

**Comments of
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on**

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

1. RULE OF LAW

1. “Rule of law is one of the EU’s founding values, and essential to its very functioning. It is fundamental for the application of EU law, protects citizens and establishes the conditions for a well-functioning single market.” Council of the European Union, Rule of Law, consilium.europa.eu/en/policies/rule-of-law/. See Article 2 TEU; Commission Communication—Strengthening the rule of law within the Union: A blueprint for action, COM(2019) 343 final, 17.7.2019, p. 1.
2. The most important rule-of-law tenet is that, “The law must be accessible and so far as possible intelligible, clear and predictable.” Tom Bingham, *The Rule of Law* (Penguin, 2010), p. 37. Rule of law requires “that government in all its actions is bound by rules fixed and announced beforehand.” F. A. Hayek, *The Road to Serfdom: Text and Documents: The Definitive Edition* (University of Chicago Press, 2007), p. 112.
3. The “Commission is responsible for the implementation and orientation of Community competition policy.” Judgment of 28 February 1991, *Stergios Delimitis v Henniger Bräu*, C-234/89, EU:1991:91, paragraph 44; Judgment of 6 October 2005, *Sumitomo Chemical v Commission*, T-22/02 and T-23/02, EU:T:2005:349, paragraph 34. Just as Article 102 “places a special responsibility on dominant undertakings by prohibiting them from abusing their market position” (Draft Guidelines ¶ 3), it also places a special responsibility on the Commission by requiring it to render Article 102 enforcement “intelligible, clear and predictable.”
4. The Commission must respect treaty interpretations by the Court of Justice and also must appreciate that the Court does not observe the principle of *stare decisis*. See Opinion of AG Fennelly delivered 6 June 1995, *Merck v Primecrown*, C-267/95 and C-268/95, EU:C:1996:228, paragraph 139. The Court must “confront the realities of the situation with the legal rule in each action, which can lead it in appropriate cases to recognize its errors in the light of new facts, of new arguments or even of a spontaneous rethinking.” Opinion of AG Lagrange delivered 13 March 1963, *Da Costa v Netherlands Inland Revenue Administration*, 28/62 to 30/62, EU:C:1963:2, point II.

5. To make making competition law “intelligible, clear and predictable,” in 1962 the Commission began a practice of issuing guidelines. *See* Communication relative aux contrats de représentation exclusive conclus avec des représentants de commerce, OJ 2921, 24.12.1962. Recent guidelines are the Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C 1645, 22.2.2024, and the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023.
6. “[G]uidelines are a useful instrument to propose a coherent and comprehensive interpretation of Art. 102 TFEU, to identify the generalisable substantive and evidentiary principles, to separate them from more context-specific findings and to fill conceptual gaps. The effort to systematise and conceptualise the Courts’ jurisprudence in this manner, and also to adapt the interpretation of Art. 102 TFEU to changing market realities, may be considered a core part of the Commission’s responsibility for the implementation and orientation of competition policy.” Heike Schweitzer and Simon de Ridder, ‘How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission’s Future Guidelines on Exclusionary Abuses’ (2024) 15 *Journal of European Competition Law & Practice* 222, 227.
7. Article 102 guidelines should articulate both the general principles and the specific standards governing the Commission’s administration of Article 102 in relation to exclusionary conduct. Most importantly, Article 102 guidelines should articulate limits. The Commission is not obliged to charge through every door that the Union Courts have left ajar, and rule of law demands that the Commission publicly identify those doors through which it has no intention to go.
8. The 2008 guidance paper (Commission Communication—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45/02, 24.2.2009) promoted rule of law by communicating how the Commission intended to enforce Article 102. The Draft Guidelines, in contrast, primarily collect and organize case law.

2. DOMINANCE

9. Paragraph 4 of the Draft Guidelines properly observes that it is “important that Article 102 TFEU is applied in a predictable and transparent manner,” and paragraph 8 of the Draft proclaims that “the Commission seeks to enhance legal certainty.” Nevertheless, the Draft recites ideas about dominance from early Court of Justice judgments without explanation or supplementation.

10. Citing *United Brands*, paragraph 18 of the Draft Guidelines states: “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 consumers.” Paragraph 23 is similar.
11. In *United Brands*, the Court of Justice focused on an undertaking’s ability “to behave to an appreciable extent independently of its competitors.” Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 65. This focus was problematic: An undertaking that can behave independently of its competitors would do just that, rather than engage in exclusionary conduct. But an undertaking lacking the ability “to behave to an appreciable extent independently of its competitors” could possess both the ability to exclude those competitors and the desire to do so.
12. In *United Brands*, the Court also focused on an undertaking’s ability “to behave to an appreciable extent independently of . . . its customers and ultimately of its consumers.” This focus was even more problematic because no undertaking behaves independently of its customers or consumers: The market demand curve constrains every commercial operator, no matter how dominant. A dominant undertaking, however, interacts only minimally with rivals on strategic choices like price.
13. Citing *Hoffman-La Roche*, paragraph 19 of the Draft Guidelines states: “Establishing dominance is not precluded by the existence of a certain degree of competition on a particular market, 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 behaviour.”
14. The Court of Justice substantially improved upon what it has said in *United Brands* in the judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36. But in paragraph 70 the Court continued to exaggerate the independence enjoyed by a dominant undertaking, since profit maximization compels it to “take account” of rivals. The hallmark of dominance is that taking account of rivals entails only minimal interaction with them on price and other strategic variables, and that was the point of paragraph 71 of the judgment.
15. Article 102 guidelines should assert a presumption of dominance from a dominant market share, and the presumption should attach only if an undertaking holds a market share of at least 70%. Dominance can be established with a lower market share, but, contrary to paragraph 26 of the Draft Guidelines, control over a bare majority of the market, without more, should not give rise to a presumption.

16. Article 102 guidelines should assert a market-share-based safe harbor. The third sentence of paragraph 26 in the Draft Guidelines should be revised to state: “Save in exceptional circumstances, a market share below 50% precludes a finding of dominance.” Footnote 41 of the Draft asserts that an undertaking does not come within a safe harbor unless its share is “below 10%,” and even then, the undertaking still could be found dominant in “exceptional circumstances.” From a rule-of-law perspective, and as a matter of common sense, this assertion is the most problematic aspect of the Draft.
17. Article 102 guidelines should state that, “The Commission bases market shares on the most appropriate indicator of competitive strength of undertakings.” In contrast, paragraph 26 of the Draft Guidelines asserts that, “Typically, market shares based on sales value are the most appropriate indicator.” This is an empirical assertion for which the Commission is unlikely to have compiled supporting data, and making the assertion places a burden on the Commission whenever it departs from its typical practice.
18. Article 102 guidelines should provide a general definition of “barriers to entry and expansion” because that definition has been a matter of controversy in the economic literature. The list of barriers in paragraph 30 of the Draft Guidelines implies a definition, but an explicit definition is needed to make the Commission’s assessment “clear and predictable.”
19. Paragraph 31 in the Draft Guidelines does not explain what network effects are, nor does it adequately explain why they matter. Even without network effects, entrants normally must persuade users to switch, and survival often depends on attracting a critical mass of customers. More is needed on how the two-sidedness of platforms presents a genuinely different problem.
20. Article 102 guidelines should not mention “countervailing buyer power,” and the term should not be used to mean something different from both “buyer power” and Galbraith’s concept of “countervailing power.” See John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952). Paragraph 33 of the Draft Guidelines defines “countervailing buyer power” as “the ability of customers to switch quickly to competing suppliers, to promote new entry or to vertically integrate, or at least the ability to credibly threaten to do so.” The first ability should not be mentioned, and the other abilities should be mentioned under the rubric of barriers to entry.
21. Article 102 guidelines should say little about “collective dominance” and thus signal that it is unimportant. The number of words that enforcement guidelines devote to a topic is nearly as important as the words themselves. The omission of a topic signifies that it has no significance, while a lengthy discussion of a topic signifies that it is of paramount significance. The Draft Guidelines signal that “collective dominance” is just as important as “single dominance,” which is a stark departure from prior enforcement practice.

3. COMPETITION ON THE MERITS

22. The Union Courts have taught that “not every exclusionary effect is necessarily detrimental to competition.” Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 134. And they have explained that “competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.” Judgment of 19 January 2023, *Unilever Italia v Autorità Garante della Concorrenza e del Mercato*, C-680/20, ECLI:EU:C:2023:33, paragraph 37; *Intel*, paragraph 134; Judgment of 27 March 2012, *Post Danmark v Konkurrencerådet*, C-209/10, EU:C:2012:172, paragraph 22.
23. In *Hoffmann-La Roche*, the Court of Justice declared that the abuse of a dominant position involved “recourse to methods different from those which condition normal competition” and which have “the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.” Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 91.
24. Beginning with *AKZO*, the Court of Justice contrasted abuse of a dominant position with “competition on the merits.” In French, the Court used the phrase “concurrence par les mérites,” which appeared then in English as “competition on the basis of quality.” Judgment of 3 July 1991, *AKZO Chemie v Commission*, C-62/86, EU:C:1991:286, paragraph 70. Since *Irish Sugar*, the parallel English phrase in Union Court judgments has been “competition on the merits.” Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 111.
25. Some experts contend that competition law now focuses on outcomes and that the concept of competition on the merits therefore should play little or no role in the administration of Article 102. *E.g.*, Pablo Ibáñez Colomo, ‘Competition on the Merits’ (2024) 61 *Common Market Law Review* 387; Chiara Fumagalli and Massimo Motta, ‘Economic Principles for the Enforcement of Abuse of Dominance Provisions’ (2024) 20 *Journal of Competition Law & Economics* 85. But the recent judgments of the Union Courts are to the contrary. *See* Massimiliano Kadar, Johannes Holzwarth, and Virgilio Pereira, ‘Abuse of Dominance under Article 102 TFEU: A Survey on 2023’ (2024) 15 *Journal of European Competition Law & Practice* 278. For example, the Court of Justice referred to “competition on the merits” 16 times in 124 paragraphs in its Judgment of 12 May 2022, *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato*, C-377/20, EU:C:2022:379.

26. Article 102 guidelines should state early on that, “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 market.” The Draft Guidelines do not make this point until the fifth page (paragraph 17).
27. Article 102 guidelines should explain that to compete on the merits is to offer customers better value, as opposed to preventing rivals from doing so. Paragraph 51 of the Draft Guidelines does not crystalize this principle. The paragraph observes that: “The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and which, in principle, relates to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods and services.” This observation is useful, but ponderous, and it describes the benefits of competition rather than the hallmarks of competition on the merits.
28. Article 102 guidelines should explain that competition on the merits entails positive efforts to gain favor with customers by offering value. Paragraph 51 of the Draft Guidelines largely does that, but paragraphs 49 and 50 are largely to the contrary. In stating that that a dominant undertaking is entitled “to protect its commercial interests” “if they are attacked,” and to “defend” itself from competitors, paragraphs 49 and 50 tend to imply that a dominant undertaking is disentitled to take positive actions to gain favor.
29. Article 102 guidelines should discuss “conduct comporting with competition on the merits” as well as “conduct departing from competition on the merits.” And Article 102 guidelines should state that impugned conduct sometimes can be exonerated through a straightforward determination that it comports with competition on the merits. In particular, “conduct which has the effect of broadening consumer choice by putting new goods on the market or by increasing the quantity or quality of the goods already on offer must, inter alia, be considered to come within the scope of competition on the merits.” *Servizio Elettrico Nazionale*, paragraph 85. For such conduct, a minimal assessment can yield the insight that the impugned conduct is part of normal competition on the merits and render further enquiry superfluous.
30. Article 102 guidelines should state that conduct that makes no economic sense but for a tendency to exclude rivals is not competition on the merits. “Any practice the implementation of which holds no economic interest for a dominant undertaking, except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, must be regarded as a means other than those which come within the scope of competition on the merits.” *Servizio Elettrico Nazionale*, paragraph 77. Paragraphs 54 and 60(c) of the Draft Guidelines make this point, but it should be made more prominently.

31. Article 102 guidelines should acknowledge that conduct that makes economic sense apart from any tendency to exclude is competition on the merits. The “no economic sense” test asks whether impugned conduct was reasonably expected to be profitable because it enhanced an undertaking’s efficiency or catered to its customers’ desires. If so, it must be deemed competition on the merits. Paragraphs 53 and 55 of the Draft Guidelines should not indicate that the “no economic sense” test is rarely useful as a limiting principle.
32. Article 102 guidelines should not hint at the existence of a mode of assessment that is not described by the guidelines. Paragraph 45 of the Draft Guidelines, however, states that the analysis described “is generally necessary” to “determine whether conduct by dominant undertakings is liable to constitute an exclusionary abuse.” The cases cited in footnote 101 do not suggest the possibility of some entirely different approach.
33. Article 102 guidelines should resolve the puzzle presented by paragraph 48 of the Draft Guidelines and paragraph 103 of the *Servizio Elettrico Nazionale* judgment (as well as by prior cases). The court asserted that conduct capable of producing an exclusionary effect and not competition on the merits “can nevertheless escape the prohibition laid down in Article 102 TFEU” if the dominant undertaking “shows that the practice at issue was . . . counter-balanced or even outweighed by advantages in terms of efficiency that also benefit consumers.” Article 102 guidelines should explain the doctrinal underpinnings of this assertion and the practicalities of its implementation.
34. Article 102 guidelines should not entertain the possibility that conduct harming competition nevertheless benefits consumers. Paragraph 103 of the *Servizio Elettrico Nazionale* judgment might be understood to imply that exclusionary conduct by a dominant undertaking can harm competition but not infringe Article 102 due to “positive effects for consumers.” But Article 102 guidelines should explain—as suggested by paragraph 58 in the Draft Guidelines—that a conclusion that impugned conduct is not competition on the merits can be reversed by the dominant undertaking’s proof that its conduct served consumers’ interests and made economic sense on that basis.
35. Article 102 guidelines should state that a dominant undertaking’s subjective intent to exclude rivals, while relevant, cannot outweigh objective evidence that its conduct was competition on the merits. Seemingly to the contrary, paragraph 49 of the Draft Guidelines asserts that a dominant undertaking is permitted to take “reasonable and proportional steps as it deems appropriate to protect its commercial interests” unless its “purpose is . . . to strengthen its dominant position” (emphasis added). In this context, “purpose” is apt to be understood to mean “subjective intent,” but it cannot mean that because “the concept of abuse [under Article 102] is an objective one” (Draft Guidelines ¶ 44).

36. Three judgments cited in footnote 104 used the word “purpose” in the sense of “objective,” which was slightly clearer using the French word “objet.” The judgments teach that context matters and conduct that would be competition on the merits in some contexts is not competition on the merits in other contexts. This point is made by paragraph 55 of the Draft Guidelines. The three judgments condemned certain conduct not because it strengthened a dominant undertaking’s market position, but because it did so by weakening the ability of its rivals to compete. As paragraph 50 of the Draft states, Article 102 requires that dominant undertakings employ “means which fall within the scope of competition on the merits.”
37. The first sentence of paragraph 52 in the Draft Guidelines should be deleted or expanded into an explanation of how a dominant undertaking can abuse its dominant position while acting with the “intention to compete on the merits.” U.S. law sensibly holds that exclusion through means other than competition on the merits “is always deliberately intended.” *Aspen Skiing v Aspen Highlands Skiing*, 472 U.S. 585, 693 (1985). In the *Tomra* case, cited in footnote 110, the abuse evidently was intended. The General Court found anticompetitive intent, and the Court of Justice held that the General Court did not err in giving weight to the finding. *Tomra* contended that the finding was error, but the Court of Justice held that it lacked jurisdiction to review fact finding. Judgment of 19 April 2012, *Tomra v Commission*, C-549/10 P, EU:C:2012:221, paragraphs 16, 19, and 25.
38. Paragraph 52 of the Draft Guidelines should not refer to “competition on the merits” in the first sentence then state that “a dominant undertaking may have to refrain from engaging in certain practices that are unobjectionable for undertakings that do not hold a dominant position.” This juxtaposition tends to imply that the scope of “competition on the merits” is systematically narrower for dominant undertakings than for non-dominant undertakings, but that is not true.
39. Article 102 Guidelines should explain that the enquiry into “specific circumstances” seeks to identify the true nature of the conduct, not its ultimate impact. Contrary to paragraph 57 of the Draft Guidelines, the “extent of the dominant position” is not a significant consideration in the enquiry. Both “market dynamics” and “specific features of the conduct” can be significant considerations, but those phrases alone convey no sense of what the enquiry entails.
40. Paragraph 144 of the Draft Guidelines states that, in some circumstances, “the assessment of whether the conduct departs from competition on the merits will be carried out on the basis of the general principles set out in section 3.2.” Section 3.2 of the Draft, however, does not directly state the controlling principles.

4. IDENTIFYING ANTICOMPETITIVE EXCLUSIONARY CONDUCT

41. Article 102 guidelines should state that protecting the welfare of consumers is the “purpose” or “objective” of Article 102. *See* Judgment of 12 May 2022, *Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato*, C-377/20, EU:C:2022:379, paragraphs 44 and 46 (referring to the “purpose of Article 102” and to its “ultimate objective”). Paragraph 5 of the Draft Guidelines, however, states that Article 102 “applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers.” This phrasing suggests that harm to consumer welfare is an element of proof in every Article 102 case.
42. Article 102 guidelines should state that Article 102 protects consumer welfare by protecting the competitive process. The Union Courts “have essentially rejected the main tenets of the so-called ‘outcome-based approach’ and confirmed the traditional approach based on the protection of competition as a ‘process’.” Raffaele Di Giovanni Bezzi, ‘A Tale of Two Cities: Effects Analysis in Article 102 TFEU Between Competition Process and Market Outcome’ (2023) 14 *Journal of European Competition Law & Practice* 83, 94.
43. Article 102 guidelines should explain that focusing on the health of the competitive process implies that an effects-based conduct assessment is not focused on the conduct’s ultimate effects on market performance. Rather, the effects of primary interest are the conduct’s proximate effects on the ability and incentive of rivals to compete. This idea is mentioned in paragraph 6 of the Draft Guidelines and should be reinforced elsewhere.
44. Paragraph 2 of the Draft Guidelines should not equate “competitive harm” with “higher prices” or other market outcomes. Because the competitive process is the central concern of Article 102, “competitive harm” is “process harm.” Process harm is apt to produce tangible adverse effects on market performance, and such effects can be evidence of harm to competition. If the law equated “competitive harm” with adverse market outcomes, the Commission’s burden often would be insuperable because the ultimate effects of marketplace conduct tend to be highly uncertain *ex ante* and not easily discernable *ex post*. Numerous confounding factors can make it infeasible to tease out the ultimate effects of particular conduct.
45. Article 102 guidelines should state how the Commission understands the concept of “capability” to produce exclusionary effects. The Union Courts have indicated that “capability” entails much more than possibility and that it is a factual issue. *See* Pablo Ibáñez Colomo, ‘Anticompetitive Effects in EU Competition Law’ (2021) 17 *Journal of Competition Law & Economics* 309. Paragraph 61 of the Draft Guidelines makes a start, but additional sentences could be helpful. Paragraph 64 is circular in stating that the issue is whether “the conduct is at least capable of producing exclusionary effects.”

46. Paragraph 6 of the Draft Guidelines usefully defines “exclusionary effect” as “hindrance to actual or potential competitors’ ability or incentive.” Focusing on competitors’ abilities and incentives is consistent with case law. See Pablo Ibáñez Colomo, ‘Anticompetitive Effects in EU Competition Law’ (2021) 17 *Journal of Competition Law & Economics* 309, 337 (“[A]n analysis of the case law suggests that the relevant question in this regard is whether the ability and/or incentive to compete are harmed to such an extent that competitive pressure is reduced.”).
47. Article 102 guidelines should focus on competitors’ ability or incentive *to compete*. Paragraph 6 of the Draft Guidelines, however, focuses on the “ability or incentive to exercise a competitive constraint on the dominant undertaking.” That phrasing could impose an extra element of proof, which could present major difficulties for the Commission.
48. Paragraphs 44 and 49 of the Draft Guidelines create similar, but greater, difficulties in suggesting that Article 102 is infringed only if “effective competition” would prevail but for the infringement. The concept of “effective competition,” as it is explained in paragraph 1 of the Draft, arguably is incompatible with the existence of a dominant market position. In any event, paragraphs 44 and 49 could narrow the application of Article 102.
49. Article 102 guidelines should state, as does paragraph 55 of the Draft Guidelines, that the “specific circumstances of the case” are relevant to a determination of whether particular “conduct departs from competition on the merits.” Article 102 guidelines should proceed to describe how the Commission determines whether “conduct departs from competition on the merits.” Paragraph 55 of the Draft, instead, describes circumstances in which some conduct, possibly conduct not mentioned, was once found to depart from competition on the merits.
50. Paragraph 55(a) of the Draft Guidelines is unclear as to how “the dominant undertaking prevents consumers from exercising choice based on the merits of the products.” Certain tying arrangements could do that, but the opening clause of paragraph 55 indicates that it addresses conduct not mentioned in paragraph 53, which mentions tying. Moreover, the cases cited in footnote 119 did not involve restrictions on consumers, and restraints at the dealer level need not have a material impact on consumers. See *Roy B. Taylor Sales v Hollymatic*, 28 F.3d 1379 (5th Cir. 1994); *Smith Machinery v Hesston*, 878 F.2d 1290, 1297 (11th Cir. 1989).
51. Paragraph 55(f) of the Draft Guidelines should not imply that an undertaking is not competing on the merits if it leverages “resources or means inherent to the holding of the dominant position.” If that were true, the concept of competition on the merits would have no meaning. An undertaking achieving dominance through skill and industry continues to compete on the merits

when it builds on what it has created by introducing new goods and services enabled by its prior skill and industry. Competitors lacking comparable resources are less efficient and they are not protected from competition by Article 102. The *Servizio Elettrico Nazionale* judgment, which the Draft cites in footnote 125, is not to the contrary; statutory monopoly, rather than skill and industry, gave rise to the advantage at issue in that case.

52. Paragraph 58 of the Draft Guidelines revisits the puzzle of paragraph 103 of the *Servizio Elettrico Nazionale* judgment. The useful contribution of the paragraph is explaining that an efficiencies defense is an argument that the impugned conduct “amounts to competition on the merits.” That point also should be made in the section on objective justifications. Paragraph 58 ends a section on “factors to establish that conduct departs from competition on the merits,” but it should end a section on “factors to establish that conduct comports with competition on the merits.”
53. Paragraph 60(a) of the Draft Guidelines implies that the Commission need not always “demonstrate a capability to produce exclusionary effects,” but the quite reverse is true. Even if paragraph 60(b) of the Draft is correct to say that conduct in some categories “is presumed to lead to exclusionary effects,” the Commission nevertheless must satisfy an “evidentiary burden” to invoke the presumption. No conduct is presumed to be capable of exclusionary effects unless and until the Commission demonstrates its exclusionary nature in a specific context. Opinions of the U.S. Supreme Court describe and employ the proper enquiry in competition law for deciding whether a categorical rule applies. *NYNEX v Discon*, 525 U.S. 128, 134–35 (1998) (group boycott); *Northwest Wholesale Stationers v Pacific Stationery & Printing*, 472 U.S. 284, 296–98 (1985) (group boycott); *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1, 19–20 (1979) (price fixing).
54. Article 102 Guidelines should articulate a salience threshold, which would be especially relevant in Paragraph 60(b). Capability to produce exclusionary effects is closely related to conduct’s marketplace footprint. For example, a few below-cost sales do not constitute predatory pricing when the accused makes millions of above-cost sales, since the accused’s rivals are not forced to match prices that their customers cannot take advantage of.
55. Paragraph 60(c) of the Draft Guidelines concerns “conduct by a dominant undertaking” that serves “no economic interest for that undertaking, other than that of restricting competition.” The capability to exclude can be obvious for conduct in this category, but that capability cannot be taken as given because the category is open ended and real-world cases present countless idiosyncrasies. Thus, the subparagraph should not assert that conduct in this category invariably is by its “very nature capable of restricting competition.”

56. The concluding sentence of paragraph 60(c) in the Draft Guidelines should not assert that “it is highly unlikely” that “naked restrictions” can be justified. Circumstances in which such conduct would be justified can be imagined, and the empirical frequency of such circumstances is unknowable.
57. Paragraph 61 in the Draft Guidelines is useful and important, but additional exposition would promote rule of law and surely is possible because the key idea already is mentioned in paragraph 6. The capability of producing an exclusionary effect is demonstrated by a showing of “hindrance to actual or potential competitors’ ability or incentive” to compete.
58. The second and third sentences of paragraph 62 in the Draft Guidelines are obscure. It is difficult to imagine how unilateral conduct could remove “the commercial uncertainty relating to the entry or expansion of competitors” and equally difficult to imagine why eliminating that uncertainty would be exclusionary. And since the term “third parties” should not refer to targets of exclusionary conduct, it is difficult to imagine the relevance of the “actual reaction” of “third parties.” The last sentence of paragraph 70(c) makes a more relevant point about the reactions of targets. Of course, exclusionary conduct can infringe Article 102 even though it meets with little or no success, and that point is well made in paragraphs 61 and 64 of the Draft.
59. Paragraph 63 of the Draft Guidelines leaves the reader in doubt as to what point is being made. Paragraph 6 defines “exclusionary effects” as “any hindrance to actual or potential competitors’ ability or incentive to exercise a competitive constraint on the dominant undertaking.” Hinderance typically can be confirmed without recourse to market developments, but if the impugned conduct has been “in place for a sufficiently long time,” the hinderance might be demonstrated through observed impacts on the conduct of affected rivals. Conduct “in place for a sufficiently long time” also might have produced observable effects on market performance, which could be what the paragraph is intended to address. Such effects, however, should not be referred to as “actual exclusionary effects,” but rather as something like “ultimate effects from exclusion on market outcomes.”
60. The ambiguity of paragraph 63 also arises in paragraph 64, and the import of paragraph 64 varies with the meaning of “*actual* exclusionary effects.” In addition, the last sentence of paragraph 64, as drafted, improperly shifts the burden of proving the “capability to produce exclusionary effects.” The only predicate fact for the last sentence is that “conduct has failed to produce *actual* exclusionary effects.” On that fact alone, there can be no basis for concluding that the impugned conduct has the “capability to produce exclusionary effects,” so the “undertaking concerned” need not provide “evidence showing that that absence of actual effects was indeed the consequence of the fact that that conduct was unable to produce such effects.”

61. The causation point made by paragraph 65 of the Draft Guidelines is correct whatever is meant by “exclusionary effects,” but it is unclear what is meant. The paragraph could refer to (a) “exclusionary effects” as defined by paragraph 6, (b) relatively direct evidence of such effects reflected in the conduct of rivals, or (c) indirect evidence of “exclusionary effects” reflected in market performance. The cited *Google Shopping* decision refers to observable aspects of market performance.
62. Paragraph 70 of the Draft Guidelines says that anything might matter and what is important is highly case-specific. That is true, and the subparagraphs that follow add little to the basic point because the assessment is so highly case-specific. The Draft could be improved deleting a page or so from these subparagraphs.
63. Paragraph 70(a) of the Draft Guidelines asserts a causal relationship between “the extent of the dominant position” and whether “conduct is capable of having exclusionary effects.” In contrast, paragraph 21 of the Draft observes only that “the degree of dominance may be relevant.” If a causal relationship is to be asserted, the mechanism should be described, which is not obvious when the conduct at issue occurs in a non-dominated market.
64. Paragraph 70(d) of the Draft Guidelines is the most helpful of the seven subparagraphs. It makes two points, both of which are substantive, useful, and non-controversial.
65. Paragraph 70(f) of the Draft Guidelines should distinguish “evidence of an exclusionary strategy” from evidence of “subjective intent.” The first sentence of the subparagraph should use the word “strategy” rather than the word “intent,” and the second sentence should explain that an “exclusionary strategy” is one that makes business sense because of its recognized tendency to exclude. The subparagraph should not mention “concrete threats of exclusionary action.” The meaning is unclear, and the cited cases are unhelpful. The phrase evidently refers to utterances by representatives of the dominant undertaking. While one can imagine an utterance that would constitute probative evidence of an “exclusionary strategy,” most would at most go to “subjective intent.”
66. Paragraph 70(g) of the Draft Guidelines would be better without the long last sentence. Instead, two sorts of “market developments” should be noted: (a) actions by targets of exclusionary conduct indicating an impact of the conduct on their ability or incentive to compete, and (b) indicia of market performance indicating an ultimate impact of the conduct. The former tends to be the more useful because it is less subject to confounding factors. Point (v) evidently refers to direct observation of competitors’ “ability or incentive” to compete, but neither ability nor incentive seems directly observable.

67. The last sentence of paragraph 71 of the Draft Guidelines could be clarified. The point seems to be that the profitability of exclusionary conduct stems from its success, and since success need not be established, actual profitability need not be established. The only cited case (footnote 177) is unhelpful because it addressed the need to establish the feasibility of recoupment in a predatory pricing case.
68. Article 102 guidelines should clarify the idea in paragraph 75 of the Draft Guidelines that “there is no *de minimis* threshold.” The *Post Danmark* judgment rejected a *de minimis* threshold on the grounds that an “anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition.” Judgment of 6 October 2015, *Post Danmark v Konkurrencerådet*, C-23/14, EU:C:2015:651, paragraph 73. But this rationale appears to make sense only if a salience threshold is implicit in the term “anticompetitive practice.” Paragraph 74 of the *Post Danmark* judgment asserted that there was “no need to show” an anticompetitive effect of a “serious or appreciable nature.” But recent judgments focused on “capability” seem to imply that “capability” embodies a salience threshold. *E.g.*, Judgment of 15 June 2022, *Qualcomm v Commission*, T-235/18, EU:T:2022:358; Judgment of 26 January 2022, *Intel v Commission*, T-286/09, EU:T:2022:19.
69. Article 102 guidelines should address the special case of conduct that reduces losses, as with matching a price cut. When a rival’s price cut inflicts a wound, matching reduces the bleeding. And matching a price cut (at least if it is above cost) is permitted under Article 102, since even “dominant undertakings can defend themselves against their competitors” (Draft Guidelines ¶ 50).
70. Article 102 guidelines should note that exclusionary conduct can resemble competition on the merits by producing short-term consumer benefits. Predatory pricing is the classic example.

5. SPECIFIC CATEGORIES OF CONDUCT

71. In articulating the “specific legal tests,” Article 102 guidelines should recur frequently to the point made in paragraph 47 of the Draft Guidelines that those tests “are an expression of the application of the general principles” for determining whether conduct infringes Article 102. All of the “specific legal tests” must be understood and applied to identify “conduct departing from competition on the merits” with the “capability to produce exclusionary effects.” Article 102 guidelines should explain briefly how each specific legal test avoids condemning competition on the merits and avoids condemning conduct that lacks the capability to produce exclusionary effects.

Exclusive dealing

72. In contrast to paragraph 82 of the Draft Guidelines, Article 102 guidelines should not presume that exclusive dealing is capable of exclusionary effects. A critical insight is that customers and suppliers sometimes find it best to auction their loyalty to the highest bidder. Exclusive dealing under such circumstances is part of normal competition on the merits rather than the product of a dominant undertaking's bribery or coercion. A dominant undertaking does not "deprive or restrict the customer's or supplier's choices" and should not be seen to infringe Article 102 merely accepting the choices customers or suppliers independently make.
73. The first sentence of footnote 184 of the Draft Guidelines does not parse. It should say: "All references to 'exclusive', 'exclusivity' or 'exclusively' in this section equally apply to purchase or supply obligations or incentive schemes relating to *all*, and to *most*, of a customer's demand or supplier's supply."
74. The elements mentioned in paragraph 83(a) of the Draft Guidelines have no evident relevance to the "capability of exclusive dealing to produce exclusionary effects" even if they are relevant to an undertaking's ability to secure exclusive arrangements on favorable terms.

Tying and bundling

75. Article 102 guidelines should state that tying, even when defined more narrowly than by paragraph 84 of the Draft Guidelines, commonly is part of normal competition on the merits. For example, when bicycle manufacturers sell their bicycles only with tires, that constitutes tying, since bicycle tires are a distinct product. And yet this practice would not infringe Article 102 if a bicycle manufacture were to find itself in a dominant market position.
76. Contrary to paragraph 90 of the Draft Guidelines, Article 102 guidelines should not suggest that conventional market delineation principles are useful in determining whether the tying and tied products are distinct products. The analytic process of market delineation determines when substitutes should be combined in a single relevant market, but strong complementarity is the rationale for deeming alleged tying and tied products not to be distinct.
77. If the point of the last sentence in paragraph 90 of the Draft Guidelines is that complementarity does always justify tying, that point could be made more clearly and need not be made at all. The sentence asserts that, "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 products." Complementarity was the "natural link" in the two cited cases. Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 36; Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 938–42.

78. Article 102 guidelines should explain the “coercion” concept differently from paragraphs 89(c) and 92 of the Draft Guidelines. At issue is whether tying materially affects choice. Contrary to paragraph 89(c) coercion is possible even if “customers [have] a choice to obtain the tying product without the tied product.” Choice is distorted if customers are forced to pay for the tied product even if they do not take it. Contrary to paragraph 92, coercion commonly cannot be passed on. Full-line forcing in sales to “intermediate parties” commonly effects no coercion on final consumers. “Coercion can still exist where the party accepting the tied product is not charged a separate price for that product,” but whether it exists is a question that must be carefully addressed in all tying cases.
79. Paragraph 93 of the Draft Guidelines is misleading. The usual objection to tying is that it undermines competition on the merits in the tied product market. Idiosyncratic tying cases have raised other objections, and contrary to paragraph 93, under idiosyncratic conditions, competitive harm from tying can be confined to the tying product market.
80. Paragraph 94(d) of the Draft Guidelines is obscure because the words “inertia” and “bias” do not conjure the scenarios in the three cited cases and because the subparagraph does not describe the limited circumstances in which this element is relevant. The General Court used the more evocative term “status quo bias” in its judgment of 14 September 2022, *Google (Android) v Commission*, T-604/18, EU:T:2022:541, paragraph 593. The very recent U.S. *Google* (search) decision referred to the “power of defaults.”
81. Article 102 guidelines should discuss tying with system-level competition. Systems competition occurs, for example, in the automobile industry. The industry has many manufacturers and intense competition, and all manufacturers tie thousands of components in a single vehicle. Tying system components promotes system competition and benefits consumers.

Refusal to supply

82. Paragraph 98 of the Draft Guidelines confusingly sets out a single condition “sufficient” to support a finding that “a refusal to supply is abusive.” The condition is that “a potential market or even a hypothetical market for the input can be identified,” which might be understood to require only that someone sought the input. The condition is from *IMS Health*, but that judgment says something quite different from paragraph 98. Far from characterizing the condition as sufficient, the Court explained that it was part of the determination of whether the refusal to supply had the effect of excluding all competition in a market, and that determination was one of three necessary conditions for an infringement. Judgment of 29 April 2004, *IMS Health v NDC Health*, C-418/01, EU:C:2004:257, paragraphs 38 and 44.

83. Paragraph 104 of the Draft Guidelines is right to assert that Article 102 can subordinate intellectual property rights, but it should not suggest that Article 102 effectively strips dominant undertakings of their most basic rights. Without qualification, paragraph 104 asserts that “bringing an action for infringement of an intellectual property right” can be an abuse, but no cited case found that bringing an infringement action was an abuse. The only cited case concerns standard essential patents subject to a licensing commitment, and the Court of Justice held that there was no abuse if the infringer failed to respond to a bona fide licensing offer. Judgment of 16 July 2015, *Huawei Technologies v ZTE*, C-170/13, EU:C:2015:477.

Predatory pricing

84. Article 102 guidelines should explain how predatory pricing can harm competition because understanding the mechanism of an exclusionary tactic can help in its identification. Critically, predatory pricing can alter either structure or behavior. First, predatory pricing can prevent the prey from entering a market or from continuing to operate in it. When predation targets an incumbent, the prey’s exit often is effected through acquisition by the predator, in which case the predatory pricing allows the predator to make the acquisition cheaply. Second, predatory pricing can be a tactic for taming an aggressive rival. In this case, predatory pricing produces what amounts to an agreement on price, customers, territories, or technological opportunities.
85. The second sentence of paragraph 107 of the Draft Guidelines is puzzling. It states that below-cost pricing “can also take place in a market segment.” The word “also” is puzzling because the prior sentence does not refer to market-wide below-cost pricing. And the focus on a “market segment” is itself puzzling. Below-cost pricing in just a market segment can target the prey, but paragraph 108 discusses targeting and indicates that paragraph 107 does not. Absent targeting, the fact that below-cost pricing occurs in just a market segment can only undermine its “capability to produce exclusionary effects.”
86. The first sentence of paragraph 108 of the Draft Guidelines should not be written as if targeted below-cost pricing is not included in the definition of predatory pricing in paragraph 107. It is included.
87. Article 102 guidelines should explain the twin purposes of a price-cost test: First, it provides a basis for concluding that a dominant undertaking’s price cutting is not normal competition on the merits. Second, it provides evidence that the price cutting is capable of exclusionary effects because it would inflict losses on an efficient rival. Paragraph 109 also should explain that a price-cost test is a sound basis for concluding that price cutting is capable of an exclusionary effect only if the test’s breadth and duration are properly set.

88. Article 102 guidelines should observe that competition on the merits is apt to yield prices below average total cost (ATC). This observation is an essential counterbalance to the assertion in paragraph 111 of the Draft Guidelines that prices below ATC but above average variable cost (AVC) or average avoidable cost (AAC) “can be regarded as predatory if it is part of a plan to eliminate or reduce competition in the relevant market.” Article 102 guidelines also should express caution in the evaluation of evidence on the existence of “a plan to eliminate or reduce competition.” Subjective intent cannot be determinative because abuse is an objective concept, and paragraph 111’s references to “direct evidence” and “indirect evidence” are too vague.
89. Article 102 guidelines should indicate that exculpatory evidence can include a demonstration that recoupment would be impossible. If price cutting cannot be credibly explained as rational predatory pricing, it must be normal competition on the merits. Citing case law, paragraph 113 of the Draft Guidelines asserts that “it is not necessary to demonstrate that it is possible for the dominant undertaking to recoup its losses.” But the Court of Justice dispensed with proof of recoupment only with “prices lower than average variable costs” and did not exclude the possibility of exculpatory recoupment evidence from the accused. Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraphs 110, 115–20.
90. Article 102 guidelines should endorse AAC as the cost benchmark for predatory pricing cases. A test based on AAC directly answers the two critical questions posed: whether the dominant undertaking departed from normal competition on the merits by engaging in a money-losing course of conduct, and whether that course of conduct was capable of excluding by forcing an as-efficient competitor to operate at a loss. The components of AAC can be found in standard accounting data, and which cost components should be included normally is defined by the specifics of the predation allegation.
91. Article 102 guidelines should explain that the specifics of a predation allegation go a long way toward specifying the product and temporal scope of the proper price-cost test. The product scope of a price-cost test generally should be the prey’s actual or projected operations in the relevant market. And the temporal scope of the price-cost test generally should be the period of the alleged predatory episode. Departure from these defaults should be based on the need to assure that the test reliably identifies only departures from normal competition that are capable of excluding competition.
92. Even if AAC and AVC “will often be the same,” as noted by paragraph 115 of the Draft Guidelines, it does not follow that they are interchangeable in use. When AVC is used, the main controversy in the case is which costs are properly treated as variable. When AAC is used, however, which costs are avoidable presents a straightforward question with an objective answer.

93. The first sentence of paragraph 115 of the Draft Guidelines is complete and accurate if the predator merely cuts price across-the-board. The resulting output increase then is central to the predatory pricing enquiry because “the conduct is not capable of producing exclusionary effects” unless the predator takes sales from the prey by increasing its own output. If, however, predation involves more than an across-the-board price cut, avoidable costs can include additional components associated with efforts to take sales from rivals.
94. Article 102 guidelines should not suggest that long-run average incremental cost (LRAIC) is a useful benchmark in the general run of predatory-pricing cases. Paragraph 116 of the Draft Guidelines explains that the need to allocate common costs makes calculating LRAIC problematic. Paragraph 116 also notes that LRAIC is a life-cycle cost construct, which means that it is necessary to prorate up-front development costs over an unknowable life-cycle quantity. These are vexing problems, which a competition agency should not take on. Thus, LRAIC should be considered only if already calculated by sectoral regulators.
95. Paragraphs 117 and 118 of the Draft Guidelines provide further reasons why Article 102 guidelines should not endorse LRAIC in predatory-pricing cases: Apart from instances in which sectoral regulators estimate LRAIC, using it would not “enable dominant undertakings to assess the lawfulness of their conduct.” And while it “is appropriate to consider the data in the dominant undertaking’s accounts,” LRAIC normally is not in those accounts and cannot be derived from standard accounting data alone.
96. Article 102 guidelines should explain when it is “appropriate to account for opportunity costs of the dominant undertaking,” whereas paragraph 118 of the Draft Guidelines merely states that it “may be appropriate” to do so in some instances. If the dominant undertaking diverts scarce resources from revenue-generating uses to increase output in the predation market, the forgone revenue is an opportunity cost that should be treated as an avoidable cost. On the other hand, purely hypothetical alternative uses for scarce resources should not be considered, and consumable inputs should be valued at the price actually paid for them, rather than at opportunity cost.
97. The parenthetical example in paragraph 57 of the Draft Guidelines should be deleted. Paragraph 57 correctly states that, “Conduct that at first sight does not depart from competition on the merits . . . may, in specific circumstances, be found to depart from competition on the merits.” The point is exemplified by pricing above ATC, but nothing in the paragraph hints at circumstances in which pricing above ATC can depart from competition on the merits, and scholarly literature does not support attacking pricing above ATC.

Margin squeeze

98. Article 102 guidelines should indicate whether the Commission intends to bring margin-squeeze cases in unregulated sectors with no history of state monopoly. Section 4.2.5 of the Draft Guidelines reflects case law involving settings in which the application of Article 102 complemented sectoral regulation. In the absence of sectoral regulation, however, enforcement against margin squeeze easily can harm consumers.
99. Margin squeeze arises because a vertically integrated dominant undertaking efficiently conducts internal transfers at marginal cost, taking its margin downstream. Inefficiency results if the law compels the undertaking to supply downstream rivals and to assure them of healthy margins. The undertaking can comply by ceasing downstream operations and taking its margin upstream. Or it can comply by transferring internally at a monopoly price and taking a second margin downstream. This double marginalization is apt to be the worst of all possible worlds for both efficiency and consumer welfare.
100. The 2008 guidance paper usefully declared that “what really matters is protecting an effective competitive process and not simply protecting competitors,” but the Draft Guidelines make no similar declaration, and their treatment of margin squeeze suggests a policy of protecting competitors. Paragraph 125 asserts: “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 in themselves predatory.” Paragraph 127 explains that “making the entry of competitors onto the market concerned more difficult” is the “exclusionary effect” of concern and that “it is not necessary that the upstream input is indispensable.” And paragraph 136 and footnote 306 effectively declare that a vertically integrated dominant undertaking cannot lawfully set an attractive price when it offers a new downstream product to compete with a rival.
101. Assessing margin squeeze using LRAIC, per paragraph 132 of the Draft Guidelines, creates substantial compliance costs and uncertainties outside sectors with regulation of the downstream prices. LRAIC is a construct developed by economists for purposes of setting regulated prices in industries with significant costs that are common to products with distinct prices. LRAIC is not calculated for normal business purposes, and it is misleading to assert in paragraph 133 that a margin-squeeze test using LRAIC “can establish whether the dominant undertaking would itself be able to offer its downstream products profitably if it had to pay its own upstream prices.” The dominant undertaking would not make any use of LRAIC unless compelled to do so by a sectoral regulator or competition agency.

Conditional Rebates

102. The definition of conditional rebates in paragraph 138 of the Draft Guidelines is overly broad because it is built around the expansive notion of a “form of purchasing behavior,” which might include, for example, purchasing on-line.
103. The last sentence of paragraph 138 of the Draft Guidelines confirms that the Draft uses the term “conditional rebates” without defined limits by stating (emphasis added) that: “The *usual feature* of a conditional rebate is that the customer is given a rebate or advantage if its purchases over a defined reference period exceed a certain threshold.”
104. The first bullet in paragraph 140 of the Draft Guidelines refers to “volume rebates” and “value rebates.” Given the broad definition of “conditional rebates” in paragraph 138, these categories appear to include discounts offered to all customers based on either the quantity or monetary amount in a single transaction. These ordinary discounts are neither “conditional” nor “rebates,” and they infringe Article 102 only when they constitute predatory pricing. Section 4.3.1 of the Draft Guidelines likely was not meant to include such discounts, but they should be excluded explicitly.
105. Paragraph 145(b) of the Draft Guidelines should not generalize from a single observation by suggesting that a lack of transparency generally tends to make rebates exclusionary. The opposite effect is no less plausible.
106. Paragraph 145(c) of the Draft Guidelines should compare greater to lesser retroactivity, rather than compare retroactive rebates to incremental rebates. First, incremental rebates were dealt with in paragraph 144, so paragraph 145 should address only retroactive rebates. Second, in comparing the potential exclusionary effects of retroactive rebates to those of incremental rebates, the difference is in kind, not merely in degree.
107. Paragraph 145(d) of the Draft Guidelines asserts that “rebates that are individualised for each customer (or type of customer) are in general more capable of producing exclusionary effects because they allow” targeting. The citation of the *Tomra* case (Judgment of 9 September 2010, *Tomra Systems v Commission*, T-155/06, EU:T:2010:370) indicates that practice referred to is offering rebates with triggers set on the basis of customer-specific data. The language, however, could be understood to describe rebates in which the amount of the rebate, rather than its trigger, differs across customers. Moreover, it is the nature of conditional rebate schemes to be individualized in application, even if not in design. The use of conditional rebates makes it possible to achieve an individualized impact while employing a single pricing rule for all customers. For example, a scheme can offer a 1% discount on all purchases during a calendar year, if a customer’s purchases exceed 110% of those during the immediately prior year.

108. Article 102 guidelines should state that a conditional rebate scheme is not “capable of having exclusionary effects” unless the loss of sales equal to the “relevant range” (as defined in paragraph 146 of the Draft Guidelines) would undermine the competitive viability of the dominant undertaking’s rivals. The need for the statement arises from the fact that the price-cost test endorsed in section 4.3.1 of the Draft is prone to indicating that conditional rebates are “capable of having exclusionary effects” when they plainly are not. A price-cost test, such as described by paragraph 150 of the Draft Guidelines, is apt to find a “price per contestable unit” below cost when the “contestable volume” is very small, and yet denying rivals a very small volume of sales normally cannot produce an exclusionary effect.
109. Article 102 guidelines should analogize the analysis of multi-product rebates to that of tying as well as to that of exclusive dealing and single-product conditional rebates. If a dominant undertaking offers rebates conditioned on the purchase of multiple complements, the rebates can produce the economic coercion characteristic of tying. Paragraph 155 of the Draft Guidelines refers to leveraging, and standard leveraging analysis was developed for tying.

Self-preferencing

110. The term “self-preferencing” only recently came into use, and it does not, as yet, denote a well-defined category of conduct. The term generally refers to discrimination, practiced by a vertically integrated undertaking, that is not characterized as price discrimination, refusal to supply, or tying. Broad definitions of self-preferencing, including that in Paragraph 156 of the Draft Guidelines, encompass much that comports with normal competition on the merits. For example, an undertaking engages in normal competition on the merits when it self-preferences by turning its fleet of trucks into mobile billboards promoting its brands and products to the exclusion of all others. The suggestion that self-preferencing is “widespread,” in paragraph 157 of the Draft, confirms its expansive use of the term “self-preferencing.”
111. Article 102 guidelines should indicate that the governing case law provides limited scope for enforcement against self-preferencing. One reason is that an “undertaking, even if dominant, remains, in principle, free . . . to use the infrastructure it has developed for its own needs.” Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 46. In addition, the “mere extension of an undertaking’s dominant position to a neighbouring market cannot in itself constitute proof of conduct that departs from normal competition, even if that extension leads to the disappearance or marginalisation of competitors.” Judgment of 10 November 2021, *Google v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, paragraph 162.

112. Article 102 guidelines should explain that the price mechanism can negate any profit incentive to engage in self-preferencing. Consider a dominant retailer of products supplied both by an affiliate and by non-affiliates, and assume that the retailer can costlessly contrive to sell a unit of affiliated product in place of a unit of a non-affiliated product. The retailer would not elect to employ the contrivance because using it would not increase profits. The retailer's dominant position gives it control over the prices it charges and also significant influence over the prices it pays. If an affiliated product, A, and a non-affiliated product, B, are close substitutes, a condition for equilibrium prices is that dominant retailer is indifferent between selling a unit of A and a unit of B. Thus, the contrivance that enables self-preferencing leads to prices that disincentivize self-preferencing.
113. Article 102 guidelines should explain that, if the price mechanism cannot disincentivize self-preferencing, because there are no prices, free-riding concerns are apt to militate against finding an infringement. If a dominant undertaking provides services to rivals without compensation, holding the undertaking to exacting non-discrimination standards protects competitors rather than competition.
114. Paragraph 158 of the Draft Guidelines explains that competition concerns arise only when self-preferencing leverages a position of dominance in the "leveraging market" to "leveraged market." But the Draft unduly complicates the explanation by using the term "vertical relationship" more narrowly than is conventional in economics. If "customers of the product of one market use it to transact with customers of the other market," the two markets have a "vertical relationship."
115. Paragraph 158 of the Draft Guidelines should not indicate that self-preferencing infringes Article 102 whenever it serves to "gain an advantage." No infringement should be found without a material marketplace advantage. *De minimis non curat lex.*
116. Because the definition of self-preferencing does not itself identify elements of an infringement, Article 102 guidelines should do so, and that is not a trivial exercise. Difficulties arise, in particular, from the fact that a dominant undertaking might be unable to deal with non-affiliates in the same way it deals with affiliates, and reasonably equal treatment might require the imposition of requirements only on non-affiliates.
117. The examples in paragraph 159 of the Draft Guidelines are unhelpful. They were not intended to be used as criteria for identifying infringements and cannot be made into such criteria. Most promotional activity could be described as an effort at "manipulating consumer behavior," but Article 102 imposes no obligation on dominant undertakings to promote the brands and products of their rivals.

118. The wording of paragraph 161(i) of the Draft Guidelines does not assure that self-preferencing matters. The undertaking under scrutiny could dominate the leveraged market, and that market could be “an important source of business for competitors in the leveraged market,” and yet the actual self-preferencing could have little impact. It is possible that accused is not “an important source of business” for the only competitors affected by the self-preferencing.
119. Paragraph 161(ii) of the Draft Guidelines should refer to “customers” in the leveraged market rather than “users.” And Article 102 guidelines should not broadly impugn efforts to influence choice “irrespective of the intrinsic qualities” of products, since that describes ordinary promotional activity.
120. Paragraph 161(iii) of the Draft Guidelines should be deleted. If self-preferencing seems “contrary to the underlying business rationale of the dominant undertaking’s activities in the leveraging market,” the reason almost certainly is a failure of the observer to grasp the “underlying business rationale” for those activities. The business rationale for activities that generate little or no revenue must be support for activities that do generate revenue. A dominant undertaking does not depart from competition on the merits merely by pursuing revenue at the expense of non-paying users.

Access restrictions

121. Paragraph 163 of the Draft Guidelines does not adequately explain the rubric of “access restrictions.” It appears that the section 4.3.4 of the Draft addresses only limitations on the extent of access provided voluntarily or under a regulatory obligation. If that is the intention, this explanation should appear in paragraph 163. The words “access restrictions” could encompass conditions imposed upon access, which raise entirely different issues dealt with under Article 101.
122. Paragraph 166(a) of the Draft Guidelines appears to assert that dominant undertakings necessarily infringe Article 102 if they “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 ordinary.” But there is no infringement if the dominant undertaking finds it impossible to fulfill all of the “ordinary” orders received. In addition, a dominant undertaking should be entitled to enter into supply arrangements with downstream competitors on a basis that overtly preferences its own downstream operations when supply is short. An “undertaking, even if dominant, remains, in principle, free . . . to use the infrastructure it has developed for its own needs.” Judgment of 25 March 2021, *Slovak Telekom v Commission*, C-165/19 P, EU:C:2021:239, paragraph 46.

6. OBJECTIVE JUSTIFICATIONS

123. Paragraph 168 of the Draft Guidelines indicates that “objective necessity” entails the “necessity” of the impugned conduct in achieving a legitimate “objective.” Article 102 guidelines should articulate a principle governing what objectives are legitimate, and that principle is that Article 102 condemns only “recourse to methods different from those which condition normal competition.” Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36, paragraph 91. And to operationalize this principle, Article 102 guidelines should adopt the “no economic sense” test.
124. Contrary to paragraph 168 of the Draft Guidelines, Article 102 guidelines should not assert that an objective necessity justification is inadmissible if “the same aim could be achieved through means that are less restrictive of competition.” A dominant undertaking should not be condemned for failing to take an action that was not an obvious alternative at the time of decision or was not obviously less restrictive of competition than the action taken. Theoretical alternatives identified after the fact are irrelevant to an enquiry into whether an undertaking had “recourse to methods different from those which condition normal competition.”
125. The first line of paragraph 169 of the Draft Guidelines appears to be missing the words “the dominant undertaking,” or something similar.
126. Article 102 guidelines should not endorse an efficiency defense grounded on the premise that competition might not be in the consumer’s interest. The premise should be that conduct in the consumer’s interest is competition on the merits. An efficiency defense, therefore, is an argument that impugned conduct was competition on the merits. As explained by Advocate General Jacobs, the “case-law provides dominant undertakings with the possibility of demonstrating an objective justification for their conduct, even if it is *prima facie* an abuse.” Opinion by AG Jacobs delivered 28 October 2004, *Syfait v. GlaxoSmithKline*, C-53/03, EU:C:2004:673, paragraph 72. This evidently is the gist of paragraph 58 of the Draft Guidelines, and paragraph 169 hints at this approach in asserting, “An efficiency defence cannot be accepted, if the exclusionary effects produced by the conduct bear no relation to the alleged advantages for consumers.”
127. The articulation of an efficiency defense by the Union Courts could be understood to entail welfare balancing. Indeed, the 2008 guidance paper interpreted the defense this way. Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 OJ C 45/02, 24.2.2009, paragraph 30. If the Commission now takes a different view, Article 102 guidelines should articulate that view with clarity.

128. If the Commission does take the view that an efficiency defense entails welfare balancing, Article 102 guidelines should describe the balancing. In particular, the description should specify (a) the welfare metric (i.e., consumer welfare or total welfare), (b) the product and geographic scope of the enquiry (e.g., the relevant market), and (c) the temporal scope (e.g., whether the enquiry looks to the future).
129. Paragraph 171 of the Draft Guidelines is right to place the burden on the dominant undertaking, but the paragraph also should describe the burden.
130. Paragraph 11 of the Draft Guidelines should not state that “the principles relevant to . . . 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 abuses.” The principles relevant to exclusionary abuse concern competition, but the concept of exploitative abuse generally is understood to have nothing to do with competition.