely reflected this understanding and was aligned with the jurisprudence of the Union Courts. It recognised that anticompetitive foreclosure encompasses not only situations in which the conduct of a dominant undertaking may lead to the full exclusion or marginalisation of actual or potential competition, but also conduct that "*adversely impacts an effective competitive structure thus allowing the dominant undertaking to negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services*".[125]

The omission of an explicit reference to anticompetitive foreclosure in the Guidelines may signal a shift in enforcement priorities. At the very least, it creates uncertainty as to the weight that the Commission intends to attach

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pursuing exploitative abuses where appropriate and may provide guidance on that type of conduct at a later stage". See: https://ec.europa.eu/commission/presscorner/detail/en/ip_26_1769

122 Komninos, 2024: 1.

123 Auer & Radic, 2026: 451.

124 Among others, Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §§299 and 643; Case T-235/18, *Qualcomm v Commission (Exclusivity Payments)*, EU:T:2022:358, §414; Case T-286/09 RENV, *Intel Corporation v Commission*, EU:T:2022:19, §§287, 335, 457, 481 and 525; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §615; Case T-814/17, *Lietuvos geležinkeliai v Commission (Lithuanian Railways)*, EU:T:2020:545, §98; Case C-240/22 P, *Commission v Intel Corporation*, EU:C:2024:915, §§286, 334 and 340.

125 Amended Guidance, §19. See Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §36; Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §281; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §§44 and 68.

to that concept in future cases. It could also suggest that the Commission is no longer strictly guided by the AEC principle and that the Guidelines may therefore effectively lower the threshold for establishing an abuse.[126] The significance of this development is heightened by the fact that the Union Courts have consistently emphasised that Article 102 TFEU is not, in principle, concerned with protecting competitors that are less efficient than the dominant undertaking.[127] The relevance of the AEC principle under the Guidelines will be considered further below (section 4.5).

Third, the rationale for replacing the expression "*liable to be abusive*", used in the draft Guidelines, with the concept of conduct that "*distorts effective competition*" in the final text is not entirely clear. The latter formulation sits somewhat uneasily with both the wording of Article 102 TFEU and the established case law of the Union Courts, which are concerned with the concept of an abuse of a dominant position, rather than with conduct that distorts effective competition as such. The Commission explains that the expression "*distorts effective competition*" is intended to refer to conduct which, in the absence of an objective justification, constitutes an abuse of a dominant position.[128] In this regard, the introduction of new terminology appears unnecessary and risks creating uncertainty regarding its relationship with the established legal framework. It would therefore have been preferable for the Commission to retain the terminology employed in Article 102 TFEU and consistently used in the jurisprudence of the Union Courts.

4.2. Welcome revisions to the draft Guidelines

A welcome clarification introduced in the final Guidelines is the express statement that Article 102 TFEU is not subject to a *de minimis* threshold.[129] The Commission rightly clarifies that the assessment of exclusionary effects cannot be reduced to a quantitative threshold based on market coverage or the proportion of the market affected. Rather, the relevant question is whether, having regard to all the circumstances of the case, the conduct is capable of producing actual or potential exclusionary effects. This clarification is consistent with the case law of the Union Courts, which has long emphasised that dominant undertakings bear a special responsibility not to

126 Ahlborn, 2025 :243.

127 Akman, 2024: 417.

128 Guidelines, footnote 7.

129 Guidelines, §83 and the case law cited therein.

impair effective competition and that conduct may be abusive even where competitors remain present on the market.

In this respect, the Guidelines correctly explain that the existence of residual opportunities for competitors does not, in itself, preclude a finding that conduct is capable of producing exclusionary effects. The clarification therefore contributes to legal certainty by dispelling any suggestion that a form of *de minimis* safe harbour exists under Article 102 TFEU and by reaffirming that the assessment must focus on the nature, context, and likely effects of the conduct, rather than on predetermined quantitative thresholds. Moreover, it aligns the Guidelines more closely with the established principle that Article 102 TFEU protects the competitive process itself, rather than merely ensuring that a minimum number of competitors remain active in the market.

Another welcome development in the final Guidelines is the reintroduction of certain safe harbours previously contained in the 2008 Guidance, particularly in relation to the assessment of dominance and pricing conduct.

In this respect, the Guidelines set out that a very large market share over a sustained period of time is by itself, save in exceptional circumstances, evidence of the existence of a dominant position.[130] Dominance may also be found in cases where an undertaking holds a market share below 50%, where other factors such as the strength and number of competitors become particularly relevant.[131] Most importantly, the Commission has restored a soft safe harbour by stating that dominance is generally unlikely where an undertaking's market share remains below 40%.[132] This indication provides a useful benchmark for undertakings and enforcement authorities alike, while remaining fully consistent with the established principle that dominance must ultimately be assessed on the basis of all the relevant circumstances of the case.

At the same time, the Commission has rightly abandoned the reference contained in the draft Guidelines suggesting that market shares below 10% exclude the existence of dominance save in exceptional circumstances.[133] That statement was based on an old judgment where this possibility was briefly discussed, although the Court ultimately held that a market share of

130 Guidelines, §24 and the case law cited therein.

131 *Ibid*.

132 *Ibid*.

133 Draft Guidelines, footnote 41.

10% was insufficient to establish dominance.[134] Given the difficulty of identifying realistic scenarios in which an undertaking holding such a limited share could be considered dominant in a properly defined relevant market, the removal of that reference improves both the analytical coherence and the practical credibility of the Guidelines.[135]

Explicit safe harbours have also been introduced for pricing conduct. The Guidelines state that where the prices are above average total costs ("ATC"), the conduct cannot be regarded as predatory.[136] In addition, a conditional rebate scheme is not deemed to distort effective competition where the effective price is above long-run average incremental costs ("LRAIC").[137] The introduction of these safe harbours is particularly significant from the perspective of legal certainty, as it offers undertakings more concrete guidance for self-assessing their conduct and reduces uncertainty as to the conditions under which pricing practices are likely to attract scrutiny under Article 102 TFEU.

Another welcome addition to the final text of the Guidelines is the express recognition of the role of a theory of harm in the assessment of exclusionary conduct. The Commission explains that, in order to identify the factors relevant to determining whether conduct by a dominant undertaking is capable of distorting effective competition, it is useful to articulate the economic mechanism through which that conduct may directly or indirectly harm consumers in its specific legal and economic context.[138] The Guidelines further clarify that a theory of harm may be framed by reference to the conduct's potential impact on the competitive market structure and process, including by raising barriers to entry or expansion, as well as to its potential effects on key parameters of competition, such as prices, quality, innovation and consumer choice.[139]

This explicit acknowledgement is welcome, as it reinforces the principle that enforcement under Article 102 TFEU should be grounded in a coherent, evidence-based and case-specific explanation of how the conduct

134 On this point the draft Guidelines referred to Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, EU:C:1986:399, §§85-86.

135 Akman, Fumagalli & Motta, 2025: 243.

136 Guidelines, §113(c) and the case law cited therein.

137 Guidelines, §113(b).

138 Guidelines, §57.

139 *Ibid*.

is capable of producing anticompetitive effects. A theory of harm should provide a coherent and context-specific narrative of the mechanism through which the conduct is capable of producing anticompetitive effects and should therefore occupy a central role in the assessment. The extent to which the facts of the case support that theory of harm must be subject to careful scrutiny.[140] Accordingly, enforcement should rest on a solid and convincing theory of harm that explains how the practice operates, demonstrates its capability to generate exclusionary effects, clarifies the incentives of the dominant undertaking to engage in the conduct, and identifies the resulting harm to consumers.

Finally, a welcome development in the final Guidelines is the express recognition that the objective of Article 102 TFEU enforcement is the protection of competition in the interests of consumers.[141] This clarification is particularly valuable given the debate surrounding the role of broader public policy considerations in the application of competition law. Importantly, the concept of consumer welfare should not be understood in a narrow or purely price-based sense, but rather in a comprehensive and dynamic manner, encompassing all relevant parameters of competition, including price, quality, innovation, choice and other dimensions of consumer benefit over the short and long term. By explicitly linking the enforcement of Article 102 TFEU to the protection of consumers through the preservation of the competitive process, the Guidelines provide a clearer normative foundation for the assessment of abusive conduct and reinforce the effects-based approach that has emerged from the case law of the Union Courts. This clarification therefore enhances the coherence of the Guidelines and contributes to greater legal certainty regarding the objectives pursued by Article 102 TFEU.

Overall, while certain aspects of the Guidelines remain open to criticism, particularly the limited treatment of exploitative abuses, the reduced emphasis on anticompetitive foreclosure and the introduction of terminology that does not always sit comfortably with the established legal framework, the final text represents a significant improvement over the draft version published for consultation. In particular, the Commission should be commended for incorporating a number of concepts that are central to a coherent and effects-based application of Article 102 TFEU, including the express recognition of the role of a theory of harm and the clarification that consumer

140 Autoridade da Concorrência, 2024: point 2.4.

141 Guidelines, §2 and footnote 3.

welfare constitutes the ultimate objective of enforcement. Together with the reintroduction of important safe harbours and the confirmation that no *de minimis* threshold applies under Article 102 TFEU, these developments contribute to a more coherent analytical framework and enhance legal certainty without undermining effective enforcement.

The following sections examine in greater detail a number of aspects of the final text that either introduce significant innovations or provide important clarifications, and which therefore offer valuable insights into the Commission's current approach to the application and enforcement of Article 102 TFEU. In particular, it considers the notion of "competition on the merits", the general legal test for establishing an abuse, the role of rebuttable presumptions, including their relationship with effects-based analysis, and the clarifications provided concerning the AEC principle and the related application of the price-cost test.

4.3. What constitutes competition on the merits and the interaction between the two limbs of the general legal test

The introduction of a two-limbed legal test for the assessment of exclusionary abuses constitutes one of the most significant conceptual innovations of the Guidelines. According to the Commission, conduct infringes Article 102 TFEU where it both departs from competition on the merits and is capable of producing exclusionary effects.[142] The Guidelines present these two limbs of the assessment as being cumulative, notwithstanding that certain strands of the case law could arguably be interpreted as treating them in a more alternative or overlapping manner.[143] The Commission's approach nevertheless finds support in recent judgments of the Court of Justice, in particular *Servizio Elettrico Nazionale*[144] and *Superleague*[145], which appear to recognise both elements as integral components of the assessment of abusive conduct.

While the two limbs are conceptually distinct, the Guidelines acknowledge that the order and intensity of the analysis may vary depending on the circumstances of the case, the conduct under examination and the competition concerns involved.[146] They further explain that a separate assessment

142 Guidelines, §59 and the case law cited therein.

143 McCallum & Kadar, 2025: 295; Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §§39 and 41.

144 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §103.

145 Case C-333/21, *European Superleague Company*, EU:C:2023:1011, §§125-127 and 129.

146 Guidelines, §60.

of each limb may not be necessary in three categories of cases[147]: where the conduct falls within specific analytical frameworks developed and recognised by case law[148]; where it is capable of excluding a hypothetical equally efficient competitor[149]; or where it is by its very nature harmful to competition.[150]

In practice, these categories encompass many forms of potentially abusive conduct, meaning that the circumstances in which the two-step test applies are comparatively narrow. The types of practices falling outside those categories are rebates that are not conditional on exclusivity (unless a price-cost test can be applied), access restrictions and self-preferencing. Yet, the Guidelines offer little substantive guidance on how the two-limbed test should be applied to these forms of conduct. Instead, they largely confine themselves to listing factors that may be taken into account, without explaining their relative importance or how they should be weighed in the overall assessment.

The prominence accorded to the notion of competition on the merits represents a notable departure from the approach reflected in the Guidance. Whereas the Guidance primarily focused on whether conduct was likely to result in anticompetitive foreclosure and references to competition on the merits were relatively limited[151], the Guidelines place competition on the merits at the centre of the legal analysis. Indeed, unlike the Guidance Paper, the Guidelines attempt to articulate the content of that concept and explain its relationship with the objectives of Article 102 TFEU.

In this respect, the Guidelines define competition on the merits based on the performance of economic operators, which typically results in lower prices, better quality, greater innovation and wider choice both in the short and long term.[152] They further explain that conduct which broadens consumer choice by introducing new products or improving the quantity or quality of existing products will generally fall within the scope of competition on the merits.[153] By linking competition on the merits to consumer welfare

147 Guidelines, §62.

148 Guidelines, §63 and the case law cited therein. The Guidelines identify five types of conduct for which specific analytical frameworks have been developed, i.e., predatory pricing, margin squeeze, exclusive dealing, tying and bundling and refusal to supply.

149 Guidelines, §64 and the case law cited therein.

150 Guidelines, §65. The Union Courts have referred to such conduct as "*naked restrictions*".

151 Guidance, §§1 and 6.

152 Guidelines, §67 and the case law cited therein.

153 Guidelines, §67 and the case law cited therein.

and successful market performance, the final Guidelines provide a clearer and more economically grounded account of the concept than was previously available.[154]

This approach draws heavily on recent case law, particularly the judgment of the Court of Justice in *Servizio Elettrico Nazionale*. That judgment identified two situations that clearly fall outside the scope of competition on the merits: practices that hold no economic interest other than the exclusion of competitors[155] and practices that rely on advantages deriving directly from the dominant undertaking's position and cannot be replicated by an equally efficient rival.[156] These examples closely resemble the logic underlying the so-called "no economic sense" test, an economic standard which assesses whether conduct is economically rational in determining whether it is anti-competitive[157], and the principle that dominance should not be leveraged through advantages unavailable to competitors.

Those examples should not, however, be interpreted as providing an exhaustive definition of that concept. Abusive conduct may take many forms and does not necessarily involve either a profit sacrifice or a demonstrable exclusionary intent.[158] Rather, the significance of *Servizio Elettrico Nazionale* lies in its identification of circumstances that are particularly strong indicators that conduct falls outside normal competition.[159] The final Guidelines appear to adopt a similar approach, using the concept as a flexible standard rather than as a rigid legal category.

From this perspective, whether particular conduct falls within the scope of competition on the merits is ultimately an economic question that requires

154 Autoridade da Concorrência, 2024: point 2.3.

155 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §77: "*Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits*".

156 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §§78-79: "*The same applies* […] *to a practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position. The relevance of the material or rational impossibility for a hypothetical competitor, which is as efficient but not in a dominant position, to imitate the practice in question, in order to determine whether that practice is based on means that come within the scope of competition on the merits, is clear from the case-law on practices both related and unrelated to prices*".

157 Akman, 2024: 430.

158 Autoridade da Concorrência, 2024: point 2.3.

159 Ibáñez Colomo, 2024: 401.

a context-specific assessment, taking into account the market context, the characteristics of the conduct and its likely impact on the competitive process.[160] Only a limited category of practices can plausibly be presumed, by their very nature, to depart from competition on the merits.[161] In the vast majority of cases, a case-specific assessment will remain necessary.

The interaction between the two limbs of the test nevertheless remains one of the more challenging aspects of the framework adopted by the Guidelines. In practice, the assessment of whether conduct departs from competition on the merits and the assessment of its capability to produce exclusionary effects often rely on closely related factual and economic considerations. Market structure, barriers to entry, the replicability of the conduct, the incentives of the dominant undertaking and the ability of rivals to respond effectively may all be relevant to both inquiries. There is therefore a significant degree of analytical overlap between the two limbs.

This overlap is reflected in the case law itself. Although *Servizio Elettrico Nazionale*[162] and *Superleague*[163] ultimately support the view that both elements must be established, the relationship between them is not always articulated in the same way and the sequence of the analysis may vary.[164] The Guidelines correctly recognise this reality by emphasising that the order and intensity of the assessment may differ from case to case.[165]

In economic terms, the two limbs can be viewed as complementary components of a broader inquiry into whether the conduct distorts the competitive process to the detriment of consumers. Conduct that genuinely reflects superior performance and enhances consumer welfare will normally fall within the scope of competition on the merits. Conversely, conduct that departs from normal competition and is capable of restricting the competitive process is likely to satisfy both limbs of the Commission's framework. The challenge going forward will be to ensure that the two concepts remain analytically distinct while avoiding unnecessary duplication in their application.

160 Ibáñez Colomo, 2024: 413.

161 Ibáñez Colomo, 2024: 415.

162 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §103.

163 Case C-333/21, *European Superleague Company*, EU:C:2023:1011, §§125-127 and 129.

164 Case C-333/21, *European Superleague Company*, EU:C:2023:1011, §§129-130.

165 Guidelines, §60.

In sum, the final Guidelines make an important contribution by placing competition on the merits at the centre of the assessment of exclusionary abuses and by integrating that concept into a structured two-limbed legal framework. At the same time, the practical significance of this framework will depend on how the relationship between its two constituent elements is understood and applied in concrete cases. The considerable overlap between the concepts of competition on the merits and exclusionary effects suggests that their utility will ultimately depend less on formal categorisation than on the development of a coherent and economically grounded theory of harm capable of explaining why the conduct at issue undermines the competitive process and, ultimately, harms consumers.

4.4. The role of rebuttable presumptions under the Guidelines

One of the most significant changes introduced in the final version of the Guidelines concerns the treatment of rebuttable presumptions. Whereas the draft Guidelines envisaged the use of presumptions in relation to both limbs of the general legal test, the final text adopts a considerably more cautious approach. Most of the proposed presumptions have been abandoned and the Guidelines now retain only a limited presumption in relation to exclusive dealing, which is presumed to be capable of distorting effective competition unless the circumstances of the case indicate otherwise.[166] This development is particularly welcome, as it reduces the risk that presumptions may relax the analytical discipline imposed by the Union Courts requiring the examination of the full economic and factual context of the conduct at issue, thereby potentially lowering the evidentiary burden placed on the Commission.[167]

The Guidelines adopt a sliding scale of evidentiary requirements, depending on the likely degree of harm of the conduct. In accordance, they explain that the amount of case-specific evidence required to establish that conduct distorts effective competition varies according to the nature of the practice at issue: the more a particular form of conduct is generally considered capable of distorting effective competition, the less case-specific evidence the Commission will need to demonstrate such effects, and vice versa.[168]

The Guidelines further recognise that, in some circumstances, the demonstration of certain factual elements may give rise to a presumption that the

166 Guidelines, §155 and the case law cited therein.

167 Padilla & Neven, 2024: 7.

168 Guidelines, §58.

conduct distorts effective competition, shifting the evidentiary burden from the Commission onto the dominant undertaking.[169] Although such presumptions may be rebutted by demonstrating that the conduct is not capable of distorting effective competition in the circumstances of the case[170], their practical significance will ultimately depend on the evidentiary threshold required to rebut them and on the intensity with which the Commission engages with the dominant undertaking's submissions. While the Guidelines provide some guidance on these issues[171], the operation of this framework in practice remains uncertain.

The central question is whether the use of rebuttable presumptions is fully consistent with the principles governing the assessment of abuses under Article 102 TFEU. At first sight, presumptions may be difficult to reconcile with the Court of Justice's repeated insistence that the demonstration of the conduct's actual or potential exclusionary effects "*must be made, in all cases, in the light of all the relevant factual circumstances*" and "*on the basis of specific, tangible points of analysis and evidence*".[172] It follows that the current state of the jurisprudence suggests that there are no genuinely presumptively unlawful exclusionary practices under Article 102 TFEU, in the sense that all conduct must ultimately be assessed by reference to its capability to produce exclusionary effects.[173] Accordingly, the burden remains on the Commission to establish that the conduct is capable of foreclosing competition, with no conduct being presumed to have such an effect.[174]

This point is closely connected to the distinction between genuine legal presumptions and what can be called factual inferences.[175] The jurisprudence of the Union Courts contains relatively few examples of true presumptions of illegality.[176] In predatory pricing cases, for instance, prices below average variable cost ("AVC") give rise to a presumption of abuse, as

169 *Ibid*.

170 *Ibid*.

171 Guidelines, §§157-161.

172 Case C-240/22 P, *Commission v Intel Corporation*, EU:C:2024:915, §179.

173 Akman, 2024: 426.

174 Auer & Radic, 2026: 438.

175 Padilla & Neven, 2024: 7.

176 *Ibid*.

established in *AKZO*[177] and reaffirmed in subsequent judgments, including *Qualcomm (Predation)*.[178] In accordance, under the Guidelines, establishing that the dominant undertaking has charged prices below AVC is sufficient to demonstrate that the conduct distorts effective competition.[179] Similarly, certain forms of conduct have been treated as abusive by their very nature in the specific circumstances of the case, such as the destruction of infrastructure designed to exclude a rival in *Lithuanian Railways*.[180] Significantly, the Guidelines address such practices separately under the heading of conduct that is by its very nature harmful to competition and, accordingly, falls manifestly outside the scope of competition on the merits.[181]

By contrast, for most categories of exclusionary conduct, namely exclusive dealing, the case law does not establish genuine presumptions, but rather evidentiary benchmarks that permit certain conclusions to be drawn from specific factual circumstances. For that reason, it would arguably have been conceptually more accurate for the Guidelines to refer, for instance, to factual inferences rather than legal presumptions.[182] This distinction is illustrated by *TeliaSonera*, where the Court of Justice held that, in a margin squeeze case, negative margins indicate "*an effect which is at least potentially exclusionary is probable*".[183] That statement does not establish a presumption of illegality as initially proposed in the draft Guidelines.[184] Rather, it identifies the evidentiary standard that the Commission must satisfy in demonstrating the likelihood of exclusionary effects.[185]

Indeed, the Commission itself appeared to acknowledge this distinction during the drafting process. The draft Guidelines explained that: "*While the Union Courts have not always made explicit use of the term 'presumption' for each*

177 Case C-62/86, *AKZO v Commission*, EU:C:1991:286, §71.

178 Case C-202/07 P, *France Télécom v Commission*, EU:C:2009:214, §109; Case C-209/10, *Post Danmark I*, EU:C:2012:172, §27; Case T-671/19, *Qualcomm v Commission (Predation)*, EU:T:2024:626, §§654, 662, 669 and 694.

179 Guidelines, §§113(a) and 114 and the case law cited therein.

180 Case T-814/17, *Lietuvos geležinkeliai v Commission (Lithuanian Railways)*, EU:T:2020:545, §§83-84 and 89-91.

181 Guidelines, section 4.10.

182 Padilla and Neven, 2024: 7.

183 Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, §73.

184 Draft Guidelines, §128.

185 Komninos, 2024: 3.

one of these practices, the Commission considers that the case-law has developed tools which can be broadly described and conceptualised, for the purpose of these Guidelines, as 'presumptions'".[186] The removal of this passage from the final text is significant. It reflects the fact that the relevant case law has generally not developed proper presumptions, but rather factual inferences that remain subject to examination in the light of the circumstances of the case.

The sole exception retained in the final Guidelines concerns exclusive dealing. According to the Commission, such type of conduct displays a particularly strong propensity to generate exclusionary effects and may therefore be presumed capable of distorting effective competition.[187] In such circumstances, the dominant undertaking bears the burden of demonstrating that the conduct is not capable of producing such effects.[188] The extent to which this approach is supported by the case law is, however, open to question. A careful reading of the jurisprudence indicates that the Court of Justice has generally recognised shifts in the burden of proof only at the stage of objective justification or efficiency defences, rather than at the prior stage of establishing the likelihood of foreclosure effects.[189] Where the Union Courts refer to a reversal of the burden of proof, this relates specifically to the dominant undertaking's obligation to substantiate efficiency claims.[190]

This understanding is reinforced by the *Intel* judgments. Far from recognising a presumption of abuse comparable to a restriction "by object" under Article 101 TFEU, the Court of Justice transformed what had often been understood as an irrebuttable presumption associated with exclusivity rebates under *Hoffmann-La Roche* into a factual inference of potential anticompetitive effects. Crucially, the burden of proof was not reversed, such that the dominant undertaking would need to proof the implausibility of potential

186 Draft Guidelines, footnote 131.

187 Guidelines, §155 and the case law cited therein.

188 Guidelines, §157 and the case law cited therein.

189 Komninos, 2024: 2.

190 Case C-209/10, *Post Danmark I*, EU:C:2012:172, §42; Case C-307/18, *Generics (UK) and Others*, EU:C:2020:52, §166; Case T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, §602: "*it is for the dominant undertaking concerned to show that the efficiency gains likely to result from the conduct under consideration counteract the exclusionary effect produced, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition*".

anticompetitive effects.[191] Where the dominant undertaking submits evidence casting doubt on the potential for anticompetitive effects, such as an AEC test aiming to show that as-efficient competitors are not foreclosed, the Commission remains under an obligation to examine that evidence and determine whether potential anticompetitive effects have been established to the requisite legal standard.[192] An AEC test does not automatically disprove the factual inference of anticompetitive effects. It nevertheless constitutes a relevant element that must be considered as part of the overall assessment, provided it is methodologically reliable and appropriate to the circumstances of the case.[193]

In its 2017 judgment, the Court of Justice reaffirmed the traditional distinction drawn in *Hoffmann-La Roche* between quantity rebates and exclusivity rebates. It held that exclusivity rebates granted by a dominant undertaking are, by their very nature, capable of restricting competition because they create incentives for customers to obtain all or most of their requirements from the dominant firm.[194] However, it immediately qualified that proposition by requiring the Commission, where the dominant undertaking adduces evidence, to assess all the circumstances of the case, including the degree of dominance, market coverage, duration of the practice, conditions governing the rebates, and any AEC analysis relied upon.[195] The judgment therefore does not create a separate category of "by object" abuse under Article 102 TFEU. Rather, it confirms that the assessment remains centred on the capability of the conduct to produce exclusionary effects and that any inference of anticompetitive harm must yield where the evidence adduced by the undertaking calls that capability into question.

The judgment delivered by the General Court on remittal reinforced this conclusion. The Court held that, because the Commission had relied on an AEC analysis and Intel had challenged the foreclosure capability of the rebates, the Commission was required to demonstrate that its assessment could establish such foreclosure to the requisite legal standard. The General Court ultimately annulled the decision insofar as it related to the rebates

191 Schweitzer & De Ridder, 2024: 237.

192 *Ibid*.

193 *Ibid*.

194 Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §§137-138.

195 Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §§138-140.

because the Commission's analysis was insufficient to prove such capability to the requisite legal standard.

In conclusion, the final version of the Guidelines reflects a more restrained and legally defensible approach to rebuttable presumptions than that envisaged in the draft text. While the retention of a presumption in relation to exclusive dealing remains open to debate, the overall framework is more closely aligned with the recent case law of the Union Courts, which emphasises the need to establish exclusionary capability on the basis of specific evidence and in light of all the relevant circumstances. The key challenge going forward will be to ensure that the concept of a rebuttable presumption is applied as an evidentiary tool facilitating the assessment of likely effects, rather than as a substitute for that assessment.

4.5. Existence of an AEC principle and application of the related AEC test

As regards price-based exclusionary conduct, the Guidance, as amended, stated that the Commission would not confine its enforcement priorities to conduct capable of leading to the market exit or the marginalisation of competitors that are as efficient as the dominant undertaking in terms of costs. According to the Commission, effective competitive constraints may, in certain circumstances, also be exerted by undertakings that are less efficient than the dominant undertaking from a cost perspective.[196] This may be the case, in particular, where the market structure does not yet permit the emergence of equally efficient competitors[197], or where the market is characterised by significant barriers to entry and/or expansion.[198]

These amendments appeared to signal a shift towards a broader conception of competitive harm, under which less efficient competitors, in terms of cost structure, may also merit protection where they exert a genuine competitive constraint on the dominant undertaking. In support of this position, the Commission relied principally on the judgments in *Post Danmark II* and *Unilever Italia*.[199]

In *Post Danmark II*, the Court of Justice observed that, in certain market conditions, the structure of the market may prevent the emergence of an as-efficient competitor. In such circumstances, the presence of a less efficient

196 Annex to the Amending Communication, §2 and Amended Guidance, §24.

197 Among others, Case C-23/14, *Post Danmark II*, EU:C:2015:651, §§59-60.

198 Among others, Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §57.

199 Annex to the Amending Communication, §2 and Amended Guidance, §24.

competitor may nonetheless contribute to intensifying competitive pressure and constraining the conduct of the dominant undertaking.[200] This aspect of the judgment has frequently been understood as recognising that the relevance of the as-efficient competitor benchmark may vary according to the particular characteristics of the market.

However, the Commission's reliance on *Unilever Italia* is less convincing. In that judgment, the Court of Justice reaffirmed that "[…] *it is not the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, on account of its skills and abilities in particular, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market*".[201] The Court further stated 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 marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation*".[202]

Importantly, what the Court clarified in *Unilever Italia* concerns the role of the AEC test, rather than a rejection of the AEC principle. The Court explained that such a test may be inappropriate, in particular, in relation to certain non-pricing practices, such as a refusal to supply, or where the relevant market is protected by significant barriers.[203] That qualification does not undermine the general proposition that Article 102 TFEU is designed to protect competition rather than less efficient competitors. Accordingly, it is difficult to derive from *Unilever Italia* support for a more relaxed interpretation of the AEC principle, as suggested by some of the amendments introduced to the Guidance.

Against this background, these changes appeared to create a degree of tension with settled case law, which recognises that the exclusion of less efficient competitors may be the natural outcome of competition on the merits[204] and

200 Case C-23/14, *Post Danmark II*, EU:C:2015:651, §§59-60.

201 Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §37.

202 *Ibid*.

203 *Ibid*, §57.

204 Among others, Case C-413/14 P, *Intel v Commission*, EU:C:2017:808, §§133-134; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, §157; Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §73; Case C-48/22 P, *Google and Alphabet v Commission (Google Shopping)*, EU:C:2024:726, §164; Case C-738/22 P, *Google and Alphabet v Commission (Google Android)*, EU:C:2026:533, §267.

that this principle applies to practices both related and unrelated to prices.[205] The adoption of the Guidelines therefore presented an opportunity for the Commission to clarify the status of the AEC principle within the broader architecture of Article 102 TFEU.

The final version of the Guidelines takes a more balanced approach. The AEC principle is expressly recognised as a key component of the analytical framework applicable to abuses of dominance and, in principle, is relevant to the evaluation of both price-based and non-price-based conduct. In line with the settled case law of the Union Courts, the principle is linked to the notions of competition on the merits and consumer welfare. Accordingly, the Guidelines reaffirm that "*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 thus less attractive to consumers*".[206] The Guidelines also correctly observe that evidence concerning the capability to exclude a hypothetical as-efficient competitor has been considered by the Union Courts primarily in cases involving pricing abuses.[207]

Another positive development is that the Guidelines now identify more clearly the circumstances in which protection of less efficient competitors may be justified, making clear that such situations should remain exceptional rather than the norm. For instance, in the context of non-pricing conduct, a practice may impede entry by potential competitors at an early stage and thereby prevent the emergence of effective competition to the detriment of consumers, as illustrated by the examples of digital markets and ecosystems provided for in the Guidelines.[208]

Furthermore, still with respect to non-pricing conduct, the Guidelines recognise that there may be circumstances in which the emergence of an as-efficient competitor is practically impossible, for instance because of the dominant undertaking's very large market share, significant barriers to entry or expansion, or regulatory constraints.[209] In such circumstances, even a less efficient competitor may exert a genuine competitive constraint on the

205 Case C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, §79.

206 Guidelines, §68 and the case law cited therein.

207 Guidelines, §85 and section 3.3.2.1.

208 Guidelines, §94.

209 Guidelines, §95 and the case law cited therein.

dominant undertaking, thereby preventing it from raising prices or reducing output, quality, choice or innovation to the detriment of consumers.[210]

In these exceptional circumstances, a strict application of the AEC principle could lead to under-enforcement by allowing genuinely harmful exclusionary practices to go unchallenged. The final Guidelines strike a more satisfactory balance in this regard. While reaffirming the central role of the AEC principle within Article 102 TFEU, they acknowledge that departures from it may be warranted where market conditions make the emergence or survival of an equally efficient competitor unrealistic. By expressly framing such departures as exceptional, the Guidelines preserve the principle's function as a benchmark for distinguishing competition on the merits from exclusionary conduct while retaining sufficient flexibility to address different market realities.

It follows that there may be well-founded reasons for departing from the AEC principle in specific circumstances.[211] For instance, such a departure may be warranted where the competitive significance of rivals cannot adequately be assessed through the AEC benchmark alone, for example where the conduct forms part of a broader exclusionary strategy aimed at depriving competitors of the scale necessary to compete effectively. In these situations, strict reliance on the AEC principle may fail adequately to capture the full extent of the conduct's foreclosure effects.

With respect to the AEC test, the Guidelines provide significantly greater clarity than the draft Guidelines, which stated, *inter alia*, that a price-cost test is "*generally inappropriate*" for non-price-based conduct.[212] On the contrary, the Guidelines provide for a clear distinction between pricing conduct, non-pricing conduct and multi-faceted conduct, assigning a differentiated role to the test under each of these categories.

The Guidelines put forward that the assessment of pricing conduct (i.e. predatory pricing, margin squeeze and conditional rebates) is typically based on determining whether the conduct is capable of excluding hypothetical as-efficient competitors, in which case it is not necessary to prove separately that the conduct departs from competition on the merits. In such cases a price-cost test is normally applied.[213]

210 Guidelines, §96 and the case law cited therein.

211 Autoridade da Concorrência, 2024: point 2.5.

212 Draft Guidelines, §56.

213 Guidelines, §89.

Regarding non-pricing conduct, the Guidelines state that the assessment may focus on the conduct's capability to exclude a hypothetical equally efficient competitor, in which case there is no need to prove separately that the conduct departs from competition on the merits, or on other types of exclusionary effects.[214] While there is no legal obligation to carry out such test in all cases, its relevance cannot be categorically excluded where the non-price aspects of the conduct can be quantified in a reliable manner.[215] However, the Commission considers that the application of a price-cost test to non-pricing behaviour could be considered only in exceptional circumstances.[216] The Guidelines importantly add that, if a dominant undertaking submits an analysis based on a price-cost test as part of its defence strategy, the Commission is required to examine its probative value.[217] This approach is fully consistent with the case law of the EU Courts, in particular with the judgment in *Unilever Italia*[218] and is therefore to be welcomed.

As regards multi-faceted conduct, involving a combination or succession of pricing and non-pricing behaviour, the Guidelines put forward that the appropriate analytical framework will depend on the specific legal and economic context of the case.[219] For instance, if a conduct predominantly consists of non-pricing conduct, it may not be necessary to apply a price-cost test to its price-based component.[220]

A final word on exclusivity rebates is warranted. In relation to this type of practice, the Commission indicates that the dominant undertaking may submit a price-cost test showing that its exclusivity rebates are not leading to an effective price below cost for the contestable units.[221] However, the Guidelines add that in the Commission's experience, such a test is "*generally not relevant for a range of exclusive dealing scenarios*" identified in the Guidelines.[222]

214 Guidelines, §92 and the case law cited therein.

215 Guidelines, footnote 180 and the case law cited therein.

216 *Ibid*.

217 *Ibid*.

218 Case C-680/20, *Unilever Italia Mkt. Operations*, EU:C:2023:33, §§57-60.

219 Guidelines, §97.

220 *Ibid*.

221 Guidelines, §158 and the case law cited therein.

222 *Ibid*.

This statement is not entirely easy to reconcile with the Court of Justice's judgment in *Intel*. Although the Court did not establish the AEC test as a mandatory legal requirement in every rebates case, it clearly held that where a dominant undertaking submits evidence, including an AEC analysis, capable of demonstrating that the conduct was not capable of restricting competition, that evidence must be examined. The judgment therefore represented a decisive move towards an effects-based approach, requiring the Commission to assess all relevant circumstances, including any AEC test submitted by the dominant undertaking. As a result, the Commission has faced a more demanding evidentiary burden in abuse of dominance cases, particularly in relation to pricing practices.

The practical implications of this shift have been considerable. Following *Intel*, several high-profile Commission decisions have been subjected to increased judicial scrutiny, including *Qualcomm (Exclusivity Payments)* and *Google Android*. While the outcomes of those cases differed, they illustrate the Union Courts' willingness to examine closely the Commission's assessment of anticompetitive effects and the evidentiary basis underpinning its findings.

According to the case law, the Commission remains under an obligation to assess the probative value of evidence submitted by the dominant undertaking, including the results of an AEC test. In both *Intel* and *Unilever Italia*, the Union Courts confirmed that where such evidence is put forward to demonstrate that the conduct is not capable of restricting competition, it must be properly examined. This requirement constitutes an important safeguard against over-enforcement and helps ensure that the assessment remains firmly grounded in economic reality.

From a practical standpoint, it is also important to recognise that the application of a price-cost test, such as the AEC test, is resource-intensive and may not be appropriate in all cases. In this respect, the Guidelines usefully clarify the types of conduct for which the AEC test may be relevant (i.e., price-based conduct), as well as those for which its usefulness is more limited, although not entirely excluded (i.e., non-price-based conduct). This clarification is a welcome development, as it dispels the idea that the AEC test should be systematically applied across all categories of abuse, irrespective of their nature and economic characteristics.[223]

223 Autoridade da Concorrência, 2024: point 2.5.

Moreover, the Guidelines simply refer to a price-cost test, removing the reference to the "as-efficient competitor" in this context, in order to reduce the risk of conflating the evidentiary tool used to assess certain forms of conduct with the broader AEC principle itself. In this way, the Guidelines seek to distinguish more clearly between the AEC principle as a general benchmark for assessing exclusionary effects and the price-cost tests that may be used as evidentiary tools in specific cases.

Overall, the final text of the Guidelines adopts a more coherent and nuanced position than either the Amended Guidance or the draft Guidelines. It reaffirms the central importance of the AEC principle as an expression of the broader commitment of Article 102 TFEU to protect competition on the merits and the competitive process rather than individual competitors. At the same time, it recognises that the relevance of the AEC test depends on the nature of the conduct and the specific market context. Although certain ambiguities remain, most notably in relation to exclusivity rebates, the final framework strikes a more convincing balance between legal certainty, economic rigour, and enforcement flexibility. In doing so, it aligns more closely with the recent case law of the Union Courts while preserving the Commission's ability to intervene where a rigid application of the AEC benchmark would not adequately capture the conduct's potential to foreclose competition.

5. CONCLUSION

The adoption of the Guidelines on exclusionary abuses constitutes the most significant policy development in the enforcement of Article 102 TFEU since the 2008 Guidance Paper. By seeking to systematise the principles emerging from nearly two decades of judicial and administrative practice, the Commission has moved beyond a document concerned primarily with enforcement priorities and has sought to provide a broader interpretative framework for the assessment of exclusionary conduct by dominant undertakings.

This article has shown that the final text of the Guidelines largely reflects the evolution of the case law of the Union Courts towards a more structured and effects-based approach to abuse of dominance. In particular, the Guidelines confirm the importance of consumer welfare, understood in a comprehensive and dynamic manner, the need to articulate a coherent theory of harm, the requirement to assess actual or potential exclusionary effects in

light of all the relevant factual circumstances, and the continued relevance of the AEC principle as a benchmark for distinguishing competition on the merits from exclusionary conduct.

At the same time, the Guidelines do not merely codify existing case law. They also reflect a number of policy choices concerning the definition of competition on the merits, the interaction between the two limbs of the general legal test, the role of rebuttable presumptions and the circumstances in which departure from the AEC principle may be warranted. Some of these choices are likely to remain controversial. In particular, the reduced emphasis placed on the concept of anticompetitive foreclosure, the introduction of the concept of conduct that "*distorts effective competition*", and the limited guidance provided on exploitative abuses leave important questions for future clarification.

Nevertheless, the final text represents a substantial improvement over the draft Guidelines published for consultation. The Commission has succeeded in preserving sufficient flexibility to address evolving market realities while incorporating safeguards that reinforce the role of economic analysis and the requirement of evidence-based enforcement. Notably, the recognition that the Commission must assess the probative value of economic evidence submitted by dominant undertakings, including price-cost analyses where relevant, reflects the influence of recent case law and contributes to greater legal certainty and predictability.

Ultimately, the significance of the Guidelines will depend less on their wording than on their application by the Commission, NCAs and national courts. Their long-term contribution will be measured by their ability to foster consistent, predictable and economically sound enforcement while preserving the effectiveness of Article 102 TFEU in protecting the competitive process. If applied in that manner, the Guidelines are likely to become the principal reference point for the interpretation and enforcement of Article 102 TFEU and a central instrument in shaping the future development of EU abuse of dominance law.

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