

Response to European Commission Consultation on Draft Guidelines on the application of Article 102 TFEU to exclusionary abuses of dominance (2024)

Contributors: Magali Eben^{*}, David Reader^{**}

Response to: European Commission, [Guidelines on exclusionary abuse of dominance](#)

Response Date: 31 October 2024

About the contributors:

Dr Magali Eben and Dr David Reader are both Senior Lecturers in Competition Law, within the competition law team at the University of Glasgow. They are members of CREATE (www.create.ac.uk), a research centre of the University of Glasgow recognised by UK Research and Innovation (UKRI) with national centre status, working on interdisciplinary research at the nexus of law, technology, creative industries, and market regulation.

Scope for improvement of the Guidelines

With the adoption of Guidelines on exclusion under Article 102 TFEU, the European Commission makes great strides in the right direction. The Guidelines go a long way to achieving their objectives of promoting effective enforcement of Article 102 TFEU, ensuring its application is predictable and transparent (particularly in the context of decentralised enforcement) (see paragraph 4), and ensuring legal certainty for undertakings and guidance for national competition authorities and courts (see paragraph 8). The Guidelines clarify and structure the case law, making the document a useful educational tool, not only for companies and national authorities, but for the general public. The suggestions which follow are intended to build on this to further strengthen the Guidelines.

The need for more holistic guidance on Article 102 TFEU

In its early paragraphs, the Guidelines discuss the benefits which flow from competition, and thus from the EU competition rules. Paragraphs 1 and 2, in particular, list a variety of benefits which emphasise that Article 102 TFEU has a wider remit than the narrow price-based consumer welfare approach. Indeed, such a narrow approach (inspired by overly narrow economic theories) is not

^{*} Senior Lecturer in Competition Law at the University of Glasgow and Deputy Director of CREATE. All views are my own, I have no conflicts to declare. Contact: Magali.Eben@glasgow.ac.uk.

^{**} Senior Lecturer in Competition Law at the University of Glasgow. All views are my own, I have no conflicts to declare. Contact: David.Reader@glasgow.ac.uk.

truly the scope of EU competition *law*. If the EU has a consumer welfare standard, it is not – and indeed we agree it should not be – one that is interpreted too restrictively, but rather one that focuses on open markets and on the harms which flow from damage to the competitive process. Thus, this emphasis in the Guidelines is to be commended. Nonetheless, there is scope to improve the Guidelines by providing clarity on the aims of Article 102 TFEU and, crucially, clarity on the harm Article 102 TFEU is meant to address.

Provide further guidance on interests and enforcement priorities

We welcome the emphasis the Guidelines place on the various interests which may be affected by impairments of competition.¹ While Paragraph 8 refers to both direct and indirect harm to the welfare of consumers, paragraph 2 refers to ‘the detriment to the public interest, other market players and consumers.’² We agree that it is important to emphasise that competition law is meant to protect broader interests, rather than consumers alone. This does indicate a move away from the enforcement priorities set out in 2008, which indicated that the Commission would prioritise conduct that was most harmful to consumers.³ The Amendment to the Guidance on Enforcement Priorities did not reflect in detail on this departure. As such, it may be useful to provide further guidance — either in these Guidelines or in amended guidance on enforcement priorities — on the Commission's priorities in the enforcement against exclusionary conduct, particularly in the extent to which the harm to consumers, SMEs, or the public interest will guide its case selection.

The aims of Article 102 TFEU as limiting and guiding principles

We submit that the connection with the aims pursued through the enforcement of Article 102 TFEU could be spelled out more clearly. This would provide guidance on the distinction with other areas of law which may apply to the same undertakings and practices. At a time of expanding concerns about economic power and its associated harms, and thus of judicial and regulatory actions outside of competition law, renewed clarity on the *purpose* of Article 102 TFEU is required.

In addition, it would also provide clarity on how to understand and interpret these guidelines. We submit that the Guidelines are in need of further articulation on the rationale of (enforcement of) Article 102 TFEU: why market power matters, and the harm which it addresses. Stakeholders will find it easier to make sense of the enforcement of Article 102 TFEU, including understanding how

¹ For a related argument, see Eben, M. (2024). A Renewed Vision of Market Definition's Importance: Competition Law in the Collective Interest. CREATE Working Paper, available at <https://doi.org/10.5281/zenodo.14006062>

² In particular in paragraph 2: ‘... or impair effective competition, to the detriment of the public interest, other market players and consumers. The competitive harm generated by dominant undertakings’ abusive conduct may take various forms, such as higher prices, a deterioration in the quality of goods and services, a reduction in innovation or a limitation of consumers’ choice.’

³ See paragraph 5 of Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009.

it improves their lives and what types of conduct are capable of being the subject of complaints. Indeed, the Commission ought to signal its own priorities in case selection, by articulating what the enforcement of Article 102 TFEU is meant to achieve. But this articulation is also useful for affected stakeholders, who are more likely to raise matters which are relevant to Article 102 (enforcement) if they understand its scope.

Guidelines on exclusionary conduct will not address all aims nor cover all harms that Article 102 TFEU can address. While this focus is understandable, the content of these guidelines should still be contextualised within the overarching purposes of Article 102 TFEU. It would be useful to have a reflection, at the start of the Guidelines, on the purpose of Article 102 TFEU more broadly, with a reflection on the manner in which the enforcement against exclusionary abuses relates to the achievement of that purpose.

Article 102 TFEU is broad in scope, and capable of tackling many types of harm and pursue various objectives. Which of these are to be pursued is not merely a question of law, but also involves policy choices. These policy choices remain relevant and in need of articulation, even with the adoption of these Guidelines.

Exploitative abuse

We also need a better framework on how to apply exploitative abuses. These evidently are not covered in these guidelines – understandably so, given its scope and aim. Nonetheless, there is merit to including a brief reflection on the relationship between exclusion and exploitation in the guidelines: not merely to note that conduct can be mixed (both exclusionary and exploitative), but also to reflect on their relationship in terms of the use of market power and the harm Article 102 TFEU is meant to address.

A departure from competition on the merits, i.e. competition based on performance, may also be useful to assess exploitative conduct as an expression of misuse of market power. The Guidelines may have missed an opportunity to set out a more general framework on the use of power which falls foul of Article 102 TFEU whereby competition on the merits plays a central role.

Market power and dominance

We appreciate the Guidelines' detailed section on the assessment of dominance, including the guidance on the Commission's view of collective dominance.

However, we submit that the relationship between dominance and abuse merits more discussion. The Guidelines currently state that dominance is relevant to establishing whether Article 102 TFEU is applicable, but that 'the degree of dominance is not as such decisive to determine its scope of application' (paragraph 21). With this statement, the Guidelines reaffirm that finding

dominance and establishing an abuse are discrete steps in the analysis. However, the Guidelines do note that ‘the degree of dominance may be relevant, among other factors, for the purpose of analysing whether the conduct ... is capable of producing exclusionary effects’ (paragraph 21, as well as paragraph 70(a)).

We submit that it would be useful to provide more guidance on: (i) the relevance of (the degree of) market power for the theory of harm, and (ii) special responsibility of a dominant undertaking.

Market power and theory of harm

First, the relevance of market power to the theory of harm could be set out in greater depth. We have come quite a way in our understanding of market power and its potential deleterious consequences. The case law is clear that there is no need to evidence causality between dominance and abuse, as such.⁴ However, there does remain a slightly different question: whether and to what degree it is useful to consider the relationship between the existence and degree of market power and the *harm* resulting from the conduct. This may vary with the theories of harm. Where the rationale behind the law is that deleterious effects occur only because of the existence of market power, this would imply causality is crucial.⁵ It could be useful for the Guidelines to reflect on the relevance of the assumption that, but for market power, the harmful effects of the practice could not have occurred; and to provide guidance on whether (a certain degree of) market power underpins the theories of harm that justify calling conduct ‘abusive’.⁶

Super-dominance and special responsibility

Second, given the references, in footnote 33, to judgments which refer to ‘super-dominance’, it would also be useful for the Guidelines to set out the Commission’s understanding of the relevance of the super-dominance concept. A few statements in the jurisprudence may indeed inspire the

⁴ Nonetheless, the Court of Justice held early on that abuse does not have to imply ‘the use of economic power bestowed by a dominant position’ as ‘the means’ of the abuse (Hoffmann-La Roche, para 91). In doing so, it followed its earlier judgment that ‘the link of causality [...] between the dominant position and its abuse is of no consequence’ (Continental Can, para 27). The Court described abuse as an ‘objective concept’ focused on the conduct itself, and on the harm that conduct causes (Hoffmann-La Roche, para 91).

⁵ In *Hoffmann-La Roche*, the Court did state that the presence of the dominant undertaking on the market means that the degree of competition is weakened, implying at least some relationship between market power and risk of anti-competitive effects (Case 85/76, *Hoffmann-La Roche* EU:C:1979:36). Article 102 TFEU is, thus, premised on the existence of market power weakening the conditions for competition on the market or in an adjacent one. Indeed, the Court acknowledges a link between the degree of the anti-competitive effects and market power (Case C-52/09, *TeliaSonera* EU:C:2011:83, para 81). It has also, in specific circumstances, held that an analysis of market power is one of the elements to show that the conduct is capable of restricting competition. See [Eben, M.](#) and [Makris, S.](#) (2023) Market Power. In: Andrea Biondi and Oana-Andreea Stefan (eds). *Elgar Encyclopedia of European Law* (Edward Elgar, forthcoming).

⁶ See Brook, O. and [Eben, M.](#) (2023) [Abuse without dominance and monopolization without monopoly](#). In: Akman, P., Brook, O. and Stylianou, K. (eds.) *Research Handbook on Abuse of Dominance and Monopolization*. Series: Research handbooks in competition law series. Edward Elgar: Cheltenham, UK ; Northampton, MA, USA, pp. 259-281. ISBN 9781839108716 (doi: [10.4337/9781839108723.00023](https://doi.org/10.4337/9781839108723.00023))

suggestion that the degree of responsibility increases as market shares become exceedingly large – so-called ‘super-dominance’.⁷ As the jurisprudence is not unanimous and underdeveloped, guidance would not go amiss.

Competition on the merits and articulations of harm

The Guidelines set out that, as a general principle, exclusionary abuse will be assessed by establishing that ‘the conduct departs from competition on the merits’ *and* that ‘the conduct is capable of having exclusionary effects’ (paragraph 45). The distinction between ‘competition on the merits’ and ‘capability of exclusionary effects’ is, at first glance, a useful one to make, at least from a conceptual point of view. It indicates that there is a need for a ‘wrongful act’ as well as harm. It raises both substantive and procedural questions, however.

Overlap between the two limbs

Procedurally, it remains unclear whether these two concepts/steps overlap. The Guidelines state that they are conceptually distinct, but that certain factual elements may be relevant to the assessment of both (paragraph 46). It is not entirely clear, however, whether these steps would indeed be treated as distinct were the same evidence brought forward for both. This is particularly interesting for those types of conduct which do not fall under the presumptions in the Guidelines, though it also applies to them.⁸ Where certain conduct is presumed to be abusive if the specific legal tests are satisfied, it is not clear from the Guidelines whether both limbs are involved in the presumption. Paragraph 53 states that where the specific legal test is satisfied, these types of conduct are ‘deemed as falling outside of the scope of competition on the merits’. This is repeated in paragraph 56 for certain pricing practices, where conduct is deemed to depart from competition on the merits if the price-cost test is satisfied, but in addition the outcome of this test is also relevant to determine whether the conduct is capable of producing exclusionary effects. We submit that the distinction between the two limbs is artificial, and that the Guidelines should either a) explain that these are not distinct and cumulative, or b) clarify their distinction.

Clarification of the meaning of competition on the merits

Substantively, this dichotomy may in any case need some further clarification. Competition on the merits is, as an ideal, a useful articulation that not *all* conduct with exclusionary effect is abusive.

⁷ Opinion AG Fenelly in *Compagnie Maritime Belge*, para. 137). This idea is not unanimously confirmed in the jurisprudence, but still made an appearance in the recent judgment by the General Court in *Google Android* (*Google Android*, paras 182-183).

⁸ The Guidelines find that certain conduct (set out in section 4.2.) can be presumed to lead to exclusionary effects (see paragraph 60(b)).

Yet, the meaning of ‘competition on the merits’ and indeed whether and how it can be used as a concept distinct from effects is contested.⁹

The Guidelines describe competition on the merits in terms of competition based on performance, and seem to indicate (in our understanding of paragraph 51) that such performance exists where it approximates offers on price, quality, choice and innovation which could exist in a competitive situation. However, paragraph 52 indicates that an undertaking cannot merely refer to its intention to compete on the merits or on the fact that its conduct is also adopted by non-dominant undertakings to show that its conduct does not depart from competition on the merits. Thus, there is a lack of clarity on the exact meaning of this concept, which the Commission has an opportunity to address in the final version of the Guidelines. Although the Guidelines set out factors to consider, it lacks an overarching explanation of ‘competition on the merits’ which does not suffer from seeming inherent contradiction.

AEC test or principle

It is laudable that the Guidelines reinforce that the AEC test is not an end in itself but an embodiment of performance-based competition. The Guidelines could dedicate more space to explaining the way the Commission perceives the relationship between the AEC principle and competition on the merits, and distinguishing it from the AEC test. This is an area of enduring confusion.

Violation of other areas of law

The Guidelines set out several factors which are relevant to assessing whether conduct departs from competition on the merits (see paragraph 55). One of these factors is ‘whether the dominant undertaking violates rules in other areas of law (for instance, data protection law) and thereby affects a relevant parameter of competition, such as price, choice, quality or innovation’ (paragraph 55(a)). The Guidelines refer, in footnote 122, to the *Meta* preliminary ruling as evidence for this factor.

We submit that it is problematic to include this factor without providing further clarification. As it stands, there is a lack of clarity in the jurisprudence on the circumstances in which the violation of another area of law may be relevant to establishing an abuse of dominance, particularly as regards to exclusionary abuses, which was not resolved by the *Meta* ruling. We submit, as we argued elsewhere,¹⁰ that although the *Meta* judgment provides useful insights on the legal requirements on authorities in their interactions with other enforcers, it does not provide much guidance on the

⁹ See Opinion of Advocate General Rantos in Case C-377/20 Servizio Elettrico Nazionale SpA ECLI:EU:C:2021:998 paras 52-74; Ibáñez Colomo, Pablo, Competition on the merits (2024) 61 Common Market Law Review.

¹⁰ Brook, O. and Eben, M. (2024) [Another missed opportunity? Case C-252/21 Meta Platforms v. Bundeskartellamt and the relationship between EU competition law and national laws](#). *Journal of European Competition Law and Practice*, 15(1), pp. 25-29. (doi: [10.1093/jeclap/lpad047](https://doi.org/10.1093/jeclap/lpad047)).

substantive interactions between competition law and GDPR (let alone other areas of law). To provide clear guidance (and achieve its objectives of legal certainty for market participants and guidance for national competition authorities) the Guidelines would need to spell this out further.

Presumptions, assumptions, and harm

In the attempt to codify the case law, the Guidelines manage to provide structure to a complex body of cases. It also attempts to provide certainty as well as ease of enforcement and, in that light, the adoption of presumptions for certain categories of conduct has merit. Presumptions can be particularly helpful in achieving the aim of robust and effective enforcement, by reducing the length and resource-intensive nature of proceedings. Although the compatibility with the recent *Intel* judgment can be questioned¹¹ and there can be concerns about the extent to which rebuttable presumptions (and the reversal of the burden of proof they entail) will work in practice, given the possibility that undertakings will bring forward evidence to rebut it which will have to be assessed, these presumptions certainly act as signals that certain conduct is particularly disfavoured.

However, there is still a need to provide further guidance on the harm which justifies these presumptions. The Guidelines refer, in paragraph 60(b), to the opportunity for dominant undertakings to rebut the probative value of the presumption by submitting supporting evidence that the conduct is not capable of having exclusionary effects. For instance, the undertaking can submit evidence to show that ‘the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical.’ For this to be a viable option, the Guidelines should make it clear what those background assumptions are. Guidance on the theory of harm is therefore indispensable. We therefore submit again that the Guidelines need further articulation of theories of harm.

More developed articulation of theories of harm would also respond to any concerns raised that economics or effects-analysis is being abandoned, by referring to the rationale and evidence for considering that certain conduct is problematic. The articulation of theories of harm will not only aid in clarifying why the conduct discussed in the Guidelines ought to be the subject of enforcement action, but will also address some fears that the presumptions in the Guidelines are overly formalistic. Linking presumptions to categories of conduct puts excessive onus on determining whether the conduct falls in such a category. However, if there is more guidance on the theories of harm which generally justify enforcement, there will be more justification to bring a case and apply the general test of the Guidelines even where conduct does not fit neatly into a category.

¹¹ Case C-240/22 P *Commission v Intel* ECLI:EU:C:2024: 915 (*Intel II*) para 179.

Novel conduct and theories of harm

The Guidelines are an instrument to codify existing case law, while also providing clarity on general principles for all exclusionary conduct cases. It is one of the strengths of the Guidelines that they set out both i) general principles to determine whether conduct is abusive, applicable across all exclusionary conduct case, and ii) legal tests for specific types of conduct.

Principles for novel theories of harm

The Guidelines do not reflect on conduct which has not yet been the subject of cases. This does not mean that there is no value in the Guidelines for new cases, since the general tests (including the two prongs of competition on the merits and capability of exclusionary effects) will be useful in considering whether future conduct falls within the scope of Article 102 TFEU. It is understandable, given the attempt to codify, that the Guidelines as such do not reflect on novel theories of harm. However, particularly given the need to provide guidance and the likelihood of future novel cases, we submit it is useful to include insights for novel conduct which does not require setting out specific legal tests. There is scope to provide guidance on the overall role of the (mis)use of economic power in the assessment of Article 102 TFEU in a manner which enables reflection on the extent to which new types of economic power or ecosystem theories of harm may be relevant to Article 102 cases.

To ensure the ability of the Commission (and NCAs) to act against new conduct and new theories of harm, it is imperative that the Guidelines are not overly restrictive. This makes it useful to focus on principles rather than detailed tests: these are flexible, but provide clarity on the rationale behind enforcement action. The two prongs are a good start, but they ought to be strengthened with more reflection on the aims of Article 102 TFEU, the sort of harm covered (and, crucially, not covered), and the role of power in the application of the law.

There is a pressing need for guidance on the scope of Article 102 TFEU: what it can achieve, as well as what the limiting principles on enforcement are. This can be addressed, partially, in these Guidelines, through more reflection on the *why* of Article 102 TFEU and enforcement against exclusionary abuses. It will also need further clarification in the future, through other tools available to the Commission.

Abusive nascent acquisitions

The draft Guidelines acknowledge (at footnote 18) the decision of the Court of Justice in *Towercast* which, by reaffirming the merger-related principle of the *Continental Can* case law, clarifies that a merger lacking Community dimension and that has not been subject to a referral under Article 22 EUMR may nonetheless face *ex post* scrutiny under Article 102 TFEU. In light of this decision, and the current sense of uncertainty surrounding the Commission's approach to combatting

harmful nascent acquisitions in the wake of the Court of Justice’s ruling in *Illumina v Commission*, we envisage scenarios where Member State competition authorities would have incentives to make greater use of Article 102 TFEU as a “last line of defence” against suspected killer acquisitions.¹² Given its novelty and potential to gain traction as a viable option for enforcement in the near future, we believe there is a compelling case for including – within Section 4 of the Guidelines – specific guidance on reviewing mergers under Article 102 TFEU.

Of particular significance within the Court of Justice’s list of five conditions for a merger to amount to an abuse of dominance under Article 102 TFEU,¹³ we believe that a practical interpretation of the fourth criterion – the level of dominance post-merger must ‘substantially impede’ competition in the relevant market – would aid legal certainty. We note that, in practice, this stands to be a much higher hurdle for a competition authority to overcome compared to the SIEC test under the EUMR, meaning mergers with a particularly significant impact on market concentration (e.g. 3-to-2 mergers) and killer acquisitions are the most likely types of case to fall foul of this test.¹⁴ However, greater procedural clarity may be facilitated through explicit reference to this abuse in the Guidelines.

¹² As a related point, we also note that third parties (incl. competitors, as was the case in *Towercast*) would have particularly strong incentives to bring ‘last resort’ claims under Article 102, especially if they are unsuccessful in their efforts (or it is unfeasible in the aftermath of *Illumina v Commission*) to petition an Member State competition authority to submit a referral request under Article 22 EUMR.

¹³ Case C-449/21 *Towercast v Autorité de la concurrence and Ministère de l’Économie* [2021] OJ C452/9; (CJ, 16 March 2023) ECLI:EU:C:2023:207, para 53 (for criteria (i) and (ii)), para 52 (for criteria (iii) and (iv)), and para 43 (for criterion (v)).

¹⁴ *ibid*, para 52: ‘the mere finding that an undertaking’s position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance [arising from the merger] would substantially impede competition [to the extent that] only undertakings whose behaviour depends on the dominant undertaking would remain in the market’.