

RESPONSE TO CONSULTATION ON PROPOSED ARTICLE 102 GUIDELINES**On behalf of an ad hoc cross sectoral industry coalition****29 November 2024**

This submission in response to the Commission's draft guidelines on exclusionary conduct is made on behalf of a coalition of multinational manufacturers and industry associations representing different sectors of the economy (fast-moving consumer goods, a range of consumer branded products, home and office electronic equipment, and pharmaceuticals), with the support of Dr Aleksandra Boutin and Dr Xavier Boutin (Berkeley Research Group).

Guidelines provide businesses with clarity about how they should comply with the law. We therefore welcome the Commission's willingness to issue guidelines based on the recent clarifications of case law and on its enforcement experience.

We consider that the Commission's 2009 Guidance Paper provided a sound basis for the assessment of unilateral conduct by companies with significant market power. It was based on coherent principles that helped to foster compliance without hindering enforcers at European or national level exploring novel theories of harm in line with technological and market developments. The more economic approach that underpinned the 2009 Guidance Paper has since been broadly endorsed by the Union Courts. In moving away from this approach, the current draft guidelines appear to confer on the Commission such broad discretion that, compounded by the risk of formalistic enforcement of the rules at national level, they risk chilling pro-competitive commercial conduct.¹ Rather than streamlining enforcement proceedings, the proposed approach will likely lead to additional litigation and delays.

While we recognise that the fast-moving pace of technology requires the competition rules to be flexible and to evolve, the Commission already has a broad range of tools to tackle perceived abuses in digital markets. It is of fundamental importance that the guidelines on Article 102 be as clear and as straightforward as possible and aligned with the more economic approach as they set cross-sectoral principles that apply to the broader economy.

In the context of the Commission's new goal of prioritising the EU's global competitiveness, the competition rule book should focus on preventing harm to consumer welfare, keeping markets open for the entry and expansion of rivals that will foster European growth. In open markets, efficient companies will inevitably be those with higher market shares. Hindering these companies from entering into procompetitive business practices will only widen the structural growth gap between Europe and the rest of the world. Clear rules and principled enforcement will foster both compliance and growth.

In line with the stated aim of the guidelines to enhance legal certainty and help undertakings self-assess and comply with the law, we have taken the liberty of suggesting concrete amendments to the draft guidelines in a manner that is broadly in line with much of the Commission's approach and that reflects the Union case law. Our proposal provides a simpler structure and more practical guidance as to the types of conduct that may be problematic and how to assess whether they are liable to be abusive (in line with the approach taken in other Commission guidelines). This explanatory accompanying note outlines the key features where we have diverged from the Commission's proposals, highlighting the clarifications we consider to be most important without commenting on every drafting suggestion.

We look forward to constructively engaging in a discussion with the Commission and other stakeholders in the coming months to collectively ensure that the final version of the guidelines best serves the public interest and contributes to competitiveness and growth in Europe.

¹ The suggestion that pricing above average total costs may be problematic in certain circumstances (paragraph 57 of the Commission proposal) is one such example.

1. INTRODUCTION

The Commission's proposed two step test of abuse (that conduct (i) departs from competition on the merits, and (ii) is capable of having exclusionary effects) is too abstract to be readily understood by the business community. It is essential that the terminology used to define exclusionary abuses is clear, consistent, and accessible. For this reason, we recommend that the Commission recognise that to be problematic, conduct must be capable of having anti-competitive foreclosure effects leading to consumer harm. Conduct meeting this test is in essence a departure from competition on the merits. Conversely, conduct that benefits consumers is competition on the merits. It is essential that there be a clearly articulated theory of harm in each case to frame why conduct on a particular market is harmful.

2. GENERAL PRINCIPLES ON THE ASSESSMENT OF DOMINANCE

Market definition: We agree that market definition and the assessment of dominance may be interrelated and recommend that be spelled out by the Commission in the context of the specific theory of harm in any given case, consistent with the helpful clarifications made in this respect in the revised Market Definition Notice.²

Market shares: Whilst dominance may exceptionally be found where an undertaking's market share is below 40%, we are not aware of prior decisions where this has been the case.³ It is important to maintain the presumption of no dominance below 40% in the interests of legal certainty, and to protect against spurious complaints.

Countervailing buyer power: The specific market context and competitive dynamics are important factors when considering countervailing buyer power. We propose a number of examples to better illustrate the point.

Aftermarkets: We recommend to carry over from the 2005 discussion paper (and established case law) the explanation of how to assess market power in aftermarkets and to clarify that ordinarily a supplier that is not dominant in the primary market will not be viewed as being dominant in the secondary market, in particular where customers have the information to make informed choices considering lifecycle pricing in choosing a primary product.

Collective dominance: While it is perhaps useful for the sake of completeness for the guidelines to define the specific conditions necessary for a finding of collective dominance, it is important to recognise publicly that those conditions are often difficult to establish in practice and that reliance on this concept will remain rare in practice (not least since it will often be easier to tackle potentially problematic conduct as an anti-competitive agreement or concerted practice).

3. GENERAL PRINCIPLES ON CONDUCT LIABLE TO BE ABUSIVE

As mentioned above, the two-step approach proposed (paragraph 45 of the Commission proposal) to establish that conduct (i) departs from competition on the merits, and (ii) is capable of having exclusionary effects, is too vague to provide workable guidance.

² See for instance para. 18 of the Commission Notice on the definition of the relevant market for the purposes of Union competition Law, C/2024/1645 available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645 which recognises that market definition seeks to identify the effective and immediate competitive constraints that are relevant for the competitive assessment of a specific conduct or concentration which means that the outcome of market definition can differ.

³ FN 41 of the Commission proposal unhelpfully suggests that exceptionally, intervention may be justified below a market share of 10%. We suggest that if a company with a small market share is found to be able to behave independently of its consumers and shape the parameters of competition, this may be because the relevant market has been wrongly defined.

The "As Efficient Competitor" Standard

We strongly urge the Commission to retain well-understood concepts that have been consistently validated by the Union Courts. The core of the analysis must be a finding of anti-competitive foreclosure to the detriment of consumers. Specifically, conduct capable of leading to the anti-competitive foreclosure of as efficient competitors ("AEC") is the very definition of conduct that departs from competition on the merits.

The foreclosure of less efficient rivals will often be the result of competition on the merits and so, in the interests of legal certainty, it is imperative to maintain the as efficient competitor standard as the general rule, and ensure that a clearly articulated theory of harm sets out why any departure from it is appropriate in exceptional case-specific circumstances. This approach is fully in line with the latest case law of the Court of Justice that endorses the as efficient competitor standard (and a related price-cost test wherever it sheds light on the conduct in question).⁴

We see no justification in the case law for the Commission's categorisation of conduct into three buckets (naked/presumptively unlawful/individual assessment, at paragraph 60). This form-based approach does not provide a coherent analytical structure. For this reason, and as further discussed in section 4 below, we recommend that section 3.2 of the draft guidelines on "conduct departing from competition on the merits" be deleted (with much of the reasoning moved to other sections of the guidelines where appropriate as outlined below).

Evidentiary burden to establish capability of producing exclusionary effects

We recommend stating clearly upfront that the case law requires the Commission to establish the intrinsic capacity of the conduct in question to foreclose competitors that are at least as efficient as the dominant undertaking and to recognise that in *Intel I*, the Court of Justice expressly clarified that it was moving away from the more formalistic *Hoffmann-LaRoche* line of case law which was not aligned with economic analysis and experience.

Despite the varied terminology ("capable", "potential", "probable", "likely") used by the Union Courts to refer to the degree of probability of anti-competitive effects required to merit intervention, it should be made clear that these terms are interchangeable and that the applicable legal standard endorsed by the Courts and applied by the Commission is one and the same.

In discharging its burden of proof in assessing all relevant facts and circumstances, the Commission must articulate an evidenced, cogent theory of harm that clearly delineates the mechanisms through which conduct can harm effective competition in the market to the detriment of consumers.

Even if, as a matter of law, the dominant undertaking would have to show that the absence of actual effects was the consequence of the fact that the conduct was unable to produce such effects, the Commission should acknowledge that the absence of actual effects will inform its enforcement priorities.

Presumptions and structured rules of reason

We consider that while the case law precludes a narrow form-based approach to the categorisation of any conduct as abuse, there is room for a limited rebuttable presumption that naked restrictions are likely to constitute abuse. Beyond this narrow category we do not consider that the case law endorses the broader use of legal presumptions (as argued at FN 131 of the Commission's proposal).

Because the effects are presumed, the standard for rebuttal of the presumption is different from that of objective necessity or the efficiency defence: it is sufficient for the dominant undertaking to show the existence of plausible pro-competitive business rationales for the burden of proof to revert to the Commission to establish

⁴ Case C-240/22, *Intel II*, judgment of 24 October 2024.

harm to the requisite standard. It should be made clear that this is a different exercise from successfully arguing objective justifications or an efficiency defence.

More generally, it would be helpful to clarify that there may be different ways to show that conduct is not capable of having exclusionary effects, for example, if the dominant undertaking is able to produce evidence to show that the facts and circumstances are materially different from the underlying assumptions on which any presumption of harm is based (in other words, if the legal and economic context casts doubt on the restrictive nature of the conduct).

Other conduct that cannot be presumed to be harmful requires a structured rule of reason approach comprising an assessment of its capability to result in anti-competitive foreclosure based on economic analysis and experience and the specific factual context (as set out in section 4).

4. PRINCIPLES TO DETERMINE WHETHER CONDUCT IS LIABLE TO BE ABUSIVE

The proposal to differentiate between three categories of conduct depending on whether or not the Courts have established a legal test is apt to create confusion and has no coherent intellectual underpinning. Judgments are an outcome of parties' decisions to appeal the Commission's assessment of particular conduct and are not a reflection of whether such conduct is unique in any legal sense. Other types of conduct can have similar effects and should in principle be subject to the same analytical framework. Furthermore, there is a continuum of both restrictive and pro-competitive effects for all sorts of conduct. It is not the classification of conduct that justifies a different structured rule of reason, but rather the likely balance between anti- and pro-competitive effects of any given conduct based on economic analysis and experience.

In order to provide workable guidance and aid compliance efforts without chilling efficient and pro-competitive business practices in Europe, we recommend that the guidelines take a similar approach to the Commission's vertical and horizontal guidelines: namely, by listing specific types of conduct, acknowledging that they are generally put in place for pro-competitive reasons, and explaining when they may be problematic, and how to analyse their effects based on all the facts and circumstances, economic analysis, and experience, including the case law of the Union Courts.

We have applied this methodology to the following types of conduct taking over much of the language from the Commission's draft guidelines: low unit pricing; conditional pricing including exclusive dealing; tying and bundling; refusal to supply; access restrictions; margin squeeze; and self-preferencing.

5. GENERAL PRINCIPLES IN ASSESSING JUSTIFICATIONS

We urge the Commission to clarify that the objective necessity test, the efficiency defence, and the existence of pro-competitive rationales are three separate exercises.

Objective necessity focuses primarily (but not necessarily exclusively) on whether the conduct is necessary to achieve a legitimate commercial objective. For this reason, the objective necessity defence requires the dominant undertaking to establish that the conduct is proportionate, i.e., that the legitimate commercial objective cannot be achieved through less restrictive means. A determination that conduct is not proportionate cannot rely merely on the description of alternative hypothetical arrangements that have never been tested in a given industry (or by analogy in industries with similar features).

An efficiency defence is an exercise that follows a determination that the conduct is capable of leading to anti-competitive foreclosure. It is subject to a high standard of proof for this reason. When harm has been presumed, as is the case for naked restrictions and for certain exclusivity conditions for example under a structured rule of reason approach, the existence of pro-competitive rationales is subject to a different, lighter legal test. The standard to be met by the dominant undertaking for the burden of proof to revert to the Commission is one of plausibility, not proportionality or indispensability. If the Commission subsequently establishes the capability

of the conduct to anti-competitively foreclose rivals, these procompetitive rationales will then be assessed as efficiencies under the relevant legal test.

* * *

Thank you for this opportunity to engage in this important exercise of formulating workable rules to guide businesses on the compliance of their unilateral conduct with the competition rules in challenging times.



EUROPEAN
COMMISSION

Brussels, **XXX**
[...](2024) **XXX** draft

SENSITIVE*
UNTIL ADOPTION

COMMUNICATION FROM THE COMMISSION

**Guidelines on the application of Article 102 of the Treaty on the Functioning of the
European Union to abusive exclusionary conduct by dominant undertakings**

COMMUNICATION FROM THE COMMISSION

Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings

Table of Contents

1.	Introduction.....	3
1.1.	Purpose of the Guidelines	3
1.2.	Scope and structure of the Guidelines	4
1.2.1.	Scope	4
1.2.2.	Structure	5
2.	General principles applicable to the assessment of dominance	6
2.1.	Introduction.....	6
2.2.	Single dominance.....	7
2.2.1	Market position of the undertaking concerned and of its competitors	8
2.2.2.	Barriers to expansion and entry	9
2.2.3.	Countervailing buyer power.....	11
2.2.4.	Aftermarkets.....	12
2.3.	Collective dominance	14
2.3.1.	Reaching terms of coordination.....	15
2.3.2.	Ability to monitor adherence to terms of coordination	16
2.3.3.	Existence of a credible deterrence mechanism	16
2.3.4.	External stability – lack of constraints exercised by actual or potential competitors and lack of countervailing power by customers	16
3.	General principles to determine if conduct by a dominant undertaking is liable to be abusive.....	17
3.1.	Introduction.....	17
3.2.	Presumptions and structured rules of reason.....	24
3.2.1.	Naked restrictions	25
3.2.2.	Other conduct.....	26
4.	Principles to determine whether particular conduct is liable to be abusive	27

4.1	Main competition concerns.....	27
4.1.1.	Horizontal anti-competitive foreclosure.....	27
4.1.2.	Non-horizontal anti-competitive foreclosure.....	28
4.2.	Assessment of particular types of conduct.....	28
4.2.1.	Low unit prices	29
4.2.2.	Conditional pricing.....	34
4.2.3.	Tying and bundling.....	42
4.2.4.	Refusal to supply	45
4.2.5.	Access restrictions	48
4.2.6.	Margin squeeze	50
4.2.7.	Self-preferencing	53
5.	Objective necessity and efficiencies.....	54
5.1.	Objective necessity defence	55
5.2.	Efficiency defence	57
5.3.	Burden of proof.....	58

1. INTRODUCTION

1.1. Purpose of the Guidelines

1. The Union rules on competition pursue the protection of genuine, undistorted competition (“effective competition”) in the internal market. Effective competition drives market players to deliver the best products¹ in terms of choice, quality², and innovation, at the lowest prices for consumers³. It ensures that markets remain open and dynamic, creating new opportunities for innovative players including small and medium-sized enterprises (“SMEs”) and start-ups to operate on a level playing field with other players. It also spurs innovation and ensures an efficient allocation of resources, thereby contributing to sustainable development and enabling strong and diversified supply chains, all of which contributes to the Union’s resilience and long-term prosperity.
2. Achieving a dominant position in the Union is not in itself unlawful but Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) places a special responsibility on dominant undertakings by prohibiting them from abusing their market position.
3. It is important that Article 102 TFEU is applied vigorously and effectively and in a predictable and transparent manner so that companies can operate freely in the internal market, within the limits laid down in Union legislation, also considering the decentralised enforcement of Article 102 TFEU⁴.
4. Pursuant to the Union Courts’ case law⁵, Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers⁶ whether by anti-competitive exclusionary or exploitative behaviour. These guidelines focus on anti-competitive foreclosure practices that may harm consumers by undermining an effective structure of competition⁷.
5. Such anti-competitive behaviour, if not objectively justified, is hereinafter referred to as “exclusionary abuse” and its effects are hereinafter referred to as “exclusionary effects”. Those effects refer to any hindrance to actual or potential competitors’ ability or incentive to exercise

¹ All references to “product(s)” in these Guidelines should be understood as also referring to services.

² The term “quality” in these Guidelines should be understood as covering all various aspects related to the quality of a given product, such as its sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products, the image conveyed or the security and privacy protection afforded by the product, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs. See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 15.

³ In these Guidelines, the concept of ‘consumers’ encompasses all direct or indirect users of the products affected by the conduct of a dominant undertaking, including intermediate producers that use the products as an input, as well as distributors, wholesalers, retailers and final consumers.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, p. 1, Articles 1, 3, 5 and 6.

⁵ Throughout these Guidelines, the term “Union Courts” refers to the Court of Justice and the General Court.

⁶ Judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraphs 44 and 46, as well as the case-law quoted therein.

⁷ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, Case 6/72, EU:C:1973:22, paragraph 26; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 24; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 44, as well as the case-law quoted therein. [As recognised in the Commission’s Policy Brief No. 1/2024 on non-price competition in merger control, “the Commission pursues a consumer-centric approach and does not go beyond a competition-related consumer welfare standard”.]

a competitive constraint on the dominant undertaking⁸ to the detriment of consumers, such as the full-fledged exclusion or marginalisation of competitors, an increase in barriers to entry or expansion⁹, the hampering or elimination of effective access to markets or to parts thereof¹⁰ or the imposition of constraints on the potential growth of competitors¹¹.

6. Against this background, these Guidelines set out principles to assess whether conduct by dominant undertakings constitutes an exclusionary abuse under Article 102 TFEU, in the light of the case law of the Union Courts.
7. By issuing these Guidelines, the Commission seeks to enhance legal certainty and help undertakings self-assess whether their conduct constitutes an exclusionary abuse under Article 102 TFEU. Although not binding on them, these Guidelines are also intended to give guidance to national courts and national competition authorities of the Member States in their application of Article 102 TFEU.
8. These Guidelines reflect the case law of the Union Courts at the time of their adoption and are without prejudice to the interpretation that the Union Courts may give to Article 102 TFEU through relevant developments in the case law.

1.2. Scope and structure of the Guidelines

1.2.1. Scope

9. The general principles set out in these Guidelines need to be applied to the particular facts and circumstances of each case. The list of practices listed in the text of Article 102 TFEU does not exhaust the methods of abusing a dominant position prohibited by Union law¹². It is not possible to provide specific guidance for every possible scenario.
10. While these Guidelines only concern exclusionary abuses, the principles relevant to the assessment of dominance (section 2) and the justifications based on objective necessity and efficiencies (section 5) are also relevant for the assessment of other forms of abusive conduct, such as exploitative abuses¹³.
11. These Guidelines are without prejudice to the application of other provisions of Union competition law to the same facts, in particular Article 101 TFEU and the rules concerning its application¹⁴.

⁸ Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 117.

⁹ Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 154.

¹⁰ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, Case T-604/18, EU:T:2022:541, paragraph 281.

¹¹ Judgment of 8 October 1996, *Compagnie maritime belge transports et Compagnie maritime belge, Dafra- Lines, Deutsche Afrika-Linien. et Nedlloyd Lijnen v. Commission*, Joined Cases T-24/93, T-25/93, T-26/93 et T-28/93, EU:T:1996:139, paragraph 149 ; judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraph 47; judgment of 21 December 2023, *European Superleague Company*, Case C-333/21, EU:C:2023:1011, paragraph 131.

¹² Judgments of 21 February 1973, *Europemballage and Continental Can v Commission*, 6/72, EU:C:1973:22, paragraph 26; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 26, and judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraph 46.

¹³ For the avoidance of doubt, the same conduct by a dominant undertaking may have both exclusionary and exploitative effects.

¹⁴ Judgment of 13 February 1979, *Hoffmann-La-Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 116; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 119 and case law quoted therein. Moreover, as regards the application of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.1.2004, p. 1-22),

12. Article 102 TFEU may also apply to conduct which falls within the scope of other regulations, Union or national, that govern the behaviour of undertakings in the market¹⁵ and which pursue different objectives from that of the competition rules¹⁶. The fact that the conduct of a dominant undertaking has been found to have infringed other legislation does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for an infringement of Article 102 TFEU for the same conduct¹⁷. In addition, the fact that an undertaking's conduct has been found to comply with other legislation – or even been encouraged by it – does not preclude the possibility that, under certain conditions, the same undertaking may be sanctioned for infringing Article 102 TFEU through the same conduct¹⁸.

1.2.2. Structure

13. In order to assess whether an undertaking has infringed Article 102 TFEU, the following steps are required. First, it is necessary to define the relevant product and geographic market (or markets)¹⁹. The Market Definition Notice provides guidance on the rules, criteria and evidence that the Commission uses when defining markets and reflects that market definition in any given case is inherently linked to the theory of harm pursued²⁰. Second, it is necessary to assess whether the undertaking concerned holds a dominant position in the relevant market(s). Third, it is necessary to assess whether the conduct of the dominant undertaking is liable to be abusive, namely whether it is capable of having anti-competitive foreclosure effects leading to consumer

the Court of Justice held that “Article 21(1) of Regulation No 139/2004 must be interpreted as not precluding the competition authority of a Member State from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 thereof, is below the thresholds for mandatory ex ante control laid down in national law, and has not been referred to the Commission under Article 22 of that regulation, as constituting an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope” (judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraph 53).

¹⁵ Judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, paragraphs 47-54; and judgment of 12 January 2023, *Lietuvos geležinkiai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 88.

¹⁶ Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 47; judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, paragraph 48. See also judgment of 1 July 2010, *AstraZeneca v Commission*, case T-321/05, EU:T:2010:266, paragraph 366, where the Court stated that the existence of remedies specific to the other regulatory system (in that case, the patent system) does not alter the conditions of application of the competition law regime.

¹⁷ This is only possible if: (i) there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; (ii) the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and (iii) the overall penalties imposed correspond to the seriousness of the offences committed. See judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, paragraph 58.

¹⁸ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 81-84; judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraph 133; judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraphs 813-817 and 864. If a conduct is required of undertakings by legislation, or if legislation creates a legal framework which eliminates any possibility of competitive activity, Article 102 TFEU does not apply. In such a situation, the abusive conduct is not attributable to the dominant undertaking as Article 102 TFEU implicitly requires the autonomous conduct of that undertaking. Article 102 TFEU may apply, however, if it is found that legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings. Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 80 and case-law therein cited.

¹⁹ Market definition allows the identification in a systematic way of the immediate competitive constraints exerted on the undertaking in question when offering products in a certain area. Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraphs 127 and 128.

²⁰ Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024. Market definition is not discussed in detail in these Guidelines.

harm, thereby departing from competition on the merits²¹. This requires the articulation of a clear theory of harm since competition on the merits is fundamentally competition that benefits consumers. Fourth, it may be necessary to assess whether the conduct is objectively justified or whether it satisfies the criteria to benefit from an efficiency defence.

14. Accordingly, these Guidelines are structured as follows:
- section 2 describes the general principles applicable to the assessment of dominance,
 - section 3 describes the general principles to determine if conduct by dominant undertakings is liable to constitute an exclusionary abuse,
 - section 4 describes the principles to determine whether specific types of conduct by dominant undertakings are liable to be abusive,
 - section 5 describes the general principles applicable to the assessment of objective justifications and efficiencies, which under certain conditions may justify or counterbalance the effects of conduct that is liable to be abusive, and the appropriate burden of proof.
15. Finally, for completeness, it is recalled that conduct that is not capable of appreciably affecting trade between Member States falls outside the scope of Article 102 TFEU. The Commission has provided guidance on the assessment of effect on trade in the Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty²².

2. GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF DOMINANCE

2.1. Introduction

16. Article 102 TFEU does not prevent an undertaking from acquiring on its own merits, in particular on account of its skills and abilities, a dominant position on a given market²³. It only prohibits the abuse of such dominant position.
17. A dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of its consumers²⁴.
18. Establishing dominance is not precluded by the existence of a certain degree of competition on a particular market for as long as the undertaking concerned is able to act to an appreciable extent without having to take account of such competition in its market strategy and without, for that reason, suffering detrimental effects from such behaviour²⁵. Accordingly, the fact that

²¹ This is consistent with existing EU Guidelines on horizontal agreements and on mergers for example, that are also predicated on the goal of preventing distortions of competition to the ultimate detriment of consumers (see, for example, the 2023 Horizontal Cooperation Guidelines (OJ 2023 C 259/1, paragraph 9)).

²² OJ C101, 27.4.2004, p.81.

²³ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 37; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 73.

²⁴ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraph 65.

²⁵ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 70.

there may be a certain degree of competition on a market is a relevant but not a decisive factor for determining whether a dominant position exists²⁶.

19. To assess dominance, it is first necessary to define the relevant market²⁷. Market definition involves identifying in a systematic way the competitive constraints exerted on the undertakings concerned when they offer products in a certain area. When defining the relevant market, the Commission may need to take into account that the undertakings concerned already exert market power²⁸. The definition of the relevant market and the assessment of whether the undertakings concerned hold a dominant position within that relevant market is normally interrelated in the context of a specific theory of harm.
20. Once dominance has been established, Article 102 TFEU becomes applicable, and the degree of dominance is not as such decisive to determine its scope of application. However, the degree of dominance may be relevant, among other factors, for the purpose of analysing whether the conduct of the undertaking concerned is capable of producing anti-competitive exclusionary effects as explained further below²⁹.
21. A dominant position may be held by one undertaking (single dominance) or by two or more undertakings (collective dominance), as explained below.

2.2. Single dominance

22. Single dominance relates to a situation where a single undertaking has the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers on the relevant market³⁰.
23. The existence of a dominant position derives in general from a combination of several factors that, taken separately, are not necessarily determinative³¹. The following sections illustrate some of these factors, in a non-exhaustive manner. Further factors may be relevant for the

²⁶ Judgment of 30 January 2007, *France Télécom v Commission*, Case T-340/03, EU:T:2007:22, paragraph 101. See also Commission decision of 10 February 2021 in case AT.40394 – *Aspen*, paragraph 63.

²⁷ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, C-6/72, EU:C:1973:22, paragraph 32; judgment 30 January 2020, *Generics UK & Others*, C-307/18, EU:C:2020:52, paragraph 127.

²⁸ One issue that can arise in the context of market definition in Article 102 TFEU cases is that the price charged by the undertaking concerned may have been raised above the competitive level. In such a scenario, the use of the so-called SSNIP test (Small but Significant and Non-transitory Increase in Price) as a tool for defining the boundaries of the relevant market may not be appropriate, as market definition must be based on substitution at the competitive prices and not at prices that have already been raised above the competitive level. The risk that a SSNIP test analysis starting at an already inflated price leads to the wrong conclusion of wide relevant markets is called the “cellophane fallacy”. Therefore, the SSNIP test must be applied carefully in Article 102 TFEU cases. See, for example, Commission decision of 15 October 2014 in case AT.39253 – *Slovak Telekom*, paragraphs 158-171. See also Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 18 c) and footnote 55.

²⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 80 and 81; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139 and judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, Case T-612/17, EU:T:2021:763, paragraph 183. See also Commission decision COMP/C-1/36915, *Deutsche Post AG*, paragraph 103.

³⁰ See to that effect judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraph 65.

³¹ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraph 66; judgment of 15 December 1994, *Gøttrup-Klim u.a. Grovvareforeninger / Dansk Landbrugs Grovvareselska*, C-250/92, EU:C:1994:413, paragraph 47.

assessment of dominance, depending on the theory of harm pursued and the specific circumstances of each case³².

2.2.1 Market position of the undertaking concerned and of its competitors

24. The analysis of the market position of the undertaking concerned and of its competitors during the time period considered³³ provides insights into the constraints that those undertakings face from actual competition in the relevant product and geographic market.
25. One important factor is the existence of very large market shares over a sustained period of time³⁴, which are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position³⁵. This is the case in particular where an undertaking holds a market share of 50% or above³⁶. Whilst dominance may also be found in cases where an undertaking has a market share below 50%³⁷, low market shares are a good proxy for the absence of substantial market power. The Commission’s experience suggests that dominance is not likely if the undertaking’s market share is below 40% in the relevant market³⁸.
26. Generally, both the value of sales or purchases and the volume of sales or purchases provide useful information for assessing market power. Typically, market shares based on sales value are the most appropriate indicator, but in other instances, sales volumes or other indicators may better reflect the competitive strength of undertakings.
27. A comparison between the market shares of the undertaking concerned and of its competitors is also important³⁹. For example, where an undertaking holds a market share that is much larger

³² For example, in the context of multi-sided platforms, with two different user groups, constraints on the market power of the platform operator vis-à-vis one side can also come from the user group on the other side of the platform; see Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 335 and section 8.2.2.5. Moreover, in the presence of aftermarkets, effective competition on the primary markets may constrain an undertaking’s market power in the secondary market; see Commission decision of 20 May 2009 rejecting the complaint in Case C-3/39.391 – *EFIM*; confirmed in Case T-296/09 *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission*, EU:T:2011:693, paragraphs 60, 90 and 91 and Case C-56/12, EU:C:2013:575, paragraphs 12 and 36 et seq.

³³ See also Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 18 b).

³⁴ What is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient.

³⁵ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 41.

³⁶ Judgment of 3 July 1991, *Akzo v Commission*, C-62/86, EU:C:1991:286, paragraph 60. For example, in judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 92, a market share of between 70% and 80% was considered as a clear indication of the existence of a dominant position in a relevant market.

³⁷ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, 27/76, EU:C:1978:22, paragraphs 108 and 109, where dominance was found with a market share of between 40% and 45%. In such a scenario, factors other than the market share of the undertaking concerned, such as the strength and number of competitors need to be considered; see also judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraphs 211 and 224 and judgment of 15 December 1994, *Gøttrup-Klim u.a. Grovwareforeninger / Dansk Landbrugs Grovvarereselska*, C-250/92, EU:C:1994:413, paragraph 48. Market shares below 10 % exclude the existence of a dominant market position save in exceptional circumstances; see judgment of 22 October 1986, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, Case 75/84, paragraphs 85 and 86.

³⁸ The Commission has so far not identified dominance below 39.7% market share. See judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraph 183.

³⁹ Judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraph 211. See, for example, also Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 312.

than that of its competitors, this may be a relevant factor for the assessment of whether the undertaking concerned holds a dominant position⁴⁰.

28. Market shares should be interpreted in light of the relevant market conditions and the extent to which products are differentiated, taking into account the competitive dynamics of the market⁴¹. In particular, it is often appropriate to take into account the trend of market shares over time⁴². In fast growing markets with short innovation cycles, or in markets characterised by frequent tenders, high market shares in themselves may be a less useful indicator of market power given that those shares may turn out to be ephemeral⁴³.

2.2.2. Barriers to expansion and entry

29. The second relevant factor for establishing dominance is the existence of barriers to market expansion and entry that prevent actual competitors from expanding their activities on the market or that prevent potential competitors from gaining access to the market⁴⁴. Easy expansion and entry in a market limits the ability of an undertaking in that market to behave independently, as applying prices or other conditions above the competitive level would attract expansion or new entry by rivals. Conversely, the existence of barriers to expansion and entry increases the ability of the undertaking concerned to behave independently and exert market power.
30. Barriers to expansion and entry may result from various factors. Legal and regulatory barriers have been found to include, for example, tariffs or quotas, planning regulations⁴⁵, licensing requirements and authorisation requirements⁴⁶, statutory monopolies⁴⁷ and intellectual property rights⁴⁸. Other barriers to expansion and entry that derive from certain advantages that

⁴⁰ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraphs 111 and 112.

⁴¹ For more information, see Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, paragraph 111. In the context of zero-price markets, other measures such as the numbers of users, transactions, or indicators of the intensity of usage may provide a better basis for analysing dominance; see, for example, Commission decision of 27 June 2017 in case AT.39740 - *Google Shopping*, paragraphs 275 et seq.

⁴² Judgment of 14 December 2005, *General Electric v Commission*, T-210/01, EU:T:2005:456, paragraph 151; see also Commission decision of 13 May 2019 in case AT.40134 - *AB InBev beer trade restrictions*, paragraphs 69 and 70.

⁴³ Judgment of 11 December 2013, *Cisco Systems and Messagenet v Commission*, T-79/12, EU:T:2013:635, paragraph 69.

⁴⁴ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraphs 122 and 124; judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 48.

⁴⁵ Regulations intended to control or regulate the construction, demolition, alteration or use of land or buildings.

⁴⁶ In pharmaceutical markets, potential market entrants typically have to obtain marketing authorisations and negotiate pricing and reimbursement conditions with national authorities; see Commission decision of 10 February 2021 in case AT.40394 - *Aspen*, paragraph 67. See also Commission decision of 04 March 2024 in case AT.40437 - *Apple - App Store (music streaming)*, paragraphs 341 and 342. This includes, for example, also regulations that only allow certain activities to be carried out after the completion of a professional qualification.

⁴⁷ See for example judgment of 23 April 1991, *Höfner v Macrotron*, C-41/90, EU:C:1991:161, paragraph 28; see also the Commission's decision of 2 October 2017 in case AT.39813 - *Baltic rail*, paragraph 162.

⁴⁸ The mere possession of IP rights cannot as such be considered to confer a dominant position, but their possession may in certain circumstances create a dominant position by enabling an undertaking to prevent effective competition on the market; see judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10, EU:C:2012:770, paragraphs 186 et seq. While ownership of a standard essential patent ("SEP") does not on its own equate to dominance, it may nevertheless be established that a SEP confers a dominant position vis-à-vis market participants on the basis of all relevant factors. See in this respect Commission decision of 29 April 2014 in case AT.39985 - *Motorola*, paragraphs 223 and 241 and Commission decision of 29 April 2014 in case AT.39939 - *Samsung*, paragraph 46.

have been identified in the past include: (i) an established distribution and sales network⁴⁹, (ii) economies of scale⁵⁰ and scope⁵¹, (iii) vertical integration and exclusive or preferential access to inputs or customers⁵², (iv) access to critical raw materials⁵³, (v) inertia of doctors in their prescribing habits⁵⁴, (vi) brand image and brand effects⁵⁵, (vii) data-driven advantages⁵⁶ and (viii) the existence of a first mover advantage⁵⁷. Other factors that may create barriers to expansion and entry are significant upfront investments and high sunk costs⁵⁸, as well as costs and other impediments when switching to a rival⁵⁹, including behavioural biases⁶⁰.

31. In particular in platform markets, network effects can also create barriers to entry and expansion. This is because a rival platform that wishes to enter the market may have to persuade a critical mass of users to switch platform. In the case of direct network effects, the willingness of users to switch to a new platform is dependent on the willingness of users on the same side of the platform to switch whereas in the case of indirect network effects, the willingness of one group of users to switch to a new platform depends on the willingness of the group of users on the other side of the platform to switch. A market entrant can thus face the difficulty of

⁴⁹ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, Case 85/76, EU:C:1979:36, paragraph 48, and Commission decision of 13 May 2019 in case AT.40134 – *AB InBev beer trade restrictions*, paragraph 74.

⁵⁰ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraph 122; Commission decision of 22 June 2011 in case COMP/39.525 – *Telekomunikacja Polska*, paragraphs 656.

⁵¹ Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 332.

⁵² Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraphs 70 et seq.; Commission decision of 15 October 2014 in case AT.39523 – *Slovak Telekom*, paragraph 291. When most companies in an industry are vertically integrated, potential market entrants may need to enter the markets at all levels to compete, which increases financial and managerial resources required to enter and compete. Vertical integration may also allow the undertaking concerned to make entry more difficult by giving itself certain advantages that can be duplicated only by other companies that are similarly integrated.

⁵³ Commission decision of 24 May 2018 in case AT.39816 – *Upstream gas supplies in Central and Eastern Europe*, paragraph 34.

⁵⁴ Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, paragraph 105; see also judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, paragraph 50.

⁵⁵ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case 27/76, EU:C:1978:22, paragraphs 91-94. See also Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 709 et seq., confirmed in the judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 489; Commission decision of 13 May 2019 in case AT.40134 – *AB InBev beer trade restrictions*, paragraph 74, and Commission decision of 20 December 2022 in case AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, paragraph 89.

⁵⁶ Judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 115; Commission decision of 27 June 2017 in case AT.39740 – *Google Search (Shopping)*, paragraphs 287 et seq. Data-driven advantages that may create entry barriers include, for example, access to unique data, economies of scale and scope relating to data or data-driven network effects.

⁵⁷ Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 278; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 637.

⁵⁸ Commission decision of 22 June 2011 in case COMP/39.525 – *Telekomunikacja Polska*, paragraphs 648 et seq.; Commission decision of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*, paragraph 242.

⁵⁹ Judgment of 11 December 2013, *Cisco Systems and Messagenet v Commission*, T-79/12, EU:T:2013:635, paragraph 73; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraph 115 and paragraphs 202 et seq. See also Commission decision of 4 May 2017 in Case AT.40153 – *E-book MFNs and related matters (Amazon)*, paragraph 65.

⁶⁰ Judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraphs 115, 184 et seq.

simultaneously attracting a sufficient number of users on both sides of the platform⁶¹. Entry barriers resulting from network effects may be even higher when users single-home⁶².

32. Persistently high market shares of the undertakings concerned over a prolonged period may in themselves indicate the existence of barriers to expansion and entry⁶³.

2.2.3. Countervailing buyer power

33. Competitive constraints may be exerted not only by actual or potential competitors of the undertaking concerned, but also by customers with countervailing buyer power. Countervailing buyer power can prevent even an undertaking with a high market share from acting to an appreciable extent independently of customers⁶⁴.
34. Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers or to vertically integrate, or at least the ability to credibly threaten to do so⁶⁵.
35. If countervailing buyer power is sufficiently strong, it may deter or defeat an attempt by the undertaking concerned to profitably increase prices. However, buyer power which only ensures that a particular or limited segment of customers is shielded from the market power of the undertaking concerned cannot be considered a sufficiently effective constraint to rule out dominance⁶⁶. Countervailing buyer power is less likely to be present when the undertaking concerned faces a large number of dispersed buyers⁶⁷, or when switching away from the undertaking is subject to significant difficulties⁶⁸.
36. Countervailing buyer power can be particularly relevant for the assessment of dominance in certain markets, such as life sciences and retail. In retail markets specifically, both online and bricks and mortar retailers can constitute important routes to market for suppliers⁶⁹. Whilst a

⁶¹ Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraphs 344 and 345; Commission decision of 20 March 2019 in case AT.40411 – *Google Search (AdSense)*, paragraphs 249, 250 and 251; Commission decision of 20 December 2022 in case AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, paragraph 90. See to that effect also judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 171.

⁶² ‘Single-homing’ refers to the use by consumers of one platform for a given product, as opposed to the use of multiple platforms in parallel for the same product (multi-homing). See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024, footnote 131.

⁶³ Commission decision of 27 June 2017 in case AT. 39740 – *Google Shopping*, paragraph 300.

⁶⁴ Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraphs 97-104, in which it was considered whether the alleged lack of independence of the undertaking vis-à-vis its customers should be seen as an exceptional circumstance preventing the finding of a dominant position in spite of the fact that the undertaking was responsible for a very large share of sales on the industrial sugar market in Ireland.

⁶⁵ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ OJ C 31, 5.2.2004, paragraphs 64 and 65

⁶⁶ Commission decision of 29 April 2014 in case AT.39985 – *Motorola*, paragraph 244; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (predation)*, paragraph 322.

⁶⁷ Commission decision of 04 March 2024 in case AT.40437 – *Apple – App Store (music streaming)*, paragraph 353; Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraph 48.

⁶⁸ Commission decision of 20 December 2012 in case AT.39654 – *Reuters Instrument Codes*, paragraph 36, Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 644 et seq. and Commission decision of 10 February 2021 in case AT.40394 – *Aspen*, paragraph 70.

⁶⁹ The Commission has identified retailer power in the case of bricks and mortar retailers in many cases. See, for example, M. 2070 *Philip Morris/Nabisco*, 16 October 2000, where the Commission approved a transaction giving rise to a 40-50% combined market share of chocolate tablets sold in the Netherlands in part on the basis that, since the success of

retailer must generally offer a range of products attractive to consumers, it will often be able to switch between competing products or even to products that are not necessarily substitutable from the perspective of the consumer but that complement its assortment⁷⁰. Conversely, suppliers of a wide range of products may compete for limited shelf-space and premium product positioning. The result is that countervailing buyer power in retail markets is liable to exist even in respect of products with successful brand positioning and/or substantial shares in a particular segment, and this should be reflected in the dominance assessment.

37. The specific market context and dynamics are relevant when considering countervailing buyer power as illustrated in the following examples.
38. In the consumer goods sector, suppliers of branded products compete with retailer-owned private label products and the success of a supplier's products depends largely on access to shelf space which is entirely in the hands of the retailers⁷¹. The increasing share of private labels on retailers' shelves is indicative of large retailers having significant bargaining power that can manifest in different ways: they can delist (or credibly threaten to delist), reallocate shelf space to other products, demote a manufacturer's brand to a less favourable position on the shelf, and/or reduce the number of stores stocking a given product in order to constrain the wholesale prices of branded products for example⁷².
39. In the pharmaceutical sector, a national health service may have no countervailing power in exceptional situations such as where, for example, a manufacturer increases the price of an off-patent medicine by 1,500% without objective justification where, for a specific small patient group, there are no on-market substitutes and, given the niche nature of the product, no realistic prospect of generic or biosimilar market entry. Conversely, the same authority may well be in a position to exert significant countervailing buyer power in relation to supplies of medicinal products for which there is viable or imminent market entry from generic or biosimilar products.

2.2.4. Aftermarkets

40. In certain circumstances, the acquisition or use of a durable product (primary product) leads to the consumption of another connected product (secondary product). This is often referred to as an 'aftermarket'. Examples of aftermarkets include printers (primary product) and cartridges (secondary product), watches (primary product) and spare parts (secondary products), and nail guns (primary product) and nail cartridges (secondary product).

a chocolate confectionery manufacturer's products depends largely on access to shelf-space, retailers could exercise strong buying power (paragraph 25).

⁷⁰ See, for example, M.2621 - SEB/Moulinex, 11 November 2003, where the Commission approved a transaction giving rise to market shares of more than 40% in small electrical appliances on the basis that these suppliers were dependent on retailers for whom these products accounted for a small percentage of overall revenue, and the retailers could penalise any attempted price rises for the overlap products by reducing purchases of other (higher revenue) products.

⁷¹ Case COMP/M.2072, *Phillip Morris/Nabisco*, Commission decision of October 16, 2000, para. 25.; Case COMP/M.2399, *Friesland Coberco/Nutricia*, Commission decision of August 8, 2001, para. 25.

⁷² Case COMP/M.4533, *SCA/P&G*, Commission decision of September 5, 2007, para. 118. See, more recently, the Commission's [Competition Merger Brief 2/2024](#) discussing M.10920 - *Amazon/iRobot* (which was subject to phase 2 review but subsequently abandoned). In that case, a key theory of harm assessed by the Commission was the ability of Amazon, as a key route to market for robotic vacuum cleaners, to prevent or limit access to iRobot's competitors through numerous total and partial foreclosure strategies that could be used in isolation or in combination in a way that might mutually reinforce each other (e.g., only delisting some models, some rivals, in some countries or during specific sales periods, including a potential reduction in visibility and/or increase in commission fees or advertising costs charged to rival products on Amazon Stores). These features must be properly weighed against general claims from retailers that any given brand is a 'must-have' product.

41. Aftermarkets may give rise to competition concerns when they are “proprietary”, that is, when brand-specific secondary products can only be used with one brand of primary product and not with other primary products, although the primary products themselves are substitutes⁷³.
42. As the Commission explains in the Market Definition Notice, it is relevant to take into account the competitive constraints imposed by market conditions in the respective connected markets when defining the relevant markets and in the competitive assessment. For the purposes of market definition, there are generally three possible ways to define relevant product markets in the case of primary and secondary products, namely:
 - a) as a system market comprising both the primary and the secondary product;
 - b) as multiple markets, namely a market for the primary product and separate markets for the secondary products associated with each brand of the primary product; or
 - c) as dual markets, namely the market for the primary product on the one hand and the market for the secondary product on the other hand.
43. Even in instances where it is appropriate to define a separate market for the secondary product (for example, because of the existence of independent competitors for the secondary product in multiple or dual markets), a dominant position on such a market can only be established after analysis of competition on both the aftermarket and the primary market⁷⁴. Where there is a close link between the primary and secondary products, the supplier’s behaviour in the secondary market may be constrained by competition in the primary market⁷⁵.
44. A supplier which is not dominant with respect to the primary product should not be considered dominant with respect to the secondary product where the following criteria are satisfied:
 - a) **Customers: (i) can make an informed choice, including lifecycle pricing, between the various manufacturers in the primary market, and (ii) are likely to make such a choice.** This is more likely, where the cost of the secondary product is high, relative to the overall lifetime of owning/operating the primary product⁷⁶, and where there is price transparency (so customers can identify the cost of the secondary product at the time at which they purchase the primary products)⁷⁷.
 - b) **In case of an apparent policy of exploitation being pursued in any specific aftermarket, a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market within a reasonable time⁷⁸.** This will usually be the case, provided there are no material switching barriers in the primary market and the supplier is not able to price-discriminate between existing and new

⁷³ Article 82 Discussion Paper, paragraph 244.

⁷⁴ Article 82 Discussion Paper, paragraph 251.

⁷⁵ Rejection of complaint of 20 May 2009 in Case COMP/C-3/39.391 EFIM, paragraph 13, confirmed by the Judgment of the General Court of 24 November 2011, *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission*, Case T-296/09, EU: T:2011:693, and by the Court of Justice Case on 19 September 2019, *EFIM v Commission*, Case C-56/12 P, ECLI:EU:C:2013:575.

⁷⁶ Case IV/34.330 *Pelikan/Kyocera*, paragraph 62. The Commission found that, where the cost of printer cartridges were as much as 70% of the total cost of ownership of the equipment, it was difficult to assume that a customer (whether a business or consumer) would not take these costs into account when purchasing the primary product.

⁷⁷ Case COMP/C-3/39.391 EFIM, paragraph 16, Case IV/34.330 *Pelikan/Kyocera*, paragraph 64. The fact that printer manufacturers typically purchase a “price per page” meant that customers could readily compare the total ownership costs, including the cost of the secondary market products (cartridges).

⁷⁸ Case COMP/C-3/39.391 EFIM, paragraph 16.

customers so as to take advantage of the installed base without fear of losing sales in the primary market⁷⁹.

45. Moreover, for the assessment of dominance in the aftermarket, in addition to the existence of a close link with the primary market, it will be necessary to consider whether competition on the secondary market may also operate as a competitive constraint on the supposedly dominant undertaking (for example, whether compatible accessories exercise price pressure that limits ability of manufacturers of original accessories to increase prices).
46. In cases where aftermarket dominance is ultimately established, it will be necessary to undertake a competitive assessment depending on the theories of harm alleged in line with the usual legal tests. However, some of the considerations relevant in the analysis of the interdependence of primary and secondary markets may need to be taken into account in the competitive assessment, even if the interdependence is not sufficient to conclude on the absence of aftermarket dominance. In addition, there may be acceptable efficiency justifications, objective justifications, and/or pro-competitive rationales for the conduct on the secondary market by the manufacturer of the primary good⁸⁰.

2.3. Collective dominance

47. A finding of collective dominance requires that two or more economic entities that are legally independent of each other present themselves or act together on a particular market as a collective entity from an economic point of view⁸¹. Once this has been established, the assessment of dominance is based on essentially the same factors that are relevant for single dominance⁸². Collective dominance does not necessarily require that competition between the undertakings concerned be eliminated, that the undertakings concerned adopt identical conduct on the market in all respects, or that the abuse involves all the undertakings concerned⁸³. It is sufficient that the action amounting to an abuse can be identified as one of the manifestations of such a joint dominant position⁸⁴.
48. To establish collective dominance, it is necessary to examine the economic links or factors giving rise to a connection between the undertakings concerned⁸⁵ that enable them to act

⁷⁹ Case IV/34.330, *Pelikan/Kyocera*, paragraphs 66-67.

⁸⁰ See Section 4 of “Competition Issues in Aftermarkets – Note from the European Union” 13 June 2017 submitted by the European Commission for the 127th OECD Competition Committee on 21-23 June 2017.

⁸¹ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 36.

⁸² A collective market share above 50 % is, in the absence of evidence to the contrary, indicative of the ability of the collective entity to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers; see judgments of 30 September 2003, *Atlantic Container Line and Others v Commission*, EU:T:2003:245, Joined cases T-191/98 and T-212/98 to T-214/98, paragraphs 932 et seq. and judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 206. However, competitive pressure exerted by competitors or the countervailing buyer power exerted by customers must not be of such a magnitude that it would render the coordination by the undertakings concerned unsuccessful. This requires an analysis of the market position and strength of rivals that do not form part of the collective entity, the market position and strength of buyers, and the potential for new entry in light of the magnitude of any barriers to entry.

⁸³ Judgments of 30 September 2003, *Atlantic Container Line and Others v Commission*, EU:T:2003:245, Joined cases T-191/98 and T-212/98 to T-214/98, paragraphs, 632, 633 and 653 et seq.

⁸⁴ Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 66. See also Commission decision of 26 November 2008 in case COMP/39388 – *German Electricity Wholesale Market* and Case COMP/39.389 – *German Electricity Balancing Market*, paragraph 27.

⁸⁵ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 41.

together independently of their competitors, their customers and consumers⁸⁶. Such a connection may result from the nature and terms of an agreement between the undertakings concerned or from the implementation of such agreement, or it may result from structural or other links (e.g. personal ties), provided that those links lead the undertakings to present themselves or act together as a collective entity⁸⁷. This could be the case if undertakings have concluded cooperation agreements that lead them to coordinate their activities on the market, or if cross-shareholdings, participation in joint ventures, interlocking directorships⁸⁸ or other links in law lead the undertakings concerned to coordinate.

49. However, the existence of an agreement or structural links between undertakings is not indispensable to establish collective dominance⁸⁹. Collective dominance may also be established based on other connecting factors, or on an economic assessment of the structure of the market in question⁹⁰ and the way in which the undertakings in question interact on the market. Where the characteristics of the market facilitate the adoption of a common policy by the undertakings concerned, collective dominance can also be established without there being an agreement or structural links⁹¹.
50. The case law sets out the elements that are relevant to establish collective dominance on the basis of (tacit) coordination between the undertakings in question, summarised below⁹².

2.3.1. Reaching terms of coordination

51. Tacit coordination is more likely to emerge if competitors can easily arrive at a common perception of how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination⁹³. The less complex and more stable the economic environment, the easier it is for undertakings to reach a common understanding on the terms of coordination, as they are able to coordinate their behaviour on the market by simply observing and reacting to each other's behaviour⁹⁴. Whether a market is conducive to coordination depends on the characteristics of the relevant market. Coordination is typically easier when a small number of undertakings are involved, and it becomes more difficult when many competitors are involved⁹⁵. Coordination may also be easier between undertakings that exhibit a high degree of symmetry in relation to, for instance, market shares⁹⁶,

⁸⁶ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 42.

⁸⁷ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraphs 44 and 45.

⁸⁸ Two or more undertakings have interlocking directorships when they have one or more members of their management boards in common.

⁸⁹ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 45 and judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraphs 273 et seq.

⁹⁰ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132, Joined Cases C-395/96 P and 396/96 P, paragraph 45.

⁹¹ Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraphs 273 and 276.

⁹² See also judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraphs 61 et seq. and judgment of 26 January 2005, *Laurent Piau v Commission*, Case T-193/02, EU:T:2005:22, paragraph 111.

⁹³ Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, C-413/06, EU:C:2008:392, paragraph 123.

⁹⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), OJ C31, 5.2.2004, paragraph 45.

⁹⁵ Horizontal Merger Guidelines, paragraph 45.

⁹⁶ Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 134.

cost structures, production capacities, product offering (e.g. in terms of price or quality), market positioning (e.g. degree of brand recognition) and level of vertical integration⁹⁷.

2.3.2. Ability to monitor adherence to terms of coordination

52. Each of the undertakings must have the means to know whether the other undertakings are adopting and maintaining the same strategy⁹⁸. Therefore, there must be sufficient market transparency for the undertakings involved in the coordination to be aware, sufficiently precisely and quickly, of the way in which the other participants' market conduct is changing. Coordination is easier to sustain when undertakings can observe each other's market behaviour with respect to the parameters of coordination or when undertakings can easily obtain this information⁹⁹. This ensures that any deviation from the focal point can be easily identified and reacted to by the other undertakings.

2.3.3. Existence of a credible deterrence mechanism

53. To make the common policy sustainable over time, there must be an incentive for each undertaking concerned not to depart from the common policy on the market¹⁰⁰. This may be the case where each undertaking is aware that competitive action on its part designed to increase its market share would provoke similar actions by the others, so that it would derive no benefit from its initiative¹⁰¹. Coordination would not be sustainable unless the consequences of deviation are sufficiently severe and timely to convince coordinating undertakings that it is in their best interest to comply with the common policy. In that case, it is the threat of future retaliation that makes the coordination sustainable. The mere existence of a credible deterrence mechanism suffices, and there is no need to adduce proof of either a threat or the effective use of a retaliatory mechanism¹⁰².

2.3.4. External stability – lack of constraints exercised by actual or potential competitors and lack of countervailing power by customers

54. For coordination to be successful, the actions of actual or potential competitors or customers should not be able to jeopardise the intended outcome of the coordination¹⁰³. In other words, competitive pressure exerted by competitors, or the countervailing buyer power exerted by customers, must not be of such a magnitude that it would render the coordination by the undertakings concerned unsuccessful. This requires an analysis of the market position and strength of rivals that do not form part of the collective entity, the market position and strength of buyers, and the potential for new entry, as indicated by the magnitude of any barriers to entry (see section 2.2).

⁹⁷ Horizontal Merger Guidelines, paragraph 48. Corporate links such as cross-shareholding or participation in joint ventures may also help in aligning incentives and encourage parallel behaviour; see Commission decision of 13 June 2000 in case COMP/M.1673 – *VEBA/VIAG*, paragraph 226 and Commission decision of 8 November 2011 in case COMP/M.2567 – *Nordbanken/Postgirot*, paragraph 54.

⁹⁸ See judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraph 62, first indent.

⁹⁹ Market transparency depends not only on the availability of data, but also on the characteristics of the data, i.e. age, fluctuation and degree of aggregation, as well as a possible delays in obtaining data.

¹⁰⁰ Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraph 62, second indent.

¹⁰¹ Judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 134.

¹⁰² Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, EU:T:2002:146, paragraph 195; judgment of 13 July 2006, *Independent Music Publishers and Labels Association (Impala) v Commission*, T-464/04, EU:T:2006:216, paragraph 466.

¹⁰³ See also the Horizontal Merger Guidelines, paragraph 56.

55. The analysis of these four elements set out in sections 2.3.1 to 2.3.4 should not be undertaken mechanically and in an isolated and abstract manner but should take the overall mechanism of a hypothetical tacit coordination into account¹⁰⁴.

56. Such cases will be rare in practice¹⁰⁵ and enforcement against abuse of collective dominance is likely to remain exceptional¹⁰⁶.

3. GENERAL PRINCIPLES TO DETERMINE IF CONDUCT BY A DOMINANT UNDERTAKING IS LIABLE TO BE ABUSIVE

3.1. Introduction

57. This section provides guidance on the general principles applicable to the assessment of whether conduct by dominant undertakings is liable to be abusive.

58. **Dominant undertakings have a special responsibility** not to engage in conduct that impairs effective competition¹⁰⁷ whether directly or through the actions of third parties¹⁰⁸. Conduct may take place and produce exclusionary effects on the dominated market(s) or on non-dominated markets. However, the substantive legal standard to prove the exclusionary effects of conduct is the same irrespective of whether the effects take place in the dominated market or in a market different from, but related to, the dominated market. When assessing effects in a dominated market, the fact that in such a market competition is already weakened due to the very presence of the dominant undertaking can be taken into account.

59. **Dominant undertakings are entitled to compete on the merits** which includes the right to protect their own commercial interests and defend themselves against their competitors by taking reasonable and proportionate steps as appropriate. There can be no presumption of abuse where conduct has a plausible pro-competitive rationale in the absence of a clear exclusionary strategy.

60. **Intent:** as the concept of abuse is an objective one, it is generally not necessary to show that an undertaking had the intent to impair effective competition in order to establish an abuse of a dominant position¹⁰⁹. A dominant undertaking's intention to compete on the merits, even if

¹⁰⁴ Judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*, C-413/06, EU:C:2008:392, paragraphs 125 et seq.

¹⁰⁵ See for example Commission decision of 26 November 2008 in case AT.39388 – *German Electricity Wholesale Market* and AT.39389 – *German Electricity Balancing Market*, paragraph 13.

¹⁰⁶ Although the concept of collective dominance has developed in parallel in the case law on Article 102 TFEU and the case law on mergers under Council Regulation (EC) No 139/2004, and a similar concept of collective dominance is applied under both instruments (see judgment of 26 January 2005, *Laurent Piau v Commission*, T-193/02, EU:T:2005:22, paragraphs 109, 110 and 111), the forward looking criteria that are relevant in the merger control context (ability to monitor adherence to terms of coordination, existence of a credible deterrence mechanism) are less relevant in an Article 102 enforcement context that is not focused on the risk of potential future hypothetical tacit collusion.

¹⁰⁷ The actual scope of that special responsibility must be considered in the light of the specific circumstances of each case. See judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 24.

¹⁰⁸ Actions by third parties (for instance, a dominant undertaking's distributors) may be attributed to a dominant undertaking if it is established that those actions were not adopted independently by those third parties, but form part of a policy that is decided unilaterally by the dominant undertaking with which the third parties were obliged to comply (judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 29 and 33).

¹⁰⁹ See judgment of 19 April 2012, *Tomra and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 21; Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 60-62, and the case law cited therein; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 45; judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 254-257; judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266,

established, is not sufficient to prove the absence of an abuse¹¹⁰. The fact that the conduct is also implemented by non-dominant undertakings in the market is not sufficient to exclude that it departs from competition on the merits¹¹¹.

61. **Anti-competitive foreclosure:** To assess whether conduct of a dominant undertaking is abusive, it is generally necessary to determine whether that conduct impairs effective competition by foreclosing competitors in an anti-competitive way, thus having an adverse impact on consumer welfare¹¹². In these guidelines, the term ‘anti-competitive foreclosure’ is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers, reduce quality or take any equivalent measure that harms consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence¹¹³.
62. **As efficient competitors:** the concept of anti-competitive foreclosure is inherently based on the foreclosure of as-efficient competitors. The Court of Justice has consistently recognised that competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient than the dominant undertaking and so less attractive to consumers from the point of view of, among other things, price, choice, quality, or innovation. In *Intel*, the Grand Chamber of the Court reiterated the general principle that Article 102 does not seek to ensure that competitors less efficient than the dominant undertaking should remain on the market and not every exclusionary effect is necessarily detrimental to competition¹¹⁴. In doing so, the Court expressly clarified the older more formalistic *Hoffman-LaRoche* case law in laying down an effects-based approach to the assessment of the capability to anti-competitively foreclose where the dominant undertaking produces evidence to support

paragraph 359. Proof of intent may however constitute a relevant factor to be taken into consideration in the assessment of the abuse, see paragraph 70(f) of these Guidelines.

¹¹⁰ See judgment of 19 April 2012, *Tomra and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 22.

¹¹¹ Judgment of 17 July 1998, *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, paragraph 139; judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 159; judgment of 9 September 2009, *Clearstream Banking and Clearstream International v Commission*, T-301/04, EU:T:2009:317, paragraph 133; judgment of 30 September 2003, *Atlantic Container Line and Others v Commission*, Cases T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 1124 and 1460.

¹¹² Such anti-competitive foreclosure can occur either at the intermediate level or at the level of final consumers, or at both levels. The concept of ‘consumers’ encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

¹¹³ It is clear from the case law that it is not necessary for conduct to cause direct harm to consumers, indirect harm by undermining the effective structure of competition suffices. Whether the goals of competition policy ought go beyond consumer welfare and anti-competitive foreclosure is a moot point for the purposes of providing guidance on exclusionary conduct. *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 44.

¹¹⁴ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 134; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 37; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 45 and 73;; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 21 and 22. An aside by the General Court in its judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 540-541 as to the relevance of the as efficient competitor test in a specific context that did not concern pricing does not undermine the relevance and appropriateness of the as efficient competitor standard more broadly. This was further confirmed in the Judgment of 24 October 2024, *Commission v. Intel Corporation*, C-240/22 P, ECLI:EU:C:2024:915, paragraph 175.

the view that the conduct is not capable of restricting competition and, in particular, of producing the alleged foreclosure effects¹¹⁵.

63. **The foreclosure of less efficient competitors is often the result of competition on the merits.** It can exceptionally lead to consumer harm in specific circumstances. However, it is not sufficient to show that conduct is capable of leading to the foreclosure of less efficient rivals to conclude that this conduct is abusive. Once it has been established that the conduct is not capable of foreclosing as efficient competitors, there is a rebuttable presumption that the conduct is not abusive. This presumption can be rebutted by showing that the legal and economic context of the conduct makes it likely that the foreclosure of less efficient rivals will lead to anti-competitive foreclosure. This could arise, for instance, in situations of extreme decreasing returns to scale (where production by a company operating at a smaller scale than the dominant undertaking will necessarily be at higher costs), or with strong static or dynamic network effects. In such situations, rivals might remain less efficient than the dominant undertaking for at least a significant period. Efficient rivals, although less efficient than the dominant undertaking, will therefore remain the only real source of competition in the market in the short to mid-term and their foreclosure could be anti-competitive. Such scenarios are rare in practice.
64. **The evidentiary burden to demonstrate that conduct is capable of producing exclusionary effects.** The Union Courts have established, as a general rule, that in order to conclude that conduct is liable to be abusive, it is necessary to demonstrate on the basis of specific, tangible points of analysis and evidence, that such conduct is capable of having exclusionary effects¹¹⁶.
65. **The degree of probability of anti-competitive effects:** the Union Courts have used several terms to qualify the threshold that is relevant for a finding of abuse and referred to “capable” or “potential”, “probable” and “likely” effects, or to conduct that has the “capability” or that “tends” to harm competition¹¹⁷. Despite this varied terminology, the applicable legal standard endorsed by the Union Courts and applied by the Commission must be understood as being one and the same¹¹⁸.

¹¹⁵ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138.

¹¹⁶ Judgments of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraphs 42, 51 and 52, and judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

¹¹⁷ Case T-612/17, *Google Shopping*, paragraph 438 (“unless it is demonstrated that there is an anti-competitive effect, or at the very least a potential anti-competitive effect”); Case C-165/19 P – *Slovak Telekom*, paragraph 109 (“capable of producing exclusionary effects”); judgment of 18 November 2020, *Lietuvos geležinkeliai v Commission*, Case T-814/17, EU:T:2020:545, paragraph 80 (“Case T-814/17 - *Lithuanian Railways*”) (“tends to restrict competition or, in other words, that the conduct is capable of having that effect”); judgment of 27 March 2012, *Post Danmark*, paragraph 44 (“actual or likely”); Case C-52/09 - *TeliaSonera*, paragraph 77 (“practice produces, at least potentially, an anti-competitive effect”); judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, Case T-336/07, EU:T:2012:172, paragraph 268 (“Case T-336/07 - *Telefónica*”) (“tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect”); Case C-23/14 - *Post Danmark II*, (paragraph 31: “capable”; paragraph 66: “may potentially exclude competitors”; paragraph 67: “conduct is likely to have an anti-competitive effect”; paragraph 68: “capable of restricting competition”; paragraph 74: “probable”).

¹¹⁸ To that effect, the Union Courts appear to refer to the different terms “interchangeably”, as noted by Advocate General Kokott in the Opinion of 23 February 2006, *British Airways v Commission*, Case C-95/04 P, EU:C:2006:133, paragraph 76, noting the issue as “a purely semantic distinction”. See to that effect Case T-814/17 - *Lithuanian Railways*, paragraph 80 (“tends to restrict competition or, in other words, that the conduct is capable of having that effect”); Case T-336/07 - *Telefónica*, paragraph 268 (“tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect”). The issue was also discussed prior to the adoption of the Guidance on enforcement priorities (judgment of 17 September 2007, *Microsoft v Commission*, Case T-201/04, EU:T:2007:289, paragraph 561, where the General Court found that Microsoft’s argument on the standard applied by the Commission

66. The case law of the Union Courts has further articulated what this standard requires in practice for establishing an abuse. First, the assessment of potential effects should not be understood as setting the bar to a simplistic or formalistic standard. In fact, while the Union Courts refer to “potential effects”, they have clarified that the finding of such effects is not a purely abstract exercise. Rather, the Commission must show that anti-competitive effects are more than merely “hypothetical”¹¹⁹.
67. Second, while requiring more than “hypothetical effects”, the case law clearly indicates that the Commission is generally not required to identify actual anti-competitive effects of a conduct to prove the existence of an abuse. The Union Courts have indeed stated that a practice must have an anti-competitive effect on the market, “*but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors*”¹²⁰.
68. In this respect, the Union Courts have also emphasized 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*”¹²¹. It is only if the practice does not produce any form of effects on the market, that it escapes Article 102 TFEU¹²².
69. **The analysis of the specific, tangible points of analysis and evidence** to establish capacity to foreclose is also relevant in assessing whether conduct which is liable to be abusive may satisfy the criteria to meet an efficiencies’ defence¹²³.
- “That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of **the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking**”¹²⁴.
70. That the Commission’s assessment of the conduct of a dominant undertaking must take into account all relevant facts and circumstances¹²⁵, including the arguments made by the dominant

was “purely one of terminology and is wholly irrelevant. The expressions ‘risk of elimination of competition’ and ‘likely to eliminate competition’ are used without distinction by the Community judicature to reflect the same idea”).

¹¹⁹ Case C-23/14 - *Post Danmark II*, paragraph 65; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, Case C-377/20, EU:C:2022:379, paragraph 98 (“Case C-377/20 - SEN”); Case C-680/20, *Unilever*, paragraph 42.

¹²⁰ Case C-52/09 - *TeliaSonera*, paragraph 64; see also Case C-23/14 - *Post Danmark II*, paragraph 66; Case T-336/07 - *Telefónica*, paragraph 268; Case C-377

¹²¹ Case C-52/09 - *TeliaSonera*, paragraph 65; Case T-336/07 - *Telefónica*, paragraph 272; Case C-280/08 P - *Deutsche Telekom*, paragraph 253; and Case C-377/20 - SEN, paragraph 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” (Case T-612/17 - *Google Shopping*, paragraph 442).

¹²² Case T-612/17 - *Google Shopping*, paragraph 438: “[I]n the absence of any effect on the competitive situation of competitors, an exclusionary practice cannot be classified as abusive vis-à-vis those competitors”. See also Case C-280/08 P - *Deutsche Telekom*, paragraph 254; and Case C-52/09 - *TeliaSonera*, paragraphs 65 to 66.

¹²³ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:120, paragraphs 49, and judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

¹²⁴ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 140.

¹²⁵ Judgment of 30 January 2020, *Generics (UK) and Others*, Case C307/18, EU:C:2020:52, paragraph 154 (“Case C-307/18 – Generics (UK)”); Case T-336/07 - *Telefónica*, paragraph 175; Case C-280/08 P - *Deutsche Telekom*,

undertaking disputing the conduct's capability to have anti-competitive effects¹²⁶, is consistent with the requirement that the assessment should not be carried out formalistically or *in abstracto*.

71. The relevant facts and circumstances and their relative importance to be taken into account may vary depending on the specific case and include, amongst other things, one or more of the following elements.
- a) *The position of the dominant undertaking.* In general, the greater the extent of the dominant position of an undertaking, the more likely it is that its conduct is capable of having exclusionary effects¹²⁷. The assessment of whether conduct is capable of having anti-competitive foreclosure effects capable of harming consumers will likely be different depending on whether the company has a 45% market share or an 85% market share without prejudice to a fuller assessment of the specific context in each case.
 - b) *The conditions on the relevant market.* This includes the conditions of entry and expansion, such as the existence of economies of scale or scope and network effects¹²⁸. Economies of scale mean that competitors are less likely to enter or stay in the market if the dominant undertaking occupies a significant part of the relevant market. Similarly, the conduct may allow the dominant undertaking to 'tip' a market characterised by network effects in its favour, or to further entrench its position on such a market¹²⁹.
 - c) *The position of the dominant undertaking's competitors.* This includes the importance of actual or potential competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds a small market share compared to other competitors. Despite smaller market shares, a competitor may, for example: (i) be a close competitor to the dominant undertaking; (ii) be a particularly innovative competitor; or (iii) have the reputation of systematically cutting prices. The Court has ruled that the finding of capability to produce exclusionary effects cannot be called into question by the actions that competitors may have taken – or could have taken – to limit the effects of the conduct of the dominant undertaking¹³⁰ in the context of a situation in which competitors' reactions could only limit the competitive harm. This does not preclude the Commission from considering whether there were realistic, effective, timely counterstrategies competitors would be likely to deploy.

paragraph 175; Case C-52/09 - *TeliaSonera*, paragraph 28; and judgment of 15 June 2022, *Qualcomm v Commission*, Case T-235/18, EU:T:2022:358, paragraphs 396 to 398;

¹²⁶ Case T-612/17 - *Google Shopping*, paragraphs 439 to 441. See also Case C-377/20 - SEN, paragraphs 54 to 56, notably stating 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"; Case C-680/20 - *Unilever*, paragraph 62; Case C-240/22 P - *Commission v. Intel*, paragraph 179.

¹²⁷ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 183; judgment of 19 April 2012, *Tomra and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 39; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 81

¹²⁸ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 226; judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 562, 1061 and 1062.

¹²⁹ Commission decision of 16 October 2019 in case AT.40608 - *Broadcom*, paragraphs 475 and 478.

¹³⁰ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 102.

- d) *The extent of the allegedly abusive conduct.* Although the Court has held that once an actual or potential exclusionary effect has been established, there is no need to prove that it is of a serious or appreciable nature, it is not appropriate to extrapolate from this a general principle that there is no *de minimis* threshold for the purposes of determining whether conduct is capable of lead to anti-competitive foreclosure. The assessment of coverage is not a formalistic one as the Court has reaffirmed in *Intel II*¹³¹. The coverage required for the assessment of the capability to foreclose will depend on the legal and economic context of the conduct and on the theory of harm. In general, the higher the share of total sales in the relevant market affected by the conduct, the longer the duration of the conduct, and the more regularly it has been applied, the greater is the capability of the conduct to produce exclusionary effects and vice versa¹³². Conduct by a dominant undertaking that affects a substantial part of the market cannot be justified by proving that the remaining part of the market is still sufficient to accommodate a limited number of competitors¹³³.
- e) In exceptional circumstances, the foreclosure of a small competitor operating exclusively in a small segment of the market can lead to anti-competitive foreclosure. This is the case for instance if this small rival is the only market player to exert competitive pressure in the only fringe of the market where competition is commercially possible. In all other circumstances, anti-competitive foreclosure can only emerge as a result of conduct that does not cover a large share of the total demand in the market if the conduct targets customers that are particularly strategic for the entry or expansion of rivals¹³⁴. These general observations are without prejudice to a fact-specific effects analysis based on a clear theory of harm.
- f) *The position of the customers or input suppliers.* The dominant undertaking may apply the conduct only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors¹³⁵. Those customers or suppliers: (i) may represent a particular means of distributing the product that would be suitable for a new entrant; (ii) may be situated in a geographic area well suited to new entry; or (iii) may be likely to influence the behaviour of other customers. In the case of customers, they may, for example, be the customers most able and likely to sponsor entry to the market – or expansion – by alternative upstream competitors of the dominant undertaking. In the case of input suppliers, they may be the input suppliers most able and likely to sponsor entry or expansion by downstream competitors of the dominant undertaking in a downstream market, or they may produce a variety of the product – or produce at a location – particularly suitable for a new entrant.

¹³¹ Judgment of 24 October 2024, *Commission v. Intel Corporation*, C-240/22 P, ECLI:EU:C:2024:915, paragraph 331.

¹³² Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 68; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139; judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 640; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 44 and 48; and Judgment of 24 October 2024, *Commission v. Intel*, C-240/22 P, ECLI:EU:C:2024:915, paragraph 130.

¹³³ Judgment of 19 April 2012, *Tomra and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 42; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 161.

¹³⁴ See to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 72-74. It is important to acknowledge that that particular ruling concerned the conduct of a universal postal service monopoly with a 95% market share facing a small sole rival on the market for bulk mail.

¹³⁵ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 904, 1038 and 1049 et seq.; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-406 and 1218.

- g) *Evidence of an exclusionary strategy.* Although the abuse of dominance is an objective concept, for which it is not necessary to establish exclusionary intent (see paragraph 60 above)¹³⁶, a body of sound and consistent evidence of exclusionary intent may still be relevant for the purposes of establishing an abuse¹³⁷. Such evidence may include: (i) internal documents setting out a concrete and explicit strategy to exclude actual or potential competitors, such as a plan presented to companies' governing bodies to engage in certain conduct in order to exclude a competitor, prevent entry or prevent the emergence of a market; or (ii) concrete threats of exclusionary action¹³⁸. Internal general speculation, for example that the dominant company "will crush the competition", is not sufficient¹³⁹.
- h) *Evidence relating to actual market developments.* Although it is not necessary to demonstrate that the conduct at stake has produced actual exclusionary effects if the conduct has been in place for a sufficiently long period of time, the market performance of the dominant undertaking and its competitors after the implementation of the conduct may provide evidence of the conduct's capability to have exclusionary effects¹⁴⁰. In particular: (i) the market share of the dominant undertaking may have risen; (ii) a faster or more significant decline in the dominant undertaking's market share may have been prevented; (iii) actual competitors may have been marginalised or may have exited; (iv) potential competitors may have tried to enter the market and failed; or (v) the ability or incentive of actual or potential competitors to exercise a competitive constraint on the dominant undertaking may have been otherwise reduced¹⁴¹. The actual or potential exclusionary effects need to be attributable to the conduct at issue¹⁴². However, the conduct does not need to be the sole cause of those exclusionary effects¹⁴³. It is

¹³⁶ See however paragraph 111 (b) of these Guidelines in relation to the specific legal requirement to prove intent as regards predatory pricing at price levels between AVC and ATC.

¹³⁷ Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 162 and the case-law cited therein; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 63; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 45; judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 359; judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 254.

¹³⁸ Judgment of 9 December 2010, *Tomra Systems and Others v Commission*, T-155/06, EU:T:2010:370, paragraph 35; judgment of 22 March 2012, *Slovak Telekom v Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 61; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, in particular, paragraphs 1118-1119 et seq.

¹³⁹ Commission Article 82 Discussion Paper, paragraph 113 (in the context of predatory pricing).

¹⁴⁰ See to that effect judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 258-259; judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 402; judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1078 et seq. See paragraphs 63 and 64 above.

¹⁴¹ See paragraph 6 of these Guidelines. In addition, see judgment of 15 March 2007, *British Airways v Commission*, Case T-219/99 P, EU:T:2003:343, paragraphs 297-298, judgment of 8 October 1996, *Compagnie maritime belge transports and Compagnie maritime belge, Dafra-Lines, Deutsche Afrika-Linien and Nedlloyd Lijnen v Commission*, Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, EU:T:1996:139, paragraph, 149; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 55-56.

¹⁴² Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 441.

¹⁴³ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 412.

sufficient to establish that the conduct contributes to increasing the likelihood of the exclusionary effects materialising on the market¹⁴⁴.

Conceptually, the analysis requires a comparison of the market situation before the conduct was implemented with the market situation after the implementation of the conduct¹⁴⁵ unless, in exceptional circumstances, the conduct of the undertaking has made it very difficult or impossible to ascertain the objective causes of observed market developments¹⁴⁶. In certain cases, it may be appropriate to use a hypothetical scenario where the conduct would be absent and where certain likely developments in the market are also taken into account¹⁴⁷. In other cases, it may be apparent that the dominant undertaking's conduct was based on assumptions that at the time were incorrect such that the conduct was not liable to have anti-competitive effects.

It follows that the absence of actual exclusionary effects due to, for example, changes that have occurred on the relevant market since the conduct began, or the fact that the undertaking in a dominant position was unable to fully implement the strategy underpinning the conduct¹⁴⁸, or the fact that third parties did not react as expected¹⁴⁹, may constitute indicia that the conduct at issue is not sufficiently appreciable to warrant investigation¹⁵⁰.

3.2. Presumptions and structured rules of reason

72. The Court of Justice has recognised that in establishing abuse, the Commission must at a minimum demonstrate potential or likely anti-competitive effects on competition from equally efficient actual or potential competitors going beyond the purely hypothetical or speculative. The Court recognises that in evidencing alleged abuse, the Commission may have recourse to “*different analytical templates on the type of conduct at issue in a given case*” but the analysis must be made in light of all the relevant circumstances, based on specific tangible points of analysis and evidence that demonstrate that the conduct, at the very least, is capable of producing exclusionary effects¹⁵¹.
73. While this precludes a form-based approach to the categorisation of any conduct as abuse, there is room for a limited number of (rebuttable) presumptions that certain conduct is by its very

¹⁴⁴ See to that effect judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 412. The existence of other facts or conducts that may also increase the likelihood of the exclusionary effects at hand does not prevent a finding of abuse in relation to a given conduct.

¹⁴⁵ See to that effect judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 377 and 452-454.

¹⁴⁶ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, Case C-377/20, EU:C:2022:379, paragraphs 98-99. See also, judgment of 14 September 2022, T-604/18, *Google and Alphabet v Commission (Google Android)*, EU:T:2022:541, paragraph 893, where the General Court considered that carrying out a counterfactual “*to evaluate the hypothetical consequences that might have been observed, in the absence of the [...] abuse*” may not be needed where effects have been proven by using different tools and evidence.

¹⁴⁷ This will be appropriate, for example, in cases where there are developments in the market that with sufficient likelihood would have occurred independent of the conduct.

¹⁴⁸ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 65; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 54-55.

¹⁴⁹ Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 602.

¹⁵⁰ Even if, as a matter of law, in order to exclude the conduct from the scope of Article 102 entirely, the undertaking concerned would have to show that the absence of actual effects was the consequence of the fact that that conduct was unable to produce such effects (judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 56), it is rational to focus resources on conduct whose likely foreclosure effects are appreciable.

¹⁵¹ Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 130.

nature capable of restricting competition and that does not normally correspond to any pro-competitive rationale (so-called ‘naked’ restrictions). The criteria to conclude that conduct amounts to a naked restriction are strict.

74. Other conduct that corresponds to the legitimate pursuit of pro-competitive rationales, but that may be capable of leading to anti-competitive foreclosure in specific circumstances as delineated by experience and economic analysis, gives rise to legal tests based on a structured rule of reason as discussed in section 4.

3.2.1. Naked restrictions

75. Conduct that generally holds no economic interest for a dominant undertaking, except that of restricting competition (so-called naked restrictions) is presumed to fall outside the scope of competition on the merits¹⁵² and are generally by their very nature capable of restricting competition¹⁵³. Examples of naked restrictions are:
- (i) payments by the dominant undertaking to customers that are conditional on the customers postponing or cancelling the launch of competitor products or products that are based on products offered by the dominant undertaking’s competitors¹⁵⁴;
 - (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of penalties such as the withdrawal of discounts benefiting the distributors¹⁵⁵; or
 - (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor¹⁵⁶.
76. While the nature of the conduct may give rise to a presumption of capability to foreclose, the assessment is not a formalistic one. The conduct should be assessed in its legal and economic context which may cast doubt as to the restrictive nature of the conduct and indicate that the conduct is not capable of leading to anti-competitive foreclosure, or that there are plausible pro-competitive rationales for it.
77. Because the effects have been presumed and not directly established, it follows that the standard for the rebuttal of the presumption based on the existence of legitimate pro-competitive business rationales is different from that of objective necessity or efficiencies¹⁵⁷. While the

¹⁵² Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 77; judgment of 26 January 2022, *Intel v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96, readopting the finding made in the judgment of 12 June 2014, *Intel v Commission*, T-286/09, EU:T:2014:547, paragraph 210; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 131.

¹⁵³ See, to that effect, judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 131, 148 and 185; Commission decision of 22 September 2009 in case AT.37990 – *Intel*, paragraph 10, and judgment of 26 January 2022, *Intel v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96, readopting the finding made in the judgment of 12 June 2014, *Intel v Commission*, T-286/09, EU:T:2014:547, paragraph 210.

¹⁵⁴ Judgment of 26 January 2022, *Intel v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 96. The General Court’s findings on the unlawfulness of the naked restrictions have become *res judicata*. – See judgment of 26 January 2022, *Intel v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 531 and Commission decision of 22 September 2009 in case AT.37990 – *Intel*, paragraph 6.

¹⁵⁵ See to that effect judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraphs 228-234.

¹⁵⁶ See to that effect judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraphs 83-84 and 89-91.

¹⁵⁷ While it is in principle open to the dominant undertaking to seek to show that the naked restriction is justified on the basis of an objective justification, it is unlikely that such behaviour can be justified in this way (see section 5 below).

existence of such pro-competitive rationales should not be merely hypothetical, it is sufficient to establish that they are plausible without it being necessary to show that they are indispensable or counterbalanced by efficiencies. It is then for the Commission to elaborate the theory of harm.

3.2.2. *Other conduct*

78. Conduct that does not constitute a naked restriction cannot be presumed to be capable of restricting competition without a specific assessment based on economic analysis and experience which focuses on identifying whether, in the specific legal and economic context, the conduct is likely to lead to anti-competitive foreclosure.
79. **Theory of harm:** Since *Post Denmark I*, the Courts have consistently required that a finding of abuse be anchored in an analysis of the actual or potential foreclosure effects of as efficient competitors, taking into account all relevant circumstances. This standard applies to all types of exclusionary abuse, irrespective of the form or nature of the contested conduct. This means that in applying Article 102 (and without prejudice to the broader powers the Commission has under the Digital Markets Act), it is for the Commission to articulate a clear theory of harm that provides a cogent and consistent narrative as to why any given conduct amounts to anti-competitive foreclosure that is sufficiently appreciable to be detrimental to consumer welfare.
80. The Union Courts have condemned the following fact patterns in individual cases as relevant in the context of specific theories of harm where consumer harm was established¹⁵⁸:
- a) whether the dominant undertaking prevents consumers from exercising their choice based on the merits of the products, including product quality¹⁵⁹;
 - b) whether the dominant undertaking provides misleading information to administrative or judicial authorities or other bodies¹⁶⁰, or misuses regulatory procedures, to prevent or make it more difficult for competitors to enter the market¹⁶¹;
 - c) 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 innovation¹⁶²;
 - d) whether the dominant undertaking's conduct consists of, or enables, biased or discriminatory treatment that favours itself over its competitors¹⁶³;

¹⁵⁸ This should not be understood as an exhaustive list of all the factors that may be relevant to establish that a given conduct departs from competition on the merits. In addition, one or more factors may be sufficient to conclude that a given conduct departs from competition on the merits but always in the light of the specific circumstances at hand.

¹⁵⁹ See judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, in particular, paragraphs 1046-1047, 1057-1058 and 1069-1070. See also judgment of 23 October 2023, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraphs 148, 152 and 157.

¹⁶⁰ Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 98.

¹⁶¹ Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, paragraph 134; judgment of 17 July 1998, *ITT Promedia v Commission*, T-111/96, EU:T:1998:183, paragraph 72.

¹⁶² Judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraphs 47 and 51.

¹⁶³ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 96-99; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 131 and 135.

- e) whether the dominant undertaking changes its prior behaviour in a way that is considered as abnormal or unreasonable in light of the market circumstances at stake, such as an unjustified termination of an existing business relationship¹⁶⁴; and
- f) whether a hypothetical competitor as efficient as the dominant undertaking would be unable to adopt the same conduct, notably because that conduct relies on the use of resources or means inherent to the holding of the dominant position, particularly to leverage or strengthen that position in the same or another market¹⁶⁵.

81. Theories of harm can vary depending on the market circumstances, but section 4 below summarizes the main competition concerns based on economic analysis and experience, drawing a distinction between horizontal and non-horizontal concerns.

4. PRINCIPLES TO DETERMINE WHETHER PARTICULAR CONDUCT IS LIABLE TO BE ABUSIVE

82. This section provides guidance on the assessment of all conduct that does not qualify as a naked restriction.

4.1 Main competition concerns

4.1.1. Horizontal anti-competitive foreclosure

- 83. Horizontal anticompetitive foreclosure refers to situation where the conduct of dominant undertaking forecloses rivals in the market where the conduct takes place. Horizontal anti-competitive foreclosure theories of harm can be broadly divided into two categories: those involving a profit sacrifice by the dominant undertaking (for instance, theories of predation), and those that do not require a significant direct profit sacrifice in order to foreclose (for instance, theories of exclusive dealing).
- 84. **Foreclosure involving a profit sacrifice** implies recoupment of the lost profits in some way. Predation is a dynamic theory of harm in which the dominant undertaking first sacrifices short-term profits to foreclose rivals, and then recoups its lost profits after the foreclosure. Instead of recouping the sacrificed profit on future sales, it is also possible for dominant undertakings to recoup these lost profits simultaneously on sales to certain customers. Foreclosure involving profit sacrifice can take the form of any pricing conduct, including low unit prices, and conditional pricing.
- 85. **Anti-competitive foreclosure can also occur in the absence of profit sacrifice.** This can happen for instance when conditional pricing allows the dominant company to extract rent from its rivals, exploit a first mover advantage, or generate a demand boosting effect. The mechanisms of anti-competitive foreclosure without profit sacrifice are more complex than in the case of anti-competitive foreclosure involving a profit sacrifice. In the absence of profit sacrifice, foreclosure is more likely to result from rebate schemes that cover a large share of the total demand regardless of whether they are set on an individual or standardised basis. Such forms of horizontal anti-competitive foreclosure normally also require a very strong form of commitment to the tariff (e.g., they would not hold in cases where customers can easily renegotiate the conditional pricing). Foreclosure without profit sacrifice is more likely to

¹⁶⁴ Judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, joined cases C-6/73 and C-7/73, EU:C:1974:18, paragraph 25; judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 179 and 616.

¹⁶⁵ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 78, 91 and 92.

correspond to conditional pricing that refers to competitors (in particular exclusivity conditions).

4.1.2. Non-horizontal anti-competitive foreclosure

86. Non-horizontal anti-competitive foreclosure theories of harm can take place in settings where firms have vertical relationships (vertical foreclosure) or conglomerate relationships (leveraging).
87. **Vertical foreclosure** refers to the situation where a dominant company that controls an input can partly or totally prevent downstream competitors from competing by restricting access to that input.
88. **Leveraging theories of harm** refer to the scenario where the dominant undertaking uses its market power in one market to foreclose its competitor in another related market. There are two main types of leveraging depending on the incentive of the dominant undertaking: defensive and offensive leveraging.
89. **Offensive leveraging** refers to a situation where the objective of the dominant undertaking is to extend its market power to another market. It is more likely to be anti-competitive in a situation where the dominant company faces constraints in extracting the rents from its dominance in the leveraging market where it is dominant.
90. **Defensive leveraging** refers to a situation where the objective of the dominant undertaking is to protect its market power in the leveraging market. The dominant undertaking usually identifies a threat to its dominance in an adjacent market and uses leveraging to foreclose its rivals in the adjacent market, thereby removing the threat in the leveraging market. In some cases the dominant undertaking may pursue both offensive and defensive objectives simultaneously.
91. Both vertical foreclosure and leveraging theories can take different forms, in particular refusals to supply, access restrictions, tying and bundling, as well as self-preferencing.

4.2. Assessment of particular types of conduct

92. This section discusses specific types of conduct. It presents the main competitive concerns associated with each and proposes an assessment, based either on the explicit legal tests established by the Union Courts when available, or otherwise based on general principles of EU law, economic analysis and experience.
93. Different forms of conduct can have the same pro-competitive or restrictive effects. For instance, all forms of conditional pricing, including exclusivity conditions, all-unit and incremental discounts¹⁶⁶, can lead to anti-competitive foreclosure, and all forms of conditional pricing can be motivated by pro-competitive rationales. There is also a continuum of potential anti-competitive effects between refusal to supply, margin squeeze, self-preferencing and access restrictions. It is therefore not the form-based classification of conduct that justifies a different structured rule of reason but rather the different balance of probabilities and likely effects of any given conduct based on economic analysis and experience. The enforcement of

¹⁶⁶ With incremental discounts, the unit price decreases for unit purchased after the condition is met. With all unit discounts, the unit price decreases for all units if the condition is met. For instance, with a condition at 10 purchased unit and a unit price of 1, purchasing a quantity of 20 with a 10% incremental discount leads to a total price of 19, while it leads to a total price of 18 with a 10% all-unit discount. All-unit discounts have often been referred as “retroactive” in Europe.

Article 102 should not lead to a fundamentally different treatment of practices that could have the same effects.

94. In the case of certain pricing practices, namely low unit prices (section 4.2.1) and margin squeeze (section 4.2.6), a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits¹⁶⁷. Such a test is also particularly relevant to assess the magnitude of a price reduction in its legal and economic context, and to establish the existence of a profit sacrifice. Therefore, the outcome of the test can also be more generally relevant for the assessment of the capability of such conduct to produce exclusionary effects¹⁶⁸. Conversely, a price-cost test may be less useful in assessing whether non-pricing practices depart from competition on the merits unless it is possible to reliably quantify the non-price elements of the conduct¹⁶⁹.

4.2.1. Low unit prices

95. High quality and low prices are normally the main purpose and outcome of competition on the merits. However, low unit prices may be used to anti-competitively foreclose rivals, in particular those that are at least as efficient. As it is important to preserve the incentives of dominant companies to behave as competitively as possible given the competitive constraints they face, public intervention should be targeted and avoid leading to umbrella pricing that is likely to leave at least some customers worse off for no good reason.

Main competition concerns

96. The main competition concern related to low unit prices is where they correspond to profit sacrifice strategies that can take place in the market on which the undertaking is dominant or in related markets¹⁷⁰.
97. Profit sacrifice strategies can also take place in a market segment, for example with the intention of increasing the attractiveness of the dominant undertaking's overall portfolio on the market or of having exclusionary effects by preventing actual or potential competitors from getting a solid foothold in the market¹⁷¹.
98. When abusive low unit prices occur in the market where the undertaking is dominant, they correspond to predation (which is a type of horizontal foreclosure with profit sacrifice). When abusive low unit prices occur in an adjacent market, they correspond to offensive or defensive leveraging.

¹⁶⁷ Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 55; Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 80-82; Judgment of 24 October 2024, *Intel Corporation*, C-240/22 P, ECLI:EU:C:2024:915, paragraph 181.

¹⁶⁸ In particular, the fact that the price-cost test is met can trigger a presumption that the conduct is capable of having exclusionary effects in the case of low unit pricing (see paragraph 98 et seq. below) and margin squeeze in the presence of a negative spread (see paragraph 182 et seq. below). In the areas of rebates and margin squeeze in the presence of a positive spread, a price-cost test showing that even a hypothetical as-efficient competitor would not be able to match the conduct of the dominant undertaking is a relevant factor for the analysis of the conduct's capability to produce exclusionary effects (see in particular paragraphs 129 and 145 (f) below).

¹⁶⁹ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 59.

¹⁷⁰ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 35-45; Commission decision of 14 December 1985 in Case IV/30.698 – *ECS/AKZO*, paragraph 85.

¹⁷¹ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 126; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-401.

99. Low unit prices that are selectively applied to specific customers can also infringe Article 102 TFEU¹⁷². In fact, pricing practices that target certain markets, market segments or specific customers can be an effective means to reduce the magnitude of the profit sacrifice required to achieve anti-competitive foreclosure¹⁷³.

Assessment

100. To assess whether pricing conduct corresponds to abusive low unit prices, an analysis based on a comparison of the average prices charged and the average costs incurred by the dominant undertaking in relation to the products concerned is necessary and carried out by means of a price-cost test¹⁷⁴. Relevant cost benchmarks include average variable cost (“AVC”), that is to say costs that vary depending on the quantities produced, and ATC, which is the sum of an undertaking’s fixed and variable costs¹⁷⁵.
101. While AVC and ATC have been used as relevant cost benchmarks to establish the specific legal test for the purposes of assessing the lawfulness of potential predatory-pricing conduct, the notions of average avoidable cost (“AAC”) and long-run average incremental cost (“LRAIC”) may better capture the relevant dominant undertaking’s costs, depending on the circumstances¹⁷⁶.
102. Depending on the outcome of the price-cost test, the following three different scenarios can be distinguished:
- a) If prices are below AVC or AAC, the pricing conduct can be considered to correspond to abusively low prices as such prices cannot correspond to a normal sustainable strategy and rivals will not be able to maintain a profitable presence in the market¹⁷⁷.
 - b) Prices below ATC or LRAIC but above AVC or AAC, could still foreclose rivals from remaining sustainably in the market. However, as a general rule, they are more likely to correspond to pro-competitive rationales. There is therefore no presumption that such pricing is capable of leading to anti-competitive foreclosure. Such pricing may be deemed abusive if the legal and economic context makes anti-competitive foreclosure likely, and in particular if it is part of a plan to eliminate or reduce competition in the

¹⁷² See, to that effect, judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraphs 117-120; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 402-406.

¹⁷³ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 43 and 115.

¹⁷⁴ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71-73; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 27-28. However, for a pricing practice that does not require a price-cost to be considered abusive see judgment of 16 March 2000, *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96 P, EU:C:2000:132, paragraph 120, upholding judgment of 8 October 1996, *Compagnie maritime belge transports and Others v Commission*, EU:T:1996:139, paragraphs 139-153.

¹⁷⁵ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 71-72; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 108. When deciding whether, in a particular case, a cost element is variable, as opposed to being fixed, a relevant aspect to consider is the reference period, that is the period over which costs are to be assessed. In that respect, the general rule is that the longer that reference period, the more likely it is that costs will be classified as variable.

¹⁷⁶ See, to that effect judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 31-39; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 780-796.

¹⁷⁷ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 71; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 41; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 109; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 27.

relevant market¹⁷⁸. The objective of that plan can be the elimination or marginalisation of one or more specific competitors¹⁷⁹, or the elimination or reduction of competition as such¹⁸⁰. To demonstrate the existence of such a plan, reference can be made to direct evidence¹⁸¹, indirect evidence¹⁸², or both, insofar as that evidence is sound and consistent¹⁸³. Moreover, anti-competitive foreclosure is more likely if unit prices are close, yet above, AVC than if they are close, yet below, ATC. Finally, anti-competitive foreclosure is more likely above AVC in sectors characterised by virtual goods and services where production costs are low but where fixed costs of infrastructure and R&D are large and should be financed by significant retail margins.

- c) Prices above ATC are presumed to not be capable to lead to anti-competitive foreclosure as such prices should nor foreclose rivals from sustainably remaining in the market.

103. Whenever the assessment of the Commission is based on a presumption, the presumption can be rebutted by the dominant undertaking submitting evidence that the conduct is not capable of producing exclusionary effects or corresponds to a plausible pro-competitive rationale¹⁸⁴.
104. In any event, while applying low unit prices may enable the dominant undertaking to recoup its profit sacrifice by taking advantage of its dominant position and thus the market power that it enjoys¹⁸⁵, it is not necessary to demonstrate that it is possible for the dominant undertaking to recoup its losses and the possibility of recoupment is presumed¹⁸⁶. This presumption can be

¹⁷⁸ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 72; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 41; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 109; judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 27.

¹⁷⁹ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 75, 82 and 109; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraph 1118.

¹⁸⁰ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 199 and 206-208.

¹⁸¹ Direct evidence of eliminatory intent includes, in particular, contemporaneous statements made within the dominant undertaking, such as in emails, letters, presentations, minutes and meeting notes, as well as external statements, such as threats to competitors. See judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 76-82; judgment of 8 October 1996, *Compagnie maritime belge transports and Others v Commission*, T-24/93, EU:T:1996:139, paragraph 147; judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 199-209; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1120-1137.

¹⁸² Indirect evidence can be described as a series of important and convergent factors, which provide evidence of the existence of an eliminatory intent, and which may relate, in particular, to the duration, the continuity and the scale of the below cost sales, as well as the targeted nature and the importance of the market (segment) in which the below-cost pricing takes place. See judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 210-215; judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246, paragraphs 151 and 190; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1138 to 1146.

¹⁸³ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 197 with reference to judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246, paragraph 151.

¹⁸⁴ See, by analogy, judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 138; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 5052 and 60.

¹⁸⁵ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 71.

¹⁸⁶ Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 44; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraphs 37, 110 and 113. That interpretation does not preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists. See judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 111.

rebutted by evidence that the dominant company is unlikely to be able to recoup any potential profit sacrifice.

The application of a price-cost test in low unit prices cases

105. The following considerations are relevant to establish whether the prices charged by a dominant undertaking can be considered as abusively low by means of a price-cost test.

a) Cost benchmarks

106. AAC is the average of the costs that could have been avoided if the company had not produced the discrete amount of (extra) output which is the subject of the abusive conduct. AAC and AVC will often be the same, as over the short to medium term only variable costs can be avoided. However, as compared with AVC, AAC may include not only variable costs but also fixed costs that can either be avoided, including costs that become sunk once incurred, or recovered, e.g. through the sale of assets that are no longer needed.
107. LRAIC is the average of all the variable and fixed costs incurred in producing a particular product during its lifecycle, which therefore include product specific fixed costs incurred before the period in which the allegedly abusive conduct took place, including costs that are sunk. LRAIC can be understood as including not only all variable costs and fixed costs directly attributable to the production of the total volume of output of the product in question, but also the increase in all common costs insofar as the increase is caused by the production of that product¹⁸⁷. As regards common costs, the mere fact that a certain cost is common to several operations does not necessarily imply that the LRAIC due to the activity in question is zero for any individual product¹⁸⁸. It is necessary to assess whether such a common cost would have been incurred, partially or totally¹⁸⁹, if the undertaking had decided not to provide the product in question¹⁹⁰.

b) Price and cost data to be considered and possibly adjusted

108. The price-cost test is generally carried out on the basis of the price and cost data of the dominant undertaking itself, rather than of the price and cost data of actual or potential competitors¹⁹¹. This is in line with the principle of legal certainty to enable dominant undertakings to assess

¹⁸⁷ Commission decision of 4 July 2007 in case COMP/38784 – *Wanadoo España vs. Telefónica*, paragraph 319.

¹⁸⁸ Commission decision of 4 July 2007 in case COMP/38784 – *Wanadoo España vs. Telefónica*, paragraph 320; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraph 780.

¹⁸⁹ See, to that effect, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraphs 33-35, notably the method of attributing common costs by way of percentages.

¹⁹⁰ Take the example of a superstore that markets two categories of products (e.g. books and electronic devices). If the store only marketed books, some common costs would be incurred (e.g. paying for the managing director) but others would be reduced in proportion to the volume of electronic devices (e.g. the store's surface area would be smaller, it would have fewer cash desks, etc.). In other words, if a proportion of the common cost is avoidable, this proportion is incremental.

¹⁹¹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 41 with reference to judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 74; judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 108.

the lawfulness of their conduct¹⁹². This is also consistent with the fact that the foreclosure of equally efficient competitors can be presumed to be anti-competitive¹⁹³.

109. In this regard, it is generally appropriate to consider the data in the dominant undertaking's accounts¹⁹⁴. Generally speaking, it is only where these data are not available or are not sufficiently reliable¹⁹⁵ that proxies and any other pertinent information should be used, for example data from customers of the dominant undertaking that show the prices quoted and discounts granted¹⁹⁶. Depending on the circumstances of the case, it can be necessary to adjust the dominant undertaking's data to calculate the effective prices paid (for example to calculate the effective prices net of discounts) or costs incurred under the applicable cost standard (for example by spreading costs over a certain period in line with the principle of depreciation of assets)¹⁹⁷. Furthermore, it may be appropriate to account for opportunity costs of the dominant undertaking. In the case of two-sided markets, it may also be necessary to include in the assessment revenues and costs incurred on both sides at the same time. In the case of aftermarkets, it may be necessary to include in the assessment revenues and costs for both the primary and the secondary markets.

c) Scope and reference period

110. Depending on the circumstances of the case, the price-cost test can be carried out for all the products and customers that are subject to the alleged predation or separately for each product or customer¹⁹⁸. However, when low prices are selective, the pattern of these low prices needs to clearly reflect a strategy to predate or leverage for the conduct to be abusive. When the pattern of selective prices does not reflect such a strategy or when it is plausible that this pattern corresponds to pro-competitive rationales, the presumptions presented in paragraph 102 do not apply.
111. As regards the reference period for which the price-cost test is carried out, relevant factors to consider include the timing of the competitive interaction and the price setting intervals for each product under investigation¹⁹⁹.

Examples:

- Company A specifically targets customers it knows, or suspects may switch to a competitor. The total prices offered to those customers fall below AAC but, if the price test were applied to all units sold by Company A on the relevant product market, the

¹⁹² While a dominant undertaking knows what its own costs and charges are, it does not, as a general rule, know what its competitors' costs and charges are, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 44 judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 202.

¹⁹³ The foreclosure of efficient rivals, yet less efficient than the dominant company, will be assessed according to the principles described in paragraph [62].

¹⁹⁴ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 154.

¹⁹⁵ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 154.

¹⁹⁶ Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraphs 99-100; judgment of 6 October 1994, T-83/91, *Tetra Pak v Commission*, EU:T:1994:246, paragraphs 201-202.

¹⁹⁷ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131-132 and 137.

¹⁹⁸ Commission decision of 14 December 1985 in Case IV/30.698 – *ECS/AKZO*, paragraph 82-87; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 399-401.

¹⁹⁹ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraphs 131 and 137; Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 630-632. Where appropriate, robustness checks can be used to verify the correctness of the price-cost test, see Commission decision of 18 July 2019 in case AT.39711 – *Qualcomm (Predation)*, paragraphs 1007-1033.

relevant pricing would fall above ATC. Company A's internal documents suggest the price cutting campaign is aimed at growing market share against specific smaller competitors. This scheme risks being viewed as abusive in nature. Whilst it would normally be appropriate to run the price cost test across the entire product market (which would yield a positive result), where there is evidence that price cuts are selectively aimed at strategically important customers, it may be appropriate to run the price cost test at a more granular level (see paragraph 110 above).

- Company X offers new medical imaging equipment to hospitals on a six-month free trial basis. These trials are based on the supplier's belief as to future business prospects. There is no reference in the company's internal documents that would suggest a strategy to exclude existing competitors or new entrants. Company X overall sales in the product market remain above AAC but fall below ATC. For the application of the price cost test, since there is no evidence that Company X is targeting specific customers as part of an exclusionary strategy, it would not be appropriate to apply the price cost test at the level of specific customers or transactions. When measured at the product market level, the price cost tests would show pricing above AAC and AVC but below ATC. This scheme is therefore only likely to be abusive if there is compelling evidence of a strategy aimed at eliminating competitors.
- Company Y sells at a price below AVC a limited number of units of a physical product that it has already produced and has in storage. The product has not met its expected demand, production has stopped, and the value of the product would depreciate further if it were kept in storage. As the product is already produced, the incremental price of selling it is below AVC. Such conduct can correspond to a pro-competitive behaviour, and would hence not be abusive, unless there is evidence that Company Y has voluntarily produced the good in excess of expected demand as part of a plan to foreclose rivals.

4.2.2. *Conditional pricing*

112. Conditional pricing refers to any system of prices rebates or other advantages²⁰⁰, whether monetary or not, granted by a dominant undertaking to its customers that differs from linear prices, where prices are expressed as a fixed per unit price.
113. An example of a conditional pricing is that the customer is given a rebate or advantage if its purchases over a defined reference period exceed a certain threshold. Another example are prices related to a condition of exclusive purchase, whether this condition is associated or not with an explicit discount.
114. Conditional pricing may be related to the purchase of one product ("single product rebates") or to the purchase of two or more different products ("multi-product rebates").
115. Conditional pricing schemes can differ depending on (amongst other factors):
 - The type of threshold necessary to trigger the rebate, for example based on volume ("volume rebates") or value ("value rebates"), a certain share requirement ("market share rebates")²⁰¹ or a certain increase compared to the previous contract period ("growth rebates");

²⁰⁰ See footnote 187.

²⁰¹ Rebates conditional on share requirements that amount to all or most of the customer's requirements, are an extreme form of market share rebates, often referred to as exclusivity rebates.

- Whether, upon reaching a given threshold, the rebate is granted on all purchases (“all unit discount or rebate”) or only on those made in excess of those required to achieve the threshold (“incremental rebates”);
- Whether the rebates are individualised (e.g. the conditions for granting the rebate - such as the threshold - vary across customers or customer groups) or standardised²⁰².

Main competition concerns

116. Conditional rebates are a common business practice. Nonlinear prices can have discontinuities, jumps, and features that create different marginal incentives in different circumstances. Undertakings may offer such rebates to grow demand and, as a result, they may stimulate demand and benefit consumers. Conditional pricing can also be used to align the incentives of all parties in situations where the lack of coordination can be welfare reducing (e.g. when there exist significant relation specific investments).
117. However, conditional rebates may infringe Article 102 TFEU if they result in horizontal foreclosure, with or without profit sacrifice. Conditional pricing can also be used for anti-competitive leveraging, in particular when it involves multi-product rebates.
118. This section focuses on guidance related to the capability of conditional pricing to lead to anti-competitive horizontal foreclosure. Guidance on the capability of multi-product rebates to lead to anti-competitive leveraging can be found in section 4.2.3 below.
119. All forms of conditional pricing, including exclusivity conditions, all-unit discounts and incremental discounts can both lead to anti-competitive foreclosure, and all forms of conditional pricing can be motivated by pro-competitive rationales. There is therefore a continuum of effects between various forms of conditional pricing. It is therefore not the classification of conduct that justifies a different structured rule of reason, but rather the different balance of probabilities and likely effects of any given conduct based on economic analysis and experience. It is important that the enforcement of Article 102 does not lead to a fundamentally different treatment for practices that could have the same effects.
120. When the use of presumptions is justified for certain types of conduct that are, under normal conditions, more likely to lead to anti-competitive foreclosure and/or less likely to be motivated by pro-competitive rationales, the assessment is never merely formalistic but based on an analysis of the legal and economic context. Whenever the legal and economic context raises doubts as to the capability of the presumed conduct to lead to anti-competitive foreclosure or to the absence of any plausible pro-competitive rationale, the conduct cannot be presumed to be abusive. Therefore, while this section makes the distinction between exclusive dealing and other types of conditional pricing, this distinction should not be understood as a formalistic one.

(a) Exclusive dealing

121. Exclusive dealing refers to various forms of obligation to purchase or sell all or most²⁰³ of a customer or a supplier’s requirements from/to the dominant undertaking, or incentive schemes

²⁰² Note that market share rebates are by definition individualised, as the share requirement applies to the volumes of each specific buyer.

²⁰³ All references to “exclusive”, “exclusivity” or “exclusively” in this section equally apply to situations where the purchase or supply obligation or the incentive schemes relate to *most* rather than *all* of a customer’s demand or supplier’s supply (see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C- 85/76, EU:C:1979:36, paragraph 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137). For example, a rebate conditional on customers purchasing 75% of their requirements from a dominant undertaking has been held to be an exclusivity rebate, see judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76,

that are conditional on a customer or a supplier purchasing or selling all or most of their requirements from/to the dominant undertaking.

122. Exclusive dealing can stem from arrangements creating a formal exclusivity requirement, or from arrangements which do not explicitly, but *de facto* amount to exclusivity requirements, or from a mix of the two. Exclusive dealing may be abusive even if it is agreed at the request of the contractual counterpart of the dominant undertaking²⁰⁴.
123. Exclusive dealing through formal contractual arrangements can take various forms: (i) an exclusive purchasing requirement that imposes an obligation on the customer, or involves a promise on its part²⁰⁵, to purchase exclusively from the dominant undertaking (“exclusive purchase obligation”); (ii) an exclusive supply requirement that imposes an obligation on the supplier, or involves a promise on its part, to sell exclusively to the dominant undertaking (“exclusive supply obligation”); or (iii) a system of incentives consisting of the grant of a rebate or other advantages²⁰⁶ conditional on the customer or supplier purchasing or supplying exclusively from or to the dominant undertaking, even in the absence of formal contractual obligations (“exclusivity rebates”)²⁰⁷.
124. Certain other obligations, such as stocking or volume requirements²⁰⁸, which appear to fall short of requiring exclusivity, may in practice lead to the same effect and can be therefore qualified as *de facto* exclusive dealing²⁰⁹.
125. Exclusive dealing by a dominant firm has a high potential to produce exclusionary effects and is presumed to be capable of having exclusionary effects²¹⁰. This presumption can be rebutted if parties submit evidence that the conduct is not capable of leading to anti-competitive foreclosure or can correspond to plausible pro-competitive rationales, for instance the protection of significant relationship-specific investments. Relevant evidence to rebut the capability to foreclose of exclusivity conditions include:
 - a) evidence showing that the conduct does not lead to *de facto* exclusivity;

EU:C:1979:36, paragraph 83. This formalistic approach has since been superceded by the effects-based approach where coverage is a relevant factor as discussed at paragraph [X] above.

²⁰⁴ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137.

²⁰⁵ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89.

²⁰⁶ Such advantages may consist of price advantages such as discounts, rebates, payments, or bonuses, and also non-price advantages such as technical support conditions, free-of-charge upgrades or installations, or early access to a technology. Commission decision of 29 March 2006, Case COMP/E-1/38.113 – *Prokent-Tomra*, paragraph 317; Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraph 364(b) (2) and (3), and footnote 269.

²⁰⁷ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 89; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

²⁰⁸ Stocking requirements refers to obligations to reserve a given space only for the products of the dominant undertaking, in a way that in practice excludes the possibility for competitors’ products to be shown to customers.

²⁰⁹ Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 98. In this case, the obligation to use freezers exclusively for the products of the dominant undertaking was considered to lead *de facto* to outlet exclusivity.

²¹⁰ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 89 and 90; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 137; judgment of 26 January 2022, *Intel v Commission*, T-286/09 RENV, EU:T:2022:19, paragraph 124; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 46.

- b) evidence showing that an as efficient competitor would find it profitable to address the consumers covered by the exclusivity conditions;
 - c) evidence showing that the coverage of the conduct is not sufficient for the conduct to be capable of leading to anti-competitive foreclosure, for instance because it does not cover most of the market, nor consumers that are strategic for rivals.
126. If the presumption of abuse is rebutted, the conduct will be subject to the same assessment than other forms of conditional pricing and requires an analysis of all the relevant legal and economic circumstances.

(b) Other forms of conditional pricing

127. To demonstrate that a conditional rebate scheme departs from competition on the merits, it may be appropriate to make use of a price-cost test²¹¹. The price-cost test is particularly useful to assist the assessment of the existence of a profit sacrifice. However, it is less useful in the case of horizontal foreclosure without profit sacrifice, or when the inducements offered by the dominant undertaking are not monetary and cannot easily be converted into a quantified monetary amount²¹².
128. The next section presents the price-cost test that can be relevant for the assessment of conditional pricing and the following one presents the structured rule of reason applicable for this type of conduct.

The possible application of a price-cost test to conditional rebates to assess profit sacrifice

129. The size of the rebate as a percentage of the total price, or the value of the nonprice advantages, and the threshold triggering the rebate are all relevant factors to assess profit sacrifice²¹³. All things equal, all-unit discounts have a higher capability to produce exclusionary effects, as the amount at stake when considering switching sourcing to a rival is larger than for an incremental discount of the same nominal amount²¹⁴. However, it is very difficult to assess whether a discount or a rebate is “large” or “small” out of context and without considering all these elements together, as well as the normal margins in the industry. The usefulness of the price-cost test is therefore to provide a metric that is informative on the magnitude of the inducement, and hence on the existence of a profit sacrifice.
130. The application of a price-cost test to conditional rebates must be based on effective prices and costs calculated over the part of demand which customers could switch to competitors of the dominant undertaking (the “relevant range”)²¹⁵.
131. The identification of the relevant range depends on the specific facts of each case. Determining the relevant range generally requires assessing, in the specific market context, the share or purchase requirements that a customer is realistically able and willing to switch to competitors of the dominant undertaking. This portion of the customers’ demand is also known as the

²¹¹ Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 57 and 61; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 58 and 62; judgment of 12 May 2022, *Servizio Elettrico Nazionale*, C-377/20, EU:C:2022:379, paragraph 81; judgment of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/183, EU:T:2022:541, paragraph 643.

²¹² Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 57.

²¹³ Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 97-100; judgment of 7 October 1999, *Irish Sugar v Commission*, EU:T:1999:246, T-228/97, paragraphs 207-214.

²¹⁴ Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, Case 322/81, EU:C:1983:313, paragraph 81; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 32.

²¹⁵ See section 4.2.1 for an explanation of the relevant cost benchmarks.

“contestable share”²¹⁶ as opposed to the “non-contestable share”, which refers to the portion of demand that customers in any event need to obtain from the dominant undertaking, given its potential position as unavoidable trading partner²¹⁷. A rebate granted by a dominant undertaking may enable it to use the non-contestable share of demand of each customer as leverage to decrease below cost the effective price paid by the customer for the contestable share of demand.

132. When the Commission uses a price-cost test over the contestable share of demand, it will estimate the effective price per contestable unit that a competitor to the dominant undertaking would have to offer in order to compensate the customer for the loss of the rebate if the latter were to switch the contestable share of its demand away from the dominant undertaking. The effective price per contestable unit that the competitor will have to offer is not the average price per unit applied by the dominant undertaking, but the normal (list) price per unit less the total value of the rebate the customer loses by switching the contestable volumes to the competitor, distributed over the contestable units in the relevant period of time.
133. This effective price is then compared to the relevant standards of costs²¹⁸:
- a) If the effective price is below AAC, the conditional pricing is normally assumed to correspond to profit sacrifice and hence to be capable to lead to anti-competitive foreclosure.
 - b) If the effective price is above AAC, but below ATC, the conduct can still correspond to profit sacrifice, but concluding that the conduct is capable to lead to anti-competitive foreclosure requires to assess the additional elements described in paragraph 71 above. Moreover, anti-competitive foreclosure is more likely if the effective price is close, yet above, AVC than if they are close, yet below, ATC. Finally, anti-competitive foreclosure is more likely above AVC in sectors characterised by virtual goods and services where production costs are low but where fixed costs of infrastructure and R&D are large and should be financed by significant retail margins.
 - c) If the effective price is above ATC, the conduct is presumed to not correspond to profit sacrifice.
134. Any presumption based on the cost of an efficient competitor can be rebutted by evidence that the emergence of an as-efficient competitor would be practically impossible, for instance, because of the dominant undertaking’s very large market share or the presence of significant barriers to entry or expansion in the market, or the existence of regulatory constraints²¹⁹. In these circumstances, efficient, yet not as efficient competitors might be the only effective competitive constraint to the dominant company in at least the short to mid-term²²⁰.

Additional elements and structured rule of reason for the assessment of conditional pricing

135. The assessment of conditional pricing will depend on the main competition concern. This assessment will normally require the performance of a price cost test aimed at establishing the

²¹⁶ The exercise of assessing the contestable share may be subject to significant limitations. For potential competitors, an assessment of the scale at which a new entrant would realistically be able to enter may be undertaken, where possible.

²¹⁷ Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 75; Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 40.

²¹⁸ See section 4.2.4 for an explanation of the relevant cost benchmarks.

²¹⁹ Judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraph 57.

²²⁰ Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 59 and 60.

likelihood of a profit sacrifice by the dominant undertaking unless the Commission has already evidence that the conduct is unlikely to correspond to profit sacrifice²²¹.

136. In case the likely existence of a profit sacrifice has been established, the Commission will then assess all the legal and economic circumstances of the case. Elements that are generally relevant include:
- a) The extent of the undertaking's dominant position on the relevant market, namely the degree of market power held by the dominant firm²²² and the fact that, for a given part of the demand, the dominant undertaking may be an unavoidable trading partner²²³;
 - b) The transparency of the conditions regarding governing the rebate²²⁴;
 - c) The individualised nature of the rebate: rebates that are individualised for each customer (or type of customer) are in general more capable of producing exclusionary effects because they allow the dominant undertaking to target the rebate thresholds to each customer's size/demand, thereby enhancing the loyalty effect and limiting the profit sacrifice required to obtain anti-competitive foreclosure²²⁵;
 - d) The share of the market that is affected by the conduct: in general terms, the larger the share of the market covered by the exclusivity obligations (in terms of share of customers covered and in terms of share of demand by each customer)²²⁶, the more likely the conduct is to produce exclusionary effects²²⁷. However, even conduct affecting a small share of the market can be capable of having exclusionary effects in certain circumstances, in particular where the customers or the market segment targeted by the conduct have strategic importance for entry or expansion²²⁸;
 - e) The possible existence of a strategy aimed at excluding actual or potential competitors of the dominant firm²²⁹. 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;
 - f) The length of the reference period: in general terms, the longer the reference period, the higher the pressure on the buyer to reach the purchase figure needed to obtain the

²²¹ See judgment of 24 October 2024, *Commission v Intel*, C-240/22 P ECLI:EU:C:2024:915, paragraph 181

²²² Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 30 and 39.

²²³ Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 75; Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 40.

²²⁴ For example, a lack of transparency can put pressure on customers and make it less attractive to switch to a competitor where the effects of complying or failing with the conditions that govern the rebate scheme are uncertain. Judgment of 9 November 1983, *Michelin v Commission*, C-322/81, EU:C:1983:313, paragraphs 83 and 84.

²²⁵ Judgment of 9 September 2010, *Tomra Systems and Others v Commission*, T-155/06, EU:T:2010:370, paragraphs 261, 262, and 269.

²²⁶ Similarly, for exclusive supply obligations, the relevant element would be the share of suppliers and the overall share of supply covered by the obligation.

²²⁷ Judgment of 19 April 2012, *Tomra and Others v Commission*, EU:C:2012:221, C-549/10 P, paragraphs 43-46; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraphs 366, 385-389; Commission decision of 20 March 2019, Case AT.40411 – *Google Search (AdSense)*, paragraphs 381-385.

²²⁸ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 696.

²²⁹ Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 139; judgment of 19 January 2023, *Unilever Italia Mkt Operations*, C-680/20, EU:C:2023:33, paragraphs 48 and 50. See also Commission decision of 16 October 2019, Case AT.40608 – *Broadcom*, paragraphs 293, 368 and 370.

discount or to avoid suffering the expected loss for the entire period, therefore making it more difficult for an entrant to compete for that customer²³⁰.

137. In case the likelihood of profit sacrifice has not been established (or has been rebutted), the finding of an abuse requires the delineation of a clear mechanism through which the conduct is nevertheless capable to lead to anti-competitive foreclosure, and cogent evidence supporting this theory of harm, based on economic analysis and experience. Horizontal foreclosure without profit sacrifice normally requires strong commitment on the pricing system by the dominant undertaking, and is therefore more likely to emerge in the context of pricing systems that are imposed on customers and that are non-negotiable (both ex-ante and ex-post). It also requires that competitors are unable to replicate such price system. Factors described in paragraph 136 are also relevant. Other factors might be relevant for the assessment on a case-by-case basis.

Examples

All unit (i.e., retroactive) rebate

138. Company A has a market share of 65% and a margin of 30%. There are two other players in the market with 20% and 15% market share respectively. Company A offers a 5% all-unit rebate if the customer purchases more than € 100,000. However, the rebate scheme in question is only open to a small number of preferred/loyal customers, accounting for 5% of total market demand.
139. If customer buys less than €100,000 from Company A, it gets no rebate. If it buys €100,000, it gets a €5,000 rebate. However, if he buys for instance €150,000, it gets a €7,500 rebate.
140. If a customer has a total demand below €100,000, he will never get the all-unit discount and an as efficient competitor can compete for any quantity from this customer. If the customer has a total demand of exactly €100,000, then any quantity bought from a rival will lead to the loss of the €5,000 rebate. To compensate this loss, and still make a positive profit with a 30% margin, a rival would need to be able to address at least €16,667, i.e. 16.67% of the total demand of this customer, which is slightly larger than the market share of the third competitor. It is plausible that a competitor with 15% market share can address at least 16.67% of the customers to whom he sells, but this should be confirmed by a specific assessment (the only way to have a 15% market share otherwise is to sell exactly 15% to 100% of the customers).
141. The situation is more complex for customers with a demand larger than €100,000. We will take the example of a customer with a total demand of €150,000. A rival can profitably address any quantity below €150,000 at the same profitable margin of 30% until reaching €50,000. Even if he sells just above €50,000, the margin it made on the first €50,000 (€15,000) is sufficient to absorb the lost rebate (€5,000). However, this rival will be better off selling just below €50,000 than just above. In fact, this rival would rather sell just less than €50,000 or above €66,667.
142. This all-unit discount therefore has at least the potential to change the behaviour of some customers and some rivals. However, this is not sufficient to conclude that it is capable to lead to anti-competitive foreclosure. Such a conclusion would require:
- a) That the 5% consumers covered by the all-unit discount are particularly strategic for the rivals, who can otherwise freely access 95% of the remaining market.

²³⁰ Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission (Michelin I)*, Case 322/81, EU:C:1983:313, paragraph 81; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 34.

- b) That €100,000 turnover represents a particularly relevant threshold, either because
 - (i) it represents a particularly large portion of the total demand of the covered consumers and the contestable share is not larger than 16.67% ; or
 - (ii) it represents a particularly relevant threshold for customers whose total demand exceeds €100,000 and a customer will find it difficult to sell large quantities once the turnover of customers fall below this threshold.

De facto exclusivity all-unit discount

- 143. Company I offers a 10% discount to Customer A, the largest consumer in the market, representing 25% of the market, provided this consumer sources at least 75% of its requirements from Company I. Company I has a margin of 30%.
- 144. As the rebate is conditional on the customer sourcing at least 75% of its total demand, the rebate may be presumed to correspond to *de facto* exclusivity, and is therefore likely to be abusive. However, Company I can show that Customer A has never sourced more than 5% of its needs from any rival, such that even this rival could multiply its sourcing by 5 before needing to compensate for the lost rebate. Taken in its context, the conditional pricing would therefore not correspond to *de facto* exclusivity. Moreover, Company I explains that the product is highly non-standard and requires significant relation specific investments from both Company I and Customer A. Company I therefore considers that this type of conditional pricing is reasonable to protect its ex-ante incentives in the face of potential ex-post renegotiation.
- 145. On the basis of these elements, the Commission may consider that concluding on whether the scheme is a quasi exclusivity rebate would require an assessment of the normal scale at which a rival should normally sell. It is possible that the existence of significant fixed costs means that the efficient scale for this market is above 25%. However, even if the presumption did hold, there exist a plausible pro-competitive rationale which leads to the rebuttal of the presumption that exclusivity would be abusive in this context.
- 146. The structure of the scheme is such that any rival could address 25% of the requirement of Customer A. However, when meeting this threshold, Customer A would lose a 10% discount on these 75% of its demand. A rival would hence have no incentive to cross the 25% threshold, unless it could supply an additional 25% ($0.75 \times 0.10 / 0.3$) to the requirements of Company I. In other words, a rival would not find it profitable to supply between 25% and 50% of Customer A's requirements (as compared to supplying less than 25%).
- 147. In this context, anti-competitive foreclosure with profit sacrifice is only plausible if it is particularly strategic for rivals to be able to supply more than 25% of Company A's total requirements but the contestable share is below 50%. As mentioned above, this could be the case due to the fixed costs necessary for both Customer A and Company I's rivals to design a product together. The burden would be on the Commission to establish this point.
- 148. In addition, the conduct is only likely to lead to anti-competitive foreclosure if Customer A is particularly strategic for rivals. This cannot be merely derived from Customer A's share of sourcing in the market but has to be based on a direct assessment of the strategic relevance of Customer A for rivals.
- 149. As the scheme covers only one customer, and contracts can easily be negotiated (both ex-ante and ex-post), anti-competitive foreclosure without profit sacrifice is unlikely.

4.2.3. Tying and bundling

150. Tying consists of offering a specific product (“tying product”) only together with another product (“tied product”)²³¹.
151. Tying can take place on a technical²³² or a contractual basis²³³. Technical tying occurs, for instance, when the tying product and the tied product are physically or technically integrated. Contractual tying occurs when the customer who purchases or uses the tying product is also required to acquire or use the tied product. The legal requirements that must be satisfied to prove that tying by a dominant undertaking is abusive are the same whether the tying is technical or contractual.
152. Bundling occurs when two products are offered jointly as a single package. In cases of pure bundling, the two products are only sold jointly, and they are not available for purchase on a standalone basis²³⁴. In cases of mixed bundling (or ‘multi-product rebates’), the two products are available for purchase on a standalone basis and are also sold jointly, typically at a discount compared to the sum of the standalone prices.

Main competition concern

153. Tying and bundling are common practices normally intended to provide customers with better products or offerings in more cost-effective ways²³⁵. However, such practices may also limit customer choice and harm competition by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market. This strategy relates to either offensive leveraging, defensive leveraging, or both (see Section 4.2)
154. Since pure bundling ties two products to each other such that neither of them can be purchased alone, the assessment of pure bundling by a dominant undertaking is subject to the same legal requirements as tying and will not be discussed separately in this subsection.
155. The practice of discounts and rebates that refer to different products (multi-product rebates and discounts) can correspond to either horizontal foreclosure, or leveraging, or both depending on the context. This document will normally refer to mixed bundling when the conduct mostly refers to leveraging, and guidance on mixed bundling will be provided in this section. Guidance on multi-product rebates and discount that relate to horizontal foreclosure (with or without profit sacrifice) is provided in Section 4.2.2.

Assessment

156. Tying is liable to be abusive where the following conditions are met²³⁶:
- a) the tying and tied products must be two separate products;

²³¹ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

²³² Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 859-862.

²³³ Judgment of 6 October 1994, *Tetra Pak International v Commission*, T-83/91, EU:T:1994:246, paragraph 242.

²³⁴ Conversely, in the context of tying, the tied product may also be offered stand-alone.

²³⁵ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

²³⁶ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 284; judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 842, 859, 862, 864, 867, 869 and 1144-1167.

- b) the undertaking concerned must be dominant in the market for the tying product²³⁷. For the avoidance of doubt, this principle also applies to aftermarkets, when tying is only liable to be abusive where the undertaking is dominant in the market for the primary product. This is supported by the Commission enforcement experience²³⁸, where the Commission has never identified abusive tying absent dominance in the primary product market;
 - c) the undertaking concerned must not give customers a choice to obtain the tying product without the tied product (a situation referred to as ‘coercion’); and
 - d) the tying conduct is capable of having exclusionary effects²³⁹.
157. When leveraging is implemented through mixed bundling instead of tying or pure bundling, it will normally be relevant to assess the capability of an as efficient competitor to compete in the bundled market based on an as efficient competitor test. The guidance set out in section 4.2.1 can be relevant²⁴⁰. This condition replaces the coercion test in paragraph c) above. The price cost test is intended to establish *de facto* coercion.
158. For the purpose of establishing the requirement set out in paragraph 156(a), it is usually relevant to assess whether there is separate customer demand for the tied product. This may be the case if a substantial number of customers would purchase or would have purchased the tied product independently, that is without buying it with the tying product from the same supplier. Whether this is the case may depend on several factors²⁴¹, including: (i) the nature and technical features of the products concerned, (ii) the facts observed on the market²⁴², (iii) the history of the development of the products concerned and (iv) the commercial practice of the dominant undertaking²⁴³. The fact that the tying and tied product belong to separate product markets²⁴⁴ (respectively, the “tying market” and the “tied market”) is usually an indication that those are

²³⁷ See section 2 above. In bundling cases, the undertaking needs to be dominant in one of the markets concerned. In the case of aftermarkets, the usual principles apply assuming the undertaking is dominant in the tying market, namely the primary product market.

²³⁸ In *Hilti*, the Commission, upheld by the EU Courts, found abusive tying based the premise that the undertaking was dominant in the tying primary product, where it held a 55% market share and a strong IP protection. In *Tetra Pak II*, four different markets were defined (i.e. aseptic machines, aseptic cartons, non-aseptic machines, and non-aseptic cartons) and the Commission found dominance in the markets of aseptic machines and aseptic cartons. Whilst there was not a finding of dominance in non-aseptic machines and cartons, the Commission found that the abuse may be extended to the non-aseptic markets given the prominent position of Tetra-Pak also in those non-aseptic markets and the direct association between those markets and the aseptic markets where Tetra-Pak was dominant. This implies that the Commission found abusive tying by leveraging from dominance in the aseptic markets (the tying product) to restrict competition also in the non-aseptic markets (the tied product).

²³⁹ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 842, 859, 862, 864, 867, 869, and 1144-1167. See also section 3 on the notion of capability to have exclusionary effects. In addition, see judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, ECLI:EU:C:1996:436, paragraph 27, for the specific case of closely associated markets.

²⁴⁰ In the case of multi-product rebates, where a price-cost test is done, it consists of comparing the incremental price that customers pay for each of the dominant undertaking’s products in the bundle and the cost incurred by the dominant undertaking for including that product in the bundle.

²⁴¹ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 925.

²⁴² For instance, evidence that customers purchase the tying and the tied products separately from different sources of supply; or that there are companies specialising in the manufacture and sale of the tied product on an autonomous basis, see judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 67; judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 36 and judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 927.

²⁴³ See judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 925 et seq.

²⁴⁴ See Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C1645, 22.2.2024.

two separate products²⁴⁵. Complementary products can constitute separate products, as customers may wish to obtain them together, but from different sources²⁴⁶. In addition, the technical integration of one product into another does not mean that the two products can no longer be considered separate²⁴⁷. Similarly, even when tying two products is consistent with commercial usage or when there is a natural link between the two products, they may nonetheless be separate products²⁴⁸.

159. The requirement set out in paragraph 156(b) concerns the dominance of the undertaking concerned in the relevant tying market, which is to be assessed based on the principles set out in section 2 above. There is no condition that the undertaking must also be dominant in the tied market. However, the increase of market power in the tied market can be evidence of actual anti-competitive foreclosure.
160. As regards the requirement set out in paragraph 156(c), the customers who are not given a choice to obtain the tying product without the tied product can either be the customers of the dominant undertaking²⁴⁹, or intermediate parties, who pass on such coercion to final customers²⁵⁰. Coercion can still exist where the party accepting the tied product is not charged a separate price for that product²⁵¹. As coercion only requires that customers are not given the choice to obtain the tying product without the tied product, it can still exist even if the party accepting the tied product is not forced to use it or is not prevented from using the equivalent product supplied by a competitor of the dominant undertaking²⁵². Coercion can also exist if the dominant company refuses *de facto* to offer the tying product without the tied product²⁵³.
161. As regards the requirement set out in paragraph 156(d), tying may result in exclusionary effects in the tied market²⁵⁴ or in both the tied market and the tying market.²⁵⁵ Tying may in particular be capable of resulting in exclusionary effects in the tied market if it is used to leverage dominance in the tying market into the tied market. This may be the case if the tying confers a significant competitive advantage on the dominant company in the tied market that is unrelated to the quality of the tied product, where that advantage is unlikely to be offset by competitors²⁵⁶. In some cases, the tying may have the aim of – or be objectively capable of – protecting the

²⁴⁵ Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 66.

²⁴⁶ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 921–922 and 932.

²⁴⁷ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 935.

²⁴⁸ Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 37 and judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 942.

²⁴⁹ Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraphs 16 and 100.

²⁵⁰ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 962.

²⁵¹ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 967, 968 and 969.

²⁵² Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 970. Accordingly, tying does not require proof that customers are obliged to purchase or use the tied product exclusively. Coercion can also be reinforced by the fact that it is not possible to uninstall the tied product: see judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 963.

²⁵³ Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 4.

²⁵⁴ Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 25.

²⁵⁵ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 283.

²⁵⁶ This is the case, for instance, when, due to the distribution through the tying product, the tied product achieves such a level of market penetration that competitors are unable to counterbalance it or match it with alternative means to reach customers or end users; see judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1036–1039; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 805 and 811; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraphs 559 and 1087.

dominant undertaking's position in the tying market, by producing exclusionary effects on the tied market (i.e. it corresponds to defensive leveraging).

162. In addition to the elements mentioned in section 3.1, the following elements may be relevant for the assessment of the exclusionary effects, depending on the specific circumstances of the case:
- a) Whether the dominant company also enjoys dominance or market power in the tied market²⁵⁷;
 - b) The significance of the link between the tying product and the tied product. This link may for example derive from the complementarity of the products²⁵⁸ or from the share of customers in the tied market that also purchase the tying product²⁵⁹;
 - c) The presence of barriers to entry or expansion in the tied market (such as the need to achieve significant economies of scale or scope²⁶⁰ or the presence of static or dynamic network effects, for instance in digital markets)²⁶¹; and
 - d) The degree of consumer inertia or bias in the tied market²⁶².
163. The depth of the analysis required to show that the tying is capable of having exclusionary effects may depend on the specific circumstances of the case. A closer examination of actual market conditions may be warranted when (i) the tied product is available for free and (ii) it is easy to obtain alternatives to the tied product²⁶³. When the tying practice at stake has been in place for a long period, the Commission may have a more complete evidentiary basis to assess whether such tying has been capable of having exclusionary effects²⁶⁴. Where it is carried out, this closer examination of actual market developments aims to identify any evidence confirming the capability of the tying to have exclusionary effects, such as the actual marginalisation or exit of competitors in the tied market or an actual increase in the barriers to entry and expansion on that market.

4.2.4. Refusal to supply

164. A refusal to supply refers to situations where a dominant undertaking has developed an input²⁶⁵ exclusively or mainly for its own use and, when requested access by a party (typically, an actual

²⁵⁷ Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraphs 68 and 69. When the dominant undertaking is also dominant on the market for the tied product, tying can help to maintain and strengthen the dominant position in the latter market; see Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraph 858.

²⁵⁸ Conversely, if a tying practice concerns two entirely unrelated products, the link/connection between the tying and the tied product is weak and exclusionary effects are less likely.

²⁵⁹ Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraph 73.

²⁶⁰ Commission decision of 20 December 2012 in case AT.39230 – *Rio Tinto Alcan*, paragraphs 70-72; Commission decision of 18 July 2018 in case AT.40099 – *Google Android*, paragraphs 859 and 860.

²⁶¹ Commission decision of 21 April 2004 in case COMP/C-3/37.792 – *Microsoft*, paragraphs 878 et seq. and 980; Commission decision of 16 December 2009 in case COMP/39.530 – *Microsoft (Tying)*, paragraphs 5556.

²⁶² Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1041 and 1042; judgment of 14 September 2022, *Google Android*, T-604/18, EU:T:2022:541, paragraphs 583 and 593; Commission decision of 16 December 2009, Case COMP/39.530 – *Microsoft (Tying)*, paragraphs 47-54.

²⁶³ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 292-295.

²⁶⁴ Judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 295 and 296.

²⁶⁵ In this context, the term 'input' refers to different types of assets used in the production or distribution of goods or services, e.g. goods, service, infrastructure, network, or intellectual property right. In some cases, access to the input

or potential competitor), refuses to give access²⁶⁶. This scenario is limited to a pure vertical relationship between an input provider and its real or potential downstream competitors in a market where it is dominant and is otherwise without prejudice to a dominant undertaking's commercial freedom to choose its customers.

165. Refusal to supply is a self-standing type of abuse, which is different from the access restrictions that are described in section 4.2.5, which can also concern providers of complementary products that are not input to each other.

Main competition concern

166. An undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs. Not being able to do so may also affect the incentives for competitors to develop competing inputs and the incentives for the dominant undertaking to invest in inputs²⁶⁷. However, a refusal to supply can also lead to anti-competitive vertical input foreclosure.
167. A finding that a dominant undertaking has abused its dominant position through a refusal to supply an input to an actual or potential competitor places that undertaking under a duty to give access to the requested input to that competitor. This obligation directly impinges on freedom of contract and the right to property of the dominant undertaking. Consequently, the Union Courts has set up relatively strict conditions for finding that a refusal to supply is liable to be abusive and, therefore, that an obligation to give access can be imposed.

Assessment

168. To find that a refusal to supply is abusive, it is sufficient that a potential market or even a hypothetical market for the input can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable²⁶⁸.
169. A refusal to supply is liable to be abusive where the following conditions are met²⁶⁹:
- a) the input is indispensable for the undertaking requesting access to compete with the dominant undertaking in a downstream market; and

in question may require some steps by the dominant undertaking, as the input may not exist “as such” in an accessible way in the market. Such steps may include, for instance, drawing up interoperability information which was not drawn up in an accessible way before (judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 249 and 807); or changes to the computer systems, detailed preparation and numerous series of tests (judgment of 9 September 2009, *Clearstream Banking and Clearstream International v Commission*, T-301/04, EU:T:2009:317, paragraph 106).

²⁶⁶ Judgement of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 45, and judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79.

²⁶⁷ Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 46 and 47.

²⁶⁸ Judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraphs 43 and 44.

²⁶⁹ Judgment of 26 November 1998, *Brunner*, C-7/97, EU:C:1998:569, paragraph 41; judgment of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 147; judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraph 44, and judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79.

- b) the refusal is capable of having exclusionary effects, which in this specific context means the capability to eliminate all competition on the part of the requesting undertaking, and is incapable of being objectively justified²⁷⁰.
170. The condition under paragraph 169(a) is meant to determine whether the dominant undertaking has a genuinely tight grip on the market concerned by virtue of that input and whether, therefore, it may be appropriate to force the dominant undertaking to grant access to that input²⁷¹. This will depend on the nature of the input at stake, but also on the extent of dominance of this undertaking.
171. In this regard, an input is considered indispensable if there is no actual or potential substitute to it²⁷². More specifically, this means that:
- i. the input cannot be duplicated realistically and in a viable way due to physical, technical, legal or economic reasons²⁷³;
 - ii. an equivalent input cannot be obtained from other sources; and
 - iii. access to the input is necessary for the requesting firm to remain viably on the market and exert an effective competitive constraint.
172. Should there be an actual or potential substitute to the input in question, even if access were less advantageous for the requesting undertaking, the input cannot normally be considered as indispensable²⁷⁴.
173. As regards the condition under paragraph 169(b), such requirement needs to be interpreted as capability to eliminate all *effective* competition on the part of the requesting undertaking²⁷⁵. In this regard, the fact that the dominant undertaking's competitors retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of effective competition²⁷⁶.
174. The exercise of an exclusive intellectual property right by a right-holder can also be found as liable to be abusive. This can be the case for instance in relation to the refusal to license

²⁷⁰ For the assessment of objective justifications, see section 5.

²⁷¹ Judgment of 25 March 2021, *Deutsche Telekom v Commission*, C-152/19 P, EU:C:2021:238, paragraphs 48 and 49; judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 48 and 49.

²⁷² Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraphs 41 and 44 to 46; judgment of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 147 and judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, paragraph 49.

²⁷³ In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called 'single source' information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate.

²⁷⁴ Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 43 and judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraph 28.

²⁷⁵ Judgment of 26 November 1998, *Bronner*, C-7/97, EU:C:1998:569, paragraph 41; judgment of 12 January 2023, *Lietuvos geležinkeliai v Commission*, C-42/21 P, EU:C:2023:12, paragraph 79 and judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 229 and 332. See Commission decision of 17 January 2024, in AT.40735 – *Online rail ticket distribution in Spain*, paragraphs 115, 116, 118 and 119.

²⁷⁶ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 563.

intellectual property rights²⁷⁷, including when the licence is necessary to provide interface information²⁷⁸, or the bringing of an action for infringement of an intellectual property right²⁷⁹.

175. In these cases, the refusal to supply an input protected by an intellectual property right may be regarded as liable to be abusive if it fulfils the requirements of the specific legal test for refusal to supply (see paragraph 169) and in addition, if it limits technical development on the market²⁸⁰.
176. A refusal can limit the technical development on the market if, for instance, it prevents the requesting undertaking from producing new features that are not offered by the dominant undertaking and for which there is a potential consumer demand (limitation of production or markets)²⁸¹. In other words, in these circumstances, the undertaking which requested the licence must not be merely duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right who has an established presence but must be attempting to produce features or services that are differentiated and for which there is a potential customer demand²⁸².

4.2.5. Access restrictions

177. “Access restrictions” refer to the imposition by a dominant undertaking of restrictions on access to an input that are different from a refusal to supply²⁸³. It can refer to situations where an input is normally traded in a market or to horizontal complementarity between products that are neither vertically related nor an aftermarket to each other.

Main competition concern

178. Access restrictions can correspond to legitimate business strategies and are commonly implemented by non-dominant undertakings. However, access restrictions can also be used to implement leveraging strategies and hence lead to anti-competitive foreclosure.

²⁷⁷ Judgment of 5 October 1988, *AB Volvo v Erik Veng*, C-238/87, EU:C:1988:477, para. 9; judgment of 6 April 1995, *RTE v Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, para. 50; and judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, para. 35.

²⁷⁸ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 331 and 332.

²⁷⁹ Judgment of 16 July 2015, *Huawei Technologies v ZTE and ZTE Deutschland*, C-170/13, EU:C:2015:477, paragraphs 47 and 73.

²⁸⁰ Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 647 to 656, where the Court found that Microsoft’s refusal to provide interoperability information prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers’ purchasing decisions in respect of work group server operating systems were channelled towards Microsoft’s products. Absent this refusal, Microsoft competitors would be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, would be distinguished from those systems with respect to parameters which consumers consider important (for example, security and reliability). The Court also clarified that the marginal presence of the dominant undertaking’s competitors in certain niches is not sufficient to conclude that there is effective competition (paragraph 563 of the judgment).

²⁸¹ Judgment of 6 April 1995, C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, EU:C:1995:98, paragraph 54, where the Court found that the dominant undertaking’s refusal to provide basic information by relying on national copyright provisions prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the dominant undertaking did not offer and for which there was a potential consumer demand.

²⁸² Judgment of 29 April 2004, *IMS v NDC Health*, C-418/01, EU:C:2004:257, paragraph 49. See also CJEU C-241/91 P and C-242/91 P *Magill*, paragraphs 30 and 54; General Court T-504/93 *Tiercé Ladbroke SA*, paragraph 131.

²⁸³ See the notion of “refusal to supply” for the purpose of these Guidelines, set out in section 4.2.4, which refers to situations where a dominant undertaking has developed an input exclusively or mainly for its own use.

Assessment

179. Access restrictions do not have to meet the specific legal test for a refusal to supply set out in section 4.2.4 above in order to be found to be abusive²⁸⁴, but should rather be assessed according to the general framework of assessment set out in section 3. This means that in the specific case at hand, it will need to be established that the conduct is capable leading to anti-competitive foreclosure.
180. Access restrictions can be liable to be abusive even if the input at stake is not indispensable, as the need to protect the undertaking's freedom of contract and incentives to invest does not apply to the same extent as in a refusal to supply setting²⁸⁵. However, where access to such input is indispensable in order to allow competitors of the dominant undertaking to operate profitably in a downstream market, this increases the likelihood that unfair practices on that market will have at least potentially anti-competitive effects to constitute abuse within the meaning of Article 102 TFEU²⁸⁶.
181. Examples of relevant criteria to assess whether access restrictions are capable to lead to anti-competitive foreclosure are:
- a) Whether the good in question is usually traded in the market, both by the dominant undertaking and its competitors (or by analogy in markets that have equivalent features).
 - b) Whether the access restrictions put in place do not correspond to the normal practice in the market in place (or by analogy in markets that have equivalent features).
 - c) Whether the access restrictions put in place by the dominant undertaking do not correspond to its strategy in other markets or for other products, or whether these restrictions seem to target particular competitors or products.
182. The following are examples of access restrictions that, based on the concrete circumstances of each case, may be considered as contrary to Article 102 TFEU²⁸⁷:
- a) Where the commercial practices of the dominant undertaking may lead to the disruption of supply of existing customers thereby risking the elimination of all competition on the part of these customers²⁸⁸. In particular, dominant undertakings cannot cease supplying existing customers who are competing with them in a downstream market if the customers abide by regular commercial practices and the orders placed by them are in no way out of the ordinary²⁸⁹.
 - b) Where the dominant undertaking fails to comply with a regulatory obligation to give access²⁹⁰.

²⁸⁴ Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 50 and 51.

²⁸⁵ Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraphs 44-51.

²⁸⁶ Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 50.

²⁸⁷ This list should not be considered as an exhaustive enumeration of all possible instances of access restrictions that are liable to be abusive.

²⁸⁸ Judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v Commission*, joined cases C-6/73 and C-7/73, EU:C:1974:18, paragraph 25.

²⁸⁹ Judgment of 16 September 2008, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEE Farmakeftikon Proïonton*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 77.

²⁹⁰ Judgment of 13 December 2018, *Slovak Telekom v Commission*, T-851/14, EU:T:2018:929, paragraph 121 and judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraphs 54 to 59.

- c) Where the dominant undertaking degrades or delays the existing supply of an input by imposing unfair access conditions (also called “constructive refusal to supply”). This could be the case, for instance, where the dominant undertaking fails to set reasonable and transparent terms and conditions for access, including pricing rules²⁹¹.

4.2.6. *Margin squeeze*

183. Margin squeeze refers to a situation where an undertaking that is active in an upstream input market and an associated downstream market²⁹² sets its upstream or downstream prices at a level that prevents downstream competitors relying on that input from operating profitably on a lasting basis²⁹³.

Main competition concern

184. The main competition concern related to margin squeeze is vertical input foreclosure.

Assessment

185. A margin squeeze is considered as liable to be abusive where the following conditions are met:
- a) the undertaking concerned is vertically integrated and is dominant on the upstream market;
 - b) the spread between the upstream and downstream prices prevents equally efficient competitors that rely on the dominant undertaking’s input from operating profitably on a lasting basis on the downstream market; and
 - c) the conduct is capable of producing exclusionary effects.
186. The condition under paragraph 185(a) requires that a vertically integrated undertaking, regardless of the actual form of the integration²⁹⁴, sells a product to undertakings on an upstream market where it is dominant and competes with those same undertakings on a downstream market for which the product is an input. There is no need for the undertaking to also be dominant on the downstream market for an abusive margin squeeze to exist²⁹⁵.
187. The condition under paragraph 185(b) requires it to be established, by means of a price cost test, that the spread between the price that the dominant undertaking charges to competitors upstream and the price that it charges to its customers downstream is either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs that that undertaking has to incur to supply its downstream products²⁹⁶. The first step of the analysis consists of determining the extent of the spread²⁹⁷. If the spread is negative, the price-

²⁹¹ Judgment of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239, paragraph 50.

²⁹² This also includes a situation in which the input is at the same level as or downstream from the market for which it is needed. This may, for instance, arise where one undertaking controls a downstream distribution level that is needed in order to access customers.

²⁹³ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 234; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 70.

²⁹⁴ The actual form of integration of the vertically integrated undertaking (e.g. sole vertically integrated company, different divisions, separate companies controlled by the same group, etc.) is not relevant.

²⁹⁵ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 89; judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 146.

²⁹⁶ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 169; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 32; and judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 73.

²⁹⁷ The spread corresponds to the downstream price minus the upstream price.

cost test is not met and it is not necessary to consider the downstream costs in detail. If, on the other hand, the spread is positive, a second step in the analysis is required in order to determine whether the spread is sufficient to cover the dominant undertaking's product-specific costs at the downstream level. If the spread is not sufficient (i.e. it leads to a negative margin), the price-cost test is not met²⁹⁸.

188. For a margin squeeze to be abusive, it is not necessary to establish that the upstream prices for the input are in themselves excessive or that the downstream prices are abusive low prices themselves²⁹⁹.
189. Furthermore, it is also not necessary to demonstrate that the dominant undertaking is capable of recouping any losses it may suffer to squeeze the margins of its competitors³⁰⁰.
190. The condition under paragraph 185(c) requires that the margin squeeze is capable of having exclusionary effects³⁰¹, for instance by making the entry of competitors onto the market concerned more difficult, or impossible³⁰². In this regard, it is not necessary to establish that the upstream input is indispensable for rivals to compete downstream³⁰³. On the other hand, the more important the upstream input is to effectively compete downstream, the more likely it is that the conduct is capable of having exclusionary effects³⁰⁴.
191. In addition, in circumstances where the price-cost test indicates a negative spread, the margin squeeze has a high potential to produce exclusionary effects.
192. In circumstances where the spread is positive but not sufficient to cover the dominant undertaking's product-specific costs at the downstream level, this element can be relevant for the assessment of the capability of the conduct to produce exclusionary effects³⁰⁵.

The application of a margin computation in margin squeeze cases

193. A margin squeeze is generally demonstrated by showing by means of a margin computation that the downstream arm of the dominant undertaking could not operate profitably on the basis of the upstream price charged to its downstream competitors and the downstream price charged by the downstream arm of the dominant undertaking³⁰⁶.
194. Several factors and metrics may influence the results of the margin computation, in particular: (a) the price and cost benchmarks, and (b) the level of product aggregation. The choice of the

²⁹⁸ The margin corresponds to the downstream price minus the upstream price minus the downstream costs. The computation of the margin takes into account the cost of capital.

²⁹⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 34; and judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 187.

³⁰⁰ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 100.

³⁰¹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 61.

³⁰² Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 253; judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 63.

³⁰³ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 55 and 56 and 72; judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paragraphs 75 and 96; judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 52.

³⁰⁴ See, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 70 and 71.

³⁰⁵ See, to that effect, judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 74. See also paragraph 56 of these Guidelines.

³⁰⁶ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 200-204; and judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 31-34.

relevant factors and metrics is made on a case-by-case basis depending notably on the market, the competitive conditions and the other circumstances of the case.

a) Price and cost benchmarks

195. The price-cost test is usually based on the difference between, on the one hand, the effective downstream price charged by the dominant undertaking and, on the other hand, the sum of the wholesale price charged by the dominant undertaking to its downstream competitors and the LRAIC³⁰⁷ of the dominant undertaking's downstream arm.
196. As a general rule, and for the same reasons as those mentioned in paragraph 108 above, the margin computation is based on the prices and costs of the dominant undertaking, since such a test can establish whether the dominant undertaking would itself be able to offer its downstream products profitably if it had to pay its own upstream prices³⁰⁸. In particular circumstances, where it is not possible to refer to the prices and costs of the dominant undertaking (e.g. if such data is not precisely identifiable), then the prices and costs of competitors can be taken into account³⁰⁹.
197. The application of the margin computation test in margin squeeze cases does not imply that the competitors of the dominant undertaking would be able to replicate its upstream assets. The margin computation is applied from the perspective of a hypothetical as efficient downstream competitor, namely a competitor that uses the upstream product of the dominant undertaking, is in competition with the dominant undertaking on the downstream market, and whose costs on that market are the same as those of the dominant undertaking³¹⁰.

b) The level of product aggregation

198. The price-cost test should generally be applied at a level of aggregation which corresponds to the relevant product market.
199. The logic of this is that an as-efficient competitor must be able to profitably replicate the dominant undertaking's product pattern³¹¹. Anti-competitive foreclosure is unlikely to occur due to a negative retail margin in a narrow segment of a relevant market when an aggregate margin squeeze test is showing healthy margins overall. The question of the relevant level of aggregation is therefore closely related to this of the coverage of the negative margin. Margin squeeze is only likely to lead to anti-competitive foreclosure if it covers most of the relevant market or segments that are particularly strategic for the rivals of the dominant company.
200. Therefore, it is not normally useful to run a price cost test against individual offers, or individual products falling within a relevant product market³¹². Such granular computation of margins is only useful in very specific circumstances, for instance where a dominant undertaking launches a new offer at a negative margin that is likely to lead to a substantial number of sales in the future.

³⁰⁷ See paragraph 116 above for more explanations about LRAIC.

³⁰⁸ Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraphs 198, 200 and 201; and judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 41-42.

³⁰⁹ See judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 44-45.

³¹⁰ Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 209.

³¹¹ See, for example, Commission decision of 15 October 2014 in case AT.39523 - *Slovak Telekom*, paragraph 832;

³¹² Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, 01..., EU:T:2012:172, paragraphs 200-211.

Example

201. Broadband operator A currently markets one retail offer (Offer 1) to 1,000,000 subscribers at a unit margin of 0.5 EUR/end-user/month. This offer gets 100,000 new subscribers.
202. A subsequently launches a new retail offer (Offer 2) with a unit margin of -2 EUR / end-user / month. This new offer has the potential to rapidly attract a significant number of subscribers. In the future, this attracts 400,000 subscribers.
203. At the time Offer 2 is launched, the overall margin earned by the dominant firm in the retail market is positive. However, as the more aggressive Offer 2 attracts subscribers, this will change. Once Offer 2 has attracted 400,000 subscribers, the overall unit margin will be $0.5 * 1,100,000 - 2 * 400,000 / 1,500,000 = -0.17$ EUR. In these circumstances, it might be appropriate for the AEC test to have been run against Offer 2 in isolation, given the clear potential for it to tip the dominant undertaking to negative margins in the future.

4.2.7. Self-preferencing

204. Self-preferencing consists of a dominant undertaking actively³¹³ giving preferential treatment to its own products compared to those of competitors, mainly by means of non-pricing behaviour.

Competition concern

205. Self-preferencing is widespread in many sectors of the economy and is implemented in by companies that are not dominant for legitimate pro-competitive reasons. However, when implemented by dominant companies, self-preferencing can be used to anti-competitive leverage market power, either offensively, defensively, or both.
206. Preferential treatment can concern, for example, the positioning or display of the leveraged product in the leveraging market³¹⁴, manipulating consumer behaviour and choice³¹⁵, manipulating auctions, manipulating ranking results, providing an artificial commercial advantage in the leveraged market due to the installed base in the leveraging market, providing improved interoperability to its tied products than between rival's products in the tied market and the dominant's product in the tying market. Preferential treatment can also consist of a combination or succession of different practices over time³¹⁶.

Assessment

207. Because self-preferencing is only capable to lead to anti-competitive foreclosure in specific circumstances, establishing that self-preferencing is liable to be abusive, requires the clear delineation of the mechanisms through which granting preferential treatment to the dominant undertaking's own products can lead to anti-competitive foreclosure, hence departing from

³¹³ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 240.

³¹⁴ See, to that effect, Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, section 7.2.1 and judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 283. See also Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and AT.40703 - *Amazon Buy Box*, paragraph 203.

³¹⁵ See by analogy judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraphs 96-99.

³¹⁶ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 187 and 329.

competition on the merits, as well as cogent evidence that this conduct is capable of producing exclusionary effects³¹⁷.

208. As regards the first condition, in addition to the factors mentioned in section 3.1. above, the following elements, which are neither cumulative nor exhaustive, may indicate that the conduct departs from competition on the merits:

- (i) the preferential treatment takes place on a leveraging market that constitutes an important source of business for competitors in the leveraged market, which competitors cannot effectively replace through other means³¹⁸;
- (ii) the preferential treatment is likely to influence the behaviour of users, irrespective of the intrinsic qualities of the leveraged product³¹⁹;
- (iii) the preferential treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities in the leveraging market, for instance by being contrary to its interests or those of its customers in that market³²⁰.

209. As regards the analysis of the conduct's capability to produce exclusionary effects, the general considerations of section 4.2.3 apply. Self-preferencing can produce exclusionary effects on the leveraged market or on both the leveraged and the leveraging market. If the self-preferencing takes the form of a combination or succession of practices, the analysis of effects should take into account the overall effects of those practices³²¹.

5. OBJECTIVE NECESSITY AND EFFICIENCIES

210. Conduct that is liable to be abusive may escape the prohibition of Article 102 TFEU where the dominant undertaking can demonstrate that such conduct is justified, either because:

- a) the conduct is objectively necessary (so-called "objective necessity defence"), or

³¹⁷ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 161-166, 175 and 195-196.

³¹⁸ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 170, 171 and 174. The importance of the product provided by the dominant undertaking in the leveraging market for competitors should not be understood as indispensability as required under refusal to supply abuses, given that self-preferencing constitutes a different type of abuse; accordingly, the criteria established in the judgment of 26 November 1998, *Bronner*, Case 7/97, EU:C:1998:569 need not be met, see judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 230 and 240. However, a finding of indispensability may provide a strong indication that the conduct amounts to an abuse, see by analogy judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 70-71. The fact that the leveraging market is an important source of business for competitors that cannot be effectively replaced may also be informative of the capability of self-preferencing to produce exclusionary effects, see judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, Case T-612/17, EU:T:2021:763, paragraph 454; Commission decision of 27 June 2017 in case AT. 39740 - *Google Shopping*, paragraphs 591-592, and Commission decision of 20 December 2022 in case AT.40462 - *Amazon Marketplace* and case AT.40703 - *Amazon Buy Box*, paragraphs 173-176.

³¹⁹ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 172. The possible influence of self-preferencing on user behaviour is relevant in particular in those instances where the conduct relies on the behavioural bias of users.

³²⁰ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 176-185.

³²¹ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 374.

- b) the exclusionary effect produced may be counterbalanced or outweighed, by advantages in terms of efficiencies that also benefit consumers (so-called “efficiency defence”)³²².

- 211. For the avoidance of doubt, these are distinct defences. Whereas objective necessity focuses primarily (but not necessarily exclusively) on whether the conduct is necessary to achieve a legitimate commercial objective of the dominant company, efficiencies focus on the impact of the conduct to the broader public, and in particular customers and consumers.
- 212. In addition, both concepts are different from the existence of a plausible pro-competitive rationale as discussed in the context of the rebuttal of presumptions in Section 3 and 4. Objective necessity and efficiencies refer to a situation where a conduct that is liable to be abusive can escape the Article 102 prohibition. Plausible pro-competitive rationales refer to a situation where a conduct cannot be presumed to be liable to be abusive because it can correspond to a legitimate business conduct, taken in its legal and economic context. Because harm has not been established at the stage where the existence of plausible pro-competitive is considered, the legal standard is different and, in particular does not involve either proportionality or indispensability.

5.1. Objective necessity defence

- 213. As explained in paragraph 59 above, dominant companies can protect their own commercial interests and defend themselves against their competitors, by taking reasonable and proportionate steps as appropriate, provided however that its purpose is not to abuse its dominant position.
- 214. An objective necessity defence must be based on evidence that: (1) the behaviour of the dominant undertaking is objectively necessary to achieve a certain aim; and (2) the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim³²³. The proportionality condition is not met where the same aim could be achieved through means that are less restrictive of competition³²⁴.
- 215. The types of objective justification that may be arguable, are likely to be fact specific, depending on the nature of the alleged abuse. Examples of legitimate commercial considerations might include:
 - a) Offering different prices to similarly situated customers, reflecting the outcome of commercial negotiations³²⁵;

³²² Judgment of 27 March 2012, *Post Denmark*, C-209/10, EU:C:2012:172, paragraphs 40 and 41 and case-law cited therein; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 165; judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 84; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraphs 201 and 202. The examples provided in this section are not exhaustive of the possible justifications that can be raised in the context of Article 102 TFEU cases.

³²³ Judgment of 12 May 2022, *Servizio Elettrico Nazionale and Others*, C-377/20, EU:C:2022:379, paragraph 103. See to that effect, judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraph 883.

³²⁴ *Ibid.*

³²⁵ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, 27/76, EU:C:1978:22, paragraphs 184 to 187; and Judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 90. In this judgment, the Court considered that “Although a system based on individual sales targets fixed or agreed every year for each dealer necessarily involves certain differences between the rates of discount granted to different dealers for the same number of purchases and although in addition Michelin NV has admitted that it could not apply its scale of discounts mechanically, as some dealers did not accept an

- b) Refusing to deal with customers where there are credit worthiness concerns³²⁶;
- c) Favours long-standing customers in times of shortage³²⁷;
- d) Offering rebates or discounts in return for value-add services provided by the customer³²⁸;
- e) Offering rebates or discounts that are indispensable to encourage customers to purchase and resell a higher volume and avoid double marginalisation;
- f) Pricing below cost, as a proportionate response to low pricing by a competitor (i.e., meeting competition)³²⁹;
- g) Refusing to fulfil orders by the customer that are out of the ordinary³³⁰ or if the customer's conduct is inconsistent with fair trade practices³³¹; or
- h) Technical justifications, for example linked to maintaining or improving the performance³³² or quality³³³ of the dominant undertaking's product.

216. The arguments supporting an objective necessity defence may also relate, for instance, to public health, safety or other public interest considerations.³³⁴ Nonetheless, the Union Courts have confirmed that it is not the dominant undertaking's task to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or as inferior in quality to its own products³³⁵, nor more generally to enforce other undertakings' compliance with the

automatic reduction in the discount as a result of a reduction in turnover, it has not been established that such differences in treatment between different dealers are due to the application of unequal criteria and that there are no legitimate commercial reasons capable of justifying them. It is not therefore possible to infer from such differences that Michelin NV discriminated against certain dealers" (para. 90).

³²⁶ See, by analogy, the Notice on the application of the competition rules to access agreements in the telecommunications sector, para. 85.

³²⁷ Judgment of 29 June 1978, *C-77/77 - Benzine en Petroleum Handelsmaatschappij BV and others v Commission*, para. 22.

³²⁸ 81/969/EEC: Commission Decision of 7 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV.29.491 - Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin, para. 45).

³²⁹ See the 2002 decision of the Danish Competition Council (*MetroXpress Danmark A/S v Berlingske Gratisavis A/S*), the authority decided that a dominant undertaking is allowed to set lower prices when a competitor sets its prices below the dominant undertaking's average variable costs for the purpose of meeting competition and maintaining customers.

³³⁰ Judgment of 16 September 2008, *Sot. Lelos kai Sia and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 70.

³³¹ Judgment of 14 February 1978, *United Brands and United Brands Continental v Commission*, Case C-27/76, EU:C:1978:22, paragraphs 182-187.

³³² Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraphs 552 and 558. See also judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 1146 and 1159, where the argument that the integration of Windows Media Player in Windows created technical efficiencies or led to "superior technical product performance" was rejected.

³³³ Judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 558.

³³⁴ For instance, that the conduct contributes to the Union's resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains.

³³⁵ Judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraph 118; judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 138.

law³³⁶. Nonetheless, the arguments supporting an objective necessity defence may also relate, for example, to public health, safety, or other public interest considerations³³⁷.

217. For example, legitimate commercial considerations may have an environmental dimension in the following scenarios:
- a) Refusing to deal with a customer that generates significant emissions in an effort to meet emissions targets;
 - b) Charging a higher price in order to cover environmental costs or to reinvest in environmental protection; or
 - c) Charging different customers different prices according to how the product is used — e.g. whether products are recycled or the energy efficiency of the downstream production process.

5.2. Efficiency defence

218. An efficiency defence requires the dominant undertaking to demonstrate that the exclusionary effects resulting from its conduct are counterbalanced, or even outweighed, by advantages in efficiency that also benefit consumers³³⁸.
219. An efficiency defence cannot be accepted if the exclusionary effects produced by the conduct bear no relation to the alleged advantages for consumers, or if those effects go beyond what is necessary in order to achieve these advantages³³⁹. To prove an efficiency defence, it is for the dominant undertaking to show that the following four cumulative conditions are fulfilled:
- a) that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and on the interests of consumers in the affected markets;
 - b) that those gains have been, or are likely to be, brought about as a result of the conduct;
 - c) that the conduct is necessary for the achievement of those efficiency gains; and
 - d) that the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition³⁴⁰.
220. A number of efficiencies may be produced by the same conduct. Conversely, different conduct may result in the same type of efficiencies. Possible efficiencies include for example:
- a) Encouraging a supplier or customer to make relationship specific investments and avoiding a “hold up problem”. Single branding/non-compete obligations, quantity

³³⁶ See to that effect judgment of 12 December 1991, *Hilti v Commission*, T-30/89, EU:T:1991:70, paragraphs 116-118.

³³⁷ For instance, that the conduct contributes to the Union’s resilience as it is necessary to reduce dependencies and mitigate shortages and disruptions in supply chains.

³³⁸ Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 86; judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 48; judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 140.

³³⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 76.

³⁴⁰ Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 42; judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 166; judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T-604/18, EU:T:2022:541, paragraphs 602, 876 and, to that effect, paragraphs 889-891; judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 204.

forcing, or exclusive sourcing can lessen the hold-up problem when the relationship-specific investment is made by the supplier, whereas exclusive distribution or exclusive supply can lessen the hold-up problem when the investment is made by the buyer³⁴¹.

- b) Opening up or entering new markets or bringing new products to market. For example, combining two independent products into a new, single product may be an innovative way to market the product(s)³⁴² where driven by genuine customer preference for joint consumption³⁴³.
- c) Achieving economies of scale in distribution³⁴⁴.
- d) Achieving cost savings in production, distribution, or transaction costs, for example through tying two independent products³⁴⁵.

5.3. Burden of proof

- 221. The analysis of the capacity to foreclose is relevant in assessing whether a specific exclusionary conduct which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU is objectively necessary or produces efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out by the Commission only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking³⁴⁶.
- 222. The burden to show an objective necessity or efficiency defence is on the dominant undertaking³⁴⁷. Proving an objective necessity or efficiency defence requires convincing arguments and evidence³⁴⁸, especially where the dominant undertaking is naturally better placed than the Commission to disclose its existence or demonstrate its relevance³⁴⁹. Vague, general, and theoretical claims or those which rely exclusively on the dominant undertaking's own commercial interests are not sufficient to demonstrate an efficiency defence³⁵⁰.
- 223. Similarly, whether the practices at issue were deliberate or, on the contrary, only accidental is not relevant for the assessment of an efficiency defence³⁵¹. Once the undertaking concerned

³⁴¹ Communication from the Commission; Commission notice - Guidelines on vertical restraints (2022/C 248/01), paragraph 16(c)

³⁴² EC Article 82 Discussion Paper, para. 205

³⁴³ See Case AT.39230 – Rio Tinto Alcan, para. 89

³⁴⁴ Communication from the Commission; Commission notice - Guidelines on vertical restraints (2022/C 248/01), paragraph 15 to 17.

³⁴⁵ Article 82 Discussion Paper, para. 205

³⁴⁶ Judgement of 6 September 2017, *Intel v. Commission*, C-413/14 P, paragraph 140.

³⁴⁷ Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraph 49; judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 688 and 1144; judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 554; judgment of 14 September 2022, *Google and Alphabet v Commission (Google Android)*, T- 604/18, EU:T:2022:541, paragraph 601. It is for the undertaking invoking the benefit of that defence against the finding of an infringement to demonstrate that the conditions for applying the defence are satisfied, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC [now Articles 101 and 102 TFEU], OJ L1, 4.1.2003, recital 5.

³⁴⁸ Judgment of 21 December 2023, *European Superleague Company, SL v Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)* C-333/21. EU:C:2023:1011, paragraph 205

³⁴⁹ Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 686; judgment of 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 577.

³⁵⁰ Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 166.

³⁵¹ Judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 168.

has raised a plea of justification and provided supporting arguments and evidence, it then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted³⁵².

³⁵² Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 688 and 1144.