Towards Guidelines for Article 102

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Background paper prepared for Oxera Economics Council meeting of 13 May 2024

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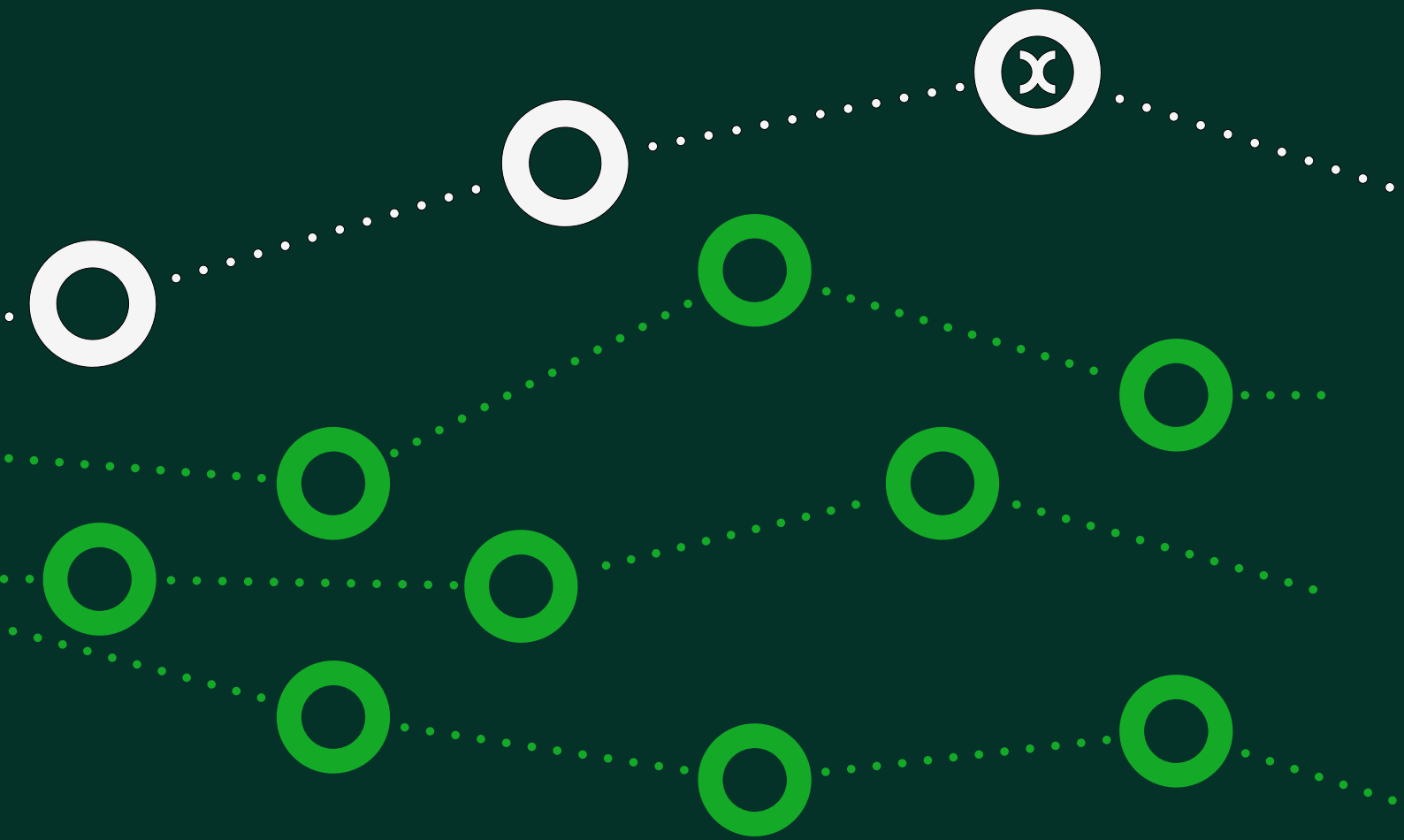

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Executive summary

In March 2023, the European Commission announced an initiative to draft new guidelines ('the Guidelines') reflecting the latest case law on exclusionary abuse of dominance under Article 102 ('Art. 102') TFEU.[1] At the same time, the Commission amended its 2009 Guidance Paper[2] to reflect the evolution of its priorities and its interpretation of the underlying case law.[3]

In the Oxera Economics Council (OEC) meeting of 13 May 2024 we will discuss the possible building blocks of a 'workable' effects-based approach, building on economics principles and on the lessons learned since the adoption of the 2009 Guidance Paper.

The preparation and adoption of new guidelines on Art. 102 comes at a critical juncture for antitrust enforcement in Europe. Recent Court judgments on Art. 102 have put increased emphasis on economic concepts, and have in part embraced the principles put forward in the 2009 Guidance Paper. However, in recent cases and statements the Commission has put less emphasis on the effects-based approach that underpinned the 2009 Guidance Paper. Part of the reason for this shift away from a more economic approach has been concern about the ease of administration and workability of economic tools in Art. 102 cases, and the resulting risk of underenforcement.

The ongoing reform of Art. 102 raises some fundamental questions about the relevant legal framework, and about the role of economics. These include the following.

- Is there an overarching legal and economic test, or at least a set of principles, that should be used in cases of exclusionary conduct? If so, what is it?
- Is there a workable and economically meaningful definition of the 'competition on the merits' principle that often appears in the case law?

[1] European Commission (2023), 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 27 March.
[2] European Commission (2009), 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 24 February, OJ C45/7 (2009 Guidance Paper).
[3] European Commission (2023), 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 27 March, para. 7.

- What is the role of protecting competitors under Art. 102, and should only as-efficient competitors be protected?
- What should be the role of quantitative as-efficient competitor (AEC) tests? Should they be limited to specific types of pricing conduct (e.g. predation and discounts that do not reference rivals)?
- Should some conduct by dominant firms (e.g. exclusive dealing and exclusivity rebates) be subject to a legal presumption of illegality?
- What role is there for theories of harm (or narratives) in the assessment of anticompetitive conduct? Should these be explicitly or implicitly part of the legal framework?

In this background report we do not take a position on the relevant substantive issues, and instead focus on setting out a list of key topics for discussion among members of the OEC. The detailed questions that we are proposing for discussion at the meeting can be found at the end of each section of this report.

1 Introduction

In March 2023, the European Commission announced an initiative to draft new guidelines ('the Guidelines') reflecting the latest case law on exclusionary abuse of dominance under Article 102 ('Art. 102') TFEU.[4] At the same time, the Commission amended its 2009 Guidance Paper on enforcement priorities[5] to reflect the evolution of its priorities and its interpretation of the underlying case law.[6]

In its policy brief, the Commission signalled that the future Guidelines would embrace a 'dynamic and workable effects-based approach' and seek to codify the CJEU's recent judgments.[7] At the same time, the Commission indicated that an 'overly rigid' implementation of the effects-based approach could make enforcement 'unduly burdensome or even impossible'.[8] The Commission has indicated that the draft Guidelines will be published and subject to consultation around the summer of 2024.

The Commission's initiative is likely to lead to an intense debate on what a workable effects-based approach means in practice. Economic analysis plays a central and sometimes controversial role in this debate. On the one hand, economics is seen by some as adding unnecessary complexity, leading to slower and weaker enforcement. On the other hand, economists are called upon to provide operational and workable tools in line with the evolving case law and with sound economic principles.

The objective of the OEC meeting is to identify practical steps towards a 'workable' effects-based approach, building on sound economic principles and economic lessons learned since the 2009 Guidance Paper. As a result, we aim to discuss a series of questions on the effective use

[4] European Commission (2023), 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 27 March.
[5] European Commission (2009), 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', OJ C45/7 (the 2009 Guidance Paper).
[6] European Commission (2023), 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 27 March, para. 7.
[7] McCallum, L., Bernaerts, I., Kadar, M., Holzwarth, J., Kovo, D., Lagrue, M., Leduc, E., Manigrassi, L., Ramos, J.M., Pereira Alves, I., Pozzato, V. and Stamou, P. (2023), 'A dynamic and workable effects based approach to abuse of dominance', Competition Policy Brief, 1.
[8] Ibid.

of economics in the application of an effects-based approach, thus informing the upcoming debate on the draft Guidelines.

This background report is prepared in order to inform the discussion during the OEC meeting. The report is closely related to, and ideally should be read in conjunction with, a recent paper on exclusionary abuse by two OEC members (Chiara Fumagalli and Massimo Motta (2024)).[9] The paper by Fumagalli and Motta provides a comprehensive review of the economic principles that should guide the implementation of the effects-based approach based on insights from recent academic research (for a summary of the policy recommendations, see section 1.2 of their paper). We therefore do not repeat this survey of the recent literature in this background report.

This background report is structured as follows.

- Section 2 sets out the background for the ongoing reform and the Commission's initiative.
- Section 3 discusses the general framework for anticompetitive exclusion from an economics perspective. In particular, we discuss the economic meaning of various enforcement standards (such as the consumer welfare and protecting competition standards), the economic meaning and operability of legal principles and tests (such as the AEC principle and competition on the merits), the role of quantitative AEC tests in assessing capability to foreclose, the economic interpretation of legal standards for showing effects, and the economic rationale for introducing legal presumptions for some types of conduct.
- Section 4 discuss the economic framework for the assessment of selected categories of conduct, with a focus on the more controversial conducts such as exclusivity rebates and exclusive dealing; outright and constructive refusals to supply; and self-preferencing.
- A review of the relevant case law can be found in the Appendix..

[9] Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*, 19 March.

2 Background

2.1 Guidance Paper of 2009

On 24 February 2009, the Commission published its long-awaited and heavily debated Guidance Paper on enforcement priorities for exclusionary abuses under Article 82 EC (now Article 102 TFEU). Following the publication of a Staff Discussion Paper by DG Competition,[10] the Guidance Paper set out the Commission's general approach to exclusionary abuses and described its methodologies for the assessment of some of the most common conducts, such as exclusive dealing, rebates, predatory pricing, refusal to supply and tying. The 2009 Guidance Paper was arguably not intended to be a summary of previous case law, but it rather signalled a departure from the formalistic approach of the case law as it stood at the time. Largely because of this, the Guidance Paper was presented by the Commission as a statement of its enforcement priorities on Art. 102 TFEU.

The publication of the 2009 Guidance Paper signalled to a wider community the intention of the Commission to use a more economically grounded or 'effects-based' approach, relative to the more formalistic approach endorsed by the Courts at the time (which was arguably out of line with modern economic thinking). Box 2.1 below provides a summary of the key elements of the 2009 Guidance Paper.

While the Commission initially relied on its 2009 Guidance Paper in some high-profile cases (notably the *Intel* decision of 2009), it has not consistently used it in subsequent cases and, in fact, it has progressively distanced itself from it. However, the Courts have embraced some of the concepts and framework of the 2009 Guidance Paper in some of their recent judgments (e.g. *Intel* (Court of Justice, 2017); *Qualcomm Exclusivity* (General Court, 2022); *Servizio Elettrico Nazionale* (Court of Justice, 2022); *Unilever Italia* (Court of Justice, 2023)).

[10] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses.

Box 2.1 Summary of the key elements of the 2009 Guidance Paper

Scope. The Guidance Paper covers only exclusionary abuses. It does not discuss exploitative abuses, such as excessive pricing or discriminatory conduct.

Consumer welfare standard. The Commission focuses on those types of conduct that are 'most harmful to consumers'. Consumer welfare is preserved 'through safeguarding the competitive process in the internal market and ensuring competition on merits' and 'protecting an effective competitive process and not simply protecting competitors'.

Dominant position. The Guidance Paper clarifies the Commission's multi-factor analysis of whether a company holds a dominant position. It sets out a market share 'safe harbour' of 40%, below which a company is unlikely to be considered dominant. Other factors include barriers to entry or expansion in the relevant market, and countervailing buyer power.

Anticompetitive foreclosure. After determining that a company has a dominant position, the Commission will examine whether the conduct in question has resulted, or is likely to result, in 'anticompetitive foreclosure', in which actual or potential competitors' access to suppliers or markets is hampered or eliminated and the dominant company is likely to be in a position to 'profitably' increase prices to the detriment of consumers. This definition directly links anticompetitive foreclosure to consumer harm.

As-efficient competitor (AEC) test. In the case of price-based exclusionary conduct (in particular, rebates, predatory pricing and margin squeezes), the Commission will apply an AEC test to evaluate the foreclosure effect of challenged conduct. In these cases, the Commission will seek to determine whether the dominant company's effective prices are above or below an appropriate cost measure—either average avoidable cost (AAC) or the long-run average incremental cost (LRAIC).

Objective justification end efficiency defence. A conduct will not violate Art. 102 where the dominant company can show that it results in efficiencies that outweigh its competitive harm, or that it is justified by objective necessity. The Guidance Paper does not rule out the possibility that a defence can be made out for any type of conduct covered by the Guidance Paper, although an efficiency defence is unlikely to be accepted for predatory conduct or conduct that creates or strengthens a monopoly or near monopoly.

Refusal to deal and margin squeeze. According to the Guidance Paper, margin squeeze is a form of constructive refusal to deal, and *Bronner* conditions (including indispensability) apply. However, in regulated industries less strict conditions apply, as a balance between an obligation to supply and incentives to invest has already been struck by the regulator.

Presumption of illegality. The Guidance Paper identifies categories of behaviour that are considered to be virtually per se abuses, in that in order to find a violation the Commission will not conduct a detailed assessment of the conduct's effect (such as assessing whether a dominant company is preventing its customers from testing a competitor's products or paying a distributor or customer to delay the introduction of such products) for which no defence is likely to be accepted.

Oxera summary of the 2009 Guidance Paper.

2.2 Evolving case law on Article 102

With its Guidance Paper, the Commission was at the forefront of promoting a more effects-based approach to Art. 102 assessment. However, somewhat surprisingly, the more effects-based approach took shape mostly in front of the EU Courts through several judicial setbacks by the Commission, in which the Courts concluded that the economic analyses undertaken were not rigorous enough.

Since the 2017 *Intel* judgment, in which the Court departed from a form-based assessment of exclusivity rebates,[11] the Court of Justice and the

[11] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, paras 139–140.

General Court have increased the intensity of the examination of Art. 102 cases and further fleshed out a more economic approach to abusive conducts by pointing to the need to evaluate 'all circumstances'[12] when examining conduct, listing the relevant factors to be taken into account,[13] and looking at consumer welfare 'from the point of view of, among other things, price, choice, quality or innovation'.[14] At the same time, the Court still considers that a conduct impairing the competitive structure can be found to be harmful without requiring a proof of direct harm.[15]

We summarise here the main developments of the case law (see also the more detailed summary of cases in the Appendix).

2.2.1 'Capability' of 'anticompetitive' foreclosure

As clarified by the Courts, examining the legality of a conduct under Art. 102 first requires an assessment of whether the conduct is *capable* of restricting competition.[16] This is not the case when the effects are purely hypothetical,[17] but the effects need not be concrete in order for the conduct to be considered capable of restricting competition.[18]

Such capability is characterised as 'anticompetitive' when the conduct could have foreclosed an 'as-efficient' competitor[19] using means falling outside of 'normal competition' or 'competition on the merits'.[20]

[12] Qu*alcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, para. 397.
[13] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 139.
[14] *Post Danmark I*, Judgment of the Court of 27 March 2012, Case C-209/10, EU:C:2012:172, para. 22; *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 134.
[15] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 44.
[16] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 48; *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, para. 355.
[17] *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, para. 65; *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, paras 396–397; *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, paras 41–42.
[18] *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, para. 66.
[19] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 136; *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, para. 350; *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 39; *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 129.
[20] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 103; *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 131.

In *Superleague*, the CJEU summarises this approach to establishing anticompetitive foreclosure as follows:[21]

[…] it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market(s) concerned, or by hindering their growth on those markets […].

The CJEU further notes that demonstrating this capability may entail 'the use of different analytical templates depending on the type of conduct at issue in a given case'.[22]

The principle of the AEC employed by the Court in *Superleague* can be traced back to *Post Danmark I*,[23] and was adopted and generalised in *Intel*, where the Court embraced the concept that anticompetitive exclusionary conduct relates to the foreclosure of as-efficient competitors.[24]

In markets with significant scale economies and/or network effects, a conduct may harm competition by foreclosing competitors that are *not yet* as efficient as the incumbent, because they do not benefit from the same economies of scale and/or network effects as the incumbent. These competitors would, however, be as efficient as the dominant firm if they had the same scale. On foreclosure of not-yet-as-efficient competitors, the Court of Justice noted in *Superleague* that foreclosure may also occur in the form of 'impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) […]'.[25]

2.2.2 As-efficient competitor tests

The Courts have referred to the AEC test put forward in the 2009 Guidance Paper in a number of instances (*Intel*, *Google Android*, *Unilever Italia*). While they have found that the AEC test is not

[21] *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 129.
[22] Ibid., para. 130.
[23] *Post Danmark I*, Judgment of the Court of 27 March 2012, Case C-209/10, EU:C:2012:172, para. 25.
[24] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 136.
[25] *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 131.

mandatory to establish abuse for non-pricing conduct such as exclusivity rebates,[26] the Courts have stated that the test needs to be taken into account when put forward by the Commission as part of its assessment (e.g. in *Intel*),[27] or when presented by the defendant (e.g. in *Qualcomm*,[28] *Unilever*).[29]

There is, however, some ambiguity over the scope of cases in which the AEC test might be relevant. For example, in the General Court judgment in *Google Shopping*, and in the Court of Justice preliminary ruling in *SEN*, the Courts have stated that AEC tests are warranted in pricing conduct examinations.[30] However, in *Unilever Italia*, it is clarified that 'even in the case of non-pricing practices, the relevance of such a test cannot be ruled out'.[31]

2.2.3 Alternative tests

When an AEC test is not feasible, proof that the conduct is outside of normal competition or competition on the merits may be based on evidence that the conduct has no economic interest other than to eliminate competitors (the '**no-economic-sense test**');[32] or that an AEC could not have replicated the same conduct given its more limited resources than those of the dominant undertaking (the '**replicability test**').[33]

This demonstration must be made in the light of all the relevant factual circumstances (the conduct itself, the market in question, and the functioning of competition in the affected markets).[34]

[26] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 142.
[27] Ibid.
[28] *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, para. 356.
[29] *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 62.
[30] *Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763, para. 538; *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 80.
[31] *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 59.
[32] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 77.
[33] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 78. See also the Opinion of Advocate General Rantos of 9 December 2021, paras 69–71.
[34] *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 130.

2.3 The Commission's targeted revisions to the Guidance Paper and Policy Brief of March 2023, advocating a 'workable effects-based approach'

In March 2023, DG Competition implemented a number of targeted revisions to its Guidance Paper, and published a Policy Brief discussing the background to these changes. At the same time, it announced its plans to publish draft Guidelines on Art. 102 for public consultation by mid-2024, for planned adoption in 2025. Upon their adoption, the Commission will withdraw the Guidance Paper on enforcement priorities.

In its Policy Brief, the Commission stated that the new Guidelines on Art. 102 will need to articulate a 'workable effects-based approach' and seek to codify recent case law. The Policy Brief is organised around four key elements: the concept of anticompetitive effects, the AEC principle, the AEC test, and refusal to deal (i.e. outright and constructive refusal to deal, including margin squeeze).

- On the notion of **anticompetitive effects**, the Commission states that case law shows that these effects do not need to be concrete, or even observed—it is sufficient that they are likely and must be more than merely hypothetical. Similarly, it states that the fact that a conduct was not ultimately successful in excluding should not alter its categorisation as abusive. At the same time, the Policy Brief sets out a case for amending the definition of 'anticompetitive foreclosure' used in the Guidance Paper to explicitly broaden its scope (beyond adverse price effects) and to link it to the concept of an 'effective competitive structure'.[35] The Commission also notes its view that it no longer needs to be demonstrated that the exclusionary conduct is profitable for the dominant undertaking.[36]
- With respect to the **AEC principle**, the Briefing Paper recognises that a less efficient competitor may also exert a constraint, and says that this should be taken into account when determining whether a particular price-based conduct leads to anticompetitive (full or partial) foreclosure.[37] The Commission therefore considers that Art. 102 TFEU should also protect the competitive constraint imposed by undertakings that are not yet as efficient as the dominant undertaking. In defining these 'not

[35] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, p. 4.
[36] Ibid.
[37] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, pp. 5 and 6.

yet as efficient' competitors, the Commission refers to potential or existing rivals that, while less cost-efficient than a dominant undertaking in the short or medium run, constitute a credible competitive force in the market and could, in future, develop to be a competitive threat on the incumbent's position in the overall market or part of it.[38]

- With respect to the **AEC test** (as opposed to the AEC principle), according to the Commission's interpretation of the recent case law it has no legal obligation to conduct a quantitative test, and, in particular, the AEC test is not warranted in cases other than those of predatory pricing and margin squeeze.[39]
- Finally, the Commission's Briefing Paper states that, according to the Commission's interpretation of the case law, **constructive refusal to supply** (including margin squeeze) is a category of abuse that is distinct from outright refusal to supply. According to the Briefing Paper, the *Bronner* criteria for indispensability set out for outright refusal to supply do not apply to constructive refusal to supply.[40] The Briefing Paper further refers to the case law to indicate that the reason for this distinction lies in the fact that, under constructive refusal to supply, as opposed to outright refusal, the 'intervention will not result in an obligation to grant access, given that access has already been granted'.

In its Communication amending the Guidance Paper, DG Competition introduced targeted amendments to the Guidance Paper concerning the issues discussed in the Policy Brief (notably, the definition of anticompetitive foreclosure; the role of the AEC test; and the relationship between refusals to deal and margin squeeze).

2.4 New guidelines: indicative direction and process

The amended Guidance and the Policy Brief provide some indications of the approaches that the Commission is likely to take in the draft Guidelines.

The indications from the Commission so far suggest that the Commission will seek to retain an effects-based approach (at least in principle), but that it will rely less directly on the theories of harm based

[38] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, p. 7, footnote 44.
[39] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, p. 6 and footnote 53. *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, para. 5; *Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763, para. 538.
[40] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, p. 7.

on the economics literature that were set out in the 2009 Guidance Paper. At the same time, the Commission may seek to increase reliance on legal presumptions for abuse arising from some types of conduct, such as exclusive dealing and exclusivity rebates. In addition, the Guidelines are expected to provide more clarity on how the Commission will assess foreclosure through non-price conduct without using an AEC test; under what conditions foreclosure of less-efficient competitors can constitute abuse; what competitive conduct may fail to qualify as 'competition on the merits'; and how the Commission will assess instances of constructive refusal to deal (including self-preferencing) in cases where the inputs in question are not 'indispensable' per *Bronner*.

In statements made by Commission officials to date, it appears that the Commission is minded to favour the following two-pronged test for exclusionary abuse (in light of recent case law, e.g. *SEN*):[41] a) does the conduct depart from 'competition on the merits'; and b) is the conduct capable of producing actual or potential effects of restricting competition? As stated by the Commission officials, this two-pronged test is fairly open-ended, and it will need to be developed in the new Guidelines to acquire substantive meaning. It does, however, appear that this two-pronged test would place significant emphasis on the concept of 'competition on the merits' (which would need to be clearly defined in the Guidelines), and it may not directly rely on the notion of foreclosure of as-efficient competitors. Indeed, this test may seek to capture the foreclosure of *existing* competition (equally efficient or not), thus potentially including foreclosure effects that relate to not-as-efficient competitors.

The background to the Commission's initiative to introduce Guidelines on Art. 102 is that the growing body of case law, while embracing the effects-based approach put forward by the 2009 Guidance Paper, has been seen as raising a number of challenges for an enforcement agency. Some commentators have argued that the high standard of proof implied by the 'effects-based' approach has resulted in difficulties

[41] See *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 103: 'Article 102 TFEU must be interpreted as meaning that a practice which is lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be characterised as 'abusive' for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits. Where those two conditions are fulfilled, the undertaking in a dominant position concerned can nevertheless escape the prohibition laid down in Article 102 TFEU if it shows that the practice at issue was either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers'.

in bringing cases and, thus, underenforcement.[42] This has led to regulatory initiatives such as the Digital Markets Act. The draft guidelines are expected to be published for public consultation in Summer 2024, and are likely to be followed by an intense discussion before adoption.[43]

[42] de Streel, A., Crémer, J., Heidhues, P., Fletcher, A., Kimmelman, G., Monti, G., Podszun, R., Schnitzer, M. and Scott Morton, F.M. (2023), 'The Effective Use of Economics in the EU Digital Markets Act', 30 July, Yale Tobin Center for Economic Policy Discussion Paper No. 8.

[43] We note that the debate on the guidelines and on the evolution of the law under Art. 102 will have implications for private and collective actions, and therefore a broad impact on enforcement across European jurisdictions.

3 Anticompetitive exclusion: general framework

3.1 Objectives and standards

The 2009 Guidance Paper explicitly states that the aim of enforcement in exclusionary abuse is to ensure that dominant firms do not engage in anticompetitive foreclosure. Anticompetitive foreclosure is defined as a situation where the conduct by a dominant firm may lead to consumer detriment and consumer harm.[44] This concept makes a direct and explicit link between anticompetitive exclusionary conduct and consumer harm.

In a number of recent judgments, the Courts have embraced consumer welfare or consumer wellbeing as a primary objective of Art. 102 enforcement.[45] It is clear that for this purpose consumer welfare is defined broadly: it goes beyond prices and incorporates other parameters such as quality, innovation, product variety and services. It also concerns final as well as intermediate consumers and/or customers.[46] The Courts have also confirmed that conduct can be justified by the efficiencies that are passed on to consumers.[47]

By embracing a consumer welfare standard, the Courts have confirmed the shift towards a more economically grounded effects-based approach. From an economic perspective, the implementation of a sound effects-based approach requires the identification of a coherent and evidence-based theory of consumer harm that sets out how the conduct is likely to harm consumers, in light of all relevant circumstances (even if that harm cannot be directly shown or quantified).

However, the case law has not recognised the need for an explicit theory of harm. Instead, the Courts have put forward alternative proxies (or legal tests) to establish whether a conduct is anticompetitive and hence likely to harm consumers. These include the notion of protection

[44] The 2009 Guidance Paper defines anticompetitive foreclosure as 'a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers'.
[45] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 46.
[46] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 46.
[47] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 140.

of an 'effective competitive process' (or 'structure'); the concept of 'competition on the merits'; and the 'as-efficient competitor' principle.

Both the 2009 Guidance Paper and the Courts refer to the notion of protection of an effective competitive process as a means of preserving consumer welfare. From an economic perspective, this notion may represent a good proxy for a consumer welfare standard provided that effective competition is defined as competition to offer consumers what they want. At the same time, undue focus on protecting competition or a competitive structure carries the risk of protecting less efficient competitors, whose presence may actually not benefit consumers. This is where the AEC principle plays an important role as an alternative proxy for consumer harm. At the same time, the AEC principle has its limitations, which we discuss in more detail in section 3.2 of this report.

The Courts have also relied on the notion of 'competition on the merits' as a possible alternative standard for anticompetitive conduct. The main drawback of this standard is that it does not have a clear definition or economic meaning. In *Unilever*, the Court has put forward a possible definition of conduct that is not 'competition on the merits', referring to conduct that has no other economic rationale except for excluding a competitor. This is essentially what economists have termed a 'no economic sense' test. This test was actively discussed by a number of prominent economists before the adoption of the 2009 Guidance Paper, but ultimately does not feature in the Guidance Paper.[48] It will be interesting to see whether this concept will feature in the new guidelines.

[48] Werden, G.J. (2006), 'Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test', *Antitrust Law Journal*, **73**:2, pp. 413–33; Salop, S.C. (2006), 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard', *Antitrust Law Journal*, **73**:2, pp. 311–374.

Box 3.1 Objectives and standards: questions for discussion

1 Should the principle of 'anticompetitive foreclosure' (as defined in the 2009 Guidance Paper) and the related notion of harm to consumers be preserved in the new Guidelines?

2 Should an explicit and coherent theory of (consumer) harm be set out in Art. 102 cases, and how could such a requirement be incorporated into the guidelines? Should the conduct be considered abusive only if consumers would be worse off with the conduct than under a counterfactual without the conduct?

3 What is the role of possible alternative definitions of anticompetitive conduct (e.g. harm to the 'competitive process'; harm to a 'competitive market structure'; impediments to 'competition on the merits'; 'no economic sense' tests)? Should they be alternatives to a consumer harm test (or ways to proxy harm to consumers)?

Source: Oxera.

3.2 The as-efficient competitor: principle and test

3.2.1 As-efficient-competitor principle

As set out in section 2.2.1, foreclosure of an 'as efficient' competitor has been advanced as the main standard for assessing 'anticompetitive foreclosure' in recent Court judgments.

The AEC principle is meant to ensure that the law does not shield less efficient rivals from competition, since this would decrease the incentives of those rivals, as well as the incumbent, to compete. As such, the application of the AEC principle can be seen as a disciplining factor to move away from the protection of competitors *per se*, favouring instead the protection of a dynamic competitive process in which firms can benefit from efforts to increase their efficiency while passing on some of the benefits to consumers.

In addition to avoiding the protection of competitors per se, a key advantage of the AEC principle is that it promotes a degree of predictability in competition law enforcement and facilitates

compliance by providing a framework for self-assessment. The reason for this is that the AEC principle relies primarily on information that firms themselves have access to. In particular, under the AEC principle, dominant firms would need to consider the consequences of their conduct primarily for a hypothetical, equally efficient competitor—rather than for their actual competitors, whose cost structures and demand they are unlikely to know. This also means that the efficiency levels of potentially excluded competitors are, in principle, irrelevant for the application of the AEC principle: it is about whether a hypothetical AEC could still profitably compete, and not whether actual competitors are excluded from the market (possibly because of their inefficiency).

The AEC concept and related tests do not, in themselves, prove or disprove any theory of harm (or benefit), but merely illustrate whether the conduct is capable of excluding a hypothetical as-efficient competitor. As such, the principle remains agnostic as to the possible anti- or procompetitive incentives behind the conduct. This, in turn, means that it may not be advisable to consider the AEC principle in isolation, but rather contextualise it within the broader fact and evidence base, and consider aspects such as the likelihood of successful monopolisation, the degree of market power, the degree of market coverage, and so on.

It has also been noted that the AEC principle may not be able to capture situations where barriers to entry and expansion (e.g. due to economies of scale or network effects) lead to the emergence of a strongly dominant firm, where no challengers may be expected to be 'as efficient' as the incumbent in the short to medium run. The presence of these smaller challengers in the market may nonetheless be expected to benefit consumers, for example if there is a prospect that they could become 'serious challengers for all or a significant portion of the dominant firms' customers in the future'.[49] There is therefore a risk that a strict application of the AEC principle as the standard for anticompetitive foreclosure could then lead to underenforcement in situations with a strong incumbency position. However, it is difficult to operationalise a standard based on not-yet-as-efficient competitors, and require a dominant firm to hold back to allow room for firms that one day may be as-efficient rivals.

[49] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, para. 5.

3.2.2 As-efficient-competitor tests

The AEC principle is a conceptual framework. However, its practical application and usefulness often depend on how the principle is translated into a formal 'test' based on data. To aid authorities and courts with the application of the AEC principle in specific cases, economists have developed various versions of tests that translate the general AEC principle into a testable quantitative tool: the AEC 'test'.

Broadly speaking, there appears to be fairly broad consensus that the AEC test can be usefully applied to certain pricing abuses, such as margin squeeze and predatory pricing. In the classic case of predation, the test boils down to a comparison between the price of the dominant firm and its costs (the *Areeda-Turner*/*Akzo* test).

The test may also be applied to other pricing or hybrid conducts (e.g. some forms of rebate), depending on the specific characteristics of the conduct. For example, in the case of loyalty rebates, the AEC test is an 'imputation' test that attributes the discount offered by the dominant firm only to the volumes that a rival is able to compete for ('contestable' volumes), and not to all of the sales made by the dominant firm.

Finally, the test may be altogether infeasible or undesirable for non-pricing conduct or other forms of conduct that explicitly reference rivals.

Sections 4.1 and 4.2 of this report cover more detail on the specific conducts, but as a matter of principle at this stage it is useful to note that the usefulness and appropriateness of the AEC test relate primarily to the following three factors.

- First, the presence of **concrete difficulties with measurements**/ computations of the sensitivity of the test to the assumptions. In predatory pricing and margin squeeze cases, the translation of the principle into a quantitative test is more straightforward, and the inputs more readily available. In other pricing cases, however (and particularly in rebates), the result of the AEC test can be highly sensitive to key assumptions that are not easily measured as inputs (e.g. the contestable share of demand). This means that a small increase in the contestable share can quite easily lead to a situation where effective prices are above cost, making it hard to make a finding of below-cost pricing and hence of abusive conduct.
- Second, the **relevance of the test to the theory of harm**. For example, on the one hand, the AEC test is more directly relevant

for 'predatory'-type theories of harm because the price level itself is the main instrument of exclusion. Predatory pricing theories of harm are premised on short-run profit sacrifice, in principle followed by recoupment/harm in the future or from other buyers (even though the case law does not require a proof of recoupment). On the other hand, contracts that reference rivals (e.g. exclusive dealing) are capable of resulting in non-predatory foreclosure (e.g. no profit sacrifice in the short run), making the AEC test less relevant. Some recent literature is even suggesting that the AEC test may be misleading for some type of conduct (see section 4.2on exclusivity rebates).

- Third, using the AEC test as a bright line for legality can constitute **quite a strict test for enforcement**, which competition authorities may struggle to meet (as in recent Court cases[50]). This test may therefore be justified for conduct that authorities may wish to encourage (e.g. low pricing), but less so for conduct that may have a less direct procompetitive benefit (e.g. discounts that lead to *de facto* exclusivity).[51] This means that, from a policy perspective, the balance of type I errors (the risk of overenforcement) and type II errors (the risk of underenforcement) should play a role in deciding when to apply the AEC test to a specific type of conduct.

In assessing these three factors, it should be borne in mind that the AEC test—like the principle in general—in fact does not provide or prove any particular theory of harm or benefit, and should not be seen as equivalent to an effects-based analysis. The latter is a broader concept, and the result of an AEC test needs to be interpreted within that broader concept, as part of an overall assessment of the conduct and of its likely effect.

[50] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632; *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358; *Google Shopping,* Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763.
[51] In the case of predation, it is notoriously difficult to differentiate legitimate price competition from predatory exclusionary conduct. The risk of chilling procompetitive conduct (i.e. lowering prices) may be seen as high, which could further justify a requirement to pass a strict test before concluding that the conduct is abusive. However, conduct that explicitly references rivals by making transactions/discounts conditional on the extent to which their customers dealt with rival suppliers may not be as prone to a type I error, because there could be less restrictive alternatives that achieve a similar procompetitive outcome (e.g. offering unconditional discounts, or conditioning on the dominant undertaking's volumes and not on market share).

Box 3.2 AEC principle and test: questions for discussion

4 Should the AEC principle be a guiding principle for all enforcement of Art. 102 (including non-price-based conduct)?

5 Is there a risk that applying the AEC principle could lead to underenforcement (for example, when less efficient competitors play an important competitive role)?

6 Does reliance on the AEC principle mean that the overall objective of enforcement is to promote efficiency (i.e. total welfare) as opposed to consumer welfare? If so, is that a bad thing?

7 Under what circumstances (and for what type of conduct) should a quantitative AEC test be used?

8 Should the AEC test be used as a bright test for legality (where, if the AEC test is passed, the conduct is not illegal), and if so, for which types of conduct?

9 Should the guidelines consider alternative tests to the AEC test for some types of conduct?

Source: Oxera.

3.3 Anticompetitive effects

This section outlines the possible interpretations and applications of the notion of 'anticompetitive effects', in light of recent jurisprudence and some key economic principles.

3.3.1 Actual or potential effect

The Courts have confirmed that certain conducts by a dominant undertaking may amount to 'naked restrictions', for which an effects analysis is not required.[52] For a finding of abuse in cases of other conducts, however, the EU Courts have clarified that, although requiring more than hypothetical effects, the effect does not necessarily have to be concrete. Instead, 'it is sufficient to demonstrate that there is an

[52] See Guidance Paper, para. 22.

anticompetitive effect which may *potentially* exclude competitors' (emphasis added).[53]

Moreover, the Union Courts have emphasised that, if a dominant undertaking actually implements a practice, 'the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU'.[54]

Finally, the case law indicates that the Commission's assessment of a conduct of a dominant undertaking cannot be carried out formalistically or *in abstracto*. Instead, it must take into account all relevant facts and circumstances.[55] For instance, in *Intel*, the Grand Chamber of the Court of Justice indicated that, in order to establish the capacity of exclusivity rebates to restrict competition, the Commission must analyse a set of relevant factors with regard to the specific circumstances of each case (these draw closely on the framework set out in the Guidance Paper).[56] And more recently, in *Google Shopping*, the General Court reiterated that, in order to find an abuse under Art. 102 TFEU, the Commission must take into account 'all the relevant circumstances', including the arguments made by the dominant undertaking.[57]

[53] *TeliaSonera*, Judgment of the Court of Justice of 17 February 2011, C-52/09, EU:C:2011:83, paras 64 and 77; *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, para. 66; *Telefónica*, Judgment of the General Court of 29 March 2012, Case T-336/07, EU:T:2012:172, para. 268; *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 53; *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 41.

[54] *TeliaSonera*, Judgment of the Court of Justice of 17 February 2011, C-52/09, EU:C:2011:83, para. 65; *Telefónica*, Judgment of the General Court of 29 March 2012, Case T-336/07, EU:T:2012:172, para. 272; *Deutsche Telekom*, Judgment of the Court of 14 October 2010, Case C-280/08 P, EU:C:2010:603, para. 253; and *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379, para. 53. Most recently, in *Google Shopping*, the General Court held that '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' (*Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763, para. 442).

[55] *Generics (UK) and Others*, Judgment of the Court of 30 January 2020, Case C-307/18, EU:C:2020:52, para. 154; *Telefónica*, Judgment of the General Court of 29 March 2012, Case T-336/07, EU:T:2012:172, para. 175; *Deutsche Telekom*, Judgment of the Court of 14 October 2010, Case C-280/08 P, EU:C:2010:603, para. 175; *TeliaSonera*, Judgment of the Court of Justice of 17 February 2011, C-52/09, EU:C:2011:83, para. 28; Qu*alcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358, paras 396 to 398; *Slovak Telekom*, Judgment of the Court of 25 March 2021, C-165/19 P, EU:C:2021:239, para. 42.

[56] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 139.

[57] *Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763, paras 439–441. See also *Servizio Elettrico Nazionale*, Judgment of the Court of

3.3.2 Likelihood and magnitude of effect

The Union Courts have previously used various terminology to refer to the probability threshold for anticompetitive effects. For example, they have referred to anticompetitive effects being 'capable', 'plausible' (which presumably implies that effects do not need to be 'more likely than not'), and even 'likely' (e.g. probability >50%).[58]

In addition to ambiguity in terms of the probability threshold, there is ambiguity in terms of the required magnitude threshold. Unlike Article 101 TFEU, Art. 102 does not have a *de minimis* rule that requires conduct to have an appreciable anticompetitive effect. However, the Union Courts have established that the conduct being investigated must have appreciable effects in terms of, for example, coverage and being non-occasional. Moreover, the existing market structure and other economic conditions determine whether a particular conduct can be considered to be 'appreciable' in terms of its effects on competition and consumer welfare.

This discussion is related to whether exclusionary abuse should be based on a '**balance of probabilities**' standard, or instead should apply a more general '**balance of harm**' standard. Under the former, only conduct that is more likely than not to lead to anticompetitive foreclosure would constitute an abuse. Under the latter, a broader consumer harm perspective is taken, which considers both the probability of foreclosure of competitors and its impact on consumer welfare (e.g. conduct that forecloses entry of the only credible threat to a player with a significant dominant position would have a strong impact on expected consumer welfare, and hence should be found to be

12 May 2022, Case C-377/20, EU:C:2022:379, paras 54–56, which notably states that if a dominant undertaking submits that a conduct, based on market developments, did not produce effects, that information can constitute evidence of a conduct's lack of capability, but 'that evidence must, however, be supplemented, by the undertaking concerned, by items of evidence intended to show that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects'; *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 62.

[58] *Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763, para. 438 ('unless it is demonstrated that there is an anticompetitive effect, or at the very least a potential anticompetitive effect'); *Slovak Telekom*, Judgment of the Court of 25 March 2021, C-165/19 P, EU:C:2021:239, para. 109 ('capable of producing exclusionary effects); *Lietuvos geležinkeliai AB (Lithuanian Railways)*, Judgment of the General Court of 18 November 2020, Case T-814/17, EU:T:2020:545, para. 80 ('tends to restrict competition or, in other words, that the conduct is capable of having that effect'); *Post Danmark I*, Judgment of the Court of 27 March 2012, Case C-209/10, EU:C:2012:172, para. 44 ('actual or likely'); *TeliaSonera*, Judgment of the Court of Justice of 17 February 2011, C-52/09, EU:C:2011:83, para. 77 ('practice produces, at least potentially, an anti-competitive effect'); *Telefónica*, Judgment of the General Court of 29 March 2012, Case T-336/07, EU:T:2012:172, para. 268 ('tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect'); *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, (para. 31; 'capable'; para. 66: 'may potentially exclude competitors'; para. 67: 'conduct is likely to have an anticompetitive effect'; para. 68: 'capable of restricting competition'; para. 74: 'probable').

anticompetitive even if the entry of the competitor was less likely than not). Under a balance of harm approach, in principle foreclosure of any competitor could be taken into account (and not just as-efficient competitors), provided that foreclosure has an impact on consumer welfare. In practice, though, capturing foreclosure of not-as-efficient competitors may lead to significant operational difficulties.

Box 3.3 Anticompetitive effects: questions for discussion

10 How should the 'capability' of an anticompetitive effect be interpreted in terms of likelihood and magnitude?

11 Should the guidelines (explicitly or de facto) adopt a 'balance of harm' approach, as opposed to a 'balance of probabilities' approach?

Source: Oxera.

3.4 Presumptions and rebuttals

Several public statements and recommendations suggest that the Commission may be minded to introduce in the new Guidelines legal presumptions for some types of conduct, such as exclusive dealing and exclusivity rebates. Such suggestions appear to be motivated mainly by the high standard of proof required for proving effects, which makes enforcement a long and complex process and may lead to underenforcement. A number of legal and economic experts highlight the importance of a careful balance of costs and errors of enforcement action, the possibility of having a 'quick look' at the conduct that is 'obviously' harmful, and the need to reverse the burden of proof in some cases to ensure an optimal balance.[59]

The 2009 Guidance Paper identifies categories of behaviour that are presumed to be illegal and where the Commission believes that it has no obligation to carry out a detailed assessment of effects. Such conduct

[59] See, for example, Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*. See also Schweitzer, H. and de Ridder, S. (2024), 'How to fix a failing Art. 102 TFEU: Substantive interpretation, evidentiary requirements, and the Commission's future guidelines on exclusionary abuses', *Journal of European Competition Law and Practice*, **15**, April.

includes preventing customers from testing a competitor's products or paying a distributor or customer to delay the introduction of such products.

Where a practice is found to be anticompetitive, it is still possible, at least formally, for the undertaking to show that the practice is or was justified objectively, either due to certain circumstances of the case that are external to the undertaking concerned, or having regard to the objective ultimately pursued by Art. 102 TFEU.[60] Relying on an objective justification is, however, not possible for otherwise anticompetitive conduct that strengthens a monopoly position. In the latter case, the Commission presumes that, where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process always outweigh possible efficiency gains.[61]

Legal presumptions are beneficial for both enforcers and businesses where they increase legal certainty. From an economic perspective, presumptions can be a useful tool where the conduct carries a high risk of harm as established by economic theory, and where efficiency either is absent or can be obtained using alternative, less harmful practices. An important question remains as to the form that this presumption must take and the implications with respect to the possibility of rebuttal. For example, should the rebuttal be confined to objective justifications/efficiencies, or can it extend to demonstrating that the conduct is not capable of leading to anticompetitive effects (e.g. because of low coverage of the practice)? In recent judgments, the Courts have clarified that it is possible for a firm to rebut the presumption of anticompetitive conduct and provide evidence showing that the strategy is incapable of restricting competition in the market(s) in which it is implemented.[62] Where the dominant undertaking provides evidence in this sense, it triggers a duty on the authority to assess its impact.[63]

Commentators continue to debate whether Art. 102 TFEU provides for a distinction between 'by object' and 'by effect' restrictions similarly to

[60] *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011, para. 84.
[61] The 2009 Guidance Paper, para. 30.
[62] *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632, para. 138. Also *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33, para. 47.
[63] Ibid., para. 139.

Article 101 TFEU.[64] The concern expressed when drawing a parallel with Article 101 enforcement is that, in practice, classifying the conduct into the 'by object' box carries a risk of the enforcer bypassing the requirement to formulate (and investigate) a coherent, and evidence-based, theory of harm, and limiting rebuttal possibilities to the efficiency defence.

At the same time, the standard of proof to justify the conduct on the basis of associated efficiencies remains high, and takes into account only verifiable (rather than potential) efficiencies that benefit consumers and that could not have been achieved otherwise. This introduces a potential asymmetry between the standard of proof required to show that a conduct is anticompetitive and the standard of proof required for the defendant to justify its conduct on the basis of efficiencies (increasing the risk of type I errors).

[64] See Akman, P. (2015), 'The Reform of the Application of Article 102 TFEU: Mission Accomplished?', *Antitrust Law Journal*, 2 September, which argues that Art. 102 does not provide for a distinction between 'by object' and 'by effect'. However, Ibáñez Colomo, P. (2023), 'The (Second) Modernisation of Article 102 TFEU: Reconciling Effective Enforcement, Legal Certainty and Meaningful Judicial Review', *Journal of European Competition Law & Practice*, **14**:8, December, pp. 608–623 argues that Art. 102 provides for 'by object' restrictions.

Box 3.4 Presumptions and rebuttals: questions for discussion

12 What is the economic rationale for introducing presumptions in the assessment of exclusionary conduct?

13 Should some conduct (e.g. contracts that reference rivals; exclusive dealing) be subject to a rebuttal presumption? If so, can this be reconciled with the current case law?

14 What form should presumptions take? How much would the competition authority be required to show in the case of a presumption?

15 What is the nature of the rebuttal of possible presumptions? Should it be confined to an efficiency defence, or should be it broader (by reference to all relevant circumstances)?

16 What should be the standard of proof for efficiencies?

Source: Oxera.

4 Assessment of specific conducts

In this section we discuss three specific conducts: predation and selective discounts; exclusive dealing (including exclusivity rebates); and refusal to deal (including constructive refusal to deal, margin squeeze and self-preferencing). We have selected these three types of conduct in order to illustrate both the general principles discussed in the previous section and some of the recent developments in the case law and policy discussion.[65]

4.1 Predation and selective discounts

As set out in section 3.2.2, predatory pricing and selective discounts that do not reference competitors are two examples of abusive behaviour where the AEC test can be usefully applied, as they are conducts that rely on prices as the main instrument of exclusion.[66]

The AEC test is perhaps most straightforward for predatory pricing, as the test involves comparing the dominant firm's prices and costs in order to understand whether the dominant firm sacrificed profits. For selective discounts (and selective predatory pricing), the test should be applied to critical customers, or the portion of demand that the discounts apply to.[67]

The case law provides that prices below AAC are presumed to be illegal, whereas prices above LRAIC are presumed to be legal.[68] For prices in between AAC and LRAIC, further evidence on intent and effects is required in order to assess whether the behaviour is anticompetitive.[69]

Even though the test is quite straightforward to apply in these cases, some challenges arise. First, in practice, it may not be as straightforward to measure the right costs and prices, especially in markets with complex cost structures. Second, even though the cost benchmarks are set out quite clearly in case law, foreclosure of competitors may not always require prices to be below cost.[70] Third, the

[65] We do not cover tying and bundling in this section, as the legal framework for this conduct is relatively stable (following *Microsoft*), and in order to keep our discussion more focused.
[66] See, for example, *Intel v. Commission*, Judgment of the Court of 6 September 2017, Case C-413/14 P, EU:C:2017:632.
[67] Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*, p. 13.
[68] *AKZO Chemie BV*, Judgment of the Court of 3 July 1991, Case C-62/86, EU:C:1991:286.
[69] Ibid.
[70] This is where the discussion about the definition of an 'as efficient competitor' is relevant. The price cost test checks only whether a company that is exactly the same as the dominant firm could

application of the AEC test depends on the theory of harm, as there is some degree of judgement in terms of which costs and prices should be included in the test. It is therefore important to articulate a clear theory of harm (including an explanation of how any short-term profit sacrifice would be recouped), especially in cases that relate to selective price cuts or selective discounts. Fourth, even in cases where the test is (more) easily applicable, such as pure predation cases, it is not the only evidence that should be relied upon. Again, a clear theory of harm is key, as well as an assessment of the facts of the case.[71] Finally, the coverage of the conduct remains an important element to determine whether the practice is capable of excluding an as-efficient competitor, especially in the case of discounts that are targeted to only some volumes or customers.

A key advantage of the AEC test for predation and selective discounts is that it relies on the dominant firms' own costs and prices. Broadening the test to include not-yet-as-efficient competitors would raise significant conceptual and practical difficulties, because i) the principle of not-yet-as-efficient competitor is vague (it does not set out clearly which firms should or should not be protected, and how to establish whether a not-yet-as-efficient competitor is on track to become as-efficient); and ii) one would have to rely on hypothetical price and cost data, or price and cost data of firms other than the dominant firm. This therefore not only complicates the practical applicability of the test, but also creates uncertainty about what the thresholds are in relation to which not-yet-as-efficient competitors should be protected. A question therefore arises about whether a workable not-yet-as-efficient competitor test (as opposed to the principle) can be constructed.

In addition to predation and selective discounts, there are some conducts that *could* be regarded as price conducts but are in a grey area between price conducts and other types of conduct. One example is where an integrated firm's behaviour is somewhere between self-preferencing and a margin squeeze or predatory pricing. The application of the AEC test in such cases may be possible as it relates to a pricing conduct, but at the same time parties could argue that the AEC test is not applicable if they put forward a self-preferencing theory of harm (see section 4.3 for a discussion of this conduct). There is therefore a risk that the competition authorities could 'pick and choose' which

be excluded. In reality, competitors that are equally (or potentially even more) cost-efficient, but financially constrained, could be excluded with prices above costs, as, for example, they would not have access to external funding due to the low prices.

[71] See Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*, 19 March.

theory of harm to consider, depending on their appetite for applying the AEC test.

Box 4.1 Predation and selective discounts: questions for discussion

17 Should an AEC test always be used for pricing conduct that does not reference rivals (e.g. predation; selective discounts)? What are the policy reasons for (not) doing so?

18 What about the case of competitors that are 'not yet as efficient'? Should the AEC test be applied in these cases, and do these 'simple-to-test' conducts suddenly also become difficult?

19 What if a conduct is in the grey area of being a pricing conduct? Is there a risk of 'picking and choosing' the theory of harm depending on whether there is appetite to apply the AEC test?

Source: Oxera.

4.2 Exclusive dealing (including exclusivity rebates)

In terms of the anticompetitive effects of exclusive dealing, the conventional post-Chicago approach emphasises:

- theories of harm around contractual externalities—the idea that an incumbent can act as a first mover and use a contract with a buyer to extract rents from an entrant;[72]
- theories of harm around economies of scale and possibly a lack of buyer coordination—the idea that an incumbent may sign exclusivity with a sufficient subset of buyers in order to foreclose an entrant. Such foreclosure occurs when the contracts are publicly observable,[73] but may fail when the contracts are private.[74] If no individual buyer's exclusivity is

[72] Aghion, P. and Bolton, P. (1987), 'Contracts as a Barrier to Entry', *American Economic Review*, **77**, pp. 388–401.
[73] Segal, I. and Whinston, M.D. (2000), 'Naked exclusion: Comment', *American Economic Review*, **90**, pp. 296–309.
[74] Miklós-Thal, J. and Shaffer, G. (2016), 'Naked Exclusion with Private Offers', *American Economic Journal: Microeconomics*, **8**:4, pp. 174–94.

pivotal to foreclosure, the incumbent may be able to secure exclusivity at a low cost, to the detriment of buyers as a group.[75]

On the procompetitive side, the literature emphasises the idea that exclusive dealing can foster relationship-specific investments.[76]

As regards the difference between exclusive dealing and exclusivity rebates, it is worth noting that the above theories of harm do not directly apply to exclusivity rebates. Unlike contracts, rebates do not entail a commitment by the buyer and therefore create neither contractual externalities nor a first-mover advantage (in the context of a lack of buyer coordination). Also, in the case of contracts with intermediate buyers, exclusivity discounts may reduce marginal costs for downstream firms, and potentially lead to lower prices for consumers. For this reason economists have generally argued that exclusivity rebates should be dealt with less strictly than contractual exclusive dealing.[77]

More recent economic research has shown that a dominant firm—defined as a firm with a cost (or quality) advantage—can profitably engage in exclusive dealing and in exclusionary discounting whenever prices exceed marginal cost—for example, when competition is imperfect and linear pricing is used. In that case, exclusive dealing is anticompetitive if the firm is sufficiently 'dominant' (i.e. if there is an important cost or quality asymmetry), which allows it to capture sales from its rivals at the same time as harming consumers.[78]

In these models, the fact that anticompetitive foreclosure can be profitable in the short run suggests that using the AEC test may not be appropriate, even ignoring any practical complications in implementing such a test. Calzolari and Denicolò (2020)[79] assess price–cost tests in

[75] The fact that buyers may not need to be compensated for exclusivity gives an early indication that the AEC test may not always be informative in this context. See Fumagalli, C., Motta, M. and Calcagno, C. (2018), *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance*, Cambridge University Press, p. 314.
[76] Segal, I. (1999), 'Contracting with Externalities', *Quarterly Journal of Economics*, **114**:2, pp. 337–88.
[77] Fumagalli, C., Motta, M. and Calcagno, C. (2018), *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance*, Cambridge University Press, p. 313.
[78] See, for example, Calzolari, G., Denicolo, V. and Zanchettin, P. (2020), 'The demand-boost theory of exclusive dealing', *The RAND Journal of Economics*, **51**:3, pp. 713–738. The reason for this is that when the cost disadvantage of a rival is significant such that product differentiation primarily protects the rival, moving to exclusive dealing changes the mode of competition to 'competition in utility space', making product differentiation irrelevant and causing the rival to exit the market. However, if the cost disadvantage of the rival is insignificant such that product differentiation protects the 'dominant' firm, exclusive dealing intensifies the competitive constraint from the rival and firms may have a unilateral incentive to compete by engaging in exclusive dealing.
[79] Calzolari, G. and Denicolò, V. (2020), 'Loyalty discounts and price-cost tests', *International Journal of Industrial Organization*, **73**:C.

this context and show that, whereas exclusive dealing may or may not be anticompetitive (depending on the level of 'dominance', as discussed above), the AEC test can give rise to both type I and type II errors.[80]

The generality of the assumptions on which the anticompetitive effects in Calzolari et al. (2020) are based—dominance and market imperfections—in combination with the fact that the AEC test is inconclusive, has led Fumagalli and Motta (2024) to advocate for a stricter approach to exclusive dealing (and exclusionary rebates) that does not rely on the AEC test: namely, a rebuttable presumption that exclusive dealing (and exclusionary rebates) is harmful when conducted by a dominant firm, thus shifting the burden of proof to dominant firms.

[80] In particular, when the competitor is as efficient as the dominant firm, but faces capacity constraints, a test focusing on a buyer's entire volume will always be passed, whereas a test focusing only on the contestable part of a buyer's volume will never be passed (even in cases where exclusive dealing is procompetitive).

Box 4.2 Exclusive dealing: questions for discussion

20 On the basis of the recent literature, which theories of harm should be applied to exclusive dealing and exclusivity rebates?

21 Should the same economic approach be applied to exclusive dealing and exclusivity rebates?

22 Should an AEC test be applied to exclusivity rebates (e.g. to show that a rebate cannot be profitably matched by an as-efficient competitor), and if not, why not?

23 If the AEC test is not suitable for exclusive dealing and exclusivity rebates, what is the alternative?

24 Under what conditions should exclusive dealing or rebates be presumed to be anticompetitive? If there is a presumption of anticompetitive conduct, what should be the nature of the rebuttal?

Source: Oxera.

4.3 Refusal to deal, margin squeeze and self-preferencing

The 2009 Guidance Paper does not make a distinction between outright refusal to deal and so-called constructive (or partial) refusal to deal (i.e. contractual relations with discriminatory supply in the form of high wholesale prices and/or degraded services for downstream competitors). In addition, it treats margin squeeze as one form of refusal to deal—where the *Bronner* conditions (including indispensability) would apply. It also does not discuss self-preferencing.

However, the Commission's March 2023 Briefing Paper notes that the recent case law establishes that **constructive refusal to supply** (including margin squeeze) is a category of abuse distinct from **outright refusal to supply**. Most of the cases where this legal principle has been established have related to regulated industries (i.e. telecoms) where the incumbent firms have faced a regulatory obligation to deal.[81]

[81] Such a position contrasts directly with the US approach. See, for example, *Verizon Communications v Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398 (2004): 'Antitrust analysis must

According to the Briefing Paper, the *Bronner* criteria for indispensability that are set out for outright refusal to supply do not apply to constructive refusal to supply.[82]

This leads to a situation where intervention is actually harder in cases of outright refusal to deal (as indispensability would need to be shown, among other things); and easier in cases of constructive refusal to deal. In other words, a dominant company runs fewer legal risks when simply refusing to deal outright than when it deals, but on terms that could be seen as disadvantageous to rivals.

This distinction may be seen to run counter to economic principles: if intervention in constructive refusal to deal is warranted, surely it is also warranted (and possibly even more so) in outright refusal to deal (all else being equal)?[83] Conversely, one might say that it is not warranted in either case. If the objective in managing intervention thresholds in vertical foreclosure cases is to balance appropriability (i.e. dynamic incentives to invest) and contestability, the exact form at which refusal to deal occurs (e.g. outright or constructive) should be irrelevant.

However, the Briefing Paper observes that, under constructive refusal to supply, as opposed to outright refusal, the 'intervention will not result in an obligation to grant access, given that access has already been granted'. As such, the lower intervention thresholds in constructive refusal to deal cases would be justified by reference to the freedom to contract and the right of companies to dispose of their products to whomever they choose—rather than the balancing exercise in protecting dynamic incentives.

The draft guidelines on Art. 102 will need to take a position on these issues, but have already clearly signalled that constructive refusal to deal (including self-preferencing) will be subject to different legal thresholds from outright refusal to deal.

sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anti-competitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages.'

[82] European Commission (2023), 'A dynamic and workable effects-based approach to Article 102 TFEU', Policy Brief, March, p. 7.

[83] See Fumagalli, C. and Motta, M. (2024), 'Economic principles for the enforcement of abuse of dominance provisions', *Journal of Competition Law and Economics*, 19 March.

Box 4.3 Refusal to deal, margin squeeze and self-preferencing: questions for discussion

25 What is, from an economics perspective, the difference between refusal to deal, margin squeeze, and self-preferencing conduct?

26 What could be the economic justification for a higher bar for intervention in outright refusal to deal than in constructive refusal to deal?

27 What would be the ideal approach, from an economics perspective, to intervention in refusal-to-deal cases (and how could it be reconciled with existing case law)?

28 Should self-preferencing conduct receive separate guidelines from (constructive) refusal to deal?

Source: Oxera.

A1 Case Law: summary of selected judgments on Article 102

A1.1 *Post Danmark I*

In 2004, Post Danmark (the dominant undertaking in the distribution of unaddressed mail in Denmark) offered targeted price reductions to three major customers in order to poach them away from its main competitor. The prices were set below average total costs but above average incremental costs.

In a Grand Chamber judgment,[84] the Court clarified that, while competition on the merits can entail the exit of less efficient competitors, Article 82 prohibits any conduct by a dominant undertaking that causes the exit of an as-efficient competitor.

To examine whether this conduct could cause the exit of an as-efficient competitor, the Court looked at the incremental costs of Post Danmark that identified well the great bulk of the costs attributable to the activity of distributing unaddressed mail. While the prices did not cover the average total costs of unaddressed mail distribution as a whole, they did cover the average incremental costs pertaining to delivering the service to the specific customers. The Court therefore concluded that an as-efficient competitor could compete without suffering unsustainable losses in the long term.

A1.2 *Post Danmark II*

In 2007 and 2008, Post Danmark operated a rebate scheme that was applicable to all customers It was conditional on the purchase of the quantities that customers had estimated at the beginning of the year , and retroactive (i.e. it was applicable to all mailings, not just those above the threshold).

In examining the legality of the conduct, the Court held that the AEC test was 'one tool amongst others [to assess] whether there is an abuse of a dominant position'.[85] It determined that, while it can be used to examine the compatibility of a rebate scheme with Article 82, running the AEC test as such is not a legal obligation.

[84] *Post Danmark I*, Judgment of the Court of 27 March 2012, Case C-209/10, EU:C:2012:172.
[85] *Post Danmark II*, Judgment of the Court of 6 October 2015, Case C-23/14, EU:C:2015:651, para. 61.

In this case, the Court determined that the test was irrelevant because the structure of the market made the emergence of an as-efficient competitor practically impossible. Given the high entry barriers, the presence of a less efficient competitor might have contributed to intensifying the competitive pressure.

A1.3 *Intel*

In 2009, the Commission fined Intel €1.06bn for naked restrictions and the use of exclusivity rebates.[86] Although the General Court confirmed this fine in 2014,[87] this decision was reversed in a landmark ruling by the CJEU in 2017, and the case was sent back to the General Court.[88] In 2022 the General Court found that 'the AEC analysis carried out by the Commission in the contested decision [was] vitiated by errors',[89] and that it had 'not established to the requisite legal standard [that the conducts] were capable of foreclosing or likely to foreclose an as-efficient competitor'.[90] Intel engaged in exclusivity rebates conditional upon the customer satisfying (nearly) all demand from Intel. The Commission deemed this to be per se abusive, but also carried out an extensive AEC test in line with the Guidance Paper. The CJEU clarified that exclusivity rebates are not abusive per se, and that, if an AEC test is performed, it must be robust.

On the objective of Art. 102, competition on the merit, and the AEC principle, the CJEU notes (references omitted, emphasis added):

133 [...], it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.

134 Thus, not every exclusionary effect is necessarily detrimental to competition. **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.**

[86] *Intel*, Decision of the Commission of 13 May 2009, COMP/C-3 /37.990, para. 1789.
[87] *Intel*, Judgment of the General Court of 12 June 2014, Case T-286/09, EU:T:2014:547.
[88] *Intel*, Judgment of the Court of 6 September 2017, Case C-413/14, EU:C:2017:632.
[89] *Intel*, Judgment of the General Court of 26 January 2022, Case T-286/09, EU:T:2022:19, para. 482.
[90] Ibid., para. 411.

135 However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.

136 That is why **Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits**. Accordingly, in that light, not all competition by means of price may be regarded as legitimate.

On the specific conduct under consideration (conditional rebates), the CJEU 'clarified' the case law, embracing a more effects-based approach to its assessment, in line with the 2009 Guidance Paper:

137 In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position.

138 However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139 In that case, the Commission is not only required to analyse, first, the extent of the **undertaking's dominant position** on the relevant market and, secondly, the share of the **market covered** by the challenged practice, as well as the **conditions and arrangements** for granting the rebates in question, their **duration and their amount**; it is also required to assess the possible **existence of a strategy** aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.

Paragraph 139 captures the key factors that need to be considered when identifying capability: (i) the extent of the dominant position; (ii) coverage; (iii) the conditions and arrangements for granting the rebates; (iv) the duration and amount; and (v) the intent to exclude an at-least-as-efficient competitor.

A1.4 *Google Shopping*

In 2017, the Commission imposed a €2.4bn fine on Google for abusing its dominant position as a search engine by favouring its own comparison-shopping services.[91] The Decision included novel substantive findings, particularly on (i) the classification of Google's conduct as 'self-preferencing'—and how this conduct departed from competition on the merits; and (ii) whether Google's general results page can be considered an essential facility within the scope of *Bronner*.

Google claimed that, by describing conduct as 'self-preferencing', the Commission sought to circumvent the conditions applicable to a refusal to supply (i.e. *Bronner*). However, the GC,[92] as well as AG Kokott in her opinion ahead of the CJEU judgment,[93] supported the findings of the Commission on the grounds that favouring (or self-preferencing) departs from competition on the merits, while confirming that the *Bronner* criteria were not applicable to this case and should be limited to refusal of supply cases. At the time of writing, a judgment by the CJEU is pending.

A1.5 *Google Android*

In 2018, the Commission fined Google €4.34bn for abusing its dominant position through three types of conduct: the tying of Google's search and browser applications, the conclusion of anti-fragmentation agreements preventing the emergence of competing Android operating systems, and the conclusion of portfolio-based revenue share agreements conditional on the exclusive pre-installation of Google Search on the listed devices.[94]

In appeal, the General Court upheld the Commission's findings regarding the first two conducts but annulled the finding of an abuse in relation to the revenue share agreement.[95] Clarifying that such a conduct led to results identical to those of loyalty rebates, the GC recalled that, when

[91] *Google Shopping*, Decision of the Commission of 27 June 2017, AT.39740.
[92] *Google Shopping*, Judgment of the General Court of 10 November 2021, Case T-612/17, EU:T:2021:763.
[93] *Google Shopping*, Case C-48/22 P, Opinion of Advocate General Kokott of 11 January 2024.
[94] *Google Android*, Decision of the Commission of 18 July 2018, AT.40099.
[95] *Google Android*, Judgment of the General Court of 14 September 2022, Case T-604/18, EU:T:2022:541.

an undertaking submits that its conduct was not capable of restricting competition, it was for the Commission to establish the practice's intrinsic capacity to foreclose competitors that are at least as efficient as the dominant undertaking.[96] While the AEC test can be used to that end, 'it is only one of several factors that may be applied in order to establish, by means of qualitative or quantitative evidence, whether anticompetitive foreclosure exists for the purposes of Article 102 TFEU'.[97] When applied, however, 'it must be conducted rigorously'.[98] The Commission, ruled the GC, had failed to do this.

First, while stating that the revenue share agreement covered a significant part of the national markets for general search services, the Commission had not provided sufficient evidence to support that claim.

Second, the Commission had insufficiently engaged with Google's arguments stating that the costs taken into account were overestimated, which resulted in underestimating the margin that a competing search service could achieve if its app were to be pre-installed alongside Google Search.

Third, the Commission had erred in estimating the contestable share of search queries by (i) focusing on what was actually contested instead of examining what a hypothetical as-efficient competitor could have contested; (ii) ignoring the fact that a much larger share was contested in some national markets; and (iii) failing to show with sufficient certainty that a competitor at least as efficient, especially from the point of view of service quality and innovation, could have contested a much greater share than the one used for the purpose of the AEC test.

Lastly, the Commission did not sufficiently rule out the ability of a hypothetically at-least-as-efficient competitor to offset the portfolio-based RSA by merely stating that a competitor could have pre-installed its own app on only a limited number of devices (since the relevant scenario concerned a hypothetical competitor proposing to substitute its own revenue share agreement for that of Google, including the entire portfolio of devices).

The GC noted, however, the validity of the Commission's dynamic analysis of the agreement, which did not focus only on the time when the agreements entered into force. Indeed, even for an as-efficient

[96] Ibid., paras 640–641.
[97] Ibid., para. 643.
[98] Ibid., para. 644.

competitor, it became more difficult to match the sales of devices sold as the number of mobile devices in circulation covered by the portfolio-based RSAs increased, in so far as the revenues shared by Google depended on searches carried out on the mobile devices sold. The GC noted, however, that the Commission's analysis had remained purely theoretical, since it had not quantified the actual effects of the devices already sold on the ability of a hypothetically as-efficient competitor to offset the rebates, and nor had it engaged with the argument that new devices generated larger revenues.

Overall, the Court had doubts as to the correctness of the result of the AEC test carried out, which therefore could not support the finding of an abuse resulting from the portfolio-based RSAs.

A1.6 *Qualcomm Exclusivity*

In 2018, the Commission fined Qualcomm €1bn for offering exclusivity payments to Apple on condition that Apple sourced all of its Long-Term Evolution standard (LTE) chipsets exclusively from Qualcomm.[99] In 2022, the GC annulled the Commission's decision in full.[100]

The annulment by the GC was made on three substantive grounds (in addition to procedural violations): (i) the Commission had failed to demonstrate anticompetitive effects of the payments and overlooked the relevance of AEC tests; (ii) the Commission had wrongly evaluated Apple's purchase motivations (not looking at the technical requirements of Apple); and (iii) the Commission had relied on contradictory and incomplete evidence, and failure to account for the absence of any actual or potential foreclosed competitors.

With respect to the AEC test, the General Court held that the Commission should have examined the capability of the payments to have anticompetitive effects, which cannot be purely hypothetical. In the specific context of the case, the exclusivity agreement could not create anticompetitive effects, since Apple had no alternative supplier available. The conclusion that the payments were capable of producing 'foreclosure effects on the ground that they had reduced Apple's incentives to switch' was not reached in the 'light of all the relevant factual circumstances'.[101]

[99] *Qualcomm*, Decision of the Commission of 24 January 2018, Case AT.40220.
[100] *Qualcomm*, Judgment of the General Court of 15 June 2022, Case T-235/18, EU:T:2022:358.
[101] Ibid., para. 417.

A1.7 *Unilever Italia*

In 2017, the Italian Competition Authority fined Unilever over €60m for entering into an exclusivity agreement with beach establishments, favouring its own products over those of its competitor, La-Bomba.[102] Unilever defended its actions by, in part, presenting an AEC test demonstrating that its conduct did not impede an equally efficient competitor. Following a referral by Italy's highest administrative court, the CJEU issued a preliminary ruling in 2023 addressing the assessment of exclusivity clauses.[103]

In assessing the role of the AEC principle and test in exclusionary conduct, the CJEU clarified that these were distinct concepts: the principle is a necessary condition in all Art. 102 cases to prove capacity to generate anticompetitive effects, whereas AEC tests are particular ways of showing this condition—in *both* pricing and non-pricing abuses, provided that the context allows for it.

More specifically, on the AEC test, the preliminary ruling notes the following (references omitted; emphasis added):

> 56 As regards the 'as efficient competitor' test, to which the referring court expressly referred in its request, it should be noted that that concept refers to various tests which have in common the aim of assessing the ability of a practice to produce anti-competitive exclusionary effects by reference to the ability of a hypothetical competitor of the undertaking in a dominant position, which is as efficient as the dominant undertaking in terms of cost structure, to offer customers a rate which is sufficiently advantageous to encourage them to switch supplier, despite the disadvantages caused, without that causing that competitor to incur losses. That ability is generally determined in the light of the cost structure of the undertaking in a dominant position itself.
>
> 57 **A test of that nature may be inappropriate in particular in the case of certain non-pricing practices, such as a refusal to supply, or where the relevant market is protected by significant barriers.** Moreover, such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects; moreover, that method takes into consideration only price competition. In particular, the use by a undertaking in a dominant position of resources other than those governing competition on the merits may be

[102] *Unilever*, Decision of the Autorità Garante della Concorrenza e del Mercato of 31 October 2017.
[103] *Unilever*, Judgment of the Court of 19 January 2023, Case C-680/20, EU:C:2023:33.

sufficient, in certain circumstances, to establish the existence of such an abuse.

58 Consequently, the competition authorities cannot be under a legal obligation to use the 'as efficient competitor test' in order to find that a practice is abusive.

59 **Nevertheless, even in the case of non-pricing practices, the relevance of such a test cannot be ruled out.** A test of that type may prove useful where the consequences of the practice in question can be quantified. In particular, in the case of exclusivity clauses, such a test may theoretically serve to determine whether a hypothetical competitor with a cost structure similar to that of the undertaking in a dominant position would be able to offer its products or services otherwise than at a loss or with an insufficient margin if it had to bear the compensation which the distributors would have to pay in order to switch supplier, or the losses which they would suffer after such a change following the withdrawal of previously agreed discounts.

60 Consequently, where an undertaking in a dominant position suspected of abuse provides a competition authority with an analysis based on an 'as efficient competitor test', that authority cannot disregard that evidence without even examining its probative value.

A1.8 *Servizio Elettrico Nazionale (Enel)*

In 2018, the Italian Competition Authority initiated proceedings against Enel. It found that, between 2012 and 2017, *Servizio Elettrico Nazionale* ('SEN')/Enel had abused its dominant position in the regulated electricity market by inducing customers to consent to sharing customer data with all of its entities (including Enel operating in the deregulated market), but requesting separate access for sharing customer data with non-Enel entities.[104] This access to SEN customer data provided Enel with a competitive advantage by enabling it to make better-targeted offers than its competitors in the deregulated market.

In 2022, the CJEU issued its preliminary ruling in this case.[105] The CJEU clarified three cumulative conditions for a dominant undertaking's conduct to constitute an abuse: (i) the conduct is capable of producing exclusionary effects, and does so (ii) through means other than through means of competition on the merits, and (iii) without proportionate and

[104] *ENEL*, Decision of the Autorità Garante della Concorrenza e del Mercato of 20 December 2018.
[105] *Servizio Elettrico Nazionale*, Judgment of the Court of 12 May 2022, Case C-377/20, EU:C:2022:379.

objective justification. The CJEU also elaborated on exclusionary effects and competition on the merits by considering factors such as the role of intent, the AEC principle, and the corresponding AEC test (in relation to its pricing conduct).

More specifically, the Court stated that (references omitted):

80 Regarding the first of these two categories of practices, which includes loyalty rebates, low-pricing practices in the form of selective or predatory prices and margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered in abstracto, is capable of reproducing the conduct of the undertaking in a dominant position.

81 Admittedly, that test is merely one of the ways to show that an undertaking in a dominant position has used means other than those that come within the scope of 'normal' competition, with the result that competition authorities do not have an obligation to rely always on that test in order to make a finding that a price-related practice is abusive.

82 Nonetheless, the fact remains that the significance generally given to that test, when it can be carried out, shows that the inability of a hypothetical as-efficient competitor to replicate the conduct of the undertaking in a dominant position constitutes, in respect of exclusionary practices, one of the criteria which make it possible to determine whether that conduct must be regarded as being based on the use of means which come within the scope of normal competition.

Overall:

103 [...] Article 102 TFEU must be interpreted as meaning that a practice which is lawful outside the context of competition law may, when implemented by an undertaking in a dominant position, be characterised as 'abusive' for the purposes of that provision if it is capable of producing an exclusionary effect and if it is based on the use of means other than those which come within the scope of competition on the merits. Where those two conditions are fulfilled, the undertaking in a dominant position concerned can nevertheless escape the prohibition laid down in Article 102 TFEU if it shows that the practice at issue was either objectively justified and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

A1.9 Margin squeeze cases (*TeliaSonera*; *Telefónica*; *Deutsche Telekom*)

In *Deutsche Telekom*,[106] the company in question applied prices that allegedly resulted in a margin squeeze for downstream competitors needing access to the local loop. The Court clarified that what mattered was the existence of the margin squeeze and not the level of the difference, and that wholesale prices were set through regulatory means. The dominant undertaking could reduce the margin squeeze, even if that meant increasing prices in the retail market. The fact that the exclusionary objective was not achieved did not matter, but the conduct could not be classified as exclusionary if it had no effect on the competitive situation of competitors and did not make their market penetration any more difficult. Here, access to the local loop was indispensable in penetrating the market, so the margin squeeze in principle hindered competition.

In *TeliaSonera*,[107] the prices applied by TeliaSonera to supply wholesalers with ADSL products, and those applied to end-users for ADSL services, allegedly resulted in squeezing TeliaSonera's competitors' margins. In its decision, the Court held that an abuse of dominance was an objective concept, and that a margin squeeze that had an exclusionary effect on an as-efficient competitor without any objective justification was an abuse. It stated that the fact that the exclusionary objective was not achieved did not prevent a characterisation of the abuse, subject to showing an exclusionary effect on an as-efficient competitor. Again, the indispensability of the input implied that the anticompetitive effect was probable. Equally, if the difference between wholesale and retail prices were negative, at least potential exclusion would be probable. If it remained positive, it would need to be shown that the pricing practice was likely to make it at least more difficult to stay in the market by reason of reduced profitability.

In Telefónica,[108] the difference between the prices charged by Telefónica for the wholesale supply of broadband and the prices charged to end-users at the retail level allegedly prevented Telefónica's competitors from competing with it. Similarly to previous cases, the Court held that it was sufficient that the margin squeeze had a potential anticompetitive effect which could exclude as-efficient competitors, regardless of the presence of concrete effects, to characterise an abuse. The General Court was under no obligation to account for the fact that the input

[106] *Deutsche Telekom*, Judgment of the Court of 14 October 2010, Case C-280/08, EU:C:2010:603.
[107] *TeliaSonera*, Judgment of the Court of 17 February 2011, Case C-52/09, EU:C:2011:83.
[108] *Telefonica*, Judgment of the Court of 10 July 2014, Case C-295/12, EU:C:2014:2062.

may not have been essential, and the TeliaSonera judgment simply stated that examining whether the input is essential may be relevant in assessing the effects of the margin squeeze.

A1.10 *Lithuanian railways*

In 2017, the Commission fined Lithuanian Railways €28m for an infringement of Art. 102 TFEU.[109] This decision was confirmed by the CJEU in 2023.[110] The case concerned the removal of 19km of tracks by the Lithuanian national railway operator and is considered to be a landmark judgment in the case-law on essential facilities, following *Slovak Telekom* in clarifying the scope of the application of *Bronner* in cases of so-called constructive refusal to supply. The CJEU found that *Bronner* was not applicable in the situation where the dominant undertaking removed essential infrastructure that it neither invested in nor owned.

A1.11 *Superleague*

In December 2023, the CJEU concluded in a preliminary ruling that FIFA had abused its dominance by not limiting its own discretionary powers in approving competing sports events through substantive criteria and detailed procedural rules that were transparent, objective, non-discriminatory and proportionate.[111]

The *Superleague* judgment is the latest judgment to summarise the CJEU's position on how to categorise conduct as an abuse. This is most clearly captured in the following paragraphs (references omitted):

> 129 In order to find, in a given case, that conduct must be categorised as 'abuse of a dominant position', it is necessary, as a rule, to demonstrate, through the use of methods other than those which are part of competition on the merits between undertakings, that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market(s) concerned, or by hindering their growth on those markets, although the latter may be either the dominated markets or related or neighbouring markets, where that conduct is liable to produce its actual or potential effects.
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> 130 That demonstration, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must however be made in the light of all the relevant factual

[109] *Baltic Rail*, Decision of the Commission of 2 October 2017, AT.39813.
[110] *Lietuvos geležinkeliai AB*, Judgment of the Court of 12 January 2023, Case C-42/21, EU:C:2023:12.
[111] *Superleague*, Judgment of the Court of 21 December 2023, Case C-333/21, EU:C:2023:1011.

circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects.

131 In addition, conduct may be categorised as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market(s) concerned, but also where it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures or other means different from those which govern competition on the merits, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation.

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