

Comments of International Center for Law & Economics on Art. 102 TFEU Draft Guidelines

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Introduction

We appreciate the opportunity to respond to this consultation regarding the Commission’s “Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings” (“Draft Guidelines”). Given that the purpose of guidelines is to provide information on enforcement practice and likely litigation outcomes by reflecting the state of the art in a certain area of the law,¹ it is reasonable to assess these guidelines based on two main criteria: (i) their legality and (ii) their clarity.

The first question that must be answered is whether the Draft Guidelines accurately reflect current legal and economic thinking on exclusionary abuses under Art. 102 TFEU, as understood by the General Court (“GC”) and the European Court of Justice (“ECJ”) (together: “the Courts”). A second related question is whether the Draft Guidelines enhance the clarity and predictability of Art.102 TFEU enforcement, such that they mark a step forward from their predecessor, the 2008 Guidance Paper on Art. 82 [102 TFEU] Enforcement Priorities (“Guidance Paper”). While the answer to this second question hinges largely on the answer to the first, they are not necessarily the same. Esoteric guidelines may faithfully depict the law, while crystal-line ones could nonetheless get the law wrong.

Unfortunately, the Commission’s Draft Guidelines offer the worst of both worlds, employing convoluted language to convey an interpretation of Art. 102 TFEU caselaw that is tenuous, at best. In this way, the Draft Guidelines not only fail to enhance predictability, but could also influence market conduct in ways that are at odds with the law’s intent.²

¹ Geoffrey A. Manne *et al.*, *ICLE Comments on FTC/DOJ Merger Enforcement RFI*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (22 Apr. 2022), at 1, 6-7, <https://laweconcenter.org/resources/icle-comments-on-ftc-doj-merger-enforcement-rfi>; and at 2: “Conceptually, the role of guidelines is to codify the accepted knowledge in a particular area of antitrust for the sake of legal certainty.”

² Guidelines, and soft laws in general, influence courts and national competition authorities (“NCAs”) by promoting a specific approach to legal issues. See, e.g., Nicoletta Maresa Angerer, *Soft Norms, Strong Impact: The Significance of Soft Law in the Legal Order of the European Union with Special Consideration of the Work of the Venice Commission* (EU Law Working Papers No. 90, Stanford-Vienna Transatlantic Technology Law Forum, 2024), <https://law.stanford.edu/publications/no-90-soft-norms-strong-impact-the-significance-of-soft-law-in-the-legal-order-of-the-european-union-with-special-consideration-of-the-work-of-the-venice-commission>. See also Gus Hurwitz & Geoffrey Manne, *Antitrust Regulation by Intimidation*, WALL STREET J.

To a significant extent, these problems stem from the Draft Guidelines construing their own repudiation of effects-based analysis as the will of the courts, rather than that of the Commission itself. As Commission officials themselves have observed, the “Guidance Paper” that preceded the current Draft Guidelines:

contributed to moving away from a formalistic approach to enforcing Article 102 TFEU, where cases were prioritized based on per se criteria, to an effects-based approach where priorities are set taking into account the potential effects of the given conduct, through the analysis of market dynamics, in line with mainstream economic thinking.³

Unfortunately, the Draft Guidelines reverse that impetus by resorting to formalistic categorizations and watering down effects-based analysis. But this reading of Art. 102 TFEU is at odds with the effects-based approach enshrined in the Guidance Paper and embraced by the Courts, including in such recent seminal decisions as *Intel*, *SEN*, *Unilever*, and *Intel Renvoi*.⁴

The Commission’s Draft Guidelines are motivated by the belief that more “vigorous” enforcement of Art. 102 TFEU is needed:

in view of growing market concentration in various industries and the digitisation of the Union economy, which makes strong network effects and “winner-takes-all” dynamics increasingly widespread, it is important that Article 102 TFEU is applied vigorously and effectively.⁵

But this belief appears to be built upon dubious premises. Market concentration “is not, in itself, a bad thing; indeed, recent research challenging the standard account

(24 Jul. 2023), <https://www.wsj.com/articles/antitrust-regulation-by-intimidation-khan-kanter-case-law-courts-merger-27f610d9>.

³ Linsey McCallum *et al.*, *A Dynamic and Workable Effects-Based Approach to Abuse of Dominance*, COMPETITION POLICY BRIEF 1 (2023), at 2, available at https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf.

⁴ Case C-413/14 P, *Intel Corp. v European Comm’n*, 2017, EU:C:2017:632 (6 Sep. 2017); Case C-377/20, *Servizio Elettrico Nazionale and Others*, 2022, EU:C:2022:379 (12 May 2022); Case C-680/20, *Unilever*, 2023, EU:C:2023:33 (19 Jan. 2023); Case T-286/09 RENV, *Intel Corporation v Comm’n*, 2022, EU:T:2022:19 (26 Jan. 2022).

⁵ Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings, 2024, para. 4 (“Draft Guidelines”).

demonstrates that much observed concentration is driven by increased productivity, rather than by anticompetitive conduct or anticompetitive mergers.”⁶ There’s no empirical evidence that market concentration has been increasing or that it is necessarily leading to increased market power or harm to the competitive process or consumers.⁷ Moreover, moving competition law away from the “effects-based” approach (or “more-economic” approach) is apt to make it more hostile to novel business conduct and to punish pro-competitive business conduct.⁸ From a policy perspective, it would be unwise, to say the least, to take such a turn at a time when Europe is lagging other global markets in productivity and competitiveness.⁹

Against this backdrop, our comments proceed as follows. Section I discusses the Draft Guidelines’ problematic reliance on presumptions that have little basis in the ECJ caselaw. Section II critiques the weakened role of effects-analysis that permeates the Draft Guidelines. Finally, Section III concludes by arguing that the Draft Guidelines will fail to achieve their aims because they neither offer clear guidance to firms nor a faithful depiction of European caselaw on the abuse of dominant positions.

⁶ Geoffrey A. Manne *et al.*, *Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (18 Sep. 2023), <https://laweconcenter.org/resources/comments-of-the-international-center-for-law-and-economics-on-the-ftc-doj-draft-merger-guidelines>.

⁷ See, e.g., Gregory J. Werden & Luke Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration* 33 ANTITRUST 74 (2018), <https://ssrn.com/abstract=3156912>, and papers cited therein. As Werden & Froeb conclude for the United States: “No evidence we have uncovered substantiates a broad upward trend in the market concentration in the United States, but market concentration undoubtedly has increased significantly in some sectors, such as wireless telephony. Such increases in concentration, however, do not warrant alarm or imply a failure of antitrust. Increases in market concentration are not a concern of competition policy when concentration remains low, yet low levels of concentration are being cited by those alarmed about increasing concentration... .” *Id.* at 78. For an analysis of a European market, see *The State of UK Competition*, Competition & Markets Authority (Report No. 2, 24 Oct. 2024), available at https://assets.publishing.service.gov.uk/media/67195323549f63039436b3b1/The_State_of_UK_Competition_Report_2024.pdf.

⁸ Geoffrey A. Manne & Dirk Auer, *Against the ‘Europeanization’ of California’s Antitrust Law*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (7 May 2024), <https://laweconcenter.org/resources/against-the-europeanization-of-californias-antitrust-law>.

⁹ See Mario Draghi, *The Future of European Competitiveness* (Sep. 2024), https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en.

I. Presumptions of Illegality: A Consolidation of the Caselaw that Also Pushes Its Boundaries

The Draft Guidelines attempt to reinstate a form-based approach to Art. 102 TFEU, under which certain categories of conduct are presumptively anticompetitive *and*, depending on the specific conduct in question, subject to different rebuttal thresholds.

This approach, however, has been forcefully repudiated by the European Court of Justice, particularly in such landmark rulings as *Intel*, *Unilever*, and *Servizio Enel*.¹⁰ In simple terms, there are no strict presumptions of illegality under Art. 102 TFEU, and much less “naked” restrictions of competition. Instead, the ECJ caselaw suggests that it is always up to the Commission to establish that conduct is capable of foreclosing competition, with no conduct categorically presumed to have such an effect. Granted, this burden is lower when, during the administrative procedure before the Commission, defendants *do not* contest the Commission’s findings with supporting evidence—as outlined in *Intel*.¹¹ But that is not the same thing as saying (as the Draft Guidelines do) that certain conduct is presumptively capable of restricting competition or, worse still, amounts to a naked restriction of competition.

A. The Guidelines’ Three-Tiered System Is Not Supported by Caselaw

It is uncontroversial that a dominant firm’s behavior can only infringe Art. 102 TFEU when it is “capable of” restricting competition. With this legal requirement in mind, the Draft Guidelines draw a distinction between three different types of conduct: (i) “conduct for which it is necessary to demonstrate a capability to produce exclusionary effects”; (ii) “conduct that is presumed to lead to exclusionary effects”; and (iii) “naked restrictions.”¹²

Unfortunately, this distinction appears inconsistent with ECJ caselaw, which neither creates any strict presumptions of capability to restrict competition, nor singles out any practices as “naked” restrictions of competition under Art. 102 TFEU. What exists under Art. 102 TFEU are “soft” presumptions that, contrary to the Draft

¹⁰ *Intel*, *supra* note 4; *Unilever*, *supra* note 4; *Servizio*, *supra* note 4.

¹¹ *Intel*, *supra* note 4.

¹² Draft Guidelines, *supra* note 5, at 21-22.

Guidelines' assertions, do not shift the burden of proof to defendants when they have been established by the Commission. In other words, these soft presumptions do not exonerate the Commission from establishing an evidence-based theory of harm.¹³

European competition law is no stranger to presumptions. These include the presumptions that a 50% market share in a defined market amounts to a dominant position,¹⁴ and that wholly owned subsidiaries are part of the same economic entity as their parent company.¹⁵ Given the widespread use of presumptions throughout EU competition law—and the explicit use of this terminology by the ECJ—it is surprising to see the guidelines mobilize this concept in an area where recent caselaw does not use the term at all. The word “presumption”—in relation to conduct’s capability of foreclosure—is, indeed, nowhere to be found in recent rulings such as *Intel*, *Google Shopping*, *Servizio Enel*, *Unilever*, or *Lietuvos Geležinkeliai*.¹⁶

The Draft Guidelines recognize in footnote 131 that “the Union Courts have not always made explicit use of the term ‘presumption’ for each one of these practices.” That is an understatement. In fact, not only do the aforementioned cases *not* include any reference to strict presumptions concerning conduct’s capability to foreclose competition (despite including references to other legal presumptions where relevant), they explicitly require the Commission to establish such capability on a case-

¹³ In this regard, see Assimakis Komninos, “*J'accuse!* – Four Deadly Sins of the Commission’s Draft Guidelines on Exclusionary Abuses,” NETWORK LAW REVIEW (30 Aug. 2024), <https://www.networklawreview.org/komninos-guidelines>. “The problem with the Draft Guidelines, as I explained above, is that the categories selected are arbitrary and form-based. For example, what makes self-preferencing so different from tying? Tying is a form of self-preferencing. And what makes rebates that are conditional on exclusivity different from retroactive rebates with respect to a fixed threshold when that threshold is equal or close to the total requirements of a customer? These are all very similar practices and cannot be subject to different tests just because of their external characteristics and form being different.”

¹⁴ Case C-62/86, *AKZO Chemie BV v Comm’n*, 1991, EU:C:1991:286 (3 Jul. 1991), para. 60.

¹⁵ Case C-97/08 *Akzo Nobel NV and Others v Commission*, 2009, ECLI:EU:C:2009:536 (10 Sep. 2009), paras. 54-61.

¹⁶ *Intel Corporation v Comm’n*, 2022, EU:T:2022:19 (26 Jan. 2022); Case C-377/20, Case C-48/22 P, *Google Shopping*, 2024, EU:C:2024:726 (10 Sep. 2024); *Servizio Elettrico Nazionale and Others*, 2022, EU:C:2022:379 (12 May 2022); Case C-680/20, *Unilever*, 2023, EU:C:2023:33 (19 Jan. 2023); Case C-42/21 P, *Lietuvos Geležinkeliai v. European Commission*, EU:C:2023:12 (12 Jan. 2023).

by-case basis. This is perhaps nowhere clearer than in the *Servizio Enel* ruling, where the Court repeats the *Intel* requirement that:

Where a dominant undertaking submits, during the administrative procedure and with supporting evidence, that its conduct was not capable of restricting competition, the **competition authority concerned is required to examine whether, in the particular circumstances, the conduct in question was indeed capable of doing so** (see, to that effect, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138 and 140).¹⁷

A careful reading of this caselaw (on which the guidelines explicitly rely to support the existence of a presumption) clearly indicates that it does not lay out any strict legal presumptions (*i.e.*, a burden-shifting framework akin to that laid out in the Commission’s Draft Guidelines). First, the ruling clearly uses the word “submits”—rather than “shows” or “proves”—which is a clear sign that parties have no legal burden to discharge. Second, it merely requires parties to produce “supporting” evidence, with no qualifiers such as “dispositive” or “convincing.” Finally, if and when parties claim their conduct is incapable of foreclosing competition, the Commission is “**required to examine whether, in the particular circumstances, the conduct in question was indeed capable of doing so.**”¹⁸ In other words, the Commission cannot merely rebut defendant’s proffered evidence, it *must* examine all relevant circumstances. This is categorically different from the Draft Guidelines’ provision that the Commission will “examine whether the presumption is rebutted based on the arguments and supporting evidence submitted by the dominant undertaking during that procedure.”¹⁹ In reaching this conclusion, the Draft Guidelines thus stray from what is, arguably, the cornerstone of modern competition caselaw pertaining to Art. 102 TFEU.

Clearly, the Commission seeks to alleviate its burden of proof by creating stronger presumptions that work in its favor.²⁰ But in *Google Shopping*, the ECJ states in no

¹⁷ *Servizio*, *supra* note 4, para. 51.

¹⁸ *Id.*

¹⁹ Draft Guidelines, *supra* note 5, at 22.

²⁰ See Draft Guidelines, *supra* note 5, fn. 131. “These Guidelines make use of the expression ‘presumption’ (or ‘presumed’) for allocating the evidentiary burdens that result from the application of the specific legal tests set out by the Union Courts.”

uncertain terms the need to demonstrate the anticompetitive effects of the allegedly abusive conduct:

In order to find, in a given case, that conduct must be categorised as ‘abuse of a dominant position’ within the meaning of Article 102 TFEU, 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 or markets concerned, or by hindering their growth on those markets...²¹

Moreover, the ECJ adds, in the same decision, that “it is for the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. By contrast, it is for the undertaking raising a defense against the finding of such an infringement to prove that that defense must be upheld.”²² In its recent *Intel II* decision, which confirms the GC *Renvoi* judgment annulling most of the 2009 Commission decision, the ECJ corroborates that the Commission bears the burden of proof in very clear terms, citing several precedents:

... it must be borne in mind that it is for the Commission to prove the infringements of the competition rules which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the constituent elements of an infringement (see, to that effect, judgments of 6 January 2004, *BAI and Commission v Bayer*, C2/01 P and C3/01 P, EU:C:2004:2, paragraph 62, and of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb v Commission*, C90/15 P, EU:C:2017:123, paragraph 26).²³

The guidelines’ misstep is compounded by their insistence that capability to foreclose is established if the Commission “shows that the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption, for instance due to the insufficient probative value of the evidence or

²¹ Case C-48/22 P, *Google Shopping*, 2024, EU:C:2024:726 (10 Sep. 2024), para. 165.

²² *Id.*, para. 224.

²³ Case C-240/22 P, *Intel v. European Commission* (Intel II), 2024, ECLI:EU:C:2024:915 (24 Oct. 2024), para. 328.

the fact that the arguments refer to theoretical assumptions rather than the actual competitive reality of the market.” This is a requirement that is nowhere to be found in ECJ caselaw, and for which the only support the Commission cites is an ostensibly unrelated passage from the General Court’s *Google Android* ruling.²⁴

What is true for presumptions applies *a fortiori* for the Draft Guidelines’ assertion that certain behavior may constitute a “naked restriction” of Art. 102 TFEU (*i.e.*, a *per-se* restriction of EU competition law).²⁵ To support this claim, the guidelines refer to the ECJ’s recent *Superleague* ruling. The Commission mainly cites the following paragraph to support its assertion:

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 (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 154 to 157).²⁶

But the devil lies in the details—which, in this case, dispel any notion naked restrictions exist under Art. 102 TFEU. Crucially, the aforementioned paragraph cites *Generics* as the relevant caselaw.²⁷ A closer inspection of that ruling, however, clearly

²⁴ Case T-604/18, *Google and Alphabet v Commission* (Google Android), 2022, ECLI:EU:T:2022:541 (14 Sep. 2022), para. 428. “A distinction must be made in this respect between theoretical competition assumptions and the practical reality, where the competitive alternatives to which Google refers appear to have little credibility or real impact due to the ‘status quo bias’ arising from the MADA pre-installation conditions and the combined effects of those conditions with Google’s other contractual arrangements, including RSAs.”

²⁵ Draft Guidelines, *supra* note 5, at 22 (3.3.1 c))

²⁶ Case C-333/21, *European Superleague*, 2023, EU:C:2023:1011 (21 Dec. 2023) para. 131.

²⁷ *Id.*, para. 160; see Case C-307/18, *Generics (UK) Ltd and Others v Competition & Markets Authority*, 2020, EU:C:2020:52 (30 Jan. 2020) paras. 154–157.

reveals there are no naked restrictions under Art. 102 TFEU. Indeed, the Court in *Generics* merely restates the *Intel* (and *TeliaSonera*) principle that:²⁸

154 ... [I]f such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects... and **that assessment must be undertaken having regard to all the relevant facts surrounding that conduct.**

155 In this case... the set of settlement agreements concluded on the initiative of GSK were part of an overall strategy on the part of that manufacturer of originator medicines and had, if not as their object, at least the effect of delaying the market entry of generic medicines... and, therefore, of preventing a significant fall in the prices of the originator medicines... the direct consequence of that entry would have been an appreciable reduction in GSK's market share and an equally appreciable reduction in the sale price of its originator medicine.

Given the preceding paragraphs—particularly the Court's requirement that “all the relevant facts” surrounding conduct must be considered—it is clear there are no “naked restrictions” under Art. 102 TFEU. Rather, there are different theories of harm where different types of evidence may be relevant to establish whether behavior is “capable” of restricting competition.

The Draft Guidelines are thus wrong to conclude that, for certain types of behavior, it is up to the defendants “to prove that in the specific circumstances of the case the conduct was not capable of having exclusionary effects.”²⁹ This likely explains why the Commission's guidelines do not cite the *Generics* ruling, as it clearly suggests that all Art. 102 TFEU cases ultimately fall under the same general principle: namely, that the Commission must show that a defendant's conduct is capable of restricting competition to establish an infringement of Art. 102 TFEU.

²⁸ *Generics*, *supra* note 27, paras. 154 -155; See also *Intel*, *supra* note 4; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, 2011, EU:C:2011:83 (17 Feb. 2011) paras. 64, 66, 68.

²⁹ Draft Guidelines, *supra* note 5, at 22 (3.3.1 c).

This intuition is further confirmed by the *Lietuvos Geležinkeliai* ruling,³⁰ which the Draft Guidelines also cite to support their position.³¹ Indeed, nothing in the paragraphs the Draft Guidelines cite comes close to establishing a category of “by object” restrictions under Art. 102 TFEU. Instead, those paragraphs merely establish that the so-called *Bronner* criteria were not applicable to the case at-hand, and that the existence of a legal obligation to provide access can be *relevant* for the assessment of the alleged abusive conduct. Accordingly, the Commission still needs to prove the anticompetitive impact of the conduct in question.

Last but not least, the recent ECJ *Intel II* ruling may be the final nail in the coffin for the notion there are naked restrictions under Art. 102 TFEU. Indeed, the case obliterates the Commission’s intent to lower the standard to prove anticompetitive conduct. While the Commission’s case rested on the premise that rebates (when the defendant is dominant) are abusive *per se*,³² that was insufficient for both the GC and the ECJ:

136 In so far as the Commission relies on Intel’s dominant position, on the conditional nature of the rebates and on the existence of a strategy aiming to exclude a competitor of Intel from the market, irrespective of whether that competitor is as efficient as Intel, **the arguments thus relied on in support of that complaint are based, implicitly but necessarily, on the idea that the contested rebates are abusive per se.**

...

138. ... Irrespective of the fact that, **in themselves, the criteria relied on by the Commission do not appear to be sufficient to find an infringement of Article 102 TFEU**, the General Court could not carry out such an examination, since, as it recalled, in essence, in paragraph 150 of the judgment under appeal, it cannot alter the constituent elements of the infringement found by the Commission by substituting its own reasoning for that of the author of the act the legality of which it is reviewing under Article 263 TFEU (see, to that effect, judgment of 16 June

³⁰ Case C42/21 P, *Lietuvos Geležinkeliai v. European Commission*, EU:C:2023:12 (12 Jan. 2023).

³¹ Draft Guidelines, *supra* note 5, footnote 142 and accompanying text.

³² *Intel II*, *supra* note 23, para. 136.

2022, *Sony Corporation and Sony Electronics v Commission*, C-697/19 P, EU:C:2022:478, paragraph 95 and the case-law cited).³³

More importantly, *Intel II* also confirmed that the Commission has to demonstrate “in all cases” that the alleged anticompetitive conduct has the effect of restricting competition:

... the demonstration that conduct has the actual or potential effect of restricting competition, which may entail the use of different analytical templates depending on the type of conduct at issue in a given case, must be made, **in all cases**, in the light of all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market or markets in question or the functioning of competition on that market or those markets. 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 (judgment of 21 December 2023, *European Superleague Company*, C333/21, EU:C:2023:1011, paragraphs 129 and 130 and the case-law cited). (Emphasis added).³⁴

In short, there is a rapidly growing body of caselaw confirming that there are no by-object restrictions of competition or strict presumptions under Art. 102 TFEU, because the Commission can never discharge its burden of proof (and shift the burden to defendants) by showing that firms’ conduct falls within a given category. Instead, so long as defendants maintain that their conduct is not capable of foreclosing competition, the burden remains firmly upon the Commission.

B. Specific Examples of Flawed Presumptions Under the Draft Guidelines

The inconsistencies discussed in the previous section (between the ECJ’s caselaw and the Draft Guidelines’ portrayal of presumptions as “naked restraints” under Art. 102 TFEU) are replicated in the guidelines’ discussion of the standards of proof applying to specific theories of harm.

³³ *Id.*, para. 138.

³⁴ *Id.*, para. 179.

For instance, the Commission proposes that, in the case of loyalty-inducing **rebates** (or “conditional rebates”), anticompetitive effects should be presumed.³⁵ In the recent *Intel II* judgment, however, the ECJ confirmed that exclusivity and other loyalty-inducing rebates have the same test.³⁶ It also confirmed that there is no strict presumption of illegality in the case of rebates.³⁷ The Commission is correct to claim that, in its *Intel Renvoi* judgment,³⁸ the GC concluded that loyalty-inducing rebates are presumed to be anticompetitive by their very nature. But it then clarified that this presumption is not tantamount to a *per-se* prohibition that would “relieve the Commission in all cases of the obligation to examine whether there were anticompetitive effects.”³⁹ Accordingly, even under this favorable ruling of a lower court, the Commission is still required to assess the defendants’ arguments and accompanying evidence indicating that the impugned conduct was not capable of having anticompetitive effects.⁴⁰

Unilever applied that same principle to **other exclusivity arrangements**, indicating that, while exclusivity purchasing agreements by a dominant undertaking were *nomi-nally* anticompetitive, the Commission must nevertheless apply the criteria from *Intel* to assess exclusionary effects whenever the defendant submits evidence suggesting that the conduct did not have the ability to produce anticompetitive effects.⁴¹

The Draft Guidelines acknowledge this in para 83, stating that, while there is a presumption against exclusive-dealing arrangements (including conditional rebates), the Commission must nevertheless take into consideration the economic evidence and the arguments put forward by the dominant undertaking. The problem is that the Draft Guidelines unduly turn the parties’ prerogative to claim their conduct is not capable of foreclosing competition into a framework of presumptions and rebuttals that is inconsistent with ECJ caselaw. In practice, the Draft Guidelines thus turn

³⁵ Draft Guidelines, *supra* note 5, paras. 80 and 82.

³⁶ *Intel Renvoi*, *supra* note 4, paras. 178-179.

³⁷ *Intel Renvoi*, *supra* note 4, paras. 328, 330-331.

³⁸ *Intel Renvoi*, *supra* note 4, paras. 518, 522; *See also Intel*, *supra* note 4, para. 138.

³⁹ *Intel Renvoi*, *supra* note 4, para. 522.

⁴⁰ *Intel*, *supra* note 4, paras. 138-139.

⁴¹ *Unilever*, *supra* note 4, paras. 46-48, 52.

nominal presumptions *de facto* into *per-se* prohibitions, in precisely the opposite sense to that advised by the ECJ in *Intel*.

The Draft Guidelines also misinterpret the caselaw on exclusivity agreements (and rebates) in at least two other important ways. First, according to paragraph 139 of *Intel*, the Commission is under the obligation 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” (emphasis added).⁴² The Draft Guidelines omit the latter part, referring instead to the exclusion of any actual or potential competitors. This greatly expands the reach of Art. 102 TFEU in a way that appears inconsistent with the caselaw, including the caselaw cited in paragraph 83 of the Draft Guidelines.⁴³ Indeed, both *Unilever* and *Intel*, the two Court authorities cited, refer to “*competitors that are at least as efficient as the dominant undertaking*” (emphasis added).⁴⁴ *Broadcom*, the other cited case, could be seen as more amenable to the Commission’s interpretation. It should be noted, however, that *Broadcom* is less authoritative than either *Intel* or *Unilever*, as it is not a ruling by a Court, but stems instead from a decision by the Commission.⁴⁵

Along similar lines, the Draft Guidelines’ reading of exclusivity arrangements is in tension with another recent case: *Qualcomm*.⁴⁶ In *Qualcomm*, a case concerning exclusivity payments, the ECJ established that merely reducing the incentives of one company (Apple) to switch to another competitor (Intel) was insufficient to produce

⁴² See also *Intel*, *supra* note 4, para. 136.

⁴³ The cases cited are *Intel*, *Unilever*, and *Broadcom*.

⁴⁴ *Unilever*, *supra* note 4, para. 48, citing *Intel*; see also Case C-209/10, *Post Danmark*, 2012, EU:C:2012:172, (27 Mar. 2012), para. 21. “Nor does [Article 102 TFEU] seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.” See also para. 22: “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.” (internal references omitted for clarity).

⁴⁵ Commission Decision of 16 October 2019, Case AT. 40608 – *Broadcom*, para. 369, indicating that “Broadcom’s competitors are becoming increasingly unable to exercise a significant competitive constraint on Broadcom. Major and established competitors appear to be losing existing customers or are prevented from finding new ones for reasons that are not dependent on competition on the merits.” But “major and established”—by which the Commission meant mostly *Intel*—is not necessarily the same as “at least as efficient.”

⁴⁶ Case T-235/18, *Qualcomm v Commission (Qualcomm)*, 2022, EU:T:2022:358 (15 Jun. 2022).

anticompetitive effects. Instead, the Court found that the Commission should have analyzed whether “exclusivity payments were capable of having an anticompetitive effect and [foreclose] *at least as-efficient competitors*” (emphasis added).⁴⁷ In other words, the foreclosure of one competitor is not synonymous with the foreclosure of competition.

The longstanding principle that competition law protects competition, not competitors,⁴⁸ is instrumental in demarcating pro and anticompetitive conduct.⁴⁹ The Courts have emphasized time and again that it is not the purpose of Art. 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.”⁵⁰ The Commission appears to be seeking to overturn this principle by way of a subtly contrived reading of the caselaw on exclusivity arrangements that glosses over the reference to “as efficient competitors.”

Second, the Draft Guidelines’ use of “typically” downplays the Commission’s duty to assess the factors listed in paragraph 83 of the Draft Guidelines. According to the caselaw, the Commission is “required” to analyze these factors when they are brought up by the dominant undertaking (though it need not do so *ex officio*).⁵¹ The Draft Guidelines also minimize the Commission’s duty to assess the existence of a possible strategy aimed at excluding as-efficient rivals: *Intel* and *Unilever* clearly state that such

⁴⁷ *Id.*, paras. 462 and 463.

⁴⁸ OECD, *Competition on the Merits*, DAF/COMP (2005), at 20, available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/03/competition-on-the-merits_27ac3d82/4ab034dd-en.pdf.

⁴⁹ Dirk Auer & Lazar Radic, *The Growing Legacy of Intel*, 14 J. COMP. L. & PRAC. 15 (2023).

⁵⁰ *Intel*, *supra* note 4, para. 133; *Unilever*, *supra* note 4, para. 37; *Post Danmark*, *supra* note 44, para. 21.

⁵¹ See, e.g., *Intel*, *supra* note 4, para. 139, “The Commission is not only required to analyse...”; *Unilever*, para. 48; It also seems that, if the Commission decides to undertake such analysis *ex officio*, it is obliged to do so correctly. *Id.*, paras. 140-142. Though these paragraphs refer to the Commission’s failure to respond to defendants’ arguments calling into question its initial AEC test, this could thus be part of the Commission’s broader duty to address the arguments (or counterarguments) raised by defendants mentioned in paragraph 139 of the same judgment. In practice, however, the Commission will most likely always have to analyze effects, because defendants are likely to always raise such arguments during the administrative procedure.

an assessment is *required*.⁵² In contrast, the Draft Guidelines go out of their way to remark that it is merely facultative:

Such exclusionary strategy is not legally required to establish the conduct's capability to produce exclusionary effects, but may play an important role in the assessment in those cases where it is established.⁵³

Similarly, in the case of **self-preferencing and refusals to supply**, the Draft Guidelines create artificial distinctions between the different “categories” of conduct. The Draft Guidelines, indeed, suggest that there is a lower evidentiary bar for so-called “constructive refusal to supply” (“where the dominant company makes access subject to unfair conditions”),⁵⁴ in contrast to “outright refusal to supply” cases, where the dominant company completely denies access to a product or service.

Traditionally, both outright and constructive refusals-to-supply and constructive refusal-to-supply cases have both been assessed under the same *Bronner* criteria, which state that a refusal to supply must concern an indispensable product that is not feasibly replicable and must, furthermore, be likely to eliminate all competition in the market.⁵⁵ In the more recent *Google Shopping* ruling, however, the ECJ ruled that a showing of indispensability is not required to establish so-called self-preferencing infringements (a subcategory of constructive refusals to deal where a dominant favors its own downstream products or services to the detriment of its rivals' offerings).⁵⁶ The Draft Guidelines, however, extend this limited exception to *Bronner* to *all* constructive refusals to supply. This represents a significant expansion of Art. 102 TFEU that has no clear basis in the ECJ caselaw.

Another example is **tying**. Paragraph 95 of the Draft Guidelines suggests that, in certain circumstances, the anticompetitive effects of tying can be presumed, though

⁵² Intel, *supra* note 4, para. 139. “[The Commission] 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” (emphasis added).

⁵³ Draft Guidelines, *supra* note 5, para. 183 (d).

⁵⁴ Communication from the Commission, Amendments to the Communication from the Commission – Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2023/C 116/01) (“Art. 102 Guidance Amendments”), annex, at 4.

⁵⁵ Case C-7/97, *Bronner*, 1998, EU :C:1998:569 (26 Nov. 1998), para. 41.

⁵⁶ *Google Shopping*, *supra* note 21.

it does not clarify when. Such a presumption, however, is unknown to the caselaw, and is largely unsupported even by the cases cited in the Guidelines. In *Hilti*, for example, Hilti's tying was found to infringe Art. 102 TFEU in light of the specific circumstances of the case: the fact that Hilti failed to approach the competent UK authority for a ruling that competitors' nails were dangerous contradicted its claims that the tying was due to safety concerns.⁵⁷

In addition, the Commission's analysis was based on the specific circumstances of Hilti's position, conduct, and the markets involved. For example, the Commission found that Hilti's actions revealed a "commercial interest in stopping the penetration of the market of non-Hilti consumables since *the main profit* from [nail guns, nails and cartridge strips] originates from the sale of consumables, not from the sale of nail guns"⁵⁸ (emphasis added). In this context, Hilti's behavior—which consisted, among other things, in a combination of tying, discriminatory policies against competitors, and deliberate delaying of licenses—was found to be anticompetitive.⁵⁹

There is thus no presumption in *Hilti* and, indeed, it is unclear what overarching presumption about tying could be drawn from the specific circumstances of that case. If anything, *Hilti* embodies the opposite principle: That the exclusionary effects of tying are highly dependent on the particular context of the case, including the dominant undertaking's position and the nature of the market at-stake.

Likewise, in *Microsoft*, the Commission famously undertook a lengthy examination of anticompetitive effects. And while it claimed the case involved conduct where foreclosure effects are "normally presumed,"⁶⁰ nowhere did the court confirm the existence of such a presumption. In fact, the Commission argued in the case that the GC should only undertake a limited review of its decision, precisely because the contested decision was based on complex technical and economic assessments,⁶¹ even as it now seeks to persuade us that such economic assessments are irrelevant.

⁵⁷ Case T-30/89, *Hilti AG v Commission of the European Communities*, 1991, ECLI:EU:T:1991:70 (12 Dec. 1991), paras. 115-117.

⁵⁸ *Id.*, para 90.

⁵⁹ *Id.*, para 8.

⁶⁰ *Microsoft*, para. 1009.

⁶¹ *Id.*, para 85.

That tying is “a normal feature of commercial life, and not something that should be viewed as inherently suspicious” has also long been recognized in the literature.⁶² In fact:

Manufacturing activity, by its very nature, involves the bringing together of different components, and it would be perverse to suggest that, when engaged in by a dominant firm, such behavior should be stigmatized as presumptively unlawful: **the presumption should be the other way.**⁶³ (emphasis added)

Alas, the Draft Guidelines include no such provisions on presumptively lawful tying.⁶⁴

The upshot is that the Draft Guidelines’ discussion of specific theories of harm systematically misconstrues existing caselaw in ways that underplay the burden of proof incumbent on the Commission. Ultimately, however, it is the ECJ, and not the Commission, that draws the limits of European competition enforcement. By failing to accurately depict the law as it is, the Draft Guidelines fail to provide useful guidance to firms operating in Europe.

II. A Weakening of Effects Analysis?

Another area where the Draft Guidelines are lacking is their description of the effects analysis that has become increasingly central to European competition enforcement. Indeed, while the Draft Guidelines pay lip service to effects-based analysis under Art. 102 TFEU,⁶⁵ they ultimately fail to draw the appropriate lessons from recent ECJ rulings.

One important way in which the Draft Guidelines seek to eschew effects analysis is by suggesting that the as-efficient-competitor (AEC) test is optional. Technically

⁶² DAVID WHISH & RICHARD BAILEY, EU COMPETITION LAW 724 - 725 (10th ed. 2022). *See also*, at 724: “There is now general recognition that per se illegality is inappropriate for tying. Instead, it is necessary to balance the tying’s pro and anti-competitive effects.”

⁶³ *Id.*, at 725.

⁶⁴ For a non-exhaustive list of reasons why firms may legitimately wish to tie their products, see David S. Evans & Michael A. Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. REG. 37 (2005).

⁶⁵ *See, e.g.*, Draft Guidelines, *supra* note 5, para. 45.

speaking, it is.⁶⁶ The ECJ caselaw indicates that, while pricing practices must, as a general rule, be assessed under the AEC test,⁶⁷ 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.”⁶⁸ In practice, however, the Commission has less space to avoid the AEC test than the Draft Guidelines suggest.

First, while it is true that the Commission is not obliged to conduct an AEC test *ex officio*, when it chooses to do so “for the sake of completion,” it follows from the caselaw that the test must be carried out properly.⁶⁹ The Commission might, of course, choose to conduct an AEC test even when it is not strictly required to do so because the AEC test is particularly useful—and persuasive—in determining whether conduct is abusive within the meaning of Art. 102 TFEU, especially in the case of pricing practices.⁷⁰ The Commission may therefore choose to conduct an AEC test preemptively in order to frame the case and minimize the chances of appeal.

Perhaps more importantly, the caselaw has clarified that, in the case of so-called “pricing practices,” where the dominant undertaking submits an AEC test, the Commission is bound to assess it.⁷¹ There is a potential exception to this principle following the ECJ’s ruling in *Google Shopping* regarding non-pricing practices, but the ruling only narrowly restricts the validity of the AEC test.⁷² Indeed, in *SEN*, the ECJ found that the AEC test can be relevant in assessing non-pricing practices, as well.⁷³ The Draft Guidelines are thus wrong to conclude that price-cost tests are generally inappropriate for assessing whether non-pricing practices depart from competition on the merits.⁷⁴

The reason the AEC test is so useful within the context of Art. 102 TFEU is that it gives meaning to the otherwise nebulous notion of “competition on the merits.”

⁶⁶ Unilever, *supra* note 4, para. 62. “The use of an ‘as efficient competitor test’ is optional.”

⁶⁷ Servizio, *supra* note 4, para. 80.

⁶⁸ *Id.*, para. 81.

⁶⁹ Intel, *supra* note 4, paras. 142-147.

⁷⁰ Servizio, *supra* note 4, para. 79.

⁷¹ Intel, *supra* note 4, para. 139; Unilever, *supra* note 4, paras. 60 and 62.

⁷² Google Shopping, *supra* note 21, paras. 264, 269.

⁷³ Servizio, *supra* note 4, para. 79.

⁷⁴ Draft Guidelines, *supra* note 5, para. 56.

Indeed, the purpose of Art. 102 TFEU is not to punish companies that successfully outcompete rivals, or to ensure that companies endlessly hover on the market when they lack the business acumen to do so naturally.⁷⁵ Without a clear yardstick, however, it is not always evident whether the actual or hypothetical departure of a competitor from the market is owed to conduct that is an expression of “competition on the merits” or, conversely, of conduct that is antithetical to it. Especially at the margins, the line between “normal” and “abnormal” competition may be blurred, the logic seeking to demarcate the two may be circular and self-referential.

Against this backdrop, the AEC test is a workable method to simultaneously dispatch the question and arrive at the answer. The question of whether conduct departs from “competition on the merits” is whether an “as efficient competitor” would survive it.⁷⁶ The answer is given by the outcome of the AEC test, which seeks to operationalize and structure that inquiry. In short, this is why, even in non-pricing practices, the Commission ignores the AEC test at its own peril.⁷⁷

Second, the Draft Guidelines downplay the need for effects analysis in establishing exclusionary anticompetitive conduct under Art. 102 TFEU more generally. While not completely jettisoned, effects analysis comes out significantly weakened from the Commission’s reading of the caselaw in a way that is likely at odds with the Court’s Art. 102 TFEU jurisprudence. This is manifested in at least three ways: (i) the creation of presumptions (discussed in Section II); (ii) in artificially lowering the burden of proof the Commission must discharge in order to show that conduct that is not presumptively abusive is nevertheless anticompetitive within the meaning of Art. 102 (see also Section IIA); and (iii) in the lowering the burden of proof the Commission has to discharge in order to successfully dismiss evidence and arguments made by the dominant undertaking that the conduct in question does not have anticompetitive effects (or, put differently, in increasing the burden of proof defendants face in escaping Art. 102 TFEU).

⁷⁵ Post Danmark, *supra* note 44, para. 21.

⁷⁶ This also indicates that the ultimate value being protected by Art. 102 TFEU is economic efficiency. The Draft Guidelines recognize this in para. 51. “The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services.”

⁷⁷ Auer & Radic, *supra* note 49.

Indeed, in recent cases—including *Unilever*, *Qualcomm*, *Intel*, and *Google Shopping*—the Courts have underscored that the Commission is obliged to assess the effects of a conduct when the dominant undertaking submits arguments and evidence indicating that the behavior in question did not result in an anticompetitive effect. In *Unilever*, for example, the ECJ found that even presumptively abusive conduct can be justified on efficiency grounds.⁷⁸

In such a case, the Commission must at least demonstrate that the conduct has the potential to produce anticompetitive effects in the market. By contrast, the Draft Guidelines suggest that the Commission is only modestly and, in a sense, superficially bound to consider these arguments and accompanying evidence. The Draft Guidelines states that, where a certain conduct fulfills a formal legal test, it is automatically deemed to fall outside of “competition on the merits.”⁷⁹ But the practical effects of this presumption are, as discussed in the previous section, likely to be limited, as the Commission cannot escape an assessment of effects.

The Draft Guidelines establish a particularly low evidentiary threshold for conduct where no specific legal test exists. In those cases, the Draft Guidelines assert that the Commission can rely on purely theoretical evidence to establish that certain conduct amounts to an infringement of Art. 102 TFEU. The Draft Guidelines state that it is sufficient for the Commission to show that “conduct was capable of removing the commercial uncertainty relating to the entry or expansion of competitors that existed at the time of the conduct’s implementation.”⁸⁰ Yet the cited case, *Lundbeck*, offers only limited support.⁸¹ Nowhere in that case is it established that the removal of uncertainty as to the entry or expansion of a competitor constitutes a universal principle for establishing anticompetitive conduct under Art. 102 TFEU.

A third departure from effects-based analysis is marked by the omission of the term “anticompetitive foreclosure” (and its apparent substitution for “competition on the merits”). This was a cornerstone of the now repealed Guidance Paper and, indeed, a crucial criterion in distinguishing exclusion of rivals that results from procompetitive

⁷⁸ *Unilever*, *supra* note 4, para. 50.

⁷⁹ Draft Guidelines, *supra* note 5, para. 53.

⁸⁰ Draft Guidelines, *supra* note 5, para. 62.

⁸¹ Case T-472/13, *Lundbeck v Commission*, 2016, EU:T:2016:449 (8 Sep. 2016), para. 363.

conduct, and that which does not and is, therefore, *anticompetitive*.⁸² Accordingly, the Draft Guidelines can be expected to condemn efficient business conduct, thereby chilling competition to the detriment of consumers.

III. Conclusion: Clarity, Transparency, and Consumer Welfare

The Draft Guidelines constitute a deep shift in the interpretation of Art. 102 TFEU; from an effects-based approach to one based on formalistic presumptions that ignore conduct's impact on consumer welfare. Unfortunately, in doing so, they fail to achieve what should be their ultimate goal: creating legal certainty by offering stakeholders a clear and accurate overview of the law.

According to the Commission, the Draft Guidelines aim to increase legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Art. 102 TFEU.⁸³ But even on their own terms, the Draft Guidelines are difficult to understand unless one is exceedingly familiar with the underlying caselaw of Art. 102 TFEU, which undercuts the purpose of publishing such guidelines in the first place. More problematically, the Draft Guidelines often deviate from established precedent. The most egregious examples concern the sections that attempt to systematize the Courts' *Google Shopping* rulings. The explanation of the factors to be taken into account when establishing anticompetitive self-preferencing in the wake of *Google Shopping* adds little clarity to the underlying caselaw and, indeed, could even be argued to detract from it. Thus, the Draft Guidelines do not clearly state which factors matter and how they should be weighed. They only give a *numerus apertus* list of elements that *could* be considered when establishing whether self-preferencing departs from competition on the merits.

Another example of this vagueness concerns the alleged "goals" or "values" of Art. 102 TFEU, which do not find support in the caselaw and which reflect policy

⁸² See, in this sense, Komninos, *supra* note 13. "Paragraphs 19 and 20 [of the Guidance Paper] were the most important paragraphs. If the Guidance Paper had to be limited to one page, these paragraphs by themselves would suffice." Paragraph 19 states: "The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice."

⁸³ Draft Guidelines, *supra* note 5, para. 8.

statements, rather than legal principles that are dispositive in abuse-of-dominance cases. For instance, neither Art. 102 TFEU nor, indeed, EU competition law, aim to achieve the litany of goals that the Draft Guidelines' opening paragraphs ascribe them.

There is, to our knowledge, no authoritative jurisprudence that would give color to the notion that Art. 102 TFEU's aim is to create new opportunities for small and medium-sized enterprises ("SMEs"); contribute to sustainable development; or enable a "strong and diversified supply chains."⁸⁴ These considerations follow from policy statements; they are not law. To the extent that they are mentioned in the caselaw, they have, at best, the status of *obiter dicta*. Mentioning these variegated and abstract values in the Draft Guidelines—even if intended as a good faith gesture of acknowledgment of the policy priorities of the current European administration—is confusing for companies subject to the law, and misunderstands the proper role of soft laws.

Along similar lines, the Draft Guidelines' reading of consumer welfare — the accepted goal of EU competition law and Art. 102 TFEU — is likewise overly broad and indeterminate. According to the Draft Guidelines, the term "quality" should be understood as covering all the aspects related to the quality of a given product, including, *inter alia*, "sustainability," resource efficiency, durability, etc.⁸⁵ These potentially infinite dimensions of product quality are, however, never developed later. Nor do the Draft Guidelines explain how they relate to conduct under Art. 102 TFEU, or how the Commission intends to rank such factors. Moreover, the Draft Guidelines cite no caselaw of the Courts in support of this assertion.

In short, the Draft Guidelines ultimately obfuscate the law. This, in turn, undermines their usefulness, because they will lead stakeholders to reach incorrect conclusions about the legality or illegality of conduct that falls, or could fall, under Art. 102 TFEU.

The second big problem with the Draft Guidelines is that they attempt to jettison the economic underpinnings of Art. 102 TFEU. This is unfortunate because, as European courts have come to recognize in recent years, the "more economic approach" to competition law improves the analysis and enforcement of competition issues. If

⁸⁴ *Id.*, para. 1.

⁸⁵ Draft Guidelines, *supra* note 5, para. 2.

anything, this approach should be implemented in a stronger and clearer way, rather than discarded. This approach emphasizes economic efficiencies and consumer welfare, rather than merely the structure of markets or the “legal nature” of business practices.

By prioritizing consumer welfare, the economic approach aims to ensure that competition law fosters an environment that benefits consumers through lower prices, improved quality, and greater innovation. As Nicolas Petit and Lazar Radic explain, the consumer welfare standard allows us to filter cases that could restrict competition to some extent, but could be perfectly the result of “competition on the merits.”⁸⁶ The “more economic approach” also allows for a more flexible and nuanced analysis in antitrust cases, enabling regulators to consider the context of business practices and their potential benefits. This can lead to more informed and balanced enforcement actions. In the United States, for instance, the Supreme Court “has repeatedly recognized the limitations that courts face in distinguishing between pro- and anti-competitive conduct in antitrust cases, and particularly the risk this creates of reaching costly false-positive (Type I) decisions in monopolization cases.”⁸⁷ Therefore, competition law in the United States has, in general, continued to adhere to the error-cost framework that is embedded in the economic approach to antitrust cases.

Specific cases should be addressed as they come, with an implicit understanding that, especially in digital markets, precious few generalizable presumptions can be inferred from the previous case. The overall stance should be one of restraint, reflecting the state of our knowledge. We may well be able to identify anticompetitive harms in certain cases, and when we do, we should enforce the current laws. But we should not overestimate our ability to finetune market outcomes without causing more harm than benefit.⁸⁸

Moreover, by recognizing that certain practices may lead to efficiencies and innovation, the “more economic approach” can encourage businesses to develop new products, services, and business practices that can, in turn, create more competition and

⁸⁶ See Nicolas Petit & Lazar Radic, *The Necessity of a Consumer Welfare Standard in Antitrust Analysis*, PROMARKET (18 Dec. 2023), <https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis>.

⁸⁷ See, Manne & Auer, *supra* note 8.

⁸⁸ *Id.*

consumer benefits. A more formalistic approach, with a reduced burden of proof, on the other hand, would increase the risk of unwarranted expropriation of rents, thereby discouraging business innovation.⁸⁹

This risk of regulatory error costs is compounded in digital markets, where uncertainty looms large,⁹⁰ and where the concomitant deployment of the Digital Markets Act (DMA) completely jettisons any effects analysis.⁹¹ The Draft Guidelines' significance must be understood against the legal and regulatory background of the DMA. If, as the Draft Guideline stipulate, economic analysis under Art. 102 TFEU is sapped, the only other avenue to assess the economic effects of unilateral conduct—including conduct covered by the DMA, such as self-preferencing, tying, and refusal to deal—will effectively be foreclosed.

This would mark a significant step backward for Art.102 TFEU in general, but is particularly ill-advised in the context of data-driven markets, where rigorous counterfactual analysis is necessary to understand causality and assess likely foreclosure

⁸⁹ *Id.*

⁹⁰ Geoffrey A. Manne, *Error Costs in Digital Markets*, 3 GAI REPORT ON THE DIGITAL ECONOMY 34 (2020). (“The inherent uncertainty in judicial decision-making is further exacerbated in the antitrust context where liability turns on the difficult-to-discern economic effects of challenged conduct. And this difficulty is still further magnified when antitrust decisions are made in innovative, fastmoving, poorly-understood, or novel market settings—attributes that aptly describe today’s digital economy;” Nora von Ingersleben-Seip & Zlatina Georgieva, *Old Tools for the New Economy? Counterfactual Causation in Foreclosure Assessment and Choice of Remedies in Data-Driven Markets*, 00 J. ANTITRUST ENFORCEMENT 1 (2024), (“While interventions under both ex-ante and ex-post (antitrust) mandates are not novel, they must be approached with extra care in data-driven digital markets, where uncertainty and error costs are high.”).

⁹¹ See, e.g., Digital Markets Act, recital 10. “[The DMA] should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control;” see also recital 11: “This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, *independently from the actual, potential or presumed effects of the conduct of a given gatekeeper* covered by this Regulation on competition on a given market” (emphasis added).

effects.⁹² In simple terms, Art. 102 TFEU enforcement may provide a useful tool to analyze the effects of DMA provisions that are inspired by this enforcement.

Ignoring counterfactual analysis in markets where rapid change is the norm, such as the ones covered by the DMA, is likely to lead to a situation in which enforcers are not able to properly understand the competitive dynamics and effects of impugned conduct. In combination with the dubious presumptions discussed in Section I, and the strict provisions of the DMA, this is likely to lead to a proliferation of costly Type I errors.⁹³

Given all of this, we believe the Draft Guidelines need to be reworked in order to bring them in line with ECJ caselaw, thereby ensuring that they provide a useful and clear depiction of the law to firms seeking to self-assess the legality of their conduct (or that of their rivals).

⁹² Von Ingersleben-Seip & Georgieva, *supra* note 90, at 16-17.

⁹³ Von Ingersleben-Seip & Georgieva, *supra* note 90, at 24. (“We argued that authorities need to proceed carefully with regard to two aspects of ex-post interventions in dynamic digital markets already governed by ex-ante obligations. First, authorities need to ensure that there is a high threshold for such interventions, requiring rigorous analysis to determine whether companies have abused their dominant position.”)